

A CONTRIBUTION FROM THE SPANISH CONSTITUTIONAL COURT TO THE EUROPEAN CONSTRUCTION PROCESS: REQUESTING PRELIMINARY RULING

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INTRODUCTION

This Article¹ focuses on the convenience or the obligation of the Spanish Constitutional Court (“CC”) to request preliminary rulings before the Court of Justice of the European Union² (“CJEU”). This is a very practical and real problem that requires an urgent answer, as it becomes in Spain increasingly important at the present time. In order to illustrate this, let us remember two different cases.

First, in the Judgment of September 19, 2008,³ the Spanish Supreme Court overturned a resolution of the Spanish Agency of Data Protection, which ordered the Archbishop to note in the baptism register the exercise of the right to cancel an inscription (which would be the consequence of declaring apostasy in the data protection legislation field). The resolution was based on the idea that the baptism register was a “file” under the data protection legislation. Huelin Martínez de Velasco, a senior judge of the Supreme Court, wrote a dissenting opinion.⁴ The dissent employed autonomous concepts of European law (like the definition of “file”) included in a European directive that pursues the complete harmonization of the national legislations on personal data protection to determine the dispute. The dissent’s interpretation was not clear, and the aforesaid judge considered that the Supreme Court should have presented a preliminary ruling to the CJEU. Something similar occurred in the Judgment of the Supreme Court of October 14, 2008,⁵ although in this particular case, the dissenting opinion was more thorough. We do not know whether the case will be submitted to the Spanish Constitutional Court. In such a case the Court would find itself in the same situation as the Supreme Court in relation to the European Union Law. Therefore, the reasoning found in Judge Huelin’s dissenting opinion would have also been applicable.

The second case is the Judgment of the Spanish Constitutional Court 199/2009, September 28,⁶ about the Euro order. In this judgment, the Spanish Constitutional Court overturned a court order of the Spanish Audiencia Nacional because the referring court order decided to hand a British citizen to Rumanian authorities applying the Euro order. The Spanish Constitutional Court considered that the referring court order violated the right of the challenger to a procedure with all the guarantees (recognized in Article 24.2 of the Spanish Constitution⁷), because the challenger was convicted to a four-year punishment of prison in his absence.

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¹ This work has precedent in another piece of work I wrote: *Tribunal Constitucional y cuestión prejudicial ante el Tribunal de Justicia de la Unión Europea*, LA LEY, Nov. 30, 2010, at 1, 1. However, this work doubles the length of the previous one and is particularly more detailed in the analysis of the Spanish Constitutional Court law with regard to the topic.

² Former European Communities Court.

³ STS, Sept. 19, 2008.

⁴ STS, Sept. 19, 2008 (Martinez de Velasco, J., dissenting).

⁵ STS, Oct. 14, 2008.

⁶ S.T.C. 199/2009, Sept. 28.

⁷ C.E. Art. 24.2.

Furthermore, the Spanish Audiencia Nacional had not established the condition that the punishment imposed in absence could be revised. Judge Pérez Tremps wrote the dissenting opinion.⁸ Judge Tremps based his dissent on various arguments, but this Article focuses on the argument that a European government cannot impose, on any other European governments, its own parameter of protection of fundamental rights. Rather, each European government must function within a common parameter. According to Judge Tremps, if the Constitutional Court viewed a punishment in absence as a violation of the so called “absolute content”⁹ it should have presented a preliminary ruling to the CJEU concerning the European rule that regulates the Euro order committing an irresponsibility if Spain did not apply said norm.¹⁰

I. IMPORTANCE OF THE PRELIMINARY RULING IN THE CONSTRUCTION OF EUROPEAN LAW

A. THE PRELIMINARY RULING AS A FEDERALIZING FACTOR IN THE EUROPEAN JURISDICTIONAL ORGANIZATION

Lately, many authors outlined the similarities between the Court of Justice of the European Union and the National Constitutional Courts. In particular, they outlined that, in practice, the Court of Luxembourg does not restrain itself to its function of negative legislator.¹¹

The Court of Luxembourg, in a similar way to the Constitutional Courts of the European continent, reserves the monopoly of declaring the unconstitutionality of an act. The function of the Court of Justice of the European Union is to reassure the primacy of European law over the national legislation. It is up to the Court of Justice to define the limits between the interpretation and the application of the European rules. This function makes the preliminary ruling a federalizing factor¹² in the European jurisdictional organization¹³.

⁸ S.T.C. 199/2009, Sept. 28 (Tremps, J., dissenting).

⁹ *Id.* at n.6.

¹⁰ This Article will not consider a different question, which is whether the judges violate Article 24 of the Spanish Constitution when they refuse to present a preliminary ruling. On this matter, the Spanish Court’s opinion is that there is no infringement. S.T.C. 58/2004 corroborates that doctrine, despite the doctrinal discussion it has derived. In effect, according to Dámaso Ruíz-Jarabo, *Los tribunales constitucionales ante el Derecho comunitario*, in 95 LA ARTICULACIÓN ENTRE EL DERECHO COMUNITARIO Y LOS DERECHOS NACIONALES: ALGUNAS ZONAS DE FRICCIÓN 199, 199 (Madrid, Consejo General del Poder Judicial, Estudios de Derecho Judicial, 2007), S.T.C. 58/2004 would represent an inflection point on the traditional doctrine of the Court in this aspect. On a similar line, Juan Ignacio Ugartemendía Eceibarrena, *El recurso a la prejudicial (234 TCE) como cuestión de amparo (A propósito de la STC 58/2004, de 19 de abril de 2004, que otorga el amparo frente a una vulneración del Article 24 CE originada por el incumplimiento de la obligación de plantear cuestión prejudicial comunitaria)*, in 11 REVISTA ESPAÑOLA DE DERECHO EUROPEO 465, 469, 474 (2004), the referred Judgment represents yet another step in the europeanisation of fundamental (national) Law towards effective judicial protection, a certain europeanisation of its guarantee, a short step towards Europeanization of constitutional rights, that would progress in the same direction as the constitutionalization of the European Union. Nevertheless, STC 58/2004 “does not change the constitutional doctrine, it just follows it.” Ignacio Borrajo Iniesta, *Los tribunales constitucionales ante el Derecho comunitario*, in 95 LA ARTICULACIÓN ENTRE EL DERECHO COMUNITARIO Y LOS DERECHOS NACIONALES: ALGUNAS ZONAS DE FRICCIÓN 252-53 (Madrid, Consejo General del Poder Judicial, Estudios de Derecho Judicial, 2007).

¹¹ DANIEL SARMIENTO RAMIREZ-ESCUDERO, PODER JUDICIAL E INTEGRACIÓN EUROPEA. LA CONSTRUCCIÓN DE UN MODELO JURISDICCIONAL PARA LA UNIÓN 159, (Cátedra Garrigues, Thomson-Civitas, Madrid, 2004).

¹² *See A.*

¹³ In this way it is pointed out by Sarmiento, *supra* note 12, at 50-51, 55, in spite of indicating the difference between the interpretation and implementation of community Law, it has no great significance. *See also* María Fraile Ortiz, *Negativa del juez nacional a plantear una cuestión prejudicial ante el Tribunal de Justicia de las*

B. THE PRELIMINARY RULING IS THE MOST IMPORTANT REGULATED MECHANISM OF DIALOG AMONGST JUDGES

The Spanish doctrine saw an “inevitable tension between doctrines of the Court of Justice of the European Union and those of the Spanish Constitutional Court,” caused by “the fact that the European integration has not reached the point of complete fusion between European law and the national legislation.”¹⁴ For years,¹⁵ the consciousness of this tension caused the doctrine to outline the importance of the so called “dialogue among judges”¹⁶ for the formation of the European Constitutional law. There are many others that insisted on the importance of the dialog among judges in the construction, development, and strengthening of the so called “European Constitutional Law.” The concept of the dialogue among courts has transcended the doctrine and reached the judgments of the courts. The Declaration 1/2004¹⁷ of the Spanish Constitutional Court, for instance, mentions this dialogue between the Constitutional Courts and the Court of Justice of European Union. This judicial dialogue includes not only the regulated dialogue (the dialogue which derives from procedural rules or international obligations that diminish the freedom of national judges who are forced to dialogue with the supranational judge), but also the unregulated dialogue, which is “free, frantic and unbridled.”¹⁸ This dialogue takes place horizontally as well as vertically. So, in the European Union, the most important mechanism of regulated dialogue is the preliminary ruling.

Comunidades Europeas, 7 REVISTA ESPAÑOLA DE DERECHO EUROPEO 433, 441-43, 458-59 (2003) (pointing out the relative character of the difference).

¹⁴ RICARCO ALONSO GARCÍA, *EL JUEZ ESPAÑOL Y EL DERECHO COMUNITARIO* 115, 118 (Valencia, Tirant lo Blanch, 2003).

¹⁵ In the Anglo-Saxon context, see Alec Stone Sweet, *Constitutional dialogues in the European Community*, in *THE EUROPEAN COURT AND NATIONAL COURTS, DOCTRINE AND JURISPRUDENCE: LEGAL CHANGE IN ITS SOCIAL CONTEXT* 303, 325 (A. M. Slaughter et al. eds. 1998). Among us, Gil Carlos Rodríguez Iglesias & José 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*, in 2 REVISTA DE DERECHO COMUNITARIO EUROPEO 239 (1997). For current further reading about this matter, we must mention: Anthony Arnall, *THE EUROPEAN UNION AND ITS COURT OF JUSTICE* (2nd ed., 2006); Ginevra Cerrina Feroni, *Karlsruhe, Lussemburgo, Strasburgo: la "Interpretationsverbund" dei diritti fondamentali ancora lontana*, in *CORTI NAZIONALI E CORTI EUROPEE* 191 (Napoli, Edizioni Scientifiche Italiane, 2006); Gianmario Demuro, *I rapporti fra Corte di Giustizia delle Comunità Europee e Corte Europea dei Diritti dell'Uomo*, in *LA CORTE COSTITUZIONALE E LE CORTI D'EUROPA* 39 (Torino, Giappichelli, 2003); Santiago Ripol Carulla, (Dir.) & Juan Ignacio Uguartemendía Uceizabarrena (Coord.), *ESPAÑA ANTE LOS TRIBUNALES INTERNACIONALES EUROPEOS. CUESTIONES DE POLÍTICA JUDICIAL*, OÑATI (IVAP 2008); Alejandro Saiz Arnaiz, *El Tribunal de Justicia, los Tribunales Constitucionales y la tutela de los derechos fundamentales en la Unión Europea: entre el (potencial) conflicto y la (deseable) armonización. De los principios no escritos al catálogo constitucional, de la autoridad judicial a la normativa*, in *CONSTITUCIÓN EUROPEA Y CONSTITUCIONES NACIONALES* 531 (Valencia, Tirant lo Blanch, 2005); Gustavo Zagrebelsky, *DIRITTI E COSTITUZIONE NELL'UNIONE EUROPEA* (Roma-Bari, 2003).

¹⁶ See Giuseppe de Vergottini, *MÁS ALLÁ DEL DIÁLOGO ENTRE TRIBUNALES* 22 (Civitas, Madrid, 2010).

