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ARTICLE

## The Essence of Rights: An Unreliable Boundary?

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### Abstract

Article 52(1) of the EU Charter of Fundamental Rights lays down respect for the essence of right as one of the requirements that limitations on rights must respect. This provision is not innovative, as it formalizes into EU law the distinction between “core” and “periphery” of rights present in many national constitutions and in the ECJ and ECtHR case law. Nonetheless, the express reference to essence has given unprecedented resonance to that concept. Essence as the “limit of limits” has a Janus-like character. On the one hand, it pronounces that every fundamental right bears a minimum content which is ringfenced from interference by public and private actors. On the other hand, it stresses the malleability of rights and their social function. The core/periphery dichotomy reflects a balancing act moored in European legal tradition whose symbolism outperforms its utility as a judicial tool. This Article examines the essence clause of the Charter in light of the ECJ case law and the constitutional traditions of the Member States and assesses its role in the framework of fundamental rights protection in EU law. The Article first attempts a classification of rights limitations clauses in national constitutions, following which it discusses the interpretation of essence by the Spanish and the Italian Constitutional Courts. The Article then engages with a theoretical discussion of the concept of essence and examines the case law of the ECJ. Lastly, it looks at the limitations of the concept as a rights protection instrument in EU law.

**Keywords:** Essence of rights; fundamental rights; EU Charter of Fundamental Rights; European Court of Justice; national constitutions

### A. The General Limitations Clause of Article 52(1)

Under Article 52(1) of the Charter, any limitation on the exercise of the rights and freedoms recognized therein must satisfy the following conditions: It must be (a) provided for by law; (b) respect their essence; and (c) comply with the principle of proportionality. This means that limitations may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others.<sup>1</sup> The general interests recognized by the Union which may justify limitations cover both the objectives referred to in Article 3 TEU and other interests protected by specific provisions of the Treaties such as

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<sup>1</sup>See European Union Charter of Fundamental Rights art. 52(1), Oct. 2, 2000 [hereinafter EUCFR], last sentence (“Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.”).

Article 4(1) TEU and Articles 35(3), 36, and 346 TFEU.<sup>2</sup> Article 52(1) does not qualify absolute rights such as the prohibition of the death penalty or the prohibition of torture.<sup>3</sup> It applies only where such limitations are recognized, expressly or implicitly, by the Charter provision establishing the right in question. Also, Article 52(1) applies only in relation to rights and freedoms and not to principles: Those are *ex-hypothesi* more general and do not acquire legal effect unless they are concretized by legislation, although it is sometimes difficult to know whether a provision establishes a right or a principle.<sup>4</sup>

Whilst much has been written about proportionality, little attention has been paid to the second condition of Article 52(1). The essence of the right as a limit of limits—*Schranken-Schranken*—derives from the constitutional traditions of the Member States and also reflects established pre-Charter case law of the ECJ.<sup>5</sup> Nevertheless, its express inclusion in Article 52(1) had a complex journey. During the drafting of the Charter, E. Van Dam MEP argued strongly in favor of the inclusion of specific limitations to fundamental rights.<sup>6</sup> Many other members of the drafting Convention expressed doubts as to the need to include reference to the protection of the essence in a general provision. Such disagreements led to the clause of Article 52(1) being redrafted several times.<sup>7</sup> Initially, the wording required the limitations of rights not to infringe “the essential content (*contenu essentiel*)”<sup>8</sup> which was later modified into the requirement to respect the “actual substance (*substance même*)” of rights. For a short while the concept disappeared from the text of the Charter,<sup>9</sup> but eventually found its way into the final text.

## B. The Essence of Rights in National Constitutional Traditions

Respect for the essence as a limitation on fundamental rights restrictions is an attribute of the European postwar constitutional compact. One can identify three patterns in European constitutional texts. A number of constitutions contain general clauses on limitations of fundamental rights which make express reference to the protection of the essence. A second category includes general limitation clauses which do not include such specific references. Finally, some European constitutions do not contain a *chapeau* clause, but provide for specific limitations in relation to individual rights.

Article 19(2) of the German *Grundgesetz* is the departure point of the first category. It states categorically that “[i]n no case may the essence of a basic right be affected.” In fact, an earlier reference to the essence can be found in the Hessen Constitution of 1946.<sup>10</sup> Similar references are found in a number of European constitutions, mostly as a result of influence by the

<sup>2</sup>See Praesidium Explanations accompanying the Charter, 2007 O.J. (C 303/17) 32. The provisions of the Charter must be interpreted with due regard to the Explanations: See art. 6(1) TEU and E.U. Charter art. 52(7).

<sup>3</sup>See EUCFR arts. 2(1), 4; *infra* Section H.

<sup>4</sup>See Takis Tridimas, *Fundamental Rights, General Principles of EU Law, and the Charter*, 16 CAMBRIDGE Y.B. EUR. LEGAL STUD. 361 (2014).

<sup>5</sup>See *infra* Section D.

<sup>6</sup>Draft Charter of Fundamental Rights of the European Union, Oct. 11, 2000, [http://www.europarl.europa.eu/charter/pdf/04473\\_en.pdf](http://www.europarl.europa.eu/charter/pdf/04473_en.pdf).

<sup>7</sup>Maja Brkan, *In Search of the Concept of Essence of EU Fundamental Rights through the Prism of Data Privacy*, 1 MAASTRICHT WORKING PAPERS FACULTY OF LAW, 4 (2017).

<sup>8</sup>Draft Charter of Fundamental Rights of the European Union art. Y, Feb. 11, 2000, [http://www.europarl.europa.eu/charter/activities/docs/pdf/convent05\\_en.pdf](http://www.europarl.europa.eu/charter/activities/docs/pdf/convent05_en.pdf).

<sup>9</sup>Draft Charter of Fundamental Rights of the European Union art. 50, July 28, 2000, [http://www.europarl.europa.eu/charter/activities/docs/pdf/convent45\\_en.pdf](http://www.europarl.europa.eu/charter/activities/docs/pdf/convent45_en.pdf).

<sup>10</sup>See HESSEN CONSTITUTION, Dec. 1, 1948, art. 63(1). Essence limitations were also included in other Land constitutions adopted after the Basic Law. See e.g., BERLIN CONSTITUTION, Sept. 1, 1950, art. 23(2) (now art. 36(2), amended Nov. 23, 1995 & Mar. 22, 2016); BRANDENBURG LAND CONSTITUTION, Aug. 20, 1992, art. 5(2).

German Basic Law, including those of Estonia,<sup>11</sup> Hungary,<sup>12</sup> Portugal,<sup>13</sup> Poland,<sup>14</sup> Romania,<sup>15</sup> the Slovak Republic,<sup>16</sup> Spain,<sup>17</sup> Switzerland,<sup>18</sup> and the Czech Charter of Fundamental Rights.<sup>19</sup>

Examples of the second category—general limitation clauses which do not include specific reference to the essence of rights—are provided by the constitutions of Croatia,<sup>20</sup> Cyprus,<sup>21</sup> Greece,<sup>22</sup> and Lithuania.<sup>23</sup> Interestingly, in Greece, a proposal to protect expressly the essential content of a right during the drafting of the 1975 Constitution was rejected as was a similar proposal in a subsequent constitutional revision.<sup>24</sup> Examples of the third category are provided by the constitutions of Austria, Bulgaria, Denmark, Finland, France, Italy, Ireland, Latvia, Luxembourg, and the Netherlands. Those constitutions may lay down limitations in relation to specific rights,<sup>25</sup> but do not contain a *chapeau* clause.

The three models outlined above are replicated beyond the borders of Europe although specific reference to the essence is less frequent. Under Spanish influence, the Chilean Constitution expressly safeguards essence.<sup>26</sup> The Canadian Charter of Rights and Freedoms<sup>27</sup> belongs to the second category, as does the Indian Constitution.<sup>28</sup> A notable case is South Africa. Whilst Section 33(1)(b) of the Interim Constitution of 1993 expressly stated that any limitation “shall not negate the essential content of the right in question,”<sup>29</sup> the general limitation clause included in Section 36 of the final Constitution of 1996 omitted such a reference.<sup>30</sup>

<sup>11</sup>EESTI VABARIIGI PÕHISEADUS [CONSTITUTION] June 28, 1992, ch. II, para. 11 (Est.).

<sup>12</sup>MAGYARORSZÁG ALAPTÖRVÉNYE [THE FUNDAMENTAL LAW OF HUNGARY], ALAPTÖRVÉNY Apr. 25, 2011, art. 8(2).

<sup>13</sup>CONSTITUTION OF THE PORTUGUESE REPUBLIC Apr. 25, 1976, art. 18(3) (prohibiting laws which “reduce the extent or scope of the essential content of the provisions of this Constitution”).

<sup>14</sup>KONSTYTUCJA RZECZYPOSPOLITEJ POLSKIEJ [CONSTITUTION] Apr. 2, 1997, arts. 31, 53(2).

<sup>15</sup>CONSTITUȚIA ROMÂNIEI [CONSTITUTION] Dec. 8, 1991, art. 53(2) (referring to the requirement that restrictions must be “without prejudice to the existence [‘existent’] of the right or freedom in question”).

<sup>16</sup>ŪSTAVA SLOVENSKEJ REPUBLIKY [CONSTITUTION] Oct. 1, 1992, art. 13(4) (Slovk.).

<sup>17</sup>C.E., B.O.E. n. 311, Dec. 29, 1978., art. 53(1) (Spain) (referring to respect of the “essential content” of a right).

<sup>18</sup>BUNDESVERFASSUNG [BV] [CONSTITUTION] Apr. 18, 1999, art. 36(4) (Switz.).

<sup>19</sup>Czech Republic: Charter of Fundamental Rights and Freedoms art. 4(4), Jan. 9, 1991. The Charter is part of the Czech Constitution. See ŪSTAVA ČESKÉ REPUBLIKY [CONSTITUTION OF THE CZECH REPUBLIC] Jan. 1, 1993, art. 3.

<sup>20</sup>Ustav Republike Hrvatske [Constitution] Dec. 22, 1990, art. 16 (Croat.).

<sup>21</sup>ΣΥΝΤΑΓΜΑ ΤΗΣ ΚΥΠΡΙΑΚΗΣ ΔΗΜΟΚΡΑΤΙΑΣ [CONSTITUTION OF THE REPUBLIC OF CYPRUS] Aug. 16, 1960, art. 33.

<sup>22</sup>1975 SYNTAGMA [SYN.] [CONSTITUTION] art. 25(1) (Greece).

<sup>23</sup>Lietuvos Respublikos Konstitucija [Constitution of the Republic of Lithuania] Oct. 25, 1992, art. 28.

<sup>24</sup>See A.G. RAIKOS, CONSTITUTIONAL LAW: FUNDAMENTAL RIGHTS, Vol. III, 167 (Law Library Press, Athens, 4th ed., 2011).

<sup>25</sup>For example, Article 15(4) of the Constitution of the Kingdom of Netherlands regulates restrictions to the right to liberty; Article 11(6) of the Luxembourg Constitution regulates limitations to the freedom of commerce and industry, the exercise of liberal professions and of agricultural labor; Section 9 of the Finnish Constitution regulates the limitations which can be lawfully imposed on the right to privacy.

<sup>26</sup>See CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] [CONSTITUTION] art. 26.

<sup>27</sup>Article 1 declares that “[t]he Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

<sup>28</sup>See INDIA CONST. art. 13(2).

<sup>29</sup>S. AFR. (INTERIM) CONST., 1993., § 33(1)(b).

<sup>30</sup>Section 36 of the Constitution nonetheless provides a comprehensive, well-drafted, limitations clause which reads as follows:

- (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
  - (a) the nature of the right;
  - (b) the importance of the purpose of the limitation;
  - (c) the nature and extent of the limitation;
  - (d) the relation between the limitation and its purpose; and
  - (e) less restrictive means to achieve the purpose.

