Rights in Europe: The Crowded House

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Working Papers in European Law

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Rights in Europe: The Crowded House

*Pedro Cruz Villalón*

‘The crowded house’, as a plausible metaphor for the present state of fundamental rights in Europe -and inasmuch as heading of this speech- seeks to give shelter to an inevitably broad and at the same time assumedly personal approach to the subject. It alludes as much to those rights often styled as ‘fundamental’ as to the people dealing with the complex task of declaring them on a case by case basis, that is, the European judges. In both senses it may be said that the house - Europe - is visibly ‘crowded’.

With regard to the rights, as I am going to refer to them, for the sake of simplicity, the plethora derives less from their arguable superabundance, but rather from the variety of their ‘sources’, the written ones in particular, be it in the form for my present purpose of national constitutions, of supranational declarations or bills of rights, or of international conventions.

These sources, without pretending to be exhaustive, differ widely in their origin, their age, their acquired authority, their symbolic function, and also in their legal force or their guarantees. To this last criterion, the guarantees, I shall return shortly. Already a first conclusion in this regard would be their heterogeneity. They are not ‘interchangeable’, as such, further to a coincidence in the wording of the rights themselves. That is not to say they are ‘incompatible’, nevertheless.

If these sources are not ‘of the same kind’ it is, in the first place, because of the differences in the perceptions of what a right is. Sources of rights, I would say, are about how a given political community ‘deals’ with rights, how it approaches the matter of rights, both in the past and in the present. This being so, sources make rights a possible object not only of ‘policies’ but of ‘politics’, which leads us to the connection of the power to adjudicate on

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rights with power, on its own. The European landscape of rights, in this first sense, is densely populated, both in quantitative and in qualitative terms.

With regard to the judges, it is well known how ‘self-respecting rights’ are frequently accompanied by ‘remedies’, judges being the most credited of them. Just as Europe has no lack of sources of rights, neither is there a scarcity of judicial remedies. The heterogeneity of the sources leads, as a matter of course, to the plurality of judges.

To be precise, it is the courts of first instance which do, by far, the main part of the job, that is, the work of making rights true. In Europe they are counted, not by the thousands, but by the tens of thousands. Nevertheless, they are not the problem, not the main problem, anyway. They do not ‘count’, in this respect.

What counts are a handful of courts of last resort, that is, courts singularly charged with the supposedly final interpretation of a large number of rights as enshrined in corresponding declarations. Their task has been said to be occasionally ‘Herculean’, but they appear sometimes also as the troublemaker, at least from the point of view of their ‘peers’. How courts of last resort may have such a thing as peers is precisely the problem I am dealing with. Be that as it may, the crowd alluded to is also a crowd of judges, of ‘these’ judges. And it is to them that I propose to refer mainly hereafter.

Cohabitation has frequently been a source of discomfort, and that in direct proportion to the space available. At a certain point, the right word to describe the situation is ‘crowded’. It results in a clear difficulty for the different European judges of last instance to adjudicate on rights without interfering with their fellows’ work.

As a problem of the European house of rights, this is not at all a new subject. Neither is it the most acute problem the European Union is currently facing. If I nevertheless propose to enter once again this well trodden territory it is partly for a general reason, partly for the renewed actuality of the subject.
As for my general reason, I take the view that the problem caused by the scarcity of the space available to the European judges requires from legal scientists renewed efforts to inquire further into the ‘identity’ of each of these courts. In other words, a certain degree of consensus on the specific raison d’être or finality of each of these courts should help to underpin their respective legitimacy and so better to accept the messages they are sending the ones to the others.

As for the renewed actuality of the subject, it is universally accepted that the Lisbon Treaty has brought about two relevant novelties, which should strongly affect the European landscape: the ‘incorporation’ of the Charter of Fundamental Rights of the European Union to EU primary law and the proclamation that the Union ‘shall accede’ to the European Convention on Human Rights (Articles 6, paragraphs 1 and 2 TEU).

For our present purpose, I suggest to give the shape of a triangle to the space here under consideration, thereby assigning an angle to the three different systems of rights protection I intend to address: an international one – ‘Strasbourg’ –, a supranational one – ‘Luxembourg’ – and a national one – ‘Madrid’ –, on this occasion.