¹⁷ S.T.C. 1/2004, Jan. 14.

¹⁸ Professor Laurence Burgorgue-Larsen, Professor of Public Law in La Sorbonne, in her Communication to the VIII Congress of Constitutional Lawyers of Spain (Feb. 4-5, 2010). The European constitutional law has a complex structure in which community Law and internal origin Law, and even the legal system of the Human Right European Convention, are imbricated. Professor Burgorgue-Larsen also suggests integrating discrepancy as a dialogue method. The dialogue leads, bears the agreement and opposition, contraction or discord and agreement, concord and approval. In this context, the judgments of the German Federal Constitutional Court traditionally contemplated, as resisting European integration must be considered as another form of dialogue.

II. PRELIMINARY RULING AND SPANISH CONSTITUTIONAL COURT

This Article does not wish to revise the traditional way in which the relationship between the Law of the European Union and the national law is presented. The rules of the relationship between the European Union Law and the national law are that of the European Union Law. That is, the European Union Law has the primacy and the direct effect of the rules. In the cases in which both orders overlap, the national judge, as well as the European Union Law judge who supervises the application of this legal system, may present a preliminary ruling before the Court of Justice of the European Union rules on the issue.

Having noted this, and coming back to the subject of this Article, the convenience or the obligation of the Spanish Constitutional Court to present preliminary ruling, this Article examines whether:

- a. The Spanish Constitutional Court can present their preliminary ruling before the CJEU;¹⁹ and
- b. In the case that the answer to a) is affirmative, it must then be defined what is the appropriate way to present the preliminary ruling.²⁰

B. WHETHER THE SPANISH CONSTITUTIONAL COURT CAN PRESENT THEIR PRELIMINARY RULING BEFORE THE CJEU.

Up to now, the Spanish Constitutional Court answered with a negative answer to the first referred question. The Court based its answer on a particular conception of the European Union Law, its relationship with the so called “*bloc constitutionnel*,” and its relationship with the Constitutional Court.²¹ This could be called a relationship of separation. This Article will study the cases in which, up to now, the Court of Justice has been demanded by the parties to present preliminary ruling, and cases that have been solved by a decision.

1. STC 28/1991, OF FEBRUARY 14.

In the case solved by the STC 28/1991,²² the appellant raised what could be called a community constitutionality appeal. A community constitutionality appeal refers to the way of adducing that, a breach of a Community Law rule is, indirectly, unconstitutional because it violates the constitutional principle or principles in which the incorporation of Community Law to Spanish Law is based, particularly on Article 93 of the Spanish Constitution.²³ This Article later discusses the Italian doctrine, which also adopted a specific terminology to name those

¹⁹ See *infra* notes 24-109 and accompanying text.

²⁰ See *infra* notes 110-44 and accompanying text.

²¹ Antonio Torres del Moral, *El Tribunal Constitucional español en negativo: cuestiones disputadas, inéditas, irresueltas y de lege ferenda*, in LA CIENCIA DEL DERECHO PROCESAL CONSTITUCIONAL. ESTUDIOS EN HOMENAJE A HÉCTOR FIX-ZAMUDIO EN SUS CINCUENTA AÑOS COMO INVESTIGADOR DEL DERECHO, T. II, TRIBUNALES CONSTITUCIONALES Y DEMOCRACIA 595 (Eduardo MacGreggor Ferrer & Arturo Zaldivar Lelo de Larrea eds., 2008). The treatment of European Law by the Constitutional Court is one of the most challenging and open questions. *Id.*

²² S.T.C. 28/1991, Feb. 14.

²³ C.E. Art. 93.

appeals of constitutionality that violate Article 117 of the Italian Constitution,²⁴ by which the compliance of the legislative activity to Community Law is established.

The Basque Parliament brought the appeal and argued against two principles which were added by the Organic Law 1/1987, April 2²⁵ to the Organic Law 5/1985, June 19, on the General Electoral System (“LOREG”),²⁶ in order to regulate the elections to the European Parliament. The first principle, Article 211.2 (d) LOREG,²⁷ concerns the capacity of membership of the European Parliament as incompatible with that of membership of the Legislative Assembly in an Autonomous Community. Pursuant to the second, Article 214,²⁸ the circumscription for the election of European Parliament Deputies was the national territory.

The appellant based the unconstitutionality of the two principles in its contradiction with Article 5²⁹ of the Act regarding the election of representatives in the European Parliament by direct universal suffrage, adopted by the European Council on September 20, 1976.³⁰ In the opinion of the Basque Parliament, such contradiction would determine the violation of Articles 93,³¹ 96.1,³² and 9.1³³ of the Spanish Constitution, as well as its Article 14.³⁴ Regarding the appeal of Article 214 LOREG, the appellant just quoted the declarations made during the

²⁴ Art. 117 Costituzione (It.).

²⁵ LEY ORGÁNICA, 1/1987 LOREG.

²⁶ LEY ORGÁNICA, 5/1985 LOREG.

²⁷ LEY ORGÁNICA, Art. 211.2 (d) LOREG.

²⁸ LEY ORGÁNICA, Art. 214 LOREG.

²⁹ LEY ORGÁNICA, Art. 5 LOREG.

³⁰ Decision 76/787/ECSC, EEC, Euratom, of the representatives of the Member States meeting in the council relating to the Act concerning the election of the representatives of the Assembly by direct universal suffrage. It was precisely stated that whereas Article 6(1) of the Decision enumerated the incompatibilities Community Law established, Article 6(2) authorized the Member State to fix applicable incompatibilities nationally until a standard electoral system was effective (Article 7.2). However, the power to establish the causes of incompatibility would be limited by Article 5, which particularly allowed a dual mandate. Therefore, Community Law authorized the dual mandate by a provision that national law could not repeal because the Decisions are not dispositive law, as it could be clearly inferred under the provisions of Article 189 of the Treaty establishing the EEC and the concordant ECSC and Euratom Treaties. As it was not clearly stated in Article 5, it was legal to distinguish between the dual mandate in the State Parliament and the one in the local Parliaments. The opposite would be to establish an unlawful inequality, that is to say, discrimination, basically relevant and obviously unreasonable, that would consequently lead to an interpretation of the mentioned Article 5 that is incompatible to the principles under Article 14 of the Constitution and is, therefore, banned by Article 9.1, among others.

³¹ C.E. Art. 93.

³² C.E. Art. 96.1.

³³ C.E. Art. 9.1.

³⁴ C.E. Art. 214. The appeal supported that Article 93 CE entrusted the Government and the courts with the guarantee of the performance of the Treaty of Accession to the European Community and of the rules deriving from it. On the one side, Article 96.1 established the inclusion into the internal legal system of the external conventional rules which the public powers would be subject to pursuant to Article 9.1. On the other side, the Treaty of Accession to the Community in Article 2 of the Act relating to the conditions of such accession envisaged the reception of the primary Community Law, among which rules was the aforementioned Article 5 of Decision 76/787 of the Council. Being a mandatory provision, it was not legitimate for the legislature to give ruling to the incompatibility regime which contradicted this Article 5. As Article 211.2 (d) of the introduced Organic Law on the General Electoral System expressly changed the mentioned ruling, it appeared as invalid by unconstitutionality infringement of Arts. 93, 96.1, and 9.1 CE.

drafting of the appealed law by the spokesmen of the three Parliamentary Groups in the Autonomous Assembly.³⁵

³⁵ The facts at issue of the judgment reproduced the fragments of the interventions in the mentioned debate by the Spokesmen of the Parliamentary groups *Eusko Alkartasuna*, *Euskadiko Ezkerra* and *Nacionalistas Vascos* in the following literal terms:

First, the right to self-government of the nationalities and regions, recognized and guaranteed under the Article, which is expressed in the same manner as the list of fundamental rights and civil liberties –that is to say, it constitutes such right as previous to the Constitution itself and as an assumption of its own legitimacy–, should also appear in the organization of the electorate as a sign and guarantee of political pluralism, defined under Article 1.1 EC, as a supreme value of the system.

Having stated as a starting point that the right to self-government is an assumption of the State's legitimacy, the following should be pointed out: That the starting point is particularly important within the scope of Article 2 of the Constitution, in the cases of the Basque Country, Catalonia, Galicia, which are the direct target of the expression “nationality” and, above all, the first two cases. We should not forget, when reading and interpreting Article 2, the public legal debate it caused. In this sense, we understand that, if the nationalities and regions express their political, cultural, and social pluralism, and they execute part of the State's political power, it should be obvious that the provinces –and, in some cases, the Autonomous Communities– are outstanding territorial entities for the purposes of the organization of the electorate. Likewise, the Autonomous Communities should also be significant for the purposes of the organization of the electorate for the elections to the European Parliament.

There are two aspects to bear in mind for the purposes of supporting the unconstitutionality thesis of the exclusive voting district. On the one hand, as a consequence of the entry in the European Community, the political power of the Autonomous Communities remains affected –it could also be said diminished–; and this would not lead to an increase in power of the State's general bodies. On the other hand, as the European Community lacks its own executive body, the Autonomous Communities, pursuant to their Statutes of Autonomy, are important political and administrative figures for the European Community.

Finally, in this line of arguments, we should remark the existence of repeated recommendations made by the European Parliament, so that the electorate of each Member State is organized within the scope of a plurality of districts. With this approach, no opposing argument can be made. The so-called State's legal personality has sometimes been put forward, because in the European Parliament it is not the States but the citizens which are represented, and proof of that is the fact that in the European Parliament the groups or the members are organized according to ideological affinities, and not to their belonging to a certain State. What is expected, all in all, is that such political pluralism of the Spanish state could also be reflected and showed in the organization of the electorate.

Besides, the single electoral district on its own does not guarantee proportionality. First, because the battle of strict proportionality is definitively lost since the moment in which those recommendations exist and since there is a working group that supports the configuration of a plurality of voting districts in every State. However, we should also bear in mind that, if proportionality is an important value, it can be established by means of grouping Autonomous Communities, for instance, with minimums in population, although always following the Parliament recommendations and the working lines of the groups developing the future European electoral bill. In this regard, it means to respect the frequently mentioned communities that are distinct enough, whether by geographic reasons –such as, for instance, the islands–, by their history or by ethno-linguistic reasons. In this regard, it should be mentioned that the difference between nationalities and regions under Article 2 may and must entail a special treatment of the historic nationalities. Because of the preceding reasons, we understand that the exclusive voting district is not in accordance with the Constitution.

PLENARY SESSION IN THE PARLIAMENT OF THE BASQUE COUNTRY (Apr. 30, 1987) (Intervention of the Spokesman of the Parliamentary group *Eusko Alkartasuna*).

We particularly believe that the chosen political option does not correspond to the constitutional and administrative legal framework defined in the Constitution under Article 2, Title VIII, in the correspondent Statute of Autonomy, and concretely in ours, the Basque Statute of Autonomy. This Parliament of the Basque Country, and from this point of view I believe we are politically and legally legitimated to establish this application for judicial review of proposed legislation, so that, although the Constitution does not contain an explicit order of how the voting districts should be, it does seem that the adopted is not perfectly

The Basque Parliament requested the Spanish Constitutional Court declare the appealed principles unconstitutional. It also requested, under Article 177 of the EEC Treaty³⁶ and the concordant Articles in the ECSC and Euratom Treaties, that the Spanish Constitutional Court address the European Court of Justice to interpret Article 5 of the European Electoral Act³⁷ and declare whether the capacities of membership in the European Parliament and membership in the Basque Parliament were compatible.

