

## EU VALUES AND CONSTITUTIONAL PLURALISM

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As Wislawa Szymborska famously noted when receiving the 1996 Nobel Prize for literature,

‘They say the first sentence in any speech is always the hardest. Well, that one’s behind me, anyway. But I have a feeling that the sentences to come – the third, the sixth, the tenth, and so on, up to the final line – will be just as hard, since I’m supposed to talk about poetry’.<sup>1</sup>

I could not agree more with that famous poet. However, unlike her, I am not here to talk about poetry, but, as a Judge, I have been asked to talk about the law of the European Union which is, in many respects, just as hard.

We Europeans are very different. We all come from Member States each of which has a strong identity. We speak different languages; we have different cultures, and we have, through the centuries, established different traditions. ‘Pluralism’ pervades the four corners of Europe from the Gulf of Finland to the Strait of Gibraltar and from the Irish Sea to the Aegean.

This was known to the authors of the Treaties, who rightly decided that the European Union ‘shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced’.<sup>2</sup>

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<sup>1</sup> W. Szymborska, Nobel Lecture, 7 December 1996.

<sup>2</sup> See Article 3(3) TEU.

Pluralism may be defined as the capacity of each national society to remain free to evolve differently according to its own values. It is thus ensured by respecting each and every national identity. As Article 4(2) TEU states, the European Union is committed to respecting the national identities of its Member States. Value diversity must, where possible, be respected and preserved by the European Union.

However, in order for the European integration project to succeed, pluralism cannot be absolute. This is so because ‘the peoples of Europe, in creating an ever closer union among them, are resolved to share a peaceful future based on common values’.<sup>3</sup>

In spite of our differences, we Europeans agree that the European Union must be founded on the indivisible, universal values of human dignity, freedom, equality and solidarity. We also agree that the European Union must be based on the principles of democracy and the rule of law.

This means that compliance with those founding pan-European values may sometimes make it necessary to set aside certain aspects of national diversity. A commonality of values inevitably implies some degree of unity. The survival of the European Union requires that what brings us together must remain stronger than what pulls us apart.

Logically, the question then is to what extent and in what fields does the EU legal order leave space for diversity.

This lecture aims to shed some light on that difficult question, which is of paramount constitutional importance. More specifically, I shall explore the interaction between EU values and constitutional pluralism specifically in the context of the EU system of fundamental rights protection.

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<sup>3</sup> See the Preamble to the Charter of Fundamental Rights of the European Union, [2012] OJ C 326/2.

I have chosen to speak about fundamental rights because they may be examined from two different, albeit closely-related, perspectives. On the one hand, fundamental rights are the fruit of Europe's common humanist inheritance. Fundamental rights are to be understood as a pan-European good. On the other hand, they are also an expression of pluralism. The level of protection that a national society gives to a fundamental right tells us something about that society's own set of values.

Accordingly, when examining the EU system of fundamental rights protection, one is also looking at the way in which the EU legal order strikes the balance between unity and diversity.

My lecture will be divided into three parts. Part I examines the scope of application of fundamental rights within the EU legal order. In my view, one cannot fully understand how the EU system of fundamental rights protection operates without first exploring the scope of application of the Charter of Fundamental Rights of the European Union (the 'Charter').<sup>4</sup>

In Part II, I shall explore the idea that EU values are the result of a constitutional consensus. This means that the EU legislator may only adopt a uniform standard of fundamental rights protection where that standard corresponds to common EU values. Subject to that proviso, it is thus for the EU political process to determine where different national standards of fundamental rights protection are to be replaced with a common EU standard. Indeed, since the EU is governed by the principle of democracy, it is for the EU political institutions, each acting within the competences that have been conferred on it, to draw the line between unity and diversity.

Part III is devoted to examining the situations where pluralism may emerge. In this regard, I shall argue that, where there is no EU legislative consensus and where national law implementing EU law complies with the values on which the EU is founded, EU law

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<sup>4</sup> [2010] OJ C 83/02.

allows room for constitutional pluralism. Put simply, EU law does not rule out a cumulative application of EU and national fundamental rights.

Finally, I shall express the view that neither unity, nor diversity, is absolute. The European Union must be respectful of both, given that neither suffices to explain the European integration project as a whole.

### **I. The scope of application of fundamental rights**

With the entry into force of the Treaty of Lisbon, the Charter now enjoys ‘the same legal value as the Treaties’. Stated differently, in light of Article 6(1) TEU, the EU legal order now has a written and legally binding catalogue of fundamental rights which stands on an equal footing with the Treaties.

From the fact that the Charter is now legally binding it does not follow that the EU has become a ‘human rights organisation’ or that the Court of Justice of the European Union (the ‘Court of Justice’) has become ‘a second European Court of Human Rights (‘ECtHR’)

To this effect, the second paragraph of Article 6(1) TEU stresses that ‘[t]he provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties’. A similar statement is also reproduced in Article 51(2) of the Charter.<sup>5</sup> It requires that, in interpreting and applying the Charter, the Court of Justice respects the principle of conferral as set out in Article 5(2) TEU.

The scope of application of the Charter is therefore the keystone which guarantees that the principle of conferral is complied with. In this regard, Article 51(1) of the Charter states that ‘the provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law’. Whilst in relation to the EU

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<sup>5</sup> Article 51(2) of the Charter reads as follows: ‘[t]he Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties’.

institutions, bodies, offices and agencies, Article 51(1) focuses on guaranteeing compliance with the principle of subsidiarity, this Article makes the Charter applicable to the Member States ‘only when they are implementing Union law’.<sup>6</sup>

But what does ‘implementing [EU] law’ mean?

According to the explanations relating to Article 51(1) of the Charter, it appears that the expression ‘only when [Member States] are implementing Union law’ should thus cover all situations where Member States fulfil their obligations under the Treaties as well as under secondary EU law (adopted pursuant to the Treaties), i.e. the Charter applies whenever Member States fulfil an obligation imposed by EU law.

In light of the case law of the Court of Justice, one may distinguish two different types of obligations that EU law imposes on the Member States, namely (1) EU obligations that require a Member State to take action (the ‘agency situation’) and (2) EU obligations that must be complied with when a Member State derogates from EU law (the ‘derogation situation’). Conversely, where EU law imposes no obligation on the Member States, the Charter simply does not apply.

In *Åkerberg Fransson*, the Court of Justice gave important guidance relating to the interpretation of Article 51(1) of the Charter. Let us look at this case more closely. The facts of the case may be summarised as follows.

In 2009, the Swedish Public Prosecutor’s Office brought criminal proceedings against Mr Åkerberg Fransson on charges of serious tax offences. He was accused of providing false information which brought about a loss of public revenue linked to the levying of income tax and VAT. Prior to that, i.e. in 2007, by reason of the same act of providing false

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<sup>6</sup> In **German**, ‘ausschließlich bei der Durchführung des Rechts der Union’. In **French**, ‘aux États membres uniquement lorsqu’ils mettent en oeuvre le droit de l’Union’. In **Dutch**, ‘uitsluitend wanneer zij het recht van de Unie ten uitvoer brengen’. In **Spanish**, ‘a los Estados miembros únicamente cuando apliquen el Derecho de la Unión’. In **Italian**, ‘agli Stati membri esclusivamente nell’attuazione del diritto dell’Unione’. In **Polish**, ‘do Państw Członkowskich wyłącznie w zakresie, w jakim stosują one prawo Unii’.

information, the Swedish authorities had, in the course of administrative proceedings, imposed a financial penalty (tax surcharge) on Mr Åkerberg Fransson.

With a view to seeing the criminal charges brought against him dismissed, Mr Åkerberg Fransson sought to rely on Article 4 of Protocol No 7 of the ECHR and Article 50 of the Charter which enshrine the *ne bis in idem* principle. Accordingly, the referring court asked the Court of Justice whether EU law precluded criminal proceedings for tax evasion from being brought against a defendant where a tax penalty has already been imposed upon him for the same acts of providing false information.

In order to answer that difficult question, the Court of Justice had first to determine whether the Charter was applicable to a situation such as that of Mr Åkerberg Fransson.

At the outset, it held that Article 51(1) of the Charter ‘confirms [its] case-law relating to the extent to which actions of the Member States must comply with the requirements flowing from the fundamental rights guaranteed in the [EU] legal order’.<sup>7</sup>

That case-law is fully consistent with Article 6(1) TEU and Article 51(2) of the Charter, according to which the provisions of the Charter cannot be interpreted in breach of the principle of conferral. In this regard, the Court of Justice drew a distinction between the situations falling within the scope of EU law and those falling outside the scope of that law.

