THE STATE OF THE EUROPEAN UNION AS A RIGHTS-BASED LEGAL ORDER

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Honored guests, I am delighted to be here with you tonight in order to celebrate the 20th Anniversary of the Hauser Global Law School. This school has enabled students, scholars and government officials from the four corners of the globe to come together in this wonderful city of New York to teach and study alongside their American counterparts. At the Hauser Global Law School, the teaching of 'Law' is understood not only as an academic discipline but also as a vehicle for the mutual exchange of ideas that transcend national boundaries and, ultimately, bring people together.

I believe that the European integration project shares that same view of the law. As the preamble to the Treaty on European Union states, the EU aims to '[create] an ever closer union among the peoples of Europe',[1] whilst respecting their history, culture and traditions.

To quote the famous EUI Research Project led by Cappelletti, Seccombe and Weiler,[2] the question that thus arises is how 'integration through law' has reached that goal of bringing the peoples of Europe closer whilst, at the same time, respecting the separate identities of the EU's 28 Member States.

In my view, the answer to that question is – in a nutshell – that the EU has placed a high priority on respect for the rights of individuals. Striking the right balance between European unity and national diversity has largely been achieved through the judicial protection of the individual rights contained in EU law.

That being so, I shall first seek to explain why the EU is to be seen as a rights-based legal order.

Second, I shall support the contention that, as is the case with the rights protected in the majority of national constitutions, EU rights are frequently not absolute, but may be subject to limitations. Those limitations must be determined by means of a consensus reached either at the constitutional level or the legislative level, depending on the origin and nature of the rights concerned.

Finally, I shall argue that, subject to the overarching constitutional rules that govern the EU legal order, it is ultimately for the EU political process to strike the right balance between European unity and national diversity. That is so because the principle of representative democracy is a touchstone of the EU's legal and political system.

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[1] Preamble to the Treaty on European Union (TEU), [2012] OJ C 326/1.

[2] M. Cappelletti, M. Seccombe and J.H.H. Weiler, *Integration Through Law* (1986, De Gruyter, Berlin).

I. The EU and individual rights

Let us begin by going back to the moment when the idea of directly effective EU rights became a living truth.

On 5 February 1963, the European Court of Justice delivered its seminal judgment in the *van Gend en Loos* case,[3] whose 50th Anniversary was celebrated last year. Allow me to quote in full what is probably the most famous passage ever written in a judgment of the European Court of Justice:

> 'the [European Union] constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, [EU] law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage.'[4]

Due to its foundational constitutional significance, *van Gend en Loos* has often been compared to *Marbury v. Madison*.[5] Paraphrasing the words of Rita E. Hauser, *van Gend en Loos* constitutes a 'breakthrough in traditional doctrines of international law which in the past have prohibited a serious concern with individual rights'.[6] Indeed, by heralding the doctrine of direct effect, that ruling demonstrated that the European Union is a rights-based legal order.

The very essence of EU law is the principle that the individual rights it creates are directly enforceable before national courts and prevail over conflicting national norms. For every EU right, there must also be a judicial remedy, an idea that has been expressly confirmed by Article 19 TEU and Article 47 of the Charter of Fundamental Rights of the European Union (the 'EU Charter'). [7] It is on this constitutional axiom that the entire EU system of judicial protection is based.

The EU Treaties grant rights to individuals that are directly effective and that create for them a sphere of personal self-determination free from government interference. For example, by virtue of the EU Treaty provisions on citizenship, every citizen has the right to move and reside freely within the territory of the Member States. They also have the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, whether or not they are nationals of that State. In the same way, within the scope of application of the EU Treaties, any discrimination on grounds of

[3] Judgment in *van Gend & Loos*, 26/62, EU:C:1963:1.

[4] *Ibid*.

[5] *Marbury v. Madison*, 5 U.S. (Cranch 1) 137 (1803). See D. Halberstam, 'Constitutionalism and Pluralism in *Marbury* and *van Gend*', in M. Poiares Maduro and L. Azoulai (eds.), *The Past and Future of EU Law* (Oxford, Hart Publishing, 2010), at 26.

[6] R. E. Hauser, 'International Law and Basic Human Rights' (1980) 62 *International Law Studies Series. US Naval War College* 579.

[7] [2012] OJ C326/02.

nationality is prohibited.[8] In addition, the fundamental freedoms enshrined in EU law confer on European citizens and on companies based in the EU the right to pursue their economic activity throughout the Union. Moreover, the EU Treaty provisions on competition law – that is, antitrust law – protect European undertakings from abuses of a dominant position and from other anticompetitive behavior.