The Court dismissed this latter appeal.³⁸ The Court explained that Article 211.2 (d) LOREG did not violate the Constitution (Articles 9.1, 14, 93 and 96.1), but those principles of Article 5 of the European Electoral Act. Therefore, the Court stated that the contrast brought before the Constitutional Court between those Constitutional provisions and the legally contested

compatible with or does not match the design of the model Autonomous State reflected on the Constitution and the Statutes of Autonomy.

Id.

[W]e understand that the political autonomy of the nationalities and regions is an organizing principle of this State. We believe it should not be avoided in such a moment as this when the incorporation of a supraplural scope takes place. We believe that the intention of the constituent was always to favor the political integration of the Autonomous Communities by means of its presence in the different forums and institutions in which influential decisions are taken and the exclusive voting district is obviously not a mere instrument to answer this organizing principle.

PLENARY SESSION IN THE PARLIAMENT OF THE BASQUE COUNTRY (Apr. 30, 1987) (Intervention of the Spokesman of the Basque Nationalist Parliamentary group).

In short, in those fragments the following was stated: that the right to self-government of the nationalities and regions ... should also be present in the organization of the electorate, particularly in the cases of the Basque Country, Catalonia and Galicia; that, as a consequence of the entry in the European Community, the political power of the Autonomous Communities was diminished, and that the Autonomous Communities, according to their Statutes of Autonomy, are important political and administrative figures for the European Community; the existence of repeated recommendations made by the European Parliament, in the sense that the electorate of each Member State is organized within the scope of a plurality of districts. Invalidity of the argument of the State's international legal personality "because in the European Parliament it is not the States but the citizens which are represented;" invalidity of the argument of proportionality because this could be established "by means" of grouping Autonomous Communities, for instance, with minimums of population, but always following the recommendations of the Parliament itself. PLENARY SESSION IN THE PARLIAMENT OF THE BASQUE COUNTRY (Apr. 30, 1987) (Intervention of the Spokesman of the Parliamentary group Eusko Alkartasuna); that the chosen political option does not correspond to the constitutional and administrative legal framework defined in the Constitution under Article 2, Title VIII, in the correspondent Statutes of Autonomy, and concretely in ours, the Basque Statute of Autonomy. *Id.*; that it was contrary to the self-government of the nationalities and regions, which is an organizing principle of the State.

Id.

³⁶ EEC Treaty art. 177 (now art. 234 EC)

³⁷ S.T.C. 28/1991, Feb. 14,

³⁸ S.T.C. 28/1991, Feb. 14, FJ 7.

[W]e must reject such cause of claim by simply thinking that the *ratio decidendi* of our dismissing order does not keep any relation to the European community law that the appealing parliamentary body invoked in order for us to judge the constitutional validity of the contested legal provision. We have not and should not mentioned anything in this constitutional process about the settlement of Article 211.2 d) LOREG pursuant to Article 5 of the European Electoral Act because the problem of this settlement is not constitutional. As the Treasury Counsel notices, European Community Law has its own guarantee bodies, among which this Constitutional Treaty is not present. Therefore, no interpreting application about the scope of the mentioned Community Law should be addressed to the CJEU, because Article 177 of the EEC Treaty is only effective in the processes where Community Law should be enforced to guarantee a standard interpretation.

Id. FJ stands for *Fundamento Jurídico*, which could be translated as "pleas of law". A Spanish Constitutional Court Judgment is divided in three parts: pleas of fact, pleas of law, and operative part of judgment.

rule would only occur immediately or indirectly. The opposition to the Constitution by the electoral provision lies exclusively on the intended violation of the Community rule, which would become a type of constitutional proceeding for validating such contested rule. Nevertheless, continues the Judgment, it is precisely this premise on which the appellant bases its argument. Article 5 of the European Electoral Act as a Constitutional canon of Article 211.2 (d) LOREG should first and foremost be accepted in order to execute the contrast brought up in the process,

because only if it is admitted that Article 5 of the European Electoral Act is a rule which composes the constitutional corpus applicable to the case and that, as such, has the power to determine directly or indirectly the validity of the contested electoral rule, this Court will be able to analyze the denounced contradiction between the European electoral rule and the national electoral rule.³⁹

The Court then dismissed that premise, and argued that neither Article 93 CE, nor 96.1 CE, invoked by the appellant, turn the European Electoral Act into a constitutionality canon. The Court explained that the regulatory content of Article 93 stating that, pursuant to it, from the date of its accession, the Reign of Spain is linked to European Union Law, primary and secondary, which, as the Court of Justice of the European Communities wording states, constitutes a real legal system integrated in the Member States' legal system, and imposes itself to its judicial bodies.⁴⁰

However, this does not dictate that Article 93 CE turns Community Law into a constitutionality canon. In this sense, the Judgment continues as follows: “[h]owever, the aforementioned link does not imply that, pursuant to Article 93, Community Law rules have gained constitutional status or strength, nor it implies that the casual violation of those rules by a Spanish provision involves an infringement of the mentioned Article 93 CE.”⁴¹ Therefore, the Court states that Article 93 CE

is not affected by the casual contradiction between the national law –State and regional- and Community law, a question which is out of the scope and content of this rule. Nor even the final digression of this constitutional provision could support such charge...because...this provision simply determines the State bodies to which the guarantee of the performance of European Union law is entrusted, regarding the type of activity that requires the execution of Community decisions.⁴²

After denying that Article 93 CE could be affected, not even indirectly by Article 211.2 (d) LOREG, the Court proceeded to reject the charge of Article 96.1 CE. The Court denied that Article 96.1 CE turns Community Law into a constitutionality canon.

³⁹ *Id.* at FJ 4.

⁴⁰ Case 6/64, *Costa v. Enel*, 1964 E.C.R. 585.

⁴¹ S.T.C. 28/1991, Feb. 14, FJ 4. The judgement proceeds:

This provision clearly constitutes the last basis of such connection because its acceptance –established by the Treaty of Accession, which is its immediate basis- expresses state sovereignty. However, this does not allow to forget that the constitutional provision, of procedural organic nature, just regulates the way of executing a certain type of international treaties, so that it determines that only those treaties may be compared to Article 93 CE in a constitutionality process, because such supreme rule is their formal valid source.

Id.
⁴² *Id.*

No international treaty receives from Article 96.1 CE more than the status of rule which, invested with the passive strength the provision gives to it, is part of the internal legal system; therefore, the assumed contradiction in treaties by laws or other subsequent mandatory provisions is not a matter that affects their constitutionality and should not be decided by the Constitutional Court (STC 49/1988, FJ 14, *in fine*), but when it is exclusively a problem of selecting the applicable Law to the particular case, its resolution corresponds to the ordinary judicial bodies. In short, the casual violation of the European Union law by later state or regional laws and rules does not turn into a constitutional case what is a mere conflict of *subconstitutional rules* to be solved within the scope of ordinary legislation.⁴³

In its following line of argument, the Court did not reveal the content of Article 5 of the European Electoral Act but an inference can be made that it deals with the impossibility of accumulating the European Act with internal state acts. However, what is decisive for the Court is that the contradiction between the European Electoral Act and the Organic Law on the General Electoral System is not a constitutional problem:

the assumed contradiction –which is the center of this appeal and supports the current cause of action- between Article 211.2 [(d) of the Organic Law on the General Electoral System and Article 5 of the European Electoral Act, lacks constitutional relevance, even though it really occurred, because the denounced antinomy does not attempt, directly or indirectly, the provisions on Article 93, 96.1 and 14 CE.⁴⁴

Then in FJ 6, the Court clearly states the dialogue with the Court of Justice to the ordinary legislation:

Naturally, the reached conclusion does not prevent the use of lawfully configured legal defense media -which effectiveness is guaranteed upon Article 24.1 EC- in order for the candidates affected by the incompatibility laid down in the present appealed provision to rise before such antinomy. The judicial bodies will then comment, in the corresponding processes, about the repeated contradiction as a previous step to the enforcement or non-enforcement of Article 211.2 [(d) of the Organic Law on the General Electoral System, to which purpose such bodies are authorized (or forced, as the case may be) to request the European Court of Justice, under Article 177 of the CEE Treaty and concordant provisions of other constituent Treaties, an interpretive declaration about the scope of Article 5 of the European Electoral Act.⁴⁵

To clarify the alleged contradictory nature of the Spanish law regarding Community law with the launch of this appeal, a member elected in the Autonomous Community and the European Parliament, to whom the Spanish Law is enforced by the electoral administration, should appeal the act before the ordinary legislature and request the approach of a preliminary ruling before the Court of Justice.

Finally, based on the Court's understanding of the relationship between the Constitution and Community Law, the Court dismisses the approach of preliminary ruling.

[W]e are obliged to dismiss such cause of action by simply thinking that the reason of our rejected announcement bears no relation with the European community rule the appealing parliamentary body invoked in order for us to judge the constitutional validity of the appealed legal provision. We have not mentioned and must not declare in this

⁴³ *Id.* At FJ 5.

⁴⁴ *Id.*

⁴⁵ *Id.* at FJ 6.

constitutional process the settlement of Article 211.2 (d) LOREG under Article 5 of the European Electoral Act, because the problem of this settlement is not constitutional. As the Treasury Counsel foresees, the European Community Law has its own guarantee bodies, which this Constitutional Court is not among. Therefore, no application of interpreting the scope of the aforementioned community rule must be addressed to the Court of Justice, because Article 177 of the EEC Treaty only operates in the processes to which Community Law should be enforced in order to guarantee a standard interpretation of the mentioned Law.⁴⁶

The Judgment, in short, aims to design a clear distinction, relation, and separation between Constitution and Community Law. Nevertheless, we should remark that Community Law is somehow enforced. Indeed, when analyzing the appeal of Article 214 LOREG, the Court dismissed the cause of action based on the lack of argument in the appeal. However, the Court adds some statements in which it comments about the content of Community Law:

For that reason, although nothing would at first prevent the state legislator, making use of his freedom of appraisal, from stipulating the territorial organization of the electoral body in the European elections in accordance with the autonomous design -whereas the current unconstitutional autonomy of the European Community Member States (Article 7 of the European Electoral Act) persist- we should reiterate that such would not be a constitutionally obliged measure, but the result of a politic decision which opportunity and decision must not be judged by this Court.⁴⁷

To sum up, the Spanish Constitutional Court dismissed what we could call a community constitutionality appeal. A breach of a Community Law rule is not, indirectly, unconstitutional on the grounds it violates the Constitution provisions under which the incorporation of Community Law to Spanish Law takes place.

2. STC 372/1993, OF FEBRUARY 14.

STC 372/1993⁴⁸ was an appeal for legal protection directed both to a Judgment of the Criminal Court at the Audiencia Nacional in Madrid which condemned the appellant as the author of an exchange control crime,⁴⁹ and to another Judgment setting aside a Judgment pronounced by the Second Court of the Supreme Court which confirmed such judgment⁵⁰ as far

⁴⁶ *Id.* at FJ 7.