Whilst in relation to the former the compatibility of the national legislation at issue with fundamental rights may be examined in light of the Charter, in relation to the latter the Court of Justice lacks jurisdiction to do so. Stated differently, ‘[t]he applicability of [EU] law entails [the] applicability of the fundamental rights guaranteed by the Charter’.<sup>8</sup> On the contrary, where ‘a legal situation does not come within the scope of [EU] law, the

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<sup>7</sup> *Åkerberg Fransson*, C-617/10, EU:C:2013:105, para. 18.

<sup>8</sup> *Ibid.*, para. 21.

[Court of Justice] does not have jurisdiction to rule on it and any provisions of the Charter relied upon cannot, of themselves, form the basis for such jurisdiction'.<sup>9</sup>

For the case at hand, this meant that in order for Article 50 of the Charter to be applicable to the situation of Mr Åkerberg Fransson, the Court of Justice had to determine whether there was a connecting factor between the tax penalties and criminal proceedings to which he had been or was subject and EU law. The question thus became whether Sweden was fulfilling an obligation imposed by EU law.

To begin with, the Court of Justice found that those tax penalties and criminal proceedings were partially connected to the fact that Mr Åkerberg Fransson had breached his obligations to declare VAT. By imposing those tax penalties and by bringing those criminal proceedings, Sweden was thus complying with its obligation 'to take all legislative and administrative measures appropriate for ensuring collection of all the VAT due on its territory and for preventing evasion'<sup>10</sup> as provided for by Articles 2, 250(1) and 273 of Directive 2006/112<sup>11</sup> and by the principle of loyal cooperation.<sup>12</sup>

Additionally, since the collection of VAT revenue contributes to the financing of the EU budget, national legislation which seeks to deter individuals from adversely affecting such collection protects the EU financial interests. It follows that by imposing tax penalties and by bringing criminal proceedings against Mr Åkerberg Fransson, Sweden was also fulfilling its obligations under Article 325 TFEU, according to which Member States are 'oblige[d] to counter illegal activities affecting the financial interests of the [EU] through effective deterrent measures and, in particular, [...] to take the same measures to counter

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<sup>9</sup> *Ibid.*, para. 22.

<sup>10</sup> *Ibid.*, para. 25.

<sup>11</sup> Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax. [2006] OJ L 347/1. Previously, Articles 2, 250(1) and 273 of Directive 2006/112 were set out in Articles 2 and 22 of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment, [1977] OJ L 145/1.

<sup>12</sup> Article 4(3) TEU.

fraud affecting the financial interests of the European Union as they take to counter fraud affecting their own interests'.<sup>13</sup>

Accordingly, the Court of Justice concluded that tax penalties and criminal proceedings such as those of the case at hand 'constitute implementation of Articles 2, 250(1) and 273 of Directive 2006/112 [...] and of Article 325 TFEU and, therefore, of [EU] law, for the purposes of Article 51(1) of the Charter'.<sup>14</sup>

Moreover, that conclusion could not be called into question by the fact that the national legislation upon which those tax penalties and criminal proceedings were founded had not been specifically adopted to transpose Directive 2006/112.<sup>15</sup>

*Åkerberg Fransson* is a seminal judgment which clarifies the scope of application of the Charter. It reiterates the Court of Justice's firm commitment to upholding the rule of law of which fundamental rights are *always* part and parcel. In that case, the Court of Justice made clear that '[t]he applicability of [EU] law entails [the] applicability of the fundamental rights guaranteed by the Charter'.<sup>16</sup> Metaphorically speaking, this means that the Charter is the 'shadow' of EU law. Just as an object defines the contours of its shadow, the scope of EU law determines that of the Charter.

To conclude this part of my lecture, I would like to provide two examples where the Court of Justice ruled that it had no jurisdiction to answer the questions referred by the national court on the ground that the national law at issue did not 'implement EU law'.

In the *Siragusa* case,<sup>17</sup> Mr Siragusa, who owned property in a landscape conservation area, made alterations to that property without first obtaining landscape compatibility

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<sup>13</sup> *Åkerberg Fransson*, above n 7, para. 26.

<sup>14</sup> *Ibid.*, para. 27.

<sup>15</sup> *Ibid.*, para. 28.

<sup>16</sup> *Ibid.*, para. 21.

<sup>17</sup> *Siragusa*, C-206/13, EU:C:2014:126

clearance. He applied for retrospective planning permission for those alterations, but was unsuccessful. Whilst such retrospective permission could, in principle, be granted subject to the payment of a fine, that solution was ruled out where works which had been carried out illegally resulted in an increase in volume. As this was the case for Mr Siragusa, the Italian authorities issued an order requiring him to dismantle the work carried out in breach of the Italian law protecting the cultural heritage and the landscape. Mr Siragusa challenged that order before the Regional Administrative Court of Sicily. The latter asked the Court of Justice whether that law constituted an unjustified and disproportionate infringement of Mr Siragusa's right to property as protected by Article 17 of the Charter. As regards the potential link between the case at hand and EU law, the referring court took the view that the protection of the landscape could not be regarded as a stand-alone objective separate from the protection of the environment which was largely covered by EU law. In this regard, by referring to primary and secondary EU legislation on environmental matters,<sup>18</sup> the national court implicitly reasoned that the Italian law protecting the cultural heritage and the landscape 'implemented EU law' for the purposes of Article 51(1) of the Charter. However, the Court of Justice took a different view.

After stressing the fact that the concept of 'implementing EU law' laid down in Article 51(1) of the Charter requires 'a certain degree of connection above and beyond the matters covered being closely related or one of those matters having an indirect impact on the other',<sup>19</sup> the Court of Justice found, in what I believe is the key passage of the judgment, that:

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<sup>18</sup> As to primary EU law, the national court referred to Articles 3(3) TEU and 21(2)(f) TEU, as well as Articles 4(2)(e) TFEU, 11 TFEU, 114 TFEU and 191 TFEU. As to secondary EU law, it cited the Aarhus Convention (approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005, [2005] OJ L 124/1); Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters to Community institutions and bodies, [2006] OJ L 264/13; Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC, [2003] OJ L 41/26, and Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, [2012] OJ 26/1.

<sup>19</sup> *Ibid.*, para. 24

‘fundamental EU rights could not be applied in relation to [the] national legislation [in question] because the provisions of EU law in the subject area concerned did not impose any obligation on Member States with regard to the situation at issue in the main proceedings’.<sup>20</sup>

Since neither the provisions of the Treaties nor the EU Directives and Regulations mentioned in the order for reference were applicable to the case at hand, the Court of Justice ruled that it lacked jurisdiction to answer the question referred by the Regional Administrative Court of Sicily.

Before looking at the facts of the second case, may I first describe the background in which it took place. As we all know, in order to overcome the current economic crisis, some Member States have had no choice but to cut public spending. Those measures have, on occasion, included a reduction in the salaries of civil servants. This has been the case in Portugal where the 2011 State Budget Act provided that civil servants’ income would be reduced. In *Sindicato dos Bancários do Norte*,<sup>21</sup> the trade union of a nationalised bank claimed that such a reduction was discriminatory as it did not apply to persons working in the private sector. However, the Portuguese Constitutional Court took a different view and, by a judgment of 21 September 2011, ruled that the 2011 State Budget Act was compatible with the Portuguese Constitution. From a national perspective, employees of that bank had no choice but to accept that the reduction envisaged would take place. From an EU law perspective, the Labour Court of Porto reasoned that the compatibility of the 2011 State Budget Act with EU law could still be called into question in light of the EU principle of equality, which is enshrined in Article 20 of the Charter. Accordingly, it asked the Court of Justice whether that principle allowed room for such a difference in treatment. However, just as in *Siragusa*, the Court of Justice ruled, by order of 7 March 2013, that it lacked jurisdiction to answer the questions referred, given that the order for

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<sup>20</sup> *Ibid.*, para. 26.

