Spanish Constitutional Court

Constitutional Dialogue on the European Arrest Warrant: The Spanish Constitutional Court Knocking on Luxembourg's Door; Spanish Constitutional Court, Order of 9 June 2011, ATC 86/2011[1]

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Introduction

On 9 June 2011, the Spanish Constitutional Court decided to refer a case regarding the execution of a European arrest warrant (EAW) to the Court of Justice of the European Union (ECJ) for a preliminary ruling.

This decision is important for at least two reasons. The first and obvious one is that, for the first time, the Spanish Constitutional Court has made such a reference to the Luxembourg Court. Generally, constitutional courts have been very reluctant to raise preliminary references.[2] Indeed, the Spanish Constitutional Court had – on previous occasions – refused the possibility of its making a reference to the ECJ.

Secondly, the reference concerns a deeply controversial issue: the compatibility between fundamental rights and the execution of a EAW. The EAW was set out in Council Framework Decision 2002/584/JHA, of 13 June 2002, *on the Euro-*

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[1] Available in Spanish at <www.tribunalconstitucional.es/es/jurisprudencia/Paginas/Auto.aspx?cod=10386>; ECJ 28 July 2011, Case C-399/11, *Reference for a preliminary ruling from the Tribunal Constitucional, Madrid (Spain)*.

[2] Until now, only the constitutional courts in Austria, Belgium, Lithuania, and Italy have done so. *See* G. Martinico, 'Preliminary Reference and Constitutional Courts. Are You in the Mood for Dialogue?', in F. Fontanelli et al. (eds.), *Shaping Rule of Law through Dialogue* (Europa Law Publishing 2010) p. 221 at p. 224-227.

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pean arrest warrant and the surrender procedures between member states (hereinafter, 2002 Framework Decision), which was last amended in 2009.[3]

It is one of the most important mechanisms for judicial cooperation in the area of freedom, security, and justice. Its main goal was the introduction of a simplified system of surrender of suspected or sentenced persons for the purposes of prosecution or execution of criminal sentences. This mechanism replaced the existing extradition procedures among the member states. The EAW is premised upon the principle of mutual recognition of judicial decisions, which in turn relies on mutual confidence among the member states.[4]

At the same time, the implementation and execution of the EAW has caused constitutional conflicts in several member states. The constitutional courts of Belgium, Poland, Germany, the Czech Republic, Italy, and the Supreme Court of Cyprus have confronted in different ways the compatibility between domestic legislation implementing the Framework Decision on the EAW and the respective constitutions.[5] Until now, only the Belgian Constitutional Court (twice) raised a preliminary reference before the ECJ.[6] Underlying all these cases, as well as the questions referred by the Spanish Constitutional Court, is the tension between constitutional protection and the principle of mutual recognition.

This analysis focuses on two main interrelated issues: (i) the content of the preliminary reference and its implications for the interaction between legal systems protecting rights in Europe; and (ii) the decision to make the reference and its

[3] Council Framework Decision 2009/299/JHA, of 26 Feb. 2009, *amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial.*

[4] 2002 Framework Decision, Recitals 4-6.

[5] See J. Komárek, 'European Constitutionalism and the European Arrest Warrant: In Search of the Limits of "Contrapunctual Principles"', 44 *Common Market Law Review* (2007) p. 9; E. Guild (ed.), *Constitutional Challenges to the European Arrest Warrant* (Wolf Legal Publishers 2006); O. Pollicino, 'European Arrest Warrant and Constitutional Principles of the Member States: A Case Law-Based Outline in the Attempt to Strike the Right Balance between Interacting Legal Systems', 9 *German Law Journal* (2008) p. 1313; L. Marin, 'The European Arrest Warrant and Domestic Legal Orders. Tensions between Mutual Recognition and Fundamental Rights: the Italian Case', 15 *Maastricht Journal of European and Comparative Law* (2008), p. 473; S. Iglesias Sánchez, 'La Jurisprudencia Constitucional Comparada sobre la Orden Europea de Detención y Entrega, y la Naturaleza Jurídica de los Actos del Tercer Pilar', 35 *Revista de Derecho Comunitario Europeo* (2010) p. 169.

[6] ECJ 3 May 2007, Case C-303/05, *Advocaten voor de Wereld VZW* v. *Leden van de Ministerraad*; ECJ 21 October 2010, Case C-306-09, *I.B.* v. *Conseil des ministres.* D. Sarmiento, 'European Union: The European Arrest Warrant and the Quest for Constitutional Coherence', 6 *International Journal of Constitutional Law* (2008) p. 171; E. Cloots, 'Germs of Pluralist Judicial Adjudication: Advocaten voor de Wereld and Other References from the Belgian Constitutional Court', 47 *Common Market Law Review* (2010) p. 645.

implications for the interaction between the Spanish Constitutional Court and the ECJ.

First, the factual and judicial background of this case will be set out since the Spanish Court had decided a very similar case in 2009 without making a preliminary reference. Secondly, the content of the preliminary reference will be examined in depth. Thirdly, the decision to make the reference will be scrutinized against previous case-law refusing to do so. Finally, this work will conclude with some remarks from the perspective of judicial dialogue.

Factual and judicial background

On 8 June 2004, the Court of Appeal of Bologna (Italy) issued a EAW for the surrender of Mr. Melloni, an Italian national. Mr. Melloni had been condemned in his absence to ten years' imprisonment for the crime of bankruptcy fraud. Throughout the judicial proceedings in Italy, before the court of first instance, the Court of Appeal and the Supreme Court, he had been represented by two lawyers of his choice.

Mr. Melloni was detained on 1 August 2008 in Spain. On 12 September 2008, the competent domestic court, the *Audiencia Nacional*, decided to execute the EAW and surrender Mr. Melloni to the Italian authorities.[7] The *Audiencia Nacional* held that, although the prison sentence had been handed down in his absence, Mr. Melloni had information about the trial and had voluntarily decided not to be present. In addition, he had appointed two lawyers, who actually defended him throughout the process.[8]

Mr. Melloni filed an individual complaint (*recurso de amparo*) before the Constitutional Court, claiming the violation of his right to a fair trial with full guarantees (Article 24.2 Constitution),[9] since he had been condemned in his absence. The Constitutional Court decided to stay proceedings and make a reference for a preliminary ruling to the ECJ.[10]

[7] Order 185/2008, 12 Sept.

[8] Mr. Melloni argued that he had appointed a different lawyer for the appeal, but the *Audiencia Nacional* held that the evidence submitted failed to prove that, see Order 185/2008, 12 Sept., para. 6.

[9] Art. 24.2 Spanish Constitution: 'Likewise, all have the right to the ordinary judge predetermined by law; to defence and assistance by 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; not to make self-incriminating statements; not to plead themselves guilty; and to be presumed innocent.'

[10] As an interim measure, the Constitutional Court decided to suspend the execution of the EAW, and Mr. Melloni was not released to the Italian authorities and remained free in Spain.