I. The General Approach: ‘The Hedgehog Dilemma (1st Part)’

The ‘hedgehog dilemma’, a concept, it seems, deriving from Schopenhauer, makes reference to some challenges of human intimacy, in analogy to a situation in which a group of hedgehogs seek to become close to one another in order to share heat during cold weather, while at the same time having to remain apart, as they cannot avoid hurting one another with their quills.

I consider this image could be applied to the European house of rights, and particularly to its supreme jurisdictions. The relationship among them appears marked by attraction as well as by repulsion. The repulsion is possibly more visible, as conflictive situations tend to be. That’s the reason why, in what follows, I shall focus on the centrifugal part of the dilemma.
A constant feature of the disputed territory of rights in Europe is the presence of ‘zones of friction’, that is, critical spots where the tension among these courts arise. I shall but offer a few examples.

The first example which comes to my mind relates nevertheless to a situation developing within European states with constitutional jurisdiction, like my own. Here the new single constitutional court and the old overarching head of the national judiciary – the supreme court – may in the event violently collide. The zone of friction is identified with the couple of notions ‘constitutionality’ and ‘legality’. This is not the occasion to enter further into this vexed question. Suffice it to say that it is an appropriate example of a zone of friction.

But my examples should be found within the alluded triangle. Concerning the interaction between the ECtHR and the national constitutional courts, the zone of friction between them tends to polarise in the again vexed question ‘minimum vs. maximum standards’, but also occasionally in the very nature of a given right. Almost every State party to the Convention has found occasionally difficult to accept a declaration of a breach of a Convention right: the Carolina v. Hannover case,¹ as a German example, as there are also a few Spanish ones. A very clear example of the latter is the already old incorporation of the quality of the environment in the right to private and family life. Should the EU become a party to the ECHR the situation would not be different.

But already in the present situation we could conceive of ‘zones of friction’ in the interaction between the ECtHR and the ECJ. As it now stands, this interaction, being as it is an indirect one, that is, one involving the member states as at the same time parties to the ECHR, there is of course the zone marked by the ‘margin of discretion’ in the sense of Bosphorus.² Things should radically change in the event of the accession of the EU to this system of international rights protection, but I shall deal with it at a later moment.

The interaction, lastly, of the ECJ and the constitutional courts shouldn’t be a problem, as the basic idea is that each legal order is in a position to take care of rights in its own domain.

¹ Von Hannover v Germany (2005) 40 EHRR 1.
We know that this has not been the case since the beginning. Both Germany and Italy provide good examples. So we may take the Solange II decision, back in 1986, as ‘Armistice Day’.

The problem may now arise from the competence of the ECJ to adjudicate on rights in the domain of national legal order directly concerned or prefigured by EU law. Here come the well known agency and derogation situations plus the vexed ‘scope of application’ notion. The ‘scope of application’ notion has the potentiality of a zone of friction.

More in general we may find zones of friction in the ‘dissonance’, let us put it that way, in the perception of the rights by both Courts. Here I wouldn’t talk of maximum vs. minimum standards, then it would be inappropriate, but of ‘discordia’. I can cite, among many others, the Cordero Alonso case, as a Spanish example.

In conclusion, the plurality of courts of last resort all of them adjudicating on rights within a reduced territory has been producing lasting zones of friction, of irritation and annoyance. Some developments taking place in the present time may worsen the situation. Or we may take profit of them to reduce the tension. With this intention in mind, and as already said, I would propose to make renewed efforts to inquire on the ‘identity’ of these courts, which should allow us to properly gauge the legitimacy – or not – of their rulings whenever they issue a polemic decision, affecting the others.

Concerning the ‘identity’ of courts, the first question is whether such a language is allowed in our case: Do courts of justice have such a thing, an identity, by right of birth, as it were?

Identity is rapidly becoming a sweeping concept among the foundational categories of the Union, and consequently of Union law. With good reason, one should add. There are words which are so powerful in themselves that they cannot be uttered in vain. ‘Human dignity’ would be a perfect example. And such is also the power of ‘identity’: simply declare that there is a commitment in EU law to the ‘identity’ of member states, and it is as if you

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3 Solange II BVerfGE 73, 339.
4 Case C-81/05 Anaclet Cordero Alonso v Fondo de Garantía Salarial (Fogasa) (2006) ECR I-7569.
entered a new landscape. For, rhetorically speaking, when was ever the talk of identities, in public law, as applied, not to ethnic groups, or the like, but to states? No wonder that the category has started its ‘Siegeszug’, with what looks like a most promising future.

