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Actual trends and challenges of the constitutional fundamental rights and principles in the ECJ case law from the perspective of multilevel constitutionalism.[1]

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Abstract: Our aim is to study the actual trends and challenges of the National Interest in the ECJ case law, with a particular focus on fundamental (constitutional) rights and principles from the perspective of multilevel constitutionalism.

Taking and note that in Europe we live in a context of relations between legal systems of different levels, we may start from the multi-level constitutionalism theoretical approach, especially after the entry into force of the Lisbon Treaty, that opened a new constitutional horizon in the European Union integration process. Because the different levels or legal systems are becoming progressively more interconnected and therefore we need to explain the relation and identify the correct criteria to integrate them from the perspective of fundamental rights protection.

We will focus on the principal ECJ last cases regarding the relation between EU law and national law as *Åkerberg Fransson* (2013), and *Melloni* (2013).

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1.- Motivation; 2.- EU law authority, constitutional limits and Fundamental Rights Protection. 2.1.- Constitutional limits: (Constitutional) Fundamental Rights and constitutional principles protection in National law as part of National Interest. 2.2.- The reinforcement of EU law authority in the protection of Fundamental Rights and judicial dialogue. 3.- Conclusions? Actual trends from the perspective of multi-level constitutionalism approach. 4.- Bibliography.

1.-Motivation

It is usual -from the Law perspective[2]- to describe the relationship between European Union (EU) law and national ones in terms of multi-level legal system, i.e. *constitutional pluralism* (MaccorMicck, 1999; Walker, 2002; Poiares Maduro, 2003; Torres Pérez, 2009; Jaklic, 2014)[3] or *multilevel constitutionalism* (Pernice, 1999 and 2002; Balaguer, 2008; Freixes San Juan, 2011, Gómez Sánchez, 2014)[4].

In both cases, we speak about theoretical constructions which try to explain the EU multilevel fundamental rights protection architecture[5], and therefore the relationship and interaction of different legal systems or levels, particularly EU and national ones, which are becoming progressively more interconnected, because we need to approach to this complex "legal reality" (Gómez Sánchez, 2014: 55) with the logic of relationships and integration (Bilancia, 2012: 84). Specially after the entry into force of Lisbon Treaty in 2009 when we can speak about a new constitutional horizon (*horizonte constitucional*) in the relations between EU law and national law (Sarrión Esteve, 2011a), or rather a type of new constitutional paradigm thanks to the Charter of Fundamental Rights of the European Union (CFREU).

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[2] There are other aproaches from Polticial Science, Economics, or Sociology. Regarding the interdisciplinary status of EU studies and a comparation between them and Law approaches, see (Milczarek, 2012: 13-32)

[3] It is a way to approach to EU integragion that differs from the traditional sovereigntist one (Fabbrini, 2014:19). For a complete vision of Pluralism, see also Avbelj and Komarek (2008) and Baquero Cruz (2008). However, some authors outline differences between Legal Pluralism and Plural Constitutionalism, see Chalmers, Davies and Monti (2014: 219-222)

[4]Although Multilevel Constitutionalism and Constitutional Pluralism have a different origin and development in the European integration studies debate, both of them "display significant similarities in therms of theoretical foundations" (Mayer & Wender, 2012: 151)

[5] We are going to focus on the EU multilevel system (particularly in the relations between EU law nad National law) and therefore we are not gooing to develop the work to all the European multielvel system, which may include European Human Rights Convention, notwithstanding that we may make some reference to the Convention.

Although it is difficult to affirm the existence of an Human Rights protection system in comparative terms with other international organizations (Castillo Daudí, 2010:157), or an EU fundamental rights system -in strict sense-[6]; we can see a system in construction (Sarrión Esteve, 2013) which was rationalized by Scholars (Tenorio Sánchez, 2013: 2-4).

Anyway, Fundamental Rights protection is an important key tool in the actual EU integration process,[7] but, it has changed with the years. At first, the Treaties constituting European Communities were silent on human rights protection and ECJ had to make it possible, but after the recognition of the autonomy, direct effect and primacy of European Law [*Van Gend &Loos*, 1963; *Flaminio Costa*, 1964][8].

Unlike fundamental rights, market freedoms have always enjoyed an explicit relevance in the Treaties as instruments to serve the attainment of market and economic integration, constituting "a solid foundation for the functioning of the European Union" (Plaňanová -Latanowicz, 2012:179). And in this sense the relevance of market freedoms and the secondary place of fundamental rights, in particular social rights[9], was criticized (Poiares Maduro,1999: 449). However, it is true that fundamental rights become more relevant with the acquisition of legal force by the CFREU in 2009, and therefore, fundamental rights aspired to an equal position with fundamental market freedoms as fundamental values and principles of EU law.