The above classification must be read subject to important disclaimers. First, there are nuanced differences among constitutions that belong within one of the categories identified above. Limitation clauses may differ in relation to their generality or focus. Thus, for example, the limitation clause of the Constitution of Lithuania is particularly brief.<sup>31</sup> In Sweden rights sit in a neat constitutional hierarchy, which distinguishes among absolute rights, rights which can be curtailed with special procedures, and rights which can be limited via ordinary law.<sup>32</sup> Second, it does not follow that in constitutions where no express reference to the protection of the essence is made, the legislature is free to afflict it. At least in some legal systems, the essence limitation derives from the very recognition of constitutionally entrenched fundamental rights, since, if it were otherwise, the ordinary law would take precedence over constitutional norms.<sup>33</sup> The constitutional nature of a right limits its own limitability.<sup>34</sup> Thus, express reference to respect the essence appears to have a declaratory rather than a constitutive character.<sup>35</sup> This is confirmed by the case law of the Italian Constitutional Court,<sup>36</sup> the Austrian *Verfassungsgerichtshof*,<sup>37</sup> and further afield, the Indian Supreme Court, which in *Coelho*, accepted that the essence of each of the fundamental rights is part of the “basic structure” of the Constitution.<sup>38</sup> Thus, absence of reference to essence does not mean that it is normatively irrelevant.

### C. Selected National Case Law

References to the essence of right in many European Constitutions or the case law of national constitutional courts elevates respect for the essence to a general principle of EU law.<sup>39</sup> Nonetheless, the concept is not understood in the same way by national courts. References to essence appear to be limited and findings that the essence has been breached are rare. It appears that courts have shied away from establishing any concrete criteria for distinguishing between the essence and the periphery of fundamental rights.

Contradictions in the case law of German courts have been well identified.<sup>40</sup> The case law of the Spanish Constitutional Court provides a striking example of the use of essence. Under the Spanish

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- (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

<sup>31</sup>Article 28 of the Lithuanian Constitution states as follows: “While exercising their rights and freedoms, persons must observe the Constitution and the laws of the Republic of Lithuania and must not impair the rights and interests of other people.”

<sup>32</sup>For example, under Swedish law, freedom of worship is an absolute right. Limitations to freedom of expression and freedom of information are subject to a qualified procedure, while the right to industrial action and to property may be limited via ordinary legislation. For an English translation of the Constitution, see *The Constitution of Sweden* (2016), available at <<http://www.riksdagen.se/globalassets/07.-dokument-lagar/the-constitution-of-sweden-160628.pdf>>.

<sup>33</sup>See Raikos, *supra* note 24, at 168.

<sup>34</sup>ROBERT ALEXY, *A THEORY OF CONSTITUTIONAL RIGHTS* 192 (2nd ed. 2010).

<sup>35</sup>See Raikos, *supra* note 24, at 168.

<sup>36</sup>See *infra* Section C.

<sup>37</sup>Despite the absence of reference to essence in the Austrian Constitution, the Austrian Constitutional Court has developed the concept of *Wesensgehalt* (essential core of rights) to ensure a minimum guarantee of individual rights even though the main judicial tool is the principle of proportionality: See Konrad Lachmayer, *The Austrian Constitutional Court, in* *COMPARATIVE CONSTITUTIONAL REASONING* (András Jakab et al. eds., 2017); Stephan G. Hinghofer-Szalkay, *The Austrian Constitutional Court: Kelsen’s Creation and Federalism’s Contribution?*, 17 *FÉDÉRALISME RÉGIONALISME* (2017) (<https://popups.uliege.be/443/1374-3864/index.php?id=1671>).

<sup>38</sup>*I.R. Coelho (Dead) By Lrs v. State Of Tamil Nadu & Ors* (2007) AIR 2007, SC 861, 23 (India) <https://indiankanoon.org/doc/322504/>.

<sup>39</sup>See Brkan, *supra* note 7, at 6.

<sup>40</sup>See, among others, ALEXY, *supra* note 34.

Constitution, the protection of the essential content of rights serves to signify that the Constitution is not merely a programmatic document but has normative effect. This approach was favored by the Spanish Constitutional Tribunal in construing the Constitution of 1978 introduced in the aftermath of a long dictatorship. It can be seen as part of an interpretative ethos seeking a break with Spain's political past.<sup>41</sup> The leading case on the interpretation of the *contenido esencial dos derechos* is *Sentencia* 11/1981.<sup>42</sup> The *Tribunal Constitucional* considered whether national legislation regulating the right to strike breached its essence. After recalling that it is for the legislature to concretize rights, the Court identified two ways of determining the essential content.<sup>43</sup> The first starts from the premise that rights exist in the abstract before being concretized by the legislature. The essential content consists of those aspects without which the right would lose its very nature.<sup>44</sup> The second approach focuses on the legal interest that the right seeks to protect and identifies the essence as the part of the right that is absolutely necessary to provide effective protection to that interest. Under this conception of rights, the essence is breached whenever the limitations imposed make it impossible to exercise it and deprive it from any legal protection.<sup>45</sup> Although the Court opted for the second approach, the fact remains that the two approaches operate at an abstract, almost metaphysical, level that makes the distinction between them elusive. On the facts, the Court found that, even though the Spanish law in question did not abolish the right to strike, it breached its essence in a number of respects: First, by restricting the right to strike in solidarity<sup>46</sup> only to workers who were directly affected by the reasons leading to the primary strike; second, by granting the employer the right to nominate workers to patrol the work place during strike actions; third, by allowing a strike to be declared only where a specific majority and quorum of workers supported it and thus denying the individual character of the right to strike; and fourth, by empowering the Government to impose the resumption of work. Such aggressive reliance on the concept of essence appears rare among national jurisdictions.

A further illustration is provided by *Sentencia* 91/2000.<sup>47</sup> The issue was whether a request by Italy to extradite a person who had been convicted to life imprisonment in absentia was compatible with the fundamental right to a fair trial and the principle of legality, protected, respectively, by Articles 24 and 25 of the Spanish Constitution. The *Tribunal Constitucional* first sought to identify the essence of those rights and considered that they must be interpreted in the light of international instruments, such as the ECHR. It held that measures adopted by another State could entail an indirect breach of the Spanish Constitution. The *Tribunal* found that the essence of the right to a fair trial was breached insofar as the applicant was absent during the criminal proceedings and was not entitled to challenge the judgment issued against him. According to the *Tribunal*, the essence of the right to a fair trial may be respected either by ensuring the active presence of the parties in the proceedings, or, in the alternative, by granting the possibility to appeal against a decision issued in absentia. *Sentencia* 91/2000 illustrates that the definition of essence under the national constitution may be informed by international fundamental rights instruments. Notably, the *Tribunal Constitucional* has revised the essential content of the

<sup>41</sup>Marian Ahumada Ruiz, *The Spanish Constitutional Court*, in *COMPARATIVE CONSTITUTIONAL REASONING* 606 (Andrés Jakab et al. eds., 2017).

<sup>42</sup>*Sentencia* 11/1981, S.T.C., Apr. 25, 1981 (B.O.E., No. 99) (Spain).

<sup>43</sup>See *id.* at para. 8 of the legal grounds of the judgment.

<sup>44</sup>See *id.* at para. 8 of the legal grounds (*Constituyen el contenido esencial de un derecho subjetivo aquellas facultades o posibilidades de actuación necesarias para que el derecho sea reconocible como pertinente al tipo descrito y sin las cuales deja de pertenecer a ese tipo y tiene que pasar a quedar comprendido en otro desnaturalizándose, por decirlo así*).

<sup>45</sup>*Id.*

<sup>46</sup>Solidarity strike is a strike by a trade union or a corporation in support of a strike initiated by workers of a separate trade union or another corporation.

<sup>47</sup>*Sentencia* 91/2000, S.T.C., May 4, 2000 (B.O.E., No. 107) (Spain).

right to a fair trial following the judgment of the ECJ in *Melloni*.<sup>48</sup> In the light of that case, it now accepts that the right to be heard and to appeal following a decision in absentia is not part of the *contenido esencial* of the right to a fair trial, where a defendant was duly summoned, his failure to attend the trial was the result of his voluntary and unequivocal decision, and he was effectively defended by a designated lawyer.<sup>49</sup>

Another illustration of the way the *Tribunal Constitucional* approaches the concept of essence is provided by reference to the right to property. The case law accepts that that right has not only an individual dimension, which consists of the powers of the owner over the asset in question, but also a social one. The identification of the essential content of private property cannot be made exclusively on subjective appreciations of the right or the individual interests that underlie it, but must also take account of its social function, understood not as a mere external limit to its scope or exercise, but as an integral part of the right itself.<sup>50</sup> By including this social dimension in the defining elements of the right, the *Tribunal* understands essence as incorporating competing elements and invites balancing between the essential aspects of a right. In *Sentencia* 93/2015, the *Tribunal* reviewed the constitutionality of an emergency decree enacted by the Andalusian Parliament taking private abandoned buildings for social housing purposes. It held that, by imposing a duty to use certain properties for social housing, the decree regulated aspects of the essential content of the right to property. It found that while the possible use of private property for social housing purposes was constitutionally permissible, it could not be introduced by way of urgent legislation. Under Article 53 of the Spanish Constitution, limitations to fundamental rights can be introduced only by way of ordinary law, and, in any event, their essence must always be respected. The *Tribunal* also reiterated that essence cannot be determined by the legislator, being, instead, a concept to be identified and protected by the courts.<sup>51</sup>

The case law of the Spanish Constitutional Court illustrates, on the one hand, a broad understanding of the concept of essence but also, on the other, its malleability and its relative meaning. The Italian perspective is no less interesting. Although the Italian Constitution makes no express reference to the essence of rights, the Constitutional Court has recognized that it provides a limit that cannot be interfered with by the legislature. In determining whether the essence has been violated, judicial scrutiny is “objective-oriented” rather than “quantitative,”<sup>52</sup> its predominant concern being to safeguard the *telos* of fundamental rights.<sup>53</sup> This approach favors an interpretation of the Constitution based on its overall scope, as expressed in its provisions considered individually and in the light of the *ratio constitutionis*.<sup>54</sup> The way the Italian Constitutional Court approaches the essence of rights forms part of its wider outlook that is guided by the need to identify the principles and the objectives of the Constitution. The Court thus enjoys wide interpretative freedom.<sup>55</sup> It interprets the Constitution as a “living

<sup>48</sup>ECJ, Case C-399/11, Stefano Melloni v. Ministerio Fiscal, ECLI:EU:C:2013:107, Judgment of 26 Feb. 2013. See *infra* Section H.

<sup>49</sup>See *Sentencia* 26/2014, S.T.C., Mar. 11, 2014 (B.O.E., No. 60) para. 4 of legal grounds (Spain).

<sup>50</sup>See *Sentencia* 37/1987, S.T.C., Apr. 14, 1987 (B.O.E., No. 89) (Spain).

<sup>51</sup>*Sentencia* 93/2015, S.T.C., June 19, 2015 (B.O.E., No. 146) para. 13 (Spain).

<sup>52</sup>See Corte Costituzionale, 29 May 1968, n. 56, G.U. n. 139, 1968 (It.), discussed *infra* 67.

<sup>53</sup>For a more general discussion on the case law of the Italian Constitutional Court, see Claudia Marchese, *Diritti Sociali E Vincoli Di Bilancio, Ricerca di dottrina* (2014) ([https://www.cortecostituzionale.it/documenti/convegni\\_seminari/STU\\_272.pdf](https://www.cortecostituzionale.it/documenti/convegni_seminari/STU_272.pdf)); Maria Fierro et al., *I Diritti Fondamentali nell'ordinamento giuridico comunitario e negli ordinamenti nazionali* (2017) ([https://www.cortecostituzionale.it/documenti/convegni\\_seminari/STU\\_306\\_Diritti\\_fondamentali\\_2017.pdf](https://www.cortecostituzionale.it/documenti/convegni_seminari/STU_306_Diritti_fondamentali_2017.pdf)).