<sup>21</sup> Order *Sindicato dos Bancários do Norte and Others*, C-128/12, EU:C:2013:149.

reference contained no concrete evidence or reasoning capable of establishing that the 2011 State Budget Act ‘implemented EU law’,

The Labour Court of Porto made a second reference to the Court of Justice in a case, which is currently pending and raises issues similar to those examined in *Sindicato dos Bancários do Norte*.<sup>22</sup> This time, the second reference involves the 2012 State Budget Act which, like its predecessor, provides for reductions in salaries of civil servants and suspends their holiday and Christmas allowances for as long as the Economic and Financial Assistance Programme (the ‘EFA Programme’) applies. Again, the Labour Court of Porto asks whether the 2012 State Budget Act is compatible with the EU principle of equality, since such a reduction only affects public sector employees. In addition, it also asks whether that Act is compatible with Article 31 of the Charter, which provides that ‘[e]very worker has the right to working conditions which respect his ...dignity’. The procedure in this second reference was suspended until the Court of Justice delivered its order of 7 March of 2013 in the first case. However, since it has not withdrawn its second reference, the Labour Court of Porto appears to believe that both the 2011 and 2012 State Budget Acts ‘implement EU law’. In its view, the austerity measures adopted by Portugal were brought about by EU law. In this regard, by Council Decision 2011/344,<sup>23</sup> the EU agreed to grant financial assistance to Portugal (up to a maximum of EUR 26 Billions). That decision approved Portugal’s economic and financial adjustment programme which aims to reduce its public spending. It also provides that, in line with specifications in the Memorandum of Understanding (the ‘MoU’) signed by the Commission and Portugal, the latter is to adopt expenditure-saving measures which shall include a rationalisation of public administration. More specifically, the MoU states that, in 2012, the salaries of public sector employees are to be reduced by suspending bonuses in the form of thirteenth and fourteenth month salary payments. It will thus be for the Court of Justice to decide whether by adopting the 2012 State Budget Act, Portugal was fulfilling an obligation imposed by EU law, i.e. whether that Act was actually ‘implementing EU law’.

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<sup>22</sup> *Sindicato Nacional dos Profissionais de Seguros e Afins*, C-264/12 (pending).

<sup>23</sup> Council Implementing Decision of 17 May 2011 on granting Union financial assistance to Portugal (2011/344/EU), [2011] OJ L 159/88.

Needless to say, the fact that the Charter is not applicable to the case at hand does not mean that the fundamental rights of the person concerned are left unprotected. If the national court takes the view that a situation is not covered by EU law, it must undertake that examination in the light of its own constitution and in light of the ECHR.<sup>24</sup>

## **II. EU values and constitutional consensus**

Let me begin the second part of my contribution by looking at the notion of ‘constitutional consensus’.

The existence of constitutional consensus leads to the adoption of norms which then become the ‘supreme law of the land’. Those norms may contain values which are pan-European and are to be found in primary EU law.

Constitutional consensus may find expression in the Treaties and the Charter as well as in judge-made principles of law (known as general principles of EU law).

Notably, the Charter is the result of a pan-European political consensus which embodies the EU’s commitment to respect for fundamental rights. This is why, since the entry into force of the Treaty of Lisbon, the Charter has been placed on an equal footing with the founding Treaties. This is also why the Preamble to the Charter stresses the fact that the Charter ‘*reaffirms* [...] the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms [‘ECHR’], the Social Charters adopted by the Union and by the Council of Europe and the case-law of the [Court of Justice] and of the [ECtHR]’.

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<sup>24</sup> *Dereci and Others*, C-256/11, EU:C:2011:734, para. 72.

As an expression of constitutional consensus, the Charter needs to fulfil three functions. First, it serves as a source of inspiration for the discovery of general principles.<sup>25</sup> Second, it serves as an aid to interpretation. Given that the provisions of the Charter are primary EU law, secondary EU law and national law implementing EU law must be interpreted in light of those provisions.<sup>26</sup> Finally, it has been relied upon as providing grounds for judicial review. EU legislation that breaches the Charter is to be held void<sup>27</sup> and national law implementing EU law that contravenes the fundamental rights enshrined therein must be set aside.

At this stage, I would like to examine three interrelated questions. First, does the EU legal order draw the distinction between ‘constitutional consensus’ and ‘legislative consensus’? Second, how is compliance with constitutional consensus ensured in the realm of fundamental rights protection? Third, once that compliance is ensured, is the EU legislator entitled to set a uniform standard of fundamental rights protection?

#### A. Constitutional and legislative consensus

The first question should be answered in the affirmative. Whilst constitutional consensus leads to the adoption of EU norms of the highest rank (primary EU law), legislative consensus is an integral part of the daily functioning of the European political process.

By ‘legislative consensus’ I refer not only to EU norms which are unanimously adopted by the Council, but to all secondary EU norms which are the result of political agreement at EU level.

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<sup>25</sup> See, e.g., *Küçükdeveci*, C-555/07, EU:C:2010:21, para. 22.

<sup>26</sup> See, e.g., *Sturgeon and Others*, C-402/07 and C-432/07, EU:C:2009:716. Confirmed by the Grand Chamber in *Nelson and Others*, C-581/10 and C-629/10, EU:C:2012:657. See also *McB.*, C-400/10 PPU, EU:C:2010:582.

<sup>27</sup> See, e.g., *Volker und Markus Schecke and Eifert*, C-92/09 and C-93/09, EU:C:2010:662, *Association belge des Consommateurs Test-Achats and Others*, C-236/09, EU:C:2011:100, and *Commission v Kadi* (*Kadi II*), C-584/10 P, C-593/10 P and C-595/10 P, EU:C:2013:518

For the purposes of this discussion, legislative consensus must be broadly understood. It goes without saying that it is more difficult to obtain a ‘constitutional consensus’ than a ‘legislative consensus’.

Indeed, in order to reform the basic rules which govern the EU, all Member States and, where appropriate, their citizens must agree to it.

It also goes without saying that ‘legislative consensus’ must comply with ‘constitutional consensus’.

## B. Compliance with constitutional consensus

In the realm of fundamental rights protection, compliance with constitutional consensus means that any limitation on the exercise of those rights as a result of the EU legislative consensus, must comply with Article 52(1) of the Charter. The same applies to national laws implementing the EU legislative or constitutional consensus.

However, it is worth noting that, just as under the ECHR and national Constitutions,<sup>28</sup> no limitation may be imposed on the rights under Title I of the Charter (Articles 1 to 5), i.e. human dignity, the right to life, the right to the integrity of the person, the prohibition of torture and inhuman or degrading treatment or punishment, the prohibition of slavery and forced labour.<sup>29</sup>

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<sup>28</sup> See, e.g., Article 30 of the Polish Constitution which provides that:

‘The inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens’

<sup>29</sup> See the explanations relating to the Charter of Fundamental Rights of the European Union, [2007] OJ C 303/17 (‘the explanations relating to the Charter’), at 17 (given that ‘the dignity of the human person is part of the substance of the rights laid down in this Charter [, it] must therefore be respected, even where a right is restricted’). The same applies in relation to the right to life and to the right to the integrity of the person. In this regard, see *Schmidberger*, C-112/00, EU:C:2003:333, para. 80 (holding that ‘unlike other fundamental rights enshrined in [the ECHR], such as the right to life or the prohibition of torture and inhuman or degrading treatment or punishment, which admit of no restriction, neither the freedom of expression nor the freedom of assembly guaranteed by the ECHR appears to be absolute but must be viewed in relation to its social purpose’).

Allow me to quote in full Article 52(1) of the Charter:

‘Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.’

It should be observed that the wording of Article 52(1) of the Charter is, for example, similar to that of Article 31(3) of the Polish Constitution.<sup>30</sup> Again, this shows that the Charter draws on the constitutional traditions common to the Member States, thereby giving concrete expression to constitutional consensus.

First, the terms ‘provided for by law’ are to be interpreted as meaning that, in the absence of a specific legal basis, an EU act of individual application may not *by itself* impose limitations on the exercise of the rights and freedoms recognised by the Charter.<sup>31</sup>

Second, in providing that any limitation must ‘respect the essence of [the rights and freedoms recognised by the Charter]’, Article 52(1) thereof guarantees that no limitation will deprive those rights and freedoms of their substance.

Third, any limitation must pursue an ‘objective of general interest recognised by the Union’ or aim ‘to protect the rights and freedoms of others’.

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<sup>30</sup> Article 31(3) of the Polish Constitution reads as follows :

‘Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights.’

<sup>31</sup> *Knauf Gips v Commission*, C-407/08 P, EU:C:2010:389.

