

The Weakening of the Protection of Fundamental and Human rights in a Multilevel Legal System

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Abstract: A much believed assumption while discussing constitutional and legal protection of fundamental and human rights, is that *the more, the better*. Thus different levels of protection for these rights, further strengthen them is a common belief. Nonetheless, the reality is not quite that simple, as one can see in Europe – a region considered to be the beacon of the so-called *multilevel system of protection of fundamental and human rights*. The present article aims to debate the *Melloni* case, where fundamental and human rights were bypassed by the need to maintain “the primacy, unity and effectiveness of EU law”. First, we show how fundamental rights expanded from a national to an international perspective – even melting with human rights – and then we debate the risks of the multilevel constitutional and legal protection of fundamental rights. At the end it is shown how the *Melloni* case effectively lowered the level of such protection, acting exactly in the opposite direction which is expected from a multilevel legal system of protection of the rights of the citizens.

Keywords: Fundamental Rights, Human Rights, *Melloni* case, Multilevel Protection and European Union

Introduction

The political and legal changes that occurred in the so-called “Western Civilization” during the 20th century led to the creation of what is called as the *multilevel system of protection of rights*. In other words, it implies that it is necessary that the protection of fundamental and human rights of the citizens must not be the exclusive responsibility of a state’s judicial organ, especially, when one considers that this institution is itself capable of violating these rights. In the context of multilevel protection of rights one may consider that Europe is a privileged place not only because this type of protection has been one of its core values for a

long period of time – at least since the creation of the European Convention on Human Rights (ECHR) in 1950 – but, also because in Europe two of the main institutions responsible for the protection of fundamental and human rights – the European Court of Human Rights (ECtHR) – and the Court of Justice of the European Union (CJUE) are located.

The existence of three levels of protection of fundamental and human rights – are needed to add to the previous two levels of the national one, symbolized by the Constitutions of the European states – leads to the assumption that there are almost endless advantages, from the citizen's perspective, in this intricate legal system. Shortly, one could argue that there is some form of complementarity between these legal systems, since the insufficiency of one of them could be solved by the advantages of the other ones. However, this multilevel system of protection of fundamental and human rights has risks, especially when one considers that these systems do not always talk to each other – in a way that this undermines the prospect of achieving real justice for the citizen.

In this context, the aim of this article is to present and analyze the risks linked to the multilevel system of protection of fundamental and human rights. To achieve that this article is based on the so-called *Melloni* case, from the perspective that this case actually *lowered* the level of the protection of fundamental and human rights of the defendant due to the emphasis on an exacerbated legal formalism of EU law by the CJUE.

The article is divided into three parts. In the first one, we speak about the appearance of the multilevel system of protection of fundamental and human rights and its theoretical construction. Next, we present the risks of this multilevel protection, especially those arising from the lack of judicial dialogue between the Courts. Finally, we analyze the *Melloni* case, showing how the dispute between the Spanish Constitutional Court and the CJUE ended by lowering the level of the protection of the fundamental and human rights of the defendant instead of increasing it, which shows that the existence of multiple level of protection of these rights doesn't necessarily lead to a greater and better protection of them.

1 Fundamental and human rights in a national and supranational perspective: from the *national* rights to the *supranational* protection

The warranty of fundamental rights is, with democracy and the separation of powers, one of the pillars of the so-called *democratic rule of law*, which, in turn, corresponds to the typical form of organization in the Western model of state¹. In this context, it is necessary to draw attention to the fact that the *guarantee*, or the *presence*, of these fundamental rights in the constitutional text of a state is not sufficient in itself; in fact, effective protection of these rights in a citizen's daily life is imperative. There's no point in having endless rights in legal documents if the citizen, the true *subject* of these rights, does not see them realized for the benefit of his/her dignity.

In this sense, as global social phenomena interfere more and more with the life of millions of individuals, the protection of fundamental rights cannot rest anymore on the hands of only one state. Clearly, coordination of efforts between states in order to ensure greater and better possible protection of citizens is needed especially if one considers that the dignity of the citizens is the most important value to be protected by the state².

Besides, as the 20th century history shows us that the state, whose primary function is to protect fundamental and human rights, itself ends up being the institution which infringes these rights the most³. The infringement may happen despite the legal guarantees available to the citizens. Europe had acknowledged this risk very early – may be because the most serious violations of fundamental rights in recent human history have occurred in the European territory during World War II – and it took some measures to prevent it from happening again.

After World War II, we have seen the rise of not only the so-called “third generation (or dimension) of fundamental rights”⁴ but also, the appearance of what is called *multilevel*

¹ MIRANDA Jorge, *Teoria do Estado e da Constituição*, Rio de Janeiro, Brazil: Forense, 2011, p. 33.

² LAFER, Celso, *A reconstrução dos direitos humanos: um diálogo com o pensamento de Hannah Arendt*, São Paulo, Brazil: Companhia das Letras, 1988, p. 20-22.

