

The Constitution of Spain: The Challenges for the Constitutional Order Under European and Global Governance



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Abstract Although the constitutional text has remained nearly untouched – only twice has the Spanish Constitution been amended since its enactment in 1978 – global and European governance have deeply transformed the constitutional order. The impact of the process of European integration upon the Constitution is an open and evolving phenomenon, encompassing the challenge to constitutional supremacy, the incorporation of new sources of law, an imbalance between the legislative and executive powers, the enhanced role of the judiciary, the multilevel protection of fundamental rights and the transformation of regionalism as a model for organising the territorial power. First, this report will analyse the constitutional amendments regarding EU membership and the constitutional limits to European integration. Indeed, the only two constitutional amendments were both prompted by the EU. Secondly, the impact of EU integration upon the protection of constitutional rights will be critically examined, with special emphasis on the economic crisis. The obligations deriving from the EU might undermine the protection of constitutional rights, as the introduction of the European Arrest Warrant, the Data Retention Directive and the austerity measures adopted in the context of the economic crisis have shown. Thirdly and more generally, global governance has had constitutional implications, for instance regarding the strengthening of the executive power vis-à-vis the legislative, pressures on the welfare state, the fight against terrorism, the curtailing of powers of the Autonomous Communities and the response to immigration. In this context, it is necessary to recast the relationship

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between the Global-European spheres and the national constitutional order to ensure respect for the principles of the rule of law, the separation of powers and the protection of fundamental rights.

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1 Constitutional Amendments Regarding EU Membership

1.1 *Constitutional Culture*

1.1.1 The Spanish Constitution of 1978 was drafted in the transitional period to democracy in the aftermath of Franco's dictatorship. General Francisco Franco died on 20 November 1975, putting an end to a long dictatorship established after the Civil War in 1939.¹ The Constitution was the outcome of a consensus among the main political parties represented in Parliament after the 1977 June elections.

The drafters were conscious of the need to reach a broad agreement about the basic structural principles of the newly established political order. The main goal was to design a stable democratic system and to ensure the protection of individuals' fundamental rights. The need to reach a consensus about highly controversial issues, such as the model of political decentralisation, on occasion led to ambiguous constitutional provisions in need of further interpretation and political negotiations. The Spanish Constitution was very much influenced by the German and Italian constitutions, regarding for instance the centralised model for the judicial review of legislation. Eventually, the Constitution was ratified in a referendum on 6 December 1978.

1.1.2 On the whole, the key elements of the rationale of the Constitution include (a) a system of representative democracy, separation of powers and the rule of law, (b) protection of constitutional rights and liberties and (c) the territorial decentralisation of political power in Spain. The model of territorial organisation was particularly contested and eventually a sort of quasi-federal state was established, i.e., the *Estado de las autonomías*. The allocation of powers between the central state and the autonomous communities has been a permanent source of conflict, and today this model is under pressure by the secessionist movement in Catalonia.

¹ See generally Ferreres Comella 2013a, pp. 1–24.

The Constitution managed to provide a framework for democratic political contestation and the protection of individual rights. Moreover, Art. 10(2), which indicates that constitutional rights need to be interpreted according to the Universal Declaration of Human Rights and other human rights treaties ratified by Spain, opened up the Constitution to international human rights law.

For a long time, the amendment of the Constitution was regarded as a ‘taboo’ since the priority was to secure the stability of the democratic system.² The fear was that any attempts to modify the Constitution would put the achievements of the democratic regime at risk, and the shadow of the dictatorship still loomed large. Nonetheless, after almost forty years since its enactment, there are more and more voices calling for an overall constitutional amendment regarding issues such as the territorial decentralisation of power, the Senate and the Crown.

1.2 Constitutional Amendments in Relation to the European Union

1.2.1 The Spanish Constitution has been amended only twice since its enactment in 1978. Both amendments were prompted by the process of European integration. Whereas these amendments were specific in their scope and nature, a more profound amendment of the Constitution in light of the constitutional transformations ensuing from EU membership has not yet taken place.³ Indeed, only the amended Art. 135 explicitly refers to the EU in the whole constitutional text (see Sect. 1.2.3).

1.2.2 In terms of the process for constitutional amendment, the Spanish Constitution is rigid. There are two amendment procedures: the general procedure (Art. 167) requires a qualified majority of three-fifths of both parliamentary chambers (Congress and Senate), and a referendum is not compulsory. Nonetheless, a referendum shall be convoked if at least one-tenth of the representatives in Congress or in the Senate request it.

The Constitution provides for a more demanding procedure (Art. 168) in order to amend certain parts: the Preliminary Title – which includes provisions on the main principles of the constitutional order – basic fundamental rights, the Crown, and for the total revision of the Constitution. According to Art. 168, a qualified majority of two-thirds is required to support the initiative, a general election has to take place and, after the election, the support of a two-thirds majority of both chambers for the final text must be secured. Ratification by referendum is compulsory. In practice, the required qualified majorities generally involve the agreement of the two main political parties represented in Parliament (*Partido Popular*, PP and *Partido Socialista*, PSOE).