Furthermore, the role of ECJ in the evolution of fundamental rights' protection in the old European Communities and the EU was and is crucial;[10] and we can see a particular constitutional approach or constitutional role of ECJ balancing fundamental rights and fundamental economic freedoms (Sarrión Esteve, 2011b and 2013).[11]

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[6] For instance, indivuals can not access directly to ECJ in order to protect EU fundamental rights as in the European Human Rights Convention system.

[7] Scholars usually structure the evolution of fundamental rights protection in the Communities and after in the EU in several stages attending to ECJ case law (Dauses, 1984) or the texts and legislation (Gómez Sánchez, 2011: 92). Se more and a recent stage classification Tennorio Sánchez (2013: 6-32).

[8] *Van Gend en Loos*, C-26/62; and *Flaminio Costa*, C-6/64.

[9] We use the term "social rights" to refer to labour rights as it is generally used in literature (Fudge, 20079.

[10] See more Dauses (1985: 398-419), Lindfeldt (2007: 68-78), and Sarrión Esteve (2013: 31-48)

[11] Some refers also to the balance between market freedoms and other national goals as tax law, see Sanz Gómez (2010).

Nevertheless some authors usually trend to share an assumption that finally seems problematic, as Komárek pointed out recently (Komárek, 2014: 8-10)[12]: the identity of fundamental rights at the different levels and systems, based on the universality of human rights. Certainly, fundamental rights are funded on universal values, but are linked to an specific legal order, and therefore to an specific constitutional and national identity (of which they form part). The reality is that Fundamental Rights protection in the EU Legal order has its own ground and standard of protection and guarantees, which differs from national ones and even from the ECHR order.

Noticeably we are dealing with articulation problems (*problemas de articulación*) in the three fundamental rights guarantee levels in the EU (Muñoz Machado, 2015). Nevertheless, we are interested to focus our work in the relation between EU and national order relationship.

In this context, as Fabbrini suggested in a recent work, in a synchronic dimension (in a diachronically the system is subject to changes and re-adaptation) the European multilevel system deal with a coexistence of a multiplicity of standards of fundamental rights protection with possible tensions in the interaction between national and transnational legislation than can be outlined as a *challenge of inconsistency*, when the latter operates as a floor of protection; and a *challenge of ineffectiveness*, when the latter operates as a ceiling of protection (Fabbrini, 2015: 45-46).

Really, the problems arise just in the so-called *challenge of ineffectiveness,* when the EU law operates as ceiling and sets a maximum standard for the protection of a specific right.

In this sense, the National Courts doctrine on constitutional limits (Sarrión Esteve, 2011c) is important to contrast to the ECJ doctrine regarding fundamental rights protection standards, and in order to see an eventual national constitutional identity to protect.

Although ECJ insists on the autonomy and primacy of EU law, national Supreme and Constitutional Courts have their own task and responsibility, i.e. to protect the national Constitution (that is a essential part of National interest). Some authors suggested that the ECJ and Constitutional courts have handled this constitutional conflict dilemma

[12] Komárek argued that the origin and fundamentation of fundamental rights is different: Constitutional fundamental rights protection is based on a political constitutional project after II World War, and EU fundamental rights protection on the foundations of the european market integration project.

thanks to the European judicial dialogue and judicial co-operation (Timmermans, 2012: 16). However, the recent ECJ case law seems to reinforce the position regarding the autonomy and primacy of EU legal order versus national Constitutional law [particularly in *Åkerberg Fransson* and *Melloni* cases (2013)].[13] And even in relation to the ECHR order [*Opinion 2/13 on Accession of the European Union to the ECHR*].[14]

We are going to study the actual trends and challenges of the fundamental (constitutional) rights and principles protection as part of National Interest in the ECJ case law.

2.- EU law authority, constitutional limits and Fundamental Rights Protection.

As we know the ECJ developed the recognition of the autonomy, direct effect and primacy of European Law in the first moments of European integration process [*Van Gend &Loos*, 1963; *Flaminio Costa*, 1964][15] "which have shaped how we conceive the authority of EU law" curbing EU Member States power (Chalmers, Davies and Monti, 2014: 201-204) and therefore limiting their sovereignty.

However the EU law's formal authority does not depend exclusively on the ECJ position. It is conditioned largely by the characteristics of each national legal system and national Supreme or Constitutional court case law and constitutional interpretation, because national Courts apply EU law.

Although most Constitutional norms usually include sovereign transfer clauses (without being exhaustive, for example German Basic Law art. 24, Netherlands Constitution, art. 66, Luxembourg Constitution art. 49 bis, Spanish Constitution art. 93) which limit the national sovereignty in favour of international organizations as EU (with subtle differences); the reality is that in most of EU Member States there have been certain constitutional reserves or constitutional limits to the primacy of EU law in the Constitutional and Supreme courts' case law, incorporating (constitutional or national) fundamental rights and principles and national identity, which are an essential part of the national interest (Sarrión Esteve, 2011c).

