

The Spanish Constitutional Court and Fundamental Rights Adjudication After the First Preliminary Reference

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A. Introduction: The Preliminary Reference Procedure and Fundamental Rights Adjudication

The purpose of the preliminary reference procedure is to ensure a uniform application and interpretation of Community law across all the Member States, including European fundamental rights as enshrined in the Charter of Fundamental Rights of the European Union. The entry into force of the Charter has reinforced the authority of the Court of Justice of the European Union (CJEU) in the field of fundamental rights adjudication. But the Charter may also be a new source of conflicts between the jurisdiction of the CJEU and the jurisdiction of national constitutional courts. Indeed, compliance with the indirect rulings over national law contained in the CJEU decisions became something logical for the national ordinary courts from the beginning of the integration process,¹ but it was not the same for national constitutional courts. Most of them have always disliked the idea of asking for the CJEU's opinion on a conflict of law involving national constitutional provisions.² The CJEU succeeded in establishing a legal doctrine through principles of Community law—supremacy and direct effect being the pioneers—that meant a material

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¹ Joseph H. H. Weiler, *A Quiet Revolution: The European Court of Justice and its Interlocutors*, 26(4) COMP. POL. STUD. 510, 515 (1994).

² Even though, as Cruz Villalón explains, "National Constitutional Courts have made a valuable effort at understanding and assuming the European integration dynamics without forgetting their particular commitment: *domestic constitutional review*." See PEDRO CRUZ VILLALÓN, *LA CONSTITUCIÓN INÉDITA* 67 (2004). Italics come from the original Spanish text.

constitutionalization of the European Union (EU) law system.³ And for the national constitutional courts, such an understanding of EU law made a rival of the CJEU.

Fundamental rights adjudication has, therefore, been a controversial issue between national constitutional courts and the CJEU, especially since the *Solange I* ruling of the German Constitutional Court and the *Granital* ruling of the Italian Constitutional Court.⁴ Both rulings are crucial to explain that mystic concept of *judicial dialogue*: a sort of unofficial way of communication between national high courts and the CJEU. This *judicial dialogue* unofficially took the place that the preliminary reference should have had in the relation between the CJEU and the national constitutional courts, as long as those high courts were, in general, so unwilling to accept that they should ask for a prior ruling from another court before taking a decision.⁵

Of course, not all Constitutional Courts have been equally reluctant to submit preliminary references to the CJEU,⁶ but the Spanish Constitutional Court (SCC) was historically in that reluctant group since Spain's accession to the European Communities in 1986. The SCC was not especially argumentative in its refusal to acknowledge CJEU authority, but simply ignored it for as long as it could. The SCC certainly admitted that EU law principles were compatible with the Spanish Constitution (SC),⁷ but it also made clear that EU law was none of its business, arguing that it was not a constitutional issue. Judicial dialogue seemed

³ See Eric Stein, *Lawyers, Judges and the Making of a Transnational Constitution*, 27 AM. J. INT'L L. 1 (1981); Joseph H. H. Weiler, *The Transformation of Europe*, 100 YALE L. J. 2403 (1991).

⁴ There is a wide variety of works relating to the reactions of the German and Italian Constitutional Courts to the doctrine of integration through law developed by the CJEU. See Juliane Kokott, *Report on Germany*, in THE EUROPEAN COURT AND NATIONAL COURTS—DOCTRINE AND JURISPRUDENCE: LEGAL CHANGE IN ITS SOCIAL CONTEXT 77 (Anne-Marie Slaughter, Alec Stone Sweet, & Joseph H. H. Weiler eds. 1998); Marta Cartabia, *The Italian Constitutional Court and the Relationship Between the Italian Legal System and the European Union*, in THE EUROPEAN COURT AND NATIONAL COURTS—DOCTRINE AND JURISPRUDENCE: LEGAL CHANGE IN ITS SOCIAL CONTEXT 133 (Anne-Marie Slaughter, Alec Stone Sweet, & Joseph H. H. Weiler eds. 1998).

⁵ See GIUSEPPE DE VERGOTTINI, *OLTRE IL DIALOGO TRA LE CORTI: GIUDICI, DIRITTO STRANIERO*, COMPARAZIONE 62 (2010).

⁶ Even the harder opponents of the CJEU jurisdiction have gradually changed their attitude. In the early days of the judicial dialogue, with the *Solange* and *Granital* rulings, it would have been unthinkable that either the German or the Italian Constitutional Court submitted a preliminary reference to the CJEU, but they have both finally yielded, acknowledging the CJEU's authority over EU law issues. While we were working on this paper for the conference in memory of Gabriella Angiulli, the German *Bundesverfassungsgericht* (Federal Constitutional Court) made a preliminary reference to the CJEU, in February 2014. The Italian Constitutional Court had historically been very reluctant to make a reference due to primacy issues, but it finally submitted preliminary references in 2008. Even the French *Conseil Constitutionnel* did so in 2013. The Belgian Constitutional Court, former *Cour d'Arbitrage*, began to submit preliminary references in 1997, the Austrian *Verfassungsgerichtshof* in 1999. The Lithuanian Constitutional Court did it in 2007, only three years after the incorporation of Lithuania to the EU.

⁷ SCC Declarations 1/1992 of 1 July and 1/2004 of 13 December. The first one made a previous constitutional review to the Maastricht Treaty. The second one did the same with the Constitutional Treaty.

to be unnecessary for the SCC. Only in 2011 did its attitude seemingly change, when it raised a preliminary reference to the CJEU. This was the famous *Melloni* case, involving an Italian citizen who had been convicted *in absentia* by an Italian court and was about to be sent back to that country through the execution of a European Arrest Warrant. The possibility of a collision between the constitutional right to a fair trial and the obligation of the Spanish ordinary courts under EU law to execute a European Arrest Warrant led the SCC to send its first preliminary ruling to the CJEU.⁸ For the first time, EU law became something of constitutional concern and it was not a coincidence that fundamental rights were involved.

Fundamental rights adjudication is at the heart of the unsettled issue of the attitude of the SCC towards the preliminary reference procedure. In order to explain this, a study of the *Melloni* case, including the final ruling of the SCC in February 2014⁹ and its precedents, will lead the first part of this analysis (B). After that, in the second part of this article we will discuss the following paradox: that the initial reluctance of the SCC to recognize the constitutional nature of some conflicts of EU law, as well as its refusal to raise preliminary references to the CJEU, could be eroding the authority of the SCC as the supreme interpreter of constitutional rights (C).¹⁰ In other words, disregarding controversies in which EU rules and fundamental rights as enshrined in the Charter are involved is not the best choice for the SCC to keep its leading role in fundamental rights adjudication.¹¹

B. The Spanish Constitutional Court and the Preliminary Reference Procedure: From Zero to *Melloni*

As earlier remarked, the SCC never liked the idea of making preliminary references to the CJEU. For the SCC, EU law was out of its jurisdiction. That was all. To understand this attitude of the SCC, and how it evolved from zero to *Melloni*, we need to start by analyzing the links between the SCC jurisdiction and EU law.