Moreover, like nation-state constitutions, EU law is committed to the protection of fundamental rights.[9] Originally recognized as judge-made principles of EU law, fundamental rights are now set out in the EU Charter. That Charter is the result of a pan-European political consensus that reflects the EU's attachment to respect for fundamental rights. The EU legal order thus has a written and legally binding catalogue of fundamental rights which stands on an equal footing with the EU Treaties.[10]

However, unlike those rights that are protected in the constitutions of nation-states, the fundamental rights enshrined in the EU Charter are not universally applicable. That is so because the provisions of the EU Charter 'are addressed to the Member States only when they are implementing [EU] law'. In contrast to the US doctrine of incorporation, according to which the US Bill of Rights applies to American States even in policy areas that are not governed by federal law, the scope of application of the EU Charter is limited to that covered by EU law.

That said, the individual rights laid down in the EU Treaties and in the EU Charter are the concrete expression of a 'constitutional consensus' and, as such, constitute the 'supreme law of the land' in all policy areas covered by EU law. This means, in particular, that the incorporation of international obligations into EU law must comply with fundamental rights as recognized by the EU Charter.

In the seminal *Kadi I* and *II* judgments,[11] the European Court of Justice held that 'the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the [EU Treaties].' In the case at hand, this meant that Regulation No 881/2002 implementing a UN Security Council Resolution that listed the persons associated with Al-Qaeda whose assets had to be frozen, was not exempt from judicial review, as this would run counter to 'the [constitutional] principle that all [EU] acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the [European Court of Justice] to review in the framework of the complete system of legal remedies established by the [EU Treaties]'.[12] Therefore, the European Court of Justice 'must ensure the review, in principle the full review, of the lawfulness of all Union acts in the light of the fundamental rights forming an integral part of the European Union legal order, including review of such measures as are designed to give effect to resolutions adopted by the

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[8] Article 18 TFEU.

[9] See Article 6 TEU.

[10] K. Lenaerts and J.A. Gutiérrez–Fons, 'The Place of the Charter in the EU Constitutional Edifice' in S. Peers, T. Hervey, J. Kenner and A. Ward (eds), *The EU Charter of Fundamental Rights: A Commentary* (Oxford, Hart Publishing, 2014), at 1557.

[11] Judgments of the ECJ in *Kadi and Al Barakaat International Foundation v Council and Commission ("Kadi I")*, C-402/05 P and C‑415/05 P, EU:C:2008:461 and *Commission v Kadi ("Kadi II")*, C-584/10 P, C-593/10 P and C-595/10 P, EU:C:2013:518.

[12] *Kadi I,* above n 11, para. 285.

Security Council under Chapter VII of the Charter of the United Nations'.[13] An international agreement which is in breach of those constitutional principles cannot form part of the EU legal order.[14]

Since fundamental rights stand at the apex of the hierarchy of EU norms, they can be relied upon not only vis-à-vis the Member States but also vis-à-vis the EU institutions.[15]

II. Limitations on individual rights

With the exception of the rights set out in Articles 1 to 5 of the EU Charter, [16] individual rights are not absolute, but may be subject to limitations. It is through those limitations that an appropriate balance is struck between the twin objectives of European unity and national diversity.

Compliance with the principle of democracy requires that balance to be the result of a legislative consensus. At EU level, legislative consensus is an integral part of the political process. In the present context that expression should be understood broadly as covering not only EU norms that are adopted unanimously by the Council, but all secondary EU legislation that is adopted in accordance with the procedural requirements laid down in this respect in the founding EU Treaties.

It is for the Member States – which are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens – and for the Peoples of Europe – which are directly represented at Union level in the European Parliament – to decide whether national diversity should yield to European unity and, if so, to what extent.

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[13] See also *Kadi II,* above n 11, para. 97.