⁴⁷ *Id.* at FJ 8.

⁴⁸ S.T.C. 373/1993, Feb. 14.

⁴⁹ The *Sala de lo Penal* (Chamber of Criminal Matters) of the Audiencia Nacional found the applicant guilty of a monetary crime, punishing him with two months of imprisonment, a fine of 14,000,000 pesetas (\$115,079) and an order to pay a quarter of the costs. The Court considered proven that the applicant had given someone also sentenced in the case, by intermediation of a third person, the amount of 26,750,000 pesetas (\$219,880) to be transferred to France. This last person was discovered and arrested at the border when attempting to cross the border on a motor vehicle carrying the money in a hidden space of the car.

⁵⁰ Having made the report for the hearing of such appeal, after the coming into effect of Real Decreto 1816/1991, of December 20, on economic external transactions, the appellant added, during the hearing, another ground consisting of the denial of the offense by which he had been sentenced, after the repeal of Article 6 of Organic Law 10/1983 by the mentioned Real Decreto.

The Supreme Court did not set aside the judgement regarding the sentence given to the appellant, because, on the one hand, the trial judge in the Court did not execute examining functions; on the other hand, there was enough charge evidence for entering a judgment; and, finally, the mentioned Real Decreto 1816/1991 had not liberalized the offenses contained under Article 6 of Organic Law 3/1983 and had not created new crime figures resulting from its

as the applicant was concerned. The submissions, on the other hand, were not equal. In some of the submissions, such as the violation of fundamental laws regarding the presumption of innocence and the impartiality of the judge, the appeal was brought against both decisions. Others, such as the violation of the rights of freedom, equality and the principle of legality, could only be put down to the Judgment of the Supreme Court because it could only have been put forward before it and upon hearing that the entry into force of Real Decreto 1816/1991,⁵¹ on economic external transactions, had unpunished the judged offence. As for the hearing of the appeals brought against the Judgment of the Supreme Court, which are the point of interest of this Article, it should be specified that at the perpetration of the acts, as well as during its procedure, the Judgment of resort, lodging and execution of the appeal to the Supreme Court, together with Organic Law 10/1983,⁵² on the exchange control legal system, Real Decreto 2402/1980,⁵³ was in force and completed the criminal provisions contained in the aforementioned Law as set of regulations on the subject. So that the Judgment of Resort sentenced the appellant as the author of fraud, as provided for and sanctioned in Arts. 6 (A) 1 and 7.1.2 of Organic Law 10/1983.⁵⁴ The Court found that the appellant violated the exchange control legal system by trying to export an amount of cash tender above 2.000.000 Pesetas (\$16,466.08) without the mandatory previous authorization under the provisions of the aforementioned Real Decreto.

Once the appeal to the Supreme Court against the Conviction Judgment was brought and entered, the executive issued the Real Decreto 1816/1991,⁵⁵ whose second final Provision repealed the Real Decreto 2402/1980 and executed the liberalization of external transactions and transfers, as provided for in Directive 88/361/EEC,⁵⁶ which laid down a transitional term for Spain applicable to certain types of transactions.⁵⁷ The Article expired on December 31, 1992, so the Government decided to bring it forward before then.

Based on this new economic external transactions rule, the appellant introduced a new ground in the hearing held on February 19, 1992. The new argument was that the offences regulated under Art. 6 of Ley Orgánica 10/1983⁵⁸ had been abolished by Real Decreto 1816/1991.⁵⁹ So, the conduct in which the Sentence was based had become unpunished. However, the Second Chamber of the Supreme Court confirmed the decision made by the Audiencia Nacional and dismissed this ground.

The request for legal protection addressed to the Constitutional Court considered that the previous courts violated the principles of legality,⁶⁰ freedom,⁶¹ and equality⁶² as far as the mentioned Real Decreto, which created again an offense type, which elements were not

regulatory status. In short, the only importance of the new regulation in the present cause of action was to increase to 5,000,000 pesetas (\$41,114) the sum to which the crime type joined.

⁵¹ B.O.E. 1991, 310.

⁵² LEY ORGÁNICA, 10/1983 LOREG

⁵³ Real Decreto (R.M.) 2402/1980, Oct. 10.

⁵⁴ LEY ORGÁNICA, 10/1983 LOREG

⁵⁵ B.O.E. 1991, 310.

⁵⁶ Council Directive, 88/361/EEC, June 24, 1988.

⁵⁷ *Id.* at art. 6.

⁵⁸ LEY ORGÁNICA, 10/1983 LOREG, de 16 de agosto, por la que se modifica LA LEY, 40/1979, de 10 de diciembre, sobre régimen jurídico de control de cambio.

⁵⁹ B.O.E. 1991, 310.

⁶⁰ C.E. Art. 25.1.

⁶¹ C.E. Art. 17.

⁶² C.E. Art. 14.

envisaged in Ley Orgánica 10/1983, and which was incompatible with the Community Directive. In those circumstances the appellant requested to be granted protection and asked the Constitutional Court to submit a preliminary ruling about the compatibility of the national provision with the Directive before the Court of Justice made a ruling. The Court dismissed the appeal for legal protection and answered that there was no need to submit a preliminary ruling.

The important subject here is that the appellant, under protection from the point of view of the principle of legality, put forward the inconsistency of Real Decreto 1816/1991 with the Community Directive 88/361/EEC. To his opinion, such Community provision allowed Spain a closing date until December 31, 1992 to begin the liberalization of capital movements among Member States of the EEC. Moreover, Real Decreto 1816/1991 brought forward such liberalization when it entered into force. Consequently, any interpretation of this Real Decreto that is incompatible with the abolition of any exchange control system violates Article 25.1 CE.⁶³ Accordingly, this Court should request a preliminary ruling about the compatibility between State and Community Law before the European Court of Justice.

The Court refuses the violation of the principle of legality⁶⁴ by the contradiction between the Real Decreto in question and the Community directive. To this respect, some legal doctrine considerations are first raised in FJ 7 and then applied in FJ 8 to the concrete case. As general doctrine, the following points should be remarked: First, only Articles 14 to 29 and 30.2 CE are appropriate to decide if the actions of public authorities are constitutional or not. The Community Law is not appropriate to this purpose. Second, the rules in the Community legal system “do not represent an autonomous constitutionality canon (STC 252/1988, 132/1989, 28/1991, 64/1991 and 111/1993, among others).”⁶⁵ Third, the appeal for legal protection addressed to the Constitutional Court, has to be based in the violation of fundamental rights, not in violation of Community Law.⁶⁶ Fourth, the Community legal system has its own guarantee bodies, among which the Constitutional Court is excluded. The power to verify if an internal rule is appropriate from the point of view of Community Law is up to the Judiciary, with the collaboration of the European Court of Justice if necessary. Finally, the Constitutional Court cannot request preliminary ruling based upon Article 177 of the Treaty establishing the European Economic Community⁶⁷ before European Court of Justice because this provision is only effective in the processes in which Community Law is applied precisely to guarantee a standard interpretation of Community Law.⁶⁸

Curiously, after these sharp affirmations on the application of this doctrine to the specific case, some considerations about the compatibility between the Real Decreto and the Directive are made.⁶⁹ Indeed, FJ 8 stated that the principle of legality had not been violated for these reasons: First, because the aforementioned Real Decreto, in the moment in which the Supreme

⁶³ CE Art. 25.1.

⁶⁴ C.E. Art. 25.1.

⁶⁵ S.T.C. 372/1993, Dec. 13, FJ 4.

⁶⁶ S.T.C. 64/1991, Mar. 22.

⁶⁷ EEC Treaty Art. 177.

⁶⁸ S.T.C. 28/1991, Feb. 14.

⁶⁹ S.T.C. 372/1993, Dec. 13, FJ 4 already stated something from which the matter of compatibility with Community Law and the presentation of preliminary ruling could be inferred, so it is not unknown to the court:

From the referred actions, there is no proof that the applicant had raised to the court competent to know the appeal for the Supreme Court any community preliminary ruling about the compatibility of such Real Decreto with Community Directive 88/361/EC; however, the answer given by the Supreme Court implies a dismissal of such approach.

Id.

Court passed its decision, had moved the liberalization of the external economic transactions a year forward, while the Directive 88/361/EC did not require it until December 31, 1991. So, no contradiction between state and Community Law was possible. Since, this argument of appeal under Article 25.1 CE tried to force the Court to control the adaptation of the rules applicable to Community Law, a task that does not correspond to this Court. Therefore, neither the violation of Article 25.1 CE must be estimated nor must the preliminary rule to the European Court of Justice be requested, as the appellant claims.⁷⁰

Although the Court tries to justify its dismissal because what has been raised is not competence of the Court, it repeatedly states that the Real Decreto does not contradict community law. Community Law and internal law are then interwoven, not apart. They may be separated but it is not an easy task. This Judgment analyzes implicitly the compatibility between internal law and Community Law. It is necessary to recognize that the Constitutional Court applies Community Law even if it only does it in a similar way as it enforces and interprets ordinary law, although the highest authority in that field is the Supreme Court.

3. STC 143/1994, OF MAY 9.

STC 143/1994⁷¹ was an appeal for protection filed by the Spanish General Council of Economists Associations against the judgment given by the Supreme Court (Third Chamber, Second Division) which declared inadmissible the appeal brought by the mentioned body against Real Decreto 338/1990⁷² of March 9 and the Ministerial Order of March 14, 1990⁷³ which regulate the Tax Identification Number. More specifically, the Spanish General Council of Economists Associations brought a judicial review against the regulatory provisions that regulated the composition and use of the Tax Identification Number because the regulatory provisions violated the fundamental right to privacy established under Article 18 EC⁷⁴ and the regulatory provisions contained procedural and formal errors. The Supreme Court stated that the appeal was inadmissible because the Spanish General Council of Economists Associations lacked standing to sue, due to the fact that such appeal did not have a direct or legitimate interest in contesting the Real Decreto and the Order regulating the Tax Identification Number. The creation of such number would not at all affect the functions within the jurisdiction of the Council regarding the Economists Associations it is composed of or the functions that assisted the Associations regarding its members. Likewise, the Judgment added that the obligation imposed on the economists of such correspondent Associations to obtain a Tax Identification Number was not due to their profession or their enrolment in an association, but because the obligation was imposed on all citizens. The Judgment rejected the importance of the fact that the economists were assigned fiscal and tax matter counseling⁷⁵ because the Tax Identification Number would not extraordinarily complicate this task.

The appeal for protection argued that the contested Judgment violated the fundamental right to judicial protection,⁷⁶ the right to a process without improper delays and the right to

⁷⁰ S.T.C. 372/1993, Feb. 14, FJ 8.

⁷¹ S.T.C. 143/1994, May 9.

⁷² Real Decreto (R.D.) 338/1990, March 8.

⁷³ Orden Ministerial (O.M), March 14, 1990.

⁷⁴ Treaty Establishing the European Communities art. 18, Dec. 24, 2002, 2002 O.J. (C 325) 45.