As to the former type of objectives, they are set out not only in Article 3 TEU but also in specific Treaty provisions.<sup>32</sup> The case law of the Court of Justice clearly displays a rather broad approach to the question whether an objective is ‘of general interest recognised by the Union’. For example, the principle of transparency,<sup>33</sup> and the requirements of international security<sup>34</sup> have been recognised as such objectives.

Moreover, limitations on the fundamental rights conferred by the Charter may have both a vertical and a horizontal dimension. This means that the assertion of a fundamental right must comply with ‘the need to protect the rights and freedoms of others’.<sup>35</sup> The words ‘rights and freedoms of others’ refer not only to the fundamental rights of third parties, but also to all rights bestowed upon them by EU law, notably the rights that stem from the Treaty provisions on free movement and Union citizenship. In relation to conflicts between fundamental rights, or between fundamental rights and fundamental freedoms, it is worth noting that there is no hierarchy of qualified rights under the Charter. Given that all qualified rights stand on an equal footing, conflicts between them must be solved by striking the right balance. In the Court of Justice’s own words:

‘Where several rights and fundamental freedoms protected by the European Union legal order are at issue, the assessment of the possible disproportionate nature of a provision of European Union law must be carried out with a view to reconciling the requirements of the protection of those different rights and freedoms and a fair balance between them’.<sup>36</sup>

Fourth and last, Article 52(1) of the Charter requires that any limitation on the rights conferred by the Charter must comply with the principle of proportionality. It is thus for

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<sup>32</sup> See e.g. Articles 36, 45 (3), and 52 TFEU.

<sup>33</sup> *Volker und Markus Schecke and Eifert*, above n 27, para. 71.

<sup>34</sup> *Kadi II*, above n 27, para. 103.

<sup>35</sup> *Sky Österreich*, C-283/11, EU:C:2013:28.

<sup>36</sup> *Ibid.*, para. 60. See, also, *Promusicae*, C-275/06, EU:C:2008:54, paras 65 and 66, and *Deutsches Weintor*, C-544/10, EU:C:2012:526, para. 47.

the EU institutions and, as the case may be, for national authorities implementing EU law to verify that any limitation on fundamental rights is suitable to meet the ‘objectives of general interest recognised by the Union’ and ‘the need to protect the rights and freedoms of others’ (this is known as the ‘suitability test’); and that it does not go beyond what is necessary for achieving the legitimate aim pursued (this is known as the ‘necessity test’).

Let us illustrate the foregoing considerations by looking at two recent judgments of the Court of Justice, namely those in the *Schwarz*<sup>37</sup> and *Digital Rights* cases.<sup>38</sup> Whilst in the former case, the Court of Justice held that EU legislative consensus complied with EU constitutional consensus, in the latter case it did not.

The factual and legal background of *Schwarz* is as follows. In accordance with Article 1(2) of Council Regulation n° 2252/2004 – which harmonises the security features and biometrics in passports and travel documents issued by Member States – ‘[p]assports and travel documents shall include a highly secure storage medium which shall contain a facial image. Member States shall also include two fingerprints taken flat in interoperable formats. The data shall be secured and the storage medium shall have sufficient capacity and capability to guarantee the integrity, the authenticity and the confidentiality of the data’.<sup>39</sup>

Accordingly, when Mr Schwarz, a German citizen, applied for a German passport but refused to have his fingerprints taken, the German authorities rejected his application. Mr Schwarz challenged that decision before the Administrative Court of Gelsenkirchen on the ground that Article 1(2) of Regulation n° 2252/2004 was incompatible with his rights to respect for his private life and the protection of his personal data as provided for in Articles 7 and 8 of the Charter. In his view, the legislative consensus reflected in Article

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<sup>37</sup> *Schwarz*, C-291/12, EU:C:2013:670.

<sup>38</sup> *Digital Rights*, Joined Cases C-293/12 and C-594/12, judgment of 8 April 2014, not yet reported.

<sup>39</sup> However, Article 1(2a) of Regulation No 2252/2004 states that children under the age of 12 years and persons whose fingerprints are physically impossible to take shall be exempt from the requirement to give fingerprints.

1(2) of Regulation n° 2252/2004 failed to comply with the constitutional consensus expressed by those two provisions of the Charter.

At the outset, the Court of Justice noted that the taking and storing of fingerprints in passports constituted a limitation on the exercise of the rights to respect for private life and the protection of personal data. Accordingly, that limitation had to comply with the constitutional consensus reflected in Article 52 of the Charter.

First, the Court of Justice ruled that the limitation arising from the taking and storing of fingerprints when issuing passports was ‘provided for by law’, since those operations are provided for by Article 1(2) of Regulation No 2252/2004, which is a legislative act.

Second, it found that those two measures were justified by two objectives recognised as legitimate by the EU legal order, namely first, to prevent the falsification of passports and second, to prevent fraudulent use thereof (i.e. use by persons other than their genuine holders).

Third, the Court of Justice noted that it was not apparent from the evidence available to it, nor had it been claimed, that the limitations placed on the exercise of the rights recognised by Articles 7 and 8 of the Charter did not respect the essence of those rights.

Fourth and last, the Court of Justice found that Article 1(2) of Regulation n° 2252/2004 complied with the principle of proportionality.

As to the ‘suitability test’, the Court of Justice found that the storage of fingerprints on a highly secure storage medium as provided for by Article 1(2) of Regulation n° 2252/2004 required sophisticated technology which was not easily accessible to everyone. Therefore such storage was likely to reduce the risk of passports being falsified and to facilitate the work of the authorities responsible for checking the authenticity of passports at EU borders.<sup>40</sup> Regarding the aim of preventing fraudulent use of passports, the Court of

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<sup>40</sup> *Schwarz*, above n 37, para. 41.

Justice noted that, although the method of ascertaining identity using fingerprints is not 100% reliable, it does significantly reduce the likelihood of unauthorised persons from being admitted into the EU.

As to the ‘necessity test’, the Court of Justice ‘[had] not been made aware of any measures which would be both sufficiently effective in helping to achieve the aim of protecting against the fraudulent use of passports and less of a threat to the rights recognised by Articles 7 and 8 of the Charter than the measures deriving from the method based on the use of fingerprints’.<sup>41</sup> Accordingly, it ruled out iris-recognition technology, because it was not as advanced as fingerprint-recognition technology and because it was significantly more expensive, thereby making it less suitable for general use.<sup>42</sup> In the same way, the Court of Justice also found that Article 1(2) of Regulation n°2252/2004 did not go beyond what was necessary to prevent the fraudulent use of passports, since the EU legislator had provided for specific and effective guarantees that sought to prevent the personal data stored in the passports from being misused and abused.<sup>43</sup>

Taking the view that, in aiming to prevent unauthorised persons from using EU passports, Article 1(2) of Regulation n° 2252/2004 complied with ‘the necessity test’, the Court of Justice reasoned that there was no need to examine whether the taking and storage of fingerprints were necessary measures in order to prevent the falsification of passports.

Consequently, the Court of Justice ruled that examination of the question referred had revealed nothing capable of affecting the validity of Article 1(2) of Regulation n° 2252/2004.

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<sup>41</sup> *Ibid.*, para. 53.

<sup>42</sup> *Ibid.*, para. 52.

<sup>43</sup> First, fingerprints may be used only for verifying the authenticity of a passport and the identity of its holder (*Ibid.*, para. 56). Second, Regulation n° 2252/2004 ensures protection against the risk of data including fingerprints being read by unauthorised persons (*Ibid.*, para. 57). Third, that Regulation does not provide for the storage of fingerprints except within the passport itself, which belongs to the holder alone (*Ibid.*, para. 60). Accordingly, Regulation n° 2252/2004 could not in and of itself be interpreted as providing a legal basis for the centralised storage of data collected thereunder or for the use of such data for purposes other than that of preventing illegal entry into the EU (*Ibid.*, para. 61).

The legislative consensus reflected in Article 1(2) of Regulation n° 2252/2004, which provided for a uniform standard of fundamental rights protection when Member States issue passports and travel documents, complied with the constitutional consensus expressed by Articles 7 and 8 of the Charter.

This meant that, contrary to the wishes of Mr Schwarz, Member States were, in principle, precluded from issuing a passport without taking the fingerprints of its holder. Since Article 1(2) of Regulation n° 2252/2004 complied with the Charter, the national legislator could not adopt a higher standard of fundamental rights protection, as such a standard would adversely affect the balance between fundamental rights and the legitimate aim of preventing illegal entry into the European Union set out in that Regulation.

