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Abstract

The purpose of this essay is to provide a close examination of two very important and extremely recent decisions issued by the national constitutional judicial bodies of two member States of the European Union. These decisions raise a series of issues regarding the process of integration of the Union, since in both cases the courts seem to incarnate the role of guardians of the constitutional national system and to act as reviewers of the overall Union policy.

Key-words

Constitutional Courts, European Court of Justice, European integration

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How interpretation techniques can shape the relationship between constitutional courts

Filippo Fontanelli*

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Introduction

The purpose of this essay is to provide a close examination of two very important and extremely recent decisions issued by the national constitutional judicial bodies of two member States of the European Union. These decisions raise a series of issues regarding the process of integration of the Union, since in both cases the courts seem to incarnate the role of guardians of the constitutional national system and to act as reviewers of the overall Union policy.

Whether this role is performed through the reassertion of the protection of fundamental rights under the national constitution (the Spanish case) or through the careful scrutiny of the conditions under which national sovereign functions are transferred to the Union (the Czech case), a shared concern appears to emerge (again) across the Union. Namely, national constitutional courts are ready to set up a system of checks and balance to avoid the indiscriminate rise of powers of the Union, especially in areas that are traditionally devolved to the State competence.

Given the novelty of the judgments commented and the consequent lack of specific literature on them, our first purpose is to provide a significantly detailed account of the merits of each decision, and of the factual (in the Spanish case) and legal background behind them. In the final part of this work, we will discuss their relevance in light of the interpretive dynamics between the constitutional courts and the European Court of Justice.

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I THE SPANISH CASE

With a recent decision,[1] the Spanish *Tribunal Constitucional* (hereinafter, "TC") upheld the claim of violation of a constitutional right (*recurso de amparo*) brought by a British citizen, who had been surrendered to the Romanian authorities pursuant to an extradition request. The competent Spanish authorities (namely, the *Sección Tercera de la Sala de lo Penal de la Audiencia Nacional*, hereinafter "AN") had granted the request, under the Spanish applicable law implementing the European Arrest Warrant framework decision.

The Tribunal noted that the claimant had been convicted *in absentia* to a severe punishment and that the Spanish authorities had not granted his surrender on the condition that it would be possible for him to ask for a new trial in Romania. Therefore, the Tribunal found that the AN's resolution violated the claimant's due process rights.

1. The Facts

The claimant had been convicted for sexual exploitation of children and sentenced to four years in prison by the Romanian appellate court, upholding the judgment of the first instance criminal court. Thereafter, the Romanian judicial authorities issued a request for extradition of the claimant to the Spanish authorities. The claimant contested the request contending that, since the criminal judgment against him had been delivered *in absentia*, the surrender could not be granted.

Nonetheless, the AN disregarded his arguments and issued the surrender resolution (*auto*) that was subsequently challenged in the *recurso de amparo*.[2] In particular, the AN discarded the *in absentia* claim noting that, as confirmed by the Romanian authorities, the criminal proceedings had not been celebrated *in absentia*, since the indicted had been duly summoned in court and was defended in first instance and in appeal by his legal representative.

The surrender procedure was executed, and the claimant was delivered to the Romanian authorities to serve his sentence. However, he brought a claim before the *Tribunal Constitucional* alleging that

[1] *Tribunal Constitucional, sentencia* no. 199/2009 of 28 September 2009.

[2] The *amparo* is a remedy provided by the Spanish system of constitutional justice, whereby individuals (or legal persons) can challenge the constitutionality of any act by the public administration other than legislative acts, when they believe that such act (or the application thereof) violated their fundamental rights, and they have already challenged its legality before the competent authorities without success.

the *auto* violated his due process right (codified in Art. 24(2) of the Spanish Constitution, hereinafter "SC"[3]), and his right of defense (Art. 24(1) of the SC[4]).

2. The Law

First of all, it should be anticipated that the legal framing of the dispute is somehow complicated by the multiplicity of applicable legal sources. Namely, the TC had to consider, at once, the Spanish constitutional charter, the EU framework decision and the corresponding Spanish implementation statute. Indeed, this dispute concerned a case in which the intersection among legal regimes gave rise to significant interpretation difficulties.

The Tribunal rejected the complaint regarding the violation of claimant's right of defense.[5] Claimant's contention that his surrender would expose him to a material risk of suffering inhumane and degrading treatment by Romanian judicial authorities was found to be excessively vague and unsubstantiated. Consequently, the *auto* was not defective for not providing an adequate response thereto.

On the contrary, the alleged violation of Art. 24(2) SC was deemed to be founded. The issue of extradition in connection with default convictions had been since long acknowledged to bear constitutional relevance by the TC. In 2000 the TC had found that granting extradition unconditionally towards countries in which sentences for serious convictions *in absentia* are implemented, without making sure that the convicted can challenge the sentence "*amounts to an 'indirect' violation of the requirements of the right proclaimed in Art. 24(2) of the SC, a violation that undermines the essential content of due process in a way that affects human dignity*".[6]

[3] Reading: "… all have the right to the ordinary judge predetermined by law; to defense 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 defense; not to make self-incriminating statements; not to plead themselves guilty; and to be presumed innocent." For an accurate overview of the elements relating to the constitutional right to a fair trial in Spain, see Riordan (1999) 379.

[4] Reading: "All persons have the right to obtain effective protection from the judges and the courts in the exercise of their rights and legitimate interests, and in no case may there be a lack of defense."

[5] See § 2 of the Legal reasoning of the *Sentencia*.

[6] See *sentencia* STC 91/2000, of 30 March 2000, *fundamento juridico* 14. See also G Jiménez Sánchez and I. De la Cueva Aleu (2007).

This doctrine was reiterated in several cases,[7] and in 2006 the TC confirmed that it applied also to the new framework brought about by the EU framework decision on the European Arrest Warrant and Surrender Procedures (hereinafter, EAW decision),[8] superseding and the 1957 European Convention on Extradition.[9] Neither the EAW decision nor the Spanish statutory law implementing it explicitly require that surrender must compulsorily be subject to the possibility for the arrested to be re-tried in the requesting country; nevertheless, the TC held that such requirement is inherently linked to "*the essential content of a fundamental right granted by our Constitution such as the due process one, in this case due process of extradition; therefore, any relevant domestic law – either implicitly or explicitly – must respect such requirement*".[10]

Moreover, even if the EAW decision does not include it as an obligation, it expressly provides each member State with the power to pass domestic law under which the surrender is subject to the requirement at stake, that is, the request to the issuing authorities of "adequate assurance" as to the arrested person's right to undergo a new trial.[11]

In the case of Spain, such discretionary power had to be reconciled with the constitutional doctrine on the issue: the EU legislator gave to the member states the right to choose whether and how to subject the surrender to the "adequate assurance" condition in the case of *in absentia* indictment, and the TC found that the Spanish legal system, in keeping with the established reading of the SC, must imperatively grant such protection. Accordingly, the AN had an obligation to formulate the re-trial requirement in the challenged *auto*. By failing to include such condition, the challenged *auto* violated the claimant's right to due process, and the TC vacated it.[12]

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[7] See *sentencias* STC No. 134/2000, of 16May 2000; 162/2000, of 12 June 2000; 156/2002, of 23 July 2002; 183/2004, of 2 November 2004.

