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FUNDAMENTAL RIGHTS BEFORE
SPANISH COURTS-REASONABLE
ACCOMODATIONS WITHOUT
STRUCTURAL CHANGES.**

Preprint No. 2/2023

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BEFORE SPANISH COURTS-REASONABLE ACCOMODATIONS
WITHOUT STRUCTURAL CHANGES.¹**

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Suggested citation: L. Arroyo Jiménez; R. Cancio Fernández: *Article 47 of the Charter of Fundamental Rights before Spanish Courts. Reasonable accomodations without structural changes*, 2/23 Preprints series of the Center for European Studies *Luis Ortega Álvarez* and the *Jean Monnet* Chair of European Administrative Law in Global Perspective, 2023.

To be published in Matteo Bonelli, Mariolina Eliantonio and Giulia Gentile (eds.), *Article 47 of the EU Charter and Effective Judicial Protection*, Vol. 2 (Hart 2023)

¹ This research is supported by a research grant of the National Research Programme of Spain (PGC2018-101476-B-100).

Abstract

This chapter addresses the question of how Spanish courts apply Article 47 of the Charter from both a quantitative and qualitative standpoint. It shows, on the one hand, that Article 47 is very frequently quoted by Spanish lower and higher courts alike. National courts have also made many references for preliminary rulings of the Court of Justice about Article 47, the general principle of effective judicial protection, and the principle of the effectiveness of EU law. We claim that the evolution of judicial decisions citing Article 47 of the Charter, as well as the differences observed in terms of the type of court and the area of law are associated with certain peculiar features of Spanish law. While the chapter illustrates that Article 47 has not had a structural impact on the Spanish domestic legal order, this provision has led to some adjustments in terms of the right to access to a court, the rights of defence, the right to legal counsel, the principle of equality of arms, and the scope of judges' powers. Overall Spanish courts have correctly applied Article 47 of the Charter and the relevant case law of the Court of Justice of the European Union, yet there are two important exceptions: the lack of examination of whether a case falls within the scope of EU law, and the doctrine of the Constitutional Court regarding how it is bound by Article 47.

1. INTRODUCTION

This chapter sets out the main findings on the application of Article 47 of the Charter of Fundamental Rights of the European Union (EUCFR or the 'Charter') by Spanish courts. The analysis adopts both a quantitative and qualitative approach. The motivation for the study, the significance of the subject matter and the methodology are explained in the introductory chapter of this work. The structure of this chapter follows the editors' questionnaire, without the need for any adjustments. Section II includes a broad overview of the institutional and normative context for the application of Article 47 EUCFR by Spanish courts. Section III sets out and discusses the main quantitative results. Section IV focuses on the qualitative aspects regarding the application of Article 47 by Spanish courts. Then, section V examines the actual and potential systemic impact of Article 47 on Spain's domestic legal framework. Section VI summarises the main findings.

2. INSTITUTIONAL AND NORMATIVE CONTEXT

The Spanish Constitution (SC) defines the purpose and role of courts both objectively – from the perspective of the rule of law – and subjectively – from the standpoint of the fundamental right to an effective judicial protection.¹ As for the former, the principle of the rule of law (Article 1(1) SC) demands that judicial authorities are composed of independent and accountable judges, who cannot be removed from office except in specific circumstances and under strict proceedings, and who are only subject to the law (Article 117(1) and (3) SC). The judicial function entails deciding cases by issuing and

¹ See L Arroyo, 'Las bases constitucionales del Derecho administrativo' in J M Rodríguez de Santiago, G Doménech and L Arroyo (eds), *Tratado de Derecho administrativo I* (Marcial Pons, 2021), 602-604.

enforcing judgments, including (i) the settlement of disputes between public and private parties; (ii) the imposition of criminal sanctions; and (iii) the judicial review of administrative action (Articles 117(3) and 106(1) SC). Exclusively courts qualifying as judicial bodies within the judiciary can perform these functions.

With regard to the subjective perspective of the role of courts, Article 24 SC provides the rights to an effective legal remedy and due process. The wording of this provision is similar to that of (i) Articles 6 and 13 of the European Convention on Human Rights (ECHR), which was already in force when the Spanish Constitution was enacted in 1978; and (ii) Articles 47 and 48 of the EUCFR, which were drafted in the light of the ECHR and the case law of the Strasbourg Court. Article 24 SC is worded as follows:

‘1. Every person has the right to obtain the effective judicial protection of the Judges and the Courts in the exercise of his or her rights and legitimate interests, and in no case may he or she go undefended.

2. Likewise, all persons have the right of access to the ordinary judge predetermined by law; to the defence and assistance of a lawyer; to be informed of the charges brought against them; to a public trial without undue delays and with full guarantees; to the use of evidence appropriate to their defence; to not make self-incriminating statements; to not declare themselves guilty; and to be presumed innocent.

The law shall determine the cases in which, for reasons of family relationship or professional secrecy, it shall not be compulsory to make statements regarding alleged criminal offences.’

The Constitution and additional statutory provisions have arranged the Spanish judiciary as follows. First, courts of first instance are often single-member courts, whereas courts of appeal are made up of several judges. Second, the judiciary is organised into five divisions, or ‘jurisdictional orders’ – i.e., civil, criminal, judicial-administrative (*contencioso-administrativo*), labour and military – each composed of different circuits – district courts, regional courts and national courts. These jurisdictional orders have an internal hierarchical structure. Third, the Spanish Supreme Court (*Tribunal Supremo*) is the court of last resort for the aforementioned jurisdictional orders. It is divided into five chambers. Obtaining access before the Supreme Court usually requires filing an extraordinary appeal – the so-called ‘cassation appeal’. Cassation appeals may be grounded solely on a breach of applicable legal rules. Also, appellants should have exhausted one or two instances beforehand. Fourth, the Supreme Court is the highest court for all cases other than for constitutional interpretation and fundamental rights protection. These matters are entrusted to the Constitutional Court under Article 122(1) SC. The Spanish Constitutional Court (*Tribunal Constitucional*) exercises its jurisdiction through appeals brought by public authorities, references made by ordinary courts, and individual claims for the protection of fundamental rights filed by individuals – the *recurso de amparo*, governed by Article 161 SC. The Spanish Constitutional Court has defined the scope of the rights to an effective judicial protection and to a fair trial under Article 24 SC via individual claims for the protection of fundamental rights.

In 2004, the Constitutional Court delivered a landmark ruling on the compatibility with the Spanish Constitution of Article I-6 of the Treaty establishing a Constitution for

Europe, which expressly stated the principle of supremacy of EU law.² This ruling defined the relationship between EU law and the national Constitution, and thus set the normative context for the judicial application of Article 47 EUCFR. The Constitutional Court's conclusion resembles that of the constitutional courts of other Member States, although with a distinct line of reasoning. The Spanish Constitutional Court largely relied on the conceptual distinction between (i) the hierarchical supremacy of the SC; and (ii) the primacy of EU law in the application of legal provisions.

The Spanish Constitutional Court's line of reasoning is based on the assumption that domestic constitutions are at the top of the hierarchy of laws and all other provisions are ranked below them.³ International treaties, and particularly EU primary law, along with EU secondary legislation, also fall below national constitutions. The reason being that they are incorporated into the domestic legal order solely through a transfer of powers stemming from the domestic constitution. Indeed, this transfer of powers is expressly allowed under Article 93 SC. The purpose of this provision is to enable the vesting of powers in the European Communities:

'By means of an organic act, authorisation may be granted for concluding treaties by which powers derived from the Constitution shall be vested in an international organisation or institution.'