⁸ Case C-399/11, *Melloni*, 2013 E.C.R. 2013.

⁹ S.T.S., Feb. 13, 2014 (No. 26).

¹⁰ See Pablo J. Martín Rodríguez, *Tribunal Constitucional—Sentencia 26/2014, de 13 de febrero, en el recurso de amparo 6922–2008 promovido por Don Stefano Melloni*, 48 REVISTA DE DERECHO COMUNITARIO EUROPEO 603, 605 (2014).

¹¹ So it is suggested in the interesting proposal of Armin von Bogdandy, Matthias Kottmann, Carlino Antpöhler, Johanna Dickschen, Simon Hentrei, & Maja Smrkolj, *Reverse Solange—Protecting the essence of fundamental rights against EU Member States*, 49.2 COMMON MKT. L. REV. 489 (2012).

I. The Jurisdiction of the Spanish Constitutional Court and European Union Law

It must be said that the old and silent refusal of the SCC to cooperate with the CJEU through the preliminary reference procedure was not just a product of the stubbornness of the SCC, but also a consequence of the position of the Constitutional Court in the Spanish legal and institutional system. As is well known, the SCC is not part of the Judicial Branch, so its functions are not directly related to the application of EU law.¹² According to the provisions of the SC, the SCC has no jurisdiction over EU law aside from the constitutional review of international treaties established in Article 95 SC. Indeed, the SCC can be committed either by the Government or by the Chambers of Parliament to review the constitutionality of European Treaties that may contain stipulations contrary to the Constitution. That has happened twice: before the ratification of the Treaty of the European Union in 1992 and before the ratification of the European Union Constitutional Treaty in 2004.¹³

Article 95 SC could have been a means for connecting the SCC to EU law. But things are not so simple and in fact there are many situations in which the Constitutional Court can face a controversy in which EU law is at stake.

In the first place, as in the case of some other European Constitutional Courts, the SCC has a function of protecting the fundamental rights of individuals. This is established in Articles 53(2) and 161(1)(b) SC. This procedure of individual appeals against violations of fundamental rights (known as "*amparo*") is connected with regular judicial processes. In general,¹⁴ the appellant can only raise an *amparo* to the SCC after having submitted his claim in all the previous judicial stages without success. It is through this procedure that an individual appeal for protection against violation of fundamental rights related to EU law can be made to the SCC: if some rule of EU law is involved in a case previously submitted to an ordinary court and if one of the parties finds that their fundamental rights have been disregarded by the ordinary courts, the SCC would face a controversy in which the interpretation of EU law might be necessary to give judgment. And that is precisely what Article 267 of the Treaty on the Functioning of the European Union (TFEU) is made for.

¹² See Gil Carlos Rodríguez Iglesias & Alejandro del Valle Gálvez, *El derecho comunitario y las relaciones entre el Tribunal de Justicia de las Comunidades Europeas, el Tribunal Europeo de los Derechos Humanos y los Tribunales Constitucionales nacionales*, 2 REVISTA DE DERECHO COMUNITARIO EUROPEO 329, 354 (1997).

¹³ See, *supra* note 7.

¹⁴ Article 53.2 of the SC establishes that the individual appeal to the SCC should be a subsidiary procedure to protect fundamental rights. The initial claims should be submitted to the courts of the Judicial Branch. The only exception is made in Article 42 of the General Act of the Constitutional Court in relation to the resolutions of the Parliament which have no legal force and that might violate a fundamental right. In that case, the appeal can be directly submitted to the SCC.

In the second place, the SCC might face a conflict involving EU law in connection with the constitutional review of an act of the Spanish Parliament. Why not? In practice, it is not so easy to draw the limits between constitutional and legal interpretation that are set out in theory. And sometimes legal interpretation of an act of the *Cortes Generales* (Parliament) involves or requires an interpretation of EU law. The constitutional review of an act of the Parliament that implements a Directive is a good example.¹⁵ Following Article 163 SC, this can even happen as a consequence of a previous controversy before the courts, as long as Article 163 SC allows and compels Spanish judges to raise constitutional references to the SCC whenever they may have doubts regarding the constitutional conformity of an act of the Parliament that has to be applied to rule over a case. By this means, the SCC could face a controversy involving the application of EU law. As we will see, this is what happened in Judgment 28/1991 of 14 February.

II. The Spanish Constitutional Court and European Union Law: A Permanent Divorce

Melloni was not the first case in which the SCC had to make a decision involving EU law. It was only the first case in which the SCC acknowledged that the CJEU ruling was necessary to solve the controversy and that it was up to the SCC to raise it. From 1986, the date of Spanish accession to the Communities, to 2011, the date of the *Melloni* preliminary reference, the arguments made by the SCC to avoid the jurisdiction of the CJEU were based on the following reasoning: EU law is not a constitutional issue.

The argument of the non-constitutional relevance of EU law was settled in the SCC Judgment 28/1991 of 14 February. It was the first time that the SCC had faced a case involving EU law. A constitutional reference of Article 163 SC had been brought to the SCC. It was a controversy relating to the interpretation of a Decision of the European Council regarding the election of the members of the European Parliament. It was necessary to clarify whether an elected member of the European Parliament could also be a member of the Basque Parliament. The Basque Parliament claimed that a preliminary reference should be issued, but the SCC declared that it was up to the ordinary judge, and not itself, to submit such a reference to the CJEU. Following the Judgment 28/1991, the only way for the SCC to get involved in interpreting EU law would be if fundamental rights as enshrined in the Spanish Constitution were at stake. The argument that EU law was not a constitutional issue had made its first appearance,¹⁶ and so also had the hypothetical exception regarding fundamental rights adjudication.

¹⁵ As the *Bundesverfassungsgericht* did with the Data Retention Directive and the Telecommunications Act in a Decision (1 BvR 1299/05), Judgment of 24 January 2012. Nevertheless, the SCC had never been willing to analyze conflicts of this kind. See MIGUEL AZPITARTE SÁNCHEZ, EL TRIBUNAL CONSTITUCIONAL ANTE EL CONTROL DEL DERECHO COMUNITARIO DERIVADO 46 (2002).

¹⁶ S.T.S. Feb. 14, 1991 (No. 28). See CARLOS VIDAL PRADO, EL IMPACTO DEL NUEVO DERECHO EUROPEO EN LOS TRIBUNALES CONSTITUCIONALES 183 (2004).

