A FEW WORDS ON DRITTWIRKUNG, TRANSPARENCY AND PERSONAL INTEGRITY IN THE LIGHT OF DIGITALIZATION

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This article analyses the three topics listed in the headline in that order, and it subsequently identifies and discusses a common thread between them. The fact that they have all been affected by the enactment of the EU Charter of Fundamental Rights (CFR), of which they belong to the core area, is very crucial here, and so is the interplay or interaction between the European Courts and leading national courts, not least in the constitutional area. Cases such as Melloni, from 2013, have shown the problems that may occur should the Court of Justice of the EU (CJEU) not respect fundamental rights and national constitutional values. If the CJEU wants to maintain its key role in the future structure of EU law, it needs to show that it cares about fundamental rights and that it wants to work together, not against the European Court of Human Rights (ECtHR) and national courts. The three concepts discussed in this article, all strengthened by the Charter, have so far been most helpful in this process – and may become even more important in the future.

1 INTRODUCTION

The issues mentioned in the title of this article are not among any of my legal specialities and are not the ones that I deal with on a regular basis when working in the field of constitutional law broadly, be it Swedish law or EU law. I have dealt with them before, however,[1] and will now take the opportunity to deal with them once again, in a somewhat updated context. And let's be clear: their practical importance is probably greater than ever.

In this short article, I will first go through the three different concepts and show their significance, based on the fact that they have all been affected by the enactment of the EU Charter of Fundamental Rights (CFR), of which they belong to the core area. Even if these are not new, modernised or updated rights, the practical impact of the Charter has been particularly strong here. After that, I will try to explain how they may, and actually do, interact in contemporary EU law.

2 DRITTWIRKUNG

Drittwirkung is a term that has long been used in EU and, of course, German constitutional doctrinal work. It basically means that fundamental rights may be claimed by individuals, not just against the state or the public powers in general, but also against

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[1] See e.g. the report on the 20-year anniversary of the EU Charter of Fundamental Rights – Joakim Nergelius, 'EU:s rättighetsstadga 20 år: Vad har den åstadkommit?' (2020) December 2020:14epa Sieps, Epa (European Policy analysis) <https://www.sieps.se/globalassets/publikationer/2020/2020_14epa.pdf?> accessed 01 June 2024.

private subjects, be they natural or legal persons. The fact that such a possibility does exist is generally recognized in German and EU law doctrine, at least for some rights, though their scope and extent in that context is still very much discussed.

Jurisprudence from the European Court of Human Rights (ECtHR) does not really show the extent to which the European Convention on Human Rights (ECHR) does contain a form of 'Drittwirkungseffekt'.[2] In the case *Verein gegen Tierfabriken v Switzerland* from 2002, where the court stressed the need for an *ad hoc* approach rather than a 'general theory concerning the extent to which the Convention guarantees should be extended to relations between private individuals'. Switzerland was seen as violating freedom of speech (Art. 10 ECHR) by not assuring that information from an animal rights organisation could be distributed through the TV networks. Furthermore, the obligation of all states to respect the private lives of all individuals is shown, e.g. by the well-known case brought by princess Caroline of Monaco.[3]

From a Swedish point of view, the *Evaldsson* judgment[4] is of particular interest. Evaldsson and four other construction workers had chosen not to join the union (Byggnadsarbetareförbundet), which had a collective agreement (kollektivavtal) with their employer, forcing or obliging them to pay 'control fees' (granskningsavgifter) amounting to 1,5 % of their salaries to the union, of which they were not members. The purpose of the fees was to enable the union to check working conditions and salaries. The Swedish Labour Court (Arbetsdomstolen, AD) decided in 2001 that the negative freedom of association could not be invoked in order to avoid the fees, since it only applied in Sweden to the extent that it had been acknowledged by the ECtHR (which was and still is fairly unclear, as explained above).[5] The case was brought to the ECtHR, which concluded that there was an insufficient transparency concerning the union's handling of the fees, which seemed to be financing a larger part of the union's activities than they were intended for. Therefore, the complainants were:

> entitled to information which was sufficiently exhaustive for them to verify that the fees corresponded to the actual cost of the inspection work and that the amounts paid were also not used for other purposes. This was even more important as they had to pay the fees against their will to an organisation with a political agenda which they did not support.[6]