⁷⁵ Real Decreto (R.M.) 871/77, April 26, 1977.

⁷⁶ The violation of Article 24.1 CE might be due to the fact that the action brought against the regulatory provisions of the Tax Identification Number had been dismissed, despite the fact that the Council held an unmistakable

privacy recognized under sections 1 and 4 in Article 18 EC. The rejection of the appeal allegedly violated of the fundamental rights which form part of the general rules of European Community Law, which are legal security, honor, privacy, effective judicial protection of the Courts and other European Community Institutions according to the body of law of the European Court of Justice. It was also stated that the Judgment of the Court infringed the right to process without improper delays.⁷⁷ The lodged Judgment also violated the fundamental rights of privacy and human dignity. The appeal for protection concluded requesting the annulment of the contested Judgment and the lodged general provisions. Finally two preliminary rulings before the European Court of Justice were submitted. Once the Constitutional Court admitted the appeal, the further statements of the appellant under protection put forward the violation of Articles 30, 34, 59 and 67 of the Treaty establishing the European Community⁷⁸ on the freedom to provide movements of goods and capitals services and referred to several judgments to support the claim while requesting formulation of the ruling to the Court of Justice. The Court denied protection and denied the request of formulation of preliminary ruling.⁷⁹

Due to its difficulty, it may be suitable to specify the object of the appeal for protection. On the one hand, the claim denounced the violation of a series of fundamental rights directly attributable to the set of regulations of the Tax Identification Number.⁸⁰ On the other hand, Article 24.1 CE⁸¹ was also referred to, as it was violated in the later difficulties of the opened process in order to appeal the mentioned regulations before administrative court rules.

The Constitutional Court first rejected the claim addressed against the Supreme Court.⁸² The Court began by reminding the nature of legal configuration which the right invoked by the appellants possesses, and continued by stating that the Supreme Court had reasonably enforced and interpreted Article 28.1.b of LJCA.⁸³

Then the claim regarding the right to privacy was argued. Indeed, the offender held that the contested regulation violated the right to privacy.⁸⁴ The Court briefly put forward that it

standing to sue. After reasoning about the meaning and function of the requirement of legal capacity, the lawsuit stated that the General Council of Economists Associations is one of the most suitable bodies to sense that the regulatory provisions of the Tax Identification Number violate the rights of privacy and human dignity regarding the rights and obligations of the economists and the functions attributed to the Council by its Statutes of Autonomy (approved by the Ministerial Order of June 24, 1971). By denying the interest to the Council, the contested judgment would have summarized the interests of the comprising people and the professionals, who knew and denounced the effects deriving from the challenged law. Moreover, they were obliged to provide information to the Administration through the instrument which legality was questioned, becoming, therefore, accomplices of a serious transfer of fundamental rights. The constitutional legal practice would then establish an extensive interpretative criterion of the requirement of legal capacity, pursuant to Article 24.1 CE, which would oblige to a generous interpretation of Article 28.1 of the Ley de Jurisdicción Contencioso Administrativa (Administrative Appeal Courts Law) ("LJCA"). Both provisions were obviously violated by the contested judgment, which would break the recognition of the legal capacity executed in favor of the Council by contesting other similar provisions.

⁷⁷ Since it dealt with a previous allegation issued to the contrary in the answer claim form, with violation of the principles that rule the administrative process, breaching the terms established for its admission (Articles 71-73 LJCA), which would moreover prevent other subjects from entering the proceeding as assistants in the time allowed.

⁷⁸ Treaty Establishing the European Community, 2006 O.J. (C 321) 37.

⁷⁹ S.T.C. 143/1994, May 9, FJ 8.

⁸⁰ Real Decreto (R.M.) 338/1990, of March 9; Orden Ministerial (O.M.), March 14, 1990 (which developed the previous one).

⁸¹ C.E. Art. 24.1.

⁸² S.T.C. 143/1994, May 9, FFJJ 2-4.

⁸³ LEY DE LA JURISDICCION CONTENCIOSO-ADMINISTRATIVA Art. 28.1b LJCA.

⁸⁴ C.E. Art. 18.4.

referred to the arguments in the claim before the Supreme Court and reiterated only the so-called violation of Article 18.4 CE by the alleged lack of guarantees about the use of the information obtained through the operations identified with the Tax Identification Number.

In a further paragraph, the Court dismissed the violation of Article 18 CE, interpreted in the light of the international treaties ratified by Spain, as Article 10.2 CE demands.⁸⁵

At the end, the Court deals with a central question to our argument:

The actor's appeal in the sense that preliminary ruling should be requested before the European Court of Justice, as the contested decisions violate 'the principles of Community Law of legal security, honor, privacy, effective judicial protection by the Courts, etc.' is to be rejected. As there are no specific rules in such legal system which, in an autonomous way, could become interpretative instruments of the Constitution, regarding the fundamental rights invoked in the present appeal, under Article 10.2 EC, the doctrine is entirely effective and already established in the precedent judgements of the Court, which rejects the safeguard of respect for Community Law as part of its competence. Because there are already institutional and procedures suitable for this purpose in the mentioned legal system. Therefore, the claim of the party is evidently inadmissible.⁸⁶

Actually, with this brief statement the Court gives two different arguments. First, that there is no international treaty that is part of Community Law that should be used to interpret Article 18 of the Spanish Constitution. Second, the Court reinforces its doctrine according to which the Court is not competent to enforce Community Law. Community Law has its specific interpretation and enforcement institutions. But it seems that the *ratio decidendi*, as the Judgment states, is the first argument which would not contribute nowadays if a similar appeal was argued before the Spanish Court. If this appeal were given on the present date (March 2011), the Spanish Constitutional Court could not have argued about the absence of Community Law. Indeed, nowadays the Charter of Fundamental Rights of December 7, 2000, adapted on December 12, 2009 in Strasbourg, has to be enforced in our legal system because of two reasons. First, because it is established in Ley Orgánica 1/2008,⁸⁷ by imposing that our fundamental rights should be interpreted according to the Charter. Second, because Article 6 of TEU,⁸⁸ in the version from the Treaty of Lisbon, already effective since December 1, 2009, establishes that "The Union recognizes the rights, liberties and principles set out in the Charter of Fundamental Rights of 7 December 2000, as adapted at Strasbourg, on 12 December 2007 in Strasbourg, which shall have the same legal value as the Treaties."⁸⁹

4. STC 265/1994, OF OCTOBER 3.

Two appeals for protection were brought against a decision made by the Second Chamber of the Supreme Court, which confirmed on appeal another judgment of the First Division of the Criminal Chamber of the Audiencia Nacional. This judgment found one of the appellants guilty of a continuing offense of flight of capital, which carried with it a sentence of six years and one day of major imprisonment, a fine of 500,000,000 pesetas (\$4,109,800) and the payment of

⁸⁵ S.T.C. 143/1994, May 9, FFJJ 5-7.

⁸⁶ S.T.C. 28/1991, Feb. 14, among others.

⁸⁷ LEY ORGÁNICA, 1/2008 LOREG.

⁸⁸ Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Communities art. 6, Dec. 13, 2007, 2007 O.J. (C 306) 1.

⁸⁹ TEU art. 6.

1/12th of the costs. The other appellant, an offender of the same crime, was given a sentence of six years and one day of major imprisonment, a fine of 90,000,000 pesetas (\$739,932) and the same order to pay the costs. In that judgment, two other people were also sentenced as offenders of the same crime to six years and one day of major imprisonment, a fine of 217,000,000 Pesetas (\$1,783,724) and the same custodial sentence and fine of 104,000,000 Pesetas (\$854,764), apart from the same order to pay the costs. All the offenders appealed to the Supreme Court, but the corresponding appeal was rejected and two of them appealed for protection before the Constitutional Court.

The appellants for protection considered that the challenged judgments had violated their rights to effective judicial protection,⁹⁰ to presumption of innocence⁹¹ and to the principle of legality in criminal law matters recognized under Article 24.1, Article 24.2, and Article 25.1 CE respectively. Regarding the so-called violation of the right to crime legality⁹² it is based upon two arguments, among which the second should be pointed out.⁹³

⁹⁰ 6.A.1

⁹¹ Regarding the so-called violation of the right to presumption of innocence (Article 24.2 CE), it was put forward that the conviction was not based upon a probative activity which could be considered enough for the purposes of overcoming such presumption. The self-incriminatory statement given by the appellants during the police report drawn up on the day they were arrested was the only one taken into account. It was not only drawn up under unusual circumstances but it had not been reproduced in the hearing of evidence in such conditions as to allow its contradiction. This was due to the failure to appear of the agents who received it. Apart from this, it was rectified by its authors and other witnesses at the process supported by plenty of defence documentary evidence.

⁹² C.E. Art. 25.1.

⁹³ The other three procedural means should also be mentioned to a better understanding of the appeal. These were as follows:

a) The first of these procedural means to attack the contested judgement is developed from these considerations: 1) crime types contained in Article 6 of LCC corresponded to the "open-ended criminal laws," that is to say, those rules which content needs a complement situated in another legal provision of the same or lower rank; 2) therefore, by requesting the performance of such types, which "infringe the control exchange legal system" established by law, it was obvious that any modification of the system would have immediate consequences over the typical or atypical character of the action; 3) by virtue of the Real Decreto 1816/1991, the requirement of the "previous administrative authorization" disappeared, leaving all those offences, where the assumption was precisely this requirement, senseless; 4) however, the mentioned Real Decreto introduced *ex novo* certain estimations not contemplated under LCC until that time by establishing, under Article 4, an exception to the total liberalization of the transfer with other countries which was contrary to the requirements of the criminal principle of legality.

In the opinion of the appellants, Real Decreto 1816/1991 not only established that a behaviour that was previously punishable remained like that, but it created a new *ex novo* crime, because its elements could not be considered as coincident with the ones pursuant to Article 6.A.1 of LCC. This was because of the following reasons: 1) the minimum account in this last provision for the existence of a monetary crime was 2,000,000 pesetas (\$16,440), whereas in the Real Decreto it is increased to 5,000,000 pesetas (\$41,104); 2) contrary to the provisions in Article 6.A.1 of LCC, Real Decreto 1816/1991 remarked that the authorization should be understood "by person and trip"; 3) whereas Article 6.A.1 of LCC made only reference to Spanish or foreign coins or bank notes, or any other means of payment or instruments of transfer of money set in pesetas or foreign currency, Real Decreto 1816/1991 broadened the object to bearer bank checks, set in pesetas or foreign currency, and to coin or bar gold; 4) the protected legal right stopped being the same, as could be inferred from its own Statement of Purpose.

Based on these arguments, the applicants held that such marked differences between Article 6.A.1 of LCC and Real Decreto 1816/1991 on active subjects, material object, protected legal right and amount were clearly indicative of the fact that the Real Decreto had not modified any of the non-essential assumptions of the LCC by applying the technique of the open-ended criminal laws. On the contrary, it "created a new crime type which has nothing to do with the regulation of such law, as a result of broadening the scope of punishable actions not by introducing accidental elements but essential ones for the Constitution of the type of offence." This violated the reserve of the Organic Law which characterizes criminal matters and the principle of typology inherent to the principle of criminal legality since a new type of crime was established by rules without legal level (independent rule).