[14] It is worth noting that Mr. Kadi was also subject to blocking orders in the US. However, he was unsuccessful in challenging the decision of the Office of Foreign Assets Control that ordered the freezing of his assets. *See*, in this regard, *Kadi v. Geithner*, __ F. Supp. 2d __, 2012 WL 898778 at 11 (D.D.C Mar. 19, 2012). Regarding the standard of review, the US District Court for the District of Columbia held that "Courts are particularly mindful that their review is highly deferential when matters of foreign policy and national security are concerned." *See* also *Regan v. Wald*, 468 U.S. 222, 242 (1984) and *Holy Land Found*., 219 F. Supp. 2d at 84 (holding that "[b]locking orders are an important component of U.S. foreign policy, and the President's choice of this tool to combat terrorism is entitled to particular deference".) See J. C. Daskal, *Pre-Crime Restraints: The Explosion of Targeted, Noncustodial Prevention* (2014) 99 *Cornell Law Review* 327, at 341-344

[15] See, in relation to the free movement of goods, judgments in *Denkavit Nederland*, 15/83, EU:C:1984:183, para. 15; *Meyhui*, C-51/93, EU:C:1994:312, para. 11; *Kieffer and Thill*, C-114/96, EU:C:1997:316, para. 27, and *Swedish Match*, C-210/03, EU:C:2004:802, para. 59. Regarding the free movement of workers, see, e.g., judgment in *Vatsouras and Koupatantze*, C-22/08 and C‑23/08, EU:C:2009:344, para. 33.

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

A. Compliance with constitutional consensus

It goes without saying that the 'legislative consensus' must comply with the 'constitutional consensus'. Where norms that form part of the EU legislative consensus are relevant, the role of the European Court of Justice is thus limited to verifying that the level of protection accorded to an individual right, as it has been framed by the EU political process, complies with that constitutional consensus. Two examples may illustrate this point.

In 2004, the EU adopted Regulation No 2252/2004 in order to harmonize the security features and biometrics in passports of the Member States.[17] In particular, it provides that two fingerprints of the passport holder are to be taken and stored in a highly secure chip contained in the passport. In *Schwarz*,[18] the European Court of Justice was called upon to decide whether that requirement was compatible with the fundamental right to privacy and with the right to the protection of personal data enshrined respectively in Articles 7 and 8 of the EU Charter. It replied in the affirmative. Whilst the taking and storing of fingerprints constituted a limitation on those fundamental rights, the EU Regulation pursued two legitimate objectives, i.e. first to prevent the falsification of passports and second to prevent the fraudulent use thereof. Finally, the limitation on those fundamental rights was proportionate as no less restrictive alternatives were available to attain those two objectives. Hence, Regulation No 2252/2004 complied with the constitutional consensus.

By contrast, in *Digital Rights Ireland*, [19] a case also involving the fundamental rights to privacy and to the protection of personal data, the European Court of Justice reached a different conclusion. In 2006, the European Union adopted Directive 2006/24 that obliged telephone and internet providers to retain bulk metadata that made it possible to know the identity of the person with whom the user had communicated and the means by which that communication had been effected, as well as to identify the time and the place of the communication, and, moreover, to ascertain the frequency with which the subscriber or registered user communicated with certain persons during a given period.[20] As the European Court of Justice noted, that Directive '[generated] in the minds of the persons concerned the feeling that their private lives are the subject of constant surveillance'; in other words, to borrow the famous expression coined by George Orwell in his dystopian novel 'Nineteen Eighty-Four', the feeling that 'Big Brother is watching you'. Accordingly, it found that Directive 2006/24 constituted a limitation on those fundamental rights.

The European Court of Justice observed that Directive 2006/24 pursued two objectives of general interest recognized by the EU, namely 'the fight against international terrorism in order to maintain international peace and security' and 'the fight against serious crime in order to ensure public security'. However, Directive 2006/24 was a disproportionate limitation on the rights to privacy and to the protection of personal data. The European Court of Justice reasoned that that Directive failed to set out either substantive or procedural criteria determining the circumstances under which national authorities could have access to the data.

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[17] Council Regulation (EC) No 2252/2004 of 13 December 2004 on standards for security features and biometrics in passports and travel documents issued by Member States, [2004] OJ L 385/1.

[18] Judgment in *Schwarz*, C-291/12, EU:C:2013:670

[19] Judgment in *Digital Rights Ireland*, C-293/12 and C-594/12, EU:C:2014:238.

[20] Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, [2006] OJ L 105/54.

In particular, the European Court of Justice pointed out that 'access by the competent national authorities to the data was not subject to a prior review by any court or independent administrative body'. Accordingly, since the level of protection granted to those fundamental rights by Directive 2006/24 did not comply with the EU Charter, i.e. with the constitutional consensus, the European Court of Justice declared it invalid.