Well, you could say, be that as it may, how could Sweden as a state be held responsible for this error? Because the court claimed:

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[2] *Verein gegen Tierfabriken Schweiz (VgT) v Switzerland* App no 24699/94 (ECtHR, 28 June 2002) para 46. See also *Verein gegen Tierfabriken Schweiz (VgT) v Switzerland* (No 2) App no 32772/02 (ECtHR, Judgment of the Grand Chamber, 30 June 2009). An end to the case was finally reached at 22 December 2020; see *Schweizerische Radio- und Fernsehgesellschaft and Publisuisse SA v Switzerland* App no 41723/14 (ECtHR, 22 December 2020).

[3] *Caroline von Hannover v Germany* App no 59320/00 (ECtHR, 24 June 2004). We may also note the case *E.S. (Söderman) v Sweden* App no 5786/08 (ECtHR, 12 November 2013), where Sweden was held to violate privacy, Art. 8 ECHR, by not having legislated against hidden cameras or filming.

[4] *Evaldsson and others v Sweden* App no 75252/01 (ECtHR, 13 February 2007).

[5] AD 2001:20. However, the case *Sigurdur A Sigurjonsson v Iceland* App no 16130/90 (ECtHR, 30 June 1993) strongly supports the existence of negative freedom of association.

[6] *Evaldsson and others v Sweden* (n 4) para 62.

> […] while the respondent State has to be given a wide margin of appreciation in the organisation of its labour market, a system which, as in the present case, in reality delegates the power to legislate, or regulate, important labour issues to independent organisations acting on that market requires that these organisations are held accountable for their activities. This requirement was particularly significant in the present case, where the relevant labour market organisations had concluded a collective agreement whose effects also extended to unorganised workers, obliging them to contribute financially to a particular activity carried out by a trade union. In these circumstances, the Court finds that the State had a positive obligation to protect the applicants' interests.[7]

The fact that the parties of the labour market were considered to represent the Swedish state was astonishing, to say the least, but of course it also shows that Drittwirkung is a legal reality. One also gets the impression that the court preferred to find a violation of the right to property[8] rather than analysing the limits of negative freedom of association in this specific context.

In German constitutional law, the concept of Drittwirkung is well-known since at least the 1960's are connected with important, early cases from *Bundesverfassungsgericht* and the German constitutional court, such as Lüth and Mephisto.[9] The doctrine on the topic is in fact quite rich.[10] And within EU law, we see clear signs of Drittwirkung for instance in the recent CSDD-directive on Corporate Sustainability.[11] Thus, though the exact extent of Drittwirkung may be unclear, it is clearly a legal reality in today's EU law, as well as at the national level in many EU Member States.

3 TRANSPARENCY

Today, transparency clearly features as an important element of EU law and is, for instance, mentioned and described quite precisely in Article 41(2) of the Charter of Fundamental Rights, where it is said to contain a right to access to documents for persons concerned, as well as an obligation for EU institutions to justify their decisions. However, this is a fairly recent development, clearly affected by Finland and Sweden joining the EU in 1995 and then together with Denmark and Netherlands forming a coalition of transparency-oriented Member States at the same time that political tendencies throughout Europe favoured openness and transparency within public administrations. Also, some important case-law, not least from the Tribunal of First Instance, contributed to this development.[12]

Personally, I view this as the area where Swedish and Nordic law has had the clearest influence on EU law.[13] The importance and extent of transparency in Swedish law is shown by Vilhelm Persson's contribution to this volume, so I do not need to dwell on that.

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[7] *Evaldsson and others v Sweden* (n 4) para 63.
[8] Article 1 in the first additional protocol to ECHR.
[9] BVerfGE 7, 198 and 30, 173.
[10] See Bodo Pieroth and Bernhard Schlink, *Grundrechte – Staatsrecht II* (27th edn, Heidelberg 2011).
[11] Commission, 'Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937' COM(2022) 71 final.
[12] See in particular Case T-174/95 *Svenska Journalistförbundet v Council* EU:T:1998:127, and Case T-14/98, *Hautala v Council* EU:T:1999:157.
[13] See also Xavier Groussot, *General Principles of Community Law* (Europa Law Publishing 2006) 29 ff.