During the twenty years between 1991 and 2011, the attitude of the Constitutional Court towards EU law and the preliminary reference procedure was steady.¹⁷ This steadiness was reflective not only of stubbornness, but also of the position of the SCC in the Spanish constitutional system, being a logical outcome of its commitment to the Constitution and not to EU law. The SCC always emphasized that it was for the ordinary courts, and not itself, to lay down the facts of a controversy and to apply the laws, including EU law.¹⁸ This included the possible submission of preliminary references to the CJEU.

Regarding fundamental rights adjudication within the Spanish constitutional system, the SCC always tried to confine itself within the limits of constitutional interpretation, especially when facing appeals against judgments of ordinary courts through the *amparo* procedure. The purpose of the SCC was to avoid conflicts with the Judicial Branch, but also to make clear that it had the last word on fundamental rights interpretation. We could say that there has always been a sort of subliminal tension between the SCC and the ordinary courts regarding fundamental rights adjudication, as the SCC has the power to overrule the decisions of ordinary courts in order to protect individuals against violations of fundamental rights.

By contrast, the SCC's perception of the European Convention of Human Rights (ECHR) as interpreted by the European Court of Human Rights (ECtHR) was completely different. It differed both from its perception of EU Law and from its relationship with fundamental rights interpretation by the Spanish ordinary courts. The reason for this was a concrete constitutional clause regarding the interpretation of fundamental rights in conformity with international treaties. Indeed, Article 10(2) SC establishes that "provisions related 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." The ECHR was directly related to the functions of the SCC, in particular as regards fundamental rights interpretation. From the same point of view, even though for the SCC EU law and CJEU preliminary rulings would not be related with constitutional adjudication, the SCC could have to consider them as long as a controversy could be connected to EU law and fundamental rights interpretation. That is the reason why, also according to Article 10(2) SC, the SCC began to use some rules of EU law and some of the CJEU preliminary rulings as interpretive criteria in cases in which fundamental rights adjudication was at stake and EU law was directly or indirectly

¹⁷ See Luis María Díez Picazo, *El derecho comunitario en la jurisprudencia constitucional española*, 54 REVISTA ESPAÑOLA DE DERECHO CONSTITUCIONAL 255, 260 (1998); Fernando Álvarez-Ossorio Micheo, *Cuestión de inconstitucionalidad y derecho de la Unión Europea: El Tribunal Constitucional como juez «ad quo»*. *El caso español*, in RECURSO DE AMPARO, DERECHOS FUNDAMENTALES Y TRASCENDENCIA CONSTITUCIONAL 116, 127 (José María Morales Arroyo ed., 2014).

¹⁸ JAVIER PÉREZ ROYO, TRIBUNAL CONSTITUCIONAL Y DIVISIÓN DE PODERES 103 (1988).

involved. Judgment 130/1995 of 11 September was the first case in which the SCC acknowledged that EU law had an interpretive role regarding fundamental rights, and Judgment 292/2000 of 30 November connected this role with the constitutional mandate in Article 10(2). Since then, the SCC has repeated the same argument in several rulings relating to equality and non-discrimination as understood by the CJEU case law.¹⁹

Notwithstanding this particularity connected to fundamental rights interpretation, the self-rule about the non-constitutional dimension of EU law was not overruled, and it rather allowed the SCC to stay on the sidelines of conflicts involving EU law. Such conflicts were resolved as was necessary, but without the unwanted assistance of the CJEU, or, in other words, without making preliminary references. The rule of separation between constitutional law and EU law was rigidly applied. Even when an ordinary court refused to make a preliminary reference to the CJEU, and there was a subsequent appeal against the violation of the fundamental right to a fair trial and to obtain the effective protection of the courts, the SCC considered that such a refusal to make a preliminary reference did not mean an infringement of Article 24 SC (the right to a fair trial). For the SCC, the preliminary reference was not a guarantee of the Spanish Constitution, and so it did not need to be safeguarded by the Constitutional Court in an *amparo* procedure.²⁰

These last arguments changed in 2004, when feeble exceptions to the non-constitutional dimension of EU law began to be admitted by the SCC. In its Judgment 58/2004 of 19 April, the SCC unexpectedly declared that an ordinary court's judgment was void because a preliminary reference had not been made to the CJEU. The court hearing the case had found that an act of the Spanish parliament regulating taxation issues was contrary to EU law. Following the primacy rule, the national law had been set aside in order to preserve the European mandate. The SCC considered, however, that for the ordinary court to make such a decision, either a preliminary reference to the CJEU or a constitutional reference to the SCC through Article 163 SC would have been required.²¹ The SCC found a violation of the right to due process of law (Article 24(2) SC), and the judgment of the ordinary court was overruled accordingly.

¹⁹ S.T.S., Dec. 20, 1999 (No. 240); S.T.S., Mar. 14, 2013 (No. 61); S.T.S., Apr. 8, 2013 (No. 71); S.T.S., June 18, 2013 (No. 116). See JAVIER PÉREZ ROYO AND MANUEL CARRASCO DURÁN, *CURSO DE DERECHO CONSTITUCIONAL* 872 (2014).

²⁰ Díez Picazo suggests that this argument is similar to the one that has been usually given by the SCC to appellants who considered that a refusal by the judges to raise a constitutional reference to the SCC (Art. 163 SC) was a violation of the right to effective protection by the courts (Art. 24 SC). Only the reasons are different for EU law, as the SCC always stated that the preliminary reference procedure was none of its business. See Díez Picazo, *supra* note 17, at 262.

²¹ Note that, in this case, the SCC also meant to protect the fundamental concept of the submission of the judges to the acts of the Parliament, which does not allow them to set aside the national laws without the review of the Constitutional Court. See Paloma Biglino Campos, *La primacía del Derecho comunitario: la perspectiva española*, 3 *REVISTA GENERAL DE DERECHO EUROPEO* 10 (2007).

That 2004 ruling of the SCC meant a new understanding of European law by the SCC case law and a first exception to its former doctrine. Its arguments were repeated in SCC Judgment 194/2006 of 19 June and SCC Judgment 78/2010 of 20 October. These rulings both shed lights and shadows on this new doctrine and specified its effects. In both cases, the controversy was about the conformity of an act of the parliament of the Canary Islands regulating a particular tax for that territory with the European directive for tax harmonization. The peripheral territory of the Canary Islands was excluded from the scope of application of the tax harmonization Directive, so the SCC declared that a preliminary reference was not necessary and that Article 24(2) SC was not affected. EU law was not really at stake, but it was the SCC itself that checked it, disregarding its former doctrine about its lack of jurisdiction over EU law issues, but also avoiding a preliminary reference to the CJEU.²²

Finally, in 2011, the SCC made the *Melloni* reference. After that reference, but prior to the *Melloni* SCC ruling in 2014, there were two other important decisions by the SCC relating to EU law. The first was in 2012, when the SCC ruled that the refusal of an ordinary court to apply a CJEU decision was contrary to the right to a fair trial enshrined in Article 24 SC. Indeed, the CJEU had previously found that the Spanish law establishing a penalty was contrary to EU law, but, after that, a Spanish court had ignored the primacy of EU law and had applied such penalties to Iberdrola, a Spanish energy company. This decision, SCC Judgment 145/2012 of 30 July, was praised for its new understanding of the relationship between constitutional adjudication and EU law.²³ It seemed to leave behind the old doctrine of the non-constitutional relevance of EU law.