Nevertheless, the hierarchical supremacy of the SC is compatible with the application of EU law and the EU principle of primacy because the Constitution itself (see Article 93) acknowledges such precedence and is to be set aside – along with all other domestic provisions – in case of conflict with a directly effective EU provision.⁴ According to the Spanish Constitutional Court, ever since the entry into force of the SC in 1978 Spain is allowed to join supranational organisations with a legal order that could take precedence over Spanish law.

Although the Constitution is open to the EU integration process, the handing over of sovereign powers to the Union and the consequent primacy of EU law have certain substantive limits. In the words of the Constitutional Court, one of these limits is that *'Spain's state sovereignty, core constitutional framework, value system and fundamental principles be respected.'*⁵ The Constitutional Court has also noted that, *'in the unlikely event'* that the European Union overstepped those limits, *'the Court could take action seeking to safeguard Spain's sovereignty and the supremacy of its national Constitution.'*⁶ The Constitutional Court added that *'the aforesaid state sovereignty is ultimately secured'* under the EU withdrawal process subject to Article 50 TEU – formerly Article I-60 of the Treaty establishing a Constitution for Europe, which *'truly offsets'* the principle of primacy of EU law, since this principle *'cannot prevail over a country's withdrawal based on the supreme and sovereign will of Member States.'*⁷

² Constitutional Court. Opinion 1/2004, of 13 December 2004.

³ Ibid, 4.

⁴ Ibid.

⁵ Ibid, 2.

⁶ Ibid, 4; Constitutional Court. Judgment 26/2014, of 13 February 2014, 3.

⁷ Constitutional Court. Opinion 1/2014 (n 2) 2.

The Spanish Constitutional Court has also dealt with how Spanish courts are bound by EU law, and particularly Article 47 EUCFR. Where this provision applies because the case falls within the scope of the application of EU law (see Article 52(1) EUCFR), judicial authorities in Spain are required to secure the rights to an effective legal remedy and due process subject to EU law and specifically under Article 47 EUCFR, which is the main provision when it comes to defining the scope of the parties' rights. Article 47 EUCFR must here be applied directly by domestic courts.⁸ If Article 47 EUCFR imposes different requirements from the Spanish Constitution, Article 24 of the Spanish Constitution is set aside under the principle of primacy of EU law. This would only be otherwise if (i) Article 24 SC provides more extensive protection; and (ii) if EU law does not fully regulate the field.⁹ If requirements (i) and (ii) are met, Articles 53 and 47 EUCFR must be interpreted so as to establish a minimum standard of protection, which may be extended under Article 24 SC. Otherwise, Articles 53 and 47 EUCFR must be understood so as to establish a common standard of protection,¹⁰ and Article 24 of the Spanish Constitution must be set aside accordingly.

It follows that Article 47 EUCFR is binding on Spanish courts as long as the case at hand falls within the scope of application of EU law and thus of the Charter itself. EU law does not entail requirements regarding the rights to an effective legal remedy and due process if the case at stake falls outside its scope of application. However, the Charter in general, and Article 47 in particular, remain somewhat significant in entirely domestic cases by virtue of the Spanish Constitution. Article 10(2) SC provides that fundamental rights protected under the SC should be construed in accordance with '*the Universal Declaration of Human Rights and the international treaties and agreements thereon ratified by Spain.*' The drafters of the Constitution likely intended the Universal Declaration of Human Rights and the ECHR, but this provision must also be deemed applicable to the Charter.¹¹ Therefore, Article 10(2) SC requires that Spanish courts and the Spanish Constitutional Court interpret the rights enshrined in Article 24 SC in accordance with Articles 47 and 48 EUCFR – also taking into account any CJEU judgment on these provisions – even if the case at hand falls outside the scope of the application of EU law.¹²

Hence, the rights to an effective remedy and due process laid down in Article 47 EUCFR can be binding on Spanish courts in two alternative ways: (i) in cases falling within the scope of the Charter, Article 47 EUCFR must be directly applied, thus setting aside Article 24 SC, unless this latter provision provides more extensive protection to the right at hand and as long as EU law does not completely regulate the matter; and (ii) in cases falling outside the Charter's scope of application, Spanish courts should apply Article 24 SC. In this latter scenario, the rights provided under Article 24 SC are to be interpreted in accordance with Article 47 EUCFR and any relevant CJEU case law. This is the framework set out by the Spanish Constitutional Court for the Spanish ordinary courts. The Charter always applies, whether directly or indirectly by way of interpretation of constitutional provision in light of the Charter. Nonetheless, the Spanish Constitutional

⁸ Ibid, 6.

⁹ Case C-617/10 *Åkerberg Fransson* EU:C:2013:105, para 29.

¹⁰ Case C-399/11 *Melloni* EU:C:2013:107 para 60.

¹¹ Constitutional Court. Judgment 156/2021, of 16 September 2021, 2.

¹² See L Arroyo, *Empatía constitucional* (Marcial Pons, 2016), 50-61.

Court has stated that it is not subject to this differentiated regime; rather, a highly controversial line of constitutional case law – which will be discussed below – establishes that the Constitutional Court is not bound directly by Article 47 EUCFR, but only indirectly, regardless of whether case falls outside or within the scope of EU law.¹³

3. QUANTITATIVE ANALYSIS

For the purposes of our data collection, we have relied on different databases: (i) the Constitutional Court’s internal database, which comprises all its judgments, orders, and opinions; (ii) the Supreme Court’s database, including all its judgments and orders; and (iii) the General Council of the Judiciary’s database, which comprises nearly all final decisions of Spanish judges and courts. In all of them, we have run a search for the words ‘47 carta derechos fundamentales unión europea’ (in English: ‘charter 47 fundamental rights European Union’) between the years 2010 and 2021. Table 1 below shows the results.

| Constitutional Court | | | Supreme Court | | | Lower Courts | | |
|----------------------|--------------|-----------|---------------|-----------------|------------|---------------|----------------|-------------|
| (by year) | 2021 | 2 | (by Chamber) | Civil | 40 | (by division) | Civil | 1914 |
| | 2020 | 4 | | Criminal | 154 | | Criminal | 662 |
| | 2019 | 1 | | Administrative | 388 | | Administrative | 1438 |
| | 2018 | 0 | | Labour | 61 | | Labour | 995 |
| | 2017 | 0 | | Military | 5 | | Military | 2 |
| | 2016 | 1 | | Special Chamber | 9 | | Total | 5011 |
| | 2015 | 0 | | Total | 657 | (by year) | 2021 | 626 |
| | 2014 | 2 | (by year) | 2021 | 46 | | 2020 | 1029 |
| | 2013 | 0 | | 2020 | 87 | | 2019 | 727 |
| | 2012 | 0 | | 2019 | 76 | | 2018 | 564 |
| | 2011 | 1 | | 2018 | 61 | | 2017 | 460 |
| | 2010 | 0 | | 2017 | 85 | | 2016 | 372 |
| | Total | 11 | | 2016 | 80 | | 2015 | 399 |
| | | | | 2015 | 106 | | 2014 | 439 |
| | | | | 2014 | 29 | | 2013 | 202 |
| | | | | 2013 | 24 | | 2012 | 90 |
| | | | | 2012 | 24 | | 2011 | 74 |
| | | | | 2011 | 19 | | 2010 | 29 |
| | | | | 2010 | 20 | | Total | 5011 |
| | | | | Total | 657 | | | |

Table 1. Judicial decisions of Spanish Courts 2010-2021 that cite Article 47 EUCFR.

¹³ See below, s IV.