<sup>54</sup>Loris Iannucci, *L'interpretazione Secundum Constitutionem Tra Corte Costituzionale E Giudici Comuni Brevi Note Sul Tema*, “Corte costituzionale, giudici comuni e interpretazioni adeguatrici,” Roma, Palazzo della Consulta (2009) ([https://www.cortecostituzionale.it/documenti/convegni\\_seminari/Interpretazione\\_quaderno\\_stu.pdf](https://www.cortecostituzionale.it/documenti/convegni_seminari/Interpretazione_quaderno_stu.pdf)).

<sup>55</sup>See Tania Groppi, *The Italian Constitutional Court: Towards a 'Multilevel System' of Constitutional Review?* JCL 3:2 THE ITALIAN CONSTITUTIONAL COURT 105 ([http://www.astrid-online.it/static/upload/protected/Ital/Italy-constitutional-Court-JCL\\_T\\_Groppi.pdf](http://www.astrid-online.it/static/upload/protected/Ital/Italy-constitutional-Court-JCL_T_Groppi.pdf)). See also Ruiz, *supra* note 41.

document”<sup>56</sup> mainly composed by objectives and principles, as opposed to norms.<sup>57</sup> The emphasis on objectives leaves broad discretion to the legislature on how to achieve them.<sup>58</sup> When the *Corte Costituzionale* recognizes the essence or the minimum content of rights, it takes care not to invade the space of the legislature and adopts, instead, a “relational attitude” towards the other branches of government.<sup>59</sup>

Notably, the concept of essential core of fundamental principles has been used in the context of the counter-limits—*contro-limiti*—doctrine. In *sentenza* n. 1146/1988 the *Corte Costituzionale* held that the Constitution includes supreme values which cannot be repealed or modified in their *essential content*, not even through constitutional revisions, because they represent the very foundation of the Italian legal order.<sup>60</sup> These supreme values form an integral part of the constitutional imperatives against which the constitutionality of all laws is to be assessed. Recourse to the concept of “essential core of supreme values of the Italian constitutional order”<sup>61</sup> entrusts the *Corte Costituzionale* with the duty to determine the constitutional identity of the Italian legal system and shield it from both internal and external interferences, namely threats from ordinary legislation or international and EU law. Thus, the notion of “essential content of supreme values” is not employed by the *Corte* to safeguard the essence of specific rights but rather build a national identity-stance, which cannot be altered or balanced with any conflicting law. From this perspective, the notion of *contenuto essenziale* of supreme values echoes the German concept of Wesensgehalt. The value of essence is here different. The *Corte* does not seek to identify the essence vis-à-vis its periphery, but pinpoint certain rights, such as the principle of legality, as forming part of the supreme values of the Italian constitutional system.

Nonetheless, the essence of national supreme values did not play a significant role in the *Corte Costituzionale*’s reasoning in the recent *Taricco* saga.<sup>62</sup> In this respect the approach of the *Corte Costituzionale* contrasts with that of the *Corte Cassazione*. The dispute involved a series of VAT violations which run counter to EU law but had become *de facto* non-punishable under the Italian rules on limitation period. Under Italian law, rules pertaining to limitation periods are considered to fall within substantive and not procedural criminal law. As a result, they are to be regulated exclusively by the legislator, according to the principles of legal certainty

<sup>56</sup>The interpretative methods of the Italian Constitutional Court have been the subject of a vast scholarly debate, which has focused mainly on the methods of interpretation used for statutory law. Literature on the most suitable interpretation techniques for the Italian Constitution is divided and controversial. Rutolo observes that the Constitutional Court has adopted an evolutive interpretation of the Constitution, which should be limited by following a more restrained interpretation based on its text as suggested by Crisafulli. See Marco Ruotolo, *Interpretazione conforme a Costituzione e tecniche decisorie della Corte costituzionale*, GRUPPO DI PISA (2011) (<https://www.gruppodipisa.it/images/rivista/pdf/Marco-Ruotolo-Interpretazione-conforme-a-Costituzione-e-tecniche-decisorie-della-Corte-costituzionale.pdf>). Groppi, by contrast, praises the virtues of the evolutive interpretation followed by the Constitutional Court. See Groppi, *supra* note 55. This debate has been summarized in the essays published in R. Romboli, *LA GIUSTIZIA COSTITUZIONALE A UNA SVOLTA* (Giappichelli ed. 1990).

<sup>57</sup>In this respect, the Italian Constitutional Court seems to follow the distinction between “rules” and “principles” introduced by Esser and further developed by Alexy. See Joseph Esser, *GRUNDSATZ UND NORM: IN DER RICHTERLICHEN FORTBILDUNG DES PRIVATRECHTS*. (Tübingen: Mohr, 3rd ed. 1974); Robert Alexy, *On the Structure of Legal Principles*, 13 *RATIO JURIS* 294 (2002) <https://onlinelibrary.wiley.com/doi/pdf/10.1111/1467-9337.00157>.

<sup>58</sup>See Groppi, *supra* note 55.

<sup>59</sup>For an account of the adjudication style of the Italian Constitutional Court, see Marta Cartabia, *Of bridges and walls: The “Italian Style” of Constitutional Adjudication*, 1 *IT. J. PUB. L* 1 (2016), [https://www.cortecostituzionale.it/documenti/relazioni\\_internazionali/Bled\\_Juned\\_23\\_2016\\_fin.pdf](https://www.cortecostituzionale.it/documenti/relazioni_internazionali/Bled_Juned_23_2016_fin.pdf).

<sup>60</sup>*Corte Costituzionale*, 29 December 1988, n. 1146, G. U. n. 2, 1989 (It.), para 2.1 of the legal grounds.

<sup>61</sup>The notion of *contenuto essenziale dei valori supremi della Costituzione italiana* is also found in *Corte Costituzionale*, 10 February 1997, n. 35, G.U. n. 7, 1997 (It.); *Corte Costituzionale*, 25 June 2015, n. 118, G.U. n. 26, 2015 (It.).

<sup>62</sup>See ECJ, Case C-105/14, *Taricco and Others*, ECLI:EU:C:2015:555, Judgment of 8 Sept. 2015; ECJ, Case C-42/17, *M.A.S. and M.B.*, ECLI:EU:C:2017:936, Judgment of 12 May 2017.

and non-retroactivity, which are fundamental constitutional values.<sup>63</sup> The question arose whether the national court had to disapply the Italian rules on time limitations to ensure effective compliance with EU law even though that would invade the competence of the legislature to regulate time-limits in breach of such fundamental values. After a series of constitutionality questions submitted to the *Corte Costituzionale*, two preliminary references in *Taricco* and *MAS*, and some judicial acrobatics, the ECJ struck a compromise: The national courts must provide effective sanctions for violations of EU VAT rules and disapply conflicting national provisions *unless* that would contravene national fundamental values.<sup>64</sup> It is notable that the *Corte Costituzionale* made no reference to the “essential content” of supreme values, even though in one of the constitutionality questions referred to it the *Corte di Cassazione*<sup>65</sup> had relied on that concept. That court had identified the “essential core” of the principle of non-retroactivity as being the “right of the indicted not to be subject to the unforeseen application of a criminal legislation which is more severe than that in force at the time of commission of the event.”<sup>66</sup> It had also found that the disapplication of national rules on time limitations would have run counter to the “essential core” of the right to defense, provided by Article 24 of the Italian Constitution.

The notion of essence has also been employed beyond the counter-limit doctrine in relation to constitutional rights, such as the right to property<sup>67</sup> and the right to health care. The latter provides a particularly interesting illustration. In *sentenza* n. 267/1998<sup>68</sup> the *Corte Costituzionale* scrutinized a regional law requiring individuals to obtain prior authorization as a condition for the reimbursement of medical expenses under Article 3 and 32 of the Constitution, which guarantee respectively the principle of equality and the right to health care. The applicants, who had to undertake urgent surgery before being able to obtain authorization, were refused reimbursement. The *Corte* reasoned that the right to health care is an integral part of human dignity, the highest constitutional value. In these circumstances, its essence was protected, but the *Corte* found that the law violated Article 32 in combination with Article 3 as it assimilated unjustifiably urgent with non-urgent cases and thus posed an unreasonable restriction. Whilst references to “essence” were an integral part of judicial methodology, the use of the concept was somewhat impressionistic, and the *Corte* did not expressly consider how the essence of a right is to be defined. It may be said that essence was the fifth wheel in the chain of reasoning. A similar result could well have been reached by applying merely proportionality. In other *sentenze*, the notion of essence has been interpreted as a minimum threshold of the right to healthcare, which the regional legislator cannot limit. For example, in *sentenza* n. 125/2015,<sup>69</sup> the *Corte Costituzionale* held that Article 117 of the Constitution<sup>70</sup> provides for minimum standards of healthcare assistance to be respected throughout the national territory. On that basis, a regional act reducing the public health budget was held to be unconstitutional: With the envisaged fund cuts, individuals would have been deprived of minimum healthcare services granted under Article 32 of the Constitution.

<sup>63</sup>See, for example, Corte Costituzionale, 22 October 2014, n. 238, G.U. n. 45, 2014 (It.).

<sup>64</sup>See *M.A.S.*, *supra* note 62.

<sup>65</sup>Corte di Cassazione, sez. III, 8 July 2016, n. 212, G.U. n. 41, 2016 (It.).

<sup>66</sup>Corte di Cassazione, sez. III, 8 July 2016, n. 212, G.U. n. 41, 2016 (It.) at p. 31 of the judgment.

<sup>67</sup>See for example Corte Costituzionale, 29 May 1968, n. 56, G.U. n. 139, 1968 (It.); Corte Costituzionale, 24 July 1972, n. 141, G.U. n. 194, 1972 (It.); Corte Costituzionale, 6 October 1983, n. 300, G.U. 281, 1983 (It.).

<sup>68</sup>Corte Costituzionale, 17 July 1998, n. 267, G.U. n. 29, 1998 (It.).

<sup>69</sup>Corte Costituzionale, 1 July 2015, n. 125, G.U. 27, 2015 (It.).

<sup>70</sup>This provision provides for the legislative competences of the Italian state and the regions.

#### D. Path Dependencies: The ECJ Pre-Charter Case Law

In EU law, the essence limitation of Article 52(1) is the result of multiple path-dependencies. It reflects not only references to essence in national constitutions, but also the case law of the ECJ prior to the introduction of the Charter and the Strasbourg case law. In *Nold*, the ECJ proclaimed that fundamental rights are not unfettered prerogatives but must be viewed in the light of their social function and, if necessary, subjected to limits justified by the overall objectives of the EU, on the condition that their “substance . . . is left untouched.”<sup>71</sup> Since then, the case law has used this as the standard formula,<sup>72</sup> which has endured even after the entry into force of the Charter.<sup>73</sup> The *Nold* formula was spearheaded by Trabucchi AG. Although in his Opinion he did not refer verbatim to the formula, he engaged with the German doctrine of essence which he considered to underlie the legal systems of all original Member States.<sup>74</sup> Trabucchi AG referred to essence also in subsequent opinions,<sup>75</sup> but other Advocates General engaged little with that concept even in cases giving rise to conflicts between EU law and fundamental rights stemming from constitutions where essence is protected.<sup>76</sup> The terms “substance” and “essence” are interchangeable<sup>77</sup> and, as stated in the Praesidium Explanations, the Charter is intended to express the case law.<sup>78</sup> Prior to the Charter, in no case did the Court find that there was a violation of the substance of a right.<sup>79</sup>

In the case law of the ECtHR, the protection of essence first featured in the 1960s.<sup>80</sup> The ring-fencing of essence by Strasbourg is not accidental. It forms part of an interpretative ethic which favors teleology and conceptual autonomy of Convention terms over literary interpretation.<sup>81</sup> An interesting example is provided by *Young, James and Webster v. United Kingdom*, where the ECtHR referred to essence to establish a negative right—for example, the right not to belong to a trade union. The case concerned whether a “closed shop” agreement concluded between

<sup>71</sup>ECJ, Case C-4/73, *Nold KG v. Comm'n*, ECLI:EU:C:1974:51, para. 14, Judgment of 11 Jan. 1977.