The second important decision of the SCC was Judgment 27/2013 of 11 February. There, the SCC stated that the refusal of the Spanish Supreme Court to make a preliminary reference according to the *Cilfit* doctrine²⁴ was not an infringement of Article 24(2) SC, but not because of the existence of the *Cilfit* doctrine, but because there was no Spanish law that had to be set aside according to the primacy rule. If we compare this decision with SCC Judgments 194/2006 and 78/2010, we can deduce that the SCC might be more interested

²² In particular, SCC Judgment 194/2006 of June 19 was strongly criticized by the experts because of its ambiguity. See Ricardo Alonso García, *Cuestión prejudicial europea y tutela judicial efectiva (a propósito de las SSTCC 54/2004, 194/2006 y 78/2010)*, 38 CUADERNOS DE DERECHO PÚBLICO 11, 19 (2009).

²³ Daniel Sarmiento, *Reinforcing the (Domestic) Constitutional Protection of Primacy of EU Law: Tribunal Constitucional*, 50.3 COMMON MKT. L. REV., 875 (2013).

²⁴ The *Cilfit* doctrine makes reference to the *acte clair* doctrine which sets the criteria for when national courts are not obliged to make a preliminary reference to the CJEU about the matter of interpretation of EU law. Case C-283/81, Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health, 1982 E.C.R. 1982.

in preserving the application of national laws than in the conformity of the behavior of ordinary courts towards the preliminary reference procedure.²⁵

To sum up, we can say that from 2004 onwards, the attitude of the SCC towards EU law changed, but that it did not change radically. Following the SCC Judgment 58/2004, some constitutional law scholars suggested that the SCC was closer to accepting the submission of preliminary references to the CJEU. They argued that this might happen when a violation of a fundamental right occurred as a consequence of the application of a rule of EU law, and in particular if the infringed fundamental right was of special relevance in the EU law system.²⁶ That was precisely what happened in *Melloni*: The European Arrest Warrant, a rule of EU law, had to be applied; the right of defense and to a fair trial, as established in the Framework Decision, in Articles 47 and 48 of the Charter, and in Article 24.2 SC, was at stake; doubts about the meaning and validity of the provisions of EU law acquired an indirect constitutional significance, insofar as they contributed to delimiting the scope of the right recognized in Article 24(2) SC.²⁷

III. The Charter of Fundamental Rights and the Melloni Preliminary Reference

Was it a coincidence that the SCC made its first preliminary reference following the entry into force of the Charter in 2009? We think it was not. The Charter confers a new dimension on the role of the CJEU as human rights adjudicator, and the constitutional courts of the Member States, including the Spanish one, have understood it. As was earlier explained, the SSC is bound to interpret fundamental rights according to the ECHR doctrine because of the mandate of Article 10(2) SC. Now that the EU has a Charter of Rights, the SCC is also bound to interpret the fundamental rights of the Charter according to the CJEU doctrine thereon. But that is not all. When EU law and the Charter are involved, the SCC is obliged to respect the standards of protection of rights set out in the Charter, as interpreted by the CJEU. This is a consequence of the mandate of Article 93 SC, which allowed the transfer of competences derived from the Constitution to the EU through the European Treaties. EU law can no longer be considered to be a non-constitutional issue by the SCC; and the SCC's disregard towards EU law may have come to an end with this first preliminary reference in *Melloni*.²⁸

²⁵ This is the point of view of Joaquín Huelin Martínez de Velasco, *La cuestión prejudicial europea. Facultad/Obligación de plantearla*, LA CUESTIÓN PREJUDICIAL EUROPEA, IV EUROPEAN INKLINGS 44, 54 (2014).

²⁶ VIDAL PRADO, *supra* note 16, at 188.

²⁷ And that constitutional relevance, related with the scope of protection of a fundamental right, made the SSC preliminary reference consistent with its former arguments about the relationship between EU law and its own jurisdiction. Luis Arroyo Giménez, *Sobre la primera cuestión prejudicial planteada por el Tribunal Constitucional. Base, contenido y consecuencias*, 8 WORKING PAPERS ON EUROPEAN LAW AND REGIONAL INTEGRATION 15 (2011).

²⁸ See, *supra* note 8.

When the SCC delivered its Order 86/2011 of 9 of June, making the preliminary reference, both the Charter and a 2009 Amendment to the European Arrest Warrant Framework Decision had just come into force. The Amendment included some specifications about trials *in absentia* which were relevant to the *Melloni* case. As a precedent, the SCC had delivered a controversial ruling in a similar case in which the execution of a European Arrest Warrant (EAW) was also at stake. SCC Judgment 199/2009 of 28 of September was the case of a Romanian citizen who had been convicted by default in his country and sent back there by an Order of the Spanish National High Court. His lawyers appealed and the SCC declared that the Order of the Spanish National High Court was contrary to Article 24(2) of the SC and void. As the Romanian citizen was already back in his country, the SCC ruling did not affect the EAW application, but dissenting opinions with arguments about the EU law implications of the case were delivered by several SCC justices. With such precedents, and with all the normative changes that have been explained, the preliminary reference was not a complete surprise when Stefano Melloni appealed to the SCC.

Although the facts and legal arguments of the *Melloni* reference are well known, we will summarize them succinctly. The conflict was related to Framework Decision 202/584/JHA of 13 of June 2002 on the EAW and connected to the fundamental rights to defense and to a fair trial set out in Articles 24(2) SC and 47 and 48(2) of the Charter. Stefano Melloni was an Italian citizen who had received an extradition order to Italy in 1996. That first extradition order was executed by the Spanish National High Court, but Melloni escaped and never returned to Italy, hence he was still in Spain in 2008, when a court in Ferrara issued an arrest warrant to bring him back to Italy, where he had been convicted by default. The arrest warrant was implemented by the Spanish National High Court in 2008, at which point Melloni appealed to the SCC through the process of individual appeals established for the protection of fundamental rights in Article 161(1)(b) SC.