This analysis has major shortcomings. The matches for our search do not allow for differentiating between judicial decisions merely citing the provision – i.e., purely formal references to Article 47 EUCFR – and rulings actually interpreting and applying Article 47 to the case. The analysis neither allows to tell whether Article 47 is being mentioned as part of the parties’ claims and pleadings – which are always described in judgments in greater or lesser detail – or as part of the court’s *ratio decidendi*. The search only provides information regarding how many rulings include the searched words. However, it does not show the true impact or significance of Article 47 EUCFR in each judicial decision. Thus, the results can be misleading about the presence or importance of Article 47 in the case law of Spanish courts. This deficiency will be supplemented, and, accordingly, partially corrected through a qualitative analysis like the one performed later.¹⁴

The rights to an effective legal remedy and due process are cross-cutting, meaning that they can be claimed by the parties and applied by the courts in any jurisdiction or legal field. The data contained in Table 1 provide evidence of this. It categorises the relevant judicial decisions according to their jurisdictional order. The analysis of the specific legal issues on which the examined rulings decide shows the following results. The Constitutional Court has cited Article 47 EUCFR, often along with Art. 48 EUCFR, in proceedings related to European arrest warrants (EAW),¹⁵ extradition processes,¹⁶ members of Parliament’s rights¹⁷ and legal fees.¹⁸ Criminal courts have referred to these provisions also concerning EAW and extradition processes,¹⁹ fraud,²⁰ disobedience,²¹ as well as regarding the enforcement of custodial sentences.²² Labour courts have cited Article 47 EUCFR mostly in claims involving fixed-term employment contracts.²³ Most judicial decisions handed down by civil courts that refer to Article 47 EUCFR relate to consumer protection.²⁴ Finally, judicial-administrative courts often rely on Article 47 EUCFR. References to this provision can be found in very heterogeneous domains: taxes,²⁵ public procurement,²⁶ customs²⁷ and professional services.²⁸

¹⁴ See below, s IV.

¹⁵ Constitutional Court. Order 86/2011, of 9 June 2011; Constitutional Court. Judgment 26/2014 (n 6); Constitutional Court. Judgment 77/2014, of 22 May 2014; Constitutional Court. Judgment 89/2020, of 9 September 2020; Constitutional Court. Judgment 28/2021, of 16 March 2021.

¹⁶ Constitutional Court. Judgment 132/2020, of 23 September 2020; Constitutional Court, Judgment 147/2020, of 19 October 2020; Constitutional Court. Judgment 147/2021, of 12 July 2021.

¹⁷ Constitutional Court. Judgment 97/2020, of 21 July 2020.

¹⁸ Constitutional Court. Judgment 140/2016, of 21 July 2016.

¹⁹ Supreme Court. Criminal Law Chamber. Judgment 95/2017, of 16 February 2017.

²⁰ Supreme Court. Criminal Law Chamber. Judgment 371/2019, of 23 July 2019.

²¹ Supreme Court. Criminal Law Chamber. Judgment 477/2020, of 28 September 2020.

²² Supreme Court. Criminal Law Chamber. Judgment 95/2017 (n 19).

²³ Supreme Court. Labour Law Chamber. Judgment 271/2017, of 30 March 2017; Supreme Court. Labour Law Chamber. Judgment 878/2017, of 15 November 2017; Supreme Court. Labour Law Chamber. Judgment 147/2018, of 14 February 2018.

²⁴ Supreme Court. Civil Law Chamber. Judgment 241/2013, of 9 May 2013; Supreme Court. Civil Law Chamber. Judgment 638/2018, of 19 November 2015; Supreme Court. Civil Law Chamber. Judgment 69/2019, of 4 February 2019.

²⁵ Supreme Court. Administrative Law Chamber. Judgment 446/2020, of 18 May 2020.

²⁶ Supreme Court. Administrative Law Chamber. Judgment 1703/2019, of 12 December 2019; Supreme Court. Administrative Law Chamber. Judgment 702/2021, of 19 May 2021.

²⁷ Supreme Court. Administrative Law Chamber. Judgment 766/2019, of 4 June 2019.

²⁸ Supreme Court. Administrative Law Chamber. Judgment 1010/2019, of 8 July 2019; Supreme Court. Administrative Law Chamber. Judgment 901/2020, of 1 July 2020.

Two additional conclusions can be drawn after a more careful look at Table 1. On the one hand, the Supreme Court's judicial-administrative chamber is the Supreme Court division that most frequently mentions Article 47. The reason for this is twofold. First, this chamber hears the most cases (9,431 in 2020), rules on the most appeals (8,376 in 2020) and delivers the most rulings (1,809 in 2020) overall.²⁹ Second, administrative proceedings are most commonly required to apply EU law, since Europeanisation is particularly acute in this area of law.³⁰ Thus, within the field of judicial-administrative cases, the Charter is extensively applied and, as a result, so is the fundamental right to an effective legal remedy thereof. The Supreme Court's Criminal Chamber is right behind in the number of cases, partly because EAW proceedings often end up being heard by the Supreme Court, and also because some of the rights typically raised in criminal proceedings – e.g., the rights not to make self-incriminating statements and not to plead guilty – are often invoked in Spain as dimensions of the right to a fair trial under Article 24(2) SC. The judgments of the civil and labour chambers of the Supreme Court only sporadically refer to Article 47 EUCFR. The Supreme Court's military and special chambers have much less activity than the previous divisions, which is also reflected in the number of rulings citing Article 47 EUCFR.

Nonetheless, our findings from the judgments delivered by lower instance courts – the National High Court (*Audiencia Nacional*), regional high courts and provincial courts – are very different. We found a greater presence of Article 47 EUCFR in civil proceedings. This is due to the high litigation rates in Spain over the last decade arising from banking contracts and mortgage claims. There have been tens of thousands of cases before Spanish lower courts involving the application of secondary law and the interpretation thereof by the CJEU. This is why there have been almost 2,000 rulings issued by lower civil courts invoking Article 47 EUCFR. However, only a very small part of these judicial decisions ends up being reviewed by the Supreme Court because of the burdensome and stringent requirements to file cassation appeals. All of the above factors contribute to the existing differences between lower courts and Supreme Court chambers in the references to Article 47 EUCFR.

As depicted in Figure 1, judicial decisions citing Article 47 EUCFR have steadily increased during the 2010-2020 period. One possible reason is that, over the first decade since the entry into force of the Charter, Member States' domestic courts became progressively accustomed to the Charter's role within EU primary law under the Lisbon Treaty. Time may have been particularly necessary in this respect for legal counsellors and courts in Spain, since there was a domestic provision closely resembling Article 47 EUCFR – namely Article 24 SC – with which they were much more familiar. Another possible explanation relates to the development undergone by CJEU case law over the last few years. The CJEU's line of case law has slowly shifted from a framework primarily governed by the principle of effectiveness of EU law and, where appropriate, the general

²⁹ Consejo General del Poder Judicial, *Justicia dato a dato. Año 2020. Estadística judicial*, CGPJ, Madrid, 2021, p 39.