It should be noted that the facts of this case were virtually the same as those of a previous case decided by the Spanish Constitutional Court in a judgment of 28 September 2009.[11] In that case, Romania had issued a EAW regarding a British national residing in Spain, who had been condemned to four years' imprisonment in his absence, although he had been represented by a lawyer of his choice. Likewise, the *Audiencia Nacional* decided to execute the EAW, and the individual lodged a complaint before the Constitutional Court. The Court followed its doctrine regarding the 'indirect violation' of the 'absolute content' of fundamental rights, which had been developed regarding extradition procedures in a judgment of 30 March 2000.[12] According to this doctrine, state authorities will indirectly violate the Constitution, if they allow the surrender of a person to another country in which public authorities do not respect the absolute content of a fundamental right. The absolute content is defined on the basis of human dignity, and in that regard human rights treaties need to be taken into account.[13] The Court held that the right to participate in the oral trial and the right to one's own defence are part of the 'absolute content' of the right to a fair trial.[14] This doctrine was extended to the execution of a EAW in a 2006 judgment.[15]

Accordingly, in its judgment of 28 September 2009, the Constitutional Court held that the defence by an appointed lawyer was not enough to safeguard the right to a fair trial.[16] Hence, the Court concluded that surrendering a person who had been condemned in his absence, without conditioning the surrender on the opportunity to apply for a retrial, constituted an indirect violation of the right to a fair trial.[17]

[11] STC 199/2009, 28 Sept. C. Izquierdo Sans, 'Conflictos entre la jurisdicción comunitaria y la jurisdicción constitucional española (en materia de derechos fundamentales)', 34 *Revista Española de Derecho Europeo* (2010) p. 193 at p. 218-225; M. Cedeño Hernán, 'Vulneración indirecta de derechos fundamentales y juicio en ausencia en el ámbito de la orden europea de detención y entrega, a propósito de la STC 199/2009, de 28 de septiembre', 20 *Revista General de Derecho Europeo* (2010) p. 1; F. Fontanelli, 'How Interpretation Techniques can Shape the Relationship between Constitutional Courts and the European Union', 21 *King's Law Journal* (2010) p. 371; A. Torres Pérez, 'Euroorden y conflictos constitucionales: A propósito de la STC 199/2009, de 28.9.2009', 35 *Revista Española de Derecho Europeo* (2010) p. 441.

[12] STC 91/2000, 30 March.

[13] *Id.* paras. 7-8.

[14] *Id.* paras. 12-13. This interpretation was contested within the Court by the dissenting opinions.

[15] STC 177/2006, 27 June. T. de la Quadra, 'El encaje constitucional del nuevo sistema europeo de detención y entrega (Reflexiones tras la STC 177/2006, de 5 de junio)', 78 *Revista Española de Derecho Constitucional* (2006) p. 277; Cedeño Hernán, *supra* n. 11, p. 3-7; Izquierdo Sans, *supra* n. 11, p. 216-218.

[16] STC 199/2009, 28 Sept., para. 3.

[17] Unfortunately for the claimant, the EAW had already been executed when the Constitutional Court issued its judgment, so that it only had declaratory effects.

This conclusion, however, conflicted with EU law. The 2002 Framework Decision enables member states' legislation to render the execution of the EAW conditional on the opportunity of applying for a retrial in the issuing member state when the decision has been rendered *in absentia,* 'if the person concerned has not been summoned in person or otherwise informed of the date and place of the hearing' (Article 5(1)). As mentioned before, the person concerned had been represented by a lawyer of his choice. Thus, it might well be possible to infer that he had in some way been informed about the date and place of the hearing.

It is necessary to note that the Spanish statute implementing the 2002 Framework Decision (*Ley 3/2003, de 14 de marzo, sobre la orden europea de detención y entrega*) had not even included the possibility of conditioning the execution of the EAW when the decision had been rendered *in absentia* within the terms of Article 5(1) Framework Decision. Instead of discussing the consequences of this omission, the Constitutional Court simply ruled that the implementing statute had to be interpreted in conformity with Article 24(2) Constitution. This interpretation, however, made the domestic statute incompatible with EU law.[18]

In their two dissenting opinions, Judges Rodríguez Zapata and Pérez Tremps pointed out that this decision was in conflict with EU law and offered other avenues for action:[19] these ranged from interpreting domestic law in conformity with EU law in the wake of *Pupino*,[20] and correspondingly revising the previous constitutional interpretation, to making a reference to the Luxembourg Court.[21]

To conclude, the Spanish Constitutional Court failed to confront the potential conflict with the Framework Decision and placed ordinary courts at the crossroads between compliance with the Constitution or with EU law.[22] It was just a matter of time before a similar case reached the Court.

In *Melloni*, the Constitutional Court reiterated its doctrine about the indirect violation of fundamental rights, but abandoned its previous 'autism' towards EU law and made a reference to the Luxembourg Court.

[18] Torres Pérez, *supra* n. 11, p. 459-461.

[19] For an analysis of other possible outcomes see Torres Pérez, *supra* n. 11, p. 462-467.

[20] ECJ 16 June 2005, Case C-105/03, *Maria Pupino.*

[21] Judge Rodríguez-Zapata indicated that after the 2009 amendment any doubts that might have existed regarding the interpretation of the Framework Decision disappeared, and therefore there was no need to raise the preliminary reference (para. 9). Judge Pérez Tremps suggested that raising a preliminary reference was an option for the Court. In any event, for Judge Pérez Tremps, this was not a case protected under the 'absolute content' of the right to a fair trial because a lawyer representing the accused had been present over the proceedings in Romania. *See* Izquierdo Sans, *supra* n. 11, p. 222-225.

[22] Torres Pérez, *supra* n. 11, p. 470-471.

The tension between constitutional rights protection and the European Arrest Warrant

The main concern underlying the Spanish Court's preliminary reference is the possibility of conditioning execution of the EAW on the grounds of protecting the right to a fair trial. At the core of this case lies the tension between fundamental rights protection and the principle of mutual recognition in the EU. Next, the three questions formulated will be separately analyzed and assessed, from the perspective of the interaction between legal systems.

Nevertheless, before proceeding with such analysis, a few words regarding the object of the preliminary reference would be apposite at this juncture. As mentioned above, the 2002 Framework Decision had last been amended in 2009. Article 5(1) was abrogated and replaced by the new Article 4a.

The questions raised by the Spanish Constitutional Court refer to the interpretation and validity of Article 4a(1). However, the 2009 amendment had not yet been enacted when the EAW was issued in 2004, nor when the *Audiencia Nacional* decided to execute it in 2008. Indeed, the 2009 amendment entered into force on 28 March 2009, with an implementation deadline of 28 March 2011.[23]

Indeed, the Spanish Public Prosecutor opposed making the reference since the 2009 Framework Decision was not applicable *ratione temporis.* The Constitutional Court dismissed this objection arguing that the issue at stake was not the applicability of the 2009 Framework Decision, but the interpretation of the Constitution.[24] Quoting *Pupino,* the Court acknowledged the obligation to interpret domestic law in conformity with Framework Decisions. [25] Without developing a careful analysis of this objection, it merely held that the Constitution had to be interpreted in light of the EU law in force at the time.[26] It is however arguable

[23] Art. 8(1) and 10 2009 Framework Decision. In addition, Italy had issued a declaration pursuant to Article 8(3) of the 2009 Framework Decision, according to which the 2009 amendment would not apply to Italy until 1 Jan. 2014, DOUE 16.4.2009, L97/26.

[24] Constitutional Court Order ATC 86/2011, 9 June, para. 4(c).