1.2.3 The first constitutional amendment took place in 1992 and was deemed to be necessary in order to ratify the Maastricht Treaty. The Maastricht Treaty

² Ferreres Comella 2000, p. 32.

³ See Cruz Villalón 2006a, pp. 23–25.

represented a turning point from an economic to a political union and introduced EU citizenship. EU citizens were granted the right to vote and stand as candidates in local elections in their place of residence.

According to Art. 13(2) of the Spanish Constitution prior to 1992, foreigners could be granted the right to vote in local elections (*sufragio activo*), but were deprived of any right to stand as candidates (*sufragio pasivo*). After the Maastricht Treaty was signed and before its ratification, the Government asked the Constitutional Court (CC) about the compatibility of the Maastricht Treaty with the Constitution. The Constitution provides a special procedure for the constitutional review of international treaties prior to ratification.⁴ If a treaty is found to be in breach of the Constitution, the treaty may only be ratified after a constitutional amendment. In this case, in Declaration No. 1/1992 of 1 July, the CC held that the Maastricht Treaty was incompatible with the Constitution with regard to the right of foreigners to stand as candidates in local elections.

Eventually, the amendment of Art. 13(2) was enacted on 27 August 1992. Actually, only two words (*'y pasivo'*) were added to enable foreigners to stand as candidates in local elections.⁵ No specific reference to EU citizens was included. The amendment took place through the general procedure (Art. 167) and without holding a referendum.

The second constitutional amendment was enacted in September 2011 in the context of the European crisis to incorporate the 'balanced budget' rule and limitations to the public debt and deficit in Art. 135 of the Constitution.⁶

⁴ For a more detailed explanation about this procedure, see Sect. 3.1.

⁵ After the amendment, Art. 13(2) of the Constitution reads as follows:

'Only Spaniards shall have the rights recognized in section 23, except in cases which may be established by treaty or by law concerning the right to vote and the right to be elected in municipal elections, and subject to the principle of reciprocity'. The English translation used in this report is available at: http://www.congreso.es/portal/page/portal/Congreso/Congreso/Hist_Normas/Norm/const_espa_texto_ingles_0.pdf.

⁶ After the amendment, Art. 135 of the Constitution reads as follows:

1. All public administrations will conform to the principle of budgetary stability.

2. The State and the Self-governing Communities may not incur a structural deficit that exceeds the limits established by the European Union for their member states.

An Organic Act shall determine the maximum structural deficit the state and the Self-governing Communities may have, in relation to its gross domestic product. Local authorities must submit a balanced budget.

3. The State and the Self-governing Communities must be authorized by Act in order to issue Public Debt bonds or to contract loans.

Loans to meet payment on the interest and capital of the State's Public Debt shall always be deemed to be included in budget expenditure and their payment shall have absolute priority. These appropriations may not be subject to amendment or modification as long as they conform to the terms of issue.

The volume of public debt of all the public administrations in relation to the State's gross domestic product may not exceed the benchmark laid down by the Treaty on the Functioning of the European Union.

4. The limits of the structural deficit and public debt volume may be exceeded only in case of natural disasters, economic recession or extraordinary emergency situations that are beyond the control of the State and significantly impair either the financial situation or the economic or social

The constitutional amendment was prompted by the so-called Euro-Plus-Pact, a package of measures adopted by the European Council in March 2011 to respond to the crisis and preserve financial stability,⁷ and, more particularly, by the French-German summit held on 16 August 2011.⁸ Several months after the constitutional amendment, the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG), signed on 2 March 2012, incorporated the so-called ‘golden rule’, i.e., the requirement that ‘the budget position of the general government must be balanced or in surplus’ (Art. 3(1)(a)). Moreover, according to Art. 3(2), there is an obligation to give effect to the financial provisions of Art. 3(1) in national law ‘through provisions of binding force and permanent character, preferably constitutional, or otherwise guaranteed to be fully respected and adhered to throughout the national budgetary processes’.

The accelerated process through which Art. 135 of the Constitution was amended may well be contested in terms of democratic deliberation. Indeed, several scholars pointed out that the process had been carried out too quickly and without any public debate.⁹ Article 135 of the Constitution was amended in a record time of thirteen days¹⁰ by the end of the summer. Apparently, the President of the Government at the time, José Luis Rodríguez Zapatero, and the leader of the main opposition party, Mariano Rajoy, agreed on the constitutional amendment during a phone conversation.¹¹

The amendment took place by means of the general procedure and without a referendum. The proposal for the constitutional amendment, submitted jointly by the PSOE and PP parliamentary groups, followed an urgent and special procedure

sustainability of the State, as appreciated by an absolute majority of the members of the Congress of Deputies.