³⁰ L Ortega Álvarez, L Arroyo Jiménez and C Plaza Martín (eds), *Europeanisation of Spanish Administrative Law*, (Europa Law Publishing, 2010); D Sarmiento and X Codina, 'La europeización del Derecho administrativo' in J M Rodríguez de Santiago, G Doménech Pascual and L Arroyo Jiménez (eds), *Tratado de Derecho administrativo I* (Marcial Pons, 2021).

principle of effective legal protection established by the CJEU,³¹ to a framework where Articles 19 TEU and 47 EUCFR play a more prominent role.³²

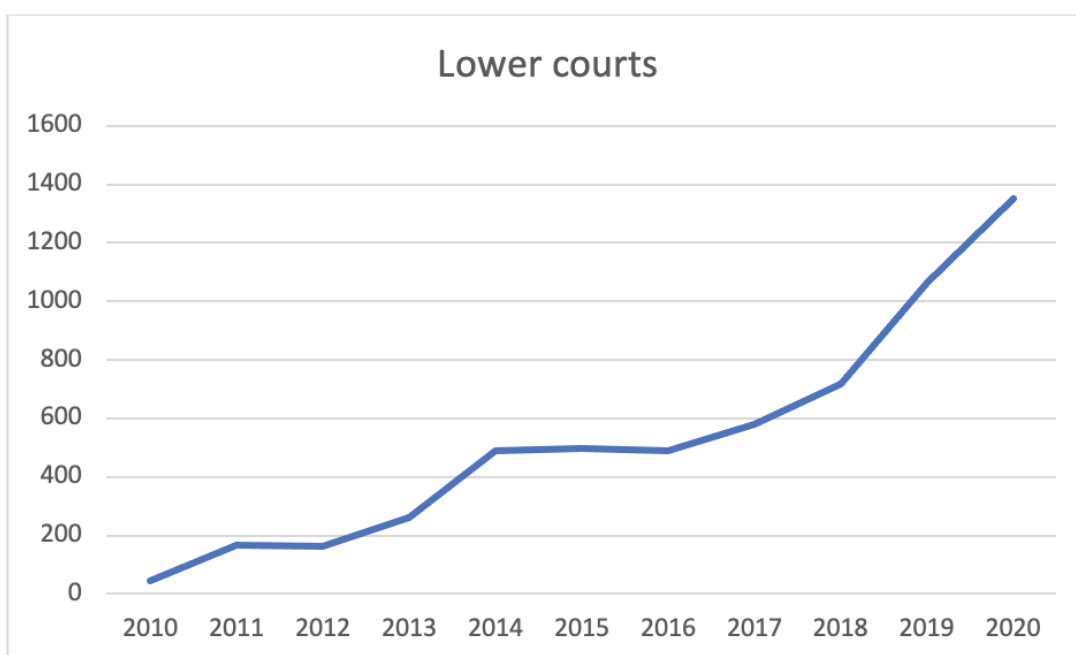


Figure 1. Judicial decisions of Spanish lower Courts that cite Article 47 CFR 2010-2020.

The development of Supreme Court decisions citing Article 47 EUCFR also followed this upward trend throughout the 2010-2020 period. However, as shown in Figure 2, the curve has two outliers, probably related to the modification of domestic cassation appeal rules. On the one hand, we found a sharp decline in the number of judicial decisions citing Article 47 EUCFR between 2015 and 2018. This decline is due to the amendment of the cassation appeal before the administrative law chamber, which was enacted – and became applicable – during this time period.³³ Regarding cassation appeals, in order to be granted leave to proceed – i.e., in order for the appeal to be admitted – appellants must not only provide evidence that the challenged decision violates domestic or EU law in breach of the appellant’s rights or interests, but also demonstrate that an additional requirement is fulfilled: appellants are required to justify that the case has an objective legal impact or *interés casacional objetivo*, or in other words that it has implications beyond the specific case at hand, thus requiring that there be Supreme Court case law. This legal amendment to the cassation appeal has led to a significant decrease in the number of cases admitted by the Supreme Court’s judicial-administrative chamber, particularly during the first few

³¹ S Prechal and R Widdershoven, ‘Redefining the Relationship Between ‘Rewe-Effectiveness’ and Effective Judicial Protection’ (2011) 4 *Review of European Administrative Law* 31.

³² See M Bonelli, ‘Effective Judicial Protection in EU Law: an Evolving Principle of a Constitutional Nature’ (2019) 12 *Review of European Administrative Law* 35.

³³ Organic Act 7/2015, of 21 July 2015, amending Organic Act 6/1985, of 1 July 1985, on the Judiciary (Official Journal 174, 22 July 2015, pp. 61593-61660), which also amended Act 29/1998, of 13 July 1998, of Administrative Law Courts; L M Cazorla Prieto and R Cancio Fernández (eds), *Estudios sobre el nuevo recurso de casación contencioso-administrativo* (Thomson-Aranzadi, 2017).

years immediately following the amendment. Although the amendment only affected the judicial-administrative chamber, its overall impact accounts for the curve's development.

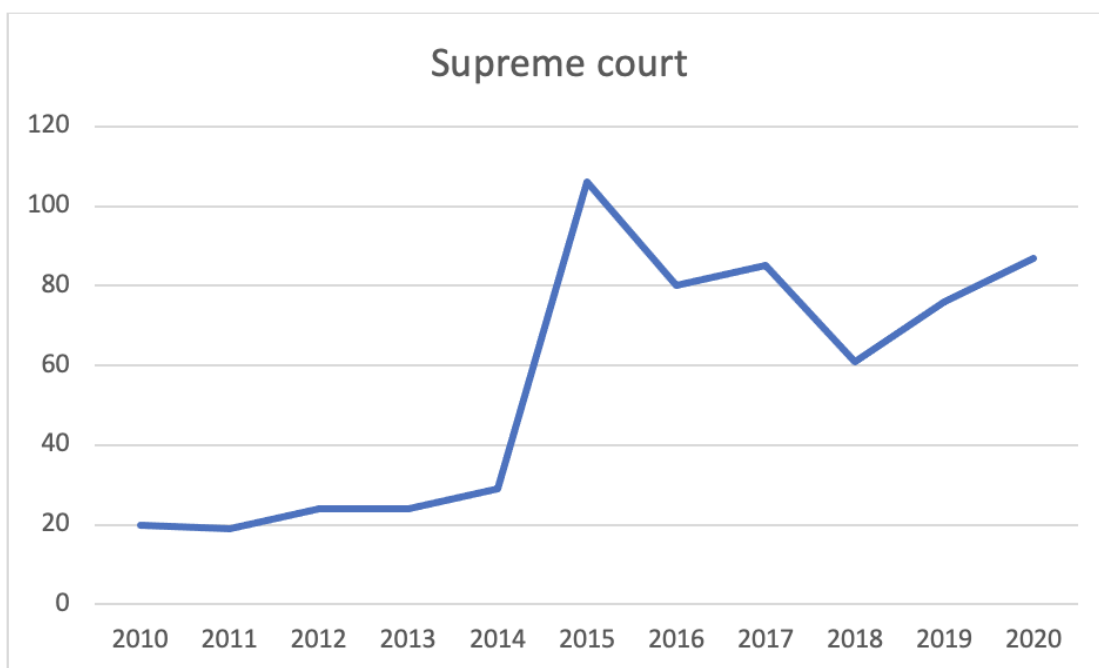


Figure 2. Judicial decisions of the Spanish Supreme Court that cite Article 47 CFR 2010-2020.

Between 2015 and 2018, the Supreme Court has slowly but surely clarified the requirement of *interés casacional objetivo*, and how appellants must justify its fulfilment.³⁴ Furthermore, after these early adjustments in the operation of the new cassation appeal, we noticed a significant increase in the number of judicial decisions that cite Article 47 EUCFR starting in 2018 until now. Yet again, this rise is also due to the cassation appeal rules: one of the elements which determine the presence of *interés casacional objetivo*, and thus the admissibility of a claim before the Supreme Court through a cassation appeal, is that the case has a specific significance from the perspective of EU law. More specifically, the Supreme Court may admit the cassation appeal if the decision under appeal

‘interprets or applies EU law in apparent contradiction to the CJEU case law or otherwise in any cases where a reference for a preliminary ruling of the CJEU may still be mandatory.’³⁵

Therefore, within the architecture of the Spanish administrative justice system, this provision entrusts the Supreme Court with a twofold duty: (i) ensuring that lower courts do not apply EU law in ways that are at odds with CJEU case law, admitting any appeals claiming such a contradiction with the aim of remedying it; and (ii) ensuring the proper

³⁴ R Cancio Fernández, *20.000 recursos de viaje casacional* (Tirant lo Blanch, 2021).