[25] ECJ 16 June 2005, Case C-105/03, *Maria Pupino,* paras. 34, 43. As is well know, in *Pupino* the ECJ held that the obligation of interpreting national law in conformity with Directives was applicable also to Framework Decisions. At the same time, the ECJ argued that this obligation was limited by the principles of legal certainty and non-retroactivity (para. 44). In particular, it held that the obligation of conformity interpretation may not lead to the aggravation or determination of criminal liability. Yet, the ECJ held that the provisions at stake in that case did not concern the extent of criminal liability, but the conduct of the proceedings and means of taking evidence (paras. 45-46). Actually, the facts of the case in *Pupino* had occurred in Jan.-Feb. 2011, before the enactment of the Framework Decision on 15 March 2011. The proceedings, however, took place over the implementing period.

[26] In contrast, in STC 199/2009, 28 Sept., the Constitutional Court held that it should not take into consideration the 2009 amendment, since it had not yet been transposed and it was not applicable to the case. In his dissenting opinion, Judge Pérez Tremps argued that the 2009 Frame-

that doubts could be raised about the admissibility feasibility of the preliminary reference.

In any event, and without going further into the issue of the applicability of the 2009 Framework Decision here, it should be recalled that the potential clash with the constitutional interpretation of the right to a fair trial is not the result of the 2009 amendment, but existed already on the basis of the repealed Article 5(1). In this regard, Article 4a(1) clarifies the previous Article 5(1). At the end, it would have been more accurate – from the perspective of the temporal application of norms – for the Constitutional Court to refer to the 2002 Framework Decision, in light of the 2009 amendment.

The interpretation and validity of the Framework Decision (first and second questions)

The first question raised by the Constitutional Court refers to the interpretation of Article 4a(1) 2009 Framework Decision. According to this provision, the executing judicial authority may refuse to execute a EAW if the person was not present at the trial, unless the person concerned was summoned in person or otherwise informed about the scheduled date and place of the trial, or being aware of the scheduled trial, had given mandate to a legal counsellor.[27]

The Constitutional Court offers two interpretations that would allow overcoming the potential conflict between the constitutional interpretation of the right to a fair trial and the Framework Decision.

First, the Court suggests that Article 4a(1) could be interpreted in such a way that the execution of the EAW might not be refused when the person concerned 'being aware of the scheduled trial, had given a mandate to a legal counsellor', but that the execution could still be conditioned on the possibility of applying for a

work Decision could be used as an interpretive criterion of Art. 24(2) Constitution, according to Art. 10(2) Constitution.

[27] Art. 4a(1): 'The executing judicial authority *may also refuse to execute* the European arrest warrant issued for the purpose of executing a custodial sentence or a detention *order if the person did not appear in person at the trial* resulting in the decision, *unless* the European arrest warrant states that the person, in accordance with further procedural requirements defined in the national law of the issuing member state:

(a) in due time: (i) either *was summoned in person* and thereby informed of the scheduled date and place of the trial which resulted in the decision, *or by other means actually received official information of the scheduled date and place of that trial* in such a manner that it was unequivocally established that he or she was aware of the scheduled trial; and (ii) was informed that a decision may be handed down if he or she does not appear for the trial; or (b) being aware of the scheduled trial, *had given a mandate to a legal counsellor*, who was either appointed by the person concerned or by the State, to defend him or her at the trial, and was indeed defended by that counsellor at the trial' (emphasis added). This article contains other grounds in which the execution of a EAW in case of trial in absence may not be refused.

retrial. According to the Court, the text of the Article excludes 'refusing' the execution, but not the 'conditioning' of it.

Secondly, were this first interpretation to be rejected, the Court argues that Article 4a(1) should be interpreted systematically in connection with Article 1.3 Framework Decision. This Article states that the Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights enshrined in Article 6 TEU.

It is considered that the first interpretation proposed cannot be admitted because it is not compatible with the text of Article 4a(1). If the execution of the EAW were conditioned on the possibility of obtaining a retrial and this condition were not fulfilled, then the consequence would be the refusal to execute it, which is precisely what Article 4a(1) excludes.

Moreover, this interpretation would run counter to the goal of the 2009 amendment, which is to provide 'clear and common grounds for non-recognition of decisions rendered following a trial at which the person concerned did not appear in person.'[28] In addition, this interpretation would undermine the purpose of 'fostering the application of the principle of mutual recognition,' as it appears in the title of the 2009 Framework Decision.

The second interpretation in connection with Article 1.3 Framework Decision would amount to allowing member states to refuse to execute the EAW for violation of fundamental rights. The Framework Decision, however, already specifies the grounds for such refusal in Articles 3 and 4.

Actually, this was one of the questions raised by the Belgian Constitutional Court in *I.B.* v. *Conseil des ministres*:[29] '(…) are Articles 3 and 4 of the Framework Decision to be interpreted as preventing the judicial authorities of a member state from refusing the execution of a European arrest warrant if there are valid grounds for believing that its execution would have the effect of infringing the fundamental rights of the person concerned, as enshrined by Article 6(2) of the Treaty on European Union?' The ECJ, however, managed to avoid answering this question.[30]

It should be observed that the implementing statutes of two thirds of the member states have incorporated general clauses enabling them to refuse the execution of the EAW for violation of fundamental rights, on the basis of Article 1(3), or Recitals 12 and 13 of the Framework Decision. The 2006 Commission Report on the EAW found these clauses 'disturbing.'[31] The Commission reluctantly admitted

[28] 2009 Framework Decision, Recital 4.

[29] ECJ 31 July 2009, Case C-306/09, *Reference for a preliminary ruling from the Cour constitutionnelle* (Belgium), forth question.

[30] ECJ 21 Oct. 2010, Case C-306/09, *I.B.* v. *Conseil des ministres,* paras. 62-63.

[31] *Report from the Commission based on Article 34 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member states*, Brussels, 24.1.2006 COM(2006)8 final, p. 6; V. Mitsilegas, 'The Constitutional Implications of Mutual

their legitimacy but declared that they ran counter to the intention of the Council and could only be invoked in exceptional circumstances.[32]

In any event, on the basis of Article 6 TEU, the fundamental rights that would supposedly allow the refusal to execute a EAW would be EU fundamental rights but not national constitutional rights. Therefore, the point is how the right to a fair trial should be interpreted in the EU. This leads us to the second question raised by the Spanish Constitutional Court.

The second question challenges the validity of Article 4a(1) in light of the right to an effective judicial remedy and to a fair trial (Article 47) and the right of defence (Article 48(2)) as laid down by the Charter.[33] The answer to this question first requires an interpretation of those Charter Articles.

The Constitutional Court acknowledges that EU fundamental rights are autonomous, and thus the interpretation of Charter rights might not coincide with the constitutional interpretation of parallel rights. It expressly refers to the Explanations to the Charter,[34] according to which Articles 47 and 48 are based upon Article 6 European Convention on Human Rights (ECHR). The Court also points out that, according to Article 52.3 Charter, 'the meaning and scope of Charter rights that correspond to rights guaranteed by the Convention shall be the same as those laid down by the Convention. Yet, this provision shall not prevent Union law providing more extensive protection.'