This Article will consider the case which established that Real Decreto 1816/1991 abolished the legal system of exchange control, with which the assumption to enforce Article 6 of LCC had disappeared. The appellants for protection considered that any interpretation of the Real Decreto that maintained the exchange control was incompatible with Directive 88/361/CEE,⁹⁴ of which the Real Decreto was a mere transposition instrument to national law. So, bearing in mind that Community Law prevails over national law, and that it does not preserve the figure of previous authorization, it should be concluded that the Judgment given by the Second Chamber of the Supreme Court applying Article 4.1 of Real Decreto⁹⁵ had violated the rights to liberty, legal crime, and equality.⁹⁶ Consequently, the Constitutional Court was specifically requested to either rule about this so-called conflict between national and Community Law because it affected fundamental rights,⁹⁷ or to submit the following preliminary ruling before the European Court of Justice, based on Article 177 of the CEE Treaty:

5. 'Are Real Decreto 1816/1991 and the developing Order of 27 December 1991 a truthful transposition of Community Directive 88/361/CEE of 24 June 1988?'⁹⁸
6. Is Article 4 of Real Decreto 1816/1991, of 20 December, on external economic transactions, compatible with Article 67 of the Treaty of Rome, with the European Single Market and with equality and proportionality rights, whereas it imposes previous authorization to a European citizen in order to cross the Spanish border to reach another CE country carrying coins, bank notes, or bank checks, set on pesetas or foreign currency, or coin or bar gold, which value is above 5,000,000 pesetas ([\$]41,084[]) by person and trip, and with which failure to comply is punished with the prison and a fine based in Article 10 of the mentioned Real Decreto?'⁹⁹

Furthermore, it stated that every intention of complementing the new criminal type by a remission of the provision which contained, Article 4.1 of Real Decreto 1816/1991, to the estimations contained in the Second Chapter of LCC would have implied to face banned analogy. It was finally alleged that this "new crime type" also violated the principles of proportionality and equality, since the rest of the transfers with other countries were liberalized.

b) The third procedural means of argumentation held that the Judgement of the Second Chamber of the Supreme Court violated the principle of criminal legality, since it had not applied retroactively, which was the most favorable rule. This was made according to the fact that Real Decreto 1816/1991 had completely abolished the legal system of exchange control, which was the only interpretation that, according to the previous section, would be compatible with the provisions under Directive 88/361/CE.

c) As the last procedural means of argumentation, regarding the so-called violation of the right to criminal legality, the appellants for protection alleged that, if contrary to what they reasoned, the offense remained a monetary crime (Article 4.1 of the Real Decreto in accordance with Article 6.A.1 of LCC), their punishment would only be supported if the concurrence of the composing elements of such typology had been proved enough. However, such was not the case, because they did not prove that the exportation of currency was "higher than 5,000,000 Pesetas (\$41,104) by person and trip"; besides it would also not have been the case if, by adding up the exported amounts, the limit had been exceeded. However, it could not have been demonstrated that the limit would have been exceeded in every trip made by the same person. These were essential requirements to talk about a typical behaviour. In other words: the text in Article 4 of Real Decreto 1816/1991 excluded the figure of a continuing offence, charged to the appellants, regarding the typology contained in such Article.

⁹⁴ Directive 88/361/CEE, June 24.

⁹⁵ Even though it is incompatible with Community law.

⁹⁶ Instead of giving immediate applicability to the Directive and, consequently, estimating that the action had been decriminalized.

⁹⁷ See S.T.C. 107/1984, Nov. 23; S.T.C. 28/1991, Feb. 14; S.T.C. 64/1991, Mar. 22.

⁹⁸ Antecedente de Hecho n. 3; S.T.C. 265/1994, Oct. 3

⁹⁹ *Id.*

In the later allegations before the Court, it was also reported, as a complementary fact to the basis containing the appeal for protection presented by one of the appellants, that there existed a preliminary ruling before the European Court of Justice requested by the Audiencia Nacional, regarding the issue of Directive 88/361/CEE. The Constitutional Court rejected this claim and stated there was no need in submitting preliminary ruling. The Judgment begins by stating that the first thing to be undertaken is the study of the arguments about the alleged violation of the right established in Article 25.1 CE, which is attributed to the Second Chamber of the Supreme Court on January 28, 1993. Nevertheless, the Judgment first answers if Directive 88/361/CEE, of 24 June, would have effect on the proceedings. As alleged by both defenses, under the principle of direct effect the Directive would have already had brought about a complete liberalization of capital movements from Spain towards foreign countries, since December 31, 1992.

It is difficult to distinguish the *ratio decidendi* of this question in the judgment. If by *ratio decidendi* we mean the cause or ground enough and suitable to solve a question, the reason for this is that the capital movements had not run in this case through EC countries but through Andorra and Switzerland. However, the Court's clear will in establishing a doctrine of not requesting preliminary ruling¹⁰⁰ can be inferred from the judgment. Indeed, the Judgment, FJ 2, begins by establishing a general doctrine excluding the formulation of preliminary ruling:

As has been stated in previous occasions and must be repeated now, the alleged contradiction of Community law by later national provisions is not a question that affects their constitutionality, because, in such case, it should be determined by the European Court of Justice (STC 49/1988, 28/1991, 61/1991 and 180/1993). On the other hand, this excludes the formulation of preliminary ruling by the Constitutional Court before such body based in Article 177 of the Treaty of Rome. Because this provision is only effective in the processes where application of Community law should be made and precisely to guarantee a standard enforcement of that.¹⁰¹ Therefore, there is no possibility of such preliminary ruling. The request for a preliminary ruling has already been submitted by some legal bodies before the European Court of Justice in similar terms to those indicated in the appeals for protection.

However, the Judgment proceeds to make a remark on what was previously classified in this Article as *ratio decidendi*, which would invalidate the earlier considerations.

Nevertheless, it should be pointed out that the crucial effect the appellants for protection attribute to the mentioned community directive would exclusively refer to the capital movements between the Member States of the European Union. That is a prerequisite that does not match the capital movements which destination was several opened current accounts in Switzerland after crossing the Principality of Andorra, as the ones carried out by the appellants for protection. It is highly significant here that whereas Article 1.1 of the mentioned Directive contains the term 'abolish' regarding the restrictions of capital movements between Member States, Article 7.1 establishes that the Member States 'will make efforts to achieve' the same degree of liberalization in the regime applied to the corresponding transfers to capital movements with third countries as the one in the operations among residents of the rest of the Member States. This indicates that the provisions under Directive 88/361/CEE on capital movements between Member States of

¹⁰⁰ It should be made present that the Spanish Constitutional Court understands that it does not only lodge doctrine on the *ratio decidendi* of its judgements. See, for instance, the important S.T.C. 155/1999, June 25.

¹⁰¹ See S.T.C. 372/1993, Dec. 13, FJ 7.

the European Union are no longer compulsory in such cases as the one concerned here, which tackles the movements of capital to third countries.¹⁰²

There is no further reference in the rest of the judgment to the argument analysed here.

C. WHY THE CONSTITUTIONAL COURT MUST PRESENT PRELIMINARY RULINGS BEFORE THE CJEU.

The submission of preliminary ruling before the European Court of Justice by the Constitutional Court imposes itself for many reasons. Before considering them, it could be pointed out that, as a matter of political convenience, the Spanish Constitutional Court should present, where applicable, preliminary ruling. First, because it would favor the process of building Europe,¹⁰³ although modestly, and, second, because the Spanish Constitutional law could also influence, even more modestly, in European Law.

There are also powerful arguments based on positive law that justify an affirmative answer. However, this Article will only outline them. First, the relationship between the Spanish Constitutional Court and the so-called “*bloc constitutionnel*,” and the European Union Law is not a relationship of separation. It is not a relationship that allows considering the Constitutional Court as a judge of the European Union law *in the scope of presenting preliminary ruling*. Not only are Spanish National Law and the European Union Law not separated, but they are intimately related. Furthermore, the possibility of them crossing exists. This does not mean that we must consider European Union Law, not even the primary one, as a parameter of constitutionality, nor does it mean that the Spanish Constitutional Court is capable of controlling the legislative acts of the European Union.

Second, the CJEU is the deciding competent body which must decide which bodies can put forward a preliminary ruling, and the CJEU is favorable to authorize this for constitutional courts. In effect, as the Court Luxembourg is the supreme interpreter of the European Union Law,¹⁰⁴ the notion of the judge in charge of presenting preliminary ruling under the current Article 267 of the Treaty on the Functioning of the European Union (“TFEU”),¹⁰⁵ must be defined by the competent bodies of the European Union Law. It cannot be established by national bodies on their own accord. The CJEU must assess if the Constitutional Courts can or cannot be judges that present preliminary rulings, since the Court of Luxembourg is the ultimate interpreter of the European Union Law.¹⁰⁶

In relation to this point, the jurisprudence of the Court of Luxembourg was, and is, decisively constant. The CJEU has been drawing up a series of criteria that enable it to assess if a

¹⁰² S.T.C. 265/1994, Oct. 3, FJ 2.

¹⁰³ Since I attended the speech by Mr Jiménez de Parga pronounced at the Royal Academy of Moral and Political Sciences (Full member and Chairman of the Constitutional Court until June 2004) due to the closing ceremony of the 25th anniversary of the Spanish Constitution series, entitled “De la Constitución de España a la Constitución de Europa” (published by the Academy itself), I am convinced we must face a more united European future with enthusiasm.

¹⁰⁴ Which no one doubts, including the Spanish Constitutional Court.

¹⁰⁵ Treaty on the Functioning of the European Union art. 267, Sep. 5, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU].

¹⁰⁶ Francesco Sementilli, *Brevi note sul rapporto tra la Corte costituzionale italiana e la Corte di giustizia delle Comunità Europee*, in GIURISPRUDENZA COSTITUZIONALE 4771 (2004); I. Viarengo, *Diritto comunitario e valori fondamentali tra sindacato di costituzionalità e controllo di validità della Corte di giustizia*, 33 RIVISTA DI DIRITTO INTERNAZIONALE PRIVATO PROCESUALE 393 (1997).

preliminary ruling has been correctly presented by a national judge. For example, in case *Standesamt Stadt Niebüll*,¹⁰⁷ the CJEU stated that “to assess if the issuing body has the requirements to be considered a judiciary body according to Article 234 EU Treaty,¹⁰⁸ which is an exclusively European Union Law matter, the Court takes into account a group of elements, such as the legal origin of the body, its permanent character, the compulsory character of its jurisdiction, the contradictory nature of the procedure, the fact that the body applies juridical regulations and that it is independent.”¹⁰⁹ The CJEU stated repeatedly that it is solely responsible for elucidating the legal capacity of the judge issuing the preliminary ruling, as it is considered a European Union matter, and not a national law matter. So, it can be inferred from the study of the criteria established by the Court of Luxembourg, the judge of the Union has tended (and tends) to interpret in a wide sense¹¹⁰ the notion of jurisdictional body of Article 231 EU Treaty (Article 267 TFEU). To such point, the advocate generals, who are worried about the overload of pending preliminary rulings in Luxembourg, have tried to introduce more restrictive notions in order to limit the access to the CJEU.¹¹¹

In any case, from the European Union Law point of view, there is no doubt that Constitutional Courts, such as the Spanish one, are included in the notion of judiciary body and drawn within the criteria of the CJEU. On the other hand, there have been preliminary rulings presented before the CJEU on behalf of the Constitutional Courts of other member States, and the CJEU has not hesitated in admitting them. But this, because of its relevance, must be considered as an independent argument, which will be discussed later in this article.