But now I am not about to comment on ‘identity’ as a normative category, as it appears in Article 4.2 TEU. My intention is – again – to put forward the notion with a practical purpose, as a possible tool in order to better inquire into the functioning of the European adjudication on rights. Having this in mind, I shall examine successively our three courts.

a) The European Court of Human Rights: A ‘Court of Auditors’

Starting with the law, the ECHR, I would propose a negative assertion: the ECHR, even taken in all its constituent parts, substantive, institutional and procedural, is not a legal order. You may have occasionally met, in the case law of the ECJ, allusions to ‘the three legal orders’, thereby including also Strasbourg. But I wouldn’t encourage the language of ‘legal order’ when referring to the ECHR, as we do when referring to the EU legal order or a national legal order. In my view, the ECHR is not a legal order nor was it ever called upon to become such.

Further to its having acquired over the years an unprecedented authority, the Convention remains what it has been since its beginnings: an international instrument providing for the effective compliance of a number of states with a given number of rights and to that effect setting up an ad hoc single judicial body.

A declaration of rights is, furthermore, ‘fragmentary’ in itself. From an historical perspective, a bill of rights is something like an inverted ‘cahier de doléances’. In the same vein it was never conceived as a system. Rights have kept much of their original condition, that is, specific ‘reactions’ to specific intrusions in the sphere of individual freedom. Just consider data protection, among other possible examples.
In this same vein, the EU Charter could aspire to introduce a certain degree of ‘order’ in the dispersion of rights across the whole of the EU legal order. But it is far from being a ‘system’, and, for better reason, far from being a constitution.

Admittedly, the potentiality of ‘Strasbourg’ may occasionally look awesome, but let us not be led to hurried conclusions. By all the richness of its case law the ECHR remains unique as a legal document. Nevertheless we should also keep in mind that the Convention system is founded, in very specific terms on a case law ‘acquis’, an ‘acquis jurisprudentiel’. But this is its specific domain or preserve, that is, authority based on convincing reasoning as its only weapon.

Coming to its judicial body, it begins and ends in the ECtHR. It is not a court of last instance, but of ‘unique’ or single instance. Its sole source of legitimacy is in the rights they are called upon to guarantee at the international level.

In this respect, I do not think there was ever a chance for the ECtHR to build up the majestic image of an autonomous legal order adorned with the qualities of direct effect and primacy over the national legal orders. On the other side, the Convention rests wholly on the good will of the signatory parties. So there was never the shadow of a doubt about who ‘the masters’ of the Convention are.

In consequence, in its 60 years of history, though punctuated by moments of irritation, the Convention system has basically kept to its calling. The widening range of the rights entered invariably into its realm by the sole initiative of its founders and masters. But again, we must be realistic: The rights as the states originally incorporate them to the Convention may be later construed by the ECtHR with somewhat unexpected features.

In conclusion, my point concerning the identity of the Convention system is twofold: i) Strasbourg should be accepted by the others as an essentially external control instance of the respect of rights by the contracting states. In this sense, Strasbourg could be described as a ‘court of auditors’ in the matter of rights. ii) Strasbourg should, at the same time, avoid what I would call ‘the spider's web temptation’. By that I mean the temptation of pretending to
build a complete legal system where the national legal orders and, in the future, the supranational legal order could feel ‘trapped’, or ‘cornered’.

b) The Union and the Court of Justice: A Supreme Court for a Supranational Polity

By contrast, EU law was always meant to be a fully-fledged legal order underpinned by a solid construction of fundamentals or principles. I shall not entertain you with this matter. Suffice it to say that even if it is a treaty-based legal order, founded on the principle of conferral from the member states, the EU legal order had to assert itself as the legal order of a rather unprecedented polity, as ‘a supranational legal order’. But again, this is clearly not the occasion to elaborate on this notion.

In this regard, there should be no doubt that the formula ‘Communauté de droit’ was meant to underline the strategic role of law, of the legal system, in a ‘supranational’ polity.

And the Court of Justice of the European Union, as again a single institution, appears as the sole interpreter of this legal order. That’s its finality and raison d’être. In this same vein, it can be argued that the ECJ was ‘predestined’ to become and to act as it has: as the Court of _van Gend en Loos_, of _Costa v ENEL_ and _Les Verts_. That was, arguably, the only chance for a ‘supranational’ Union to survive.