Hence, the Constitutional Court then refers to the interpretation of Article 6 ECHR. In *Sejdovic* v. *Italy*,[35] the European Court of Human Rights (ECtHR) summarized its case-law regarding the interpretation of Article 6 ECHR in cases in which the accused has been sentenced in his absence. According to the ECtHR, a person charged with a criminal offence is entitled to take part in the hearing. Yet, a trial *in absentia* does not violate Article 6 if the person thus convicted is entitled 'to obtain from a court which has heard him a fresh determination of the merits of the charge, in respect of both law and fact.'[36] However, there is no need to secure the possibility of a retrial if the person 'has waived his right to appear and to defend himself or intended to escape trial.'[37] The ECtHR added that, in

Recognition in Criminal Matters in the EU', 43 *Common Market Law Review* (2006), p. 1277 at p. 1292-1294; Marin, *supra* n. 5, p. 482-484.

[32] *Report from the Commission*, *supra* n. 31, p. 5. Also, the Council of Justice and Home Affairs, in its 2664th Council meeting, Luxembourg, 2-3 June 2005, 8849/05 (Presse 114), p. 10, expressed its concerns regarding these clauses from the perspective of the principle of mutual recognition.

[33] ECJ 28 July 2011, Case C-399/11, *Reference for a preliminary ruling from the Tribunal Constitucional, Madrid (Spain)*.

[34] *Explanations Relating to the Charter of Fundamental Rights* (2007/C 303/02), 14 Dec. 2007.

[35] ECtHR 1 March 2006, Case No 56581/00, *Sejdovic* v. *Italy.*

[36] *Id.* para. 82.

[37] *Id.* para. 82.

order to be effective, 'a waiver of the right to take part in the trial must be established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance.'[38]

The *Melloni* case indicates very neatly the potential conflicts that might emerge as a consequence of the overlap among systems of rights protection when parallel rights are interpreted differently.[39] The right to a fair trial is protected by the Spanish Constitution, the ECHR, and the EU. If we compare these three systems, we will find the following.

First, the provisions of the Framework Decision seem to be compatible with Article 6 ECHR, since Article 6 ECHR would not protect an individual who, being aware of the scheduled trial, had given a mandate to a lawyer and was indeed defended by that lawyer.[40]

Secondly, the level of protection given by the Spanish Constitution, according to the Constitutional Court's interpretation, is higher than the protection afforded by the Convention and the Framework Decision.

Second, the level of protection granted by the Spanish Constitutional Court is higher than the level of protection granted by the ECtHR.[41] This is not problematic from the perspective of the Convention. According to Article 53 ECHR, the Convention sets a minimum floor of protection, below which the States cannot fall. States, however, may grant more extensive protection.

Third, in contrast, the fact that the protection granted by the Spanish Constitution is more extensive than the protection afforded by the Framework Decision is troublesome. If states were free to enforce a higher level of protection of the right to a fair trial and thereby refuse the execution of a EAW, this would hinder the uniform application and effectiveness of this instrument, and eventually undermine the principles of mutual recognition and mutual confidence.[42]

[38] *Id.* para. 86.

[39] *See* Torres Pérez, *supra* n. 11, p. 446-458.

[40] Note, however, that according to Art. 4a(1) Framework Decision refusing the execution of a EAW in case of trial in absence is an option for the States. Thus, a State may decide to execute the EAW in a case in which the person was not present and did not have any knowledge about the trial. This situation would breach Art. 6 ECHR. Arguably, the Framework Decision leaves a margin for the states to comply with the ECHR, but it does not require them to do so.

[41] In STC 91/2000, 30 March, and STC 199/2009, 28 Sept., the Constitutional Court misread the ECtHR case law and understood that the constitutional interpretation of Article 24(2) Constitution was required by the ECtHR, Torres Pérez, *supra* n. 11, p. 449-452. Now, the Constitutional Court acknowledges that this specific constitutional interpretation goes beyond the Convention level.

[42] These potential conflicts between EU law and the Constitution, which take place above the Convention floor, would not be solved with the accession of the EU to the ECHR. EU law might respect the Convention, but still the Constitution might afford better protection than the EU, and this might be problematic from the standpoint of the implementation of EU law.

The potential conflict between the Constitution and the Framework Decision would vanish if the Charter were to be interpreted in the same way as the Spanish Constitution. Putting it more precisely, the Spanish Constitutional Court suggests that the Charter could be interpreted as granting a higher level of protection than the ECHR, and equivalent to the protection afforded by the Spanish Constitution. If so, Article 4a(1) Framework Decision would have to be declared invalid for violating the Charter.

It is very unlikely, however, that the ECJ would raise the protection to that level. There is no need from the perspective of the EU to exceed the level provided by the ECHR, and it might be even abusive to protect a person in cases in which they had information about the trial and were defended by a lawyer of their choice. Actually, if the possibility to obtain a retrial were always available, this could act as an incentive to decline showing up at the trial in another country.

Finally, the Constitutional Court indicates that if the ECJ refused to extend the scope of protection of the right to a fair trial, it should be made sure that in the circumstances of Article 4a(1) the individual had waived the right to be present in an unequivocal manner, as required by the ECtHR.

Generally, one might think that if the person had information about the date and place of the trial and had appointed a lawyer to defend them, then that person had waived the right to be present or simply intended to escape prosecution. According to the ECtHR, the waiver does not need to be explicit, but it must be unequivocal.[43] In *F.C.B.* v. *Italy*, although the person had been represented by a lawyer, the ECtHR ruled that Article 6 had been violated since 'it does not appear that Mr. F.C.B., whether expressly or at least in an unequivocal manner, intended to waive his right to appear at the trial and defend himself.'[44] Actually, the applicant was in prison in the Netherlands when the trial took place. Thus, in exceptional circumstances, it might be that a person, who had information about the trial and was represented by a lawyer, was absent for reasons beyond their control.

Hence, the ECJ might require an interpretation in conformity with the ECHR, in the sense that the waiver of the right to take part in the trial must be established in an 'unequivocal manner.' This could be a way for the ECJ to sustain the validity of Article 4a(1) Framework Decision, while admitting that, in exceptional circumstances, if the waiver were not unequivocal, the execution could be refused.

The interpretation of Article 53 Charter (third question)

In case the ECJ were to consider Article 4a(1) compatible with Articles 47 and 48 Charter, the Constitutional Court has formulated a question about the interpreta-

[43] ECtHR 1 March 2006, Case No 56581/00, *Sejdovic* v. *Italy,* para. 99.
[44] ECtHR 28 Aug. 1991, Case No 12151/86, *F.C.B.* v. *Italy,* para. 33.

tion of Article 53 Charter.[45] In particular, the Court asks whether Article 53 allows a member state to grant a higher level of protection to the right to a fair trial than the protection deriving from EU law, in order to avoid an interpretation that 'restricts or adversely affects' a fundamental right.[46]

Since the Charter was proclaimed in Nice in 2000, the interpretation of this Article has given rise to many doubts.[47] It has even been claimed that this is just an 'inkblot',[48] useful to calm the anxieties of those who feared that the Charter would lead to a lowering of the standards of constitutional protection.

The Spanish Court suggests three interpretive options. First, given the textual similarity, Article 53 Charter could be interpreted in the same way as Article 53 ECHR. According to this interpretation, the Charter would set a minimum floor of protection.[49] State constitutions could be interpreted as granting better protection than the Charter, without that higher level being imposed on other states. As the Court points out, this interpretation would imply that member states may refuse execution of a EAW claiming the need to secure the protection of constitutional rights.[50]

As mentioned before, however, if each state were able to unilaterally decide when to execute a EAW on the basis of their respective constitutional rights, the effectiveness and uniform application of the EAW could be endangered. Thus, this understanding of Article 53 Charter would eventually undermine the principles of mutual recognition and mutual confidence.