In previous rulings, the SCC had declared that as a conviction by default entailed a violation of Article 24(2) SC (the right to a process with all due guarantees), such a conviction in a foreign court could justify a refusal to implement an extradition order in Spain. The reasoning behind this was that the execution of the extradition order would amount to an indirect violation of a fundamental right enshrined in the Spanish Constitution. But an arrest warrant issued by an Italian court in Ferrara meant that *Melloni* was not a typical case of extradition, for EU law was involved. The SCC needed to know whether Articles 47 and 48(2) of the Charter could be interpreted as preventing the implementation of an arrest warrant when the convict had been sentenced by default in the European country issuing the arrest warrant. If the answer to this question was to be that these provisions of the Charter did not prevent the implementation of the arrest warrant, then, bearing in mind Article 53 of the Charter, the SCC would need to establish which standard of protection to apply to the case: either the higher one set out in the SC (under Article 24), or the standard of the Charter.

To the first question, the CJEU answered that Articles 47 and 48(2) of the Charter did not prevent the implementation of an arrest warrant when the convict had been sentenced by default. In the opinion of the CJEU, the standard of protection of the fundamental right of defense was the result of a common decision of the Member States contained in the Framework Decision—which certainly allowed the implementation of the arrest warrant in such circumstances. To the second question, the CJEU answered that such a common standard of protection would not affect a higher standard of protection in any Member State *out of* the scope of application of EU law.

The *Melloni* precedent has been of great interest in the academic context, because it has meant a first interpretation of the controversial Articles 51 and 53 of the Charter regarding the scopes and levels of fundamental rights protection. But above all, *Melloni* has been of great importance for the two Courts involved, the CJEU and the SCC. Together with the *Åkerberg Fransson* ruling,²⁹ for the CJEU these cases have turned out to be landmark ones. Through them, the CJEU has sketched out the scope of application of the Charter when a Member State applies EU law—something that Article 51(1) of the Charter leaves open to interpretation. And following Article 53 of the Charter, the CJEU has also settled some principles for the differentiation between standards of protection of fundamental rights: the EU standard, the standards of the Member States, and the ECHR standard.³⁰ For the SCC, this first preliminary reference meant a long-awaited and a very necessary acknowledgment of the constitutional dimension of some issues of EU law, leading many scholars to think that the SCC had finally decided to play an active role in the integration-through-law process.

But these expectations were frustrated when the SCC's final *Melloni* decision was delivered on 13 February 2014. The ruling disappointed many scholars, who consider that the SCC has not been able to accept the ultimate consequences of the ruling of the CJEU.³¹ On the contrary, some opinions blame the CJEU for the reaction of the SCC, arguing that the SCC considered itself forced to follow the CJEU's interpretation and that the CJEU was so bold in its ruling because the SCC was an embattled constitutional court, which was "pretty much in competition with ordinary Spanish courts" rather than with the ECJ.³² These last

²⁹ Case C-617/10, *Åkerberg Fransson* (February 26, 2013), <http://curia.europa.eu/>.

³⁰ Daniel Sarmiento, *Who's Afraid of the Charter? The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe*, 50(5) COMMON MARKET L. REV., 1267, 1288 (2013); Pedro Tenorio Sánchez, *Diálogo entre tribunales y protección de los derechos en el ámbito europeo*, 31 REVISTA GENERAL DE DERECHO EUROPEO 16 (2013).

³¹ The sentence also disappointed three justices of the SCC who delivered concurrent opinions. Critics of the SCC ruling can be found in Aida Torres Pérez, *Melloni in Three Acts: From Dialogue to Monologue*, 10.2 EUR. CONST. L. REV. 308, 330 (2014). See also Rodríguez, *supra* note 10, at 605.

³² Leonard F. M. Besselink, *The Parameters of Constitutional Conflict after Melloni*, 4 EUR. L. REV. 531, 551–52 (2014).

ideas remind us of the debate about the Czech Constitutional Court following the CJEU *Landtová* ruling. Perhaps this is not the first time that the CJEU has forgotten to pay attention to the national circumstances of some judicial controversies.³³

From our point of view, the legal reasoning of the SCC uses Article 10(2) SC to put the Charter rights at the same level as the ECHR rights, and to give the rulings of the CJEU the same efficacy as the rulings of the ECtHR when the constitutional position of EU law is different from the constitutional position of the ECHR rights. Indeed, the SCC has appealed to Article 10(2) SC to integrate the CJEU ruling into its own decision, instead of founding its decision on the transfer of competences made effective through Article 93 SC. And instead of treating Articles 47 and 48(2) of the Charter as the relevant rules to decide the controversy, the SCC has used Article 24(2) SC. Finally, the SCC has reinterpreted the scope of protection of this constitutional right in accordance with the CJEU ruling but, as a result, this new interpretation of Article 24(2) SC is somehow in contradiction with Article 53 of the Charter, which declares that the standards of protection of the constitutional rights of the Member States should not be adversely affected by the coming into force of the Charter.³⁴ As explained, the SCC had always said that a conviction by default could justify the denial of an extradition order, because it would be contrary to Article 24(2) SC. Only if the conviction by default could be reviewed in the country issuing the extradition order could the Article 24(2) SC guarantees be deemed to be respected. In its *Melloni* ruling, the SCC has changed this doctrine, by ruling that Article 24(2) SC must henceforth be interpreted according to both the doctrine of the ECHR and the doctrine of the CJEU regarding Article 10(2) SC. This mandate of interpretation allows a Spanish court to execute any extradition order, and not only an arrest warrant, if the convicted has at least the representation of an attorney. Somehow, then, the guarantees of Article 24(2) have shrunk, meaning that the interpretation of the rights of defendants under the Spanish Constitution have narrowed.³⁵

Three of the twelve justices of the SCC issued dissenting opinions to this *Melloni* ruling. They considered that the Charter rights are of a compelling—and not merely interpretative—nature when EU law is involved. They argued that the *Melloni* decision of

³³ Case C-399/09, *Marie Landtová v. Česká správa sociálního zabezpečení*, 2011 E.C.R. I-05573. See Ricardo Alonso García, *Guardar las formas en Luxemburgo*, 28 REVISTA GENERAL DE DERECHO EUROPEO (2012); Georgios Anagnostaras, *Activation of the Ultra Vires Review: The Slovak Pensions Judgment of the Czech Constitutional Court*, 14 GERMAN L.J. 959 (2013).

³⁴ Article 53: “Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.”

³⁵ BESSELINK, *supra* note 32, at 533.

the CJEU was directly related to the case, so the SCC, acting as European court, should have applied the CJEU decision instead of unnecessarily reinterpreting Article 24(2) SC.³⁶ And we agree with them. From our point of view, there should be a deeper change in the SCC understanding of a preliminary reference procedure when the scope of application of EU law and the Charter rights are involved. The interpretation of the Charter by the CJEU has only just begun to update the sphere of individual fundamental rights. The Constitutional Courts, in particular the SCC, should be aware and willing to play their role in this process of innovation.