[8] 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, implemented in Spain within Ley no. 3/2003.

[9] European Convention on Extradition. Paris, 13 December 1957.

[10] See *sentencia* STC 177/2006, of 27 June 2006, *fundamento juridico* 7 b).

[11] See Art. 5, reading: "The execution of the European arrest warrant by the executing judicial authority may, by the law of the executing Member State, be subject to the following conditions: 1. where the European arrest warrant has been issued for the purposes of executing a sentence or a detention order imposed by a decision rendered in absentia and if the person concerned has not been summoned in person or otherwise informed of the date and place of the hearing which led to the decision rendered in absentia, *surrender may be subject to the condition* that the issuing judicial authority gives an assurance deemed adequate to guarantee the person who is the subject of the European arrest warrant that *he or she will have an opportunity to apply for a retrial* of the case in the issuing Member State and to be present at the judgment. …" (our emphasis)

[12] See *sentencia* STC 199/2009, *fundamento juridico* 3.

3. The Reasoning of the TC

The TC did not uphold AN's argument that, since a legal counsel had defended the claimant during the criminal proceedings in Romania, he could not claim to have been sentenced *in absentia*. Indeed, the TC stressed that "*the convicted person's right to appear before the court at oral hearings is not required only by the adversary principle, but is also a means that makes the enjoyment of the right to self-defense possible … .*"[13] The Spanish judges therefore held that only the physical presence of the indicted can meet the standards of criminal due process, and supported this contention by referring to their previous case-law, and to a literal interpretation of Art. 6(3)c of the European Convention of Human Rights (hereinafter, "ECHR").[14]

It is important to specify that the discretionary clause enshrined in the EAW decision does not refer generally to State authorities, but to State law only. In other words, if a State chooses to take advantage of the room of maneuver provided by the framework decision it must make sure that the additional conditions are codified in a domestic statute. It follows that, in principle, national authorities charged with the execution of a surrender request cannot impose additional conditions on top of those dictated by the EAW and the Spanish implementation statute, unless they are enshrined in a domestic statutory act.

In the case at hand, as noted above, the Spanish statute implementing the EAW decision does not list the issue of judgments *in absentia* among the specific circumstances empowering the requested State to ask for "*[a]ssurances .. from the requesting State*."[15] Nor is the issue contemplated in the following clause, regulating the available "*[c]auses of refusal*."[16] Therefore, the Spanish legislator did not implement the regulatory delegation set forth in Art. 5 of the EAW.[17] Under this

[13] See *ibid*., *fundamento juridico* 4. This passage refers to the previous *sentencia* STC 91/2000, cit.

[14] Reading: "Everyone charged with a criminal offence has the following minimum rights: … (c) to defend himself in person or through legal assistance of his own choosing". The reasoning of the TC goes as follows: the concept of assistance is different from that of substitution, and implies the continued presence (in trial) of the assisted subject, that is the convicted person. We dare to note that this reading is somewhat facilitated by the Spanish translation of the Convention, that reads "*derecho … a ser asistido por un defensor*," therefore splitting the concept of legal assistance into two elements: the subject (the counsel) and the activity (the assistance). In the English text these two elements are merged, and it is harder to maintain that the formula "*legal assistance*" meaningfully intended to indicate the activity of assistance *as opposed to that of representation*.

[15] See Art. 11 of Ley 3/2003, cit., named "Garantías que deberán ser solicitadas del Estado de emisión en casos particulars." In fact, the only two circumstances listed therein are life imprisonment and surrender of Spanish nationals.

[16] See Art. 12, *ibidem*.

[17] On the contrary, for instance, the Italian legislator has included in the implementation statute (Law of 22 April 2005 no. 69: Norms implementing the framework decision 2002/584/JHA in the Italian legal system, published on the OJ no.

perspective, it appears that the AN simply applied the Spanish statute as it is, whilst the TC, on the contrary, disregarded the literal interpretation of both the EAW decision and the Spanish statute and provided an *extra legem* construction of the European norm.[18]

As clarified below, this radical reading is at odds with the general trend of de-politicization of the European extradition regime and ends by endowing the domestic authority with a significant margin of appreciation.

For the purpose of appreciating the interplay between the EU and the Spanish legal order (and the position of the TB - and of the dissenting judges - in that respect), two other issues deserve to be analyzed: the Tribunal's referral to the recent amendment to the EAW decision and the content of the dissenting opinions.

4. The 2009 Framework Decision

In early 2009, the Council adopted a framework decision amending the EAW decision,[19] specifically in the part regarding the trials *in absentia*. The purpose of said amendment, *inter alia*, was to set up a consistent regulation of extradition and surrender procedures. One factor of inconsistency was deemed to be the unpredictability of the regime governing the possibility that States refuse to execute a foreign judgment rendered *in absentia*. This uncertainty was reflected in the discretion enjoyed by the requested State in appreciating the assurances about the re-trial provided by the issuing State (see above).[20]

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98 of 29 April 2005) a clause governing the issue of *in absentia* indictments. Art. 19, indeed, reads: "The execution of the European arrest warrant by the Italian authorities shall be subject to the following conditions: a) if the arrest warrant is issued in connection with the execution of a criminal judgment handed down *in absentia*, and if the indicted person was not summoned in person or otherwise informed of the date and place of the hearing that led to the *in absentia* sentence, the surrender is subject to the condition that the issuing authority provides sufficient assurances that the indicted person is able to apply for a new trial in the issuing State and to be present in court."

[18] See also § 4 of Pérez Tremps' opinion, arguing that the interpretation given by the majority is even *praeter legem*, and that the praetorian integration of the conditions set in Ley 3/2003 amounts to an instance of undue judicial activism ("*voluntarismo jurídico*").

[19] Council Framework Decision 2009/299/JHA of 26 February 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, OJ L 81, 27.3.2009.

[20] See, in particular, whereas no. 3-4: "(3) … The adequacy of such an assurance is a matter to be decided by the executing authority, and it is therefore difficult to know exactly when execution may be refused. (4) It is therefore necessary 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. … ".

The amendment substitutes the above-mentioned Art. 5 of the EAW with a new provision. The new Art. 4a entitles issuing authorities to include in the surrender request a set of additional information showing that the trial, although conducted *in absentia*, complied with certain procedural requirements and therefore did not amount to a violation of due process rights. Accordingly, the possibility not to grant extradition is limited to a residual set of cases where the requesting State is not able to provide sufficient evidence of the trial's procedural fairness.

If the new norm had been into force at time of the request that gave rise to the *recurso de amparo* under exam (February 2007), the Romanian authorities could have easily confirmed that, "*being aware of the scheduled trial, the convicted person had given a mandate to a legal counselor … to defend him or her at the trial, and was indeed defended by that counselor at the trial*".[21] This would have curbed any discretion of the Spanish authorities, which would have had to grant the surrender request.[22]

However, the TC just noted that the new regime was not in force at the time and refused to use it as an auxiliary means of interpretation of the old rule.[23] In doing this, indeed, the TC promoted precisely the exercise by domestic authorities of that deal of discretion that the 2009 amendment commits to reduce.