Interestingly, a similar case has been brought before the US federal courts. In *Klayman v. Obama*,[21] the U.S. District Court for the District of Columbia held that the National Security Agency (NSA)'s bulk phone metadata collection program operated under Section 215 of the USA Patriot Act,[22] was unconstitutional as it breached the right to privacy under the Fourth Amendment. In that case, after describing the technology used by the NSA as 'almost Orwellian',[23] Federal Judge Leon noted that '[he could not] imagine a more "indiscriminate" and "arbitrary invasion" than this systematic and high-tech collection and retention of personal data on virtually every single citizen for the purposes of querying and analyzing it without prior judicial approval. Surely, such a program infringes on "that degree of privacy" that the Founders enshrined in the Fourth Amendment.'[24] The US Government has brought an appeal against that judgment before the US Court of Appeals for the District of Columbia, which is currently pending.

B. Three types of legislative consensus

One may distinguish three types of legislative consensus according to the degree of discretion that is allowed to the Member States,. First, the legislative consensus may, in a particular context, set a uniform level of protection of an individual right that precludes Member States from providing for a different level of protection.

Second, the EU legislator may decide not to set a uniform level of protection. Instead, it will be for each Member State to define the level of protection that best reflects its own values. Obviously, in so doing, the national legislator must choose a level of protection that is not lower than that guaranteed by the EU Charter, i.e. by the EU constitutional consensus. In addition, that level must not call into question the EU measure being implemented by national law.

Between those two extremes, it is possible for the EU legislator to opt for a 'third-way'. It may decide to lay down a regulatory framework that determines, albeit in a general and abstract fashion, the level of protection to be afforded to a particular individual right. In that case, it is for the European Court of Justice to provide guidance as to the way in which that framework is to be applied in a particular context. Such an EU regulatory framework allows room for flexibility and may have the advantage of leaving sufficient latitude for solutions to be found that equip the Union to meet the challenges brought about by societal changes, new scientific discoveries and technological progress.

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[21] Judgment in *Klayman v. Obama*, 957 F.Supp.2d 1 D.D.C., of 16 December 2013.
[22] 50 U.S.C. § 1861(a)(1).
[23] *Klayman v. Obama*, at 33.
[24] *Ibid*., at 42.

Allow me to illustrate those three types of legislative consensus by looking at the rulings of the European Court of Justice in *Melloni*, *Jeremy F.* and *Google Spain*.

1. A uniform standard of protection

As we all know, over the past sixty years, the European Union has changed. Its remit is no longer confined to economic matters relating to the establishment and functioning of the internal market, but has evolved with successive EU Treaty reforms to cover a far broader range of subject matters. Consequently, the Union now exercises powers over areas of activity which had traditionally been reserved to the nation-state.

As Title V of Part III of the TFEU shows, matters such as criminal law and family law are no longer the exclusive preserve of national sovereigns. Through the adoption of regulations or directives in the Area of Freedom, Security and Justice (the 'AFSJ'), the EU legislator is now called upon to take policy decisions that are likely to affect the daily lives of European citizens.

Indeed, the role played by the principle of mutual recognition in the field of the internal market differs significantly from the way in which that principle operates in the AFSJ, notably when it comes to judicial cooperation in criminal matters. Unlike economic integration which is always built upon the protection of fundamental freedoms, integration in criminal matters often limits the rights of the person concerned (the principle of *ne bis in idem* constitutes an important exception, in that regard). One of the main objectives of European integration in criminal matters is to prevent criminals from exploiting free movement as a means for pursuing their illegal activities with impunity. By facilitating the mutual recognition of judicial decisions in criminal matters, the AFSJ supports the effectiveness of national criminal laws.

For example, where the EU legislator has harmonized the level of fundamental rights protection in the field of judicial cooperation in criminal matters and the Member State issuing a European arrest warrant complies with that level, the Member State responsible for executing the arrest warrant may not oppose execution on the ground that the judgment or order of the issuing Member State fails to comply with fundamental rights as defined under its own national law, i.e. the law of the executing Member State. In that regard, it is legitimate for the EU legislator to place limitations on individual rights, since the Member States may rest assured that those limitations comply with the EU Charter, i.e. with the EU constitutional consensus.

The ruling of the European Court of Justice in *Melloni*,[25] a case involving questions relating to the validity and interpretation of the EU Framework Decision on the European Arrest Warrant,[26] illustrates this point. In that case, the EU legislator sought to harmonise the grounds for non-recognition of decisions rendered following a trial at which the person concerned did not appear in person (conviction *in absentia*). To that end, it laid down a list of circumstances in which, in spite of the fact that the person concerned was convicted *in*

[25] Judgment in *Melloni*, C-399/11, EU:C:2013:107.