³ MARTINS, Ana Maria Guerra; ROQUE, Miguel Prata, *A tutela multinível dos direitos fundamentais: a posição do Tribunal Constitucional Português*. Trilateral conference of the Constitutional Courts of Spain, Italy and Portugal held at Santiago de Compostela, Spain, 16th-18th December 2014. Available at <http://www.tribunalconstitucional.es/es/actividades/Documents/XVITriateral/PONENCIA%20PORTUGAL.pdf>, Last visited on 13th June 2016, p. 4.

⁴ The third generation (or dimension) of fundamental rights refers to those rights which are related not only to the individual (1st dimension – civil rights) nor to the collectivity (2nd dimension – social rights). But, to the individuals and the collectivity at the same time. As an example - one can think about the protection of the environment as a 3rd dimension of the fundamental rights: it refers not only to the individual taken alone but, also to the collectivity. See QUEIROZ, Cristina M. M., *Direitos fundamentais*, Teoria geral, 2^a edição, Coimbra, Portugal: Coimbra Editora, 2010, p. 20-21.

constitutionalism. This concept can be understood as the process of (re)organization of the states which leads to the appearance of new ways of governance, with a special mention of the shared governance between states and international institutions. Thus, once citizens begin to have multiple *social identities* – in Europe, for example, there’s one social identity linked to their city, other linked to their country (nationality), and a last one linked to the European Union. In order to protect the fundamental rights of the citizens coordination between the governments of each of these instances⁵ becomes a necessity.

In this sense, the European Union as an institution on the whole – and not only each of its member states individually – must ensure the protection of these rights, especially when one of the requisites of a Constitution is the forecasting and the warranty of fundamental rights of the citizens of the state, and the other one is that the Treaties of the European Union are to be considered, if not in the formal perspective then at least in a material perspective, as a Constitution⁶. This implies that if there are European *citizens* as defined by the Treaties of the European Union – that is, if there are direct political and legal links between the individuals and the *institution* of the European Union – then this institution also has a duty to ensure the protection of fundamental and human rights of its citizens.

The guarantee of the fundamental rights of European citizens – that is, of the citizens connected to the European Union by political and legal links – has increased with the implementation of the latest version of the Treaty on European Union (hereinafter, TEU) in 2009, which recognizes fundamental rights in article 6/1 as “set out in the Charter of Fundamental Rights of the European Union of 7 December 2000 [...] which shall have the same legal value as the Treaties” – that is, the Charter (hereinafter, CFREU) which is now considered as one of the fundamental laws of the European Union⁷.

The legal protection of fundamental rights inside the European Union is guaranteed by the CJUE, which has competence to guarantee these rights not only in relation with the judicial review of the European legislation, but also, concerning the actions of the member states of the European Union in order to materialize primary and secondary European legislations.

⁵ PERNICE Ingolf, *The Treaty of Lisbon: multilevel constitutionalism in action*, Columbia Journal of European Law, Vol. 15, n. 3, 2009, Available at <http://ssrn.com/abstract=1326114>, Last visited on 1st June 2016, p. 402.

⁶ MARTINS, Ana Maria Guerra, *Manual de direito da União Europeia*, Coimbra, Portugal: Almedina, 2014, p. 46.

⁷ Supra note 3 at p. 19-20; Supra note 5 at p. 401.

Both Constitutional and Ordinary Courts at the national level are responsible for the interpretation and application of the Union norms related to the fundamental and human rights of citizens⁸. This is the actual configuration of the multilevel protection of fundamental and human rights at the European Union level.

Synthetically, it can be argued that the multilevel protection of fundamental rights has the following advantages: firstly, a layer of protection could fill gaps eventually existing in another layer (as it seems to be the case of social rights, which are granted by national constitutions and by the CFREU but not by the ECHR); secondly, it allows institutions beyond the state present themselves as guarantors of fundamental and human rights to ensure their effectiveness in implementation; and thirdly, it enables greater chances of access to the judicial system by citizens, since Courts, apart from the national courts too can be approached by the citizens to challenge the infringement of their rights⁹.

However, the existence of different levels of protection does not necessarily bring about only benefits to the citizens. It is possible to identify the following risks as well: firstly, the multiplication of fundamental and human rights' catalogues does not necessarily lead to a greater and better protection of the citizens and this is primarily due to the political barriers existing between the Courts involved in the issue; secondly, there may be uncertainty to the citizens about what is the correct catalogue of fundamental and human rights that may solve their issue (should he/she pursue his/her objective based on the national rights, the European rights or the ECHR rights? – will the citizen pursue his rights based in the national, European or the ECHR legislation?); thirdly, rights defined in these catalogues can have the same words yet different meanings, leading to conflicts of jurisdiction; fourthly, the existence of many Courts and many possibilities of appeal can make the process time consuming and expensive; and fifthly, there may be contradictory decisions from the Courts involved, which creates mistrust and lack of acceptance of the given decision¹⁰. The aforementioned risks may *lower* the level of protection of fundamental and human rights.

2 The risks of the multilevel protection of fundamental and human rights

⁸ Supra note 3 at p. 30-31.

⁹ Supra note 3 at p. 34.

¹⁰ Supra note 3 at p. 34-35.