C. The Spanish Constitutional Court and Fundamental Rights Adjudication within the Scope of Application of EU Law

Aside from *Melloni*, and as long as we have only one preliminary reference from the SCC to talk about, we cannot establish a comparison or a deeper analysis of the judicial dialogue between the CJEU and the SCC regarding fundamental rights adjudication. What we can do is a review of some situations that show a distance between the case law of both courts, and from this we can try to prove the convenience that would be presented by a more fluent dialogue between them through the preliminary reference procedure.

1. Right to Equality and Non-Discrimination: Agreements and Disagreements

As has already been explained, the SCC had already appealed to the CJEU case law to solve some controversies in which the right to equality and non-discrimination was at stake. Article 10(2) SC allowed the SCC to follow the CJEU doctrine on equality and non-discrimination without having to accept the constitutional relevance of EU law. Through its Judgment 130/1995, mentioned above, the SCC declared that a Moroccan citizen who had been working in Spain could not be excluded from unemployment benefit because of a European Regulation that prohibited discrimination between EU citizens and Moroccan citizens regarding social security benefits. The SCC also appealed to EU law and CJEU case law in its Judgment 292/2000 to declare that the rules relating to the social security benefits that discriminated against part-time workers were contrary to the equality principle enshrined in the SC and in EU law.³⁷ The same argument was held by the SCC—

³⁶ S.T.S., Feb. 13, 2014 (No. 26). The arguments related to the interpretation of the CJEU ruling through Art. 10.2 SC are in para. 3 of the judgment. Justice Asua Batarrita criticizes such arguments in para. 1 of her dissenting opinion: “[T]he judgment of the Court avoids the central issues [related to the function and protection of the rights of the Charter]. Instead, it holds to a previous constitutional doctrine through which the Court had repeated that European law is not a constitutional issue, that the SCC has not the function of guaranteeing the application of Union law and that European law would only be relevant regarding article 10.2 SC, this is, in relation with the interpretation of the scope of application of the constitutional fundamental rights.” The Judgment has not been published in the Official Gazette yet, but it can be consulted on the SCC website.

³⁷ Arguments repeated by the SCC in its Judgments 253/2004, 61/2013, 71/2013 and 116/2013.

240/1999—for a female public employee who was demanding leave to look after her children.³⁸

But some contradictions between the CJEU and the SCC doctrines on this fundamental right to equality and non-discrimination were also detected. For example, there were particular CJEU judgments on equality and non-discrimination which slightly contradicted the SCC doctrine thereon. As an example, in *Cordero Alonso v. Fondo de Garantía Salarial*, the CJEU stated that the supremacy of EU law was at stake even though the SCC had previously ruled over the constitutional conformity of a national rule that happened to be applicable to a case before the CJEU. The SCC conception of Article 14 SC (the right to equality) was in slight contradiction with the right to equality as developed in EU law. And, in such a situation, EU law interpretation was to prevail even if it contradicted a previous SCC ruling. This same argument was repeated by the CJEU in 2010 when it delivered its ruling on *Francisco Javier Rosado Santana v. Consejería de Justicia y Administración Pública de la Junta de Andalucía*.³⁹

This kind of misunderstanding between the CJEU and the SCC in relation to fundamental rights adjudication is not convenient. Furthermore, the entry into force of the Charter could lead to more disagreements between the courts if the SCC does not use the preliminary reference procedure as a logical mechanism of collaboration with the CJEU. The interpretation of the Charter rights by the CJEU has a direct impact on the interpretation of the SC rights, as the *Melloni* case makes clear. The CJEU has ultimate authority over the interpretation of Charter rights whenever EU law is at stake, regardless of the national court involved in the particular controversy. And the SCC has ultimate authority over the rights set out in the Constitution, including the margin of appreciation, acknowledged by the ECHR, and the national standards, acknowledged by the Charter. If the SCC refuses to establish a dialogue with the CJEU on fundamental rights standards, its ultimate authority will be eroded, because the ordinary courts will assume the leading role in that task. The case of data protection is an example of this.

II. Data Protection: A Bit of Disregard

Data protection is a fundamental right enshrined in Article 18(4) SC. Since its early decisions on Article 18(4), the SCC has stated that protection of personal data is not only a guarantee for privacy and reputation (as set out in the wording of Article 18(4)), but a

³⁸ See *supra* note 19.

³⁹ Case C-81/05, *Cordero Alonso v Fondo de Garantía Salarial (Fogasa)*, 2006 E.C.R. I-07569. See Fernando Álvarez-Ossorio Micheo, *El sistema multinivel de protección de Derechos Fundamentales. Un análisis desde la Carta de Derechos Fundamentales de la Unión Europea*, in *LA UNIÓN EUROPEA EN PERSPECTIVA CONSTITUCIONAL* 113, 118 (Ana M. Carmona Contreras ed., 2008). See also Case C-177/10, *Francisco Javier Rosado Santana v Consejería de Justicia y Administración Pública de la Junta de Andalucía*, 2011 E.C.R. I-07907.

separate fundamental right with its own particular features.⁴⁰ Notwithstanding these statements, the SCC doctrine on data protection has always been somewhat confusing, connecting, as it does, infringements of protection of personal data with infringements of privacy or of the right to personal image, both of which are established in Article 18(1) SC. As these rights almost always absorb the Article 18(4) right, the SCC has never identified the particular European features of data protection and it has never turned to the CJEU case law on this right.⁴¹

On the one hand, following the SCC doctrine, EU law was not a constitutional issue while data protection was just a constitutional one, even though Directive 95/46/EC regulated data protection for all Member States. On the other hand, although the SCC was bound to interpret fundamental rights in accordance with international Treaties ratified by Spain (under Article 10(2) SC), protection of personal data was not considered to be a fundamental right in any international Treaty other than the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, Number 108 of the Council of Europe. For all these reasons, the SCC doctrine never paid attention either to the European dimension of data protection or to the CJEU case law. Only in some decisions—and only as one argument among others—did the SCC indirectly mention the European origins of data protection. Moreover, in some decisions, the SCC mentioned this fact so as to refuse the constitutional dimension of the Directive on data protection,⁴² in keeping with its well-known doctrine about the non-constitutional relevance of EU law.

On several occasions, the SCC has also refused to submit preliminary references on data protection issues. The first one came in a controversy relating to the implementation by the Spanish Government of the tax identification number. The appellants argued that such identification numbers were contrary to the right to privacy and the right to protection of personal data under the Spanish Constitution. They also asked the SCC to make a

⁴⁰ See SCC Judgment 254/1993 of 20 July, the very first case about protection of personal data decided by the SCC.