<sup>72</sup>In subsequent case law, the ECJ has refined the formula referring to the permissibility of restrictions on the exercise of fundamental rights which “in fact correspond to objectives of general interest pursued by the Community and do not constitute, with regard to the aim pursued, disproportionate and unreasonable interference undermining the very substance of those rights.” See e.g., ECJ, Case C-292/97, *Kjell Karlsson and Others*, ECLI:EU:C:2000:202, para. 45, Judgment of 13 April 2000.

<sup>73</sup>See e.g., ECJ, Case C-548/09, *Bank Melli Iran v. Council*, ECLI:EU:C:2011:735, para. 114, Judgment of 16 Nov. 2011; ECJ, Case C-416/10, *Jozef Križan and Others*, ECLI:EU:C:2013:8, para. 113, Judgment of 15 Jan. 2013; ECJ, Case C-539/10, *Stichting Al-Aqsa v. Council*, ECLI:EU:C:2012:711, para. 121, Judgment of 15 Nov. 2012.

<sup>74</sup>*Nold*, *supra* note 71, at 515.

<sup>75</sup>See ECJ, Case C-118/75, *Watson and Belmann*, ECLI:EU:C:1976:106, Judgment of 7 July 1976.

<sup>76</sup>See e.g., Case 11/70, *Internationale Handelsgesellschaft*, 1970 E.C.R. 1125; Case C-44/79, *Hauer*, 1979 E.C.R. 3727; ECJ, Case C-5/88, *Wachauf v. Bundesamt für Ernährung und Forstwirtschaft*, ECLI:EU:C:1989:321, Judgment of 13 July 1989.

<sup>77</sup>Thus, in the original version of his opinion in *Nold*, Trabucchi AG referred to the “*essenza*” of fundamental rights. Whilst the English, Italian, and French versions of the judgment refer to “substance,” the Spanish version uses the term “*esencia*.” Charter terminology is to “essence” and “essential content.” The French, Italian, and Spanish versions of Article 52 refer respectively to the “*contenu essentiel*,” “*contenuto essenziale*” and “*contenido esencial*” of fundamental rights. The English and German versions refer to “essence” and “*Wesensgehalt*” respectively.

<sup>78</sup>See Explanations relating to the Charter of Fundamental Rights, Dec. 14, 2007, 2007 O.J. (C 303/17) 32.

<sup>79</sup>Note, however, that in his opinion in Case C-353/99, *Council v. Hautala*, ECLI:EU:C:2001:392, Judgment of 6 Dec. 2001, Leger AG found that the Council had breached the very essence of the fundamental right to access to documents by depriving all applicants of the right to have access to information not covered by the public interest exception. See *Hautala*, C-353/99 at para. 115. Neither the General Court at first instance nor the ECJ on appeal relied on the concept of substance. For a finding that the essence was not violated, see e.g., *Joined Cases 20 & 64/00, Booker Aquaculture v. The Scottish Ministers*, per Mischo AG, ECLI:EU:C:2003:397, Judgment of 10 July 2003.

<sup>80</sup>The first reference to the protection of the substance of Convention rights appears in the *Belgian Language Case*. See Case “Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium” v. Belgium, App. Nos. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64 (July 23, 1968), <http://hudoc.echr.coe.int/eng?i=001-57524>. The first reference to essence was made in *Winterwerp v. The Netherlands*, App. No. 6301/73 (Oct. 24, 1979), <http://hudoc.echr.coe.int/eng?i=001-57597>. In this case, the ECtHR found a breach of the very essence of the right to liberty as protected by Article 5(4) ECHR.

<sup>81</sup>George Letsas, *Strasbourg’s Interpretive Ethic: Lessons for the International Lawyer*, 21 EUR. J. INT’L L. 509 (2010).

British Rail and three trade unions, providing that union membership was a condition of employment, was compatible with Article 11 ECHR, protecting the freedom of assembly and association. The Court held that a threat of dismissal involving loss of livelihood was a most serious form of compulsion and was directed against persons engaged by British Rail before the introduction of any obligation to join a trade union. In the Court's assessment, such a form of compulsion struck at the very substance of the freedom guaranteed by Article 11.<sup>82</sup>

In a nutshell, the inclusion of the essence of rights in the Charter finds direct ancestry in ECJ and Strasbourg case law and is in line with the conception of the Charter as an instrument consolidating rather revolutionizing the constitutional *acquis* of Europe.

### E. A Conceptual Analysis

The concept of essence is not easy to determine.<sup>83</sup> In theory, there are three ways of approaching the essence-periphery dichotomy. Essence can be understood as an absolute requirement separate from proportionality. This means that a *sine qua non* for a restriction to be constitutional is that it must not affect the essence of a right. A government intervention may affect non-essential elements subject to the principle of proportionality, but no proportionality inquiry is to be carried out in relation to the essence since it can never be overridden. Proportionality begins where essence stops. Under a second view, the essence of a right is not immune from affliction, but any proportionality inquiry must take on board the heightened respect that the core element of a right deserves. According to this relativist view, where the core is under attack, courts must apply a very high, perhaps excruciatingly high, degree of scrutiny. A third way is to interpret essence as meaning that it is inflicted when the right is extinguished. This equates essence to the abolition of a right.

The absolute view appears preferable. It is supported by the letter of Article 52(1), which sets out the three conditions on limitations as cumulative requirements. National constitutional clauses also appear to make essence part of a set of conditions that operate cumulatively. The absolute view is also more cogent. It makes eminent sense to conceive most rights not as unfettered privileges, but legal entitlements that may be restricted in the interests of the common good. If, however, fundamental rights are to be meaningful, they must be understood to have an inner core which is indefeasible. Respect for essence is the logical consequence of the characterization of a right as fundamental. Essence reflects "an unconditional moral imperative"<sup>84</sup> derived from human dignity and owed to every individual. The absolute theory makes for a much neater distinction and enhances the legitimating and signaling function of the limitation clauses by placing the inner core of the right beyond balancing. By contrast, the second, relativist, view outlined above conceptualizes a right as a progressive entitlement where the greater the infliction, the greater the need for justification and scrutiny. This adds little to the proportionality inquiry since, under the test of necessity and the test of *stricto sensu* proportionality, the seriousness of the violation is already a key factor of the enquiry. Furthermore, it is not easy to determine *a priori* a set threshold of pain beyond which the level of scrutiny automatically changes. This would only serve to complicate an already taxing enquiry. If a safety switch is to exist to safeguard core elements of the right, it makes sense that it has a finality effect and serves to foreclose balancing. The third view mentioned above fuses the essence of a right with its very existence. It serves as a reminder that the legislature is not free to override constitutional commands but the judicial enquiry centers on the definition of a right and whether it has been totally destroyed. This understanding of essence, however, empties essence of any autonomous input. It is also not supported

<sup>82</sup>See *Young, James and Webster v. United Kingdom*, 11 Eur. Ct. H.R. 439, para. 55. (1989).

<sup>83</sup>For a discussion in English of German theories on the essence of right, see INGRID LEIJTEN, CORE SOCIO-ECONOMIC RIGHTS AND THE EUROPEAN COURT OF HUMAN RIGHTS 126–41 (2018).

<sup>84</sup>See *Re Northern Ireland Human Rights Commission's Application for Judicial Review* [2018] UKSC 27 (Ire.) para. 338, per Lord Reed (making statement in relation to absolute rights guaranteed by the ECHR).

by Article 52(1) which prescribes conditions for limitations on the exercise and not the existence of rights.

Respect for essence is therefore best understood as an autonomous condition that must be satisfied separately from the requirement of proportionality. This, however, begs the question of how essence is to be distinguished from the periphery of the right. The case law suggests that this is a near impossible task.

The essence encompasses the essential attributes of an entitlement that define its nature as a distinct right. Their determination is a matter of interpretation that must be guided by the specific objectives of the right and its placement and significance in the overall system of fundamental rights protection. The trouble is that the core element of the right is difficult to determine. It could be defined subjectively—from the point of view of the right holder—or objectively—from the point of view of the function of rights within the constitutional polity. The problem with a subjective definition is that it leads to an excessively broad understanding of essence: Imprisonment by definition defeats the right to liberty just as deportation defeats the EU right to free movement. If understood subjectively, essence becomes overbearing and incapable of accommodating the social or community aspect of rights. Objective definition, on the other hand, enables the communitarian character of rights to be taken into account but leads to the relativization of what is intended to be an absolute concept. To determine the core of the right, we need to look at its objectives, its positioning in the constitutional hierarchy, the objectives of the limitations imposed on it, and the circumstances of a specific restriction. The definition of essence gets entangled with, among others, the intensity and the extent of the violation. But this is a process which can only, or at least best, be undertaken inductively rather than deductively, reaching an abstract solution after observing restrictions in specific cases. In short, although the concept of essence as a legal threshold must be understood as an autonomous limit, in effect, it is impossible to determine it without engaging in a balancing process which is best carried out through a proportionality analysis. Therein lies a conundrum that limits the utility of essence as a tool of judicial methodology.

This conundrum explains why courts tend to shy away from seeking to lay down general criteria for determining essence and also why, in many cases, they follow contradictory reasoning. The above discussion of the case law of the Spanish and the Italian Constitutional Courts showed that, even though they take the concept of essence very seriously, their approach is on a case by case basis and lack a firm theoretical outlook. Contradictions are present in the case law of the German Federal Constitutional Court. In one case,<sup>85</sup> the *Bundesverfassungsgericht* was concerned with social welfare legislation which mandated the detention of persons in state institutions if they were of limited mental capacity or unable to look after their own affairs and posed a danger to the public. The Court held that the compulsory referral of an individual to such an institution was in breach of Article 2(2) of the Basic law which guarantees the right to personal freedom because, in the circumstances, the purpose of detention was not to protect the general public or the individual but to improve him. The Court reasoned that the improvement of the well-being of a person could not outweigh personal freedom and thus the right to personal liberty was affected at its core. But if one takes into account the objectives of restriction in determining whether the essence of the right has been violated, a trade off exercise is undertaken which denies the absolute character of essence. Alexy is correct in arguing that in the context of that case, reference to the essence was otiose.<sup>86</sup> The judgment contradicts earlier case law where the Court proclaimed, in relation to the secret tape recording of conversations, that the core of the right to private life could not be overridden even by an overwhelming public interest and no proportionality analysis was to be carried out.<sup>87</sup>

<sup>85</sup>Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] July 18, 1967, *Neue Juristische Wochenschrift* [NJW] 1795, 1967 (Ger.).

<sup>86</sup>Alexy, *supra* note 34 at 194–95.

<sup>87</sup>Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] 31 January 1973, *Neue Juristische Wochenschrift* [NJW] 981, 1973 (Ger.).