The proliferation of protective layers of fundamental and human rights may cause the *lowering* of the level of protection, especially when the issue is to be analyzed from the following two perspectives. First of all, one may speak about the *race to the bottom* in the protection of these rights through public policies¹¹. This corresponds to the situation in which a state would reduce its own level of protection of these rights when it verifies that other states have lower levels of protection. This is done because the first state will try to compete with the other ones, not only in socioeconomic, but also in political and legal terms.

The second perspective – which will be developed more deeply in the following pages – relates to the fact that the multiplicity of levels of protection can make Courts eager to impose themselves when relating to others, in order to show off their political and legal strengths. In doing so, these Courts may *legally* lower the level of the protection of fundamental and human rights instead of increasing it. In other words, we talk about the possible situation in which a given Court decides to apply a legislation that may bring, as a consequence, a less effective protection of the rights of a citizen, this being contrary to the expected social justice resulting from the actions of the state¹².

One of the solutions for this problem would be the so-called *judicial dialogue*¹³, although this solution, besides being fundamental in order to achieve the needed exchange of information and of *different views of the same thing* to achieve the best possible protection of the citizens¹⁴, does not seem to be enough to avoid the lowering of the level of the protection of rights. In this perspective, despite the presence of positive factors relating to the judicial dialogue in the so-called *European triangle*(national Courts, ECtHR and CJUE), this mechanism may also be criticized by the doctrine especially when one considers that what really occurs, at least within European Union, is the judicial *imposition* and not judicial *dialogue*. In other words, although the relationship between the national and the European judges is based in the principle of equality (or isonomy) due to the absence of a formal

¹¹ ROQUE Miguel Prata, *A dimensão transnacional do direito administrativo. Uma visão cosmopolita das situações jurídico-administrativas*, Lisbon, Portugal: AAFDL, 2014, p. 633.

¹² As we will see in the next section of this article.

¹³ The *judicial dialogue* corresponds to the situation in which the Court “A” uses arguments provided by Court “B” not only in the sense that Court “A” could just quote a jurisprudence or a decision from Court “B” in its own decision, but, also that Court “A” would *really* use, in its decision, the *values* and *principles* originated by Court “B”. For a definition of judicial dialogue, see VERGOTTINI, Giuseppe de. El diálogo entre tribunales. *Teoría y Realidad Constitucional*, N. 28, 2011. Available at <http://revistas.uned.es/index.php/TRC/article/view/6962/6660>, Last visited on 11th June 2016, p. 345-346.

¹⁴ Supra note 5 at p. 402.

hierarchy between them, in fact, it turns out to be the centrality of the European judges, especially those from the CJUE, with these judges being almost the sole holders of the possibility of interpretation of European Law because of the “preliminary rulings” mechanism established in article 267 of the Treaty on the Functioning of the European Union¹⁵ (TFEU).

Another criticism to this judicial dialogue in the current form relates to the difference between *dialogue* and *influence*. It is questioned whether, there is an effective judicial dialogue in situations where only one Court is using the values and principles of the other without reciprocity. It is not possible to speak about *dialogue* if there is no interaction between Courts, but, just *influence* from one on another, especially in cases where a Court just appropriates the ideas, arguments and thoughts of another Court, more prestigious, or when a Court effectively submits to another¹⁶. In these situations it is possible to say that there are no comparisons between different kinds of law, and even less dialogue between Courts, but only the *appropriation*, by one Court, of what it thinks is more convenient or useful to formulate the justification of its statements or even only to support these statements when they are already defined¹⁷.

The practical evidence of the absence of judicial dialogue in European Union seems to be present in the *Opinion 2/13* from CJUE, which analyzed the conditions for EU’s access to the ECHR according to the provisions set in article 6/2 TEU. Although, all EU member states are also members of the ECHR, and although the Council of Europe and the European Union have “different roles [but] shared values”¹⁸, the CJUE decided by the *incompatibility* of the agreement on the accession of the European Union to the ECHR at the end of 2014, a fact that unfortunately contributes to the situation of crisis that exists nowadays in the protection of fundamental and human rights of individuals in the European Union.

¹⁵ DAMELE Giovanni; PALLANTE Francesco, *A tutela multinível dos direitos: quantidade é sinónimo de qualidade?* In: MARQUES, A.; BARCELOS P., *Direitos fundamentais e soberania na Europa História e atualidade*, Lisbon, Portugal: Instituto de Filosofia da Nova, 2014, Available at [http://www.academia.edu/10339157/A_tutela_multin%C3%ADvel_dos_direitos_Quantidade_é_sinónimo_de_q](http://www.academia.edu/10339157/A_tutela_multin%C3%ADvel_dos_direitos_Quantidade_é_sinónimo_de_qualidade)ualidade, Last visited on 13th June 2016, p. 266.

¹⁶ VERGOTTINI, Giuseppe de. El diálogo entre tribunales, *Teoría y Realidad Constitucional*. N. 28, 2011. Available at <http://revistas.uned.es/index.php/TRC/article/view/6962/6660>, Last visited on 11th June 2016, p. 349.

¹⁷ Id.

¹⁸ Title of the webpage available at <http://www.coe.int/en/web/portal/european-union>, Last visited on August 16th 2016.

