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AVOIDING THE RAIN OR LEARNING TO DANCE IN IT: THE HESITATIONS OF THE SPANISH CONSTITUTIONAL COURT

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1 INTRODUCTION

This chapter will present the Spanish Constitutional Court's hesitations regarding the application of the Charter of Fundamental Rights. One must trace the milestones of its case-law to understand a court's position (or lack thereof). In the Spanish constitutional case-law, it is challenging to differentiate periods since the basic assumptions of the Spanish Constitutional Court about European integration are essentially the same as when Spain joined the European Communities (EC) in 1986. Without a doubt, what has changed in the 37 years of Spanish membership in the European Union (EU) (1986–2022) is the normative context of the latter. The entry into effect of the Charter of Fundamental Rights and the subsequent case-law of the European Court of Justice federalising its application have marked the turning points for the constitutional adjudication of fundamental rights in the Member States. Therefore, those landmarks will help us assess and structure the evolution of the Spanish Constitutional Court's case-law.

Before exploring the evolution of the case-law, a few considerations on the scope and organization of the Spanish constitutional jurisdiction may be worthwhile. Although Spain already had a 'Court for Constitutional Guarantees' during the Second Republic (1931–1939), the current Spanish Constitutional Court was created by the Constitution of 1978, which definitively replaced the dictatorial rule of General Franco. The regulation of the Spanish Constitutional Court, both in the Constitution (Arts. 159–165) and in the Organic Law of the Constitutional Court of 1979 (amended several times), has been greatly inspired by the German model,[2] though more so concerning the Court's powers than to its organization and procedure, which follow domestic traditions.[3] Nonetheless, its main areas of jurisdiction continue to be those of 1931: judicial review of laws, protection of fundamental rights, and adjudication of conflicts between the central state and autonomous communities.

The constitutional protection of fundamental rights operates in Spain with the same extension and in a similar way as in Germany: through judicial review of legislation and individual applications before the Constitutional Court after exhausting existing remedies before ordinary courts. Differences are purely organisational.[4] Like its German homologue, the Spanish Constitutional Court has two chambers (of six judges each) divided into two sections (of three judges each). Still, unlike Germany, Spain has no division of competencies between the two chambers. Individual applications on any matter or constitutional ground can reach any of the four sections since they are assigned for admission first and for study and proposal later to single judges on a rotation basis according to the registry number they obtain on arrival; that is, regardless of the expertise of each constitutional judge. In other words, during their nine-year-long mandates, constitutional judges have no defined area of responsibility, and they must deal with all kinds of procedures in all areas of constitutional law; in fact, after the renewal of a third of the judges every three years, they can move to another section and chamber, sitting on a different panel of judges.

[2] See Cruz Villalón (1990); Balaguer Callejón and Azpitarte Sánchez (2010); Cruz Villalón (2011).

[3] Rubio Llorente (2012), p. 1211.

[4] For more detail see in English, Ahumada Ruiz (2017) and Arzoz (2021).

Although in the first few decades of activity, numerous individual complaints were adjudicated in one of the two chambers, while judicial review of legal norms and conflicts of attributions were decided by the plenary of the Court, nowadays, fewer individual complaints are admitted for decision, and when they contain new issues or may be controversial, they tend to be deferred to the plenary. In addition, since 2000, half or more than half of the constitutional judges tend to be career judges.[5] All in all, this results in less specialized, ambitious, and coherent case-law.

Summing up, at the Spanish Constitutional Court, no single judge has a special responsibility, task, or commission to follow EU developments or to reflect on constitutional challenges coming from European integration. This may explain the difficulty for successive sets of constitutional judges in developing the comprehensive vision required for accommodating the constitutional jurisdiction of a state set within a supranational Union.

2 THE SOLIPSISTIC ATTITUDE IN THE PERIOD BEFORE THE LEGAL EFFECTS OF THE CHARTER, OR: NEITHER CONCERN FOR NOR CONCERNED ABOUT EUROPEAN INTEGRATION (1986-2010)

The first period of the Spanish Constitutional Court's case-law on European integration is comprised of the first 25 years after the accession of Spain to the European Communities on January 1, 1986.

The Spanish Constitutional Court was established in 1980 and started to adjudicate in January 1981. From the beginning, the individual protection of fundamental rights was a main task for the Court. It had to review many judicial decisions based on laws or interpretations that were fully or partially inconsistent with the new Constitution. The impact of the Constitutional Court's case-law on the transformation of the Spanish legal order was huge. In that transformation, a constitutional provision proved to be crucial.

That constitutional provision is Art. 10 para. 2, which provides that "[t]he provisions relating to the fundamental rights and liberties recognized by the constitution shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements thereon ratified by Spain." Based on this article, which from a comparative perspective was a notable constitutional innovation in 1978,[6] the Court's interpretation of fundamental rights has been in accordance with international treaties on human rights ratified by Spain. The Court has interpreted Art 10 para. 2 broadly; it has given hermeneutic relevance not only to formal international treaties but also to binding and non-binding acts, to resolutions and recommendations of international organizations dealing with human rights, and above all to the case-law of

[5] Since the last partial renewal of the composition of the Constitutional Court in December 2022, there are eight career judges and three academic judges, with an additional non-covered vacancy. The trend will remain for the next few years. Six of the current career judges will continue as constitutional judges until 2029, after the next partial renewal at the beginning of 2026. What is new is that four of them do not have the status of Supreme Court judge, but that of a higher court.

[6] See Saiz Arnaiz (1999); Queralt Jiménez (2008); Arzoz (2014), p. 159-262.

international courts and monitoring committees established for the implementation of international human rights treaties. The international organisations whose legal acts have been considered by the Court when interpreting fundamental rights include the International Labour Organization (ILO),[7] the United Nations, and the Council of Europe, as well as their various bodies and committees. In any case, the legal sources statistically most used within Art. 10 para. 2 are the text of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) and the case-law of the European Court of Human Rights that interprets and implements it.