The question is that, inevitably, such a judicial body, sooner or later, had to take the protection of rights in its own hands, and to the full extent necessary: first and foremost, in its own preserve or domain; secondly, as already mentioned, in that part of the national legal order directly determined by EU law.

But I beg you not to forget the following: Adjudication on rights has become a crucial question of power. In order to convey this point I am tempted to engage in a paraphrase of the well known proposition of Carl Schmitt: ‘Sovereign is the one who adjudicates on

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rights’. The formula is admittedly provocative. But I still think that here we are dealing with a relevant feature of our time.

Anyhow, my point concerning the ECJ would be again twofold: i) a supranational legal order needs a judicial body in a position to guarantee its uniform interpretation and application in the concerned legal space. And in order to that it is essential that the ECJ, in our case, does not grind to a halt whenever it is confronted with a matter of fundamental rights. ii) But at the same time I am of the view that the ECJ has also to avoid a temptation. And in this case the temptation is, very obviously, ‘the federal temptation’, that is, the temptation to make the EU legal order evolve from a supranational legal order to a federal one, by its own and only initiative. The temptation has, as is well known, deep historical roots, both old and recent: The American Bill of Rights of 1791 for the former (268 US 652 (1925) Gitlow c. N. York), the precedent of the ECJ founding decisions of half a century ago, for the latter. I leave here this point.


c) On Constitutions and Constitutional Courts: A Court for the ‘Normative’ Constitution

I come finally to the system formed by national constitutions and national constitutional courts. The constitutions I am concerned with are ‘written’ constitutions. When speaking in London, this is not a superfluous remark. And, keeping the same perspective, there is right in saying that written constitutions are those which couldn't be otherwise. This formula, ‘constitutions that couldn’t be without being written’ immediately alludes to a problem of normativity. On the Continent political constitutions have had great difficulty in affirming themselves as effectively binding documents, as ‘normative’ constitutions. In this respect, written constitutions are ‘reactive’ institutions, born in reaction to an historic situation.

There is a certain degree of correspondence between written constitutions and constitutional courts. Why the normativity of written constitutions does require constitutional courts is ‘ein weites Feld’, quite a broad subject. It has a lot to do with the tradition of the judiciary in most of the Continent. Anyway, constitutional courts are also reactive institutions. And the

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6 The original proposition, ‘sovereign is he who decides on the exception’, is found in Schmitt’s Politische Theologie (1922).
important thing is that they are also single ‘ad hoc’ judicial bodies, that is, courts specifically conceiving as ‘constitutional guaranties’.

In Spain at least, there is frequent talk of ‘supremacy’ (of the constitution), in opposition to the ‘primacy’ (of the EU legal order), but the truth is that what really concern constitutional courts is the ‘normativity’ of the constitution, the ‘supremacy’ of the same coming only as a natural consequence. And that’s the main and possibly the only concern of constitutional courts. They are supposed to guarantee the normativity of the written constitution in the national legal order, nothing else in principle. Other legal problems are the worries of other national judicial bodies, not theirs (including problems with ‘external’ legal orders).

There is another perspective: Written constitutions and constitutional courts are still enshrined in the living memories of the populations of quite a large number of member states, as they are often not older than the Union itself.

And it should be added here that even member states, as really sovereign states, are often younger than the Union. Sovereignty of member states, as well as their constitutional orders and, in the last instance, their constitutional courts, are born candidates to the category of national identities in the sense of Article 4.2 TEU.

In this sense, rights, as an essential part of national constitutions, may with all right pretend to be adjudicated by constitutional courts. But at the same time these constitutional courts should not forget that they are adjudicating on constitutions which are the constitutions of member states of a supranational union.

In conclusion, concerning constitutional courts my twofold point is: i) constitutional courts are entitled to be the – supreme – ‘normal’ or the ‘ordinary’ jurisdiction of human rights concerning the national legal order. ii) But they must avoid their own temptation. In the case of constitutional courts its temptation is frequently called ‘splendid isolation’. I have always wondered why ‘splendid’. But, anyhow, constitutional courts should make an effort to look over or beyond their supposedly magnificent fences, and deduce all the consequences of the supranational space in which they are in fact adjudicating.
II. The Calling of the Time: On Incorporation and the Duty to Accede

The present in the European house of rights is very particularly marked by the still recent entry into force of the Treaty of Lisbon, and its two important novelties already alluded to: ‘incorporation’ and ‘accession’.