[13] *Åkerberg Fransson*, C-617/10; *Melloni*, C-399/11.
[14] However, we are not going to focus in this Opinion in the paper.
[15] *Van Gend en Loos*, C-26/62; and *Flaminio Costa*, C-6/64.

2.1.- Constitutional limits: (Constitutional) Fundamental Rights and constitutional principles protection in National law as part of National Interest.

Certainly the EU State Members Constitutional or Supreme Courts with a constitutional role are important actors in the European integration process and particularly in the protection of (national or constitutional) fundamental rights and principles, as well as the national identity, within the national interest.

As already indicated, in most of EU Member States there have been certain constitutional reserves or constitutional limits to the primacy of EU law in the Constitutional and Supreme courts' case law. In this sense, the assumption of the primacy principle of EU law, and therefore the so-called authority of EU law, is not accepted with uniformity in all Member States.[16]

To speak about the constitutional limits jurisprudence the doctrine usually use the terms counter-limits (*controlimiti*) or constitutional reserves (amongst others). We prefer to use the simple term of 'constitutional limits' (Sarrión Esteve, 2011c, 2014).

We can find the origin of the constitutional limits doctrine in the jurisprudence of the Italian Constitutional Court [*Acciaierie San Michele,* and *Frontini* cases][17] and in the doctrine of the German Constitutional Court [*Solange I* case].[18]

This doctrine of constitutional limits or constitutional reserves related to the primacy principle are logical and responds to a sceptical view of the role of the ECJ in the protection of fundamental rights (Sarrión Esteve, 2014:62), and in fact, the constitutional limits' doctrine has developed a lot in Italy[19] and in Germany[20].

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[16] There are formal limits in constitutional law and material limits in the jurisprudence of Constitutional courts, but the difference between formal and material limits is not very relevant, from our point of view, the key question is the interpretation of the Constitutional law by the competent Constitutional or Supreme court with constitutional competence and therefore if there are or not real constitutional limits to the primacy EU law principle.

[17] *Acciaierie San Michele c. CECA* (Corte Costituzionale, Nº 98/1965), and *Frontini* (Corte Costituzionale, Nº 177/1983). Doctrine confirmed after in *Granital* (Corte Costituzionale, Nº 170/1984), *Fragd (*Corte Costituzionale, Nº 232/1989), and Corte Costituzionale, Nº 454 de 2006.

[18] *SOLANGE I*, 37 BVerfGE 271, 29 May 1974. Doctrine confirmed by the German Constitutional Court in the sentences *Vielleicht*, BverfGE, 4, 168. 25 July 1979; SOLANGE II, , BVefGE, 73, 22 October 1986; *Maastricht Urteil*, BverfGE 89, 155, 12 October 1993; Arrest warrant case, BverfG, 2BvR 2236/04, 18 July 2005; and Lisbon Treaty case, BVerfG, 2 BvE 2/08, 30 June 2009.

[19] Regarding the German Constitutional Court and its position, see Vidal Prado (2006) and López Castillo, Menéndez and Vidal Prado (2011).

[20] Regarding the Italian Constitutional Court, see Rossi (2008, 2009).

In Italy, from the first cases [*Acciaierie San Michele* (1965), and *Frontini* (1983)][21], the Italian Constitutional Court confirmed its position in *Granital* (1984)[22] and particularly in *Fragd* (1989)[23]. It is also important to note that the Italian Constitutional Court considers the constitutional limits doctrine relevant in case of a general infringement of constitutional fundamental rights and principles and not in an individual case. For instance in *Fragd* case the Italian Constitutional Court evaluated the constitutionality of article 177 of the European Community Treaty (actual article 267 of TFEU). Certainly the Italian Constitutional Court did not apply the constitutional limits doctrine in the sense of considering unconstitutional the European article with an example of the called "self-restraint" in the judicial dialogue (Rossi, 2009: 320).[24] After that the Court considered the European Charter of Fundamental Rights as an expression of common principles in juridical European systems, [cases nº 393 and 284 of 2006][25] and "as an auxiliary –yet authoritative- means of interpretation" (Rossi, 2009: 320). Moreover, it valued EU law with a constitutional status [cases nº 348 and 349 of 2007][26] interpreting articles 117 and 11 of the Italian Constitution in the sense of "confer a privileged status to EU Law" (Rossi, 2008: 77]. Finally the Italian Constitutional Court considered itself as an EU judge in the request for a prejudicial question to ECJ.[27]

In Germany the first cases [*Solange I* (1976)[28] and *Vielleicht* (1979)][29] are the origin of a clear doctrine of constitutional limits or reserves to European law. But in *Solange II* [1986][30], we see some doubts in relation to the protection of fundamental rights when the German Constitutional Court applied a self-restraint doctrine in the sense that "as long as the European Communities, and in particular the case law of the Court of Justice of the European Communities, generally ensured an effective protection of fundamental rights" the Constitutional Court will not apply the *Solange* doctrine. After that the German Court had the opportunity to develop this doctrine in a confused way in the

