

Valentin Bou-Franch*

The Charter of Fundamental Rights of the European Union in Spanish Law

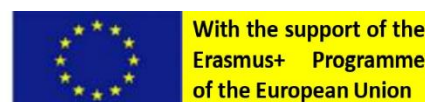
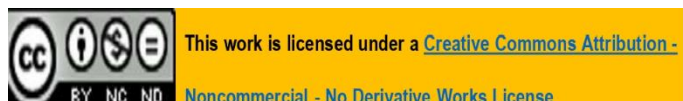
SLIDE 1

Hello, welcome. I am Valentín Bou and in this video I am going to talk to you about the Charter of Fundamental Rights of the European Union in Spanish law.

SLIDE 2

In order to determine when the Charter applies in Spanish law, three different points in time must be taken into account.

First, prior to the adoption of the Charter, the Court of Justice of the European Union had already stated (one) that it was not entitled to review, in relation to fundamental rights, national legislation which was not part of the Community legal order; and (two) that, as soon as such legislation comes within the scope of Community law, the Court of Justice hearing a case referred for a preliminary ruling must provide all the elements of interpretation



* Full Professor of Public International Law. University of Valencia (Spain).

necessary for the national court to assess the conformity of that legislation with fundamental rights.

Secondly, the current Charter of Fundamental Rights, in Article 51, states that "The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union... and to the Member States only when they are implementing Union law".

Thirdly and finally, following the adoption of the Charter, the Court of Justice has held that: (one) Article 51 confirms its case-law enunciated before the entry into force of the Charter, according to which the obligation to respect fundamental rights guaranteed in the Union legal order is imposed on Member States only when they act within the scope of application of Union law; and (two) correlatively, since the fundamental rights guaranteed by the Charter must be respected when national legislation falls within the scope of application of Union law, there is no situation covered by Union law in which those fundamental rights do not apply. The applicability of Union law implies the applicability of the fundamental rights guaranteed by the Charter.

SLIDE 3

As for the legal value of the Charter in Spanish law, we must begin by recalling that the Charter: (1)

is an international treaty; (2) is an international treaty dealing with human rights; and (3) is an international treaty establishing the European Union, which is incorporated into Spanish law through Article 93 of the Spanish Constitution.

With these premises, we contemplate two different situations. The first consists of determining the legal value of the Charter compared with Spanish norms with the status of law and lower.

If a contradiction is detected between the Charter and any Spanish regulation with the rank of law or lower, we should remember that international treaties (including the Treaties establishing the Union) have supra-legal rank in Spain, because:

- According to Article 94 of the Spanish Constitution, treaties may entail the "modification or repeal of any law".

- the 'provisions of the Treaties may not be derogated from, amended or suspended by any rule of Spanish law'.

- there is uniform case law of the Constitutional Court and the Supreme Court maintaining that, in case of conflict between the Treaties and rules having the status of law, the Treaties apply; and

- because the primacy of the Treaties is reinforced when the international Treaty is a Treaty establishing the European Union. In these cases, Article 93 of the Constitution states that it is up to

the General Courts or the Government, as the case may be, to guarantee compliance with these Treaties.

SLIDE 4

However, two statements of the Spanish Constitutional Court must be taken into account: (1) that Articles 93 and 96 of the Constitution do not incorporate European Union law, including the Charter of Fundamental Rights, into the constitutional bloc. They are not, therefore, a criterion for assessing the constitutionality of Spanish rules with the status of law; and (2nd) that the conflict between a law and European Union law (original or derived) has no constitutional relevance (the Constitutional Court described it as an "infra-constitutional conflict", when in the best of cases it would be an "extra-constitutional" conflict). From these premises, the Constitutional Court concluded that: (1) this type of conflict should not be brought before the Constitutional Court; and (2) these conflicts should be resolved by the judicial bodies of the ordinary jurisdiction through the correct selection of the applicable law. Over time, the Constitutional Court has enshrined the expression "control of conventionality of Spanish norms with the status of law".

Applying this constitutional doctrine, it is worth mentioning that: (1) the Supreme Court has on

several occasions recalled the judgments of the Court of Justice *Costa v. ENEL* and *Simmenthal*, which developed the principle of the primacy of EU law; and (2) in fact, ordinary judges apply the primacy of the EU Charter over Spanish laws, without or after a preliminary ruling from the Court of Justice of the European Union.

DIAPO 5

The second situation is to determine the legal value of the Charter compared to the Spanish Constitution.

Two different issues need to be addressed. Firstly, we should remember that the Charter is an international treaty on human rights. Therefore, in accordance with Article 10.2 of the Constitution, the Charter is obligatorily interpretative of Title I of the Spanish Constitution, which contains the norms relating to the fundamental rights and freedoms recognised by the Constitution.

Secondly, in the highly unlikely event that a contradiction between the Charter and the Spanish Constitution is detected, three pieces of information provided by Spanish law should be taken into account, as well as the position of the Court of Justice of the European Union.

The three facts offered by Spanish law are the following: (1) according to Article 95 of the

Constitution, "the conclusion of an international treaty containing stipulations contrary to the Constitution shall require prior constitutional review". It should be noted that, despite the fact that the affirmation of the primacy of European law in the *Costa v. ENEL* judgment dates from 1964, in Spain, the Spanish Constitution does not contain such a provision. *ENEL judgment* dates from 1964, Article 95 of the Constitution was not used in Spain in 1985, in respect of the Treaty and the Act of Accession to the European Communities, nor in 2007 when ratifying the Lisbon Treaty incorporating the Charter into Spanish law; (2) the first time this article was used, the Constitutional Court was wrong to state that the prior constitutional review of Article 95 "guarantees the primacy of the Constitution"; and (3) the second and last time this article was used was precisely in relation to the affirmation of the Treaty establishing a Constitution for Europe, which expressly affirmed the primacy of all European law over all rules of national law, without excluding the constitutions of the Member States. In its Declaration 1/2004, the Constitutional Court partially rectified its previous doctrine, holding that there is no contradiction between the affirmation that the Spanish Constitution enjoys supremacy and the affirmation that European Union law enjoys primacy. With a rather confused argumentation, the Constitutional Court held that the primacy of European Union Law does not

contradict the supremacy of the Spanish Constitution, because (1) primacy obeys reasons other than the hierarchy of norms; and (2) primacy responds to the provision of the transfer of powers in Article 93 of the Constitution, so that, in the matters transferred, European Union Law takes precedence.

In contrast, the position of the Court of Justice of the European Union is more radical. Precisely in a case in which the Spanish Constitutional Court's doctrine on human rights was at stake, the Court of Justice held that: according to settled case law, by virtue of the principle of the primacy of Union law, which is an essential characteristic of the Union's legal order, the reliance by a Member State on provisions of national law, even if they have constitutional status, cannot affect the effectiveness of Union law in the territory of that State.

SLIDE 6

That is all I had to say to you. Thank you very much for your attention.