⁴¹ See as examples SCC Judgments 11/1998 of 13 January; 202/1999 of 8 November; 144/1999 of 22 July or 159/2009 of 29 June. The exception could be SCC Judgment 29/2013 of 11 February, in which the pictures of an employee recorded by a security camera were not treated as right to personal image, but as right to protection of personal data. The relationship between privacy and personal data as fundamental rights in the Spanish constitutional doctrine is studied in PABLO LUCAS MURILLO DE LA CUEVA, *EL DERECHO A LA AUTODETERMINACIÓN INFORMATIVA: LA PROTECCIÓN DE LOS DATOS PERSONALES FRENTE AL USO DE LA INFORMÁTICA* 26 (1990); Francesc de Carreras Serra, *El derecho fundamental a la protección de datos personales*, in *LOS NUEVOS DERECHOS FUNDAMENTALES* 65, 69 (2007); or EMILIO GUICHOT REINA, *DATOS PERSONALES Y ADMINISTRACIÓN PÚBLICA* 164 (2005).

⁴² The Directive was obviously taken into account in SCC Judgment 292/2000 of 30 November, in which the SCC had to decide about the constitutionality of General Act 15/1999 of 13 December. In other decisions, the SCC had just mentioned the Directive indirectly and together with a reference to the Covenant 108 of the Council of Europe. See as examples SCC Judgments 202/1999 of 8 November and 79/2009 of 23 March. In its Judgment 29/2013 of 11 February, the SCC only mentions the Directive after having made reference to the General Act and to the regulations which implement it in the Spanish system of law.

preliminary reference to the CJEU, as they found that some EU law principles were involved, namely those linked to protection of reputation and privacy and some others relating to certainty and the rule of the law. Directive 95/46/EC and the Charter had not yet been issued, and so the SCC replied to these arguments that there were no specific regulations in EU law at that moment against which to interpret the rights of the Constitution regarding Article 10(2) SC. The Court also made its well-known argument that EU law was not the object of its jurisdiction. Consequently, the petition of the appellants to make a preliminary reference was deemed inadmissible.⁴³

Some years later, the SCC had a new opportunity to consider submitting a preliminary reference in relation to data protection. An appellant to the SCC argued that the inclusion of his personal data in a catholic baptism register was contrary to his right to protection of personal data. He had formerly applied for the erasure of his data from the record, but had received a negative answer. For the Spanish Supreme Court, as these books of baptisms were not considered a *filing system*, the appellant's claim could not be considered an infringement of his right to protection of personal data.⁴⁴ This argument was in fact an interpretation of the scope of application of the Directive. A justice of the Spanish Supreme Court delivered a dissenting opinion arguing that a preliminary reference should be made to the CJEU in relation to the conflict.⁴⁵ However, neither the Supreme Court nor the Constitutional Court made the preliminary reference. The SCC affirmed the decision of the Supreme Court through its Order 20/2011 of 28 of February, disregarding the possibility of a reference and notwithstanding the important issues related to the scope of application of the Directive and its connection to the right to protection of personal data. In contrast with the former case about the tax identification number, the Charter was already in force when this case was raised to the SCC. And, as a matter of fact, the SCC had even to interpret the provisions of the General Law of Protection of Personal Data,⁴⁶ meaning that it had to interpret the Directive and, consequently, to rule on the application of EU law. On the one hand, the doctrines of direct and indirect effect of EU law are accurate in such controversies, meaning that disregarding the Directive could have meant an infringement of the Treaty. On the other hand, the SCC was in fact interpreting EU law – something that the SCC itself considered to fall outside its jurisdiction. Too many contradictions were left unresolved.

⁴³ S.T.S., May 9, 1994 (No. 143). Anyway, Díez Picazo considers that it would have been absurd to send a preliminary reference on this issue, as the Directive had not been enacted yet. Díez Picazo, *supra* note 17, at 262.

⁴⁴ T.S. Sept. 19, 2008 (Sec. 3).

⁴⁵ The same opinion is in Pedro Tenorio Sánchez, *Tribunal Constitucional y Cuestión Prejudicial ante el Tribunal de Justicia de la Unión Europea*, 7520 DIARIO LA LEY 1 (2010).

⁴⁶ Another example is SCC Judgment 96/2012 of 12 June, a very interesting case about disclosure of personal data to a third party in preliminary proceedings in the course of a private law action.

In the aftermath of the entry into force of the Treaty of Lisbon, the situation is different. Article 8 of the Charter declares that the protection of personal data is an EU fundamental right; the TFEU includes, in Article 16, a legal basis to regulate this right within the scope of EU law; the European Commission has proposed a General Data Protection Regulation;⁴⁷ and Spanish ordinary courts have submitted several preliminary references to the CJEU relating to data protection. In 2010, shortly after the entry into force of the Charter, the Spanish Supreme Court submitted two preliminary references to the CJEU relating to the interpretation of the Directive and the balancing of the rights to privacy and protection of personal data.⁴⁸ In 2011, it was the National High Court that made a preliminary reference of particular interest, *Google Spain*, not only concerning data protection, but also the fundamental rights to freedom of expression and information. The ruling of the CJEU, delivered in May 2014,⁴⁹ deduced a new right to be forgotten from Articles 7 (privacy) and 8 (data protection) of the Charter. Consequently, search engines such as Google are required to remove, upon request by a data subject, certain information from the list of results displayed when introducing that data subject's name. In granting this right to be forgotten, the CJEU held that the right to privacy will outweigh both the interests of internet users, their right to obtain information, and Google's economic interest. This is a fairly bold statement, in acknowledging the primacy of the privacy right over freedom of information and freedom to conduct a business.⁵⁰ It is a concrete result of a balancing of rights which could be extended to similar conflicts and give rise to a general doctrine.

The preliminary reference in this case has set a precedent that would be very difficult to object to if the SCC happens to face a similar controversy. It contains an extensive interpretation of the right to protection of personal data and a balancing between that

⁴⁷ COM (2012) 11 final of 25 January 2012, Proposal for a Regulation of the European Parliament and the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation). The Commission's draft and the information about the legislative procedure can be found in Pre-Lex database (<http://ec.europa.eu/prelex/apcnet.cfm?CL=es>).

⁴⁸ Joined Cases C-468/10 and C-469/10, *Asnef and Fecemd*, 2011 E.C.R. I-12181.

⁴⁹ Case C-131/12, *Google Spain v. AEPD*, (May 13, 2014), <http://curia.europa.eu/>. The case involved a Spanish citizen, Mario Costeja, who contacted Google with the following demand: each time his name and surnames were entered in the search engine, a link to a newspaper of 1998 appeared and he wanted that link to be erased. The information in question was a note about a real-estate auction connected with attachment proceedings prompted by social security debts. The data subject, Costeja, was mentioned as the owner of the real-estate. All the information was true and it came from an official source, so no objection could be made in relation to the newspaper publication, covered by the exception of Article 9 of the Directive in relation to journalistic purposes. But the data subject argued that the particular proceedings recounted in the newspaper had been concluded years before and were not of relevance or public interest in 2010. The fact that his name appeared connected to that ancient judicial process affected his fundamental rights, in particular his right to reputation in connection with his right to protection of personal data, so he claimed a right to be forgotten to be included as a consequence of Art. 8 ECFR. This case was crucial in defining balancing criteria in a really up-to-date conflict of fundamental rights.