The function of Art. 10 para. 2 has changed over time. Initially, it allowed the Spanish Constitutional Court to compensate for the *absolute lack* of human rights jurisprudence. Since the Court started from scratch, the incorporation of international human rights standards served to flesh out the abstract constitutional provisions on fundamental rights with a minimum common denominator. Nevertheless, today the interest in Art. 10 para. 2 lies in *coordinating* the domestic level of protection with the evolving international level of protection.

After Spain joined the European Communities in 1986, the Spanish Constitutional Court continued with business as usual.[8] Its general attitude towards EU law in the following decades can be summed up by a strong belief that European integration is not incompatible with the Spanish Constitution and has no implications for the realization of its jurisdictional functions. In the past 37 years, it has assessed the constitutionality of EU treaties on only two occasions, both at the government's behest: the Treaty of Maastricht (1992) and the Treaty establishing a Constitution for Europe (2004).[9] The Constitutional Court did not review the remaining Treaties because none of the legitimate actors required the Court to do so. And only once, in 1992, did it find a minor and remediable incompatibility between the Spanish Constitution and the European treaties - the passive suffrage in local and European elections recognised for all European citizens by the Treaty of Maastricht - which was speedily solved by amending the Spanish norm.

Legal scholarship has dubbed the attitude of the Constitutional Court towards the European integration as 'deliberate distancing,'[10] 'discreet indifference' and 'safe remoteness,'[11] as 'splendid isolation'[12] and even 'constitutional solipsism.'[13] This attitude had advantages and disadvantages. The benefit was that it encapsulated and safeguarded European integration against the turbulence of ordinary politics and the activism and ambitions of constitutional judges. Unlike its German homologue (and other constitutional courts eagerly to follow it), the Spanish Constitutional Court never voiced objections against normative shortfalls of the European project in terms of rights

[7] See Chacartegui and Arzoz (2021).

[8] For an early assessment, see Mangas Martín (1991), Rodríguez Iglesias (1993) and Pérez Tremps (1994).

[9] Opinions 1/1992 of 1 July 1992 and 1/2004 of 13 December 2004, respectively.

[10] González Campos (2002), p. 500.

[11] Azpitarte Sánchez (2008), p. 192.

[12] Requejo Pagés (2015), p. 493. In the nineteenth century, the expression 'splendid isolation' characterized the British foreign policy in the people's conception.

[13] Baquero Cruz (2009), p. 148-149, 153-154.

protection and democratic governance, nor did it show any ambition towards challenging the Court of Justice on the primacy of EU law.[14] The Court saw no compatibility problems between European integration and the Constitution, and the main political parties agreed. Thus, the Court could fully devote itself to what it considered the more urgent and energy-consuming task at hand: the constitutionalisation of the legal order after forty years of dictatorial rule and the configuration of a viable 'autonomy state,' which had been insufficiently defined in the Constitution.

The disadvantage was that it *separated* EU law from the interpretation and application of the Spanish Constitution and isolated the constitutional jurisdiction from law on European integration. The Constitutional Court considered that European integration and its law did not affect its jurisdiction or mandate; it changed neither its object of control nor its parameter of review. That attitude was summarized in the following *dictum*: 'Thus, the duty to guarantee the correct application of Community law by the national public powers is an issue of sub-constitutional relevance and, therefore, excluded within the individual complaint procedure as well as from other constitutional procedures.'[15]

Further, the Court explicitly declared that it would review the constitutionality of national acts implementing EU law, regardless of their validity according to EU law.[16] This continues to be the position of the Spanish Constitutional Court today. Still, in 2023, the Spanish Constitutional Court continues to follow its conception of jurisdictional separation that coincides neither with the ruling in *Solange I* nor the ruling in *Solange II*, both of the German Federal Constitutional Court.[17] Indeed, it does not sanction the 'confrontational' side of *Solange I* in the sense that it reserves to itself the right to directly review *EU* legal acts,[18] just the rather 'isolationist' side according to which it does not exclude the review of *national* acts implementing EU law, even if that review indirectly implies reviewing EU law.

This isolationist stance has had certain unintended effects, such as the lack of a robust, unequivocal recognition of the Court of Justice of the European Union (CJEU) as the ordinary legal judge for the definitive interpretation and validity of EU law that national authorities must apply. This lack has only recently started to be remedied.

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[14] Meinel (2023), p. 112.

[15] Spanish Constitutional Court, judgment 28/1991 of 14 February 1991, legal ground no. 4 (author's translation). Similarly, judgments 372/1993 of 13 December 1993, legal ground no. 7; 143/1994 of 9 May 1994, legal ground no. 8; 58/2004 of 19 April 2004, legal ground no. 11.

[16] Spanish Constitutional Court, judgment 64/1991 of 22 March 19911, legal ground no. 4 a), and judgment 58/2004, of 5 May 2004, legal ground no. 11.

[17] German Federal Constitutional Court, judgment of the Second Senate of 29 May 1974, BvL 52/71 (*Solange I*); and judgment of the Second Senate of 10 October 1986, 2 BvR 197/83 (*Solange II*).

[18] In Judgment 64/1991 of 22 March 1991 (legal ground no. 4), it stated that 'the Court has no competence to control the conformity with European Community law of the activity of national authorities;' in Opinion 1/2004 (legal ground no. 2), the Court stated that 'the constitution is no longer the framework of validity for Community legislation, but rather the Treaty itself;' and in Judgment 26/2014 of 13 February 2014 (legal ground no, 3), it declared that 'this Court is not entitled to check the validity of the law adopted by European institutions; this control should be, in any case, carried out by the European Court of Justice.'

The issue of a parameter of review is more complex. Formally speaking, nothing changed in 1986, after joining the European Communities, and nothing changed in the following decades of Spanish membership to the EC/EU. Since Judgment 28/1991, the Court has often insisted that EC/EU law has no constitutional character and rank and, consequently, cannot be used as a parameter to review national rules and acts.[19] Nevertheless, it could not close its eyes to the ever-growing reality of national law originating in EU law and of EU law directly or indirectly influencing national law or containing standards of individual protection.