This is why most of scholars positioned themselves against *Opinion 2/13*. As stated by Gragl¹⁹, something is wrong when “the promise of a more effective and coherent protection of human rights in Europe is rejected in favour of legal autonomy [of the European Union]”. The criticism is based on the fact that the *Opinion*, by emphasizing continuously on *the primacy, unity and effectiveness of EU law*, left aside that value which is the first one of the European Unity, that is human dignity, and it is materialized by the broadest possible protection of fundamental and human rights. In this context the CJUE preferred to give more importance to “other constitutional principles such as the effectiveness and primacy of EU law over the respect for human rights”, and this, in consequence, weakened “the EU’s constitutional credentials”²⁰.

As a result, citizens may not have their rights protected because, according to article 35 of the ECHR, they must exhaust all “domestic remedies” before petitioning at the ECtHR. As the European Union (EU) is not part of the European Convention on Human Rights (ECHR), the European Court of Human Rights (ECtHR) has no jurisdiction on acts from the EU. This means that the ECtHR cannot condemn the EU if it was to violate citizen’s human rights.

For example - if I am a Portuguese citizen and the Portuguese State violates anyone of my human rights, I have first to check if that violation was made by the Portuguese State itself, putting into practice its own legislation, or if it was an action by the Portuguese State in order to put into practice European legislation. So, if it was Portuguese legislation, I can blame the Portuguese State based in the ECHR; but if it was European legislation put into practice by the Portuguese State, I have no one to blame, since EU isn’t part of the ECHR. So, I would have no one to blame, or no one to protect me against those violations.²¹

In conclusion, we see that, despite all the benefits from the multilevel protection of fundamental and human rights, there still exist many problems resulting from this plurality of

¹⁹ GRAGL, Paul, *The reasonableness of jealousy: Opinion 2/13 and EU accession to the ECHR*, Draft. In: BENEDEK, Wolfgang; BENOÎT-ROHMER, Florence; KARL, Wolfram; NOWAK, Manfred (eds.), *European Yearbook on Human Rights*, Viena: Neuer Wissenschaftlicher Verlag GmbH, 2015. Available at <http://ssrn.com/abstract=2563455>, Last visited on 13th June 2016, p. 3.

²⁰ NANOPOULOS, Eva, *Killing two birds with one stone? The Court of Justice’s opinion on the EU’s accession to the ECHR*, *The Cambridge Law Journal*, Vol. 74, n. 2, 2015, Available at <http://dx.doi.org/10.1017/S0008197315000458>, Last visited on 3rd June 2016, p. 187.

²¹ GRAGL, Paul, *Accession revisited: will fundamental rights protection trump the European Union’s legal autonomy?* In: BENEDEK, Wolfgang; BENOÎT-ROHMER, Florence; KARL, Wolfram; NOWAK, Manfred (eds.), *European Yearbook on Human Rights*, Viena: Neuer Wissenschaftlicher Verlag GmbH, 2011, Available at <http://ssrn.com/abstract=2180452>, Last visited on 13th June 2016, p. 70.

levels of protection, and it can even be seen as a proof of the absence of the judicial dialogue between judicial organs at the European Union. One way to solve this problem is through the establishment of some *margins for interpretation* to the Courts involved when they share responsibilities²² – or, in other words, to the existence of an *effective* judicial dialogue between the Courts, although this, as we will see below, does not occur very often.

3 The *Melloni* case and the lowering of the level of protection of fundamental and human rights

Within a multilevel system of protection of fundamental and human rights the emphasis must not be put on the enlargement of the competence and responsibilities of one or another Court – especially because this “competition” between Courts, in the sense of “which can do the most”, may bring undesirable practical results to the citizens –, “...rather at achieving functional, efficient and rapid legal protection for our citizens”²³. Otherwise, the worst thing that can happen to citizens is, the *lowering* of the level of protection of his/her fundamental and human rights.

In this light, it becomes important to analyze the *Melloni* case. The case is important not only with regards to the relationship between the Spanish Constitutional Court (SCC) and the CJUE, but also, regarding the relationship between distinct legal orders with different levels of protection of the same fundamental and human rights²⁴. This is true especially when one considers that the final decision generated in this case lowered the level of protection of such rights, that is, it confirmed that *quantity is not the same as quality*²⁵.

3.1 The *Melloni* case in brief

The *Melloni* case relates to the situation of Mr. Stefano Melloni, an Italian citizen condemned by the Italian Courts for bankruptcy fraud. As Italy issued a European Arrest Warrant (EAW),

²² VOßKUHLE, Andreas, *Protection of human rights in the European Union. Multilevel cooperation on human rights between the European Constitutional Courts. Our Common Future*, Hannover, November 4th, 2010. Available at http://www.ourcommonfuture.de/fileadmin/user_upload/dateien/Reden/Vosskuhle.pdf, Last visited on 11th June 2016, p. 4-5.

²³ Id. at p. 5.

²⁴ PÉREZ, Aida Torres, *Melloni in Three Acts: From Dialogue to Monologue*, European Constitutional Law Review, Vol. 10, n. 2, 2014, Available at <http://dx.doi.org/10.1017/S1574019614001199>, Last visited on 3rd June 2016, p. 308.