Through the case-law of the 1990s, via an agreement on transparency in the EU institutions in 2001 and Article 41(2) of the Charter, with equal status of the Treaties according to Article 6(3) of the Treaty of the European Union (TEU), transparency today has a totally different position within EU law than 30 years ago. The content of the *Melloni* case is indeed very hard to reconcile, with the prohibition for the Spanish Constitutional Court to apply Article 24 of the Spanish Constitution, which was established in that case. This contradiction becomes even clearer when reading para 48 of *Åkerberg Fransson*, where the CJEU with a clear message to the Swedish Supreme Court, which had previously made some severe mistakes in its handling of *ne bis in idem* matters,[14] stated that

> European Union law precludes a judicial practice which makes the obligation for a national court to disapply any provision contrary to a fundamental right guaranteed by the Charter conditional upon that infringement being clear from the text of the Charter or the case-law relating to it, since it withholds from the national court the power to assess fully, with, as the case may be, the cooperation of the Court of Justice, whether that provision is compatible with the Charter.[15]

Thus, in other words, and to keep it short, national courts simply must have the power to assess whether certain legal provisions are compatible with CFR. I will return to this issue towards the end of the article.

4 PERSONAL INTEGRITY AND DIGITALIZATION

If we focus on the so-called Data Retention Directive[16] in relation to personal integrity, we may note that, from the CJEU, cases such as *Digital Rights Ireland* in 2014 have clarified that the directive may violate the protection of personal integrity in Articles 7-8 of the CFR,[17] since it had not determined the grounds for access to the data pertaining to national authorities and its storage. Also, the case *Tele2* from 2016 should be mentioned.[18] Thus, the integrity of EU-citizens has clearly been strengthened since the Charter entered into force.

The same goes for the *Schrems* case ('Facebook'), where the CJEU reviewed and annulled a previous decision from the Commission, stating that USA had a sufficient protection for personal data for information to be sent there.[19] And in *Google Spain,* from 2014, where Google was ordered to remove information on a bankruptcy that was nine years old, Articles 7-8 in the were allowed clear horizontal effect ('Drittwirkung').[20] Thus, a connection between Drittwirkung and personal integrity is now acknowledged within EU law.

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[14] See the cases NJA 2010 p. 168 and 2011 p. 444.
[15] Case C-617/10 *Åkerberg Fransson* EU:C:2013:105 para 48.
[16] 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 L105/54.
[17] Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland* EU:C:2014:238.
[18] Joined Cases C-203/15 and C-698/15 *Tele 2* EU:C:2016:970.
[19] Case C-362/14 *Schrems* EU:C:2015:650.
[20] Case C-131/12 *Google Spain* EU:C:2014:217.

5 A SYNTHESIS WITH A WIDER VIEW

A common feature for the three issues discussed here is that they have all been affected by the enactment of the EU Charter of Fundamental Rights. In fact, they belong to the core area of, if not new, modernized or updated rights, where the impact of the Charter has been particularly strong.

However, this does not mean that the Charter, and the increased use of it by the CJEU, does not bring with it certain problems. Quite the contrary. It is therefore vital to discuss the relationship in the future case-law of the CJEU between the application(s) of the ECHR and the EU Charter, as well as future relations between the two courts. For instance, like many other 'insiders' of EU law, even a very learned scholar such as Allan Rosas believes that 'the risk of conflict between Strasbourg and Luxembourg case law has become negligible', without really managing to show how this can be true when the CJEU may make full use of the Charter that is not yet at the disposal of its Strasbourg counterpart.[21] It is also necessary to consider the difficulties connected with the accession of the EU to the Convention.

As a general background, it may be noted that according to Article 52(3) of the CFR, the rights therein that are also to be found in the ECHR shall have the same extent and meaning or significance as they have there. Nevertheless, there is in my view a clear risk that a different application and interpretation of these rights may now emerge between Luxembourg and Strasbourg, since the CFR, and hence the 'EU-specific catalogue of fundamental rights', will be exclusively elaborated by the CJEU (as well as by national courts when national bodies will 'apply' – i.e. implement or interpret themselves, independently so to speak – EU law at the national level, according to Article 51 CFR). Thus, the risk for a gradual divergence in the jurisprudence of the two EU courts, where the CJEU will interpret the rights in the CFR in another way than the ECtHR applies the rights that occur in both the CFR and the ECHR must not be underestimated. The CJEU may apply and interpret both texts, while the ECtHR is restricted to applying the ECHR. And the national courts are likely to be affected or inspired by and follow the interpretations of the CFR made by the CJEU, given the key position of the CJEU within the EU legal system.