When adjudicating conflicts of competence between the central institutions of the State and autonomous communities, the Constitutional Court considered the scope and content of EU secondary law to decide which level is constitutionally empowered to implement or execute it. Considering EU law became a matter of legal interpretation, a kind of *travaux preparatoires* before drafting certain national rules.

In contrast, when adjudicating fundamental rights relating to activities regulated by EU rules, the Constitutional Court simply resorted to Art. 10 para. 2 of the Constitution. Apart from being the only interpretative tool explicitly recognised by the Constitution, Art. 10 para. 2 was a proven method for coordinating the interpretation of constitutional provisions with the external obligations of the State. Thus, the Court treated EU law, without any distinction between primary and secondary law, written and case-law, or binding and soft law, as just another source of international law to be respected, along with other international treaties, when interpreting constitutional provisions in areas falling within its field of application. Indeed, in 1978 Art. 10 para. 2 was not considered an *instrument of constitutionalising EU law* but of keeping the *interpretation* of the Spanish Constitution in line with evolving international human rights law to which Spain was a Contracting Party. In the first few decades, few EU rules for the protection of individuals needed to be contemplated within the scope of constitutional provisions. Nevertheless, the choice to use Art. 10 para. 2 increased over time.

3 THE LITMUS TEST FOR THE OPENING UP OF THE CONSTITUTIONAL JURISDICTION (2011-2014)

3.1 The European turn in constitutional case-law

Some scholars have argued that a certain Europeanization of the Spanish constitutional case-law started in 2004.[20] Two important pronouncements were handed down in that year.

[19] Among many, judgments 64/1991 of 22 March 1991, legal ground no. 4; 41/2002 of 25 February 2002, legal ground no. 2; 58/2004 of 19 April 2004, legal ground no. 7; 120/2012 of 4 June 2012, legal ground no. 2; 239/2012 of 1 December 2012, legal ground no. 5; and 212/2014 of 28 December 2014, legal ground no. 3.

[20] E.g. Sarmiento (2013b), p. 875; Alonso García (2023), p. 10-11.

Constitutional Court's Opinion 1/2004 of December 13, 2004, on the Treaty establishing a Constitution for Europe, previously mentioned, was certainly promising. It tried to set European integration on safe constitutional ground, by incorporating the European common toolbox for constitutionalizing European integration[21]. The toolbox included the recognition of the primacy of EU law; the firm belief in the far-reaching convergence of the values and principles of the European Treaties with those of the Spanish Constitution, thereby removing the possibility of conflict; the prevalence of the Constitution as a rule of conflict in the 'unconceivable case' that incompatibility between it and EU law should arise; and the extension of its jurisdiction to the review EU acts in those extraordinary cases.

In addition, Opinion 1/2004 recognised Art. 93 of the Constitution,[22] a provision equivalent to Art. 23 para. 1 of the German Basic Law in its pre-Maastricht version, not only the procedural function of governing the transfer of power to a supranational organisation that was already in Opinion 1/1992 but also a 'qualitative or material dimension.' This critical statement remains quite cryptic. To this day, the Court has not elaborated on its consequences. It should, at least, imply that Art. 93 of the Constitution allows for adjustments as required by EU law regarding the functions of internal public powers, particularly adjustments deriving from the principle of primacy, and a displacement of the Constitution as the parameter of review regarding EU secondary law.

The second pronouncement was Judgment 58/2004 of May 5, 2004, in which the Court, for the first time, annulled a decision that had failed to refer a question on the interpretation of an EU provision to the CJEU. That judgment inaugurated a promising avenue for controlling judicial decisions containing aspects of EU law through the constitutional benchmark of effective judicial protection. However, it was still affected by a lack of definition and other serious flaws, which subsequent cases would make evident.[23]

The advocates of the 'European turn' hypothesis also hint at a couple of other seemingly 'integration-friendly' pronouncements that followed in 2011 (the Court's first preliminary request to the CJEU) and 2012 (the Court's first annulment of a judicial decision for ignoring the effects of a CJEU's ruling), which we will comment on in the coming pages. From a general perspective, the four cases were attempts of *aggiornamento*. Their undoubted merit was to bridge the gap with the case-law of other

[21] On Opinion 1/2004 of 13 December 2004 see: Alonso García (2005); Areilza Carvajal (2005); Becker (2005); Burgorgue-Larsen (2005); Castillo de la Torre (2005); Del Valle Gálvez (2005); Gómez Fernández (2005); Herrero de Miñón (2005); López Castillo et al. (2005); Martín y Pérez de Nanclares (2005); Matia Portilla (2005); Moderne (2005); Rodríguez Iglesias (2005); Rodríguez (2005); Schutte (2005); Roldán Barbero and Díez Peralta (2006), p. 87-110; Pérez Tremps and Saiz Arnaiz (2007), p. 49-52; Arzoz (2015), p. 75-87.

[22] 'By means of an organic law, authorisation may be granted for concluding treaties by which powers derived from the Constitution shall be vested in an international organisation or institution. It is incumbent on the Cortes Generales or the Government, as the case may be, to guarantee compliance with these treaties and with the resolutions emanating from the international and supranational organisations in which the powers have been vested.'

[23] Judgments 194/2006 of 19 June 2007, 78/2010 of 20 October 2010, 27/2013 of 11 February 2013, 212/2014 of 18 December 2014, 99/2015 of 25 May 2015 and 135/2017 of 27 November 2017 and Order 155/2016 of 20 September 2016. On these cases, see Arzoz (2020), p. 266-297.