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

absentia, the European arrest warrant was nevertheless to be executed. The Framework Decision states in this respect that the execution of a decision rendered *in absentia* may not be refused where the person concerned was aware of the time and place of the scheduled trial, appointed legal counsel, and was in fact defended by that counsel at the trial. The Spanish Constitutional Court asked whether the Framework Decision allowed for value diversity, given that, under the Spanish Constitution, the execution of a decision rendered *in absentia* was always conditional upon a retrial. The European Court of Justice replied in the negative. In striking the balance between enhancing mutual recognition of judicial decisions in criminal matters and the rights of the defense, the EU legislator had defined the precise level of fundamental rights protection with which all Member States were to comply. Thus, the EU legislative consensus prevailed over value diversity. The Spanish Constitutional Court went on to ask whether that legislative consensus was compatible with the EU Charter, to which the European Court of Justice replied in the affirmative. Indeed, the balance struck by the EU legislator was held to comply with the rights enshrined in Articles 47 (the right to an effective remedy and to a fair trial) and 48 (presumption of innocence and rights of defense) of the EU Charter. In so ruling, the European Court of Justice held that the fundamental right to effective judicial protection and the rights of the defense are not absolute but may be subject to limitations, provided that those limitations pursue a legitimate objective and are compatible with the principle of proportionality. This was indeed the case. The strengthening of mutual recognition of judicial decisions in criminal matters is an objective recognized by the EU Treaties. As to the principle of proportionality, the Framework Decision lays down the circumstances in which the person concerned must be deemed to have waived, voluntarily and unambiguously, his or her right to be present at the trial. Hence, the European Court of Justice ruled that the legislative consensus set out in the Framework Decision complied with the constitutional consensus reflected in the EU Charter.[27]

The Spanish Constitutional Court gave effect to this ruling of the European Court of Justice by altering its traditional interpretation of the relevant provision of the Spanish Constitution when that provision was applied in the context of the execution of a European arrest warrant issued by a court of another EU Member State.

2. National constitutional diversity

Before examining the ruling of the European Court of Justice in *Jeremy F.*,[28] it is worth pointing out that the issuing of a European arrest warrant must comply with the principle of specialty. This means that a warrant may only be executed in respect of the offences listed therein. If the requesting authority wishes to prosecute the person surrendered for offences other than those for which that person has been surrendered, the executing judicial authority must adopt a decision agreeing to such prosecution. The facts of the case, which were all over the UK media, are as follows. A high school teacher, Mr Jeremy F., had run away with one of

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[27] See K. Lenaerts and J.A. Gutiérrez-Fons, above n 10, at 1557. See also V. Skouris, 'Développements récents de la protection des droits fondamentaux dans l'Union européenne: les arrêts *Melloni* et *Åkerberg Fransson*' (2013) *Il diritto dell'Unione Europea* 229, 241. See also N. de Boer, Case Note on *Melloni* (2013) 50 *Common Market Law Review* 1083, 1096; D. Ritleng, 'De l'articulation des systèmes de protection des droits fondamentaux dans l'Union: les enseignements des arrêts *Åkerberg Fransson* et *Melloni'* (2013) *Revue trimestrielle de droit européen* 267, 283, and D. Sarmiento, 'Who's afraid of the Charter? The Court of Justice, national courts and the new framework of fundamental rights protection in Europe'(2013) 50 *Common Market Law Review* 1267.

[28] Judgment in *Jeremy F.*, C-168/13 PPU, EU:C:2013:358.

his female students, a minor, when the UK authorities issued a European arrest warrant against him in connection with criminal proceedings relating to actions which could be classified as child abduction under English law. A few days later, he was detained by French authorities and consented to be handed over to the UK authorities. The European arrest warrant was executed by the *Cour d'appel de Bordeaux*, and Mr Jeremy F. was sent to the UK.

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

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

Having doubts as to the compatibility of that Article of the French Code of Criminal Procedure with the French Constitution, the French *Conseil constitutionnel* asked the European Court of Justice whether the Framework Decision had to be interpreted as precluding Member States from providing for a constitutional right which would enable the person concerned to bring an appeal having suspensive effect against a decision agreeing to a request such as the one at issue.

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

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

3. Giving concrete expression to legislative consensus

The third type of legislative consensus relates to EU norms that lay down a regulatory framework that Member States must apply in a manner that strikes a balance between the opposing rights and interests involved.

