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Constitutional limits to European integration in the New Member States after the biggest enlargement

Abstract: We live in the Europe Union (EU) in a context of relations between legal systems of different levels. Therefore the positions of EU New Member States Constitutional or Supreme Courts are analysed in the paper with the use of the multilevel constitutionalism theoretical approach and focus on changes introduced by the Lisbon Treaty, that opened a new constitutional horizon in the EU integration process. The European Court of Justice (ECJ) defined relations between EU law and national law thanks to the primacy principle of EU law. Nevertheless the EU law's formal authority does not depend exclusively on ECJ position. It is conditioned largely by characteristics of each national legal system and national supreme or constitutional court case law.

In fact, in most of EU Member States, certain constitutional reserves or constitutional limits to the primacy of EU law in the constitutional and supreme court case law with regard to (constitutional) fundamental rights and principles, can be found. The paper analyses the origin and development of those limits in the case law doctrine of Constitutional Courts in two old and three new EU Member States and concludes with the identification of the consequences and perspectives of EU integration with regard to the coherent protection of fundamental (constitutional) rights and principles across the EU.

Keywords: multilevel-constitutionalism, constitutional limits, European integration, fundamental rights, court dialogue.
JEL codes: K19, K33, K39, K49.

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Introduction

The main aim of this work is to examine the origin and development of the constitutional limits in the case law doctrine in Italian and German Constitutional Courts, and afterwards the development of this doctrine after the biggest enlargement in 2004 of new EU Member States.

The paper is divided into three main sections. The first section examines the origin and development of the constitutional limits doctrine in Italian and German Constitutional Courts. The second one section analyzes the development of the constitutional limits doctrine in new EU Member States, and the third section covers the conclusions of the paper.

The European integration process can be structured as an economic, social, political and legal one with special and plural characteristics and a nature and future in ongoing discussion.

In this sense it is important to point out the dual economic and social dimension of European integration manifested in Treaties and European Court of Justice case law. What is noteworthy is that fundamental rights protection in the European Union has changed with the years.[1] 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].[2]

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.[3] The "conceptualization" of market freedoms is left aside, even if like in the case of fundamental rights, this legal question has been widely discussed in the literature;[4] but even more – in

[1] In the paper no deeper discussion about the concept of "fundamental rights" and the distinction with the concept of "human rights" will be provided. However, it is necessary to define the meaning of these terms along these lines. as given The distinction made by Diez Picazo is used in the work in the sense that the difference between human and fundamental rights would be based on the system that recognizes and protects them: internally, in the case of fundamental rights, and internationally, for human rights. Of course European Union Law is in the ambit of international law, however, given the peculiarities of European Union, it has commonly used the term "fundamental rights" [Díez Picazo 2005, p. 389].

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

[3] To study the evolution of market freedoms in European Union Law see more Pérez de las Heras [2008].

[4] About the literature, believing that the conceptualization exists see Krzeminska-Vamvaka [2005, pp. 5–6], and Lindfelt [2007, pp. 196–208].

the jurisprudence of the Court,[5] where ECJ referred to them in: *Forcheri v. Belgium* [1983];[6] *UNCTEF v. Heylens* [1987];[7] *Dounias v. Minister for Economic Affairs* [2000].[8]

In this sense the relevance of market freedoms and the secondary place of fundamental rights, in particular social rights,[9] has been criticized [Poiares Maduro 1999, p. 449]. However, fundamental rights have become more relevant with the acquisition of legal force by the Charter of Fundamental Rights of the European Union.

Nevertheless, the role of ECJ in the evolution of fundamental rights' protection in the European Communities and the European Union is crucial.[10] In fact we think that ECJ is exercising a constitutional role in EU Law system today [Sarrión Esteve 2013].

However fundamental rights protection is not a question where different Courts can participate. They must participate because it is their role and function. So we know that we are living in the EU in a context of relations between legal systems of different levels (European Union level, European Human Rights level, national levels).