Similar pronouncements suggesting that the essence provides an absolute threshold have been made in other cases.<sup>88</sup> The difficulties associated with pinning down the content of essence may explain why Anglo-Saxon courts have found it a less useful tool. It is remarkable that, in its seminal judgment in *Makwanyane*,<sup>89</sup> the South African Supreme Court found the death penalty to be unconstitutional in the absence of an express prohibition but found the concept of essence of limited help in reaching that conclusion. None of the justices relied on the constitutional command to respect the essence of rights. The case also provides a striking contrast with the Hungarian Constitutional Court, which relied on the protection of essence of rights to declare the unconstitutionality of the death penalty.<sup>90</sup>

Despite the conceptual difficulties identified above, if Article 52(1) is to be meaningful, the absolute conception of essence is preferable. Whether the essence is violated has to be determined by the residue left after the restriction. In the conceptual gradation of the definition of a right, essence and effectiveness lie at the opposite ends of the spectrum: The first provides for the absolute minimum of protection whilst the second seeks to augment the scope and the functionality of a right. Given the importance of rights in building the EU construct and the traditionally weak *imperium* powers that the EU may exercise, it is easy to see why the case law of the ECJ has been preoccupied with effectiveness rather than essence. It should also be accepted that every Charter right and freedom has an essence. Indeed, because the essence is part of the identity of the right, it would be incongruous to suggest otherwise. As the case law of the Italian and the Spanish Constitutional courts suggest, socio-economic rights and not just civil liberties have an essence.<sup>91</sup> The determination of the essence is an exercise in interpretation which relies on the objectives of the right, the underlying interests that it seeks to protect, and its identifying features. The following points may be made in this respect. First, in European constitutionalism, the core of a right, just as the periphery, is subject to an evolutionary interpretation and may evolve as the underlying features of a polity change. Second, the determination of the essence may be more difficult in relation to certain rights. How, for example, would it be possible to determine the essence of the right of non-discrimination? The truth is that equality exposes the instrumental limits of essence. Once a difference in treatment is established, the inquiry switches to whether that difference is justified and becomes wholly dependent on proportionality. Also, the distinction between core and periphery makes no sense in relation to absolute rights.<sup>92</sup> Here, the whole right is not subject to a trade-off. The judicial inquiry focuses therefore on the interpretation of the scope and content of the right. Finally, the concept of essence is also closely related to human dignity. Indeed,

<sup>88</sup>See e.g., Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] June 11, 1958, *Neue Juristische Wochenschrift* [NJW] 1035, 1958 (180) (Ger.); Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] 10 June 1963, *Neue Juristische Wochenschrift* [NJW] 1667, 1963 (201) (Ger.); Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] 4 May 1971, *Neue Juristische Wochenschrift* [NJW] 2121, 1971 (69) (Ger.).

<sup>89</sup>*State v. Makwanyane* 1995 (6) BCLR 665 (CC) (S. Afr.).

<sup>90</sup>See *Alkotmánybíróság* (AB) [Constitutional Court] Oct. 31, 1990, Decision No. 23/1990 (Hung.). The Hungarian Constitutional Court found the death penalty to be contrary to the right to life guaranteed by Article 54 of the Constitution of Hungary. It held that capital punishment infringed the essential content of the fundamental rights to life and human dignity, which must be respected under Article 8.

<sup>91</sup>Note, however, that, as stated above, not all provisions of the Charter create rights. Article 51 envisages a distinction between, on the one hand, rights and freedoms, and, on the other hand, principles but it is not necessarily clear which provisions of the Charter provide merely for principles. It will be a matter of interpretation to determine to what extent the provisions of Title IV of the Charter, which pertain to social rights, establish rights rather than principles.

<sup>92</sup>The rights recognized in Title I of the Charter are absolute. These are human dignity, the right to life, the right to the integrity of the person, prohibition of torture and inhuman or degradation treatment or punishment, prohibition of slavery and forced labor. Certain rights recognized by the Convention are also considered to be absolute. These are the prohibition of torture and cruel treatment (Article 3), the prohibition of slavery (Article 4(1)) and the principle of *nulla poena sine lege* (Article 7). For a discussion, see Natasa Mavronicola, *What is an absolute right? Deciphering Absoluteness in the Context of Article 3 of the European Convention on Human Rights*, 12 HUMAN RIGHTS L. REV. 723 (2012).

this is made clear in national case law<sup>93</sup> and the Explanations to the Charter which state that the dignity of the human person is part of the substance of Charter rights and must be respected even where a right is restricted.<sup>94</sup> The correlation between dignity and essence is useful in showing that the two concepts underlie the constitutional design.

## F. An Analysis of the ECJ Case Law

The ECJ treats the three conditions of Article 52(1) as cumulative and understands essence as an autonomous requirement separate from proportionality that places the core element of a right beyond trade off.<sup>95</sup> Although this is not always the case, in some instances the Court examines each of the conditions of Article 52(1) systematically. This trend is more prevalent in recent years. A prime example is *Schwarz*,<sup>96</sup> which gave a clean bill of health to the storage of fingerprints in passports under Council Regulation No 2252/2004. The Court went through each of the conditions that limitations on rights must fulfill under Article 52(1), including the three aspects of proportionality, namely, suitability, the less restrictive alternative test, and proportionality *stricto sensu*. The analysis focused on proportionality. In relation to the essence, the Court simply noted that “it was not apparent from the evidence available to the Court,” nor “had it been claimed,” that the limitations placed on the exercise of the rights recognized by Articles 7 and 8 of the Charter did not respect their essence.<sup>97</sup> Those disjunctive terms raise the issue whether the Court might, perhaps, in extreme cases, be prepared to raise a violation of the essence on its own motion.<sup>98</sup>

In practice, proportionality is by far the most important of the limiting conditions provided for in Article 52(1). Although the Court has referred to essence in a number of cases and in relation to a variety of rights, it has engaged analytically with the concept only in few of them. Such engagement has not been particularly enlightening either as regards the meaning of the concept or its interaction with the other conditions of Article 52(1) but rather provides a somewhat impressionistic understanding of it. References have been made by the ECJ, its Advocates General, and the EU General Court.<sup>99</sup> In many cases, reference to the essence is made *in passim* as part of outlining the conditions which limitations of rights must respect under Article 52(1).<sup>100</sup> Such references proliferate as a result of formulaic references to previous case law and the almost mechanical

<sup>93</sup>See *supra* the discussion of the case law of the Italian Constitutional Court.

<sup>94</sup>Explanations relating to the Charter of Fundamental Rights, Dec. 14, 2007, 2007 O.J. (C 303/17) 17.

<sup>95</sup>This is evident, in particular, from the right to private life and the protection of personal data. See e.g., ECJ, Digital Rights Ireland, Joined Cases 293 & 594/12, ECLI:EU:C:2014:238, Judgment of 8 April 2014; ECJ, Tele2 Sverige AB v. Postoch telestyrelsen, Joined Cases 203 & 698/15, ECLI:EU:C:2016:970, Judgment of 21 Dec. 2016; ECJ, Case C-362/14, Schrems v. Data Protection Commissioner, ECLI:EU:C:2015:650, Judgment of 6 Oct. 2015.

<sup>96</sup>ECJ, Case C-291/12, Schwarz v. Stadt Bochum, ECLI:EU:C:2013:670, Judgment of 17 Oct. 2013.

<sup>97</sup>*Schwarz*, *supra* note 96, para 39.

<sup>98</sup>By contrast, Mengozzi AG did not engage with the concept of essence in that case.

<sup>99</sup>The engagement of the General Court with the concept of essence has been minimal. For general references to essence as part of the conditions of Article 52(1), see e.g., ECJ, Case T-545/13, Fahed Mohamed Sakher Al Matri v. Council, ECLI:EU:T:2016:376, Judgment of 30 June 2016, para. 163 (right to property, freedom to conduct a business); ECJ, Case T-593/11, Al-Chihabi v. Council, ECLI:EU:T:2015:249, Judgment of 30 Apr. 2015, para. 38 (right to defense). The analysis of essence is often conflated with that of proportionality. See e.g., ECJ, Case T-245/15, Klymenko v. Council, ECLI:EU:T:2017:792, Judgment of 8 Nov. 2017, para 208 (right to property); ECJ, Case T-215/15, Mykola Yanovych Azarov v. Council, ECLI:EU:T:2017:479, Judgment of 7 July 2017, para. 75 (right to property); ECJ, Case T-149/15, Sirine Bent Zine El Abidine Ben Haj Hamda Ben Ali v. Council, ECLI:EU:T:2017:693, Judgment of 5 Oct. 2017, para. 160 (right to property); ECJ, Case T-720/14, Rotenberg v. Council, ECLI:EU:T:2016:689, Judgment of 30 Nov. 2016, para. 169 (right to property, right to privacy, and freedom to conduct a business).

<sup>100</sup>See e.g., ECJ, Case C-134/15, Lidl GmbH & Co. KG v. Freistaat Sachsen, ECLI:EU:C:2016:169, Judgment of 26 Aug. 2016, per Bobek AG, para. 31 (freedom to conduct a business); ECJ, Case C-300/11, ZZ, ECLI:EU:C:2013:363, Judgment of 18 July 2013, para. 51 (Charter art. 47); ECJ, Case C-170/13, Huawei Technologies Co., ECLI:EU:C:2014:2391 Judgment of 20 Nov. 2014, per Wathelet AG, at para. 66 (Charter art. 47).

reproduction of precedent which is a standard of feature of the Court's reasoning.<sup>101</sup> Reference to essence may also be made to indicate that a right is not an unfettered prerogative and may be restricted. In this context, judicial acknowledgment of essence serves to stress the malleability of rights and facilitate restrictions.<sup>102</sup> In some cases, the ECJ refers to the substance or the "very core" of a right<sup>103</sup> rather than the essence of right but, in the context of permissible limitations, the two concepts are indistinguishable.<sup>104</sup> In some cases the ECJ will expressly state that the essence is not affected.<sup>105</sup>

Judicial pronouncements have sought to identify the essence of a right or pinpoint what would be a violation. Often, however, such efforts raise more questions than they answer. In *Puid*,<sup>106</sup> Jääskinen AG referred to the principle of *non-refoulement* as forming the essence of the fundamental right to asylum. This is helpful only to a limited extent. The fact that no derogations are permitted from the principle of *non-refoulement* can be derived from Article 78 TFEU which requires the EU to ensure compliance with that principle. The statement therefore refers to the definition of the right itself. Similarly, in *Spasic*, Jääskinen AG sought to identify the core of *ne bis in idem* principle by reference to its defining elements.<sup>107</sup> In *LM*,<sup>108</sup> the Court held that judicial independence forms part of the essence of the fundamental right to a fair trial, being one of the essential guarantees of the value of the rule of law.<sup>109</sup> This, however, leaves open the questions how judicial independence is to be understood, what are its boundaries and what are its *sine qua non* elements. In *Delvigne*, Cruz Villalón AG stated that "automatic and long-term" deprivation of prisoners of the right to vote would be contrary to the essence of universal suffrage.<sup>110</sup> Essence appears here to be affected when two elements coincide, namely, "automatic" and "long term." There are, however, multiple problems with this

<sup>101</sup>See e.g., ECJ, Joined Cases 584, 93 & 595/10 P, *Commission v. Kadi (Kadi II)*, ECLI:EU:C:2013:518, Judgment of 18 July 2013, paras. 101, 134; ECJ, Case T-545/13, *Fahed Mohamed Sakher Al Matri v. Council*, ECLI:EU:T:2016:376, Judgment of 30 June 2016, para. 130; ECJ, Case T-593/11, *Fares Al-Chihabi v. Council*, ECLI:EU:T:2015:249, Judgment of 30 Apr. 2015 para. 38; ECJ, Case C-348/12, *Council v. Kala Naft*, ECLI:EU:C:2013:776, Judgment of 28 Nov. 2013; ECJ, Case C-280/12, *Council v. Fulmen and Mahmoudian*, ECLI:EU:C:2013:775, Judgment of 28 Nov. 2013. But note that reference to essence was not made in similar sanctions cases where the same rights were in issue. See e.g., ECJ, Case C-630/13, *Anbouba v. Council*, ECLI:EU:C:2015:247, Judgment of 21 Apr. 2015; ECJ, Case C-176/13, *Council v. Bank Mellat*, ECLI:EU:C:2016:96, Judgment of 18 Feb. 2016.