³⁵ Article 89(2)(f) of the Act 29/1998, of 13 July 1998, of Administrative Law Courts, as amended Organic Act 7/2015, of 21 July 2015.

functioning of the requests for preliminary rulings, by allowing scrutiny of any appeals where the case has to be referred to the CJEU for a preliminary ruling on the validity or interpretation of any applicable EU law provisions. Within this new legislative framework EU law becomes a gateway for the parties to access the jurisdiction of the Supreme Court. As a result, legal counsellors increasingly rely on EU law in order to claim that lower courts have either apparently misapplied an EU law provision or disregarded Article 267 of the Treaty on the Functioning of the European Union. A greater presence of EU law before the Supreme Court also facilitates the invocation of Article 47 EUCFR. Once the case has been framed within the scope of EU law, claims regarding the violation of the rights to an effective legal remedy, due process and a fair trial are more frequently grounded on Article 47 EUCFR, either along with Article 24 SC or as sole legal grounds. All these factors explain the Supreme Court's references to Article 47 EUCFR over the last years.

4. Qualitative Analysis

The CJEU has delivered 16 preliminary rulings referred by Spanish courts on effective judicial protection, either expressly focused on Article 47 EUCFR³⁶, or relying on the general principle of effective judicial protection and the principle of effectiveness of EU law.³⁷ These requests for preliminary rulings were submitted by all kinds of judicial authorities, from various jurisdictions and regarding a wide array of matters. We now discuss the most remarkable referrals.

The only preliminary ruling requested by the Constitutional Court gave rise to the *Melloni* case, regarding the execution of an EAW stemming from a conviction *in absentia*. The Spanish Constitutional Court's reference contained two relevant questions as far as effective judicial protection is concerned: (i) whether the Council Framework Decision on the EAW, requiring the requested authority to execute the warrant despite the conviction being rendered *in absentia*, violated the convicted person's rights to a fair trial (Article 47(2) EUCFR) and defence (Article 48 EUCFR);³⁸ and (ii) if no violation was found, whether the executing authority could, on the basis of Article 53 of the Charter, set aside the Framework Decision giving precedence to a domestic constitutional provision (Article 24(2) SC) that provided more extensive protection to the fundamental rights at stake than the Charter.³⁹

As is well-known, the CJEU responded to the first question that the Charter does not preclude EU secondary legislation from requiring the execution of EAWs to enforce

³⁶ Case C-504/19 *Banco de Portugal and Others* EU:C:2021:335; Case C-659/18 *VW* EU:C:2020:201; Case C-472/16 *Colino Sigüenza* EU:C:2018:646; Case C-169/14 *Sánchez Morcillo and Abril García* EU:C:2014:2099; Case C-265/13 *Torrallbo Marcos* EU:C:2014:187; *Melloni* (n 10); Case C-444/09 *Gaviero Gaviero* EU:C:2010:819; and Case C-275/06 *Promusicae* EU:C:2008:54 – the last one quoting Art 47 EUCFR even before it entered into force as a legally binding provision. Case C-49/18 *Escribano Vindel* EU:C:2019:106, quotes Art 19(1) TEU regarding the principle of independence of the judiciary.

³⁷ Case C-598/15 *Banco Santander* EU:C:2017:945; Case C-154/15 *Gutiérrez Naranjo* EU:C:2016:980; Case C-421/14 *Banco Primus* EU:C:2017:60; Case C-407/14 *Arjona Camacho* EU:C:2015:831; Case C-49/14 *Finanmadrid EFC* EU:C:2016:98; Case C-413/12 *Asociación de Consumidores Independientes de Castilla y León* EU:C:2013:800.

³⁸ Constitutional Court. Order 86/2011 (n 15) 6.

³⁹ *Ibid*, 7.

convictions rendered *in absentia* under the conditions laid down in the Framework Decision.⁴⁰ As for the second question, the CJEU held that, in areas like the EAW, where domestic authorities have no scope for action to enforce an EU provision that fully covers the matter, the Charter is not actually providing a minimum standard for the protection of fundamental rights, but rather a shared or common standard that cannot be derogated by national Constitutions, not even when they provide a higher level of protection.⁴¹ Consequently, the Spanish Constitutional Court modified its case law doctrine on convictions *in absentia*, lowering the level of protection traditionally afforded to the rights to a fair trial and defence (Article 24(2) SC) regarding the execution of EAWs.⁴²

The Spanish Supreme Court has referred various questions for preliminary rulings, but only one of them regarding Article 47 by the Supreme Court's civil law chamber.⁴³ The question related to the potential implications of a retroactive bank restructuring decision issued by an administrative authority on judicial proceedings before the courts of another State. The CJEU found that, pursuant to the claimant's right to an effective legal remedy (Article 47 EUCFR), such a decision could not entail that the defendant lose legal standing.⁴⁴

Moving on to the lower courts, these are the jurisdictions – particularly civil courts – which submitted most questions involving Article 47 EUCFR to the CJEU. Indeed, lower civil courts have referred seven cases for a preliminary ruling in connection with the effective legal protection of consumer rights under Directive 93/13. Although most of these questions have been raised, at least to an extent, from the perspective of Article 47 EUCFR, the CJEU has rather focused on the effectiveness of EU secondary legislation. These referrals touch on different matters, such as the right of access to a court,⁴⁵ second instance proceedings,⁴⁶ the powers of judges⁴⁷ or the principle of equality of arms and adversarial rights.⁴⁸ In the area of mortgage loans, the lower courts have relied on preliminary rulings to change the line of case law of the civil law chamber of the Supreme Court.⁴⁹

Furthermore, labour courts have requested four preliminary rulings regarding judicial independence requirements,⁵⁰ the right to access to a court⁵¹ and the scope of judges'

⁴⁰ *Melloni* (n 10) para 52.

⁴¹ *Ibid*, paras 60-63. Supreme Court Order (Criminal Chamber) of 9 March 2021 (special proceedings no. 20907/17) refers various questions for a preliminary ruling on the execution of EAW and fundamental rights, although concerning the content of the Framework Decision and CJEU's case law, without mentioning Articles 47 and 48 EUCFR.

⁴² Constitutional Court. Judgment 26/2014 (n 6) 4.

⁴³ *Banco de Portugal and Others* (n 36).

⁴⁴ *Ibid*, para 63.

⁴⁵ *Banco Primus* (n 37).

⁴⁶ *Asociación de Consumidores Independientes de Castilla y León* (n 37).

⁴⁷ *Banco Santander* (n 37); *Gutiérrez Naranjo* (n 37); *Banco Primus* (n 37).

⁴⁸ *Sánchez Morcillo* (n 36).

⁴⁹ J Díaz-Hochleitner, 'Cuestión prejudicial y política judicial' in R Alonso García and J I Ugartemendía Eceizabarrena (eds), *La cuestión prejudicial europea* (IVAP, 2014), 165-168.

⁵⁰ *Escribano Vindel* (n 36).

⁵¹ *Colino Sigüenza* (n 36); *Torrallbo Marcos* (n 36).

powers.⁵² Administrative law courts only referred two cases for preliminary rulings, both related to judges' powers or authority.⁵³ Finally, there was only one preliminary ruling requested by a criminal investigation court, concerning the scope of the right to legal counsel.⁵⁴

Most judicial decisions that cite Article 47 EUCFR however do so without requesting a preliminary ruling, either because the interpretation of the relevant EU provisions raises no concerns or because they have been previously clarified by the CJEU. It is worth making two remarks about this group of judicial decisions. First, any references to the Charter tend to be merely formal. More often than not, the parties raise Article 47 EUCFR along with Article 24 SC and the court simply mentions these provisions when summarising the parties' pleadings and line of reasoning. We reached this conclusion after examining the rulings challenged through cassation appeals heard by the Supreme Court citing Article 47 EUCFR.