Therefore it is necessary to adopt a multi-level constitutionalism theoretical approach, where the European Court of Justice, EU Member States Constitutional or Supreme Courts and European Human Rights Court (EHRC) have a relevant position as actors in the protection of fundamental rights in Europe.

EHRC's role guaranteeing the European Human Rights Convention is very relevant for fundamental rights in Europe. From the multilevel constitutional perspective it is also important to the development of the relations between legal systems. In fact we can say that Human Rights Convention is a bed of rights (from the European Human Rights Convention, EU law, and constitutional law perspectives). Therefore EHRC can be seen as the last guarantor. Nevertheless actually the EU is not part of European Human Rights Convention and as EHRC said in the *Bosphorus* case the fundamental rights

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[5] In this sense compare Biondi [2004, pp. 53–54].

[6] *Forcheri v. Belgium* , C-152/82, para. 11, referred to the free movement of workers.

[7] *UNCTEF v. Heylens*, C-222/86, para. 14, referred to the free movement of workers.

[8] *Dounias v. Ipourgos Ikonomikon (Minister for Economic Affairs),* C-228/98, para. 64, referred to the free movement of goods.

[9] We use the term "social rights" to refer to labour rights as it is generally used in literature [Fudge 2007].

[10] See more Dauses [1985, pp. 398–419], Lindfelt [2007, pp. 68–78], and Sarrión Esteve [2013, pp. 31–48].

protection under EU legal system is equivalent to the Convention system and EHRC will not control (in general) EU law.[11] Only with the future accession of EU to the Convention, EHRC will be the last Court in the EU legal order as the guarantor of human rights.[12]

Regarding EU legal order the question is that ECJ defined relations between EU law and national law thanks to the primacy principle of EU law [*Flaminio Costa* 1964].[13] 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.

Therefore now 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 fundamental rights.

As already indicated, in fact 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.

Thanks to this study actual perspectives of EU integration in relation to (constitutional) fundamental rights and principles are examined in order to understand better the relationship between the highest courts of EU Member States and the European Court of Justice in the European multilevel legal system.

1. The origin and development of the constitutional limits doctrine in Italian and German Constitutional Courts

The assumption of the primacy principle of EU law is not accepted with uniformity in all Member States and we can see formal limits in constitutional law and material limits in the jurisprudence of Constitutional courts.

[11] European Human Rights Court, 30 June 2005, *Bosphorus*.

[12] We leave aside (in general) the actual and future position of EHRC because our paper is focused on the relations between national Constitutional and Supreme courts and ECJ, and particularly in the development of constitutional limits doctrine (in national Constitutional and Supreme Courts case law) to EU legal order.

[13] *Flaminio Costa*, C-6/64.

The difference between formal and material limits is not very relevant. The key question, from author's point of view. 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 principle.

To speak about these constitutional jurisprudence limits the doctrine usually uses the terms counter-limits (*controlimiti*) or constitutional reserves (amongst others). The simple term of 'constitutional limits' is used in the paper in relation to the European integration process or in relation to primacy principle.

The origin of the constitutional limits doctrine is well known. We can find the origin of the constitutional limits doctrine in the jurisprudence of the Italian Constitutional Court [*Acciaierie San Michele,* and *Frontini* cases][14] and in the doctrine of the German Constitutional Court [*Solange I* case].[15]

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, or better, in the European Communities' protection of the fundamental rights system.

The constitutional limits' doctrine has developed a lot in Italy and in Germany:

In Italy, from the first cases [*Acciaierie San Michele,* and *Frontini*],[16] the Italian Constitutional Court confirmed its position in *Granital*[17] and particularly in *Fragd.*[18] 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 princi-

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[14] *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.

[15] *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.

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

[17] Corte Costituzionale, nº 170/1984, 8 June.