[21] *Acciaierie San Michele c. CECA* (Corte Costituzionale, Nº 98/1965), and *Frontini* (Corte Costituzionale, Nº 177/1983).
[22] Corte Costituzionale, nº 170/1984, 8 June.
[23] Corte Costituzionale, nº 232/1989, 21 April.
[24] Rossi considers that "In the *Fragd* case (…) The Italian Constitutional Court went closer to establishing such a violation, but diplomatically avoided doing so." (Rossi, 2009: 320].
[25] Corte Costutizionale, nº 393/2006, and nº 393/2006.
[26] Corte Costituzionale, nº 348/2007, and nº 349/2007.
[27] Corte Costituzionale, nº 102/2008, and nº103/2008.
[28] *Solange I*, BVerfGE 37, 279.
[29] *Vielleicht*, BverfGE, 4, 168.
[30] *Solange II*, BVefGE, 73, 339.

sense that in some cases it seems to reinforce it [*Maastricht Urteil* (1993);[31] *European arrest warrant case* (2005);[32] Lisbon Treaty Case (2009);[33] *Counterterrorism Database* (2013)[34], while in other cases it seems to relax it [*Banana case* (2000),[35] *Honewey*, (2010)].[36]

Finally the German Constitutional Court decided recently on 14 January 2014 to request a preliminary ruling on the Outright Monetary Transactions Programme from the ECJ.[37]

Although someone can suggest that we are at the end of the constitutional limits doctrine, it is not right, and the constitutional limits doctrine has been very successful, probably because it is a way of limit the principle of primacy without a radical break from it, and in point of fact, this doctrine has been generalized, and we can identify this doctrine in other EU Member States as Belgium[38], Ireland[39], Spain[40], Denmark[41], UK[42], France,[43] Poland[44], Cyprus[45] and the Czech Republic[46] (Sarrión Esteve, 2014: 64-65)[47].

[31] BverfGE 89, 155.
[32] BverfG, 2BvR 2236/04.
[33] BverfG, 2 BVE 2/08.
[34] BverfG, 1 BvR 1215/07
[35] BverfG, 2 BvL 1/97
[36] BverfG, 2 BvR 2661/06.
[37] BVerfG, 2 BvR 2728/13
[38] Cour d'Arbirtrage, 23 March 1990, nº 26/90, 3.B; and 3 February 1994, *Ecoles Européenes*, nº 12/94.
[39] *S.P.U.C. c. Grogan*, 1998, IR 343.
[40] STC 64/1991, 22 March, STC 252/1988, 20 December, amongst other sentences; and particularly DTC 1/1992 in relation to Maastricht Treaty ; and DTC 1/2004, in relation to European Constitution.
[41] Denmark Supreme Court, Maastrich Case, 6 April 1998, n I-361/1997
[42]*Thoburn v. Sunderlaland Citi Council* (Queen's Bench Division, Divisional Court, 18 de febrero de 2002); *Mc. Whirter & Gouriet v. Secretary of State of Foreign and Commonwealth Affairs* (Court of Appeal (Civil Division), 5 March 2003). The constitutional limits doctrine is very interesting due to the specific characteristics of the UK Constitutional system, see (Sarrión Esteve, 2011c) and Bombillar Sáenz (2011).
[43] French Constitutional Council, Nº 2004-496, 10 June 2004, *Loi pour la confiance dans l'économie numérique* ; confirmed in Nº 2004-497, 1 July 2004 ; Nº 2004-498, 29 July 2004; Nº 2004-499, 29 July 2004 ; Nº 2004-505, 19 November 2004, *Traité établissant une Constitution pour Europe* ; Nº 2006-540, 27 July 2006, loi relative au droit d'auteur et aux droits voisins dans la société de l'information; Nº 2006-543, 30 November 2006, *Loi relative au secteur de l'énergie;* Nº 2008-564 DC, 19 June 2008.
[44] Polish Constitutional Court (*Trybunal Konstytucyjny*) 11 V 2005 judgement K 18/04; 24 IX 2010 judgement K 32/09.
[45] Cyprus Supreme Court, 7 November 2005, Civil Appeal Nº 294/2005
[46] 2006/03/08-Pl. ÚS 50/04, Sugar Quota Regulation III; 2008/11/26- Pl. ÚS 19/08, Treaty of Lisbon; 2009/11/03- Pl. ÚS 29/09, Treaty of Lisbon II, 2012/01/ 31-Pl. ÚS 5/12, Slovak Pensions XVII.
[47] Of course it is clear that each Member State is a special case with its own circumstances and as we speak about constitutional interpretations, which can evolve and change (with or without a constitutional reform) because the situation is not static.

2.2.- The reinforcement of EU law authority in the protection of Fundamental Rights and judicial dialogue.