²⁵ Supra note 15.

the *Sala de lo Penal of the Audiencia Nacional* (Criminal Division of the High Court) of Spain, the country where Mr. Melloni had been detained, decided in favor of his extradition, thereby fulfilling the EAW. Upon being released on bail, Mr. Melloni escaped, with the aim of not to surrender to the Italian authorities²⁶.

The *Tribunale di Ferrara* (Ferrara Court, Italy), which was responsible for the case in Italy, proceeded with the trial in Mr. Melloni's absence, since the Court took into consideration the presence of Mr. Melloni's lawyers as representative. Mr. Melloni was found guilty in all Italian instances – by the *Tribunale di Ferrara*, *Corte d'appello di Bologna* (Bologna Appeal Court) and the *Corte Suprema di Cassazione* (Supreme Court of Cassation). The *Procura Generale della Repubblica* (Italian Public Prosecutor's Office) issued an EAW to ensure that the sentence imposed by the *Tribunale di Ferrara* could be executed (ten-year imprisonment). Upon Melloni being arrested again in Spain, the *Juzgado Central de Instrucción* (Central Investigating Court) in Spain referred the case to the First Section of the *Sala de lo Penal of the Audiencia Nacional* to execute the Italian sentence²⁷.

Mr. Melloni argued that he had revoked authority of the lawyers who represented him and had appointed a new one, despite the fact that the notices of his case continued to be sent to the former ones. According to Mr. Melloni, this situation would configure trial *in absentia*, which is not allowed by the Italian procedural law. The defendant argued that the EAW should be conditional to the possibility for him to appeal against that judgment *in absentia*. The First Section of the *Sala de lo Penal of the Audiencia Nacional* did not sustain Mr. Melloni's arguments and authorized his surrender to the Italian authorities in order for him to serve the sentence imposed by the *Tribunale di Ferrara* as perpetrator of a bankruptcy fraud²⁸.

Mr. Melloni filed a *recurso de amparo* (petition for constitutional protection) before the *Tribunal Constitucional de España* (Spanish Constitutional Court – SCC). Mr. Melloni argued, based on the Constitution of Spain, that he had not been given a fair trial, since the

²⁶Case C-399/11 (*Melloni case*), Court of Justice of the European Union (CJUE). Grand Chamber. February 26th 2013, Available at <http://curia.europa.eu/juris/document/document.jsf?docid=134203&mode=req&pageIndex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=196638>, Last visited on 4th June 2016, par. 13.

²⁷ *Id.* at paragraph 14-15.

²⁸ *Supra* 26 at paragraph 16-17.

execution of the EAW would affect his dignity because this would validate a trial made *in absentia* and would not allow him to defend himself against the offenses he had been charged with.

The First Section of the SCC acknowledged that the *recurso de amparo* was admissible and should be analyzed by the Plenary Chamber of the SCC²⁹. The SCC considered that the execution of the EAW by the *Sala de lo Penal of the Audiencia Nacional* would configure as an indirect infringement of an essential part of the fundamental right of a fair trial and that such a decision would affect ultimately human dignity³⁰.

The decision of the SCC was based on article 5/1 from the Framework Decision n. 2002/584, which states that the execution of an EWA “issued for the execution of a sentence imposed *in absentia* should be subject, ‘in accordance with the law of the executing Member State’, to, among others, the condition that ‘the issuing judicial authority should furnish guarantees that are regarded as sufficient to ensure that the person requested under a European Arrest Warrant will have an opportunity to apply for a retrial such as to safeguard his rights of defense in the issuing Member State and to be present at the hearing’”³¹.

The problem with this Framework is that the Decision n. 2002/584 has been altered by Framework Decision 2009/299. This change removed article 5/1 from the Framework Decision and included a new article 4-A, which prohibits the refusal of the execution of an EAW even if the defendant has had a trial *in absentia*, as long as the defendant has given a mandate to a legal counsellor “who was either appointed by the person concerned or by the State, to defend him or her at the trial, and was indeed defended by that counsellor at the trial”³². If one considers that there had been two lawyers previously appointed by the defendant, and considering that they effectively accompanied all the procedures in all instances, one should think that the EAW must have been executed by Spain.

Due to this situation, the SCC started a preliminary ruling based on article 267 of the TFEU by sending to the CJUE three questions. The first two questions referred, respectively, to the interpretation and validity of article 4-A from Framework Decision n. 2009/299, and the third

²⁹ *Supra* 26 at paragraph 18-19.

³⁰ *Supra* 26 at paragraph 20.

³¹ *Supra* 26 at paragraph 20-21.

³² *Supra* 26 at paragraph 23.

question referred to the interpretation of article 53 of the CFREU³³. Thus, there was a great opportunity presented so, that the expected judicial dialogue between Courts in European Union could occur, especially because the SCC itself provided the CJUE, in the initial request, some possible interpretations of article 53 of the CFREU, sending a sign of good will in order to materialize that judicial dialogue³⁴. After all these debates between these Courts, what was the decision of the CJUE in *Melloni* case?