In the *Digital Rights* case, the Court of Justice was asked, in essence, to examine whether Directive 2006/24<sup>44</sup> was valid in light of Articles 7, 8 and 52(1) of the Charter. That Directive sought to ‘harmonise Member States’ provisions concerning the retention, by providers of publicly available electronic communications services or of public communications networks, of certain data<sup>45</sup> which are generated or processed by them, in order to ensure that the data are available [to the competent national authorities] for the purpose of the prevention, investigation, detection and prosecution of serious crime, such as organised crime and terrorism, in compliance with the rights laid down in Articles 7 and 8 of the Charter’.<sup>46</sup>

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<sup>44</sup> 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 networks and amending Directive 2002/58/EC, [2006] OJ L 106/54.

<sup>45</sup> *Digital Rights*, above n 38, para. 26. That data included: ‘data necessary to trace and identify the source of a communication and its destination, to identify the date, time, duration and type of a communication, to identify users’ communication equipment, and to identify the location of mobile communication equipment, data which consist, inter alia, of the name and address of the subscriber or registered user, the calling telephone number, the number called and an IP address for Internet services’.

<sup>46</sup> *Ibid.*, para. 24.

Whilst it was true that Directive 2006/24 did not permit the retention of the content of communications or of any information consulted using an electronic communications network, the Court of Justice pointed out that it did make it possible to know the identity of the person with whom a subscriber or registered user had communicated and the means by which that communication was effected, as well as to identify the time and the place of the communication, and to know the frequency of the communications of the subscriber or registered user with certain persons during a given period.<sup>47</sup> Directive 2006/24 also allowed for the data to be retained and used without the subscriber or registered user being informed, thereby ‘generat[ing] in the minds of the persons concerned the feeling that their private lives are the subject of constant surveillance’;<sup>48</sup> in other words, to borrow the famous expression coined by George Orwell in his dystopian novel ‘Nineteen Eighty-Four’,<sup>49</sup> the feeling that ‘Big Brother is watching you’.

In the Court of Justice’s view, this showed that the retention of data and the access of the competent national authorities to those data, as provided for by Directive 2006/24, ‘directly and specifically affect[ed] private life’ which is protected by Article 7 of the Charter.<sup>50</sup> It also constituted the processing of personal data within the meaning of Article 8 of the Charter. Given that Directive 2006/24 limited the exercise of the rights laid down in Articles 7 and 8 of the Charter, it had to comply with the requirements laid down in Article 52(1) thereof.

In that connection, the Court of Justice observed, first, that Directive 2006/24 did not adversely affect the essence of the rights set out in Article 7 of the Charter, since it did ‘not permit the acquisition of knowledge of the content of the electronic communications as such’. In the same way, the rights set out in Article 8 of the Charter were not deprived of their essence since the Directive required Member States to adopt ‘appropriate

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<sup>47</sup> *Ibid.*, para. 26.

<sup>48</sup> *Ibid.*, para. 37.

<sup>49</sup> Published in 1949.

<sup>50</sup> *Ibid.*, para. 29.

technical and organisational measures against accidental or unlawful destruction, accidental loss or alteration of the data’.<sup>51</sup>

Second, the Court of Justice noted that Directive 2006/24 pursued two objectives of general interest recognised by the EU, namely ‘the fight against international terrorism in order to maintain international peace and security’<sup>52</sup> and ‘the fight against serious crime in order to ensure public security’.<sup>53</sup>

Third, the Court of Justice examined whether Directive 2006/24 complied with the principle of proportionality. By drawing on the case law of the ECtHR,<sup>54</sup> it took the view that, in light of the extent and seriousness of the interference with the fundamental right to private life brought about by the provisions of that Directive, the EU’s legislative discretion was reduced.<sup>55</sup>

Next, the Court of Justice went on to find that the retention of data in connection with electronic communications was an appropriate means of attaining the objective pursued by Directive 2006/24, as such retention was indeed a valuable tool for criminal investigations.<sup>56</sup>

Finally, the Court of Justice observed that ‘derogations and limitations in relation to the protection of personal data must apply only in so far as is strictly necessary’.<sup>57</sup> This meant that, when adopting that Directive, the EU legislator was under the obligation to lay down

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<sup>51</sup> *Ibid.*, paras. 39 and 40.

<sup>52</sup> *Kadi and Al Barakaat International Foundation v Council and Commission*, C-402/05 P and C-415/05 P EU:C:2008:461, para. 363.

<sup>53</sup> *Tsakouridis*, C-145/09 EU:C:2010:708, paras 46 and 47.

<sup>54</sup> ECtHR, *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, § 102, ECHR 2008-V).

<sup>55</sup> *Digital Rights*, above n 38, para. 48.

<sup>56</sup> *Ibid.*, para. 49.

<sup>57</sup> *Ibid.*, para. 52.

clear and precise rules governing the extent of the interference with the fundamental rights enshrined in Articles 7 and 8 of the Charter. However, the Court of Justice gave three reasons for its conclusion that this test was not satisfied in the case of Directive 2006/24.

The first reason was that ‘Directive 2006/24 cover[ed], in a generalised manner, all persons and all means of electronic communication as well as all traffic data without any differentiation, limitation or exception being made in the light of the objective of fighting against serious crime’.<sup>58</sup> It thus entailed a wide-ranging and particularly serious interference with the fundamental rights of practically the entire European population.

As to the second reason, that Directive failed to provide either substantive or procedural criteria ‘delimiting the access of the competent national authorities to the data and to their subsequent use for the purposes of prevention, detection or criminal prosecutions concerning offences that, in view of the extent and seriousness of the interference with the fundamental rights enshrined in Articles 7 and 8 of the Charter, may be considered to be sufficiently serious to justify such an interference’.<sup>59</sup> In particular, the Court of Justice observed that Directive 2006/24 did not lay down any criterion identifying the persons authorised to have access to the data. Nor did it limit the use of the data retained by those persons to what was strictly necessary in light of the objective pursued. Most importantly, access by the competent national authorities to the data was not subject to a prior review by any court or independent administrative body.<sup>60</sup>

The third reason was that, in accordance with Directive 2006/24, data was to be retained for a minimum period of six months and a maximum of 24 months, regardless of its usefulness for the purposes of preventing serious crime. This meant that the period of retention was not determined according to objective criteria that were apt to ensure that this period was limited to what was strictly necessary.<sup>61</sup>

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<sup>58</sup> *Ibid.*, para. 57.

<sup>59</sup> *Ibid.*, paras 60 and 61.

<sup>60</sup> *Ibid.*, para. 62.

<sup>61</sup> *Ibid.*, paras 63 and 64.

Moreover, Directive 2006/24 also failed to provide for sufficient safeguards, as required by Article 8 of the Charter, to ensure effective protection of the data retained against the risk of abuse and against any unlawful access to and use of those data. In particular, this was so because providers of electronic communications services could, for reasons of economic feasibility, limit the level of security which they would apply. In addition, the irreversible destruction of the data at the end of the data retention period was not guaranteed and it was possible for the data to be retained outside the EU.<sup>62</sup>

Accordingly, the Court of Justice held that Directive 2006/24 was incompatible with Articles 7, 8 and 52(1) of the Charter and, as a consequence, declared it to be invalid.

### C. The existence of legislative consensus

Value diversity is ruled out where there is a European legislative consensus as to the precise level of protection that should be granted to a particular fundamental right. Of course, as the rulings of the Court of Justice in *Schwarz* and *Digital Rights* demonstrate, any such EU legislative consensus must also comply with the EU constitutional consensus.

Concretely, this means that the policy choices made by the EU legislator must provide a level of protection which is at the very least equal to that provided for by the Charter.

The ruling of the Court of Justice in *Melloni*,<sup>63</sup> a case involving questions relating to the validity and interpretation of the EU Framework Decision on the European Arrest Warrant, also illustrates this point.<sup>64</sup> In that case, the EU legislator sought to harmonise the grounds for non-recognition of decisions rendered following a trial at which the person concerned did not appear in person (a person convicted *in absentia*). To that end, it laid down a list of the circumstances in which, in spite of the fact that the person

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<sup>62</sup> *Ibid.*, paras 67 and 68.

<sup>63</sup> *Melloni*, C-399/11, EU:C:2013:107.