⁵⁰ Hannah Crowther, *Google v. Spain: Is There a Right to be Forgotten?*, 9 J. INTELL. PROP. L. & PRAC. 892, 893 (2014).

right and those rights relating to freedom of expression and electronic communications. In the light of such a ruling, and following the SCC's own doctrine in *Melloni*, the SCC has no choice but to take into account the CJEU criteria. Article 10(2) of the SC compels it to do so. Moreover, it seems that the ultimate arbiter in conflicts of this kind will be the CJEU, and that the ordinary courts will be the counterparts in the judicial dialogue.⁵¹ If the SCC is left out of this, its authority as the ultimate guarantor of fundamental rights within the Spanish system will be in danger.

D. Final Considerations

The SCC would be wise to take an active role in the development of the standards of protection of the Charter rights. These standards will, of course, be drawn up by the CJEU, but the preliminary reference procedure will be the instrument for defining such standards, and the SCC should take part in this task. Issuing a single preliminary reference, as the SCC has done with *Melloni*, will not be enough; the interpretation made by the SCC of the CJEU *Melloni* rule is not enough. The *Melloni* reference could have led to the beginning of a new relationship between the SCC and the CJEU, but such a relationship is still a long way off. The entry into force of the Charter is a very important landmark and the SCC should take advantage of the new situation. Given the shared competence between both Courts on fundamental rights adjudication, the SCC might need the CJEU opinion on matters regarding some fundamental rights, especially those which are, remarkably, within the scope of competence of EU law as well as within the scope of protection of the Spanish Constitution. Cooperation is the best choice for the SCC.

Indeed, the SCC would be best understanding that following the CJEU ruling in a preliminary reference related to the interpretation of the Charter, when EU law is directly involved, is never going to weaken its role as ultimate guarantor of fundamental rights. On the contrary, the SCC should consider the Charter as a new field for the definition of the European citizen's fundamental rights and it should find its role in such a task.⁵² If the SCC does not accept this role, some other national courts will. And then the role of the SCC as ultimate guarantor of fundamental rights *will* be weakened, and the preliminary reference procedure will be the main cause for its weakening.

Since 1980, the SCC case law has been a crucial element in the implementation of a doctrine of fundamental rights in Spain. After forty years of an authoritarian regime, a

⁵¹ We make reference to the article of Mattias Kumm in which he suggests that there should not be a final arbiter, but rather collaboration between the CJEU and the Constitutional Courts, in particular the German one, in a pluralist conception of European constitutionalism. See Mattias Kumm, *Who Is the Final Arbiter of Constitutionality in Europe?*, 36 COMMON MKT. L. REV., 351 (1999).

⁵² Sarmiento, *supra* note 30, at 1299. The identification of the rights of the Charter with European citizenship is analyzed in VON BOGDANDY, *supra* note 11.

fundamental rights doctrine was something new and a challenge for the Spanish judiciary. The SCC has also been very active in the implementation of the ECHR doctrine in Spain. References to the ECHR case law, which are mandatory through Article 10(2) SC, became usual in the SCC judgments and the Spanish courts and judges have learned to use those references to protect fundamental rights. As has been explained in this article, the SCC, through its case law, has also reinforced the obligation of the ordinary courts to make preliminary references to the CJEU when a national rule could be set aside as a consequence of the application of the primacy principle. Finally, in a sentence delivered after *Melloni*, SCC Judgment 50/2014 of 14 April, the SCC declared that the case law of the CJEU has to be taken into account by ordinary courts when ruling over controversies in which some judgment of that court could be relevant and applicable to a case. The SCC here acknowledges that the fundamental rights to a fair trial would be damaged if ordinary courts refused to follow the CJEU applicable rulings. The SCC has succeeded in all these challenges, but now it has a new one in relation to the definition of EU fundamental rights in connection with the fundamental rights of the Spanish Constitution.

Further arguments can be made in support of these considerations. When the culture of fundamental rights was already settled in Spain, the General Act of the Constitutional Court was amended. This happened in 2007. The amendments were made with the purpose, *inter alia*, of reducing the vast volume of individual appeals against violations of fundamental rights. The idea was that the SCC would only admit individual appeals of special constitutional relevance: cases that presented new situations regarding the comprehension of a fundamental right; cases that made it necessary to review the doctrine about a particular fundamental right; and cases in which the SCC doctrine had been completely ignored by the courts. From 2007, it would be up to the Judicial Branch to protect fundamental rights, following the doctrine that the SCC had already settled, with the SCC only ruling on specific cases of singular constitutional relevance. Any case involving the interpretation of Charter rights has, undeniably, constitutional relevance, and so also does any case involving the conformity of the ruling of an ordinary court with the CJEU case law. Indeed, the SCC confirmed this in its aforementioned judgment 50/2014 of 14 April. The SCC should not dare to interpret EU Charter rights when EU law is involved without the assistance of the CJEU. Ideally, the doctrine of the SCC, which is mandatory for the Judiciary following Article 5(1) of the General Act of the Judiciary Branch, would contribute to the uniform interpretation of those constitutional rights which have a European nature.

If the SCC does not assume a leading role in the definition of the standards of protection of fundamental rights together with the CJEU, the judiciary will do it through the preliminary reference procedure. In fact, it has been remarked that the SCC decided to make the *Melloni* preliminary reference prior to the National High Court in order to avoid being left

behind in the judicial dialogue with the CJEU.⁵³ A culture of judicial responsibility for fundamental rights protection is already settled in Spain, as is a culture of the submission of preliminary references as a tool for the suitable implementation of EU law. What is lacking now is a culture of collaboration between the SCC and CJEU – something that is necessary for there to be a good relationship between the rights upheld in the Charter and those contained in the Constitution.⁵⁴ Although *Melloni* was a first step, it was not the turn of the screw that had been so long-awaited by the experts. The SCC still holds to its original interpretation of EU law conflicts: it is not the duty of the SCC to implement EU law, not even EU rights. The Charter rights have the same meaning for the SCC as do those of the ECHR. The rulings of the CJEU are at the same level as those of the ECtHR, even when EU law is applied by the Member States. Unfortunately, that is not what Article 51 of the Charter establishes.

⁵³ Javier Díez-Hochleitner Rodríguez, *Cuestión prejudicial y política judicial*, in LA CUESTIÓN PREJUDICIAL EUROPEA, IV EUROPEAN INKLINGS 164, 169 (2014).

⁵⁴ “Furthermore, constitutional courts can put their privileged jurisdictions at the service of the Charter in order to reinforce the rights it enshrines in the domestic scene.” SARMIENTO, *supra* note 30, at 1300.