3.2 The result of the *Melloni* case: the lowering of the level of the protection of rights

The CJUE ignored the suggestions made by the SCC, finishing the intended judicial dialogue, and put away immediately any possibility EU member states could have to apply higher levels of protection of fundamental and human rights than those settled in CFREU – and the CJUE had done that based on *the primacy, unity and effectiveness of EU law*, “thus reducing Article 53 [of the CFREU]’s meaning to insignificance”³⁵.

The CJUE synthesized its positioning about the possibilities of the interpretation of Article 53 of the CFREU as proposed by the SCC asserting that member states of the EU have the possibility of applying their own standards of protection of fundamental and human rights

³³ These questions are available in *Case C-399/11 (Melloni case)*. Court of Justice of the European Union (CJUE). Grand Chamber. February 26th 2013. Available at <http://curia.europa.eu/juris/document/document.jsf?docid=134203&mode=req&pageIndex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=196638>, Last visited on 4th June 2016, par. 26. It is important to note that for the argument developed here in this article the most important question is the third one: “Does Article 53 of the Charter [of Fundamental Rights of the European Union], interpreted schematically in conjunction with the rights recognised under Articles 47 and 48 of the Charter, allows a Member State to make the surrender of a person convicted *in absentia* conditional upon the conviction being open to review in the requesting State, thus affording those rights a greater level of protection than that deriving from European Union law, in order to avoid an interpretation which restricts or adversely affects a fundamental right recognised by the constitution of the first-mentioned Member State?”.

³⁴ *Supra* 24 at p. 311.

³⁵ BESSELINK, Leonard F. M., *The Parameters of Constitutional Conflict after Melloni*, European Law Review Vol. 39, n. 3, 2014, Available at <http://ssrn.com/abstract=2345143>, Last visited on 7th June 2016, p. 3. According to Besselink Article 53 of the Charter of Fundamental Rights of the European Union reads: “Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.” This way, when the CJUE decided to ignore the suggestions of the SCC and to impose its own interpretation, it actually said that the level of protection *as interpreted by itself* is the *highest level* allowed for a Member State to guarantee, even if that Member State has a higher level of protection (in comparison to the CFREU) due to its national Constitution or due to an international agreement – thus putting Article 53 of the CFREU aside. The CFREU is available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2016.202.01.0389.01.ENG&toc=OJ:C:2016:202:FULL, Last visited on 26th October 2016.

when they are putting into practice National Acts aiming to fulfill EU law “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”³⁶.

That is, from one perspective the CJUE established that the level of protection granted by the CFREU corresponds to the minimum threshold that member states must accomplish. They can guarantee a higher level of protection than defined in the CFREU if their national Constitutions allow that – and the definition of which is the level of protection as defined by the CFREU will be interpreted by the CJUE itself. From this point of view the solution provided by the CJUE seems to present no problem at all, since it establishes the CFREU as the *minimum* level of protection of fundamental and human rights³⁷.

But, from another perspective, this means that the level of protection of rights guaranteed by EU member states cannot violate “the primacy, unity and effectiveness of EU law”. Thus, the level of protection of rights as defined in EU law is the *maximum* level of protection “allowed” by the CJUE to be put in practice by member states of the EU if one assumes that member states’ actions could jeopardize those “principles” of the EU (*primacy, unity and effectiveness of EU law*)³⁸.

That is, there may be situations in which the level of protection of fundamental rights in the national Constitutions is *higher* than that established in the CFREU – or than that *interpreted* by the CJUE – but, member states must set aside their own *higher* protection and guarantee a *lower* level of protection of fundamental rights, being this “restriction” created by CJUE in order to keep in line with the aforementioned principles.

This understanding is reinforced once again in *Melloni* case where the CJUE affirms that to allow a member state to evoke Article 53 of the CFREU to ensure a higher level of protection of any fundamental right based in its own constitutional law would cast “doubt on the uniformity of the standard of protection of fundamental rights as defined [in the EU law]” and “would undermine the principles of mutual trust and recognition which that decision purports

³⁶ *Supra* 26 at paragraph 60.

³⁷ *Supra* 35 at p. 18.

³⁸ *Id.* at p. 18.

to uphold and would, therefore, compromise the efficacy of [EU law]”³⁹. This means that the CJUE explicitly recognizes that some formal principles of the EU are much more important than the protection of fundamental and human rights.

The CJUE argues that as each member state has a different level of protection of these rights when compared to each other, the EU law would serve to strengthen *mutual recognition* of standards from the perspective of the member states. Besides, it also argues that the efficiency of EU law is derived from a consensus to which all member states agreed when creating the same EU law⁴⁰. However, the fact that a consensus has been reached in relation to the level of protection does not mean that this level of protection is enough⁴¹. From this point of view the *Melloni* case presents itself as a dangerous precedent, which could lead to the general lowering of the level of protection of fundamental and human rights in Europe – especially if we think about a hypothetical movement by the member states to change their national Constitutions in order to make them comply with the standards present in the CFREU as interpreted and defined by the CJUE⁴².

The practical consequence of the *Melloni* case was the *determination*, from the CJUE – and not from the *suggestion* as a consequence of an intended judicial dialogue –, of the lowering of the level of protection of fundamental rights when applied by SCC⁴³ – and this, despite the opinion of Advocate General Yves Bot, who made it clear in his *Conclusions* that CFREU, as

³⁹*Supra* 26 at paragraph 63.