European constitutional courts.[24] All in all, the four cases were insufficient to prompt the comprehensive revision necessary to adapt the constitutional jurisdiction born from a nation-state to the constitutional jurisdiction of a member state of a supranational Union. The Court's watchtower was secured, but maintaining a safe distance from EU issues remained the policy. Nevertheless, this timid attitude of opening up by the Court would soon run into conflict with EU law when the EU Charter of Fundamental Rights showed its bite. The response from the Court of Justice to the Constitutional Court's first reference to the CJEU abruptly put an end to these promising green shoots.

3.2 The acid burn of the Melloni judgment from the Court of Justice

In 2000, the Constitutional Court established an internally controversial doctrine, which had a significant impact on extradition procedures. This doctrine considered that the Spanish Constitution included, through the fundamental right to a fair trial, a procedural guarantee against *in absentia* decisions which required compliance by Spanish authorities, even beyond the Spanish jurisdiction in legal relationships with other States. This implied that Spanish authorities had to reject requests for extraditing persons to States in which they have been sentenced *in absentia*, and where no right to appeal against that conviction was granted.[25]

In 2002, a Council framework decision simplified the conditions for arresting and surrendering suspects between EU member states for a long list of crimes.[26] For a time, the Constitutional Court's doctrine on the far-reaching constitutional guarantee against *in absentia* trials could still be applied. However, a 2009 amendment made it impossible to maintain this maximalist constitutional case-law any longer.[27] According to the wording of the new Art. 4a of the Council framework decision, *in absentia* decisions were not an automatic obstacle to the execution of European arrest warrants, only when the person concerned had not been summoned in person or otherwise informed of the date and place of the hearing or if s/he had not been defended by a legal counsellor at the trial. The Spanish Constitutional Court's case-law established only 9 years earlier had not allowed for such distinctions or caveats. This was the situation when the Italian national, Stefano Melloni, whose extradition had been requested of Spain by Italy after being sentenced *in absentia* there, appealed to the Spanish Constitutional Court after the ordinary jurisdiction had accepted the execution of the Italian arrest warrant.

The Constitutional Court thought that it could persuade the CJEU to adjudicate based on the higher standard of protection, instead of keeping itself in 'splendid isolation.' This was a daring endeavour as well as evidence of maturity. In June 2011, for the first (and last) time in its history, the Spanish Constitutional Court referred three preliminary

[24] For a critical assessment of the Court's case-law on EU issues prior to Opinion 1/2004 of 13 December 2004, see Estella de Noriega (1999), Ortiz Vaamonde (2001), Martín y Pérez de Nanclares and López Castillo (2002) and Pérez Tremps (2003).

[25] Spanish Constitutional Court, judgment 91/2000 of 30 March 2000. The judgment included two dissenting votes, one by then president of the Court Cruz Villalón and another by three judges. All the dissenting judges argued for the consideration of Europe as a legal space with common supranational standards (ECHR).

[26] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA) (OJ L 190, 18.7.2002, p. 1).

[27] Council Framework Decision 2009/299/JHA of 26 February 2009 (OJ L 81. 27.3.2009, p. 24).

questions to the European Court of Justice: two questions of interpretation and another of validity. The Constitutional Court requested that the CJEU decide whether the amended framework decision was compatible with the EU Charter of Fundamental Rights then in force, regarding the execution of *in absentia* decisions. Secondly, it asked whether the framework decision could otherwise be interpreted as consistent with EU fundamental rights. And thirdly, should the two first questions be answered negatively, whether Art. 53 of the Charter would allow the Constitutional Court to apply a higher standard regarding the surrender of persons who had been sentenced *in absentia*.[28]

The Court was optimistic and proud of its preliminary request: the preliminary questions were well-founded and explicitly suggested three different avenues for reaching high standard interpretation which would be satisfactory for all concerned parties.[29] Nevertheless, the three questions showed more naivety than understanding about how EU law works and what the Charter of Fundamental Rights is about.

Furthermore, the third question was a time bomb in connection with the Court's previous case-law. In 2004 in its review of the Constitutional Treaty, the Spanish Constitutional Court declared that no conflict between the Charter and the Spanish Constitution *could* arise for two reasons, one material and one formal. First, the Charter was based on the European Convention of Human Rights to which Spain was already a party; second, Art. 53 of the Charter specifically safeguarded *whatever* higher level of protection national Constitutions would provide.[30] Certainly, the main justification seemed to be the first one. Nevertheless, the second reason was a bold interpretation of Art. 53 of the Charter,[31] according to available materials from the institutions involved in drafting the Charter[32] and to scholarly publications.[33] In other words, with its third preliminary question, the Spanish Constitutional Court was trying to save its case-law on the absolute scope of the right to a fair trial but, at the same time, was also indirectly playing Russian roulette with the reasoning that seven years prior had supported the declaration of compatibility of the Charter as part of the Constitutional Treaty with the Spanish Constitution.

The CJEU's answer was not what the Court expected.[34] The content and tone of the *Melloni* judgment of the Court of Justice was a bitter pill for the Spanish Constitutional

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[28] Spanish Constitutional Court, order 86/2011 of 11 June 2011. On this order, see Aguilar Calahorro (2011), Andrés Sáenz de Santamaría (2011), Arroyo Jiménez (2012), González Pascual (2012), Pérez Manzano (2012), Revenga Sánchez (2012), Torres Pérez (2012) and López Castillo (2014).

[29] See, for example, a scholarly writing on the preliminary question of the Spanish Constitutional Court by its then-president: Sala Sánchez (2012).

[30] Spanish Constitutional Court, Opinion 1/2004 of 13 December 2004, legal ground no. 6.

[31] Already Arzoz (2005), p. 104-110, with more references.

[32] E.g. Communication from the Commission on the legal nature of the Charter of Fundamental rights of the European Union, COM(2000) 644 final, point 9: 'the relationship between Union primary law, which would include the Charter if it is incorporated in the Treaties, and national law will remain unchanged'; and the then Director of the Legal Service of the Council J.-P. Jacque (2000), p. 49.

[33] Liisberg (2001a) and (2001b).