Third, the CJEU not only considers the constitutional courts of Member States empowered to propose a preliminary matter but also, in exceptional events, it could declare an EU member responsible if its constitutional justice institution does not initiate the already mentioned preliminary ruling.

It is worth noting how recent judgments of CJEU, related to the responsibility of member states of the EU because of transgression of the EU Law, have supposed a relevant push in this sense. The wide jurisprudence mine opened by the *Francovich Judgment*¹¹² which recognized, for the first time, the right of individuals to be compensated for transgression of the EU Community duties, has been lately enriched by some cases that deserve to be highlighted in this context. These cases referred to the events of damages caused by jurisdictional institution's behavior and mainly related to the lack of use of the preliminary ruling.

Within the Community jurisprudence, the leading case in this sense is the judgment CJEU of 30 September 2003, *affair Gerhard Köbler v. Republic of Austria*.¹¹³ In this occasion, the CJEU had the opportunity to explain thoroughly how the principles of civil responsibility of

¹⁰⁷ Case C-96/04, *Niebüll*, 2006 EUR-Lex CELEX LEXIS (Apr. 27, 2006). *See also* Case C-54/96, *Dorsch Consult*, 1997 E.C.R. I-4961; *Joined Cases C-110-147/98, Gabalfrija et al.*, 2000 E.C.R. I-1577; Case C-178/99, *Salzmann*, 2001 E.C.R. I-4421; Case C-182/00, *Lutz GmbH et al.*, 2002 E.C.R. I-547.

¹⁰⁸ TFEU art. 267.

¹⁰⁹ Case C-96/04, *Niebüll*, 2006 EUR-Lex CELEX LEXIS (Apr. 27, 2006).

¹¹⁰ *See* Case C-43/95, *Forsberg v. MSL Dynamics, Ltd.*, 1996 E.C.R. I-4661.; Case C-54/96, *Dorsch Consult*, 1997 E.C.R. I-4961 (the opinion of Advocate General Tesauro, who doubted of the jurisdictional nature of the body that had put forward the preliminary ruling); Case C-17/00, *Coster v. Watermael-Boitsfort*, 2001 E.C.R. I-9445 (the restrictive opinion of Advocate General Ruiz-Jarabo Colomer.

¹¹¹ So far, the advocate generals have not had success in trying to introduce more restrictive notions).

¹¹² *Joined Cases C-6 & 9/90, Francovich et al. v. Italian Republic*, 1991 E.C.R. I-5357. *See also* *Judgments of the CJEU of 5 March 1996, Joined Cases C-46 & 48/93, Brasserie du Pêcheur SA v. Bundesrepublik Deutschland, Factortame Ltd. et al.*, 1996 E.C.R. I-1029.

¹¹³ Case C-224/01, *Köbler v. Republic of Austria*, 2003 E.C.R. I-10239.

a State, when transgressing Community Law, are also applicable in case of harm caused by a judicial activity, in particular a last resort judge decision.¹¹⁴ Consequently, non-fulfillment of the preliminary referral is one of the criteria to be considered in order to determine the existence of a clear infringement of the EU Law that can be attributed to a supreme judicial institution. This reason must be added to those already established by the CJEU in the *Brasserie du Pêcheur* and *Factortame* Judgments, as well as the following jurisprudence related to the State's legal responsibility due to the legislator or the Public Administration.

Although the Community jurisprudence has been quite moderate in this sense,¹¹⁵ a subsequent CJEU decision highlighted the extension of responsibility derived from European Union Law transgression. The *Köbler* jurisprudence surpasses the narrow limits settled by the Italian Law with regard to the civil responsibility of the magistrates, which will be hardly criticized by the CJEU and considered doubtful compatibles with the Community principles). In CJEU 13 June, 2006, C-173/03, *affair Traghetti del Mediterraneo SpA c. Italian Republic*, the CJEU declared about the compatibility between the Italian Law and the European Union Law in terms of civil responsibility of judges contained in the *Köbler* judgment.¹¹⁶

Fourth, having a look at the comparative law, it is noticeable that the idea of a justice institution¹¹⁷ starting preliminary matters is expanding. Nevertheless, it is also certain that the

¹¹⁴ Naturally, the CJEU establishes some restrictive conditions that must concur in order for the damage caused by the Judges to be recoverable in the light of European Law. In particular, it is stated that if the damage is recoverable when the rule of Community Law that has been violated attributes rights to individuals, the violation must be sufficiently characterized and a direct causal link between the violation and the damaged suffered by the affected parties. More precisely, in the case of damage caused by a jurisdictional decision, by violation of "sufficiently characterized" Community Law, the violation is known to be "of manifest character." The *Köbler* judgment numbers as examples hypotheses that could be considered as manifest violation of Community Law (paragraphs 53 and 56) and among these it numbers the non-compliance of the obligation of putting forward a preliminary ruling for judges of final instance in Article 234.3 of ECJ. Section 55 of the *Köbler* judgment, specified that we must take into account, in particular, "the degree of clarity and precision of the violated rule, the intentional nature of the infringement, the excusable or inexcusable nature of the Law error, the position, in this case, adopted by a Community institution, as well as the non-compliance by the jurisdictional body when it has the obligation of putting forward preliminary ruling in compliance with Article 234 CE, paragraph 3." Case C-224/01, *Köbler v. Republic of Austria*, 2003 E.C.R. I-10239.

¹¹⁵ The CJEU Judgment revisited in Case C-154/08 presents a threefold interest: on one hand, it seemed, at a certain point, that the Commission considered that Spain had not complied with the obligation of putting forward a preliminary ruling. On the other hand, it was a case in which the Commission requested the declaration of responsibility by the Spanish State, not derived from a regulation dictated legislatively or executively, but as a consequence of a Judgment rendered by the Supreme Court. But above all, we perceive that normally in the case of not complying with the Community Law, it is the Commission that takes action due to the non-compliance of the merits of the case, for not having presented preliminary ruling. The matter of discussion was the Spanish regulation that considered that the services rendered to an Autonomous Community by the Land Registrars, in their condition as clearing bearers of a clearing office, were not subject to VAT.

¹¹⁶ In the scope of a complex and very long process which confronted the company *Traghetti del Mediterraneo* with *Tirrenia* for abuse of its dominant position and of State aids, the CJEU was called upon to solve by means of preliminary ruling presented by the Genoa Court to clarify if the principle of extracontractual responsibility of the Member States regarding individuals could tolerate case-law such as Italy's, that excludes the judges from that responsibility, in relation with the activity of interpreting judicial regulation and in order to evaluate the act and the evidence carried out in the jurisdictional field. This limited the responsibility only when the judge committed fraud or a serious offence. More precisely, the Genoa Court demanded the CJEU examine the problem of the damaged caused to individuals, caused by the judge of last instance for not having presented preliminary ruling, that, according to Italian case-law, were not recoverable.

¹¹⁷ Such kind of institution not only guarantees the Constitution, but also controls the adequate running of the political system. In this sense, in the Spanish doctrine, see J. DE ESTEBAN & PEDRO J. GONZÁLEZ-TREVIJANO,

Constitutional Court of Germany (“FCFa”) and the Constitutional Council of France (“CCF”)¹¹⁸ are reluctant, but, on the other hand, the Constitutional Court of Austria (“TCa”),¹¹⁹ the Belgian Constitutional Court (“TCb”), when still named the Belgian Arbitration Court,¹²⁰ the Lithuanian

TRATADO DE DERECHO CONSTITUCIONAL III 141-44 (Servicio de publicaciones de la Facultad de Derecho de la Universidad Complutense de Madrid, 1ª edición 1994).

¹¹⁸ In France, the CCF has developed in recent years a jurisprudence that completes itself in its Decision of 30 November 2006, that is confirmed by another on 19 June 2008, and pursuant to which the Council applies Community Law to control the adequacy of a law determined by the development of a directive that aims to develop, and as long as the contradiction is manifest. This doctrine is based in Article 88.1 of the French Constitution, that states the Republic participates in the European Communities, and contains the following notes:

1) It does not clarify if it is possible the control of any rule, not only acts, regarding any rule of the EU legal system.
 2) The article refers only to the manifested contradiction because, being the closing date to decide of 8 or 30 days, there is no time to submit the case to the Court of Justice of the European Communities. The act establishing the internal preliminary ruling and the control of constitutionality on promulgated acts do not cause any changes in this sense. The closing date to decide will be three months, so the Conseil will continue to consider it as too short timing. Some authors have proposed an intermediate solution. The court could submit the preliminary ruling but not to wait for the Court to answer. The response would be applied to the *a quo* judge later, so it could give rise to contradictory decisions and the need for a dialogue among judges.

¹¹⁹ SSTJCCEE November 8, 2001, Case C-143/99, *Adria-Wien Pipeline GMBH, Wietersdorfer & Peggauer Zementwerke GmbH v. Finanzlandesdirektion für Kärnten*, 2001 E.C.R. 8365 (which deals with a petition to the Court of Justice of the European Communities pursuant to Article 177 TCE, by *Verfassungsgerichtshof* (Austria), in order to obtain a preliminary ruling about the interpretation of Article 92 TCE to be applied in the pending cases *Adria-Wien Pipeline GmbH, Wietersdorfer & Peggauer Zementwerke GmbH y Finanzlandesdirektion für Kärnten*); Case C-171/01, *Wählergruppe Gemeinsam Zajedno v. Birlitke Alternative, Grune GewerkschafterInnen v. UG*, 2003 E.C.R. I-4301 (which deals with a petition to the Court of Justice of the European Communities pursuant to Article 234 CE, by *Verfassungsgerichtshof* (Austria), in order to obtain a preliminary ruling about the interpretation of Article 10.1 of Decision n. 1/80, September 19, 1980, related to the Agreement of Association between the European Community and Turkey, in order to be applied by the *Verfassungsgerichtshof* in a case filed before the Court by *Wählergruppe «Gemeinsam Zajedno/Birlikte Alternative und Grüne GewerkschafterInnen/UG»*, en el que intervienen: *Bundesminister für Wirtschaft und Arbeit, Kammer für Arbeiter und Angestellte für Vorarlberg, Wählergruppe «Vorarlberger Arbeiter- und Angestelltenbund (ÖAAB) - AK-Präsident Josef Fink»*, *Wählergruppe «FSG - Walter Gelbmann - mit euch ins nächste Jahrtausend/Liste 2»*, *Wählergruppe «Freiheitliche und parteifreie Arbeitnehmer Vorarlberg - FPÖ»*, *Wählergruppe «Gewerkschaftlicher Linksblock»* y *Wählergruppe «NBZ - Neue Bewegung für die Zukunft»*); *Joined Cases C-465/00, C-138-39/01, Rechnungshof v. Österreichischer Rundfunk et al., Christa Neukomm v. Österreichischer Rundfunk, Joseph Lauer mann v. Österreichischer Rundfunk*, 2003 E.C.R. I-5014 (which deal with three petitions to the Court of Justice of the European Communities pursuant to 234 CE by *Verfassungsgerichtshof* (case C-465/00) and *Oberster Gerichtshof* (Supreme Court) (cases C-138/01 y C-139/01) (Austria), respectively, in order to obtain a preliminary ruling about the interpretation of Directive 95/46/CE, the Data Protection Directive, of the European Parliament and European Council, on October 24, 1995 (DO L 281, p. 31), to be applied in the pending cases *Rechnungshof* (case C-465/00) y *Österreichischer Rundfunk* (Austrian broadcasting company), *Wirtschaftskammer Steiermark* (Austrian Chamber of Commerce), *Marktgemeinde Kaltenleutgeben, Land Niederösterreich, Österreichische Nationalbank* (Austrian National Bank), *Stadt Wiener Neustadt, Austrian Airlines, Österreichische Luftverkehrs-AG, versus Christa Neukomm* (case C-138/01), *Joseph Lauer mann* (case C-139/01) and *Österreichischer Rundfunk*).