⁴⁰ *Supra* 26 at paragraph 62.

⁴¹ *Supra* 24 at p. 317. Moreover, at page 327 the author points out that “however the fact that the EU legislators reached an agreement regarding the level of [fundamental] rights protection should not automatically exclude the possibility of accommodating higher levels of constitutional protection”. Since “governments are not the ultimate interpreters of fundamental rights and should not be able to dispose of the standard of constitutional protection by reaching an agreement at the EU level”. This is why “the primacy of EU law needs to be balanced against the backdrop of national constitutional rights protection”. It is also interesting to note that the CJUE decided according to the will of the Spanish *government*, not according to the Spanish *judiciary power*. Regarding the dispute between the Executive and Judiciary branches of power inside member states of EU and the role of the CJUE in that, see *Supra* note at 35 at p. 20-21.

⁴² *Supra* note 24 at p. 318.

⁴³ LAZOWSKI, Adam; WESSEL, Ramses A, *When caveats turn into locks: Opinion 2/13 on accession of the European Union to the ECHR*, German Law Journal, Vol. 16, n. 1, 2015, Available at http://static1.squarespace.com/static/56330ad3e4b0733dcc0c8495/t/56c84feff055e95324090f83/1455968241242/PDF_Vol_16_No_01_Special_179-212_Lazowski.pdf, Last visited on 3rd June 2016, p. 190; *Supra* 35 at p. 23; *Supra* 24 at p. 318.

interpreted by CJUE, “cannot have the effect of requiring Member States to lower the level of protection of fundamental rights guaranteed by their national constitution”⁴⁴.

As was the case with *Opinion 2/13*, there are scholars who agree with the result of *Melloni*, and others who disagree. Those who think that the *Melloni* case was a positive output from the CJUE argue that the Court did nothing more than to explain what was already present in Article 53 of the CFREU, at least in what concerns to the scope of the actions developed by the actors involved⁴⁵. By other words, this means that the protection of the fundamental and human rights should be automatically linked to supranational mechanisms when member states are implementing EU law, and to their own national constitutional mechanisms when they are implementing their own law.

However, we cannot ignore that the *Melloni* case has brought negative consequences to the protection of fundamental and human rights, especially, when we consider that the CJUE put as its first priority “the primacy, unity and effectiveness of the EU law”, instead of human dignity. By ending the judicial dialogue with the SCC, the CJUE put itself in a position of power, not of cooperation, which is a very regretful position if we think that the main objective of Courts – national or supranational – is to solve citizens’ issues, not to put themselves above all other judicial institutions.

It is also worth mentioning that CJUE, with the *Melloni* case, ended up violating some of the most important values of the EU⁴⁶. These values are reflected in Article 2 of the TEU, and the first of them – which in reality summarizes all those which follow – is the respect for human dignity. In turn, this human dignity can only be put into practice if fundamental and human rights are respected and protected not only by states but also by international institutions such

⁴⁴ *Case C -399/11 (Melloni case)*. Opinion of Advocate General Bot. Delivered on October 2nd 2012. Available at http://curia.europa.eu/juris/document/document_print.jsf?doclang=EN&text=&pageIndex=0&part=1&mode=req&docid=127841&occ=first&dir=&cid=196638, Last visited on 4th June 2016, par. 134.

⁴⁵ THYM, Daniel, *Separation versus fusion – or: how to accommodate national autonomy and the Charter? Diverging visions of the German Constitutional Court and the European Court of Justice*, European Constitutional Law Review, Vol. 9, n. 3, 2013, Available at <http://dx.doi.org/10.1017/S1574019612001228>, Last visited on 6th June 2016. The author adds that article 53’s interpretation given by CJUE in *Melloni* case would not apply to secondary law, which means that for this author even the merit of the case should not have been analyzed by the Court. On the contrary, saying that “all application of secondary EU law is subject to its being in conformity with fundamental rights” – and thus submitted to the CFREU, see *Supra* 35 at p. 6-7.

⁴⁶ *Supra* 35 at p. 24; JAKAB, András, *Supremacy of the EU Charter in national Courts in purely domestic cases*, VerfBlog, 27th March 2013. Available at <http://www.verfassungsblog.de/the-eu-as-a-community-of-human-rights>, Last visited on 4th June 2016, p. 1.

as the EU. At the same time, there is no indication that the (so-called) principles of the primacy of EU law or the mutual trust between member states of the EU appear to be so fundamental to the EU itself that they could surpass human dignity⁴⁷. Therefore, even if one considers that one of the preconditions for the very existence of the primacy of the EU law is the respect for fundamental rights⁴⁸, we could expect from the CJUE an approach more focused on the judicial dialogue in order to achieve the highest possible protection of citizens' fundamental and human rights in their daily lives.