Both are only relative novelties, as is well known. The Convention as well as the Charter were already in existence and relevant, singularly for the Union before December 1, 2009. The ECHR as a singularly inspiring document of the general principles of EU law inasmuch as it enshrines the protection of fundamental rights in accordance with the European common constitutional traditions. And the Charter as a not legally binding text, taken in itself, but as an ‘ostensorium’ of the different EU rights, conceived back in the 1999 Convention, as they could be drawn from a variety of ‘niches’: two documents to be ‘taken into account’, but, at least for the Union, not much more than that.

Now, since December 1, 2009, EU primary law includes, firstly, a fully-fledged charter of rights, and second a declaration according to which the Union ‘shall accede’ to the Strasbourg system of rights.

A binding Charter, ‘on equal footing’ with the Treaties, that is a far cry from the previous situation. To be sure, it has not acceded to the legal status unscathed, but there it is.

As for the ‘accession programme’, it surely is a big novelty, after 50 years of the member states as parties to the Convention bearing the burden of the respect of fundamental rights by the Community or Union into which they, freely and as their sole concern, had entered. Not quite a heavy burden, certainly, as it can be said with hindsight, but a burden nevertheless. Now, it should be different for the future, for, from now on, the EU should be able to be challenged for violations of the Convention rights.

But, on the one hand, the Charter appears to be inspired by, so to speak, the ‘do not disturb’ principle, that is, as born with the firm conviction not to change anything, with all the self denying declarations attached to it. And on the other hand, the accession to the Convention
is not only dependent on the acquiescence of all the present parties to it, but appears already in the Treaty in the company of a couple of not unproblematic conditions.

Anyway, let us not trivialise altogether. This is new, a positive duty to enter the Convention. If the commitment with the content of the rights as included in the Convention was already there, there is now, additionally, a commitment to its sources, the Convention system as such.

Let us begin with the Charter, whose legal value is unconditionally proclaimed in the Treaty. The time calls, so it seems, for extracting all the consequences of this peculiar EU Bill of Rights, which has been ‘blessed’, first and foremost, with legal force and singularly with ‘the same’ legal force as the Treaties. The Charter is made part ‘on equal footing’ of the primary EU law. The Charter of Rights becomes in such a way part of the ‘constitutional Charter’ in the sense of the Les Verts dictum. In this respect I cannot repress the analogy with the French ‘bloc de constitutionnalité’.

For two years now, the Charter has been in force, and already quite a few commentaries have been dedicated to its presence in the corresponding case law of the ECJ. Certainly, there is a presence, but not a glamorous one, I am afraid: Nothing like an overhaul, marking a ‘before’ and an ‘after’, to employ a usual Spanish idiom.

In a way this is not so surprising. The Charter has entered the EU primary law, with the unaltered presence of too many competitors. The room available was already crowded, considering the complicated formula ‘general principles of EU law/European common constitutional traditions/Convention rights and liberties’. Now all this has been kept as if nothing had happened, as if an EU Bill of Rights had not finally arrived.

Inertia has proved to be, once more, not only a physical phenomenon but also a feature of collective psychology. There was a well established way of dealing with rights in the ECJ. There was no need to switch to other language, to other categories.
Let me make reference to my own experience as an Advocate General, which started precisely at the same time. As I entered the Court, the Charter had just become binding EU law. From the start I have regularly invoked the Charter in my conclusions: judicial protection and fair trial, age discrimination, lex praevia as a requirement of rights restrictions, freedom of expressions, even workers protection. I simply refer to my conclusions in *Samba Diouf, Prigge, e-date and Martinez, Scarlet Extended or Santos Palhota.*

Interesting to note is the fact that the ensuing decisions although not so different in the solution were drafted without the assistance of the Charter.

There is a certain lack of enthusiasm, I would suggest, in abandoning the ‘general principles’ arsenal, but I am not altogether pessimistic about the future of the Charter. Let us not forget that the question of fundamental rights in the EU was always connected and ‘dialogued’ with the protection of the ‘corresponding’ national rights by national courts, as already mentioned. A Bill of Rights drawn up, solemnly proclaimed and, finally, ‘constitutionalised’ by and for the EU should in no mean terms help to settle things in this regard.