An important argument in favour of the enactment in 2000 of the CFR, at the same time, was that it might provide EU citizens with a new and strong protection *against the EU institutions*, with their extensive competencies. Once the CFR became legally binding in 2009,[22] these institutions now have to act within a given legal framework, provided by the Union itself. Further, it is also necessary to take into account that the CFR contains certain important rights and principles that the ECHR lacks, such as the ones discussed above and the freedom to conduct a business (Art. 16).[23] Thus, through the CFR, the human rights protection within EU law is now materially more extensive than before December 2009, when the CFR entered into force. That is perhaps one of the reasons why the issue of EU accession to the ECHR does not seem to be high on the EU legal or political agenda,

[21] Allan Rosas and Lorna Amati, *EU Constitutional Law – An Introduction* (3rd edn, Hart Publishing 2018) 152.
[22] See Art. 6 TEU.
[23] For a closer study, see Steve Peers, Tamara Hervey, Jeff Kenner, and Angela Ward (eds), *The EU Charter of Fundamental Rights: A Commentary* (Bloomsbury Publishing 2014) 437 ff.

although the additional protocol no 14 of the ECHR does now make such an accession formally possible.

This possible accession was for a long time another main line in the discussion on the human rights protection within EU law. The ECJ declared in an Opinion from 1996 that such an accession required a treaty change (Opinion 2/94).[24] That same position was then as we know maintained, rather surprisingly, in the Opinion 2/12 from 2014, though Article 6 TEU does now urge the EU to accede to the ECHR.[25]

The current, unregulated relation between the CJEU and the ECtHR may create uncertainties for individual EU citizens as well as Member States. While the EU has not acceded to the ECHR, the CJEU is not formally bound by judgments from the ECtHR. This risk increased when the CFR became legally binding in December 2009, given the fact that the CJEU may easily deviate from interpretations made by the ECtHR concerning the same right(s) in the ECHR.

There are well-known examples of diverging opinions between the CJEU and the ECtHR, such as the so-called *Irish Abortion* case in the 1990s. There, an Irish court prohibited information regarding the possibilities for abortion in the UK. When the case came before the ECJ as a preliminary ruling according to Art. 267 TFEU, the court decided to see it as regarding free movement of services rather than freedom of speech or information, thus finding that Ireland had not broken EU law.[26] When the ECtHR dealt with the case a year later – in the days when that court would still treat cases relatively fast – it found that Ireland had violated both freedom of speech and freedom of information (Art. 10 ECHR), since the prohibition was not necessary in a democratic society.[27] The ECJ, however, maintains the view that the issue of human rights violations within EU law may not be reviewed when the national rule(s) in question will seem to lie outside the material scope of EU law.[28] This is true also for the CFR, which is subsidiary to other forms of EU law and may, according to Article 51(1) thereof, only come into force when some other kind of EU law – be it competition law or environmental law – is being applied.

6 JUDICIAL DIALOGUE IN THE FIELD OF EUROPEAN HUMAN RIGHTS LAW? THE GOOD EXAMPLES

It is of course very natural that an important and rather unexpected outcome like the one in Opinion 2/13 will have a huge aftermath and be very much discussed in legal and political circles throughout Europe. The question may even be raised whether an EU accession to the ECHR, with all the reservations and obstacles now identified by the ECJ, would be beneficial for and really strengthen the human rights protection in Europe of today, which is in fact far from certain. Here, I will, however, focus on what the Opinion might mean for the relationship between the CJEU and other European Courts, not only

[24] Opinion 2/94 *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms* EU:C:1996:140.
[25] Opinion 2/13 *Accession of the European Union to the ECHR* EU:C:2014:524.
[26] Case C-159/90 *Society for the Protection of Unborn Children Ireland v Grogan and Others* EU:C:1991:378.
[27] *Open Door and Dublin Well Woman v Ireland* Apps no 14234/88 and 14235/88 (ECtHR, 29 October 1992).
[28] See also e.g. Case C-260/89 *ERT* EU:C:1991:254.

the ECtHR but also constitutional and/or supreme courts in the Member States (the so-called Bermuda Triangle of high European courts).