Secondly, Article 53 could be interpreted as indicating the 'respective fields of application' of the Charter and state constitutions. According to this interpretation,

[45] ECJ 28 July 2011, Case C-399/11, *Reference for a preliminary ruling from the Tribunal Constitucional, Madrid (Spain).*

[46] A general problem for comparing 'levels of protection' is that, in many instances, it is difficult to ascertain which the best level of protection is, particularly when different rights conflict.

[47] J. Bering Liisberg, 'Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law?', 38 *Common Market Law Review* (2001) p. 1171; L.F.M. Besselink, 'The Member States, the National Constitutions and the Scope of the Charter', 8 *Maastricht Journal of European and Comparative Law* (2001) p. 68; R. Alonso García, 'The General Provisions of the Charter of Fundamental Rights of the European Union', 8 *European Law Journal* (2002) p. 492 at p. 507-514; F. Rubio Llorente, 'Mostrar los Derechos sin Destruir la Unión (Consideraciones sobre la Carta de Derechos Fundamentales de la Unión Europea)', 64 *Revista Española de Derecho Constitucional* (2002) p. 13; A. Torres Pérez, 'La dimension estructural de la Carta de Derechos Fundamentales de la Unión Europea', 67 *Revista Vasca de Administración Pública* (2003) p. 253 at p. 292-295; M. Díaz Crego, *Protección de los derechos fundamentales en la Unión Europea* (Reus 2009) p. 202-238.

[48] Liisberg, *supra* n. 47, p. 1198.

[49] This seems to have been the interpretation granted to Art. 53 by the Spanish Constitutional Court in Declaration 1/2004, 13 Dec., para. 6.

[50] Although the Spanish Constitutional Court does not mention it, Recital (12) Framework Decision sets forth: 'This Framework Decision does not prevent a Member State from applying its constitutional rules relating to due process … .'

outside the field of application of the Charter, member states' constitutions would be fully effective. However, it is obvious that the Charter could never restrict or adversely affect constitutional rights in those fields in which the Charter does not apply.[51]

The crucial issue is how to resolve potential conflicts when the Charter and the national constitution overlap in their scope of application.[52] Following this second interpretive option, Article 53 would not speak to those overlapping areas. In case both constitutional and EU law applied, EU law would claim precedence on the basis of the primacy principle. As a result, in the field of application of EU law, the levels of rights protection may be lowered. Member states would not be allowed to refuse to execute a EAW in order to avoid restricting or adversely affecting fundamental rights.

In the end, as the Spanish Constitutional Court acknowledges, this interpretation would imply leaving Article 53 devoid of any meaning. This article would become coextensive with Article 51.1 Charter, which regulates the scope of application of the Charter.

Finally, the third interpretive option would involve a combination of the previous two. Depending on the circumstances of the case, Article 53 Charter could operate as establishing a floor of protection (allowing for higher levels of constitutional protection) or imposing a uniform interpretation (assuming the possibility of lowering standards of protection). Ultimately, the answer should not necessarily be formulated in the abstract, but according to the specific features of each case.

This third eclectic option is rather vague. It might be understood in terms of deference.[53] Article 53 Charter might be read as indicating the need for the ECJ to be deferential to domestic courts if the level of constitutional protection were higher and there were no other rights or general interests that should prevail in the particular case. Deference could be an instrument for the ECJ to allow for higher constitutional standards of protection, without imposing that standard to the other states, in line with *Omega.*[54] Accommodating a degree of diversity in the interpretation of fundamental rights does not always significantly undermine the effectiveness of EU law, let alone the success of the entire integration project.[55]

[51] Liisberg, *supra* n. 47, p. 1191.

[52] Besselink, *supra* n. 47, p. 75.

[53] A. Torres Pérez, *Conflicts of Rights in the European Union. A Theory of Supranational Adjudication* (OUP 2009) p. 168-177.

[54] ECJ 14 Oct. 2004, Case C-36/02, *Omega Spielhallen und Automatenayfstellungs GmbH* v. *Oberbürgermeisterin der Bundesstadt Bonn;* ECJ 14 Feb. 2008, Case C-244/06, *Dynamic Medien Vertriebs GmbH.*

[55] Torres Pérez, *supra* n. 53, p. 70-93.

The ECJ might be tempted to avoid answering this question, given the political sensitivity of the issue. Lately, the ECJ tends to skirt around the sensitive questions regarding the interaction between legal systems in the field of fundamental rights.[56] Yet, as the ultimate interpreter of the Charter, the ECJ should not miss the chance of clarifying the interpretation of Article 53.

To summarize, for the foregoing reasons, the first interpretation cannot be fully embraced. Within the EU framework, member states ought not to make a more protective standard prevail unilaterally, irrespective of the consequences for the effectiveness of EU law.[57] The second option is the safest from the perspective of the primacy of EU law and secures uniformity in rights interpretation.[58] This interpretive option, however, would deprive Article 53 of any meaning and would not fit in adequately with the pluralist structure of the European legal order.[59]

An option that would give content to it, without directly conflicting with the primacy of EU law, would entail understanding this article from the standpoint of deference. Article 53 would provide the states with a claim for the ECJ to respect higher constitutional levels of protection. In other words, this provision would contain a self-restraint mandate to the ECJ in rights adjudication.[60] Yet, it is not clearly established which criteria should guide the ECJ in the exercise of deference and more work should be done in this field.

Finally, according to the suggested interpretation, in the specific case, should the ECJ be deferential to the higher constitutional level of protection? Or should the Constitutional Court be asked to renounce the 'extra protection'? Admittedly, in this case, as will be argued below, there are other rights and interests that should be taken into account that would tip the balance for a uniform interpretation.

[56] For instance, ECJ 8 March 2011, Case C-34/09, *Gerardo Ruiz Zambrano* v. *Office national de l'emploi*.

[57] Torres Pérez, *supra* n. 53, p. 60-62.

[58] Rejecting the interpretation of Article 53 in any way limiting the supremacy of EU law, *see* Liisberg, *supra* n. 47, p. 1190-1196; Rubio Llorente, *supra* n. 47, p. 43-44. In contrast, others have suggested that, to some extent, Art. 53 weakens the primacy principle, such as Besselink, *supra* n. 47, p. 80; Alonso García, *supra* n. 47, p. 513-514; A. Saiz Arnaiz, 'El Tribunal de Justicia, los Tribunales Constitucionales y la tutela de los derechos fundamentales en la Unión Europea: entre el (potencial) conflicto y la (deseable) armonización. De los principios no escritos al catálogo constitucional, de la autoridad judicial a la normativa', in M. Cartabia et al. (eds.), *Constitución europea y constituciones nacionales* (Tirant lo Blanch 2005), p. 531 at p. 575-576.

[59] N. Krisch, 'The Open Architecture of European Human Rights Law', 71 *The Modern Law Review* (2008) p. 183 at p. 215-216.

[60] Torres Pérez, *supra* n. 53, p. 168-177; M. Díaz Crego, 'El margen de apreciación nacional en la jurisprudencia del Tribunal de Justicia de las Comunidades Europeas referida a los derechos fundamentales', in J. García Roca and P.A. Fernández Sánchez, *Integración europea a través de Derechos Fundamentales: de un sistema binario a otro integrado* (Centro de Estudios Políticos y Constitucionales 2009) p. 55 at p. 72-75.