Second, where Spanish courts actually apply Article 47 EUCFR, they are careful to rely on and abide by CJEU case law. By and large, Spanish courts have neither refused nor been reluctant to abide by EU case law on the Charter, the general principle of effective legal protection and the principle of effectiveness of EU law. The Spanish Constitutional and Supreme Courts' judgments show their willingness to faithfully apply the case law of the Court of Justice. Firstly, according to a line of judgments, the Constitutional Court will find a violation of Article 24 SC if courts fail to make a preliminary reference to the CJEU when required to do so under Article 267 TFEU.⁵⁵ In order to establish when it is mandatory to refer the case for a preliminary ruling, the Constitutional Court relies on the CJEU's rulings on the scope and limits of the requirement to make preliminary references.⁵⁶ Secondly, the Supreme Court's civil chamber has embraced the CJEU's doctrine on the requirements arising from the right to an effective legal remedy in connection with consumer contracts. As a result, the Supreme Court's civil chamber has often examined this European case law, ultimately modifying its own and abiding by it.⁵⁷

However, there is a significant case where being in line with the CJEU's case law raises major concerns. In *Melloni*, the Constitutional Court abided by the Court of Justice's interpretation of the rights of defence, departing from its own constitutional precedent and thus lessening the level of protection traditionally afforded to the rights to a fair trial and defence. Nonetheless, the Constitutional Court refused to directly apply the relevant Charter provisions – i.e., Articles 47 and 48 EUCFR – and set aside the more protective constitutional provision – i.e., Article 24(2) SC. The Constitutional Court argued that it is

⁵² *Arjona Camacho* (n 37).

⁵³ Case C-184/15 *Martínez Andrés* EU:C:2016:680; *Gaviero Gaviero* (n 36).

⁵⁴ *VW* (n 36).

⁵⁵ Constitutional Court. Judgment 58/2004, of 19 April 2004; Constitutional Court. Judgment 78/2010, of 20 October 2010; Constitutional Court. Judgment 232/2015, of 5 November 2015; Constitutional Court. Judgment 37/2019, of 26 March 2019.

⁵⁶ Case C-283/81 *CILFIT* EU:C:1982:335; Case C-561/19, *Conorzio Italian Management* EU:C:2021:799; Arroyo (n 12) 110-118; X Arzoz Santisteban, *La garantía constitucional del deber de reenvío prejudicial* (CEPC, 2020).

⁵⁷ See, e.g., Supreme Court. Civil Law Chamber. Judgment 123/2017, of 24 February 2017, 4 (incorporating the doctrine established by the CJEU in *Gutiérrez Naranjo* (n 37)).

not directly bound by the Charter under Article 93 SC – as opposed to ordinary courts and tribunals.⁵⁸ In turn, it stated that it should only rely on the Charter indirectly, as an interpretative instrument that must be taken into account when interpreting the domestic bill of rights –i.e., under the framework of Article 10(2) SC.⁵⁹ The Constitutional Court claimed that the CJEU’s response was ‘*very helpful*’ for the interpretation of the Spanish Constitution. Precisely because of that, the Court departed from its traditional interpretation of Article 24(2) SC to match the lower level of protection of the rights of defence arising from Articles 47 and 48 EUCFR.⁶⁰ The Constitutional Court thus accepted the CJEU’s line of case law on the specific case referred to, adapting its own constitutional case law on Article 24 of the Constitution. Nevertheless, from an EU law perspective, the result is far from being completely satisfactory: although the Constitutional Court sidestepped the conflict thanks to its willingness to embrace the CJEU’s criterion, the underlying constitutional narrative is in open contradiction with a proper EU law rationale, since the Constitutional Court ultimately claims that EU law is not directly binding on it.⁶¹

The Spanish Constitutional Court’s doctrine in *Melloni* also entails establishing a distinction between the binding effect of Article 47 on ordinary courts – including the Supreme Court – and the Constitutional Court. As noted above, ordinary courts can be bound by Article 47 EUCFR in two different ways. According to Article 51 EUCFR, Article 47 of the Charter must be applied directly in cases falling within the scope of application of EU law. Outside this scope, EU law does not require domestic authorities to comply with Charter provisions. However, under Article 10(2) SC, the Charter has an additional legal effect: Spanish authorities – including courts – are required to interpret fundamental rights enshrined in the Constitution in line with international treaties entered into by Spain for the protection of fundamental rights,⁶² including the rights to an effective legal remedy, due process and a fair trial in Article 24 SC. Since these international instruments comprise both the ECHR and the Charter, Spanish Courts must interpret Article 24 SC in conformity with Articles 47 and 48 EUCFR, even if the case at hand falls outside the scope of EU law. This obligation, which does not stem from EU law, but from the Spanish Constitution, implies that the Charter be used as an instrument to interpret domestic fundamental right provisions.

The Spanish Constitutional Court has thus imposed on ordinary courts this twofold binding effect of the Charter. However, as advanced before, in *Melloni* the Court argued that the Charter was not directly binding on it.⁶³ The Constitutional Court’s starting point

⁵⁸ See above s II.

⁵⁹ Ibid.

⁶⁰ Constitutional Court. Judgment 26/2014 (n 6) 4.

⁶¹ T de la Quadra-Salcedo Janini, *El papel del Tribunal Constitucional y de los Tribunales ordinarios en un contexto de tutela multinivel de los derechos fundamentales*, WP IDEIR, No 23, 2015; Arroyo (n 12) 62-72; X Arzoiz Santisteban, *La tutela de los derechos fundamentales de la Unión Europea por el Tribunal Constitucional* (INAP, 2015) 87-110; P Cruz Villalón, ‘¿Una forma de cooperación judicial no reclamada? Sobre la extensión del amparo a la Carta de Derechos Fundamentales de la UE’ (2021) 25 *Anuario Iberoamericano de Justicia Constitucional* 57.

⁶² A Sáiz Arnáiz, *La apertura constitucional al derecho internacional y europeo de los derechos humanos. El artículo 10.2 de la Constitución española* (CGPJ, 1999); X Arzoiz Santisteban, *La concretización y actualización de los derechos fundamentales* (CEPC, 2014).

⁶³ Constitutional Court. Judgment 26/2014 (n 6) 4.

for this line of reasoning is that its jurisdiction is limited to the enforcement of Spain's national Constitution. However, instead of refusing to decide on constitutional claims within the scope of EU law, the Constitutional Court decides those cases applying the domestic bill of rights, interpreted in accordance with the Charter. In other words, it hears the appeals regardless of whether the case falls within the Charter's scope of application or not, directly applying domestic constitutional provisions and relying on the Charter for merely interpretative purposes either way. Ultimately, the Spanish ordinary judicial authorities can apply Article 47 EUCFR either directly or indirectly with interpretative effects, depending on the case. However, the Spanish Constitutional Court always applies the provision indirectly for interpretative purposes, whether the case falls under the Charter's scope of application or outside of it. There is a heated debate that has been ongoing for a while, both within the Spanish Constitutional Court⁶⁴ and among scholars,⁶⁵ about whether the Constitutional Court should stick to this line of case law or dismiss it. In any case, the Constitutional Court fully respects the standards of protection of the rights to effective judicial protection and due process arising from Article 47 EUCFR. In fact, if the *Melloni* saga has had any consequence in this respect, one has been to lower the standards traditionally laid down by the Spanish Constitutional Court.