[18] Corte Costituzionale, nº 232/1989, 21 April.

ples 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, p. 320].[19] 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][20] and "as an auxiliary – yet authoritative – means of interpretation" [Rossi 2009, p. 320]. Moreover, it valued EU law with a constitutional status [cases nº 348 and 349 of 2007][21] interpreting articles 117 and 11 of the Italian Constitution in the sense of "confer a privileged status to EU Law" [Rossi 2008, p. 77]. Finally the Italian Constitutional Court considered itself as an EU judge in the request for a prejudicial question to ECJ.[22]

In Germany the first cases [*Solange I*[23] and *Vielleicht*][24] are the origin of a clear doctrine of constitutional limits or reserves to European law. But in *Solange II* [1986],[25] 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 sense that in some cases it seems to reinforce it [*Maastricht Urteil* 1993;[26] *European arrest warrant case* 2005;[27] Lisbon Treaty Case 2009],[28] whilst in other cases it seems to relax it [*Banana case* 2000;[29] *Honewey* 2010].[30] Finally the German

[19] 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, p. 320].

[20] Corte Costutizionale, nº 393/2006, y nº 393/2006.

[21] Corte Costituzionale, nº 348/2007, and nº 349/2007.

[22] Corte Costituzionale, nº 102/2008, y nº103/2008.

[23] *Solange I*, BVerfGE 37, 279.

[24] *Vielleicht*, BverfGE, 4, 168.

[25] BVefGE, 73, 339.

[26] BverfGE 89, 155.

[27] BverfG, 2BvR 2236/04.

[28] BverfG, 2 BVE 2/08.

[29] BverfG, 2 BvL 1/97.

[30] BverfG, 2 BvR 2661/06.

Constitutional Court decided recently (on 14 January 2014) to request a preliminary ruling on the Outright Monetary Transactions Programme from the ECJ.[31]

Are we at the end of the constitutional limits doctrine in Europe? No, we are not. In reality the Italian and German Constitutional Courts' doctrine in relation to constitutional limits is confusing because they want to reserve a portion of power of decision but it is difficult to see a way to limit the power of ECJ if they act as European judges and request for a preliminary ruling from ECJ.

Of course we can think that the limits doctrine is a sceptical view of the question of fundamental rights protection in European Communities and afterwards in the European Union system but in this case we must agree that it should disappear with EHRC *Bosphorus* case [2005].[32] In the Bosphorus case, as we pointed out in the introduction, EHRC highlighted that the protection of fundamental rights in the EU system was equivalent to the European Human Rights Convention. This conclusion allowed the European Human Rights Court not to engage in the review of cases regarding EU [De Hert & Korenica 2012, p. 875].

Despite the confusion of the Italian and German Constitutional Courts' doctrine the jurisprudence of the constitutional limits has been very successful, probably because it is a way of limit the principle of primacy without a radical break from it. In this sense the constitutional limits doctrine has been generalized, winning new support , and increasing its relevance. 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. The development of constitutional limits doctrine in New EU Member States

The group of states in which we have identified the development of the doctrine of constitutional limits following the example of Italy and Germany

[31] BVerfG, 2 BvR 2728/13.

[32] European Human Rights Court, 30 June 2005, *Bosphorus.*

would be in the whole EU: Belgium,[33] Ireland,[34] Spain,[35] Denmark,[36] UK,[37] France,[38] Poland,[39] Cyprus[40] and the Czech Republic.[41]

Of course it should be noted that although we have tried to conduct a comprehensive study of constitutional law in all EU Member States and have identified the jurisprudence of constitutional limits previously mentioned in these cases, it is possible that we have neglected a particularly recent case that we did not identify correctly in time.

In addition, in the cases of Ireland and Cyprus, there are two constitutional amendments that can change the constitutional limits doctrine in favour of the primacy of EU law.

Another relevant question is the role of the EU Member States Constitutional and Supreme Courts as ordinary judges in relation to the prejudicial question (one of the most important instruments of dialogue between Courts) because several of them had presented a prejudicial question to ECJ (for instance the Irish Supreme Court,[42] or the Spanish Constitutional Court[43]).