[34] CJEU, judgment of 26 February 2013, *Stefano Melloni v Ministerio Fiscal*, C-399/11, ECLI:EU:C:2013:107. On the judgment, among many, see Brkan (2013), De Boer (2013), De Visser (2013), Díez-Hochleitner (2013), Dubout (2013), Gaede (2013), Martín Rodríguez (2013), Ritleng (2013), Sarmiento (2013a), Torres Muro (2013), Ugartemendia Eceizabarrena and Ripol Carulla (2013),

Court. The Court of Justice answered the two first questions negatively and, in response to the third, argued that, in situations that were fully determined by EU law, as was the case, only the level of protection deriving from the EU Charter could be applied. The objective of uniformity had more weight than that of safeguarding higher standards.

The efforts of the Spanish Constitutional Court to Europeanize its higher standard of protection or at least to preserve it for its constitutional order had backfired. The Court found itself in an awkward situation. It did not want to run into conflict with EU law nor to bury its much-appreciated case-law. Nevertheless, in the end this second option proved inevitable.

Invoking national identity according to Art. 4 para. 2 TEU to overcome the absolute primacy of EU law over national constitutional law was not a serious option, either. Spain had been one of the member states most interested in passing the Council framework decision in 2002, and in its 2009 amendment, the Spanish government had not mentioned that its content could run into conflict with the interpretation of the Constitution rendered by the Constitutional Court. Furthermore, the doctrine on the absolute scope of the fundamental right to a fair trial was not written constitutional law, but internally controversial case-law of recent recognition. These were poor grounds for a principle that would qualify as belonging to national identity which needed to be protected against the primacy of EU law.

It took the Court almost a year to react to the CJEU's judgment.[35] In the meantime, four new constitutional judges were appointed. The twelve judges were in favour of adjusting the Court's case-law in line with the preliminary ruling. The question was not what to do, but how, not what level of protection apply to the individual case, but how the inevitable change in the domestic level of protection should be carried out or justified.

The Court did not hide their upset with the CJEU's judgment. The style of the very short ruling of the Constitutional Court was dry and sharp. It even included a threatening reference to the constitutional limits of EU integration. This was particularly confusing since the sense or the extent to which those limits might have been touched upon was not discussed in any way. This was a peculiar way of showing that the Constitutional Court was unhappy with the response from Luxembourg and its tone. For the operation of lowering the domestic standard to the point required by the amended framework decision and the CJEU's *Melloni* judgment, the Court resorted once again to the interpretation mechanism provided for in Art. 10 para. 2 of the Constitution. Regardless of the whole preliminary procedure, the terms of the questions referred to the CJEU and the content of the preliminary ruling itself, the Constitutional Court acted

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Appanah (2014), Bailleux (2014), Besselink (2014), and Safferling (2014).

[35] On Constitutional Court judgment 26/2014 of 13 February 2014, see Alonso García (2014), p. 179-194; Besselink (2014), p. 539-541, 550-552; Macías Castaño (2014), p. 135-141; Martín Rodríguez (2014); Requejo Pagés et al. (2014), p. 234-235; Arzoz (2015), p. 87-110; Muñoz Machado (2015), p. 219-223; Requejo Pagés (2015), p. 499-500; Torres Pérez (2014), p. 319-323; Matia Portilla (2016); Ripol Carulla and Eceizabarrena Ugartemendia (2017). An English version of judgment 26/2014 can be downloaded from the Court's official web site, section 'Translated resolutions': STC 26-2014 EN.pdf (tribunalconstitucional.es)

as if it were not applying the judgment of the CJEU but reinterpreting a constitutional guarantee.

In concurring votes, three constitutional judges criticized the fictious way in which the Court pretended that it was changing its case-law by its own prerogative. They blamed the majority for inconsistency; the Court didn't abide by the preliminary ruling it had requested from the CJEU. With its preliminary questions, the Court had recognised that the framework decision and, subsequently, *the Charter* were both appliable to the case as interpreted by the CJEU, but it avoided to apply those rules as such when it received unexpected answers. The Court had downgraded the preliminary ruling to a source of inspiration to interpret the Spanish *Constitution*, and, consequentially, the CJEU to a kind of consultative jurisdiction, ignoring its mandatory character.

In their concurring votes, two judges argued additionally that applying Art. 10 para. 2 was not the right constitutional basis to incorporate the content of the preliminary ruling rendered by the CJEU into the Spanish legal order. In their views, the Court should have based the amendment of its case-law on Art. 93 instead of Art. 10 para. 2 of the Constitution. For those constitutional judges, Art. 93 of the Constitution was the constitutional grounds that justified the effects that EU rules and rulings have in the Spanish legal order.[36] The implications were clear; the Court should have applied EU fundamental rights as interpreted by the Court of Justice.[37]

In its *Melloni* judgment, the Spanish Constitutional Court managed to adjust its case-law to bring it in line with the evolution of EU law.[38] Nevertheless, the price of that alienation disguised the real reason for the curtailment of the scope of a constitutional guarantee, filling the new wine of EU Charter rights into the old wineskins of constitutional provisions on fundamental rights, an operation for the sole consumption by the Constitutional Court since ordinary courts do not need, and are not allowed to resort to, such subterfuge to apply EU law and CJEU judgments. Several legal scholars criticized the fictious construction of the Constitutional Court, that it was through the Court's free-standing interpretation *of constitutional guarantees* that their scope coincided precisely with that of the Charter rights.[39]

Apart from disguising the cause for the lowering of the constitutional standard, the critical point was that, in cases classified as '*Melloni* situations,' the CJEU had imposed the direct and exclusive application of the Charter rights, pre-empting the application of any constitutional standard, be it higher or lower. It had not allowed for the implementation of Charter rights through national rules, even those constitutional in nature, nor for their replacement through the application of national rules providing for an equivalent level of protection. There is no equivalent protection doctrine within the EU system of fundamental rights. Any kind of reception of the Charter, whatever its formal construction and regardless of its substantive impact, contradicts the primacy

[36] Judges Asua Batarrita and Roca Trías, concurring votes to Judgment 26/2014 of 13 February 2014.