5. The Dissenting Opinions

Judges Rodríguez-Zapata Pérez and Pérez Tremps wrote two dissenting opinions (*votos particulares*) to the judgment commented.[24]

(i) In the first dissenting opinion, judge Rodríguez-Zapata Pérez criticizes the choice of the majority to hamper the functioning of the EAW system (and to disregard its rationale based on mutual trust between judicial authorities of different States). As for the domestic procedural guarantees invoked by his colleagues to support the judgment, the dissenting justice refers to them as "*obsolete barriers*" raised against the free circulation of judgments in the EU, and notes that "*[i]n the third pillar [these obsolete barriers] have cracks, through which criminals are able to flee*."

[21] See Art. 4a, let. (b) of the amended EAW decision.

[22] Note that in the Italian implementation statute Italian authorities can ask for additional assurances only when the indicted person was not present at the hearings *and* was not notified the order fixing the hearing.

[23] As noted also by Pérez Tremps in his dissenting opinion, see § 6.

[24] This possibility is provided for by Art. 164(1) of the SC and Art. 90(2) of the Ley Organica del Tribunal Constitucional.

In his view, stubborn reliance on a principle whose origin lies solely in domestic case law is not justified. Moreover, TC's precedents recalled relates to common extradition rather than to the relatively new European Arrest Warrant[25]: the two mechanisms differ greatly in history and scope,[26] and after January 1, 2004, when the new EAW decision replaced the old multilateral extradition system,[27] a national doctrine based on a limited set of judicial precedents regarding a superseded procedure cannot anymore be effectively raised to distort the interpretation of the EAW common system.

(ii) The dissenting opinion of Pérez Tremps is even more interesting for the purpose of our analysis, since it faces up to the typical problems arising from the non-coordination of multiple levels of protection of fundamental rights.

Pérez Tremps' opening reflection is of remarkable scope. He notes that the judgment of his colleagues relies on the implicit substantial contention that the AN, by granting the surrender request, ratified (and concurred to) the due process violation perpetrated by the Romanian judicial authorities. In his view, this is a false premise, founded on unreasonable distrust toward foreign States' systems of protection of fundamental rights.

In the European Union, indeed, the process of integration and the gradual inclusion of the fundamental rights discourse into the legal texts and the judicial practice[28] have given place to a common legal culture, in which a sort of "equivalence" among different systems of fundamental

[25] As for the reference to STC 177/2006 cit., justice Rodríguez-Zapata Pérez contends that such ruling had an "extraditionary" basis, and therefore cannot be reasonably used to justify the transplant of the re-trial doctrine from the extradition to the EAW scenario. See § 3 of the dissenting opinion.

[26] As the justice notes: "Extradition … is a XX century procedure that cannot be compared to the European Arrest Warrant, which is a procedure belonging to XXI century European Union". See § 4 of the dissenting opinion.

[27] As confirmed by the ECJ in the judgment C-303/05, *Advocaten voor de Wereld VZW v. Leden van Ministerraad* of 3 May 2007. Justice Rodríguez-Zapata Pérez also recalls his own dissenting opinion in a previous case (*auto* ATC 74/2005 of 14 February 2005), where he argued that the EAW decision had brought about "a transcendental shift in the judicial relationship among member States of the EU", in that the "archaic system based on domestic specific technicalities, emblematically represented by the extradition procedures" was replaced by "the culture of a new Europe, founded on the quasi-automatic recognition of foreign judgments, a sense of mutual trust and the direct and immediate interplay among corresponding judicial authorities."

[28] The dissenting opinion mentions Articles 49(1) and 6(1) of the EU Treaty, under which membership to the European Union is subject to compliance with the principles of "liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law." Beside this fundamental premise, other concurring factors are mentioned, namely the human rights provisions in the EU legal texts, the common constitutional traditions of the member States, the case-law of the ECJ and the role of the ECHR and the European Court of Human Rights (hereinafter, the "ECtHR").

rights' protection must be presumed. In other words, States are called to operate *vis-à-vis* each other according to a principle of mutual recognition, when fundamental rights issues are at stake.[29]

In Pérez Tremps' words, "*this principle of equivalence and appropriateness is particularly clear and actionable with the European Union, that can develop as a meaningful political and legal project only if it is based on the mutual trust among Community bodies and among member States*"[30]. This principle of recognition is even more necessary in the EAW system, whose aim is precisely "*to implement the principle of mutual recognition of criminal decisions*."[31]

This dissenting opinion concedes that a difficulty could emerge in the interpretation of the EAW decision.[32] The majority's view that there is an *imperative* right not to be tried *in absentia* conflicts with the design of Art. 5, that sets forth a *facultative* power to protect this right through the request for assurances. On the other hand, acknowledging that such right could be fundamental in Spain and facultative elsewhere is not in keeping with the principle of non-discrimination of EC citizens.[33]

However, Pérez Tremps notes that the TC should have referred such interpretation issue to the European Court of Justice (hereinafter, the "ECJ") through the preliminary reference procedure,[34] rather than opting for a solution that exposes Spain to liability for non discharging the obligation to surrender provided in the EAW decision, particularly now that the entry into force of the Lisbon Treaty endows the Commission with a new power to trigger an infringement procedure also for those matters formerly belonging to the third pillar.

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[29] Significantly, the principle of recognition is supported also recalling the ECtHR judgment in the case *Bosphorous* v. *Ireland* of 30 June 2005 (Reg. no. 45036/98). At § 155 of the decision, the Strasbourg judges use the concept of "equivalent (or comparable) protection" of fundamental rights, noting that any requirement that the level of protection be identical to qualify for recognition would amount to an obstacle to international cooperation.

[30] See Pérez Tremps' dissenting opinion, § 1.

[31] See whereas no. 2 of the EAW decision.

[32] These interpretive difficulties are well-known, see Ruggeri (2009): "The basic question, in the end, is precisely whether there is an alternative to either the constitutional interpretation of a right originating from an external order (that risks to pervert its essence) or its displacement due to incompatibility with the constitution (with the risks, just as serious, of opening a series of conflicts among Charters (and Courts) that might be irremediable)."

[33] See Art. 12 of the ECT, reading: "Within the scope of application of this Treaty, … any discrimination on grounds of nationality shall be prohibited." This reference is slightly out of focus, since the EAW system, as specified, is not covered by the competences of the Community, therefore, it is technically outside the scope of the application or Art. 12 ECT.

[34] That, with respect to third pillar's measures, is set forth in Art. 35 of the EUT.

6. The TC's Interpretation and the Harmonization of Arrest and Surrender Procedures

In order to appreciate these opinions it must be borne in mind that the harmonization of surrender procedures brought about by the EAW decision is a matter belonging to the third pillar of the European Union (formerly named 'Justice and Home Affairs', now evolved into 'Police and Judicial Co-operation in Criminal Matters').[35]

This means that, from the outset, member States delegated to the EU the competence to regulate this field only on an intergovernmental basis, in order to retain the highest degree of control on the matter *before* any decision is taken. In other words, States' interest to keep the grasp onto matters relating to criminal law prevails over the need for harmonization, and only unanimity can trigger EU's regulatory action.