<sup>102</sup>See e.g., ECJ, Case C-249/13, *Khaled Boudjlida v. Préfet des Pyrénées-Atlantiques*, ECLI:EU:C:2014:2032, Judgment of 25 June 2014, per Wathelet AG, para. 57 of the Opinion (rights of defense).

<sup>103</sup>See ECJ, Case C-279/09, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland*, ECLI:EU:C:2010:811, Judgment of 22 Dec. 2010, para. 60.

<sup>104</sup>See ECJ, Case C-170/13, *Huawei Technologies*, ECLI:EU:C:2015:477, Judgment of 16 July 2015, para. 59 (Charter art. 17(2), 47).

<sup>105</sup>See e.g., *Digital Rights Ireland*, Joined Cases 293 & 594/12, discussed in Section F; ECJ, Case C-18/16, *K. v. Staatssecretaris van Veiligheid en Justitie*, EU:C:2017:680, Judgment of 14 Sept. 2017, para. 35 (right to liberty under Charter art. 6); *Schwarz*, *supra* note 96 (Charter art. 8).

<sup>106</sup>ECJ, Case C-4/11, *Bundesrepublik Deutschland v. Kaveh Puid*, ECLI:EU:C:2013:244, Judgment of 14 Nov. 2013, at para 49 of the Opinion.

<sup>107</sup>ECJ, Case C-129/14, *Zoran Spasic*, ECLI:EU:C:2014:586, Judgment of 27 May 2014, para. 88 of the Opinion. Jääskinen AG identified the core of *ne bis in idem* as including the following: (i) The prohibition of proceedings initiated after a final conviction or acquittal (ii) in the area of general criminal law (iii) by the authorities of the same Member State (iv) concerning the same acts (v) having the same legal status in view of the interest protected under the applicable national law (vi) provided that there has been no fundamental defect in the first proceedings and (vii) that there is no new evidence. On the basis of that definition, he came to the conclusion that Article 54 CISA did not breach the essence of *ne bis in idem*.

<sup>108</sup>ECJ, Case C-216/18 PPU, *Minister for Justice and Equality*, ECLI:EU:C:2018:586, Judgment of 25 July 2018, para. 48.

<sup>109</sup>This was confirmed in ECJ, Case C-619/18, *Commission v. Poland*, ECLI:EU:C:2018:1021, Judgment of 17 Dec. 2018, para. 21. Cf. *Schrems*, Case C-362/14 discussed *infra* in this section. That judgment identifies other aspects of the essence of Article 47 Charter. It follows that the ECJ sees the essence of Article 47 Charter as including the essence of separate sub-rights encompassed by that provision. See further the cases referred to *infra* note 110.

<sup>110</sup>ECJ, Case C-650/13, *Delvigne v. Commune de Lesparre Médoc and Préfet de la Gironde*, ECLI:EU:C:2015:363, Judgment of 4 June 2015, at para. 114 of the Opinion.

association. First, the appreciation of at least one of them—for example, length—cannot easily occur outside the assessment of proportionality. For how long should offenders be deprived of their voting rights for the violation to be considered to interfere with essence? Should this depend on the type of crime committed? Second, even the meaning of “automatic” could be disputed. Does it cover a rebuttable presumption of deprivation of voting rights for certain heinous offences? Third, the combination of automaticity and length raises questions regarding their relative weight. The truth is that essence is defined by reference to qualities the assessment of which requires a balancing exercise and therefore, at the very least, implies a proportionality analysis.

The identification of essence may also become relevant in balancing different rights. In defining the scope of proportionality, Article 52(1) states that rights may be limited where it is necessary to protect the rights and freedoms of others. In case of competing rights, therefore, the essence of each must be protected and the balancing occurs within the conflict zone of the overlapping peripheries. In this context, however, references to essence have been scarce. No reference was made for example in *Google Spain*,<sup>111</sup> which brought to the fore the right to be forgotten. In *Coty Germany*,<sup>112</sup> the issue was whether German law on bank confidentiality was compatible with Directive 2004/48 on the enforcement of intellectual property rights. The Court was called upon to reconcile, on the one hand, the right to a trademark and the owner’s right to an effective remedy, which included the right to access information in the context of proceedings for the infringement of trademark rights and, on the other hand, the right to protection of personal data. In its analysis, the Court did not place emphasis on the concept of essence but used instead the language of “serious impairment.” It pointed out that a measure which results in serious infringement of a Charter right does not provide for a fair balance between conflicting rights.<sup>113</sup> It found that the unlimited and unconditional authorization to invoke banking secrecy provided by German law was liable to impair seriously the effective exercise of the fundamental right to intellectual property.<sup>114</sup>

Although in *Coty* the Court referred to the conditions of Article 52(1), it expressly applied neither essence nor proportionality conflating the two. Whilst Cruz Villalón AG agreed with the Court, his reasoning was somewhat different. He took the view that the essence of the rights would not be respected if the national legislation at issue resulted in the frustration of the right of any holders of intellectual property rights to obtain protection from the courts.<sup>115</sup> This dictum however defines the essence at a level of abstraction which is too general to be helpful.

In *Bauer*,<sup>116</sup> it was held that the right of a worker to receive payment in lieu of outstanding annual leave upon termination of the employment relationship forms part of the very substance of the right to annual leave provided by Article 31(2) of the Charter and can be claimed by the employee’s heirs. Notably, the Court required respect of essence in a horizontal situation holding that employers may not rely on national legislation which is in breach of Article 31(2) to avoid payment of the allowance.

<sup>111</sup>ECJ, Case C-131/12, *Google Spain v. AEDP*, ECLI:EU:C:2014:317, Judgment of 13 May 2014.

<sup>112</sup>ECJ, Case C-580/13, *Coty Germany GmbH v. Stadtparkasse Magdeburg*, ECLI:EU:C:2015:485, Judgment of 16 July 2015.

<sup>113</sup>*Id.* at para. 35. This has been the approach of the Court in other cases involving conflicts between intellectual property rights and other rights: See ECJ, Case C-70/10, *Scarlet Extended*, ECLI:EU:C:2011:771, Judgment of 24 Nov. 2011, paras. 48, 49; ECJ, Case C-360/10, *Sabam*, ECLI:EU:C:2012:85, Judgment of 16 Feb. 2012, paras. 46, 47. In both cases, Article 17 Charter had to be balanced with Article 16 thereof, protecting the freedom to conduct business.

<sup>114</sup>*Coty Germany GmbH*, Case C-580/13, at para. 40.

<sup>115</sup>*Id.* at para 39.

<sup>116</sup>ECJ, Joined Cases 569 & 570/16, *Bauer*, ECLI:EU:C:2018:871, Judgment of 6 Nov. 2018. See, to the same effect, ECJ, Case C-684/16, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, ECLI:EU:C:2018:874, Judgment of 6 Nov. 2018.

Clearly, essence is not a *sine qua non* condition of the inquiry. In some cases, the ECJ does not refer to essence. In others, it may refer to it but not resolve the case on its basis. In *Kadi*, for example, the ECJ took issue with the complete absence of safeguards which resulted in a violation of the right to judicial protection but did not reason by reference to the essence or substance of that right.<sup>117</sup> The same is correct in relation to other leading cases where the court established a violation of rights.<sup>118</sup> Since the coming into force of the Charter, the judicial inquiry has become more structured. The ECJ treats the requirement to respect essence as distinct from proportionality but does not always address essence separately.<sup>119</sup> In practice, the distinction between the two may not be easy to make. It requires determining the core of a right which is not susceptible to any balancing which, at least in relation to some rights, may be very difficult to make *in abstracto*. The definition of the core element entails an interpretational process which may itself incorporate an element of unacknowledged balancing.

Thus far, the main area in which the ECJ has engaged with the essence of rights is the right to personal data. In *Digital Rights Ireland*,<sup>120</sup> it annulled Directive 2006/24<sup>121</sup> which required providers of electronic communication services to retain certain customer data in the interests of public security. The judgment is important both for its substantive outcome and the methodology followed by the Court. The Court was unusually forthcoming in determining the level of judicial scrutiny that it would employ.<sup>122</sup> In the circumstances, review was strict given the important role played by the protection of personal data in the light of the fundamental right to respect for private life and the extent and seriousness of the interference.<sup>123</sup> It held that although the interference with the right to private life and the right to protection of personal data was wide ranging and particularly serious, it did not affect their essence. The interference with the former did not affect its core because the directive did not permit acquisition of knowledge of the content of the

<sup>117</sup>ECJ, Joined Cases 402 & 415/05 P, *Kadi & Al Barakaat International Foundation v. Council and Commission*, ECLI:EU:C:2008:461, Judgment of 3 Sept. 2008, paras. 357–358 (the inquiry on the substance of the right appears to have been conflated with the proportionality inquiry). In subsequent sanctions cases, the Court identified as part of the essence of effective judicial protection the right of the person concerned to obtain a judgment ordering annulment, whereby the contested measure is retroactively erased from the legal order and is deemed never to have existed, and declaring that the listing of his name was vitiated by illegality. See ECJ, Case C-584/10, *Commission v. Kadi*, ECLI:EU:C:2013:518, Judgment of 18 July 2013, para. 134; ECJ, Case C-239/12 P, *Abdulrahim v. Council and Commission*, ECLI:EU:C:2013:331, Judgment of 28 May 2013 paras. 67–84.

<sup>118</sup>See e.g., in relation to the right to judicial protection, ECJ, Case C-222/84, *Johnston v. Chief Constable of the Royal Ulster Constabulary*, ECLI:EU:C:1986:206, Judgment of 15 May 1986. See also ECJ, Case C-294/83, *Les Verts*, EU:C:1986:166, Judgment of 23 Apr. 1986.

<sup>119</sup>Apart from the cases mentioned in the main text, see e.g., ECJ, Case C-601/15 PPU, N., ECLI:EU:C:2016:84, Judgment of 15 Feb. 2016, para. 52 (concerning detention as a restriction on the right to liberty and security protected by Article 6 of the Charter). In that case, the Court implied that a regime that would impose detention irrespective of the personal conduct of an individual would impair the very substance of the right to security. ECJ, C-314/13, *Peftiev*, ECLI:EU:C:2014:1645, Judgment of 12 June 2014 (right to judicial protection). In that case, the ECJ implied that conferring absolute discretion to national authorities whether to authorize the release of funds subject to economic sanctions for the payment of legal services would run counter to the essence of the right to judicial protection. Cf. ECJ, Joined Cases 92 & 93/09, *Volker und Markus Schecke GbR and Hartmut Eifert v. Land Hessen*, ECLI:EU:C:2010:662, Judgment of 9 Nov. 2010, (right to personal data); ECJ, Case C-544/10, *Deutsches Weintor v. Land Rheinland-Pfalz*, ECLI:EU:C:2012:526, Judgment of 6 Sept. 2012 (right to carry out a trade or occupation). In these cases, the ECJ did not expressly examine whether the essence of the right was affected and moved directly to applying proportionality.

<sup>120</sup>*Digital Rights Ireland*, Joined Cases 293 & 594/12. For commentary, see among others, Maja Brkan, *The Concept of Essence of Fundamental Rights in the EU Legal Order: Peeling the Onion to its Core*, 14 EUR. CONST. L. REV. 332–68 (2018).

<sup>121</sup>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 O.J. (L 105) 54.