[37] Explicitly Judge Asua Batarrita.

[38] To be more precise, the constitutional level of protection was lowered to coincide with the level of protection deriving from the ECHR, which was slightly higher, although in the *Melloni* case the difference was not relevant.

[39] E.g. Muñoz Machado (2015), p. 223.

and autonomy of EU law. Nevertheless, the doubt remained as to whether this peculiar way of incorporating the Charter's level of protection was a tantrum by the Constitutional Court over the imposing nature and harsh tone of the CJEU's *Melloni* judgment.

4 THE REGULARIZATION OF CONSISTENT INTERPRETATION AS THE ONLY AVENUE FOR INCORPORATING THE EUROPEAN LEVEL OF PROTECTION (2014-2022)

The promising 'European turn' in the Spanish Constitutional Court's case-law was short lived, spanning only from Opinion 1/2004 to Order 86/2011. It collapsed when the Court of Justice gave its preliminary ruling in the *Melloni* case. Certainly, progress was made in other fields in the following years. The Spanish Constitutional Court continued to advance its case-law in another area of its fundamental rights jurisdiction with implications for the primacy of EU which had been hitherto underdeveloped, if compared with the case-law of other constitutional courts. It began to adjust its case-law concerning the duty to refer preliminary questions to the CJEU by national ordinary courts. Although never fully carried out with the necessary clarity, this meant huge progress. A constitutional court can choose to be distant from the application of EU law by national courts, but, if it is a fundamental rights court, in the long run, it cannot ignore the implications of the correct functioning of preliminary procedure, not only for the sake of the unity of EU law, but also for the effectiveness of the rights awarded by EU law to individuals.

The basis for the new case-law was laid down, even prior to the *Melloni* saga, in a case in which a national court had upheld an administrative penalty imposed on a legal firm, even though a CJEU preliminary ruling had previously declared the legal provision being applied in the case inconsistent with EU law. The court had argued that the preliminary ruling did not have *ex tunc* effects. The affected legal person submitted an individual constitutional complaint. The Constitutional Court's judgment was forceful; it solemnly endorsed the principle of primacy of EU law and the duty to fully respect the CJEU's rulings.[40] It sent a clear message to ordinary courts not to ignore the legal effects of the CJEU's judgments.

From the foregoing finding, the appraisal of the constitutional relevance, of complying with the duty to refer to the CJEU according to Art. 267 TFEU, was only a step away. In 2019, the Constitutional Court broke a taboo; for the first time, it annulled a decision by the Supreme Court for not having referred a preliminary question to the CJEU.[41] Even though it was controversial because of the stringent application of the *acte éclairé* doctrine, the annulment sent a powerful signal that the Court would no longer turn a blind eye to the fulfilment of the duty to refer, even if the Supreme Court was responsible for the breach. The duty to refer was acquiring a safe constitutional

[40] Spanish Constitutional Court, Judgment 145/2012 of 2 July 2012. See Arroyo Jiménez (2013); Sarmiento (2013b); Ugartemendia Eceizabarrena (2013), p. 422.

[41] Spanish Constitutional Court, Judgment 37/2019 of 26 March 2019.

dimension. The case-law seemed to hint at a better understanding of the existential needs of EU law.

Nevertheless, some doubts on this case-law's rationale remained. The Constitutional Court's compelling case-law focusses on cases in which a national court chooses to not apply a national rule of legal rank that it considers to be inconsistent with EU law, while failing to request a preliminary ruling from the CJEU to establish its incompatibility. This creates the impression that the constitutional value that is protected through this case-law is the principle of legality or that of parliamentary sovereignty, not the primacy of EU law as such or the duty to refer that serves that primacy. The Court discovered that Art. 267 TFEU could be instrumentalised to supervise the correct use of the *Simmenthal* doctrine by national courts, when it comes to national rules of legal rank.[42]

However, the function of the Charter and the CJEU's case-law on fundamental rights in constitutional adjudication remained unsolved. After the vicissitudes regarding the Council framework decision on the European arrest warrant, it was the General Regulation for the Protection of Personal Data's turn.[43] This Regulation implies a deep harmonization of the exercise of a fundamental right. Most of its field of application can qualify as a *Melloni* situation.

In 2020, a case dealing with the new right to be forgotten reached the Spanish Constitutional Court.[44] In this case, it seemed favourable to opt for a direct application of the Charter. First, the structural requirements of EU law for the sole application of the Charter had been already laid forth in the *Melloni* and *Åkerberg* judgments (2013) by the CJEU,[45] and their implications had been sufficiently discussed in legal scholarship. Second, the issue before the Spanish Constitutional Court dealt with an application submitted by an individual against Google, on the grounds that the Spanish Supreme Court had infringed upon the balancing criteria established both by the CJEU and the Constitutional Court. In this case, both courts were sharing the same criteria. Thirdly, the direct application of the Charter no longer seemed like such a bold gesture as it would have in 2014, with the only, then unknown, precedent coming from the Austrian Constitutional Court;[46] the German Federal Constitutional Court had already taken that step in 2019 with a case on the right to be forgotten in its so-called "November (r)evolution."[47]

[42] For a thorough analysis, see Arzoz (2020), p. 265-324.

[43] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC.

[44] On the status of the right to be forgotten in Spain, see Guichot (2019).

[45] CJEU, Judgments of 26 February 2013, *Åklagaren v Hans Åkerberg Fransson*, C-617/10, ECLI:EU:C:2013:105, and *Stefano Melloni v Ministerio Fiscal*, C-399/11, ECLI:EU:C:2013:107.

[46] Austrian Constitutional Court, Judgment of 14 March 2012, U 466/11 and others, VfSlg. 19.632/2012.