For example, 'Directive 95/46[[29]] is intended to ensure free movement of personal data' while 'ensuring a high level of protection of the fundamental rights and freedoms of natural persons, in particular their right to privacy, with respect to the processing of personal data'.[30] Since Directive 95/46 must comply with the constitutional consensus, the regulatory framework laid down therein must be interpreted in light of the fundamental rights to privacy and to the protection of personal data enshrined respectively in Articles 7 and 8 of the EU Charter.

Moreover, given that Directive 95/46 provides for the complete harmonization of the relevant national laws,[31] the level of protection to be afforded to those fundamental rights must remain the same throughout the EU and, accordingly, Member States may not depart from that level.

More specifically, Directive 95/46 confers rights on data subjects. It provides that personal 'data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law, that everyone has the right of access to data which have been collected concerning him or her and the right to have the data rectified, and that compliance with these rules is to be subject to control by an independent authority'. It also states that 'Member States are to guarantee every data subject the right to obtain from the controller, as appropriate, the rectification, erasure or blocking of data the processing of which does not comply with the provisions of Directive 95/46, in particular because of the incomplete or inaccurate nature of the data'.[32]

In addition, Article 7 of Directive 95/46 'sets out an exhaustive and restrictive list of [six principles] in which the processing of personal data can be regarded as being lawful'.[33] Regarding the last of those principles, Article 7(f) of that Directive 'sets out two cumulative conditions that must be fulfilled in order for the processing of personal data to be lawful: firstly, the processing of the personal data must be necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed; and, secondly, such interests must not be overridden by the fundamental rights and freedoms of the data subject'.[34] As the European Court of Justice noted in *ASNEF*, 'application of Article 7(f) thus necessitates a balancing of the opposing rights and interests concerned, in the context of which account must be taken of the significance of the data subject's rights arising from Articles 7 and 8 of the EU Charter'.[35] However, when striking

[29] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, [1995] OJ L 281/31.

[30] See also judgments in *ASNEF and FECEMD*, C-468/10 and C-469/10, EU:C:2011:777, para. 29 and *IPI*, C-473/12, EU:C:2013:715, para. 28.

[31] Judgment in *Lindqvist*, C-101/01, EU:C:2003:596, para. 96.

[32] Judgment in *Google Spain and Google*, C-131/12, EU:C:2014:317, paras 69-70.

[33] *ASNEF and FECEMD*, above n 30, para. 30.

[34] *Ibid.*, para. 38.

[35] *Ibid.*, para. 40.

that balance, Member States 'cannot introduce principles relating to the lawfulness of the processing of personal data other than those listed in Article 7 thereof, nor can they amend, by additional requirements, the scope of the six principles provided for in Article 7'.[36] Finally, where the data subject considers that the processing of his or her personal data does not respect that balance, he or she may object, at any time, to that processing.[37]

It follows from the foregoing that Directive 95/46 lays down a regulatory framework within which the balance between legitimate interests and the rights of data subjects must be struck. It is thus for the European Court of Justice, as the ultimate arbiter on all issues concerning the interpretation of EU law, to define how that balance should be achieved in a particular context.

In this regard, in the *Google Spain* case, the European Court of Justice was called upon to apply that regulatory framework in the context of the internet.[38] In particular, that case related to the conflict between, on the one hand, the legitimate interest of internet users in having access to information and, on the other hand, the so-called 'right to be forgotten'. It concerned an individual who objected to the fact that a Google search under his name continued to direct users to newspaper reports concerning a real-estate auction that took place in 1998 connected with attachment proceedings against him under national law, prompted by the social security debts that he then owed.

In substance, the European Court of Justice ruled in favor of that individual. After noting that Directive 95/46 applied to situations such as that in the case at hand, the European Court of Justice found that the processing of personal data by Google constituted an interference with the fundamental rights to privacy and to the protection of personal data of the person whose name made the object of a search, 'since that processing enable[d] any internet user to obtain through the list of results a structured overview of the information relating to that individual that can be found on the internet — information which potentially concerns a vast number of aspects of his private life and which, without the search engine, could not have been interconnected or could have been only with great difficulty — and thereby to establish a more or less detailed profile of him'. The adverse effects of that interference were heightened by the fact that information available on the internet 'is ubiquitous'.[39]

In the light of the potential seriousness of that interference, the European Court of Justice reasoned that those rights override, as a general rule, not only the economic interest of the operator of the search engine but also the interest of the general public in having access to that information upon a search relating to the data subject's name. However, that is not the case if it appears, for specific reasons, such as the role played by the data subject in public life, that the interference with his fundamental rights is justified by the preponderant interest of the general public in having, on account of its inclusion in the list of results, access to the information in question.[40]

[36] *Ibid.*, para. 36.
[37] See subparagraph (a) of the first paragraph of Article 14 of Directive 95/46.
[38] *Google Spain and Google*, above n 32.
[39] *Ibid.*, para. 80.
[40] *Ibid.*, para. 81.