Maybe constitutional limits doctrine is a form of judicial dialogue, as de use of preliminary questions. Some authors outline the positive value of judicial dialogue and also suggest that Courts are dealing with an eventual constitutional conflict thanks to it (Timmermans, 2012:15); while others wonder about it and its reality (De Vergottini, 2011; Torres Pérez, 2013:49).

ECJ assumed few years ago the constitutional limits doctrine in order to limit International law in the *Kadi* case [2008] arguing that International law can no prevail over EU fundamental principles[48] (Sarrión Esteve, 2012:3376). It opened a very interesting horizon regarding the question of fundamental rights standard in EU:

> *"the obligations imposed by an international agreement cannot have the effect o prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty"*[49]

However, recent ECJ case law reinforce the authority (autonomy and primacy) of EU legal order versus national Constitutional law, particularly in *Åkerberg Fransson* and *Melloni* cases [2013],[50] and even in relation to ECHR order [*Opinion 2/13 on Accession of the European Union to the ECHR*]

The ECJ position on EU law authority and constitutional limits doctrine seems to me as a *dialogue between deaf* (*diálogo de sordos*, Sarrión Esteve, 2007). Nevertheless, Baquero Cruz suggest that for many years ECJ and Constitutional Courts have lived under the dream of unilateral supremacy and the entry into force of the CFREU "has proved how fragile the illusion and the marriage can be" outlining as examples *Åkerberg Fransson* and *Melloni* [2013][51] although it can be an opportunity to "find a way to live in harmony without the assistance of false illusions, but with the benefits and the daunting challenges of having to face reality" in a new EU fundamental rights framework (Baquero Cruz, 2013: 1267-1269)

On one hand *Åkerberg Fransson* deals with the relevant question of the scope of application of the Charter (art. 51(1) CFREU), and indirectly with the question of the

[48] *Kadi et Albarakaat International Foundation*, C-402/05 and C-415/05.
[49] *Kadi et Albarakaat International Foundation*, C-402/05 and C-415/05, 285.
[50] *Åkerberg Fransson*, C-617/10; *Melloni*, C-399/11.
[51] *Åkerberg Fransson*, C-617/10; *Melloni*, C-399/11.

fundamental rights standard or the level protection clause (art. 53 CFREU); while *Melloni* deals directly on the second question (Sarmiento, 2013: 1272). On the other hand, and regarding the second question of the rights protection standard *Åkerberg Fransson* and *Melloni* are the best examples of the *challenges of inconsistency* and of *ineffectiveness,* respectively, outlined by Fabbrini, because EU fundamental rights standard acts as a floor in *Åkerberg* and as a ceiling in *Melloni* (Fabbrini, 2014: 39-41).

a) The scope of application

Before the entry into force of the Charter (with the Lisbon Treaty), the ECJ delivered on the scope of application of Community (today EU) law, and therefore of (EU) fundamental rights as general principles of EU law.[52] They were binding not only to European institutions [*Defrenne*, 1978],[53] but also to Member States when they implement or apply Community law [*Wachauf*, 1989][54], or invoke and exception to it falling within the scope of Community law[*Elliniki*, 1991].[55]

Elliniki doctrine is more important that it seems, because in *Wachauf* the range of national rules over the scrutiny of EU law (EU) fundamental rights were "very circumscribed" to national measures transposing a directive (i.e implementing EU law) while *Elliniki* expanded this scrutiny significantly (Chalmers & Davies & Monti, 2014: 280-281) to National rules when "those rules fall within the scope of Community law" (Biondi, 2004:55).

Some scholars argued that in *Wachauf* and *Elliniki* we can see two different ECJ case lines: the "implementation" and the "scope of application" of EU law, developed prior to the Charter.[56] But although in *Wachauf* ECJ does not speak about the scope of Community law, and refers to the "implementation" of Community law by Member States in the English version, in other (like in Spanish) the term is "apply" (*aplicar*). The language and the term used seems more important than it might appear.

[52] The development of the ECJ jurisprudence on fundamental rights protection as general principles of Community Law (today EU law) is well known, and I refer to it, in a summary form in section 2.1.
[53] *Gabrielle Defrenne v. Sociêté anonyme belge de navigation aérienne SABENA*, C-149/77.
[54] *Hubert Wachauf v. Germany*, C-5/88.
[55] *Elliniki Radiophonia Tiléorassi AE et Panellinia Omospondia Syllogon prossopilou v. Dimotiki Etairia Pliroforissis et Sotirios Kouvelas et Nicolaos Avdellas y otros* C-260/89.
[56] See Sarmiento (2013: 1275-1277).

Elliniki doctrine is confirmed in *Bostock* [1994][57] and concretized in *Kremzow* [1997][58] *Annibaldi* [2007][59]m *Roquete Frères* [2002][60], *Sopropé* [2008][61], *Dereci* [2011][62] and *Vinkov* [2012][63]

But the problem of determine the scope of EU law remains open. Advocates General try to consider particularly on the extension of the (EU) fundamental rights scrutiny. In this sense, Jacobs suggest to extent the application of (EU) fundamental rights to any personal economic movement,[64] Maduro argued to apply the scrutiny to grave and persistent violations of fundamental rights,[65] and Sharpston proposed to limit the scrutiny to all national measures will fall within the EU competences.[66]

Of course the problem arises in the same way that regarding the scoop of application of the Charter.