Nevertheless: just to settle, really, or also, at least partially, to ‘unsettle’? Here I connect with the already alluded ‘zone of friction’ represented by the ‘scope of application’ case law. As said, the Charter is not only meant to be the yardstick of rights in and for the Union law but also, in the event, the yardstick of rights for the law of member states, with unavoidable consequences for the allocation of the judicial competences in the matter. That was something taken for granted, at least, for that national law which was born as ‘implementation’ of EU law. But the case law of the ECJ has not confined the rule of the European rights to this relatively controlled territory of national law but has extended it to every acre of national law ‘coloured’ by EU law. And the wording of the Charter, to a lay reader, could seem to run counter to this latter case law. The Charter, since its original version, has troubled the legal community with this ‘only implementation’ formula.

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7 Case C-69/10 *Brahim Samba Diouf v Ministre du Travail, de l’Emploi et de l’Immigration* Opinion of 1 March 2011; Case C-447/09 *Reinhard Prigge and Others v Deutsche Lufthansa AG* Opinion of 19 May 2011; Joined Cases C-509/09 and C-161/10 *eDate Advertising GmbH v X* (C-509/09) and *Olivier Martinez and Robert Martinez v MGN Limited* Opinion of 29 March 2011; Case C-70/10 *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* Opinion of 14 April 2010; Case C-515/08 *Criminal proceedings against Vítor Manuel dos Santos Palhota and Others* Opinion of 5 May 2010.
That is how a certain curiosity could be justified as to how the Court shall deal with the subject in the near future, possibly. But the problem, as I see it, is not so much whether the Charter imposes or not a change in the pertinent case law. The question is rather whether the notion of ‘scope of application’, as it stands and as it could develop in the future, is or not the best idea, from the perspective, that is, I am dealing with. But I wouldn’t dare to enter further into the subject.

Just let me add that the ‘general principles’ argument as a way out of the ‘only implementation’ formula seems rather disconcerting to me. But then again there is the reality that we are faced with. It is not exactly the same thing to have the Charter as the second part of the unborn Constitutional Treaty than to have it in the present somewhat undignified position as we know it. All this has avowedly its own costs.

The incorporation of the Charter to EU primary law has proved to be equally momentous from another quite different perspective, the interaction between the ECJ and constitutional courts or, to be precise, for the interaction between the ECJ and the constitutional court in Madrid. Interestingly enough, this has happened as a consequence of that specific device of EU law called ‘preliminary reference’.

The point is relevant, at least from the national point of view, because this has been the door that, after twenty-five years of adjudicating on the constitution of a member state, the Spanish constitutional court has just found it acceptable to finally issue an order for reference addressed to the ECJ.8

The fact is that the Spanish constitution includes a singular mandate to construe the fundamental rights enshrined in the constitution in accordance with the corresponding rights contained in the Universal Declaration of Human Rights and other similar conventions ratified by Spain (Article 10.2 C.E.).

8 Case C-399/11 Melloni OJ C 290/5 1.10.2011.
Until now, the constitutional court has simply taken into consideration all these international norms when adjudicating on rights, and most particularly the ECHR. The matter now is that none of these conventions were accompanied by anything like ‘preliminary rulings’ issued by any court whatsoever. But things are different now for the Spanish constitutional court. First, for the reason just given, the preliminary rulings provided for in the TFEU.

And, secondly, for a reason which, to my knowledge, is unique to Spain: Spain has ratified the Lisbon Treaty through the normal constitutional procedure of an ad hoc organic law. Now, in this same law the Spanish legislator has added a specific provision of ratification of the Charter itself. The consequence - intended or not - is that the Charter has entered in the Spanish legal order with the specific quality of an international convention on human rights in the sense of the said constitutional provision (Article 10.2 C.E.)

As the sum of all these circumstances we have an unprecedented situation whereby the said court has asked the ECJ for a preliminary ruling on a not altogether irrelevant constitutional question: The compatibility of the right to a fair trial (Article 47 of the Charter) with criminal hearings conducted in absentia, even if it happens with legal counsel.

This being the case, we may legitimately ask whether this order for reference has been issued in direct compliance with the Treaty provisions or rather as a spontaneous addition by way of the free initiative of a national constitutional court. The fact is that the national court openly declares that the European provision which immediately prompted its move - the European arrest warrant in the 2009 version - is of no application to the case ratione temporis.