<sup>64</sup> Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States, [2002] OJ L 190/1.

concerned was convicted *in absentia*, the European arrest warrant must nevertheless be executed. For example, the Framework Decision states that refusal of execution of a decision rendered *in absentia* may not take place where the person concerned, who is aware of the scheduled trial, has appointed legal counsel, and he or she was in fact defended by that person at the trial. The Spanish Constitutional Court asked whether the Framework Decision allowed value diversity, given that, under the Spanish Constitution, the execution of a decision rendered *in absentia* was always made conditional upon retrial. The Court of Justice replied in the negative. By striking the balance between enhancing mutual recognition in criminal matters and the rights of the defence, the EU legislator had defined the precise level of fundamental rights protection with which all Member States must comply. Thus, the EU legislative consensus prevailed over value diversity. Logically, the Spanish Constitutional Court also asked whether that legislative consensus complied with the Charter, to which the Court of Justice replied in the affirmative. Indeed, the balance struck by the EU legislator was held to comply with Articles 47 and 48 of the Charter. In so ruling, the Court of Justice held that the fundamental right to effective judicial protection and the rights of the defence are not absolute but may be subject to limitations, provided that those limitations pursue a legitimate objective and are compatible with the principle of proportionality. This was the case. The strengthening of mutual recognition in criminal matters is an objective recognised by the Treaties. As to the principle of proportionality, the Framework Decision lays down the circumstances in which the person concerned must be deemed to have waived, voluntarily and unambiguously, his right to be present at his trial. Hence, the Court of Justice ruled that the legislative consensus set out in the Framework Decision complied with the constitutional consensus reflected in the Charter.

By judgment of 13 February 2014, the Spanish Constitutional Court decided to revisit its interpretation of Article 24 of the Spanish Constitution.<sup>65</sup> However, in so doing, it followed a reasoning grounded in the methods of interpretation provided for by the Spanish Constitution, rather than in the EU principle of primacy.

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<sup>65</sup> Spanish Constitutional Court, judgment of 13 February 2014, not yet reported.

At the outset, the Spanish Constitutional Court held that, where Spanish authorities are called upon to execute a decision adopted by foreign authorities which is incompatible with fundamental rights, the former may indirectly commit a violation of those rights. However, it noted that in situations governed by international rules, the content of the right to a fair trial does not include all the guarantees established by Article 24 of the Spanish Constitution, but only those that constitute the very essence of the notion of a 'fair trial'. Accordingly, it reasoned that, when the right to a fair trial produces 'ad extra effects', its content is to be determined in the light of the international treaties to which Spain is a party. In this regard, the Spanish Constitutional Court decided to look at the case law of the ECtHR and to take due account of the ruling of the Court of Justice in *Melloni*. Contrary to what it had previously decided, it thus ruled that Article 24 of the Spanish Constitution does not prevent the Spanish judicial authorities from consenting to extradite a person who has been convicted *in absentia*, provided that such a person has, voluntarily and unambiguously, waived his right to be present at his trial and has been effectively defended at the trial by legal counsel. Subject to that proviso, the question whether that person is given the opportunity to apply for a retrial in the requesting State was no longer relevant. For the purposes of the case at hand, this meant that the Spanish Constitution did not oppose the execution of the European arrest warrant issued against Mr Melloni.

### **III. National diversity**

It follows from the foregoing that there is room for value diversity in the absence of a European legislative consensus as to the level of protection that must be given to a common good. This means, for example, that where a matter falls within the scope of EU law and the EU legislator has not yet determined the precise level of protection that must be given to a fundamental right, it is for the society of each Member State to make that determination.

Yet, since pluralism is not an absolute value, the level of protection granted to a fundamental right by a national legal order must comply with any constitutional consensus that exists at EU level.

In the realm of fundamental rights, this means that value diversity may be expressed, provided that ‘the level of protection provided for by the Charter, as interpreted by the Court [of Justice], and the primacy, unity and effectiveness of European Union law are not [...] compromised’.<sup>66</sup>

Needless to say, the absence of EU legislation means that there is no EU legislative consensus. Conversely, the existence of EU legislation does not necessarily imply the existence of EU legislative consensus as to the level of protection that must be accorded to a common good.

It is true that the EU legislator may adopt measures which seek to harmonise a policy field and, at the same time, lay down a uniform standard of fundamental rights protection. This was the case in *Melloni*, where the EU legislator decided to enhance the principle of mutual cooperation in criminal matters whilst providing for a uniform standard of protection of the rights of the defence of persons convicted *in absentia*. However, this does not always hold true: the EU legislator may decide to harmonise a policy field, whilst nevertheless allowing room for a cumulative application of fundamental rights.

This means that national diversity may emerge in both the presence and the absence of EU legislation. Let us illustrate this point by looking at the case law of the Court of Justice.

#### A. Diversity in the presence of EU legislation

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<sup>66</sup> *Åkerberg Fransson*, above n 7, para. 29.

I would like to illustrate the fact that national diversity may emerge where EU legislation is present by examining the ruling of the Court of Justice in *Jeremy F.*,<sup>67</sup> a case also involving the EU Framework Decision on the European Arrest Warrant.

Before looking at the facts of that case, it is worth pointing out that the issuing of a European arrest warrant must comply with the principle of specialty. This means that a warrant may only be executed in respect of the offences listed therein. If the requesting authority wishes to prosecute the person surrendered for offences other than those for which that person has been surrendered, the executing authority must adopt a decision agreeing to it. The facts of the case, which were all over the UK media, are as follows. A high school teacher, Mr Jeremy F., had run away with one of his female students of minor age, when UK authorities issued a European arrest warrant against him in connection with criminal proceedings brought against him for acts which could be classified in English law as child abduction. A few days later, he was detained by French authorities and consented to be handed over to the UK authorities. The European arrest warrant was executed by the Cour d'appel de Bordeaux, and Mr Jeremy F. was sent to the UK.

Subsequently, the UK judicial authorities decided to prosecute him for the offence of sexual activity with a child under 16. Accordingly, they requested the Cour d'appel de Bordeaux to give its consent as that offence might constitute an offence other than that for which he had been handed over. The Cour d'appel de Bordeaux delivered a judgment in which it agreed to that request.

Mr Jeremy F. brought an appeal against that judgment before the Cour de cassation. After noting that Article 695-46 of the French Code of Criminal Procedure did not allow for such an appeal, the Cour de cassation called into question the constitutionality of that provision and referred the case to the *Conseil constitutionnel* for consideration.

Having doubts as to the compatibility of that Article of the French Code of Criminal Procedure with the French Constitution, the French *Conseil constitutionnel* asked the

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<sup>67</sup> *Jeremy F.*, C-168/13 PPU, EU:C:2013:358.

Court of Justice whether the Framework Decision had to be interpreted as precluding Member States from providing for a constitutional right which would enable the person concerned to bring an appeal having suspensive effect against a decision agreeing to the request in issue.

The Court of Justice reached the conclusion that it did not. The Framework Decision did not prohibit the person concerned from bringing such an appeal. Nor did it require Member States to make provision for it. The Charter leads to the same conclusion: its Article 47 affords an individual a right of access to a court but not to a particular number of levels of jurisdiction. Regarding the possibility of making such an appeal, there was therefore no European consensus, be it legislative or constitutional. As a consequence, it was for each Member State to decide whether its constitutional law permitted the national legislator to rule out such an appeal or else to provide for it. Needless to say, in making provision for such an appeal the national legislator could not call into question the system of mutual recognition set out in the Framework Decision. This meant, in particular, that such an appeal could not prevent the executing authority from adopting a decision within the time-limits prescribed by the Framework Decision.

Three weeks after the Court of Justice delivered its judgment, the French *Conseil constitutionnel* ruled on the question of constitutionality referred by the Cour de cassation.<sup>68</sup> It found that, in light of the principles of non-discrimination and effective judicial protection as protected by the French Constitution, the expression ‘not subject to appeal’ laid down in Article 695-46 of the French Code of Criminal Procedure was unconstitutional. Whilst the French Constitution does not require a second level of jurisdiction, it does guarantee that limitations to any right of appeal, which amount to a limitation on the right to effective judicial protection, must be justified. However, the French *Conseil constitutionnel* found that neither EU law nor French law provided for such a justification.<sup>69</sup>

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<sup>68</sup> See Conseil constitutionnel, Decision n° 2013–314 QPC of 14 June 2013.

<sup>69</sup> See the Commentary on Decision n° 2013–314.