[47] German Federal Constitutional Court, Judgment of the First Senate of 6 November 2019, 1 BvR 276/17 (*Right to be forgotten II*). The phrase 'November-(r)evolution' has been taken from Kühling (2020). For a Spanish language analysis of the transformations of the German constitutional jurisdiction through the European integration, from the *Solange I* case to the *Right to be forgotten II* case, see Arzoz (2022).

Nevertheless, in Judgment 89/2022 the Court missed the opportunity to declare the Charter a parameter of review in further *Melloni* situation cases.[48] According to the claimant, the Supreme Court had infringed upon the criteria established by the CJEU. Therefore, the judgment exhaustively analysed the CJEU's substantive case-law on the right to be forgotten.[49] However, the analysis is presented aseptically as if it were a study of comparative law prior to adjudication. After this introductory report, it analysed the infringement of the "fundamental right to be forgotten," with the help of balancing criteria extracted from the CJEU's case-law ("public relevance of the widespread information," "the time factor") using their own weight, disconnected from EU law, and interpreted according to the Constitutional Court's own general case-law on these criteria. The finding was that, because of the infringement on those criteria, the challenged decisions of the national courts had violated the fundamental right to informative self-determination entrenched in Art. 18 para. 4 of the Spanish Constitution.

There is some controversy about what the Court did in this case, or about the direction it was moving. For some commentators,[50] the Court might be paving the way for the direct application of the Charter as advocated by the First Chamber of the German Federal Constitutional Court in *Recht auf Vergessen II*.[51]

In my view the ruling continues the approach of the *Melloni* judgment by the Constitutional Court,[52] an approach of fully complying with the content of the CJEU's case-law but pretending to only apply the constitutional parameter of review. The Court is still operating under the consistent interpretation paradigm, although the constitutional provision allowing for it (Art. 10 para. 2) is not mentioned. Spanish scholars would have, perhaps, not paid so much attention to this ruling if two constitutional judges, in a joint dissenting vote, had not hinted at what they considered to be a defect of its reasoning.[53] They not only dissent from the majority regarding the balancing conducted by the ruling, they also blame the majority decision for limiting itself to presenting the EU regulation and case-law on the right to be forgotten, instead of building on its constitutional parameter of review and stringently following its own constitutional case-law, in particular Judgment 58/2018.

They included a principled statement: 'the idea of dialogue between courts does not imply the replacement of the Constitution as the benchmark of fundamental rights, the protection of which is incumbent lastly on this Court by virtue of the amparo jurisdiction, nor the replacement of the constitutional case-law by the case-law of interpretation organs of other human rights texts.'[54] A rather harsh statement: the

[48] Spanish Constitutional Court, Judgment 89/2022 of 29 June 2022.

[49] CJEU, judgment of 13 May 2014, *Google Spain and Google*, C-131/12, ECLI:EU:C:2014:317; judgment of 24 September 2019, *GC and others (De-referencing of sensitive data)*, C-136/17, ECLI:EU:C:2019:773; and judgment of 24 September 2019, *Google (Territorial scope of de-referencing)*, C-507/17, ECLI:EU:C:2019:772.

[50] Alonso García (2022) and (2023), p. 18; Cruz Villalón (2022).

[51] See above note 47.

[52] Spanish Constitutional Court, Judgment 26/2014 of 13 February 2014.

[53] Judges Xiol Ríos and Balaguer Callejón, joint dissenting vote to Judgment 89/2022 of 29 June 2022. They submitted a similar joint dissenting vote to Judgment 105/2022 of 13 September 2022, which was also similar to the previously mentioned Judgment.

[54] Author's translation. The statement was confirmed in a later dissenting vote by one of the two judges:

dissenters were not only against 'the replacement of the Constitution as the benchmark of fundamental rights' that, in their view, would have taken place in the ruling, but the Court of Justice was also presented not as a *court* of a *supranational* organisation to which Spain is a member state, but as an *interpretation organ* of a human rights text among many!

The point is not the inadequacy of the criticism to what the judgment does—in fact, the Court did the same as in other cases, even in the ruling presented as "a model" by the dissenting vote[55]—but its meaning, the charge of neglecting or departing from the constitutional parameter of review.

In other words, as some constitutional judges did in 2014 regarding the *Melloni* judgment by the Constitutional Court, other constitutional judges also criticized this new ruling of 2022 for its ambiguity in the use of the parameter of review. Nevertheless, although the methodology of both judgments is similar, the reasons for criticism differ. While two of the concurring votes of 2014 wished that the judgment had unequivocally applied the *European* level of protection, according to the (then) new *Melloni* doctrine of the CJEU, the two dissenters in 2022 wanted the ruling to be grounded more robustly on the *constitutional* fundamental right concerned.

5 CONCLUSIONS AND PERSPECTIVES

The Spanish Constitutional Court was never concerned with European integration nor did it entertain concern or ambition to challenge the rising penetration of EU law into national legal orders. Nor has its approach to the notion and implications of the EU Charter of Fundamental Rights ever been conflictive, even after the Court of Justice in the *Melloni* judgment seriously disappointed its high expectations in preserving a higher level of constitutional protection regarding trials *in absentia*.

In thirty-seven years of EU membership, the Constitutional Court has not considered that European integration or even the federalization of the CJEU's interpretation of the Charter demand adjustment in the main coordinates of its jurisdictional function as defined in the Constitution and legislation.

Regarding the object of review, the Constitutional Court still lives under the paradigm of German Federal Constitutional Court's *Solange I* Judgment[56] in the sense that it has not renounced the competency to fully review national acts and rules, even if they implement EU law. This inevitably begs the question of whether that unrestricted definition of its object of control - that the German Federal Constitutional Court gave up in 1986 generally speaking and still maintains regarding national rules, and which

Judge Xiol Ríos, dissenting vote to Judgment 151/2022 of 30 November 2022, point no. 5.