First, we may ask if such a thing as a legal dialogue between the highest courts in Europe does actually exist. Here, opinions seem to range from very optimistic to rather cynical ones. For example, Koen Lenaerts has talked about some 'sunshine stories' in this respect,[29] pointing to a case before the ECJ brought from Belgium[30] and decisions from the Austrian Constitutional Court (Verfassungsgerichtshof).[31] He stresses that the very existence of the preliminary ruling procedure in Article 267 TFEU is intended to create a climate of dialogue, which he believes will thrive in an era characterized by what is often called *constitutional pluralism*. Although his article was obviously written before Opinion 2/13 was published, he also pointed to some potential problems, such as the negative attitude towards the supremacy of EU law shown by the Czech Constitutional Court in 2012.[32]

There are undoubtedly some tendencies in the jurisprudence[33] and also a number of rules in the EU Treaties, the CFR and the ECHR that may very well foster such a dialogue. Here we may point to the obligation of the EU to respect the national identities of the Member States, 'inherent in their fundamental structures, political and constitutional' in Article 4(2) TEU, as well as the principle of loyalty according to Article 4(3), the fact that the fundamental rights form a part of the general principles of EU law according to Article 6(3) and not least the attempts to sideline the Charter with the ECHR and human rights in the constitutions of the Member States in Article 52 (3-4) CFR (whereas Article 53 CFR seems to be helplessly undermined by the *Melloni* judgment, as discussed below). Also Article 53 ECHR may be mentioned here, as well as the many articles in the ECHR (e.g. Articles 1, 13, 35) indicating that national courts must be involved in the application of the convention, in the spirit of subsidiarity, that is probably more important than ever given the very heavy workload of the ECtHR.[34] We may of course also find examples of cases from the ECJ that seem to be cooperative, so to speak, towards national courts. For instance, *Åkerberg Fransson* may be said to have such an effect, extending the range of the CFR (or perhaps rather stressing its already very wide range) while at the same time leaving the decision-making in individual cases to national courts, who know best the specific circumstances in each case.[35]

Another such case is *Kamberaj* from 2012,[36] where the ECJ found – albeit perhaps somewhat controversially – that Article 6(3) TEU does not in itself oblige national courts to set aside national rules that are contrary to the ECHR, since Article 6(3) does not regulate the relationship between the ECHR and national law. This may certainly be

[29] See Koen Lenaerts, 'Kooperation und Spannung im Verhälnis von EuGH und nationalen Verfassungsgerichten' (2015) 50(1) Europarecht 3.
[30] Case C-73/08 *Bressol* EU:C:2010:181.
[31] ÖVerfGH 28 November 2012, G-47/12-11 u.a.
[32] Pl. Ús 5/12 'Slovak Pensions', 31 January 2012, which is available in English at <http://www.usoud.cz/> accessed 01 June 2024. In this judgment, the Czech court declared the judgment in the Case C-399/09 *Landtova* EU:C:2011:415 to be *ultra vires*.
[33] See here in the doctrine Markus Ludwigs, 'Kooperativer Grundrechtsschutz zwischen EuGH, BVerfG und EGMR' (2014) 41(9-12) Europäische Grundrechte Zeitschrift 273, 278, invoking the case Michaud v France App no 12323/11 (ECtHR, 06 December 2012).
[34] See here also the new Additional Protocol No. 15 to the ECHR, that has yet not entered into force.
[35] *Åkerberg Fransson* (n 15).
[36] Case C-571/10 *Kamberaj* EU:C:2012:233.

interpreted in different ways, but it may after all make life a little bit easier for national judges, who are of course anyway obliged to set aside national rules that violate the ECHR due to the convention itself and to established rules and custom of international law.