According to article 51(1):

> *"The provisions of this Carter 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"**[67]

This term "implementing" is ambiguous and "less clear" than it can seems (Chalmers & Davies & Monti, 2014: 280). Indeed some language versions use the word "apply" instead (Rosas, 2012:1269; Sarmiento, 2013: 1275[68]) -as in *Elliniki* case- and it seems more appropriate attending to the explanations relating the article 51, which use the term "act in the context of Community law"[69]. These explanations cite specifically

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[57] *The Queen v. the Ministry of Agriculture, Fisheries and Food, ex parte: Dennis Clifford Bostock*, C-2/92.
[58] *Friedrich Kremzow*, C-299/95, 15.
[59] *Annibaldi*, C-309/96, 13
[60] *Roquette Frères*, C-94/00, 25.
[61] *Sopropé*, C-349/07,34.
[62] *Dereci and Others*, C-256/11, 72.
[63] *Vinkov*, C-27/11, 58.
[64] *Kostantidinis*, C-168/91, Opinion of Advocate General Jacobs, 46.
[65] (2007) *Centro Europa 7 v. Ministero delle Comunicazioni*, C-380/05, Opinion of Advocate General Maduro, 22
[66] (2010) *Zambrano*, C-34/09, Opinion of Advocate General Sharpston, 163
[67] Italics added.
[68] Sarmiento argues that the vague "application" term could be interpreted as a via media between the Wachauf and ERT lines (Sarmiento, 2013: 1276)
[69] Explanations relating to the Charter of Fundamental Rights (Article 51):
"As regards the Member States, it follows unambiguously from the case law of the Court of Justice that the requirement to respect fundamental rights defined in a Union context is only binding on the Member States *when they act in the context of Community law* (...)" (Italics added)

Wachauf, *Elliniki* and *Annibaldi* cases, in which we have seen that ECJ speaks about to "fall within the scope of Community law", a criterion much wider including when EU member States apply EU law with a wide margin of discretion (Sarmiento, 2013: 1274).

Since the Charter entered in force on 1 December 2009, ECJ had the opportunity to resolve several cases with "contradictory messages" in *Dereci* (2011)[70], and *Iida* (2012)[71] with references to the scope of EU law in the first case, and to the implementation of EU law in the second (Sarmiento, 2013: 1276).

However, it seems to me that this distinction is not really so important, because the implementation is part the scope of EU law. It is a question of a particular aspect or dimension of the scoop of the EU law, when EU Member States implement EU law. And therefore when ECJ speaks about implementation, the "scope of EU law" is implicit in the case.

Anyway, in *Åkerberg* ECJ outlined that the field of application of the Charter is obviously not limited only to EU Member States when they implement EU law, but when they act in the scope of EU law interpreting article 51(1) in connection with the explanations of this article (according to art. 6(1) TEU and article 52(7) CFREU and understanding that "act in the scope of" implies to "fall within the scope of" EU law.[72] Therefore the ECJ doctrine regarding to fall within the scope of EU law applies also to the CFREU.

Nevertheless, it is true that according to article 51(2) CFREU this scope of application cannot exceed the powers conferred to EU, but this "did not prevent the Court from referring to the Charter again in situations falling within the reserved powers of Member States" (Dubout, 2014:208), because the scoop of EU law is not confined exclusively to the characteristics of European Union competence matters, and EU Member States in the exercise of its exclusive powers should also respect EU law when there is a link or connection with EU law, except in the case of a domestic situation without connection therewith.[73]

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[70] *Dereci and Others*, C-256/11.
[71] *Iida*, C-40/11.
[72] *Åkerberg Fransson*, C-617/10, 17-22.
[73] This has allowed the ECJ to control the registration and change of name a in the national registry, in the cases *Kostantinidis* (C-168/91, 1993), *Garcia Avello* (C-148/02, 2003), *Grunkin Paul* (C-353/08, 2008) and *Sayn Wittgenstein* (C-208/09, 2010); and the withdrawal of nationality from a Member State, in the case *Janco Rottman* (C-135/08, 2010).

b) The fundamental rights standard problem.