[55] Spanish Constitutional Court, Judgment 58/2018 of 4 June 2022. Not only when establishing general principles, but also when reasoning their application in the case, it referred to several CJEU's judgments, while the criticized Judgment 89/2022 of 29 June 2022 only referred to them in the first step and avoided them in the second.

[56] See above note 17.

implies an overlapping scrutiny through two different parameters by two different jurisdictions - can be considered a fully cooperative conception of constitutional review within a *Verfassungsgerichtsverbund*. If the Spanish Constitutional Court wishes to exercise complete jurisdiction over national acts, it should, at least, respect the Court of Justice's priority in the review of the validity of EU law before reviewing national acts that have been adopted to transpose or implement EU legal acts.[57]

Regarding the parameter of review, the Constitutional Court has a mental reservation regarding the direct application of the Charter - which is mandatory according to the CJEU's case-law in so-called *Melloni* situations - insofar as it fails to follow its Austrian and German homologues, the great models for its constitutional jurisdiction in 1931 and 1978, which have gone in that direction.

In 2022, a few Spanish scholars still took a clear stand against the direct application of the Charter by the Constitutional Court.[58] They support an isolationist conception of the constitutional jurisdiction and consider that guaranteeing the supremacy of the national Constitution, understood as giving full effect to its whole normativity, is incompatible with guaranteeing the legal value of the Charter within the scope of its procedures and competences, an incompatibility that does not exist for the abovementioned constitutional courts.

Other scholars do not close all doors but request a law allowing the replacement of the parameter of constitutional review.[59] Consequentially, they do not see a principled incompatibility in said replacement but expect legal empowerment of the Court to proceed. This, nevertheless, would make a big difference in the autonomy with which the German Federal Constitutional Court fine tunes its jurisdiction; none of the successive adjustments in its object or parameter of constitutional control to deal with the existence of EU law have been motivated by the legislature. They have, instead, been implemented by the Court itself through case-law.

Recently, a former president of the Spanish Constitutional Court and former advocate-general of the Court of Justice, Pedro Cruz Villalón, considered this an inevitable development. He explained, 'the issue is, in any case, how long the Court can maintain, on firm footing, an approach that is so far away from reality and, above all, from EU legality."[60]

So far, we have spoken about what the Constitutional Courts does *not* do. But what does it do exactly? Consistent interpretation under Art. 10 para. 2 of the Constitution is the general gateway for the incorporation of the European level of protection into constitutional case-law. From the beginning, it has practised under Art. 10 para. 2 a sort of pragmatical hybridisation of the constitutional parameter of review, initially

[57] See CJEU, Judgment of 11 September 2014, *A/B and others*, C-112/13, ECLI:EU:C:2014:2195, para. 43.

[58] E.g. Matia Portilla (2016) and (2022), p. 178.

[59] Cruz Villalón (2021), p. 21; Cruz Villalón (2022), p. 246 (but see the following paragraph in the text); Alonso García (2023), p. 11.

[60] Cruz Villalón (2022), p. 246. In the same sense, García Couso (2022), p. 219, who sees no incompatibility between continuing preserving the supremacy of the Constitution and acting as a European judge.

regarding international human rights standards. When the need arose, it did not see any problem applying the same approach, first, to EC/EU law and, later, to the Charter as interpreted by the CJEU and to apply its level of protection indirectly, under the disguise of national fundamental rights. Constitutional Court Judgments 26/2014 (the *Melloni* case) and 89/2022 (the case on the right to be forgotten) are evidence of that stance. Therefore, the Court's approach to the legal relevance of the Charter is monistic and has not integrated, or adapted to, the dual track built by the CJEU's *Melloni* and *Åkerberg* judgments for the European level of protection. It consciously avoids the dual landing strip for both kinds of situations carefully elaborated by the First Senate of the German Federal Constitutional Court in 2019.

That approach has two advantages and one disadvantage. The first advantage is smooth coordination of the Court's interpretation of constitutional rights with the case-law of both the ECtHR and the CJEU and, subsequently, a pragmatic avoidance of conflicts. The second is the uninhibited use of the resulting hybrid interpretation of the constitutional parameter of review beyond the scope of EU law, which also helps to avoid asymmetries in the level of protection applicable to situations both within and outside the scope of EU law in the national legal order. The disadvantage is that, since the Charter is used by the Constitutional Court as an interpretative parameter rather than as a proper instrument of EU law, national courts, which are the main enforcers of EU law in the national legal order, are given a wrong idea about its status. This does not foster the full and direct implementation of the Charter in Spain.[61]

Is it this approach as employed by the Spanish Constitutional Court purely idiosyncratic? Is it an oddity with no parallels in the European context? The two cases decided by the First Senate of the German Federal Constitutional Court on November 6, 2019,[62] both on the right to be forgotten, neatly differentiated between so-called '*Melloni* situations' on the one side and '*Åkerberg* situations' on the other. In the case dealing with a '*Melloni* situation,' the First Senate accepted the application of the Charter. In the case dealing with an '*Åkerberg* situation,' it opted for the preferential application of the national level of protection *although interpreted consistently in line with the Charter*. This second route, found by the First Senate in 2019, and which, statistically-speaking, must be the most frequent, is very close to the eclectic and integrative approach that the Spanish Constitutional Court has practised since 1986 and that it overtly confirmed in its *Melloni* judgment of 2014, insomuch as it endorses a sort of hybridisation and openness of the national parameter of review to the European level of protection.

Hybridisation of the national parameter of review does not fully correspond with the requirements of the Court of Justice's federalising case-law. In '*Melloni* situations,' it demands the exclusive application of the Charter. Still, the Spanish Constitutional Court encourages this approach because it is less disruptive to its conception of the constitutional mandate of full and exclusive preservation of the supremacy of the Constitution, in terms of both the object and the parameter of constitutional review. Time will tell whether this is only a temporary accommodation or if it might prove a lasting arrangement.

[61] About the unsatisfactory impact of the Charter in Spain see Sarmiento and Codina (2020).

[62] See above note 47.

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