'In the mood for dialogue'[61]

Next, the unprecedented decision by the Spanish Constitutional Court to ask for a preliminary ruling will be assessed. Indeed, the Constitutional Court expressly admits that this is a court for the purposes of Article 267 TFEU.[62] Usually, constitutional courts have been very reluctant to make references to the ECJ. This reluctance might be explained in terms of preserving a field of autonomy and resisting the position of being placed under the interpretive authority of the ECJ. As it has been put, they might be afraid of losing 'freedom, sovereignty and independence.'[63] For instance, until 2008, the Italian Constitutional Court refused to make a preliminary reference to the ECJ, arguing that it could not be qualified as a 'court or tribunal' in the sense of Article 267 TFEU.[64] Still, this does not mean that constitutional courts have not interacted with the ECJ, but they have preferred other forms of 'hidden dialogue,'[65] in the sense of non-formalized ways of communication.

From reluctance…

In the past, the Spanish Constitutional Court had repeatedly declined the possibility to make a reference. In a seminal decision in 1991,[66] it rejected the notion that the incorporation of EU law through Article 93 Constitution granted EU law constitutional status.[67] Therefore, the compatibility between EU law and domestic law was not a problem of constitutional relevance. The Court therefore argued that it was for ordinary judges to decide on the potential conflict between domestic legislation and EU law and, if the case so warranted according to Article 267 TFEU, refer a question to the ECJ.[68] Hence, following the view that the enforce-

[61] This title is taken from Martinico, *supra* n. 2.

[62] Constitutional Court Order ATC 86/2011, 9 June, para. 4(e).

[63] M. Cartabia, 'Europe and Rights: Taking Dialogue Seriously', 5 *European Constitutional Law Review* (2009), p. 25.

[64] *Id.,* p. 24; Martinico, *supra* n. 2, p. 224, 227-237; F. Fontanelli and G. Martinico, 'Between Procedural Impermeability and Constitutional Openness: The Italian Constitutional Court and Preliminary References to the European Court of Justice', 16 *European Law Journal* (2010) p. 345; M. Dani, 'Tracking Judicial Dialogue – The Scope for Preliminary Rulings from the Italian Constitutional Court', *Jean Monnet Working Paper Series* 10/08.

[65] G. Martinico, 'Judging in the Multilevel Legal Order: Exploring the Techniques of "Hidden Dialogue"', 21 *King's Law Journal* (2010) p. 257.

[66] STC 28/1991, 14 Feb., para. 7.

[67] Art. 93 Constitution authorizes the transfer of powers to an international organization and sets the corresponding procedure.

[68] STC 28/1991, 14 Feb., paras. 5-6.

ment of EU law was not its function, the Court refused to make any reference.[69] This view has since been reiterated.[70]

Nevertheless, and assuming that the Constitutional Court does not enforce EU law, this does not mean that a reference needs to be excluded. Article 267 TFEU does not require EU law be directly applicable to the case, but only that it is relevant for the decision,[71] and the ECJ has interpreted the term 'relevance' quite broadly. Thus, EU law might not be directly applicable by the Constitutional Court but its interpretation might be relevant for the decision in the case.

Actually, in the above-mentioned 1991 judgment, the Constitutional Court on the basis of Article 10(2) Constitution[72] admitted that EU fundamental rights needed to be taken into account in order to interpret constitutional rights.[73] This was not to mean, however, that EU fundamental rights constituted an autonomous parameter of validity of domestic legislation, directly applicable by the Constitutional Court.[74] Still, if it is admitted that EU fundamental rights need to be taken into account for interpreting constitutional rights, and the Court has doubts about the meaning of those rights, this would offer enough grounds for it to make a reference.[75] The Constitutional Court would thereby not be directly 'enforcing' EU law, but using EU law as a hermeneutic tool.[76]

Indeed, in Declaration 1/2004, the Constitutional Court expressly recognized the need for dialogue.[77] Before the ratification of the failed Constitutional Treaty, the Court was asked about the compatibility of the Constitution and two horizontal clauses of the Charter.[78] It held that specific constitutional problems might

[69] *Id.* para. 7.

[70] Criticizing this position, *see* Alonso García, *El Juez español y el Derecho Comunitario* (Consejo General del Poder Judicial 2003), p. 255-269; M. Cienfuegos Mateo, 'El planteamiento de cuestiones prejudiciales por los órganos jurisdiccionales españoles: teoría y práctica', in S. Ripol Carulla and J.I. Ugartemendía (eds.), *España ante los tribunales internacionales europeos. Cuestiones de política judicial* (IVAP 2008), p. 54-58.

[71] García, *supra* n. 70, p. 263-264.

[72] Art. 10(2) Constitution: 'Provisions relating to the fundamental rights and liberties recognized by the Constitution shall be construed in conformity with the Universal Declaration of Human Rights and international treaties and agreements thereon ratified by Spain.'

[73] STC 28/1991, 14 Feb., para. 5; A. Saiz Arnaiz, *La Apertura Constitucional al Derecho Internacional y Europeo de los Derechos Humanos. El Artículo 10.2 de la Constitución Española* (Consejo General del Poder Judicial 1999), p. 185-203; X. Arzoz Santiesteban, 'La relevancia del derecho de la Unión Europea para la interpretación de los derechos fundamentales constitucionales', 74 *Revista Española de Derecho Constitucional* (2005) p. 63.

[74] STC 64/1991, March 22, para. 4.

[75] García, *supra* n. 70, p. 266-267.

[76] *Id.* p. 259-260.

[77] DTC 1/2004, 13 Dec., available in English at <www.tribunalconstitucional.es/es/jurisprudencia/restrad/Paginas/DTC122004en.aspx>.

[78] In particular, the question was about Art. II-111 and II-112, now Art. 51 and 52 Charter.

not be the object of an anticipated and abstract opinion and that the solution might only be sought, 'within the framework of constitutional procedures', taking into account the specific circumstances of each case, and 'in constant dialogue with the authorized jurisdictional instances … for the authentic interpretation of the international agreements that contain declarations of rights.'[79] Regardless of this invocation of dialogue in the domain of fundamental rights, it was not until 2011 that the Constitutional Court made its first preliminary reference.

… to dialogue

Taking into account this background, several questions arise: How does the Spanish Constitutional Court justify this groundbreaking decision? Why did it make the preliminary reference at this moment? What might be the implications for the future? And ultimately, was the preliminary reference necessary in this case?

First, *how* does the Constitutional Court justify this shift? In *Melloni*, the Court explicitly acknowledges the 'constitutional relevance' of the interpretation given to EU law provisions protecting fundamental rights as well as regulating the EAW, 'as opposed to previous cases.'[80]

In the past, however, the main reason for its refraining from making a reference was not so much that EU law was irrelevant, but rather that the enforcement of EU law did not concern the Constitutional Court. Now, in *Melloni,* the fact that the Constitutional Court does not enforce EU law is no longer a reason for its refusing to make a reference.

Instead of admitting this reversal of its previous case-law and seeking to justify it, the Constitutional Court simply holds that this case is different from previous ones and offers no explanation as to how. Indeed, the judgment of 28 September 2009 regarding the execution of a EAW was virtually the same type of case.