In the case at stake, TC's reference to the domestic constitutional framework in interpreting the EAW resulted in an *ex post* enlargement of an exception included thereto: by equaling trials *in absentia* to trials where a legal counsel represented the indicted, the Spanish court unilaterally added to the list of Articles 11 and 12 of the Spanish implementation statute a justification for refusing to grant a surrender request.[36] It is a typical example of how the constitutionally-oriented interpretation of a supra-national obligation ends by depriving this latter of its meaning.

This undermines the very purpose of the EAW system, which was to ensure a coherent and a-political management of inter-state surrender procedures. It comes as no surprise, therefore, that both dissenting opinions mentioned the opportunity of lodging a preliminary question before the ECJ. If we were to use international law rhetoric, we could say that this interpretation is at variance with the object and purpose of the legal instrument (among the tenets of the framework decision there is the mutual recognition of judgments, that must only "*be subject to sufficient controls*"[37] by the execution authorities) and establishes a sort of *de facto* national reservation in the set of obligations binding each EU State *vis-à-vis* the Union and the other member States.

[35] This means, in a nutshell, that normative acts passed by the Union in this area must follow a stricter procedure than the one used in the first pillar (the Community pillar). In particular, whereas regulation and directives adopted under the first pillar require generally qualified majority voting, third pillar's decision-making is by the intergovernmental method, that is to say that the Council of Ministers adopts framework decisions and decisions by unanimity.

[36] See § 6 of the dissenting opinion by Rodríguez-Zapata Pérez.

[37] See whereas no. 8 of the EAW decision.

7. European National Courts and the Preliminary Ruling

The dissenting judges' suggestion to ask for a preliminary ruling by the ECJ is a crucial aspect of the judgment commented. It must be noted, indeed, that the TC has never lodged a preliminary question, even if it had the chance of acknowledging the importance of the mechanism thereof. In 2004,[38] the TC upheld a *recurso de amparo* brought by a Spanish municipality, who claimed that its constitutional right to a due process had been violated by an ordinary judge (the Administrative chamber of the State of Cataluña Supreme Court) since this latter, during a trial, had refused to lodge a preliminary question for the interpretation of an EC norm, even though he was bound to do so.[39]

This decision, acknowledging that the failure to raise the question may entail a violation of due process, was hailed as the proof that the TC has become aware of its role of grantor of EC law's application in the domestic system and of the importance of the interaction between the ECJ and national courts. Furthermore, this ruling has paved the way for the use of the preliminary ruling by the TC itself.[40]

Historically, the TC had deliberately refrained from raising the preliminary question to the ECJ, despite the scholarship generally shared the view that it was entitled (and sometimes compelled) to do so.[41] The reason advanced for such refusal was that constitutional proceedings, in light of their peculiar nature and object, are irrelevant for any issue of EC law interpretation.[42] Many other

[38] See *sentencia* STC 58/2004 of 19 April 2004.

[39] Indeed, Art. 234 of the ECT provides that the power to raise the preliminary question can convert into an obligation, see last paragraph: "Where any such question [of interpretation or validity of EC law] is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice."

[40] See Baño León (2004) 479: "*No puede descartarse incluso que, llegado el caso, el Tribunal Constitutcional estuviera obligado a plantear una cuestión prejudicial cuando la alegada vulneración del derecho fundamental relativa, por ejemplo, a un acto de aplicación del Derecho Comunitario … requiriera necesariamente de la interpretación del Tribunal de Justicia, por tratarse de un derecho fundamental de relieve comunitario que así haya sido reconocido por el Tribunal de Justicia en el ámbito de sus competencias*." See also Sánchez Legido (2004) 387. For an overview of the constitutional case law prior to the 2004 judgment see Ortiz Vaamonde (2004) 301.

[41] Among the others, see García de Enterría (1986) 707; Rodríguez-Pinero Y Bravo-Ferrer (1998) 459-461; Villagómez Cebrián (1994) 218.

[42] "[EC law] has its own supervisory bodies, and this Tribunal is not one of them. When it comes to assessing the consistency of a domestic norm to EC law, this is a task devolved to ordinary judicial bodies, and only the European Court of Justice, if necessary, can intervene. Likewise, it is not possible that this Tribunal Constitutional raises before the European Court of Justice a preliminary interpretative question under Art. 177 [now 234] of the EC Treaty, since this mechanism operates exclusively in those proceedings in which the application of EC law is at stake, in order to ensure the consistent interpretation thereof, and this is not the case of the proceedings heard by this Tribunal

European constitutional tribunals shared this approach,[43] but in recent years this trend has weakened and several constitutional bodies have raised a preliminary question, including the Italian Constitutional Court (although in the context of *principaliter* proceedings), to which the ECJ answered issuing the preliminary ruling a few weeks ago.[44]

It must be stressed that several aspects of the case under consideration advise to reconsider the importance of the passages suggesting the use of the preliminary reference. They only appear in the dissenting opinions, and they concern an interpretive dilemma that has been already resolved by the EU legislator with the 2009 amendment. Furthermore, the *amparo* proceedings, differently from typical constitutional trials, are not aimed at ascertaining the constitutionality of normative acts, but the potential violation of fundamental rights caused by any decision or act by public authorities. Finally, before the entry into force of the Lisbon Treaty,[45] the regime of the preliminary reference as regards acts of the third pillar was significantly different from the common procedure set forth in Art. 234 ECT.

All these peculiarities would call for understatement rather than enthusiasm, yet it is remarkable that the encouragement to engage in a dialogue with the ECJ comes from within the Tribunal. In the Lisbon scenario, indeed, the third pillar matters will be absorbed under the general umbrella of the EU general competences, and will be accorded the same treatment that now is reserved to common market policies of the first pillar (qualified majority voting, full judicial review by the ECJ, possibility of sanctions by the Commission).

It is about time that the constitutional courts realized the importance of cooperating with the ECJ in order to compose on the interpretation level the normative antinomies that could arise, especially in the field of fundamental rights, and it appears that they are slowly making up their mind.

Constitucional." *Sentencia* STC 372/1993 of 13 December 1993, *fundamento juridico* 7. A similar line of reasoning is reproduced in STC 28/91 of 14 February 1991, FJ 7; STC 143/1994 of 9 May 1994, FJ 8; STC 265/1994 of 3 October 1994, FJ 2.

[43] The famous early exceptions being the Belge *Cour d'Arbitrage* (see the ECJ judgment *Fédération des chambres syndicales de médicins*, of 16 July 1998, C-93/97) and the Austrian *Verfassungsgericht* (see the ECJ judgment *Adria-Wien Pipeline e.a.*, of 8 November 2001, C-143/99).

[44] See Corte Costituzionale, *ordinanza* no. 103/2008 of 15 April 2008; ECJ judgment *Presidente del Consiglio dei Ministri v. Regione Sardegna*, of 17 November 2009, C-169/08. On this issue, and for a wider overview on the sea change that brought European constitutional courts to embrace the preliminary ruling dynamics, see Fontanelli and Martinico (2008); Martinico and Fontanelli (2010).

[45] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 (OJ C 306, 17 Dec. 2007).

II The Czech case

This part of the paper will deal with the recent decision of the Czech Constitutional Court (hereinafter, the "CCC") of 3 November 2009, whereby the Court declared that the Lisbon Treaty is conform with the Czech Constitution (hereinafter, the "CC") and accorded clearance for the subsequent presidential ratification, that incidentally constituted the last step for the entry into force of the Treaty, occurred on the 1st of December 2009.