While studying the situation in new EU Member States after the biggest enlargement we have identified the development of the doctrine of constitu-

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[33] Cour d'Arbirtrage, 23 March 1990, nº 26/90, 3.B; and 3 February 1994, *Ecoles Européenes*, nº 12/94.

[34] *S.P.U.C. c. Grogan*, 1998, IR 343.

[35] 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.

[36] Denmark Supreme Court, Maastrich Case, 6 April 1998, n I-361/1997.

[37] *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).

[38] 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.

[39] Polish Constitutional Court (*Trybunal Konstytucyjny*) 11 V 2005 judgement K 18/04; 24 IX 2010 judgement K 32/09.

[40] Cyprus Supreme Court, 7 November 2005, Civil Appeal Nº 294/2005.

[41] 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.

[42] IESC 7 (30 th January, 2009, Appel Nº 136/08).

[43] ATC 9 June de 2011.

tional limits in Poland,[44] Cyprus[45] and the Czech Republic.[46] From author's point of view it seems to be difficult to see it in other cases.

In Poland the Polish Constitutional Court valued the Adhesion Treaty on the basis of constitutional supremacy in 2005.[47] After that the Court accepted the primacy of EU law in situations of conflict with Polish laws in 2009.[48] Nevertheless, the limit of constitutional law is clear and in this sense the Court evaluated the constitutionality of the Lisbon Treaty in 2010.[49]

In the case of Cyprus the Cyprus Supreme Court evaluated and declared unconstitutional the national law in the execution of the European arrest warrant decision in relation to national citizens made by Europe because the Cypriot Constitution forbade their extradition in article 11.2 f.[50] However after the decision there has been a constitutional reform in the sense of the reform of art. 11 to allow the extradition of citizens and the introduction of a new paragraph to article 179 providing that any decision or any organ of the Republic should be contrary to the Constitution or any obligation arising from the participation of the Republic as a member of European Union [law 127/2006].[51] So, the constitutional limits doctrine is seriously threatened in Cyprus after the constitutional reform.

In the Czech Republic the Constitutional Court[52] had the opportunity to resolve several cases in relation to the primacy of EU law and the supremacy of the Czech Constitution. In the first case the Court held that the primacy of EU law was not unconditional and requested the Constitutional Court ju-

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[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] Polish Constitutional Court (*Trybunal Konstytucyjny*) 11 V 2005 judgment K 18/04.

[48] Polish Constitutional Court (*Trybunal Konstytucyjny*) 19 XII 2006 procedural decision P 37/05, later confirmed in 18 II 2009 judgment Kp 3/08.

[49] 24 IX 2010 judgment K 32/09.

[50] Civil Appeal Nº 294/2005.

[51] Law 127/2006 Article 1.A "no provision of this Constitution will be held to annul laws that are enacted, acts, that are carried out or measures that are introduced by the Republic which are necessary by reason of its obligations as a Member State of the European Union or hinder Regulations, Directives or other acts or binding measures of legislative character that are adopted by the European Union or the European Communities or their institutions or their competent bodies on the basis of the Treaties establishing the European Communities or the European Union from producing legal effect in the Republic".

[52] Ústavní soud, http://www.concourt.cz.

risdiction to review the exercise of the delegated powers which were compatible with the preservation of the foundation and sovereignty of the Republic.[53] Afterwards this doctrine is confirmed in relation to the European Arrest Warrant in the sense that the Court can intervene when the EU does not act in accordance with the principles of a democratic state of law because the EU has limited powers, although in this case it considered the constitutionality of the measures.[54] Other relevant cases are those in relation to Lisbon Treaty ratification when the Constitutional Court evaluated the Treaty on two occasions, in 2008[55] and 2009[56] and considered it constitutional. Finally it is very important to cite the recent case *Landtova* in 2012,[57] where it exercised a genuine constitutional control inspired by the German Constitutional Court [Komarek 2012].