7 AND THE BAD ONES

Melloni points in a totally different direction that makes judicial dialogue in Europe more or less impossible.[37]

In this case, Melloni had been sentenced in Italy to ten years of prison for fraud related to a bankruptcy. This was established in a trial in which he had not himself been present. The sentence was finally laid down in 2004 and the Italian authorities then wanted him extradited from Spain where he resided, invoking the European Arrest Warrant (EAW). In fact, Melloni had by then been in Spain for a long time, and Italian authorities had already wanted him extradited before in 1993. In 1996, Spain accepted this request, but Melloni disappeared and was not caught until 2008. After he had been arrested, a lower court, Audiencia Nacional, decided that he should be extradited, but Melloni then appealed to the Spanish Constitutional Court, Tribunal Constitucional, arguing that Article 24(2) of the Spanish Constitution strongly protects the right to a fair trial, which includes the right not to be sentenced to prison – at least not for long – in your absence. After fairly long proceedings, the Constitutional Court decided in June 2011 to ask three crucial questions to the ECJ.

Those three questions all concerned the relationship between three central rules in EU law, namely the EAW (secondary law), the Charter of Fundamental Rights (primary law) and the Spanish Constitution, though they were phrased in different terms. One of the reasons for the somewhat – in my view – odd outcome of the case, and one of the main difficulties for the ECJ, seems to have been the interpretation of the EAW, which in its original 2002 version prescribed that all Member States are to execute extraditions from other Member States according to the well-known principle of mutual recognition. At the same time, however, Article 5 of the text contained certain guarantees, clarifying that if someone was requested for extradition having been sentenced in his absence, there should be a possibility to have the sentence and judgment reviewed. Still, in the new framework decision of 2009, which should have been implemented in the Member States by March 2011 or at the very latest 1 January 2014, it is stated that these guarantees do not apply when the person requested for extradition had been represented by a lawyer and when he had known about the procedure against him and the fact that he might be sentenced in his absence.

Despite the fact that there may be reasons for these harsh rules – such as the interest in making the EAW work smoothly and, as far as Italy is concerned, the combatting of organized crime – the situation here was complicated, even more so since the ECJ actually

[37] Like many other European judges who have commented on the issue, Lenaerts, a most distinguished scholar if there is one, seems surprisingly unwilling to accept this. See Lenaerts, 'Kooperation und Spannung im Verhälnis von EuGH und nationalen Verfassungsgerichten' (n 29) 21 ff. Besselink ('The Parameters of Constitutional Conflict after Melloni' (2014) 39(4) European Law Review 531, 551), on the other hand, goes so far as to state that *Melloni* shows that ECJ finds it easier to get involved in a conflict with an 'embattled' constitutional court such as the Spanish than with a powerful one like the German, which in his view shows that the whole idea of a judicial dialogue is somewhat futile.

neglected to inform the readers of its judgment on the knowledge of such facts that Mr. Melloni might have had during the lengthy procedures. Furthermore, the possibilities for extradition were increased in 2009, as explained above, while the Spanish Constitutional Court ought to base its judgment on the situation in 2008.[38]

Anyway, against this background the Spanish Constitutional Court asked three questions to ECJ, which were formulated in the following way:

> 1. Must Article 4a(1) of Framework Decision 2002/584/JHA, as inserted by Council Framework Decision 2009/299/JHA, be interpreted as precluding national judicial authorities, in the circumstances specified in that provision, from making the execution of a European arrest warrant conditional upon the conviction in question being open to review, in order to guarantee the rights of defence of the person requested under the warrant?
> 2. In the event of the first question being answered in the affirmative, is Article 4a(1) of Framework Decision 2002/584/JHA compatible with the requirements deriving from the right to an effective judicial remedy and to a fair trial, provided for in Article 47 of the Charter…, and from the rights of defence guaranteed under Article 48(2) of the Charter?
> 3. In the event of the second question being answered in the affirmative, does Article 53 of the Charter, interpreted schematically in conjunction with the rights recognised under Articles 47 and 48 of the Charter, allow 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?[39]

8 CONSTITUTIONAL ANALYSIS OF *MELLONI*

Thus, though all three questions raise very important issues concerning the status of the EAW, the third and last question is in a sense wider, since it adds the huge constitutional issue, of general interest for the EU as whole, of the relationship between the EAW (secondary EU law), the Charter (primary EU law) and a national constitution.

Having this very interesting background in mind, the judgment is regrettably short. The ECJ applied the EAW in its new version; the fact that this in reality made the penalty or at least the application of the relevant penal rules harder was seen as mere procedural issue and thus obviously unproblematic, which is somewhat surprising.