On the one hand, the discussion of this lengthy judgment will prove easier than that of the Spanish one, because there is no factual background involved: the CCC was asked by a parliamentarian minority to pronounce on the abstract compatibility of certain provisions of the Treaty with the CC, carrying out an *ex ante* review. On the other hand, it will be necessary to give account of a recent precedent by the CCC itself, in which it was called to perform an identical task as regards certain other norms of the Lisbon Treaty.[46] The two rulings, therefore, cannot be read in isolation from each other, at least because the earlier is *res judicata* with respect to the latter.

For this reason, the next paragraph will be dedicated to a selection of the issues explored in the 2008 ruling that we deem most relevant, whereas the 2009 decision will be discussed in the following part, also selectively.

8. The 2008 Decision

After a constitutional amendment occurred in 2001,[47] the CCC has obtained *ex ante* jurisdiction on international treaties.[48] In 2008, during the discussion of the Lisbon Treaty in the Czech Parliament, the Senate seized the CCC and asked for a ruling regarding the conformity of the Treaty with the Czech constitutional order. The CCC had already pronounced in two occasions on the relationship between the Czech system and the EU, finding that the membership to the EU did not undermine the basic aspects of state sovereignty of the Czech republic.[49]

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[46] Judgment of 26 November 2008, case No. Pl. ÚS 19/08 (published as No. 446/2008 Coll.). The English translation is available at http://angl.concourt.cz/angl_verze/doc/pl-19-08.php.

[47] Constitutional Act No. 395/2001 Coll.

[48] See Art. 87(2) of the CC, reading: "Prior to the ratification of a treaty under Art. 10a or Art. 49, the Constitutional Court shall further have jurisdiction to decide concerning the treaty's conformity with the constitutional order. A treaty may not be ratified prior to the Constitutional Court giving judgment."

[49] Judgment of 8 March 2006, case No. Pl. ÚS 50/04 *Sugar Quotas* (published as No. 156/2006 Coll.) and Judgment of 3 May 2006, case No. Pl. ÚS 66/04 *European Arrest Warrant* (published as No. 434/2006 Coll., extending the findings of the *Sugar Quotas* ruling to the third pillar). On the relevance of these judgments, where the Czech Court seems to draw inspiration from the German *Solange* jurisprudence and the Italian doctrine of the counter-limits ("*controlimiti*"),

The CCC refused to consider the constitutionality of the Treaty text as a whole, and focused on the provisions thereof that the Senate had expressly challenged in the claim.[50] This is why, as more fully explained below, it was possible to challenge the Treaty a second time in 2009, by raising a question of constitutionality concerning another set of norms.

The first decisive issue tackled by the judgment is the transfer of sovereignty.[51] The CCC embarks on the thankless task of defining sovereignty, with the blatant intent[52] to promote a conception thereof that is able to survive the massive phenomenon of delegation of competences to the EU.[53] The Court recalls that the process of European integration is a reaction to the challenge of a globalized world, and refers to a concept of "pooled sovereignty"[54]:

> … the transfer of certain state competences, that arises from the free will of the sovereign, and will continue to be exercised with the sovereign's participation in a manner that is agreed on in advance and that is reviewable, is not a conceptual weakening of the sovereignty of a state, but, on the contrary, can lead to strengthening it within the joint actions of an integrated whole.[55]

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see Sadurski (2008) and Komarek (2005; 2007). In particular, see this detailed passage from the *Sugar Quotas* decision: "the Constitutional Court cannot disregard the fact that several high courts of older Member States, including founding members, such as Italy (*Frontini v. Ministero delle Finanze*, Constitutional Court, Case No. 183/73, 27 December 1973; *Fragd v. Amministrazione delle Finanze dello Stato*, Constitutional Court, Case No. 232/1989, 21 April 1989) and Germany (*Wünsche Handelsgesellschaft (Solange II)*, Federal Constitutional Court, Case No. 2 BvR 197/83, 22 October 1986; *Maastricht Treaty 1992 Constitutionality Case*, Federal Constitutional Court, Case Nos 2 BvR 2134 and 2159/92, 12 October 1993), and later acceding Member States such as Ireland (*Society for the Protection of Unborn Children (Ireland) Ltd. v. Grogan* , Supreme Court, 19 December 1989, and *Attorney General v. X*, 5 March 1992) and Denmark (*Carlsen and Others v. Rasmussen*, Supreme Court, Case No. I-361/1997, 6 April 1998), have never entirely acquiesced in the doctrine of the absolute precedence of Community law over the entirety of constitutional law; first and foremost, they retained a certain reserve to interpret principles such as the democratic law-based state and the protection of fundamental rights"(§ 6).

[50] As regards the constitutional standard of review, instead, the CCC decided to use the whole text of the Constitution, rather than a limited set of key provisions.

[51] The relevant provision regulating the delegation of powers to international organization is the Art. 10a of the CC.

[52] Not surprisingly, the CCC tries to outdate a definition of sovereignty that includes absolute independence from external powers, by noting that by adopting such perspective "no country, including the USA, would fulfill the elements of sovereignty." See § 107.

[53] This view that praises the sovereignty-enhancing effects of the transfer of powers to the EU is instrumental also to reject the contention of the Senate, claiming that the new list of exclusive competences of the EU, as well as the existence of a series of shared competences with the member states and the existence of a clause providing the Union with implicit powers, are in themselves a threat to state sovereignty. See §§ 121-155.

[54] As correctly noted by Briza (2009) 149.

[55] See § 108 of the judgment.

The CCC supports its reasoning recalling the *Solange II*[56] and *Maastricht*[57] precedents of the German *Budesverfassungsgericht*, and provides a summary thereof: the EU ensures a level of protection of human rights that is comparable to that of single member States, and operates on the basis of the powers that the members have agreed to delegate. Therefore, a State should not review every EU act with the pretext either of implementing a better protection of fundamental rights or reassessing its own sovereignty, unless a serious violation of fundamental rights occurs, or an act is adopted clearly *ultra vires*. As long as (*so lange*) neither of this extreme events happens, the EU and his norms enjoy a presumption of constitutionality in every domestic order.[58]

In the CCC's ruling, human rights and sovereign prerogatives go constantly hand in hand: the same mechanism of trustful presumptions underpins the legitimacy of the EU as regards both matters, and in relation with both of them the CCC reserves the right to halt the excessively intrusive action of the Union. It is important therefore to examine how the CCC treated the formal incorporation in the new EU Treaty of the Charter of Fundamental Rights of the European Union (hereinafter, the "Charter").[59]

After specifying that the Charter has a limited scope,[60] the CCC specifies that it is not a device that might enlarge the powers of the Union, but rather an overarching instrument aimed at strengthening the rule of (human rights) law of the EU's action.

Significantly, the CCC speculates about the use of the Charter by the European institutions, and comes to the conclusion – once again – that the overall system of protection of the EU is comparable to that of the Czech Republic, hence the application of the Charter by the ECJ should

[56] *Wünsche Handelsgesellschaft* (BvR 2, 197/83; 1987 3 CMLR 225), judgment of October 22, 1986.