3. New perspectives of EU Member States' Constitutional Courts as actors in the European Union integration process

From the author's point of view the question of the relation of the called constitutional conflicts between ECJ and Constitutional and Supreme Court must be solved with a multilevel constitutionalism perspective (approach). As it was said before fundamental rights' protection is a question where different Constitutional Courts can participate, or rather, must participate because of their role and function.

In the context of multi-level constitutionalism, where the European Court of Justice, EU Member States Constitutional or Supreme Courts and the European Human Rights Court are key actors in the protection of fundamental rights in Europe they must reinforce the dialogue between them.

With the Lisbon Treaty the European Union Charter of Fundamental Rights entered into force. The Charter reinforces limits on the power of the EU, as shown in articles 6.1 EUT and 51.2 of the Charter [Gómez Sánchez 2011, pp. 108–110].

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[53] 2006/03/08-Pl. ÚS 50/04, Sugar Quota Regulation III.
[54] 2006/05/03-Pl. ÚS 66/04, European Arrest Warrant.
[55] 2008/11/26- Pl. ÚS 19/08, Treaty of Lisbon.
[56] 2009/11/03- Pl. ÚS 29/09, Treaty of Lisbon II.
[57] 2012/01/ 31-Pl. ÚS 5/12, Slovak Pensions XVII.

Moreover the Charter "furthers the development of a more articulated system of fundamental rights, encouraging a *rebalancing* of different goals of European integration" [Menéndez 2003, p. 192].

Certainly article 6.1,3 of TEU provides that rights, freedoms and principles in the Charter must be interpreted in accordance with Title VII of the Charter.

In relation to the scope and interpretation of rights and principles, article 52 of the Charter stipulates that when the Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), "the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection" (article 52.3 Charter); and when the Charter recognizes rights resulting from common constitutional traditions of Member States these rights must be interpreted in harmony with them (article 52.4 Charter) [Mangas Martin 2010, p. 826–850].

In these two paragraphs art. 52 establishes the link between the rights enshrined in the Charter with the ECHR and common constitutional traditions in Member States which are the sources of fundamental rights recognized by the Court of Justice as general principles of EU Law. The reason for this provision is to exclude any kind of conflict between fundamental rights protection standards. However, it is not enough because while reading this article one may interpret that there are three standards: European Human Rights Convention standard, European Union Standard, and National Standard concluding that the last (the national one) contains exclusively fundamental rights resulting from common constitutional traditions.

This interpretation is not correct according to the author. Certainly, article 53 with the title 'Level of protection' establishes that: "Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, in their respective fields of application, by Union law and international law and by international agreements to with 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".

In this sense, we can step back and we can understand that art. 53 provides a limitation on the scope of the applicability of the Charter to prevent a lesser level of fundamental rights protection in relation to other standards, including International Law, International agreements (to which the EU or all the Member States are party, including the European Convention) and finally the standard of "Member States' constitutions".

The National Standard indicated in article 53 is not the standard of fundamental rights resulting from common constitutional traditions as it is clear that it refers to any national constitutional standard.

In this sense, it is equivalent to asking for the highest fundamental rights protection standard of as a "principle of non-regression" [Sarrión Esteve 2013].

This would mean that the Charter only produces legal effects on Member States if they do not guarantee a higher level of protection in which case the Charter should be applied [Ridola 2002, p. 92], or "should make utterly clear that the Community rights should be interpreted, in line with national constitutional traditions, in such a way as to offer a high standard of protection" [Giubboni 2003, p. 15]. But any national constitutional tradition with a higher standard of protection of fundamental rights should prevail over EU and European Convention standards.