Leaving aside the Constitutional Court now, ordinary courts should in any case assess whether the case falls under or outside the scope of application of EU law in order to determine if the directly applicable provision is Article 47 EUCFR or Article 24 SC. Although courts sometimes perform that assessment,⁶⁶ in practice, they usually apply both provisions together in an undifferentiated way. The Charter's interpretative scope exceeding EU law's scope of application, as required by Spain's Constitution, is probably the reason why Articles 47 EUCFR and 24 SC are often raised jointly and interchangeably, both by parties and courts. On top of that, there is a widespread belief, largely based on the *Melloni* implications, that the domestic constitution provides greater protection to the rights to an effective legal remedy and due process. This was indeed true in *Melloni*. However, this is not always the case,⁶⁷ and even when this occurs, the CJEU very clearly established in *Melloni* that, in matters fully covered by EU law, domestic courts should apply the Charter and not national constitutions.⁶⁸

5. SYSTEMIC IMPACT

Article 47 EUCFR has not radically transformed how Spanish courts understand the rights to an effective legal remedy, due process and a fair trial. We noticed some differences between the protection afforded by Articles 47 EUCFR and 24 SC, which will be discussed below. Leaving such particular differences aside, admittedly, the Charter has not had a structural impact on the Spanish domestic legal order. First, this is because at the

⁶⁴ Ibid; and the dissenting opinions of Justices A Asúa Batarrita, E Roca Trías, and A Ollero Tassara.

⁶⁵ See Arroyo (n 12) 62-72; and Cruz Villalón (n 61) (in favour of keeping the traditional stance); Arzo Santisteban (n 61) (vigorously suggesting a new approach, in line with the one subsequently taken by the German Federal Constitutional Court's in 1 BvR 276/17, *Recht auf Vergessen II*).

⁶⁶ See, e. g., Supreme Court. Judgment 878/2017 (n 23).

⁶⁷ VW (n 36) para 47.

⁶⁸ *Melloni* (n 10) paras 60-63.

time of Spain's accession to the European Communities in 1986 – and most certainly by the Charter's entry into force in 2009 – Article 24 SC was already in force and has a very similar wording to that of Articles 47 and 48 EUCFR. Also, as stated before, there seems to be a somewhat widespread belief that, generally, Article 24 SC is more protective of the rights to effective legal remedy, due process and fair trial than the Charter. The outcome of the *Melloni* saga probably has a lot to do with this. Second, the CJEU's interpretation of the Charter often relies on that of the European Court of Human Rights (ECtHR) regarding the relevant provisions of the ECHR (Article 52(3) CFR), and the ECtHR's interpretation had already been accurately and fully embraced by the Spanish Constitutional Court when interpreting Article 24 SC, as required by Article 10(2) SC.

For these two reasons, Article 47 EUCFR has not significantly changed the understanding of the right to effective judicial protection. However, we did find that the Charter has shifted Spanish courts' approach to the application of EU law norms. When it came into effect in 2009, Article 47 EUCFR was added to two other norms with which it currently overlaps, at least partially: first, the right to effective judicial protection put forward by the CJEU as a general principle of EU law;⁶⁹ second, the principle of effectiveness which, according to CJEU case law, limits procedural autonomy in the domestic enforcement of EU law.⁷⁰ Within this context, the Charter's entry into force has had three major consequences: first, it has made easier for lawyers to rely on the fundamental right to an effective legal remedy as a Union law norm; second and consequently, it has been more frequently relied on in the case law of Spanish courts; and third it has facilitated referring cases to the Court of Justice for preliminary rulings. These referrals no longer relate solely to the requirements arising from the principle of effectiveness in domestic courts' enforcement of EU secondary legislation. The referred cases also relate to the interpretation of the various rights enshrined in Articles 47 and 48 EUCFR. Ultimately, the Charter has fostered the application of the EU fundamental right by national courts.

Although there has not been a broad transformation in the understanding of these rights, Articles 47 and 48 EUCFR have had an impact on certain pieces of Spain's procedural legislation, sometimes in a very significant way. First, as a result of *Melloni*, the Constitutional Court modified its case law on the right to a fair trial under Article 24(2) SC to make it compatible with the requirement to execute EAWs subject to the Framework Decision which, at the same time, had been found to be in conformity with Articles 47 and 48 EUCFR by the CJEU.⁷¹ However, this departure from the previous case law did not only cover the EAW system. Subsequently, it also extended to the execution of extradition requests from the judicial authorities of third states.⁷² What the Constitutional Court has not done – and perhaps will never do – is expand this new judicial doctrine to the imposition of criminal penalties for serious offences by Spanish courts.

⁶⁹ Case C-222/84 *Johnston* EU:C:1986:206, para 18.

⁷⁰ Case C-33/76 *Rewe-Zentralfinanz* EU:C:1976:188, para 5.

⁷¹ Constitutional Court. Judgment 26/2014 (n 6).

⁷² Constitutional Court. Judgment 132/2020 (n 16); Constitutional Court. Judgment 147/2020 (n 16); Constitutional Court. Judgment 147/2021 (n 16).

Additionally, CJEU case law on Articles 47(3) and 48(2) EUCFR and on Directive 2013/48/EC has forced the modification of Spanish case law on the scope of the fundamental right to legal counsel.⁷³ In particular, the Court of Justice declared that these provisions were to be interpreted as precluding Spanish procedural legislation on the right of access to a lawyer in criminal proceedings. According to the settled case law of both the Spanish Constitutional Court and the Supreme Court courts, these domestic procedural provisions established that, during the investigation stage in criminal proceedings, the enjoyment of the right of access to a lawyer may be subject to the obligation, for the person accused, to appear in person before the court. Consequently, the benefit of such a right may be refused when that person is absent or cannot be located, and this would not violate Article 24 SC.⁷⁴ In turn, the Court of Justice declared that the exercise by a suspect or accused person of the right of access to a lawyer laid down by Directive 2013/48/EC, read in the light of Article 47 of the Charter, does not depend on the person concerned appearing in person before the court.⁷⁵ This highlights that Charter provisions are sometimes more protective of the fundamental rights laid down in Article 24 SC.

Finally, CJEU case law regarding the rights to a fair trial and equality of arms and adversarial rights under Article 47(2) EUCFR had to set aside a domestic procedural provision that allowed the company – but not the consumer – to file an appeal against the judicial decision on enforcement proceedings brought by a company against a consumer.⁷⁶

CJEU case law on the effectiveness of legal protection in certain fields of secondary law has also had an impact on certain areas of Spanish procedural legislation. The scope of judges' powers and authority, in particular, has been largely extended due to the case law on Directive 93/13 on consumer rights, which required the setting aside of domestic provisions governing various judicial proceedings. First, the CJEU declared that a domestic procedural provision preventing a judge ruling on an order for payment in expedited payment proceedings from finding that a clause in a company-consumer agreement was unfair was incompatible with Directive 93/13.⁷⁷ Second, the Court of Justice also found that another Spanish procedural rule setting a one-month time-barring period (within the official publication of an Act) for objecting to foreclosure on the grounds that a mortgage contract clause was unfair was at odds with the Directive.⁷⁸ Third, the court responsible for a mortgage enforcement proceedings must be able to examine the unfairness of a term contained in the contract which gives rise to the debt claimed and which constitutes the basis of the right to enforcement,⁷⁹ as well as to grant interim relief, including, in particular, staying the mortgage enforcement proceedings, where such relief is necessary to ensure the full effectiveness of the final decision of the court hearing the declaratory proceedings before which the consumer argues that that term is unfair.⁸⁰ Fourth, courts must be able to find that a clause is unfair, subsequently

⁷³ *VW* (n 36) para 47.