It follows from a joint reading of *Melloni* and *Jeremy F.* that it is not for the Court of Justice to decide when and how national diversity is to be replaced by European unity. That is a decision to be made by the EU political institutions. Since the EU is governed by the principle of democracy, it is for the EU political process to draw the line between unity and diversity. As a court that upholds the rule of law, the Court of Justice may only ascertain that, when drawing that line, the EU political institutions have complied with the EU constitutional consensus.

## B. Diversity in the absence of EU legislation

In the absence of EU legislation, and in so far as there are no national measures producing a protectionist effect (or having a protectionist intent), Member States enjoy a broad leeway to safeguard national interests which are deemed fundamental to their identity. Beyond a core nucleus of shared values where the Court of Justice must ensure uniformity, EU law cannot disregard the cultural, historical, and social heritage that is part and parcel of national constitutional traditions. In other words, outside the scope of constitutional consensus, the Court of Justice welcomes ‘value diversity’. The rulings of the Court of Justice in *Omega*, *Sayn-Wittgenstein* and *Runevič-Vardyn and Wardyn* illustrate this approach.<sup>70</sup>

### 1. Human dignity

In *Omega*, the Bonn police authority prohibited Omega from offering games involving the simulated killing of human beings on the ground that they infringed human dignity. Given that Omega had entered into a franchise contract with a British company, it argued that the ban was contrary to the freedom to provide services embodied in ex Article 49 EC (now Article 56 TFEU). Thus, the Court of Justice was called upon to strike a balance between ex Article 49 EC and the concept of human dignity, as understood by a national authority. After noting that the ban constituted a restriction on the freedom to provide services which, nevertheless, pursued a legitimate objective – the protection of human

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<sup>70</sup> *Omega*, C-36/02, EU:C:2004:614; *Sayn-Wittgenstein*, C-208/09, EU:C:2010:806, and *Runevič-Vardyn and Wardyn*, C-391/09, EU:C:2011:291.

dignity – the Court of Justice ruled that, for the purposes of applying the principle of proportionality, ‘[i]t is not indispensable [...] for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected’.<sup>71</sup> Thus, the fact that a Member State other than Germany had chosen a system of protection of human dignity that was less restrictive of the freedom to provide services did not mean that the German measure was contrary to the EC Treaty. Given that the ban satisfied the level of protection required by the German constitution and did not go beyond what was necessary to achieve that result, the Court of Justice considered that it was a justified restriction on the freedom to provide services. Thus, *Omega* demonstrates that the Court of Justice did not seek to impose a common conception of human dignity. Nor did it embrace the national conception prevailing outside Germany which was more protective of free movement. Instead, it endorsed a model based on ‘value diversity’, where national constitutional traditions are not in competition with the economic objectives of the Union, but form an integral part of them.<sup>72</sup>

## 2. The abolition of titles of nobility

The Court of Justice followed the same approach in *Sayn-Wittgenstein*. The facts of the case were as follows. In 2003, the Austrian Constitutional Court delivered a judgment in which it interpreted the Law on the abolition of the nobility, which enjoys a constitutional status as it implements the principle of equal treatment in this field. It held that the Law on the abolition of the nobility prohibits Austrian citizens from bearing titles of nobility, including those of foreign origin. This meant for Ilonka Fürstin von Sayn-Wittgenstein – an Austrian national residing in Germany who took the name of her German stepfather – that all official documents delivered by Austrian authorities could no longer contain the noble elements ‘Fürstin von’, i.e. her surname could only be registered as ‘Sayn-Wittgenstein’. The latter, who had been using the prefix ‘Fürstin von’ both personally and

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<sup>71</sup> *Omega*, above n 70, para. 37.

<sup>72</sup> T. Tridimas, *The General Principles of EU Law*, 2<sup>nd</sup> edn (Oxford, OUP, 2006), at 341.

professionally in Germany for more than fifteen years, argued that the Law on the abolition of nobility hampered her rights to free movement. By contrast, the Austrian Government stressed the importance of the Law on the abolition of nobility which, as a matter of public policy, ‘went hand in hand with the creation of the Republic of Austria’.<sup>73</sup> Hence, the referring court asked, in essence, whether Article 21 TFEU may authorise a Member State to rely on reasons of a constitutional nature in order not to recognise all the elements of a name obtained by one of its nationals in another Member State. The Court of Justice began by finding that the refusal by Austrian authorities to recognise the noble elements of Ms Sayn-Wittgenstein’s surname constituted a restriction on her rights to free movement. Such refusal may cause Ms Sayn-Wittgenstein “serious inconvenience” within the meaning of *Grunkin and Paul*<sup>74</sup> result[ing] from having to alter all the traces of a formal nature of the name “Fürstin von Sayn-Wittgenstein” left in both the public and the private spheres, given that her official identity documents currently refer to her by a different name’.<sup>75</sup> Indeed, the discrepancy in names may cast doubts as to Ms Sayn-Wittgenstein’s identity and the authenticity of the documents she submits, or the veracity of their content.<sup>76</sup> As to the justification for the restriction, the Court of Justice held that, as a matter of public policy, a Member State may restrict the right to free movement in order to protect an element of its national identity.<sup>77</sup> Although public policy had to be interpreted strictly, the Court of Justice noted that, since ‘the concept of public policy may vary from one Member State to another and from one era to another [,] [t]he competent national authorities must therefore be allowed a margin of discretion within the limits imposed by the Treaty’.<sup>78</sup> Next, the Court of Justice recognised as legitimate the objective pursued by the Law on the abolition of the nobility, which ‘seeks to ensure the observance of the principle of equal treatment as a general principle of law’,<sup>79</sup> enshrined in Article 21

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<sup>73</sup> *Sayn-Wittgenstein*, above n 70, para. 32.

<sup>74</sup> *Grunkin and Paul*, EU:C:2008:559.

<sup>75</sup> *Sayn-Wittgenstein*, above n 70, para. 67.

<sup>76</sup> *Ibid.*, para. 69.

<sup>77</sup> *Ibid.*, paras 83 and 84.

<sup>78</sup> *Ibid.*, para. 87.

<sup>79</sup> *Ibid.*, para. 89.

of the Charter. As to the principle of proportionality, the Court of Justice recalled its findings in *Omega*:

‘it is not indispensable for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected and that, on the contrary, the need for, and proportionality of, the provisions adopted are not excluded merely because one Member State has chosen a system of protection different from that adopted by another State’.<sup>80</sup>

Hence, the Court of Justice ruled that the refusal by the Austrian authorities to recognise the noble elements of the surname of a national of that State was compatible with Article 21 TFEU.

Moreover, in order to strengthen its reasoning, the Court of Justice referred for the first time, albeit in passing, to Article 4(2) TEU, recalling that under that provision ‘the [EU] is to respect the national identities of its Member States, which include the status of the State as a Republic’.<sup>81</sup> This is an important development which suggests that Article 4(2) TEU is to be interpreted as protecting ‘national identity’, that concept being understood as the fundamental constitutional principles of the Member States. However, the fact that the Court of Justice mentioned Article 4(2) TEU in the context of the principle of proportionality implies that ‘national identity’ is not absolute, but must be weighed against the fundamental values of the EU itself.<sup>82</sup> This means that where fundamental

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<sup>80</sup> *Ibid.*, para. 91.

<sup>81</sup> *Ibid.*, para. 92.

<sup>82</sup> See A. von Bogdandy and S. Schill, ‘Overcoming absolute primacy: Respect for national identity under the Lisbon Treaty’ (2011) 48 *Common Market Law Review* 1417, at 1420 (arguing that ‘[n]ational identity [...] does not enjoy absolute protection under EU law, but has to be balanced against the principle of uniform application of EU law; implementing this duty is a task of both the [Court of Justice] and national constitutional courts as parts of a system of composite constitutional adjudication’). See also S. Rodin, ‘National Identity and Market Freedoms after the Treaty of Lisbon’ (2011) 7 *Croatian Yearbook of European Law and Policy* 11, at 41 (who argues that ‘[t]he role of Article 4(2) TEU is twofold. As a competence

constitutional values of the Member States are at stake but no core value of the Union is at issue, then ‘value diversity’ will prevail over the uniform application of EU law. Conversely, where the national measure concerned threatens values of essential importance to the Union (such as the prohibition of discrimination on grounds of nationality), the Member State concerned will not be able to rely on Article 4(2) TEU. The approach followed by the Court of Justice in *Omega* and *Sayn-Wittgenstein* is fully consistent with this reading of Article 4(2) TEU. Where the contested national measure has nothing to do with protectionism,<sup>83</sup> i.e. where no core value of the Union is at stake, the Court of Justice seeks to respect ‘value diversity’ by applying a ‘proportionality test’ which leaves to the Member States the level at which constitutional principles of fundamental importance are to be protected.