In short, while the decision to make the reference should be welcomed since the previous blunt refusal to do so could no longer be sustained, nevertheless the Court fails to properly explain the reasons for this unprecedented shift.

Consequently, the intriguing question as to *why* the Spanish Court decided to refer at this moment is left open. Hypothetically, it is possible to consider several reasons that might explain its shift. In particular, what has changed since the Constitutional Court judgment of 28 September 2009?

From a systemic point of view, the Treaty of Lisbon entered into force on 1 December 2009. The Lisbon Treaty proclaims in Article 4(2) TEU the need to respect the 'national identity' inherent in constitutional fundamental structures. The core of constitutional rights might integrate this notion.[81] Thus, the Consti-

[79] DTC 1/2004, 13 Dec., para. 6.

[80] Constitutional Court Order ATC 86/2011, 9 June, para. 4(b).

[81] In Declaration 1/2004, the Constitutional Court held that constitutional rights may be a limit to integration, para. 2.

tutional Court might have relied on this provision to claim for respect for the constitutional understanding of fundamental rights. However, the notion of constitutional identity does not seem to have had any explanatory force, and Article 4(2) TEU is not even mentioned.

The Lisbon Treaty has obliterated the three pillar structure, which has implications for the legal nature of Framework Decisions and for the jurisdiction of the ECJ. Indeed, in their respective decisions regarding the EAW, the Polish, German, and Czech Constitutional Courts emphasized the differences between the legal nature of acts under the first and the third pillar.[82] Additionally, prior to the Lisbon Treaty, the possibility of making a reference within the third pillar was subject to a declaration of acceptance by each member state.[83] Thus, arguably, the 'depillarization' might have encouraged the Spanish Court to refer.

Yet, it should be noted that according to Protocol 36 on transitional provisions, over a five-year period, the Treaty of Lisbon does not change the competence of the ECJ regarding acts in the field of police and judicial cooperation in criminal matters adopted before the entry into force of the Lisbon Treaty. In any event, Spain had already declared its acceptance of the jurisdiction of the ECJ at the moment of the ratification of the Amsterdam Treaty in 1998,[84] as the Spanish Constitutional Court recalls.[85]

Besides, the 2009 amendment of the Framework Decision might have had some bite. With this amendment, the potential conflict between EU law and the constitutional interpretation of the right to a fair trial was even more difficult to ignore than before, and the period for its implementation had elapsed on 28 March 2011.[86]

Also, the preliminary reference might have been motivated for reasons of avoiding the risk of state liability. If the Constitutional Court kept the same position as in the 2009 judgment and conditioned the execution of the EAW, Spain could be condemned for breach of EU law.

The Constitutional Court might have been influenced by the precedent of other constitutional courts, such as the Belgian Court, which had raised two preliminary references regarding the EAW; or the fact that the Italian Court, which had repeatedly refused ever raising a preliminary reference, had already done so.[87]

[82] *See* Iglesias Sánchez, *supra* n. 5.

[83] Ex Art. 35 TEU.

[84] Organic Law 9/1998, authorizing the ratification of the Amsterdam Treaty. Interestingly enough, Spain had only accepted the competence of the ECJ to decide on preliminary references from courts of last instance, according to the modality of (a) para. 3, ex Art. 35(2) TEU.

[85] Constitutional Court Order ATC 86/2011, 9 June, para. 4(a) and (e). The Constitutional Court confirms that this is a court of last instance for the purposes of ex Art. 35(2) TEU.

[86] In any event, as argued before, the 2009 amendment had not yet been enacted when the EAW was issued and executed.

[87] Fontanelli and Martinico, *supra* n. 64.

From an internal perspective, although four new judges had been appointed to the Constitutional Court in December 2010, it does not seem that the change of internal composition can explain the Court's reversal of its previous case-law.

Reasons linked to 'judicial politics' might explain the shift of the Court. The criminal court in charge of the EAW, the *Audiencia Nacional*, had twice ignored previous constitutional doctrine regarding the interpretation of the right to a fair trial and decided to execute the EAW without conditioning it. With the judgment of 28 September 2009, the Constitutional Court put the *Audiencia Nacional* in the position of having to choose between complying with the Constitution or with EU law.[88] There was a risk that, in a subsequent case, the *Audiencia Nacional* would just disregard the constitutional mandate or itself make the reference. The Constitutional Court has anticipated this. In this way, the Constitutional Court has the opportunity to defend the constitutional interpretation directly before the ECJ and avoid being side-stepped by the *Audiencia Nacional*.

Lastly, it might be that the Spanish Court is finally reacting to the long-lasting doctrinal critique to the refusal to make any references.[89]

With regard to the *implications* of this decision, has the Spanish Constitutional Court opened the door for further preliminary references in the future? The Court seems to be willing to make a reference when the interpretation of EU law is relevant for the interpretation of the Constitution. It even declares that the parameter to decide about the constitutionality of the execution of the EAW needs to include both EU fundamental rights and the provisions regulating the EAW. At some point, however, the Constitutional Court seems to restrict the constitutional relevance of EU law to cases concerning the 'indirect violation' of a fundamental right.[90]

Nonetheless, this restrictive understanding would not be consistent with Article 10(2) Constitution, which generally rules that constitutional rights need to be interpreted in conformity with international human rights law. Indeed, the Constitutional Court has already quoted the Charter and other secondary EU law provisions in order to interpret constitutional rights.[91]

Finally, was the preliminary reference necessary in this case? Judge Pérez Tremps in his dissenting opinion claims that it was not. On the one hand, Pérez Tremps celebrates the fact that the Constitutional Court has overcome its traditional

[88] The STC 199/2009, 28 Sept., had not yet been issued when the *Audiencia Nacional* decided about the execution of the EAW against Mr. Melloni on 12 Sept. 2008.

[89] Alonso García, *supra* n. 70, p. 266-267; Cienfuegos Mateo, *supra* n. 70, p. 54-58.

[90] Constitutional Court Order ATC 86/2011, 9 June, para. 4(b); L. Arroyo Jiménez, 'Sobre la primera cuestión prejudicial planteada por el Tribunal Constitucional', 4 *InDret* (2011) <www.indret.com>, p. 19.

[91] SSTC 145/1991, 1 July; 58/1994, 28 Feb.; 268/1994, 4 Oct.; 147/1995, 16 Oct.; 136/1996, 23 July; 198/1996, 3 Dec.; 292/2000, 30 Nov.; 41/2006, 13 Feb..

position and has decided to participate in the so-called 'European judicial dialogue.'[92]

On the other hand, Pérez Tremps argues that, in this case, the preliminary reference ought not to have been made.[93] Taking into account the principle of mutual recognition, the Constitutional Court should have abandoned the doctrine of the indirect violation of the absolute content of a right within the EU. This doctrine allows the Constitutional Court to monitor indirectly the action of foreign authorities through the review of domestic judicial decisions executing the EAW. In other words, given that the EAW is premised upon the principle of mutual recognition, domestic courts should not second guess decisions coming from other courts in the light of constitutional rights. He claims that the principle of mutual recognition is premised upon a shared common culture of fundamental rights among the member states, and that the political and legal project of the EU is based upon horizontal confidence among states. Finally, he argues that Article 24(2) Constitution should be interpreted in accordance with the Framework Decision and the ECHR. Thus, it should be understood that surrendering a person condemned in *absentia*, if that person had information about the trial and was represented by a lawyer, does not violate the right to a fair trial.[94]

Indeed, in this specific case, one might agree that there were reasons for the Constitutional Court to reverse the previous constitutional interpretation of the right to a fair trial and adopt a consistent interpretation with EU law. The reason for that would not be an automatic application of the primacy of EU law, but a careful balance of the different rights and interests at stake. First, the constitutional interpretation of the right to a fair trial had been internally contested since its inception. Second, contrary to what the Constitutional Court had understood in the past,[95] the ECtHR did not require such an extensive protection.[96] Third, there were other interests to take into account, such as the protection of the victim or the fight against crime. Ultimately, in this case, the interest in the effectiveness of the EAW and the principle of mutual recognition should have prevailed.