[57] *Manfred Brunner et al v. The European Union Treaty* (89 BVerfGE 155; 1994 1 CMLR 57), judgment of 12 October 1993.

[58] At § 120 the CCC reserves the right, "as an *ultima ratio*", to review whether an act of the EU exceeded the powers conferred under Art. 10a of the CC. Significantly, the German Constitutional Court will recall this passage in its 2009 decision on the Lisbon Treaty (see below), and declares itself fit to declare the inapplicability of EU legal instruments transgressing the competence limits, see § 343.

[59] The new Art. 6(1) reads: "[t]he Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties."

[60] See Art. 51 of the Charter, reading: "1. The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers. 2. This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties."

not raise any particular problem. This principle of comparable protection, explicitly borrowed from the *Bosphorous* precedent of the ECtHR, is the same that we have seen above in Pérez Tremps dissenting opinion: indeed, Pérez Tremps' praise of the dialogue between the courts echoes in the following lines of the CCC, declaring that the relationship between the ECJ and the constitutional courts of member States, even after the entry into force of the Lisbon Treaty, "*should continue to be a dialogue of equal partners, who will respect and supplement each other's activities, not compete with each other*."[61]

9. The 2009 Decision

The Lisbon Treaty was challenged again in 2009 before the Brno judges by a group of Euro-skeptical parliamentarians. We are not in the position to expatiate on the intricate political reasons underlying this second scrutiny,[62] therefore we will briefly comment only on some legal issues of the judgment.[63]

The CCC refused to review the Treaty as a whole (despite it was explicitly asked to do so by the petitioners), and to examine those provisions that it had already reviewed in 2008.[64] It should be recalled that, between the two decisions, the German *Bundesverfassungsgericht* had handed down a very significant decision concerning the Lisbon Treaty,[65] ruling for the constitutionality of the new European order, yet specifying that the transfer of new competences had to be compensated by an

[61] See § 197 of the 2008 judgment. Obviously, the comparison with Pérez Tremps opinion is functional to the exposition of the ideas, but is chronologically incorrect: it is rather the CCC's reasoning that echoes in the Spanish judge's opinion.

[62] In sum, the President allegedly feared that the entry into force of the Lisbon Treaty, incorporating the Charter, would expose the Czech Republic to compensation liability related to certain expropriation practices perpetrated on a German minority that was expulsed from the Czechoslovakia in 1945-1946. Even though this is legally incorrect, the Czech menaced to refuse to ratify the Treaty (and launched the constitutional proceedings in order to delay this step) if the EU had not accepted to grant an opt-out from the obligations of the Charter (see Protocol no. 30 to the Lisbon Treaty). The date of the judgment was therefore strategically scheduled a few days after the Brussels session of the European Council of 29-30 October 2009, in which the exemption was discussed. The Czech Republic succeeded in obtaining the opt-out and the CCC handed down the pro-Treaty decision shortly thereafter. See Peers (2009); Horak (2009) 7-8; Sampol (2009).

[63] Judgment Pl. ÚS 29/09 of 3 November 2009, nyp. An official English translation is available on the CCC's site at: http://www.usoud.cz/file/2506.

[64] See §§ 95 ff, explaining the effect of *res judicata* of the 2008 judgment, and warning over-zealous petitioners: "the Constitutional Court is a constitutional body … not a place for endless debate, which some parties seek." Therefore, it rejects the petitioners' request "to reevaluate its conclusion stated in [the 2008 judgment]," and recalled that "it is not the role of the Constitutional Court to answer questions, but to make authoritative rulings."

[65] See judgment of 30 June 2009, 2 BvE 2/08, available at http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html .

increase of legitimacy, notably in the form of a more significant role of the German Parliament in shaping and reviewing the EU's action.

In this ruling the German court had laid down a list of State competences that could not be subject to a transfer of powers to the EU.[66] The petitioners in the 2009 Czech case asked the CCC both to engage in a similar task, drafting a list of non-transferrable competences, and to provide an abstract description of the elements of the "material core" of the constitutional order. These requests aimed at challenging the docile approach of the CCC in the 2008 judgment as regards sovereignty transfer and fundamental rights protection, forcing the Brno judges to identify *ex ante* certain elements that could not be covered by the presumption of constitutionality accorded to the EU.

However, the CCC refrained from drafting the lists as requested and noted that it would not engage in such a political endeavor, which only the national legislator has the authority to perform.[67] In par. 113 the judges make the point that abstract definitions can be misleading, and that their role is to use the concepts of sovereignty and rights protection only in the context of a case by case review:

> This does not involve arbitrariness, but, on the contrary, restraint and judicial minimalism, which is perceived as a means of limiting the judicial power in favor of political processes, and which outweighs the requirement of absolute legal certainty … The attempt to define the term "sovereign, unitary and democratic state governed by the rule of law, founded on respect for the rights and freedoms of the man and of citizens" once and for all (as the petitioners, supported by the president, request) would, in contrast, be seen as an expression of judicial activism …

Many other claims of unconstitutionality concerning single provisions of the Lisbon Treaty were either blatantly unfounded or *mala fide*.[68] Instead, it is interesting to examine another point of the CCC's reasoning, addressing the claim of unconstitutionality of Art. 83 of the Treaty on the

[66] See point 252 of the German judgment, listing (1) substantive and formal criminal law, (2) disposition of the police monopoly on the use of force towards the interior and of the military monopoly on the use of force towards the exterior, (3) the fundamental fiscal decisions on public revenue and public expenditure, (4) decisions on the shaping of circumstances of life in a social state, and (5) important cultural issues, for instance as regards family law, the school and education system, and the relationship with religious communities. See Niedobitek (2009) 1271.

[67] See § 111 and 112 of the 2009 judgment. On the political character of *ex ante* abstract reviews see Sadurski (2008) 40.

[68] See for instance the President's claim that the very concept of shared competences is not compatible with the sovereignty of the Czech Republic, which the CCC rebuts simply by quoting a passage from the 1995 Czech application for EU membership, signed by the President (then Prime Minister) in which shared sovereignty and shared responsibility were acknowledged as being "unavoidable," see § 148.

Functioning of the European Union (the "operational" half of the Lisbon Treaty), for violation of the Czech state sovereign powers.

The first paragraph empowers the EU legislator to "*establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crimes* [of international nature]." Indeed, this provision affects the state power to regulate autonomously the field of criminal law, although only in a limited area; the CCC acknowledges the "*growing trust among the democratic states of the European Union*," as well as the difficulty to conduct investigation and suppression of such crimes within a single State and the awareness that "*the present standard for protection of fundamental rights within the European Union* [is not] *of a lower quality than the protection provided in the Czech Republic*."[69]

This is an instance in which the three main doctrines of the CCC concur (mutual trust, enhanced efficiency of shared sovereignty and comparable protection) and make the delegation of criminal powers acceptable.[70] It is also particularly significant because it confirms CCC's position on the (former) third pillar's competences of the EU, the same that the Spanish judges decided to interpret unilaterally.

In the final section, we will develop a reflection on the different approaches of the Spanish and Czech courts.

10. Constitutional courts and supra-national regimes, a delicate balance

In the Czech case, the CCC performed an actual constitutional review of the EU norms, and declared their constitutionality. In the Spanish case, instead, the TC did not expressly scrutinize any EU norm, since the object of the proceedings was the administrative order granting the arrest warrant. However, it criticized the behavior of the AN for not following a constitutional praxis when applying the EU provision (as implemented domestically), and to some extent even suggested

[69] See § 155.