In this sense the Charter should be interpreted as a instrument to apply the highest standard of protection of fundamental rights between the European Convention standard, the national standard and the Charter (or EU) standard [Sarrión Esteve 2014], contrary to what the ECJ seems to interpret in a recent case *Melloni*, C-399/11. In this case the ECJ considered that national Constitutional Courts cannot apply the application of EU law on consideration of the protection level of fundamental rights affecting the primacy and uniformity of EU law. Although this case maybe have set the ground for a new framework of fundamental rights protection in the EU [Sarmiento 2013] and it can affect the multilevel constitutionalism approach [Tenorio 2014] we think that the ECJ should assume a position of *self restraint* regarding the protection of constitutional fundamental rights when the national standard involved is higher than the EU standard.

Conclusions

The assumption of the primacy principle of EU law is not accepted with uniformity in all Member States and the doctrine of constitutional limits to EU law primacy has developed in a relevant group of EU Constitutional and Supreme Courts, following the first steps of Italian and German Constitutional Courts: Belgium,[58]

[58] Cour d'Arbirtrage, 23 March 1990, nº 26/90, 3.B; and 3 February 1994, *Ecoles Européenes*, nº 12/94.

Ireland,[59] Spain,[60] Denmark,[61] UK,[62] France,[63] Poland,[64] Cyprus[65] and the Czech Republic.[66]

Certainly the developed constitutional limits doctrine in Italian and German Constitutional Courts seems so confusing, but we can see a more coherent development of this doctrine in new EU Member States after the biggest enlargement, particularly in Poland, Cyprus and the Czech Republic.

The constitutional limits doctrine has a place under European Union Law from the perspective of a multi-level constitutionalism interpretation of the Charter of Fundamental Rights. The Main actors involved in the protection of fundamental rights in Europe: the European Court of Justice, EU Member States Constitutional or Supreme Courts and European Human Rights Court have to continue and enhance the dialogue between themselves with regard to the application of EU law.

The interpretation of EU law must respect the multi-level approach in order to guarantee the role of national Constitutional and Supreme courts in fundamental (constitutional) rights protection. Therefore the ECJ must change and reorient its jurisprudence in Melloni's case and this strict view of the primacy principle, making it more flexible regarding constitutional rights and principles.

It is important to highlight the need of dialogue between the highest Courts at national, EU and Human Rights Convention level in order to guar-

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[59] *S.P.U.C. c. Grogan*, 1998, IR 343.

[60] STC 64/1991, 22 March, STC 252/1988, 20 December, among other sentences; and particularly DTC 1/1992 in relation to Maastricht Treaty ; and DTC 1/2004, in relation to European Constitution.

[61] Denmark Supreme Court, Maastricht Case, 6 April 1998, n I-361/1997.

[62] *Thoburn v. Sunderlaland Citi Council* (Queen's Bench Division, Divisional Court, 18 February 2002); *Mc. Whirter & Gouriet v. Secretary of State of Foreign and Commonwealth Affairs* (Court of Appeal (Civil Division), 5 March 2003).

[63] 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 dorit 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.

[64] Polish Constitutional Court (*Trybunal Konstytucyjny*) 11 V 2005 judgement K 18/04; 24 IX 2010 judgement K 32/09.

[65] Cyprus Supreme Court, 7 November 2005, Civil Appeal Nº 294/2005.

[66] 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.

antee -the best standard- fundamental rights protection in Europe. National Constitutional and Supreme Courts are one essential piece of the system and they can contribute to the higher protection of fundamental rights within the constitutional limits doctrine.

Maybe new EU Member States can follow this way better than older members in order to guarantee fundamental (constitutional) rights in Europe.

Certainly the ECJ is actually focused on the reinforcement of the EU law primacy principle in order to guarantee the uniformity of the EU legal order. Nevertheless the future EU's accession to the European Human Rights Convention will make the European Human Rights Court the last Court (also in EU law) as the guarantor of human rights. Therefore the dialogue between national Constitutional and Supreme Courts and the ECJ will be more necessary to preserve fundamental rights when applying EU law under the watchful eye of the EHRC.

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