<sup>122</sup>See *Digital Rights Ireland*, Joined Cases 293 & 594/12 at para. 47. The Court held that the discretion of the EU legislature may prove to be limited depending on a number of factors, including, in particular, the area concerned, the nature of the right at issue guaranteed by the Charter, the nature and seriousness of the interference, and the object pursued by the interference. Although those factors could be derived by an analysis of the case law, it is rare that the Court refers to them explicitly.

<sup>123</sup>*Id.* at para. 48.

electronic communication as such.<sup>124</sup> Similarly, there was no interference with the essence of the right to personal data because the directive required certain principles of data protection and data security to be respected. In particular, under Article 7 of the Directive, Member States were required to ensure that appropriate technical and organizational measures were adopted against accidental or unlawful destruction, accidental loss or alteration of the data.<sup>125</sup> The Court held however that Article 7 did not provide for sufficient safeguards to ensure effective protection of the data retained against the risk of abuse and against their unlawful access and use. The difference appears to be between complete absence of safeguards and safeguards which are inadequate. In the first case, there is interference with the very essence of the right. If, by contrast, the legislature provides for such safeguards but they prove to be insufficient, this amounts to disproportionate interference.<sup>126</sup> This distinction is somewhat reminiscent of the test followed in determining the threshold of seriousness for the purposes of the non-contractual liability of the EU.<sup>127</sup> It appears to be based, however, on a quantitative rather than qualitative criterion. In truth, it is difficult to determine objectively the degree of interference that must exist to do away with the balancing act that the principle of proportionality entails.

In *Tele2 Sverige AB*,<sup>128</sup> the Court held that Directive 2002/58,<sup>129</sup> read in the light of the Charter, precluded national legislation which, for the purpose of fighting crime, provided for the general and indiscriminate retention of all traffic and location data of all subscribers relating to all means of electronic communication. The Court found the retention of such wide categories of data to be in breach of proportionality. It held that while the effective fighting of crime depends heavily on the use of modern investigation techniques, such an objective could not in itself justify legislation providing for the general and indiscriminate retention of all traffic and location data. *Tele2 Sverige AB* illustrates the flimsiness of the distinction between core and periphery of right. On the one hand, the Court suggested that legislation which does not permit retention of the content of a communication is not such as to affect adversely the essence of the rights to private life and to personal data.<sup>130</sup> On the other hand, it held that the data that had to be retained under the national laws in issue was so extensive that it provided “the means, of establishing a profile of the individuals concerned, information that is no less sensitive, having regard to the right to privacy, than the actual content of communications.”<sup>131</sup>

The essence methodology reached its apex in *Schrems*,<sup>132</sup> the only case so far where the ECJ has found a breach of the core element of a right and one which brought to the fore the fundamental differences between the US and EU data protection regimes. In *Schrems*, the Court declared that legislation permitting the public authorities to have access on a generalized basis to the content of electronic communications must be regarded as compromising the essence of the fundamental right to respect for private life, as guaranteed by Article 7 of the Charter.<sup>133</sup> Likewise, legislation not providing for any possibility for an individual to pursue legal remedies in order to have access to personal data relating to him, or to obtain the rectification or erasure of such data, does not respect the essence of the fundamental right to effective judicial protection, as enshrined in Article 47.<sup>134</sup>

<sup>124</sup>*Id.* at para. 39.

<sup>125</sup>*Id.* at para. 40.

<sup>126</sup>*See id.* at para. 69.

<sup>127</sup>*See* Joined Cases 104/89 & 37/90, *Mulder II*, 1992 E.C.R. I-3061.

<sup>128</sup>*Tele2 Sverige AB*, Case C-203/15.

<sup>129</sup>Directive 2002/58/EC, Concerning the Processing of Personal Data and the Protection of Privacy in the Electronic Communications Sector, 2002 O.J. (L 201) 31, 7.

<sup>130</sup>*Tele2 Sverige AB*, Case C-203/15. at para. 101.

<sup>131</sup>*Tele2 Sverige AB*, Case C-203/15. at para. 99 [emphasis added].

<sup>132</sup>*Schrems*, Case C-362/14.

<sup>133</sup>*Schrems*, Case C-362/14 at para. 94.

<sup>134</sup>*Schrems*, Case C-362/14 at para. 95. The ECJ held that the very existence of effective judicial review is of the essence of the rule of law.

In *Digital Rights* and *Tele2 Sverige AB*, the distinction between a serious or particularly serious infringement of a right and an infringement of its essence is so fine that it becomes virtually impossible to draw. In *Schrems*, violation of the essence comes dangerously close to the extinction of the right. In all cases, an overt or covert proportionality analysis is hard to avoid. The truth is that even in cases where the ECJ makes reference to essence, the inquiry seamlessly integrates essence and proportionality.

Essence is an area where there is, at least sometimes, variation between the approach of the Court and that of the Advocate General. In cases where the ECJ relied on and struggled with the concept, the Advocates General did not find it problematic and vice versa. In *Digital Rights*, Villalón AG did not examine whether the essence of the right was being violated since, in his view, the directive failed to meet the other two safeguards of Article 52(1). In *Tele 2 Sverige*, the Court found the national legislation dangerously close to the violation of essence whilst Saugmandsgaard Øe AG found the answer to be straightforward.<sup>135</sup> In *Schrems*, Bot AG found it extremely doubtful that the limitations in issue respected the essence of Articles 7 and 8 of the Charter for two reasons:<sup>136</sup> US authorities had power to access the content of electronic communications and the limitations were so broadly worded that they potentially allowed all the Safe Harbour principles to be disapplied. He then continued to find that the interference with the right to privacy and personal data violated also the other requirements of Article 52(1). Bot AG further concluded that the Commission exceeded the limits imposed by proportionality by not providing clear and precise rules governing effective remedies for breaches of Article 7 and 8 Charter on US territory.<sup>137</sup> Notably, in none of these cases did the Advocate General seek to engage theoretically with the concept of essence.

*Enzo di Puma*<sup>138</sup> concerned the accumulation of criminal and administrative sanctions for insider trading. The persons concerned had been acquitted in criminal proceedings but subjected to administrative fines in respect of the same acts. Under Italian law, the findings of the criminal court as regards the lack of an offence have *res judicata* effect with regard to administrative proceedings. The question, however, was raised whether that rule might breach the EU obligation to provide for effective and dissuasive penalties for breaches of the prohibition on insider trading. Although the Court found the Italian rule to be compatible with EU law, the judgment suggests a narrow understanding of essence. It held that instituting proceedings for an administrative fine which is essentially of a criminal nature, following the final conclusion of criminal proceedings, is a limitation on the right to *ne bis in idem* which is subject to Article 52(1). It must comply strictly with the principle of proportionality. In the circumstances, it found that bringing such proceedings clearly exceeded what was necessary. The Court made no reference to essence and relied purely on proportionality. Campos Sánchez-Bordona AG, by contrast, was more forthcoming. He expressed doubts as to whether legislation which enables the same unlawful conduct to be punished twice in the form of an administrative, albeit criminal in substance, penalty and a criminal penalty, without establishing a clear procedural mechanism to prevent double prosecution and double punishment respected the essence of the right of *ne bis in idem*.

A direct conflict between the Court and the Advocate General occurred in *Menci*,<sup>139</sup> which concerned the cumulation of administrative and criminal penalties for VAT violation. The

<sup>135</sup>See *Tele2 Sverige AB*, Case C-203/15 at paras. 155–57 of the Opinion. The Advocate General opined that, since the legislation in issue did not permit the acquisition of knowledge of the content of the electronic communications as such, there was no violation of essence.

<sup>136</sup>*Schrems*, Case C-362/14 at para. 177.

<sup>137</sup>*Schrems*, Case C-362/14 at paras. 213–15.

<sup>138</sup>ECJ, Joined Cases 596 & 597/16, *Di Puma*, ECLI:EU:C:2018:192, Judgment of 20 Mar. 2018.

<sup>139</sup>ECJ, Case C-524/15, *Menci*, ECLI:EU:C:2018:197, Judgment of 20 Mar. 2018.

Court held that the Italian legislation in issue respected the essence on Article 50 of the Charter since it allowed duplication of proceedings and penalties only under conditions which were exhaustively defined, “thereby ensuring that the right guaranteed by Article 50 is not called into question as such.”<sup>140</sup> This however equates essence to the very existence of the right, in effect depriving essence of any autonomous value.<sup>141</sup> Yet, the constitutional command to respect the essence of a fundamental right is stronger than the command merely not to abolish a right. Campos Sánchez-Bordona AG expressed doubts whether the duplication of proceedings complied with essence. It is submitted that both his reasoning and the outcome that he reached is more in line with the letter and the spirit of Article 50.

Notably, in *Associação Sindical dos Juizes Portugueses*,<sup>142</sup> the ECJ employed the concept of essence in relation to the overarching values of the Union provided in Article 2 TEU. It held that effective judicial review at Member State level and judicial independence are part of the essence of the rule of law as an EU value. The national legal systems therefore must guarantee that courts which may be called upon to apply EU law meet those requirements. In *Juizes Portugueses*, essence is invoked to provide the EU founding value of the rule of law with a normative content which corresponds to the principle of effective judicial protection provided in Article 19 TEU and Article 47 of the Charter. The judgment is part of a new generation of cases which articulate the constitutional essentials of EU law and the attributes of EU autonomy. The essence narrative however raises a number of issues and is only a part of the inquiry. Although effective judicial review and judicial independence are *sine qua non* attributes, their substantive content remains a matter of judicial interpretation. Each of those principles may also be said to have a core element that is immune from restriction.

## G. From Civil Liberties to EU Rights: The Interplay of High and Low Rhetoric in Distinctly European Rights

In contrast to constitutional rights, the concept of essence has played a limited role, if any role at all, in relation to free movement rights. In determining the legality of restrictions on free movement, the judicial inquiry is entirely proportionality focused. Many reasons may account for this. A first reason is the absence of path dependency. Inter-state movement rights are not historically fundamental and are not governed by the common European constitutional tradition. Second, the lack of constitutional status made essence an unsuitable transplant. The affinities to civil libertarianism and human dignity, which lie at the heart of essence rationale, are not present in relation to free movement rights. Third, the determination of their content and scope of application is almost entirely the product of case law. This task fell on the ECJ, which acted as the pathfinder. The need to distinguish between core and periphery was simply not present and would be counter-productive. On the one hand, the ECJ would risk alienating the national governments by giving EU free movement rights the pretense of constitutional status. On the other hand, drawing a distinction between periphery and core might be seen by national governments and courts as a license to override their non-core elements.

Notably, the concept of essence has proved instrumental in defining the meaning of EU citizenship rights. In *Zambrano*, the ECJ elevated Union citizenship to an independent source of rights.<sup>143</sup> Reiterating that Union citizenship is intended to be the fundamental status of nationals

<sup>140</sup>*Id.* at para. 43.

<sup>141</sup>Note also that in ECJ, Case C-258/14, *Florescu*, ECLI:EU:C:2017:448, Judgment of 13 June 2017, para. 55, the ECJ found that the essence of the right to property was not violated because the restrictions in issue did not call into question “the very principle of the right to a pension.”

<sup>142</sup>ECJ, Case C-64/16, *Associação Sindical dos Juizes Portugueses*, ECLI:EU:C:2018:117, Judgment of 27 Feb. 2018, para. 36.