[70] As for the second paragraph of Art. 83 of the TFUE, extending the power to adopt minimum criminal legislation in relation to other crimes than those listed in the first paragraph, the CCC notes that it is just a codification of the ECJ's doctrine developed in the trans-pillar cases (Case C-170/96, *Commission* v. *Council* (Airport transit visas), [1998] ECR I-2763, paras. 15–16; Case C-176/03, *Commission* v. *Council* (Environmental penalties), [2005] ECR I-7879; Case C-440/05, *Commission* v. *Council* (Ship Source Pollution), [2007] ECR I-1657; Case C-91/05, *Commission* v. *Council* (ECOWAS); Joined Cases C-402 & 415/05 P, *Kadi and Al Barakaat International Foundation* v. *Council and Commission*; Case C-301/06, *Ireland* v. *Council and Parliament*) whereby the Community was entitled to give criminal instructions to the States to promote the effective punishment of serious violations of a harmonized EC policy (e.g. the protection of the environment, or the freedom of services) occurred. See Hillion and Wessel (2009); Fontanelli (2010).

that the constitutional case-law prevails over EU norms (formally stating that EU norms must be interpreted according to the constitutional praxis).

This is revealing of the modern role of the constitutional courts *vis-à-vis* the European Union. Once the supremacy principle was established,[71] it could not be contested anymore, at least formally. The only exception could be the threat,[72] by national constitutional judges, to raise the barrier of the domestic order in the unlikely event that the Union norms undermined some core values, such as in case of a serious violation of a basic fundamental right or an encroachment upon the minimal attributes of each State's sovereignty.[73]

This *entente cordiale* appeased both sides, but has done worse than good, in that the surface of the formal equilibrium (EU supremacy as opposed to *minimal* national counter-limits) does not reflect what goes on underneath. As obvious, episodes of conflict in the field of fundamental rights and sovereignty aspects never concern exclusively the protection of a single value, but mostly the balance between competing values or the degree of power delegation that can still be deemed to represent an exercise, rather than a deprivation, of power.[74]

The conflict, therefore, arises when two orders that profess to protect the same values have in fact different views regarding the actual accommodation of multiple values, and strike different balances when it comes to promote one at another's expense.[75] One typical example is the divergence

[71] Note that it is now codified in Declaration no. 17 attached to the Lisbon Treaty, reading: "in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States." This is a somewhat clumsy compromise, designed to 'hide' the primacy clause in the Declaration, rather in the body of the Treaty, as it was for Art. I-6 of the Treaty establishing a Constitution for Europe.

[72] On the nature of this threat, that was virtually never enforced, and nevertheless proved useful to some extent, see Stith (2008) 446.

[73] See the national judgments listed supra. For instance, see how the CCC phrased this doctrine in the 2008 judgment cit., § 85: "the Constitutional Court is required to regularly apply … the principle of Euro-conforming interpretation. However, this principle can not have the character of a kind of "implicit Euro-amendment" of the Constitution. In the event of a clear conflict between the domestic Constitution and European law that can not be cured by any reasonable interpretation, the constitutional order of the Czech Republic, in particular its material core, must take precedence."

[74] It is of little use, therefore, to specify that fundamental rights and freedoms, as well as the principles of democracy, people sovereignty, separation of powers and rule of law "can not be touched even by an amendment to the Constitution … because many of them are obviously of natural law origin, and thus the state does not provide them, but may and must – as a constitutional state – only guarantee and protect them." See *ibid*., § 93.

[75] The CCC efficiently summarized this view (mentioning Alexy and Kumm) in the 2008 judgment, § 197: "the majority of rights and freedoms ensured by the present systems of protection … and their practical application by the most important constitutional courts are open to comparison based on analysis of the proportionality of interference in one guaranteed right to the benefit of another right."

between the Italian practice regarding compensation in case of public expropriation and the position of the ECtHR: whereas in Italy the constitutional protection of property did not grant more than a reasonably indemnity for the expropriated,[76] the Strasbourg Court interpreted the relevant provision of the Convention as requiring full compensation at market price.[77] Only after several rulings from Strasbourg sanctioning Italy for violating the Convention the Constitutional Court declared the unconstitutionality of the relevant Italian provisions.[78]

In the case of the European Community, more typically, the "market freedoms" have been variously upheld or retracted[79] when they clashed with values such as human dignity,[80] freedom of expression,[81] and right to strike.[82] The ECJ did engage, in each case, in a proportionality assessment, to determine whether the promotion of a competing interest justified the violation of the market freedom. In other words, the European Court struck *its preferred balance* between the concurring interests.[83]

Obviously, and despite the undeniable influence of some "structural bias,"[84] this tension cannot be reduced to a manichaeist struggle between the market-driven system (the EC) and the States, for at least two reasons. First of all, States themselves ensure constitutional protection and promotion of economic rights and liberties. Conversely, the Community, that admittedly had no specific

[76] See *Corte Costituzionale*, decisions No. 148/1999; 396/1999 and 24/2000, and orders No. 251/2000 and 158/2002.

[77] See ECtHR, *Scordino v. Italy*, of 29 May 2006 (Reg. no. 36813/97).

[78] For indirect violation of the constitutional norm (Art. 117 of the Italian Constitution) requiring consistency of State legislation with Italy's international obligations including, in the case at stake, those enshrined in the ECHR. See *Corte Costituzionale*, decisions No. 348 and 349/2007. For a comment of these decisions that also accounts for the problematic issue of the reception of international norms in the Italian system, see Pollicino (2008); Biondi Dal Monte and Fontanelli (2008).

[79] See Morijin (2005).

[80] ECJ, judgment C-36/02, *Omega Spielhallen und Automatenaufstellungs GmbH v. Oberburgermeister der Bundesstadt Bonn*, [2005] ECR I-9609. For a comment, see Ackermann (2005).

[81] ECJ, judgment C-121/00, *Eugen Schmidberger, Internationale Transport und Planzuge v. Austrian Republic* [2003] ECR I-5659.

[82] ECJ, judgments C-438/05 *Viking* [2007] ECR I-10779 and C-341/05 *Laval* [2007] ECR I-11767.

[83] See ECJ, judgment *Viking*, cit., § 46.

[84] On the concept of "structural bias" see Koskenniemi (1989, re-issued in 2006) 600-615. See also how he uses is in the 2006 ILC report, referring to the structural bias of the WTO legal system toward free-market interests at the expense of other public interest values. See also Beckett's comment (2009) 1056.

competence to "regulate human rights,"[85] yet incorporated them first as general principles of EC law and, prospectively, is now ready to make them a major element in the post-Lisbon Union, through the hardening of the Charter (see *supra*) and the EU membership to the ECHR. In this new framework, as recognized by the CCC in the 2008 judgment, "*there may be conflict with domestic standards of protection of fundamental rights more frequently than heretofore*."[86]

There is not total overlap between the relevant human rights regimes. Not only is the Charter limited in scope and application, but the jurisdiction of the ECJ as a whole does not cover human rights claims outside the scope of EU law.[87] In other words, the human rights machinery is part of the "applicable law" of the ECJ, without being part of its "competence."[88]

A common procedural device that aims at minimizing the divide between the national and the supra-national balances is the use of "consistent interpretation" techniques.[89] Their purpose is to guide the interpretation of simultaneous obligations in the attempt to avoid, as much as possible, that performance with one of them results in a violation of another: although in principle they are not able to solve hard conflicts, they might defuse minor ones.[90]

In the Spanish case, the TC contended that its conclusions were the result of a "constitutional interpretation" of the supra-national obligations. It is significant here to juxtapose to this position the opinion of the CCC on the very same obligations (those deriving from the EAW framework decision):

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[85] See ECJ Opinion 2/94 of 28 March 1996, ECR 1759, on the Community's ability to accede the European Convention for the Protection of Human Rights and Fundamental Freedoms.