Accordingly, in the absence of any such preponderant public interest, the operator of a search engine is obliged to remove from the list of results displayed following a search made on the basis of a person's name, links to web pages, published by third parties and containing information relating to that person. That obligation even applies to cases where the publication of the relevant name or information on those web pages is, in itself, lawful.[41]

Moreover, the European Court of Justice noted that 'even initially lawful processing of accurate data may, in the course of time, become incompatible with [Directive 95/46'] where those data are no longer necessary in the light of the purposes for which they were collected or processed'.[42] If that is the case, the information relating to the person concerned must be eliminated from the search engine results. That is so regardless of whether that information causes prejudice to that person.[43]

The ruling of the European Court of Justice has attracted the media attention from around the globe. It has been praised by defenders of the right to privacy and seen as a dangerous precedent by some supporters of free speech. In particular, it has caught the attention of US scholars, some of whom have argued that a 'right to be forgotten' akin to that guaranteed by Directive 95/46 would be difficult to reconcile with the right to free speech under the US Constitution.[44]

Be that as it may, *Google Spain* illustrates the fact that the application of an EU regulatory framework that balances fundamental rights will, in practice, frequently give rise to divisions in public opinion. Paraphrasing the words of Eric Stein, gone are the days when the European Court of Justice was '[t]ucked away in the fairy land Duchy of Luxembourg and blessed […] with benign neglect by the powers that be and the mass media'.[45]

However, in my view, media attention and public interest in the rulings of the European Court of Justice are a welcome development, since they offer the opportunity for the European Court of Justice to understand more readily how its rulings are perceived by a whole range of 'stakeholders'. Whilst the European Court of Justice must, at all costs, remain independent, EU law does not exist in a vacuum and must, I believe, be treated as what the *European Law Journal* has called 'a law in context'.[46]

Moreover, it is worth noting that the European Commission has proposed the adoption of a new General Data Protection Regulation that will, if adopted, repeal Directive 95/46.[47] As the Explanatory Memorandum states, whilst '[t]he current framework remains sound as far as its objectives and principles are concerned, … it is time to build a stronger and more coherent data protection framework in the EU, backed by strong enforcement that will allow the digital economy to develop across the internal market, put individuals in control of their own data

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[41] *Ibid*., para. 88.
[42] *Ibid*., para. 93.
[43] *Ibid*., para. 96.
[44] For a comparative study on the right to be forgotten, see, e.g., S C. Bennett, 'The "Right to Be Forgotten": Reconciling EU and US Perspectives' (2012) 30 *Berkeley Journal of International Law* 161.
[45] E. Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution' (1981) 75 *American Journal of International Law* 1.
[46] See, in this regard, the 'new approach' of the *European Law Journal*.
[47] Communication from the Commission COM (2012) 10.

and reinforce legal and practical certainty for economic operators and public authorities'.[48] Thus, the proposed Regulation aims to define in a precise and clear fashion how the balance between the right to freedom of expression and the right to privacy is to be struck in a digital context. In that regard, Article 17 of the proposed Regulation codifies and clarifies 'the right to be forgotten' as defined by the European Court of Justice in *Google Spain*.[49]

C. In the absence of EU legislation

Logically, national diversity may also arise in the absence of EU legislative action. Where a matter falls within the scope of EU law and the EU legislator has not passed legislation determining the precise level of protection that must be given to an individual right, it is for the society of each Member State to make that determination according to its own preferences. However, since pluralism is not an absolute value, the level of protection granted to an individual right by a Member State must comply with any constitutional consensus that exists at EU level.

For example, in the *Omega* case,[50] the Bonn police authority prohibited Omega from offering games involving the simulated killing of human beings on the ground that they infringed human dignity (laser tag). Given that Omega had entered into a franchise contract with a British company from which it obtained the equipment, it argued that the ban was contrary to the freedom to provide services, a right enshrined in Article 56 TFEU.