[92] *Id.,* dissenting opinion of Judge Pérez Tremps, para. 1.

[93] In STC 199/2009, 28 Sept., in his dissenting opinion, Pérez Tremps mentioned the possibility to raise a preliminary reference as an option open to the Court. Still, he already held that the Court should give up the doctrine of the absolute content of fundamental rights and revise its interpretation of Art. 24(2) Constitution.

[94] Hence, contrary to what it might seem from the fact that he opposed raising the preliminary reference, his position was more 'Europeanist' than the one of the majority.

[95] As mentioned above, the Constitutional Court had misread the ECtHR case-law.

[96] Still, the ECHR does not prevent the states from going over the level of protection set up by the ECtHR (Art. 53 ECHR).

Concluding remarks

To conclude, it is necessary to reflect upon the lights and shadows of the first ever preliminary reference made by the Spanish Constitutional Court. From the point of view of its content, the reference fulfils the expectations of dialogue. For a robust dialogue to develop, it is not enough to make a question. Dialogue involves exchanging arguments.[97]

In *Melloni,* the Court elaborates on the constitutional interpretation of the right to a fair trial, and explains the reasons for it.[98] It signals the potential conflict between the Constitution and EU law and suggests several avenues for avoiding it. Thus, the Constitutional Court takes the opportunity to defend its interpretation and give reasons as to why that level of protection should be respected. At the same time, it acknowledges the authority of the ECJ as a counterpart in dialogue for fundamental rights interpretation.

Now the challenge is for the ECJ to respond to this invitation for dialogue. The sparse, at times cryptic, ECJ's style of reasoning has been deeply criticized.[99] In the constitutional domain, the ECJ should be fully responsive to the claims and arguments regarding rights interpretation, particularly if voiced by constitutional courts, as the ultimate interpreters of constitutional rights.[100] Unfortunately, this has not always been the case.[101] Thus, the ECJ's answer should properly take into account the arguments articulated by the Spanish Constitutional Court and carefully answer them.[102] At the end, the interpretation of the Charter concerns all member states and the ECJ needs to live up to the expectations.

From the point of view of the decision itself to make the preliminary reference, the Spanish Court has rightly overturned its previous doctrine, which bluntly refused the possibility to refer a question to the ECJ. The Court, however, does not properly justify this shift or convincingly distinguish this case from previous ones, which undermines the coherent development of constitutional doctrine.

[97] Torres Pérez, *supra* n. 53, p. 135.

[98] Arroyo Jiménez, *supra* n. 90, p. 20-21.

[99] J.H.H. Weiler, 'Epilogue: The Judicial après Nice', in G. de Búrca and J.H.H. Weiler (eds.), *The European Court of Justice* (OUP 2001) p. 215 at p. 225; M. Cartabia, 'Europe and Rights: Taking Dialogue Seriously', 5 *European Constitutional Law Review* (2009) p. 29-30.

[100] D. Grimm, 'The European Court of Justice and National Courts: The German Constitutional Perspective after the Maastricht Decision', 3 *Columbia Journal of European* (1997) p. 229 at p. 238.

[101] In particular, *see* the preliminary rulings responding to the Belgian Constitutional Court regarding the EAW, *supra* n. 6. Sarmiento, *supra* n. 6, p. 178, 182, claimed that *Advocaten* is an example of how dialogue should not be conducted. Furthermore, in *IB*, the ECJ left the forth question regarding fundamental rights protection unanswered.

[102] Weiler, *supra* n. 99, p. 225.

Besides, in this particular case, there are reasons to believe that, instead of referring, the Court should have given up the 'extra protection' afforded to the right to a fair trial and revise its previous interpretation in light of the principles of mutual recognition and mutual confidence. Constitutional courts are not isolated in the function of interpreting and protecting rights, and they need to acknowledge the impact of EU law upon their function.

Still, for a court that in 2009 had decided a virtually similar case by overtly disregarding EU law, the decision to refer amounts to a big step forward. This decision demonstrates that the Spanish Constitutional Court is willing to collaborate with the ECJ, without automatically renouncing the standards of constitutional protection.

Moreover, in cases in which the level of constitutional interpretation is higher, constitutional courts may well engage in dialogue with the ECJ in order to find out whether it is possible to avoid the potential conflict by eventually embracing that standard of protection at the EU level or allowing for diverse interpretations through the exercise of deference.[103]

In the specific case, and for the reasons mentioned above, there would be no reasons for the ECJ to embrace the constitutional interpretation, or to be deferential. The ECJ could warn against an automatic application of Article 4a(1) and emphasize the need to make sure that the waiver of the right to be present is unequivocal. In any event, the ECJ should not miss the chance to interpret the Charter, and significantly Article 53. In this way, constitutional courts and the ECJ might collaborate in the process of shaping fundamental rights and accommodating the plurality of legal systems in Europe.

Ultimately, the principle of mutual recognition should not automatically trump fundamental rights. Very recently, in an asylum case,[104] the ECJ has admitted that the principle of mutual confidence does not create an absolute presumption of compliance with fundamental rights in other member states.[105] Indeed, the ECtHR had previously condemned Belgium for transferring an asylum seeker to Greece, since he had been exposed to conditions in that state in breach of Convention

[103] Generally, raising a preliminary reference burdens the individuals involved, since this requires more time (and money). However, when the constitutional level of protection is higher, individuals will have an interest in the Constitutional Court being able to maintain that level of protection. In this particular case, Mr. Melloni was not disadvantaged with prolonging the proceedings.

[104] ECJ 21 Dec. 2011, Joined Cases C-411/10 and C-493/10, *N.S.* v. *Secretary of State for the Home Department,* and *M.E., A.S.M. ,M.T, K.P., E.H.* v. *Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform.*

[105] *Id.,* according to the ECJ, this presumption could be rebutted: 'if there are substantial grounds for believing that there are systemic flaws in the asylum procedure and reception conditions for asylum applicants in the Member State responsible, resulting in inhuman or degrading treatment, within the meaning of Article 4 of the Charter' (para. 86).

rights.[106] These are cases in which states did not reach the European standard, set by the Charter and the ECHR respectively. The *Melloni* case is structurally different since the European standard does not reach the level of protection of one particular state. This case reflects one of the most challenging questions for the multilevel system of rights protection in Europe: to what extent does European integration require the lowering of the level of constitutional rights' protection? The preliminary reference offers constitutional courts the possibility to have a voice in the process of interpreting EU fundamental rights, as well as to fulfill their role as guardians of constitutional rights.

[106] ECtHR 21 Jan. 2011, Case No. 30696/09, *M.S.S.* v. *Belgium and Greece.*