[86] See § 187 of the CCC's 2008 judgment.

[87] See ECJ *Kremzow*, C-299/95, judgment of 29 May 1997, ECR I-2629, § 15; *Vajnai*, C-328/04, order of 6 October 2005, ECR I-8577, § 12; *Kovaľský*, C-302/06, order of 25 January 2007, nyp, § 19; *Polier*, C-361/07, order of 16 January 2008, nyp, §§10-14. On the issue of the absence of an original human rights' competence of the EU, see Peers (2009).

[88] On this distinction, often overlooked by the scholars, see Bartels (2001; 2010) and the new framework proposed by Pauwelyn and Salles (2009) 45.

[89] See also Joerges and Roedl (2008) proposing the adoption of a "conflict of laws" approach (founded on supranational deliberation) to manage the competing constitutional interests of States and the EU: this would prevent the ECJ from exercising the highly political *ad hoc* proportionality test, since it "it is not legitimated to re-organize the interdependence of Europe's social and economic constitutions." (*ibid*., 19).

[90] A crystal-clear example would be Art. 52(3) of the Charter, that prevents any possible interpretation conflict with the ECHR endorsing as an interpretive tool of its provisions the meaning and scope of the corresponding rights laid down in the latter. A similar provision is perhaps Art. 53, that explicitly states that the Charter cannot be interpreted so as to restrict or affect the protection of rights granted by members' constitutions.

> … the Constitution of the Czech Republic, in connection with the principle of cooperation set forth in Art. 10 of the Treaty establishing the EC gives rise to a constitutional principle under which *domestic legal regulations, including the Constitution, are to be interpreted in accordance with the principles of European integration* and the cooperation of community bodies and the bodies of a member state. Thus, if there are several interpretations of the constitutional order, which includes the Charter of Fundamental Rights and Freedoms, and only some of them lead to fulfilling the obligation that the Czech Republic assumed in connection with its membership in the EU, that interpretation must be selected which supports fulfillment of that obligation, and not an interpretation that prevents such fulfillment.[91] (emphasis added)

Obviously, it is easier to proclaim deference before any actual application of the rules at stake, it is nevertheless striking the different approach of the two courts: the Spanish TC flexes EU law in its favor, whereas the CCC (declares that it) is ready to flex its own constitution to meet EU obligations, in keeping with the general principle of EU prevalence.[92] In principle, constitutional interpretation and Euro-interpretation do not exclude each other, but certainly their resolution effect is diluted if they are deemed to operate at the same time.[93]

Likewise, it would be maybe too easy to contrast the allegations of judicial activism raised by Pérez Tremps against the TC and the CCC's profession of "*judicial minimalism*." In fact, the move of the CCC is less self-interested than it seems: in rebutting domestic intolerance to the Lisbon Treaty it made sure to reassess its role of supreme arbiter within the national legal order and, at the same time, to send a signal to the EU, that it will still have to search for the Court's clearance whenever an issue of sovereignty delegation arises. Sadurski's comment to the *Sugar* case can be replicated: "*by condemning the* [national claimants] *for* [contesting] *EU functions while no threat to democratic principles (hence, no breach of the conditions for the transfer of powers) had been*

[91] See § 114 of the CCC 2009 judgment, referring to the EAW precedent, cit. It goes without saying that the structure of this EU-consistent interpretive task is analogue to the US *Charming Betsy* doctrine.

[92] See Case C-438/05 *Viking*, cit., § 44: "even if, in the areas which fall outside the scope of the Community's competence, the Member States are still free, in principle, to lay down the conditions governing the existence and exercise of [fundamental rights], the fact remains that, when exercising that competence, the Member States must nevertheless comply with Community law."

[93] The risk is that consistent interpretation (be it constitutional, Euro-related, conventional or other) ends by being used as a boilerplate commitment, accompanied by the specification that it cannot heal real conflicts. See the paradoxical consequence of this trend in the judgments no. 348 and 349/2007 of the Italian Constitutional Court, cit., where the Italian Court recalls that ordinary judges must interpret the norms that they intend to apply constitutionally, conventionally (that is, consistently with the ECHR) and consistently with EU law, all at the same time.

ascertained, [the CCC] *establishes itself gently but surely in the role of an umpire of national-European legal relationships on the basis of its own interpretation of democracy*."[94]

In sum, we believe that these two cases are symptomatic of the uncertain dimension of continental European constitutional courts in the current context of supra-national and international law expansion. They strive to find a relevant role amidst the multiple governance and legislative layers that affect the life of their nation, trying to prevent the marginalization drift that involves them, mainly due to the entrance on stage of "higher level" courts such as the ECJ and the ECtHR. Unilateralism and dialogue are the available options to preserve interpretive relevance. The downside of the former is that it can lead to isolation, and can be countered at the supra-national level (in the Spanish case, consider how the 2009 legislative amendment prevents *pro futuro* the TC from persisting in its interpretation), whereas the disadvantage of dialogic or cooperation techniques is that their outcome is often pre-determined when one of the interlocutors is significantly more powerful than the other (in the Czech case, ruling for the unconstitutionality of the Lisbon Treaty was not a really available option).

In observing how the single courts place themselves in the spectrum between stubborn reliance on the supremacy of the constitutional order and systematic remission to the supra-national system, it is worth analyzing that among the tools used by the judges to carry out their judicial policies sovereignty and human rights arguments are perhaps the most frequently employed. In particular, fundamental rights are at times the vehicle of dialogue and coherence (*Solange I*, *Bosphorous*, all the Czech decisions, in particular those dealing with the EAW and the Lisbon Treaty), but sometimes they are used to foster interpretive competition and to halt integration (see the Spanish decision).

The only reasonable prediction that we can make is that the multiplication of fundamental right charters and of judicial bodies tasked with the application thereof will bring about a massive increment of the transnational and supra-national human rights adjudication case law. It is fair to believe that this case law will attain a certain degree of structural cohesion, over time, and that the episodes of conflict will be a relatively marginal area of the whole caseload. Conflicts are healthy, because they challenge the interpretation, and beg for resolution. They also can carry within the antibodies that could prevent future instances (see the dissenting opinions in the Spanish case).

[94] Sadurski (2008) 12.

Constitutional courts, for historic and proximity reasons, are more than fit to handle fundamental rights claims: if they manage to bring their expertise to Europe without fearing to be overshadowed by the European courts the common European human rights language will hopefully evolve into a consistent system.

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