<sup>143</sup>ECJ, Case C-34/09, *Zambrano v. Office national de l’emploi*, ECLI:EU:C:2011:124, Judgment of 8 Mar. 2011.

of the Member States, it held that Article 20 TFEU precludes national measures which “have the effect of depriving Union citizens of the genuine enjoyment of the substance of the rights conferred by virtue of their status as Union citizens.”<sup>144</sup> *Zambrano* expanded the substantive content of citizenship and brought within the ambit of EU law situations which do not involve inter-state movement. Whilst subsequent case law sought to restrict the scope of the ruling,<sup>145</sup> *Zambrano* has redefined the scope of EU law. In some respects, the *Zambrano* test is overelaborate: The attribution of “genuine” to enjoyment appears to add little and it is unclear why it might be material relative only to citizenship as opposed to any other rights. The reference to the “substance” of citizenship has an important signaling effect. It suggests that Union citizenship has a constitutional status and affinities to the nationality of a nation state. It also suggests that *Zambrano* offers minimal protection. Indeed, subsequent case law made it clear that the denial of the genuine enjoyment of the substance of citizenship rights refers only to situations in which the Union citizen has to leave the territory of the Union as a whole.<sup>146</sup> The *Zambrano* right has gone through corrective readjustments. After an initial stream of cases which narrowed it down, recent case law suggests a more nuanced approach.<sup>147</sup> The term “substance” in *Zambrano* can be taken to refer to a minimum core aspect of citizenship rights that cannot be touched. Nonetheless, CS<sup>148</sup> suggests that it is not an absolute right and that proportionality does play a role in determining whether the right can be claimed.

## H. Essence and Judicial Selectivity

As a rights-enhancing attribute, essence suffers from two important deficiencies. It does not preclude a narrow understanding of rights; nor does it encompass the essence of a right as protected by national constitutions. In that respect, it does not preclude the possibility that EU law will lower the standard of protection of fundamental rights guaranteed by a national constitution. This first deficiency is illustrated by *N.S.*,<sup>149</sup> the second by *Melloni*.<sup>150</sup> Both cases provide examples of lowering rights protection in the name of European integration.

The key issue raised in *N.S.* was whether a Member State should send back an asylum seeker to the Member State, which under Dublin II was responsible for examining his application, if this exposed him to inhuman or degrading treatment. The Court reasoned as follows. It pointed out that the EU measures that establish the Common European Asylum System were conceived in a context making it possible to assume that all the participating States observe fundamental rights. The Dublin II Regulation was adopted precisely because of the principle of mutual confidence in order to rationalize the treatment of asylum claims. In those circumstances, it had to be assumed that the treatment of asylum seekers in all Member States complied with the requirements of the Charter, the Geneva Convention, and the ECHR.<sup>151</sup> Nevertheless, it was not inconceivable that that system may, in practice, experience major operational problems in a given Member State, meaning that there is a substantial risk that asylum seekers may, when transferred to that Member State, be treated in a manner incompatible with their fundamental rights.<sup>152</sup>

<sup>144</sup>*Id.* at para 42.

<sup>145</sup>See e.g., Case C-434/09, *McCarthy*, 2011 E.C.R. I-3375; Case C-256/11, *Dereci and Others*, 2011 E.C.R. I-11315; ECJ, C-86/12, *Alopkpa and Moudoulou*, ECLI:EU:C:2013:645, Judgment of 10 Oct. 2013.

<sup>146</sup>*Dereci*, Case C-256/11 at para. 66.

<sup>147</sup>See ECJ, Case C-133/15, *Chavez-Vilchez*, ECLI:EU:C:2017:354, Judgment of 10 May 2017; ECJ, Case C-82/16, *K.A. and Others*, ECLI:EU:C:2018:308, Judgment of 8 May 2018.

<sup>148</sup>ECJ, Case C-304/14, *CS*, ECLI:EU:C:2016:674, Judgment of 13 Sept. 2016.

<sup>149</sup>ECJ, Joined Cases 411 & 493/10, *N.S. v. Secretary of State for the Home Department*, ECLI:EU:C:2011:865, Judgement of 21 Dec. 2011.

<sup>150</sup>*Melloni*, Case C-399/11.

<sup>151</sup>*N.S.*, Joined Cases 411 & 493/10 at paras. 78–80.

<sup>152</sup>*Id.* at para. 81.

However, it did not follow that any infringement of a fundamental right would affect the obligations of the other Member States to comply with the provisions of Dublin II.<sup>153</sup> That would be the case only where there are substantial grounds for believing that there are “systemic flaws” in the asylum procedure and reception conditions for asylum applicants in the Member State responsible, resulting in inhuman or degrading treatment within the meaning of Article 4 of the Charter.<sup>154</sup>

The Court thus appeared to draw a distinction between, on the one hand, mere infringements of fundamental rights, and, on the other hand, systemic flaws in the asylum procedure and reception conditions resulting in inhuman or degrading treatment. The principle of mutual recognition can be displaced only where there is a substantial risk of such an infringement occurring.<sup>155</sup> If this reading of the judgment is correct, the Court’s finding is the very antithesis of essence depriving human rights from their character as rights of the individual.<sup>156</sup>

What about the essence of national constitutional rights? Although Article 53 of the Charter states that the Charter may not restrict or adversely affect rights as recognized by the national constitutions, this does not preclude a maximalist interpretation of the Charter. In *Melloni*,<sup>157</sup> the Court subordinated Article 53 to the primacy of EU law. The Court held that the provision does not give general authorization to a Member State to apply the standard of protection of fundamental rights guaranteed by its constitution when it is higher than that deriving from the Charter. Such an interpretation would undermine the primacy of EU law.<sup>158</sup> *Melloni* is a judgment of constitutional importance both because of the subject matter of the case and the parties to the judicial dialogue. It was the first ever reference made by the Spanish Constitutional Court. There was also previous case law of that court which had arrived at the opposite conclusion from that reached by the ECJ.<sup>159</sup> The case concerned the compatibility of Article 4(a) of the Framework Decision on the European Arrest Warrant (EAW) with the right to a fair trial. Article 4(a) limits the possibilities of the executing State refusing to surrender a person on the ground that the EAW issued relates to the execution of a sentence imposed by a judgment following a trial *in absentia*. It provides that, if the person convicted *in absentia* was properly informed of the scheduled trial and chose not to appear or gave a mandate to a lawyer to defend them, the executing judicial authority is required to surrender that person. It cannot make their surrender subject to there being an opportunity for a retrial at which they are present in the issuing Member State. The ECJ held that Article 4(a) was compatible with the right to an effective remedy and the right to a hearing as provided in the Charter. It then held that that interpretation foreclosed the possibility of a Member State refusing to execute the warrant on the ground that the standard of protection of the right to a fair trial is higher under the national constitution. Such a view would run counter to the primacy of EU law. As stated above, following the judgment of the ECJ, the Spanish *Tribunal Constitucional* capitulated.<sup>160</sup>

<sup>153</sup>*Id.* at para. 82.

<sup>154</sup>*Id.* at para. 86.

<sup>155</sup>Confirmed in ECJ, Case C-4/11, Puid, ECLI:EU:C:2013:740, Judgment of 14 Nov. 2013, para 30.

<sup>156</sup>The case came in the aftermath of *M.S.S. v. Belgium and Greece*, App. No. 30696/09 (Jan. 21, 2011), <http://hudoc.echr.coe.int/eng?i=001-103050>, where the ECtHR had found that, in light of deficiencies in asylum procedures in Greece, by returning the applicant there, the Belgian authorities had exposed him to detention and living conditions that were in breach of Article 3 of the Convention. In *R (on the application of EM (Eritrea)) v. Secretary of State for the Home Department* [2014] UKSC 12 (UK), the Supreme Court of the United Kingdom offered a softer interpretation of the judgment in *NS*, but it is doubtful whether it accords with the ECJ’s intention. For a more extensive discussion of those cases and subsequent case law, see Takis Tridimas, *Competence, Human Rights, and Asylum: What Price for Mutual Recognition?*, in *THE DIVISION OF COMPETENCES IN THE EU LEGAL ORDER—A POST-LISBON ASSESSMENT* 151–70 (Sacha Garben & Inga Goevare eds., 2017).

<sup>157</sup>*Melloni*, Case C-399/11.

<sup>158</sup>*Id.*, paras. 56–57.

<sup>159</sup>See *supra* Section C.

<sup>160</sup>See *supra* Section C.

*Melloni* projects an inclusive, centralized approach to the protection of fundamental rights placing the Charter at the apex of the edifice. It interpreted Article 53 as a soft conciliation clause but with little bite to restrict the interpretation of EU law by the ECJ. *Melloni* essentially interprets Article 53 as meaning that the Charter does not lower the standard of protection provided by the national constitutions where, by virtue of EU law, those standards continue to apply and that the national level of protection is to be taken into account when the Court interprets the Charter without prejudice to the autonomy of EU law. Behind the clinical language of the Court and the cold logic of primacy lies a choice of a centralized constitutional model in which national constitutional standards could be under threat.

### I. Conclusion: The Three Faces of Essence

Since the Charter came into force, judicial references to the essence of right have proliferated. Nonetheless, there has been minimal engagement with the concept by the Court or the advocates general. The concept of essence has two limiting features. First, by its nature it signals a minimum of protection. In that respect it performs a powerful defensive role but lacks the malleability of proportionality. Lack of flexibility may render it a useful boundary but an unsuitable judicial tool. Second, by stressing the core elements of a right, it invites engagement with theoretical concepts that courts often feel uncomfortable with as they are likely to shift focus from the resolution of the specific dispute to a more abstract discussion of the theoretical underpinnings of constitutionalism. This may also explain the aversion of Anglo-Saxon courts towards the concept. This however should by no means detract from essence as a constitutional value. The command to protect the essence of fundamental rights can be understood at various levels.

First, it can be understood as legitimacy. The ring-fencing of essence bears all the hallmarks of the legitimating effect of constitutional language. It has a strong signaling effect to the populus, its reassuring resonance forming an integral part of the system of constitutional guarantees of a liberal democracy. Understood in that way, despite limiting functionality, the haziness of essence is an advantage, operating as a rallying democratic cause, an invitation to trust addressed by the government to the citizenry.

Second, it is a counter-majoritarian residue. The requirement to respect the essence is addressed to all branches of government but primarily to the legislature. Constitutional texts tend to enshrine rights in abstract terms and accompany their definition with a fairly open-ended mandate to the legislature to restrict them or even signal that the definition of a right is a cooperative task shared between the constitution and the legislature. In this respect, the safeguarding of essence seeks to influence the legislative process *ex ante* serving as a guide in the concretization of constitutional rights by the legislature. This grants the concept of essence a counter-majoritarian flavor but, at the same time, places the legislature in control: The essence serves as a limitation on legislative discretion within the judicial deference commonly accorded to the political process.

Third, essence is a constitutional posture supported by path dependency. The recognition of an indefeasible element of basic rights which is not open to bargaining is part of the EU constitutional design and pays tributes to the EU values of human dignity and the rule of law. Respect of essence is a necessary consequent of the characterization of a right as fundamental. It is also moored in European legal tradition. Article 52 is supported by a triple path dependency. It derives from the constitutional traditions of the Member States, the case law of the ECJ pre-existing the Charter, and the case law of the Strasbourg Court. Understood in this way, the concept of essence is part of the post-war liberal compact that define European constitutionalism founded on dignity and the antithesis to arbitrariness. In the constitutional traditions of European States, essence has a cathartic value signaling a definite break with totalitarianism and illiberalism. In EU law, its express

protection serves as an element of constitutional identity, intended to safeguard EU values from “an invisible army of grave inflictions.”<sup>161</sup>

None of the above functions can hide the limitations of essence as a judicial tool. It does not do away with the need for balancing nor does it guarantee a higher level of protection than would otherwise apply. The value of the concept lies much more in offering a constitutional posture and a legitimizing device than a judicial tool that provides a firm dividing line.

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<sup>161</sup>Randy E. Barnett, Why Popular Sovereignty Requires the Due Process of Law to Challenge “Irrational or Arbitrary” Statutes, 14 GEO. J.L. & PUB. POL’Y 355, 357 (2016).