### 3. The protection of the official national language

In *Runevič-Vardyn and Wardyn*, the Court of Justice was called upon to examine the compatibility of Lithuanian rules, which required a person’s forenames and surnames to be entered in documents indicating civil status which that Member State issued using only the characters of the Lithuanian alphabet, with the Treaty provisions on EU citizenship. For example, this meant that the use of diacritical marks, such as ‘Į’, was not allowed and that names written with the letter ‘W’ had to be rewritten using the letter ‘V’.<sup>84</sup> In 2007, Malgožata Runevič-Vardyn, who was a Lithuanian national belonging to the Polish minority of that Member State (but not having Polish nationality), requested that the Vilnius Civil Registry Division change her forename and maiden name, as they appear on her birth certificate and marriage certificate, namely ‘Malgožata Runevič’, to ‘Małgorzata

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rule, it imposes limits on EU regulation, even in cases where such regulation would otherwise be permissible. As an interpretative rule, it provides guidance for the [Court of Justice] and national courts on how to interpret the relationship between EU and national law’).

<sup>83</sup> Cf. *International Transport Workers' Federation and Finnish Seamen's Union*, C-438/05, EU:C:2007:772. See, in this regard, K. Lenaerts and J.A. Gutiérrez-Fons, ‘The constitutional allocation of powers and general principles of EU law’ (2010) 47 *Common Market Law Review* 1629.

<sup>84</sup> On the use of diacritical marks as a right of minorities under public international law, see R. Satkauskas, ‘Use of Diacritics: towards a New Standard of Minority Protection?’ (2008) 21 *Lithuanian Foreign Policy Review* 112.

Runiewicz’, which corresponds to her name according to the Polish spelling rules (the ‘first request’). She also put forward a similar request asking for her second surname — i.e. her husband’s surname —, as it appears on her marriage certificate, to be changed from ‘Vardyn’ to ‘Wardyn’ (the ‘second request’). Her husband, a Polish national, also requested that his forenames, as they appear on his marriage certificate, namely ‘Lukasz Pawel’, be changed to ‘Łukasz Paweł’ (the ‘third request’). It is worth noting that the competent Lithuanian authorities had written his surname using the Polish rules governing spelling, i.e. ‘Wardyn’. However, in accordance with Articles 3.281 and 3.282 of the Lithuanian Civil Code, the Vilnius Civil Registry Division rejected all three requests. That decision was subsequently challenged by Ms Runevič-Vardyn and her husband before the First District Court of the City of Vilnius, which sought guidance from the Court of Justice. Ms Runevič-Vardyn argued that the decision of the Vilnius Civil Registry Division adversely affected her rights of free movement under Article 21 TFEU, as the civil status documents issued by the competent Lithuanian authorities on which neither her forename nor her surnames were written in accordance with rules governing Polish spelling, failed correctly to reflect the nature of her relationship with her husband or even her son.

As to the existence of a restriction, the Court of Justice proceeded to examine each of the three requests separately. In relation to the first request, it ruled out that the decision of the Vilnius Civil Registry Division refusing to change Ms Runevič-Vardyn’s forename and maiden name, as they appear in her birth certificate, was liable to deter her from exercising her rights of free movement, since those names had always been entered in the civil registry in the same way. As to the second request, the Court of Justice held that it was for the referring court to decide whether the fact that her second surname was spelled with a ‘V’ instead of with a ‘W’ — i.e. it was written in a form that did not match her husband’s surname as registered in Poland — could cast doubts as to her and her husband’s identity and the authenticity of the documents which they submitted. Referring to *Garcia Avello* and *Sayn-Wittgenstein*,<sup>85</sup> the Court of Justice held that if the decision of the Vilnius Civil Registry Division ‘involve[d] the possibility that the truthfulness of the

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<sup>85</sup> *Garcia Avello*, C-148/02, EU:C:2003:539, para. 36, and *Sayn-Wittgenstein*, above n 70, paras 55 and 66 to 70.

information contained in those documents [would] be called into question and the identity of that family and the relationship which exist[ed] between its members placed in doubt’,<sup>86</sup> that might cause serious inconvenience to Ms Runevič-Vardyn and her husband amounting to a restriction on the rights conferred upon them by Article 21 TFEU. Finally, as to the third request, the Court of Justice found that the only difference between the name of Ms Runevič-Vardyn’s husband, as it appears on their marriage certificate, and the way in which it would have been written using rules governing Polish spelling was that the competent Lithuanian authorities had omitted diacritical marks. That omission, in view of the Court of Justice, was not sufficient to cause ‘serious inconvenience’ to Ms Runevič-Vardyn’s husband in the exercise of his rights of free movement. As the Opinion of AG Jääskinen points out, ‘diacritical marks are often omitted in many daily actions for practical reasons’ (e.g. technological constraints inherent in some computer systems).<sup>87</sup> The Court of Justice also added that ‘for people who are unfamiliar with a foreign language the significance of diacritical marks is often misunderstood and they will not even notice them’.<sup>88</sup>

In relation to the second request, the Court of Justice also examined whether, in the event of the referring court finding a restriction on the rights of Ms Runevič-Vardyn and her husband set out in Article 21 TFEU, such a restriction could be justified. Several Member States intervening in support of Lithuania argued that it was legitimate for a Member State to ensure that the official national language was protected in order to safeguard national unity and preserve social cohesion. In addition, the Lithuanian Government stressed that ‘the Lithuanian language constitutes a constitutional asset which preserves the nation’s identity, contributes to the integration of citizens, and ensures the expression of national sovereignty, the indivisibility of the State, and the proper functioning of the services of the State and the local authorities’.<sup>89</sup> The Court of Justice held that it was legitimate for the Member State concerned to protect and promote its official language. Referring to Article

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<sup>86</sup> *Runevič-Vardyn and Wardyn*, above n 70, para. 77.

<sup>87</sup> *Ibid.*, para. 81.

<sup>88</sup> *Ibid.*

<sup>89</sup> *Ibid.*, para. 84.

3(3) TEU and Article 22 of the Charter, the Court of Justice observed that the EU is committed to respecting its rich cultural and linguistic diversity. Most importantly, the Court of Justice stated that the protection of a State's official language is part and parcel of its national identity which, in light of Article 4(2) TEU, the EU must protect. Regarding the principle of proportionality, the Court of Justice limited itself to providing general guidance. It held that it was for the referring court to balance, on the one hand, the right of Ms Runevič-Vardyn and her husband to respect for their private and family life and, on the other hand, the legitimate protection by the Member State concerned of its official language and traditions. However, the Court of Justice seemed to suggest that, if a restriction were to be found in relation to the second request, it would be very difficult for that restriction to comply with the principle of proportionality: the surname 'Wardyn' had already been entered on the very same marriage certificate issued by the competent Lithuanian authorities. Moreover, in Lithuania, the name of nationals of other Member States may be written using characters of the Roman alphabet which do not exist in the Lithuanian alphabet.

#### **IV. Concluding remarks**

European values which are the result of a constitutional consensus are embedded in primary EU law. It is essentially for the political process to determine when, and indeed whether, those norms – which require the unanimous consent of the Member States and, where appropriate, of their citizens – should be adopted. Constitutional consensus can also lead to the adoption of general principles of EU law. These principles allow room for flexibility, yet in a context of conceptual continuity between the European Union and its Member States. When discovering a general principle, the Court of Justice serves as a bridge between the constitutional traditions common to the Member States and their shared European values.

It is the existence or absence of an EU legislative consensus that indicates whether the Member States are developing at the same pace and in the same manner or whether national societies are evolving in accordance with their own scales of values. That being said, national diversity and EU legislative consensus must both comply with values which

are regarded as pan-European, i.e. those that are the object of a constitutional consensus at EU level.

It is this latter consensus that guarantees that the forces that bring Europeans together are stronger than those that pull them apart or, to put it more eloquently, paraphrasing the words of Marie Skłodowska-Curie, the European Union is based on the idea that we, Europeans must be 'less curious about [differences in] people and more curious about [common] ideas'.

Thank you very much.