Certainly, article 53 CFREU stipulates that:

> *"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 [ECHR] and by the Member State's constitutions."*

Some scholars interpreted this clause in relation to articles 51 and 52, as a non regression clause (Liisberg, 2001: 1171), or a transversal clause (Freixes Sanjuan, 2005) and a basis to apply the highest standard of protection of fundamental rights, i.e, the prevalence of the highest standard of protection of fundamental rights (between International standard particularly European Human Rights Convection, EU Law standard, and the national constitutional standard involved), and therefore allowing EU Member States to apply the national standard when it guarantee a higher level of protection than the EU one (See Ridola, 2002:92; Freixes Sanjuan, 2005; Mangas Martín, 2008:829; Alonso García, 2010: 312-314)

However, when the Spanish Constitutional Court asked on this possibility in *Melloni* ECJ reaffirmed the primacy of EU law and dismissed this interpretation of Article 53 (Tenorio Sánchez,2013: 32-34; Boer, 2013: 50; Visser, 2013:1267; Gómez Sánhez, 2014: 119; Besselink, 2014: 531; Craig and De Burca, 2015: 400), generating a *challenge of ineffectiveness* because operates as a ceiling of protection (Fabbrini, 2015: 45-46).

From my point of view, Fabbrini's suggestion is very interesting, in a synchronic dimension (in a diachronically the system is subject to changes and re-adaptation) the European multilevel system deal with a coexistence of a multiplicity of standards of fundamental rights protection with possible tensions in the interaction between national and transnational legislation than can be outlined as a *challenge of inconsistency*, when the latter operates as a floor of protection; and a *challenge of ineffectiveness*, when the latter operates as a ceiling of protection (Fabbrini, 2015: 45-46).

As *Melloni* is a good example of the *challenge of ineffectiveness*, *Åkerberg* is a good example of the *challenge of inconsistency* (Fabbrini, 2015: 39-45). Certainly, in *Åkerberg* the ECJ allows to National Courts to apply the national standard (although there is a limitation, to preserve the primacy, unity and effectiveness of EU Law),

because It was area falling under the National exclusive competence, and therefore the EU Standard acts as a floor of protection:

> *" That said, where a court of a Member State is called upon to review whether fundamental rights are complied with by a national provision or measure which, in a situation where action of the Member States is not entirely determined by European Union law, implements the latter for the purposes of Article 51(1) of the Charter, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of European Union law are not thereby compromised (see, in relation to the latter aspect, Case C-399/11 Melloni [2013] ECR, paragraph 60)."*
>
> *Åkerberg*, 29

Meanwhile, in *Melloni* is different because the situation is under the exclusive competence of EU and therefore the situation is entirely determined by European Union Law:

> *" It is true that Article 53 of the Charter confirms that, where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised.*
>
> *However, as is apparent from paragraph 40 of this judgment, Article 4a(1) of Framework Decision 2002/584 does not allow Member States to refuse to execute a European arrest warrant when the person concerned is in one of the situations provided for therein."*
>
> *Melloni, 60-61.*

Really, the problems arise just in the so-called *challenge of ineffectiveness,* when the EU law operates as ceiling and sets a maximum standard for the protection of a specific right.

Moreover, *Åkerberg* and *Melloni* imply a reinforcement of EU law authority in relation to National (Constitutional) law which contrasts to a pluralistic vision of the *Multilevel Constitutionalism* and the *Constitutional Pluralism*. And it has another chapter with the *Opinion 2/13 on Accession of the European Union to the ECHR*, in relation to International Law, and particularly ECHR.

And the dialogue between Courts has also serious challenges, because it seems a hierarchical vision of the relations between EU law-National Law and EU law-International Law, including Fundamental Rights Systems.

In this sense, as we pointed before, Constitutional and Supreme Courts developed the constitutional limits doctrine, and one can suggest how they can interact with this reinforcement. In the *Melloni* case, the Spanish Constitutional Court reconsidered and changed its doctrine regarding the rights to a fair trial lowering the national level of protection, but not only for the *Melloni* case, but also for national situations without connection to EU law (STC 26/2014).[74] This paradoxical situation makes possible a future regression of fundamental rights protection in Europe.

Advocate General Bot suggested that the key of the interaction between different fundamental rights protection standards will be in the article 4(2) of EU Treaty and not in the article 53 CFREU, and therefore the relevance will be in the National Identity of the Member State,[75] which content is, however, uncertain, and it is also open to the Judicial Dialogue between ECJ and Constitutional and Supreme Courts. Certainly, the key question is who determines the content of this word, which will be the boss (Quadra-Salcedo Janini, 2015: 34).

But although it is true that the article 4(2) of EU Treaty limits the primacy in order to guarantee the National Identity, it is nevertheless true that Fundamental Rights Protection are protected in article 53 CFREU which have the same value as the Treaty according to the article 6(1) of the EU Treaty.

A pluralistic interpretation of article 53 CFREU would have been, from our point of view, a better option, allowing national courts to apply the higher standard of fundamental rights protection, since it did not constitute in any way a violation of the EU law primacy, but his true and correct fulfilment. Thereby, the ECJ failed in take an integrative interpretation of article 53, and therefore to allow a new and positive constitutional horizon from the perspective of fundamental rights, when it was possible under Lisbon Treaty, thanks to the transversal clause of article 53 in connection with articles 51 and 52.