Concerning the first question, the ECJ referred to the principle of mutual recognition and stated that extradition must take place in a case such as this, at least when the convicted person was aware of the trial against him and had the possibility to be represented by a lawyer (or was aware of the fact that a judgment against him may be given in his absence). Once again, it is not quite clear from the judgment what Melloni really

[38] Cf Article 7 ECHR and Article 49(1) CFR.
[39] Case C-399/11 *Melloni* EU:C:2013:107 para 26.

knew, though the judgment is obviously based on the pre-supposition that he was fully aware of all these facts.

In relation to question 2, then, the ECJ argued, invoking its own previous jurisprudence as well as case-law from the Strasbourg court, that the right to be present at a trial may be limited, thus arriving, in a not very convincing or persuasive line of reasoning, at the conclusion that the EAW (in particular Article 4a(1)) does not violate Articles 47-48 CFR. This argumentation is not convincing and may definitely be criticized, but the answer to the third question is nevertheless the most crucial part of the judgment, in my view.

As we know, Article 53 of the Charter states that none of its rules may limit or infringe upon the fundamental rights that are acknowledged by EU law, international law, international conventions to which the Member States are parties or the Constitutions of the Member States. The possibility for national courts to maintain a higher standard for single persons or cases in this respect than the one provided by the EAW (as interpreted by the ECJ) was, however, simply dismissed by the ECJ since that would 'undermine the principle of the primacy of EU law inasmuch as it would allow a Member State to disapply the legal rules which are fully in compliance with the Charter where they infringe the fundamental rights guaranteed by that State's constitution'.[40] But isn't that exactly what national courts ought to do, taking Article 53 of the Charter seriously?

This particular line of reasoning of the ECJ is not new. On the contrary, it is well-known from cases such as *Costa v Enel*[41] and *Simmenthal*.[42] It basically means that any kind of EU law, primary as well as secondary, is superior to any kind of national law of the Member States, including the national constitution. This latter part of this constitutional jurisprudence is not accepted by very many Member States or their highest courts, as is also well-known.

However, in this case the ECJ first, before maintaining its jurisprudence on this last point, on dubious grounds managed to find that the secondary EU law in question was compatible with the applicable primary EU law, which in itself states that it is inferior in relation to any more far-reaching protection of human rights that may be found in a national constitution. Thus, the ECJ has managed a double operation, both steps of which are most doubtful, in order to 'save the life' of the EAW, which has obviously been seen as very crucial. But while saving this patient, hasn't the 'life' or, at least, the legal status of the arguably considerably more important Charter been sacrificed instead, given that its Article 53 has so evidently been applied and interpreted *a contrario,* thus in reality losing its significance? At least, that is what follows from a close reading of the judgment.

Furthermore, unfortunate though it may be, it is clear that Opinion 2/13 reinforces the Melloni doctrine rather than loosening it. It is also worth noticing here that the 'Melloni-inspired' objections to accession based on mutual trust and the scope *ratione materiae* of EU law represent the only critical point in the Opinion which the AG didn't comment or analyse. In a way, then, this real or perceived problematic aspect of accession may be said to have been invented by the Court itself.

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[40] Melloni (n 35) para 58.
[41] Case C-6/64 *Costa v E.N.E.L.* EU:C:1964:66.
[42] Case C-106/77 *Amministrazione delle finanze dello Stato v Simmenthal* EU:C:1978:49.

When analysing the legally crucial parts of Opinion 2/13, it seems clear that the risk or possibility that the ECtHR might, after accession, have the right to examine aspects of the relationship between EU law and national law was one of the main problems for the ECJ. In particular, this sometimes perhaps understandable worry seems to have mattered in areas that are supposed to be characterized by a so-called mutual trust between the EU Member States. Here, it may even be said that the ECJ wished to impose an interpretation of the ECHR (including its Article 53) that is inspired by *Melloni* on the other main judicial actors in Europe, including the ECtHR. And that is not a sound basis for a dialogue.