⁷⁴ *Ibid*, para. 16.

⁷⁵ *Ibid*, para. 46.

⁷⁶ *Sánchez Morcillo* (n 36) para 50.

⁷⁷ *Finanmadrid EFC* (n 37) para 54.

⁷⁸ *Banco Primus* (n 37) para 52.

⁷⁹ Case C-618/10 *Banco Español de Crédito* EU:C:2012:349 para 57; Joined Cases C-537/12 and C-116/13 *Banco Popular Español* EU:C:2013:759, para 60.

⁸⁰ Case C-415/11 *Aziz* EU:C:2013:164 para 64; *Banco Popular Español* (n 79) para 60..

invalidating the clause and, where appropriate, setting aside domestic procedural law despite the invalidated clause not even having been applied to the case at hand.⁸¹ Finally, legal certainty standards justify that there be domestic provisions establishing time-barring periods for appeals in respect of the *res judicata* principle. However, courts cannot define the invalidity of an unfair clause in a company-consumer agreement as merely prospective.⁸²

In the future, the impact of CJEU case law on Article 47 CFR in Spanish law could go in two directions. First, it might well be discussed whether the principle of judicial independence (Articles 19(1) TEU and 47 EUCFR) may influence domestic legislation regulating the General Council of the Judiciary (*Consejo General del Poder Judicial*) – i.e., the constitutionally established body responsible for governing the judiciary and making decisions regarding, e.g., appointments, promotions, relocations and disciplinary proceedings. According to the applicable legislation, each legislative chamber proposes the appointment of ten out of the 20 members, including 12 judges and eight jurists or scholars of recognised standing.⁸³ In its recent case law on the independence of the judiciary, the CJEU has declared that the appointments being proposed to the President of the Republic by the Polish Council of the Judiciary could objectively narrow the President’s scope for action. However, this would only be the case when the Council of the Judiciary enjoys sufficient independence with respect to the legislature, the executive branch and the appointing authority.⁸⁴ In order to determine if a council of the judiciary enjoys such a degree of independence, several aspects must be assessed, including *inter alia* whether the council members could be appointed by a legislative chamber and not by judges themselves.⁸⁵

In Spain, the legislative chambers appoint all 20 members of the General Council of the Judiciary, including the 12 judges. Therefore, the Spanish Council does not fulfil the requirement established in the Polish case. However, the fact that Spanish judges are appointed by a body with this designation procedure does not suffice to find a violation of the principle of judicial independence. Indeed, the CJEU found that, on top of this, there were additional shortcomings and flaws to be considered in the Polish case. Taken in isolation, each of these shortcomings did not necessarily compromise a court’s independence. However, all together, jointly, they could most certainly lead to a different outcome.⁸⁶ In the case of the Spanish Council of the Judiciary, aside from the fact that all its members are appointed by the legislative chambers, there are no additional circumstances compromising judicial independence. Therefore, there is no room for comparing the situation in Spain to the Polish case.

The second possible development in terms of CJEU case law on Article 47 EUCFR influencing Spanish law relates to a dimension of the right to an effective legal remedy

⁸¹ *Banco Primus* (n 37) para 52.

⁸² *Gutiérrez Naranjo* (n 37) para 73.

⁸³ Artt 112 and 113 of the Organic Act 6/1985, of 1 July 1985, as amended by Organic Act 2/2001, of 28 June 2001 (Official Journal, 155, of 29 June, pp. 23174-23176).

⁸⁴ Joined Cases C-585/18, C-624/18 and C-625/18 *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* EU:C:2019:982 para 137.

⁸⁵ *Ibid*, para 143.

⁸⁶ *Ibid*, paras 142, 152.

raised by the CJEU that has not been identified, at least clearly, by the Spanish Constitutional Court on Article 24 SC – the right to comprehensive or sufficient judicial review.⁸⁷ This is not related to legal standing, time-barring periods or other elements concerning when can courts perform their function – the extension of judicial protection – but rather to the scope of judges’ power or authority when doing so – the intension⁸⁸ of judicial protection. It has been submitted that the CJEU is slowly replacing national procedural autonomy with a differentiated standard of review under Article 47 EUCFR.⁸⁹ In this new framework, the right to comprehensive or sufficient legal protection vis-a-vis administrative discretion could be raised by Spanish lawyers and courts, who are particularly active in terms of increasing the intensity of the judicial review of administrative discretion. Therefore, in the future we could expect requests for preliminary rulings on whether and to what extent the judicial review of administrative discretion performed by Spanish courts, as well as the degree of deference granted to administrative authorities relying on such judicial reviews are compatible with this dimension of the right enshrined in Article 47 EUCFR.

6. CONCLUSION

Article 47 EUCFR is very frequently quoted both by Spanish lower courts, as well as by the Supreme and the Constitutional Court. This provision of the Charter is relied on in virtually every area of law, and it is cited by judges and courts of all divisions of the judiciary. The same pattern emerges in references for preliminary rulings of the CJEU made by Spanish courts regarding the fundamental right to an effective remedy, the principle of effective judicial protection and the principle of the effectiveness of EU law. Both the distribution and the evolution of judicial decisions citing Article 47 EUCFR reflect special features of the domestic legal order, such as the regulation of the cassation appeal before the Supreme Court or the profusion of judicial proceedings in certain areas of law.

By and large, Spanish courts have faithfully and accurately applied Article 47 EUCFR and CJEU case law. Infringements have rather been due to careless mistakes by the courts, or the actual evolution of this case law, but not because they purposefully or defiantly disregard EU law. An outlier is the Constitutional Court decision in *Melloni*: despite the Court overruling its own precedent to by-pass the conflict with Luxemburg, the underlying constitutional narrative is in open contradiction with EU law, since the Constitutional Court claimed that Articles 47 and 48 EUCFR are not directly binding on it; rather, it used

⁸⁷ Case C-199/11 *Otis NV and Others* EU:C:2012:684 para 49; Case C-300/14 *Imtech Marine Belgium NV* EU:C:2015:825 para 38; Case C-682/15 *Berlioz* EU:C:2017:373 para 55; Case C-403/16 *El Hassani* EU:C:2017:960 para 39.

⁸⁸ We are using here the correlative notions of ‘intension’ and ‘extension’ of concepts. In turn, intensity of judicial protection (the degree to which this principle is optimized) can be conceived of as the product of both properties (when can judges decide cases, and what can they do when deciding cases). These two dimensions give rise to a more or less intense judicial protection.

⁸⁹ R Widdershoven, ‘The European Court of Justice and the Standard of Judicial Review’ in J de Poorter, E H Ballin and S Lavrijssen (eds), *Judicial Review of Administrative Discretion in the Administrative State* (Asser Press/Springer, 2019).

the Charter as an interpretative instrument with reference to Article 24 SC. By contrast, the Constitutional Court has accepted that ordinary courts must directly apply the Charter within the scope of EU law. In practice, however, Spanish courts rarely assess whether the case falls under or outside the scope of EU law to determine if the directly applicable provision is Article 47 EUCFR or Article 24 SC; they usually apply both provisions jointly in an undifferentiated way.

While Article 47 EUCFR has not had a structural impact on the Spanish domestic legal order, the Charter and CJEU case law have had an effect on certain areas of domestic procedural legislation that are related to some of the building blocks of the right to an effective judicial remedy, due process and a fair trial, such as the right of access to a court, the rights of defence, the right to legal counsel, the principle of equality of arms or the scope of judges' powers. As for future challenges and possible developments in this respect, Article 47 CFR may well be invoked in the future regarding the composition of the Spanish Council of the Judiciary, and the definition of the standards of review of administrative discretion within the scope of EU law.