The absence of the judicial dialogue is of extreme importance in this case, not only because this caused the lowering of the level of protection of fundamental and human rights, but also because it created some blockades regarding constitutional dialogue itself. In other words, if on the one hand the principles of primacy, unity and effectiveness of EU Laws appear as the basic ones in the development and maintenance of the Union itself according to the CJUE, then on the other hand, one can consider that the Union also has the obligation to respect the national identity of each of the member states, including their political and constitutional structures^{49, 50}. Instead, the CJUE opted simply to extend the reach of the "primacy" to the CFREU, prematurely ending the judicial dialogue⁵¹.

This means that if on the one hand member states have *common* constitutional traditions – which led to the creation of the EU itself –, on the other hand, they also have *individual*

⁴⁷ It is possible to question if "the primacy, unity and effectiveness of EU law" are real EU principles. This questioning is based on article 2 of the TEU, which brings that "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail". As we can see, "the primacy, unity and effectiveness of EU law" are not core values of the EU and could be questioned if they are *real* principles of this institution, especially, if we consider that the text of article 2 has a much more "human" approach than an "institutional" one.

⁴⁸ *Supra* 24 at p. 319.

⁴⁹ As stated in article 4/2 TEU: "The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State".

⁵⁰ *Supra* 24 at p. 327. In the same sense, at page 328 the author states that "there might be cases in which even the primacy and effectiveness of EU law would have to yield to more protective constitutional rights protection. [...] It should be for the CJEU to balance the different rights and interests at stake on a case-by-case basis. [...] Instead of an automatic application of primacy and effectiveness, then, the CJEU should take into consideration the possibility of accommodating more protective fundamental rights".

⁵¹ LAZOWSKI, Adam; WESSEL, Ramses A. When caveats turn into locks: Opinion 2/13 on accession of the European Union to the ECHR. *German Law Journal*. Vol. 16, n. 1, 2015. Available at http://static1.squarespace.com/static/56330ad3e4b0733dcc0c8495/t/56c84feff055e95324090f83/1455968241242/PDF_Vol_16_No_01_Special_179-212_Lazowski.pdf, Last visited on 3rd June 2016, p. 209.

constitutional traditions, which also *must be respected* not only by other member states *but also by the EU*. The respect for constitutional traditions is a two-way road in which the plurality of values is something that should be taken into account⁵². Such respect appears as possible only from the moment in which the Courts start the dialogue amongst themselves, in a way that they get to know each one's peculiarities while aiming to achieve together the higher possible level of protection of citizens' fundamental and human rights.

Conclusion

Fundamental and human rights, once established as the main way of achieving human dignity, present themselves as the basic elements of any state based on a democratic rule of law. This means that the presence of such rights is required not only on paper, but also, in the daily life of the citizens. The implementation and the effectiveness of such rights, however, are not tasks which are developed by the sole, traditional "nation-state": this is a responsibility shared with citizens themselves, when dealing with each other, and more than that, with institutions acting in the global arena, especially, those created by states themselves in order to act in the defense of their interests – such as the European Union.

The Charter of Fundamental Rights of the European Union (CFREU) has a symbolic strength since the EU positions itself as a beacon for human rights in the world. This is strengthened by the fact that the CFREU is as binding as any other Treaty of the European Union. But albeit this situation, the CJUE thought that the EU must not participate in the ECHR — so here there's a contradiction, because from one point of view the EU/CJUE regards human rights as important "things", since the CFREU has a binding strength; from another point of view, the EU/CJUE cannot submit itself to the ECHR, weakening the protection of citizen's human rights.

However, the very existence of three levels of protection of fundamental and human rights in the European geographic space – national, supranational (European) and international (ECHR) – does not necessarily lead to a higher level of protection of such rights, as we would expect. Although, it is possible to say that there are some similarities in the protection granted by these three legal orders, their level of protection is somewhat different from each other, so

⁵² *Supra* 35 at p. 20.

that there are gaps which eventually could cause the citizen not having the protection of his/her rights by a Court – and this, by itself, would already be an infringement of his/her fundamental and human rights.

One of the possible solutions presented by scholars to solve this problem is the *judicial dialogue*, that is, by the constant exchange of information and practices between Courts from different legal orders so, that one could get in touch with the way of thinking of another one, thus enriching the legal doctrine and jurisprudence by the exchange of ideas, principles and values that could guarantee the maximum justice to the citizen.

Such dialogue, however, seems not to exist in reality. The absence of such kind of dialogue is shown in the *Melloni* case, as the Spanish Constitutional Court, using the mechanism of preliminary ruling as stated in Article 267 of the Treaty on the Functioning of the European Union, sent to the Court of Justice of the European Union three possible interpretations of article 53 of the Charter of Fundamental Rights of the European Union in order to solve the situation of Mr. Melloni and none of these interpretations were even considered by the Court of Justice. Instead of entering the judicial dialogue, this Court opted for a final and irrevocable decision concerning the interpretation of article 53 and decided to impose its way of thinking on the Spanish Constitutional Court, based on the primacy, unity and effectiveness of European Union law.

Thus, although there are many advantages in the multilevel system of protection of fundamental and human rights, the risks of such kind of protection are also relevant and should be considered. Such risks must be diminished so, that fundamental and human rights could be effectively protected and, in consequence, citizenship and democracy both could thrive, as well as human dignity, achieving, at the end of the process, the so-expected social justice from the perspective of the citizen.