But: its referral rather concerns, if I may put it that way, the ‘timeless’ scope of the right to a fair trial as laid down in the Charter, with the sole objective of complying with the constitutional mandate concerning the interpretation of the corresponding constitutional right. In these terms, this first preliminary reference of the Spanish constitutional court would hardly answer to the finality of the preliminary reference as it was devised by the Treaty since the beginnings of the Union. And it could even legitimately be asked if such a move is the best example of loyal cooperation.
But let us be assured. The Spanish order for reference concerns more than the said abstract interpretation of the Charter. In addition, it includes, first, a quite ordinary question of interpretation of secondary EU law, in the matter the European arrest warrant and, secondly, one question of interpretation of one of the horizontal provisions of the Charter: Article 53, relating to the minimum standard clause. All this is Article 267 TFEU standing on its own two feet.

I think that there are lessons to be drawn from this order for reference. The Spanish court found a dignified way to address the ECJ that others, singularly Karlsruhe, do not seem to dispose of. The nature of the questions raised in this order for referral shows that the interest of the ‘conversations’ to be held in the future between both courts may be considerably enhanced as a consequence of the legal character of the Charter. And others could and possibly should follow the example. Be that as it may, the Spanish court is arguably ready to abandon the ‘disguise’ under which it has presented itself, on this first occasion, before the ECJ.

Accession: The ‘Duty’ of the EU to Accede to the ECHR

Quite different is the situation concerning the accession of the EU to the ECHR. Two years after the entry into force of the Lisbon Treaty, and despite all the energy which has been expended from the very first day, the accession is not in sight.

The problems for the effective accession are manifold. The difficulties begin, as we know already, with the conditions incorporated in the Lisbon Treaty (Protocol No. 8) to continue with the diversity of suggestions that the said conditions have prompted. This is again not the occasion to comment on them.

The fact remains - and that is my main point on this topic - that we may be stuck in an interregnum, possibly of non definite duration, for which we should be prepared. The mere mandate to conditionally accede to the Convention should already be momentous for our problem. I would for once suggest a sort of ‘as if’ principle. In the way Roman Herzog, the
late president of the 1999 convention, proposed that the Charter be written ‘as if’ it were to become a binding document, the Union should ‘imagine’ itself as already being a party to the Convention. And the obvious question is: What would that change, given the terms of the Treaty? Put in evangelical terms, the humble submission would read, ‘But, Master, I already comply with all and each of the Commandments’. And for the Master, indicating the path of perfection, to respond: ‘then, sell everything you possess and follow me’.

To follow Strasbourg: There is the rub! By all the formulas of allegiance, what tremors the idea of anyone different to ourselves effectively reviewing our rulings does not awake! Out of the plurality of problems posed by the accession subject I will add simply the following.

The ‘principle of autonomy’ of EU law, has been repeatedly presented as a specific difficulty for the acts of the Union to be controlled by the ECtHR. And the truth is that the involvement of the Union in proceedings before the ECtHR, originating in national acts issued in transgression of the Convention, is a source of problems. Certainly, the mere fact of the accession to the Convention system by a supranational polity is unprecedented. But I tend to think that, at the end of the day, we cannot have both, at least not in exactly the same terms. There is a certain price to pay for the fact of the EU becoming a party to the Convention.

On the other hand, the ‘potential accession status’ could be an excuse to examine the opportunity of something like a ‘Strasbourg criterion’ in order, for instance, to reconsider the ‘scope of application’ doctrine. That is, the question to address would be: Is there any risk, or not, of the EU being condemned by the ECtHR in a ‘composite’ situation? Or else: Which one of the parties to the convention would Strasbourg condemn, the EU or the member state?

This is a wholly ingenuous proposition. But I cannot repress the feeling that what the Strasbourg system of protection of rights is, above all, requiring is the possibility of the rulings by the ECJ concerning direct actions to find their way to their review by the ECtHR. Rulings from the national courts being reviewed by Strasbourg, even if involving EU law, is something we already have.
All this comes admittedly too late. But in the undesirable event of the process of accession coming to a standstill, I would not exclude the opportunity to rethink a couple of points from scratch.

As I come to the end, my last remark inevitably concerns the European house of rights, as a paradoxically fortunate situation. This crowded house offers all kinds of opportunities: for interaction, for adversarial discourses, even for trial and error. And the hedgehog dilemma is so much about attraction as it is about repulsion. A reduced space facilitates cross fertilisation in a larger measure than other situations do. I may just recall, by contrast, the position of the Supreme Court of the United States. But all this makes a different topic in itself.