As there was no EU legislation applicable to the case at hand, the European Court of Justice was called upon to determine whether German authorities had acted in compliance with the EU constitutional consensus as expressed by Article 56 TFEU. This meant, in essence, that the European Court of Justice was asked to determine whether the ban constituted a restriction on the freedom to provide services, if so, whether it pursued an objective recognized as legitimate under EU law and if so, whether it was proportionate.

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[48] Communication from the Commission COM (2012) 11, at 2.

[49] See Article 17 of the Proposed Regulation (as amended by the European Parliament)

'*Article 17* Right to erasure

1. The data subject shall have the right to obtain from the controller the erasure of personal data relating to them and the abstention from further dissemination of such data, and to obtain from third parties the erasure of any links to, or copy or replication of that data, where one of the following grounds applies:

(a) the data are no longer necessary in relation to the purposes for which they were collected or otherwise processed

(b) the data subject withdraws consent on which the processing is based according to point (a) of Article 6 (1), or when the storage period consented to has expired, and where there is no other legal ground for the processing of the data;

(c) the data subject objects to the processing of personal data pursuant to Article 19;

(a) a court or regulatory authority based in the Union has ruled as final and absolute that the data concerned must be erased;

(d) the data has been unlawfully processed.'

Text available at: http://ec.europa.eu/justice/data-protection/files/factsheets/factsheet_data_protection_en.pdf.

[50] Judgment in *Omega,* C–36/02, EU:C:2004:614.

At the outset, the European Court of Justice noted that the ban constituted a restriction on the freedom to provide services which, nevertheless, pursued an objective recognized as legitimate under EU law, i.e. the protection of human dignity.

Moreover, despite the effect on trade, the German authorities' attitude had nothing to do with the fact that the equipment was imported from the UK. Hence, there was no intent to insulate the local market from external competition.

In the US and in other EU Member States, a ban on laser tags may be seen as a disproportionate restriction on the freedom to provide services. In the eyes of a US observer who has the constitutional right to bear arms, such a ban may appear to be excessive. However, the European Court of Justice ruled, in this regard, that, for the purposes of applying the principle of proportionality, '[i]t is not indispensable […] for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected'. Thus, the fact that a Member State other than Germany had chosen a system of protection of human dignity that was less restrictive of the freedom to provide services did not mean that the German measure was contrary to the constitutional consensus at EU level.

Given that the ban satisfied the level of protection required by the German constitution and did not go beyond what was necessary to achieve that result, the European Court of Justice considered that it was a justified restriction on the freedom to provide services and, hence, compatible with the EU constitutional consensus.

In *Omega*, the European Court of Justice did not seek to impose a common conception of human dignity. Nor did it embrace the national conception prevailing outside Germany which was more protective of an EU right, namely the freedom to provide services. Instead, it followed an approach based on 'value diversity' according to which national constitutional traditions are not in competition with the economic objectives of the Union, but form part of an integrated whole together with them.

It follows that, in the absence of EU legislative consensus, and in so far as there are no national measures producing a protectionist effect (or having a protectionist intent), Member States enjoy broad leeway to safeguard national interests which are deemed fundamental to their identity. Beyond a core nucleus of shared values in respect of which the European Court of Justice must ensure uniformity, the substantive law of the EU must not disregard the cultural, historical, and social heritage that is part and parcel of national constitutional traditions. For example, in the context of gambling, the European Court of Justice has noted that 'the legislation on games of chance is one of the areas in which there are significant moral, religious and cultural differences between the Member States. In the absence of [EU] harmonisation in the field, it is for each Member State to determine in those areas, in accordance with its own scale of values, what is required in order to ensure that the interests in question are protected'.[51]

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[51] See judgment in *Liga Portuguesa de Futebol Profissional and Baw International*, C‑42/07, EU:C:2009:519, para. 57 and case law cited.

III. Concluding remark

European values which are the result of a constitutional consensus are embedded in primary EU law. It is essentially for the political process to determine when, and indeed whether, those norms – which require the unanimous consent of the Member States and, where appropriate, of their citizens – should be adopted.

The existence or absence of an EU legislative consensus provides an answer to the question whether the Member States are developing at the same pace and in the same manner or whether national societies are evolving in accordance with their own scales of values. That being said, national diversity and EU legislative consensus must both comply with values which are regarded as pan-European, i.e. those that are the object of a constitutional consensus at EU level.

Thank you very much.