Now, arguments in favour of the Melloni doctrine do of course exist.[43] In the doctrine, it has been argued that the Melloni doctrine and the idea of mutual trust is necessary within the areas of harmonized EU law, in order to protect the achievements of the Single Market, It may perhaps also be argued that the higher standard of human rights protection at national level that Article 53 stipulates shall only apply if this protection enjoys support from all or at least a majority of the Member States' constitutions, though that is far from clear.[44]

Nevertheless, even if those arguments are accepted to some extent, it is still quite surprising to find the Melloni argumentation at the very core of the Court's rejection of the accession to ECHR. Even if it should be accepted that the ECJ wishes to limit human rights protection *within* EU law in this manner due to certain other important key values of EU law,[45] it is still not easy to understand that those same values – i.e. mutual trust between Member States within the scope of EU law rationae materiae – should matter quite as much in relation to a future EU accession to the ECHR. Here, as said before, it seems like the ECJ wishes to impose its controversial jurisprudence on the ECtHR, in a situation where the ECJ fears a future supervision from the latter. To some extent, this is what permeates Opinion 2/13, and this attitude of the ECJ does not promote any future judicial dialogue between the highest courts in Europe. This reluctance to accept the final word of the ECtHR in future human rights issues that follows from this line of reasoning will hardly make national supreme or constitutional courts more willing to accept precedence for the CJEU in future conflicts between EU law and national constitutional law.

9 CONCLUSION

Thus, national courts must have the power to assess whether certain legal provisions are compatible with the CFR. In order to make such assessments, cooperation with the CJEU is sometimes necessary. But that cooperation, and the very basis of it, is, needless to say, undermined when the CJEU does not take the provisions of the Charter seriously.

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[43] For a kind of defense of Opinion 2/13 and its consequences, see Daniel Halberstam, "'It's the Autonomy, Stupid!". A modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the way forward' (2015) Michigan Law, University of Michigan, Public Law and Legal Theory Research Paper Series No 432 <http://ssrn.com/abstract=2567591> accessed 01 June 2024. Halberstam is however also critical towards many aspects of the opinion.

[44] This matter has never really been clarified, neither in the doctrine, nor in the jurisprudence of the CJEU or in any declarations, explanations, interpretations or other kinds of *travaux préparatoires* for the CFR. All that can be said for certain is that a human rights-friendly interpretation of Art. 53 should not impose too strict requirements in this respect.

[45] Cf Aida Torres Pérez, '*Melloni* in three Acts: From Dialogue to Monologue' (2014) 10(2) European Constitutional Law Review 308.

Therefore, the two simultaneous judgments of *Melloni* and *Åkerberg Fransson* have totally different implications. They point in different directions as far as the status of the Charter is concerned, *Åkerberg Fransson* increasing its status and impact in national law but *Melloni* in reality undermining it by protecting secondary EU law at any cost. Thus, reading and analysing *Melloni,* but also comparing it with *Åkerberg Fransson*, the shortcomings of the former, unfortunate judgment are indeed very clear.[46] Even the ECJ now seems to realize this, as may be seen, for example, in its judgment in the so-called *LM* case from 2018,[47] where a EAW was interpreted in a much more restrictive way in relation to Polish courts. That may of course be due to recent developments as an effect of the so-called rule of law crisis, but that's another story, that will not be dealt with here.[48]

In other words, and to summarise: If the CJEU wants to maintain its key role in the future structure of EU law,[49] it needs to show that it cares about fundamental rights and that it wants to work together, not against the ECtHR and national courts. The concepts discussed initially here, i.e. Drittwirkung, transparency and personal integrity, all strengthened by the Charter, have so far been most helpful in this process – and may be even more important in the future.

[46] It is however encouraging to note that the ECJ showed a far more human rights-friendly approach in its subsequent judgments on the Data Retention Directive (*Digital Rights Ireland* (n 17), as discussed above.
[47] C-216/18 PPU *Minister for Justice and Equality (Deficiencies in the system of justice)* EU:C:2018:586.
[48] For further reading, see e.g. Joakim Nergelius, 'Why Rule of Law Can Never be Part of an "Illiberal" Democracy' in Antonina Bakardjieva Engelbrekt, Andreas Moberg, and Joakim Nergelius (eds), *Rule of Law in the EU – 30 Years After the Fall of the Berlin Wall* (Hart Publishing 2021). See also Koen Lenaerts, 'On Values and Structures: The Rule of Law and the Court of Justice of the European Union' in Anna Södersten and Edwin Hercock (eds), *The Rule of Law in the EU: Crisis and Solutions* (Sieps 2023).
[49] On such 'structural issues' see also Kaarlo Tuori, *European Constitutionalism* (Cambridge University Press 2015) 45 ff.

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