¹²⁰ Case C-93/97, *Fédération Belge des Chambres Syndicales de Médecins ASBL*, 1998 E.C.R. I-4837 (in the pending case before TCb between *Fédération belge des chambres syndicales de médecins ASBL* (on one hand) and *Vlaamse regering, Gouvernement de la Communauté française and Conseil des ministres* (on the other hand) requesting preliminary ruling about the interpretation of the article 31 Directive 93/16/CEE; May 24, 2008, C- 212 / 06, submitted pursuant to Article 234 CE, by the Belgium *Cour d'arbitrage*, currently called *Cour constitutionnelle* (Belgium), in a case whose parties were the Governments of the French and Walloon Communities, on the one hand, and the Flemish Government, on the other); Case C-303/05, *Advocaten voor de Wereld*, 2007 E.C.R. I-3633 (preliminary ruling submitted by the *Arbitragehof* (Belgium)); Case C-305/05, *Ordre des barreaux francophones et germanophones et al.* (submitted pursuant to Article 234 CE, by the *Cour d'arbitrage*, currently called *Cour constitutionnelle* (Belgium), in a case whose parts were the *Ordre des barreaux francophones et germanophone*,

Court (“TCLi”)¹²¹ and the Constitutional Court of Italy (“TCi”)¹²² have already posed preliminary matters. Further, the Portuguese Court¹²³ seems to be inclined to this possibility. It is worth mentioning, the “conversions” of the TCi during the latest years, which was traditionally unwilling to pose preliminary matters, and the first experience of the TCb in setting out a preliminary ruling of validity.¹²⁴

Having positively stated that the Spanish Constitutional Court can be forced to state a preliminary issue. The next step is to specify under which circumstances. Supposing that the circumstances could be identified, the circumstances will constitute additional support to back the favorable trend to this preliminary ruling. Moreover, once the facts are determined, the Spanish Constitutional Court would be able to pose a preliminary ruling, not just in its capacity as a guarantor of rights, but also as the guarantor of the constitutional provisions about institutions and powers.

With regard to rights, it is worth discussing the contents of the Organic Act 1/2008¹²⁵ and Article 6 of the Treaty of Lisbon.¹²⁶ Indeed, the referred organic act of July 30, 2008, which authorized the ratification by Spain of the Treaty of Lisbon, states in its second article, “Charter of Fundamental Rights of the European Union,” that “according to the [second] paragraph of Article 10 of the Spanish Constitution and article 1, section 8, of the Treaty of Lisbon, the norms related to fundamental and civil rights recognized by the Constitution will be interpreted according to the Charter of Fundamental Rights.”¹²⁷ On the other hand, Article 6, section 1 of the

Ordre français des avocats du barreau de Bruxelles, Orde van Vlaamse balies, Nederlandse Orde van advocaten bij de balie te Brussel against Conseil des ministres).

¹²¹ Case C-239/07, Julius Sabatauskas et al.

¹²² ATCi 103-2008, on February 13. Conclusions by Advocate General, Ms. Juliane Kokott were presented on July 9, 2009. The case was decided by Case C-169/08, Presidente del Consiglio dei Ministri v. Regione Sardegna, (preliminary ruling submitted by the Italian Corte costituzionale).

¹²³ S.T.C. 654/1999, Dec. 7; S.T.C. 240/2000, Apr. 11, S.T.C. 278/2000, May 16.

¹²⁴ Preliminary ruling by the Cour constitutionnelle (Belgium) on July 31, 2009, I.B./Conseil des ministres, (Asunto C-306/09) (2009/C 233/19): «1. Is a European arrest warrant issued for the purposes of the execution of a sentence imposed in absentia, without the convicted person having been informed of the date and place of the hearing, and against which that person still has a remedy, to be considered to be, not an arrest warrant issued for the purposes of the execution of a custodial sentence or detention order within the meaning of Article 4(6) of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, (1) but an arrest warrant for the purposes of prosecution within the meaning of Article 5(3) of the Framework Decision?; 2. If the reply to the first question is in the negative, are Article 4(6) and Article 5(6) of the Framework Decision to be interpreted as not permitting the Member States to make the surrender to the judicial authorities of the issuing State of a person residing on their territory who is the subject, in the circumstances described in the first question, of an arrest warrant for the purposes of the execution of a custodial sentence or detention order, subject to a condition that that person be returned to the executing State in order to serve there the custodial sentence or detention order imposed by a final judgment against that person in the issuing State?; 3. If the reply to the second question is in the affirmative, do the articles in question contravene Article 6(2) of the Treaty on European Union and, in particular, the principles of equality and non-discrimination?; 4. If the reply to the first question is in the negative, are Articles 3 and 4 of the Framework Decision to be interpreted as preventing the judicial authorities of a Member State from refusing the execution of a European arrest warrant if there are valid grounds for believing that its execution would have the effect of infringing the fundamental rights of the person concerned, as enshrined by Article 6(2) of the Treaty on European Union?» (DO L 190, p. 1).

¹²⁵ LEY ORGÁNICA, 1/2008 LOREG.

¹²⁶ Treaty of Lisbon art. 6, Dec. 13, 2007, 2007 O.J. (C 306) 1. The Treaty of Lisbon was signed on December 13, 2007, modifying the Treaty on European Union and the Treaty establishing the European Community (the title of the latter is replaced by “Treaty on the Functioning of the European Union”).

¹²⁷ Charter of Fundamental Rights of the European Union, Dec. 14, 2007, 2007 O.J. (C 303) 1. *See also* C.E. Art. 10 (Fundamental rights and duties). “2. Provisions relating to the fundamental rights and liberties recognized by the

Treaty on European Union, as noted by the Treaty of Lisbon, dictates that “[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.”¹²⁸

Therefore, if the fundamental rights of the Spanish Constitution must be interpreted according to the Charter of Fundamental Rights of the European Union and also with the Court of Luxemburg,¹²⁹ it is quite believable and plausible that sooner or later some differences will appear between the Spanish Constitution and the European Union Law in the understandings of fundamental rights.

Concerning the organic part of the Constitution, it is possible to consider a new interpretation of Article 93¹³⁰ and 96¹³¹ CE, in order to make them accomplish the function carried out by Article 117 of the Italian Constitution, which opens the door to posing of preliminary questions. It is relevant to point out that Article 117.1 of the Italian Constitution, following the May 30, 2003 amendment, states, “[l]egislative power belongs to the state and the regions in accordance with the Constitution and within the limits set by European Union law and international obligations.”¹³² Since then, invoking this rule, entails invoking the European Union Law which implies setting out unconstitutionality matters. There is no such Article in the

Constitution shall be construed in conformity with the Universal Declaration of Human Rights and international treaties and agreements thereon ratified by Spain.” *Id.*

¹²⁸ Consolidated Version of the Treaty on European Union and the Treaty Establishing the European Community art. 6, sec. 1, Dec. 12, 2006, 2006 O.J. (C 321) 1. “The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties” and “the rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.” *Id.*

¹²⁹ This is not a novelty all in all. The doctrine of the Court of Justice of the European Communities about indirect sexual discrimination has been adopted by the Constitutional Court. The STC 240/1999, Dec. 20, FJ 6 recalls and summarizes this doctrine, arguing that “this Court has had chance to repeat in several decisions that the specific prohibition of sexual discrimination as declared in the 14 CE, contains both a right and a mandate against discrimination (STC 41/1999), not only the direct one, this is the differentiate legal treatment against a person on grounds his or her sex, but also the indirect one, this is, a formally neutral or non-discriminatory treatment from which comes, because of several factual condition between workers of both sexes, an impact against one of these. S.T.C. 198/1996, Dec. 3, FJ 2. *See also* S.T.C. 145/1991, July 1, S.T.C. 286/1994, Oct. 27, S.T.C. 147/1995, Oct. 16, and S.T.C. 3/2007, Jan. 15. The concept of indirect gender discrimination has been elaborated by the Court of Justice of the European Communities by deciding several cases about part-time jobs on the grounds that Article 119 EEC Treaty (currently Article 141 TCE) and some Directives which prohibit gender discrimination. A repeated assertion by the Court in several cases may summarize its approach: “As the Court has stated on several occasions, it must be ascertained whether the statistics available indicate that a considerably smaller percentage of women than men is able to satisfy the condition of two years’ employment required by the disputed rule. That situation would be evidence of apparent sex discrimination unless the disputed rule were justified by objective factors unrelated to any discrimination based on sex” (See, among others, SSTJCE on June 27, 1990; case Kowalska; on February 7, 1991, case Nimz; on June 4, 1992, case Bötél; on February 9, 1999, case Seymour- Smith and Laura Pérez).

¹³⁰ *See infra* note X(2 below) and accompanying text.

¹³¹ C.E. Art. 96.

1. Validly concluded international treaties, once officially published in Spain, shall be part of the internal legal system. Their provisions may only be repealed, amended or suspended in the manner provided for in the treaties themselves or in accordance with the general rules of international law. 2. The procedure provided for in section 94 for entering into international treaties and agreements shall be used for denouncing them.

¹³² Art. 117 Costituzione (It.).

Spanish Constitution.¹³³ Nevertheless, some voices have proposed the Spanish Constitutional Court to make a similar use of the constitutional precept that rules Spain's access to the European Union. Article 93 CE declares:

Authorization may be granted by an organic act for concluding treaties by which powers derived from the Constitution shall be transferred to an international organization or institution. It is incumbent on the Cortes Generales or the Government, as the case may be, to ensure compliance with these treaties and with resolutions originating in the international and supranational organizations to which such powers have been so transferred.¹³⁴

However and so far, and as explained, the Spanish CC has refused to make such interpretation of the aforementioned article.

¹³³ In addition to giving rise to the application of the Union Law as a parameter of constitutionality: STC 349/2008, Dec. 15.

¹³⁴ C.E. Art. 93.