This reaffirmation of the EU law authority reminds me to the Biblical reference to the new wine and old wineskins.[76] Lisbon Treaty and CFREU are the new wine, which a

[74] STC 26/2014, 13 February.
[75] *Melloni*, C-399/11, Opinion of Advocate General, 137-143. Regarding this question see Torres Pérez (2013), Quadra-Salcedo Janini(2015: 30-34). Regarding National Identity under EU Law, see also Bogdandy and Schills (2011), Rodin (2011), Casorali (2014), and Di Federico (2014).
[76] "No one puts new wine into old wineskins; otherwise the wine will burst the skins, and the wine is lost and the skins as well; but one puts new wine into fresh wineskins." Mark 2:22.

very interesting pluralistic approach to the protection of fundamental rights in the article 53 as a non regression or transversal clause, asking for the application of the highest standard of fundamental rights protection (international, EU or national).

3.- Conclusions? Actual trends from the perspective of multi-level constitutionalism approach.

In Europe we live in a context of relations between legal systems, which are becoming progressively more interconnected and we need to explain the relation and identify the correct criteria to integrate them.

This is also the case from the perspective of fundamental rights protection. Certainly we need to connect correctly National Fundamental Rights protection systems, ECHR system, and the EU Fundamental Rights system (currently under construction).

We focused our work particularly on the relation between EU law and National law, and therefore between the protection of fundamental rights at European and National Level. It is usual to describe these relationships from a pluralistic perspective, in terms of multi-level legal system, i.e. *constitutional pluralism* or *multilevel constitutionalism*.

In both cases, we speak about theoretical constructions which try to explain the EU multilevel fundamental rights protection architecture. The problem is that the European multilevel system deal with a coexistence of a multiplicity of standards of fundamental rights protection with possible tensions.

As already indicated, in most of EU Member States there have been certain constitutional reserves or constitutional limits regarding the protection of fundamental rights and constitutional principles (as part of the national interest) to the primacy of EU law in the Constitutional and Supreme courts' case law.

Really there is a problem when the EU Fundamental Rights System operates as a ceiling of protection (a *challenge of ineffectiveness* in the Fabbrini's words) and it avoids the National system to apply a higher standard of protection, as in the *Melloni* case, when under EU law there is not a exclusive national competence.

There is a previous reference to this biblical reference suggesting that *Åkerberg* doctrine maybe the new win being putting by the ECJ in the old wineskins of the case law on the scoop of application and the general principles. See Bockel and Wattel (2013).

Certainly, *Åkerberg* and *Melloni* imply a reinforcement of EU law authority in relation to National (Constitutional) law. However, is particularly *Melloni* which introduces an obstacle to the dialogue between Courts, because it seems a hierarchy vision of the relations between EU law-National from the ECJ perspective.

From our point of view, It was a better option a pluralistic interpretation of article 53 CFREU allowing to apply the higher standard of fundamental rights protection, since it did not constitute in any way a violation of the EU law primacy, but his true and correct fulfilment. ECJ failed in take an integrative interpretation of article 53, and therefore to allow a new and positive constitutional horizon from the perspective of fundamental rights, when it was possible under Lisbon Treaty thanks to the transversal clause of article 53 in connection with articles 51 and 52.

This reminds the Biblical reference to the new wine and old wineskins.[77] Lisbon Treaty and CFREU are the new wine, with a very interesting pluralistic approach to the protection of fundamental rights in the article 53 as a non regression or transversal clause, asking for the application of the highest standard of fundamental rights protection (international, EU or national). However, the ECJ position in Melloni is the old wineskin, its hierarchy perspective on the relations between EU law and national (but also international law) makes difficult the dialogue of Courts and the development of the best possible Multilevel system of Fundamental Rights Protection in Europe.

Certainly, EU law and CEFREU are binding to EU Member States not only when they implement EU law, but also when the situation is in the scope of EU law, i.e. when there is a link with EU law, the situation will be governed by EU law, and the CFREU will apply to it. Therefore there will be several situations when we can see a *challenge of ineffectiveness*, and a ceiling of protection limiting the application of a eventual higher national standard of fundamental rights protection.

The EU law authority reinforcement has as another chapter in the *Opinion 2/13 on Accession of the European Union to the ECHR*, in relation to International Law, and particularly ECHR.

This is also a challenge to a pluralistic approach, because reinforce not only the autonomy, but also the solitude of EU system from the perspective of Fundamental Rights Protection as part of National Interest.

[77] See above.

Constitutional and Supreme Courts developed the constitutional limits doctrine, and it will be interesting how they will interact in relation to this reinforcement of the EU law authority in new *ineffectiveness* situations. In the *Melloni* case, the Spanish Constitutional Court changed its doctrine regarding the rights to a fair trial, not only for the *Melloni* case, but also for the future in national situations without connection to EU law, so it is possible to see paradoxically a future regression of fundamental rights protection in Europe.

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