5. An Organic Act shall develop the principles referred to in this article, as well as participation in the respective procedures of the organs of institutional coordination between government fiscal policy and financial support. In any case, the Organic Act shall address:

- a. The distribution of the limits of deficit and debt among the different public administrations, the exceptional circumstances to overcome them and the manner and time in which to correct the deviations on each other.
- b. The methodology and procedure for calculating the structural deficit.
- c. The responsibility of each public administration in case of breach of budgetary stability objectives.

6. The Self-governing Communities, in accordance with their respective laws and within the limits referred to in this article, shall take the appropriate procedures for effective implementation of the principle of stability in their rules and budgetary decisions.’

⁷ European Council Conclusions, 20 April 2011, http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/120296.pdf.

⁸ Ridaura Martínez 2012, p. 238.

⁹ See, among others, Blanco Baldés 2011, pp. 12–15; Jimena Quesada 2012, pp. 350–353; Ridaura Martínez 2012, pp. 249–259; García-Escudero 2012, p. 165.

¹⁰ This was the time from submission of the proposition to amend the Constitution on 26 August 2011 to approval by the Senate on 8 September 2011.

¹¹ Ferreres Comella 2013b, p. 233.

according to which the proposed amendment was only discussed and voted by the full chamber of the Congress and Senate (without being discussed in the respective parliamentary commissions), and the timelines were reduced. Consequently, the role of minority groups and the parliamentary debate were curtailed.¹²

Twenty-nine deputies and seven senators asked for a referendum, but they did not reach the minimum of one-tenth of all members as required by Art. 167 – which would have meant at least thirty-five deputies or twenty-seven senators.¹³

Hence, the constitutional amendment was not the outcome of an open and broad process of deliberation involving the people, but rather was enacted under pressure from other European governments and the markets.¹⁴ The main goal was to signal Spain's commitment to the balanced budget rule and to the implementation of the ensuing austerity measures in accordance with the limits placed on public debt and deficit. The constitutional amendment was not an occasion for public debate, but the result of an agreement behind closed doors by the leaders of the two main political parties. Paradoxically, in November 2014, the current leader of the PSOE, Pedro Sánchez, announced that he was willing to amend Art. 135 again to ensure the protection of social rights and in particular public education, healthcare and pensions.¹⁵

1.3 Conceptualising Sovereignty and the Limits to the Transfer of Powers

1.3.1–1.3.2 Article 93 of the Constitution enables the transfer of powers 'derived from the Constitution' to international organisations. According to this Article, '[a]uthorization 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'. Despite the fact that the EU is not expressly mentioned, this provision was drafted with the future accession of Spain to the EU in mind.

Following this provision, the ratification of an international treaty that transfers sovereign powers to an international organisation needs to be approved by an organic law. This means that the transfer needs to be approved by an absolute majority of Congress. Hence, this clause merely sets the procedure in order to authorise the transfer of sovereign powers, but it does not include any substantive

¹² See García-Escudero 2012, p. 179. Indeed, two deputies of the parliamentary group ERC-IU-ICV submitted an individual complaint before the CC, but the complaint was found inadmissible.

¹³ García-Escudero 2012, p. 172.

¹⁴ Ferreres Comella 2013b, p. 233.

¹⁵ Europa press 24 November 2014.

limits or requirements regarding the values, principles or objectives that should be respected by international organisations of which Spain is a member.

1.3.3 Nonetheless, the CC has interpreted this provision to contain implicit substantive limits to integration: the respect for state sovereignty, basic constitutional structures, and the system of values and fundamental principles enshrined in the Constitution, in particular fundamental rights.¹⁶ In this decision, the CC established its counter-limits doctrine, following the lead of the German and the Italian Constitutional Courts.¹⁷ The limits to integration were formulated rather broadly, since the Court did not spell out what ‘basic constitutional structures’ were considered to be or how to understand ‘respect for state sovereignty’ at a time in which this concept is constantly being revised and reshaped.

1.3.4 The foregoing decision was delivered in the context of the ratification of the Treaty Establishing a Constitution for Europe (TECE) in 2004, when the Spanish Government consulted the CC about the compatibility between the Constitution and the principle of primacy of EU law, expressly stated in the so-called European Constitution.¹⁸ The CC resolved the potential conflict by crafting a distinction between the primacy of EU law and the supremacy of the Constitution. The CC found that the primacy of EU law did not impinge upon the supremacy of the Constitution, since the former referred to the applicability of domestic legislation clashing with EU law, whereas the latter referred to the validity of domestic legislation in light of the Constitution.¹⁹ Following previous case law, the CC stated that the primacy of EU law was grounded on Art. 93, which allowed the transfer of powers to an international organisation. In turn, the CC declared for the first time that Art. 93 contained substantive limits to integration. Eventually, the CC concluded that the TECE was compatible with the Spanish Constitution and that no constitutional amendment was required. In the end, the process of ratification failed after the negative referendums in France and the Netherlands in 2005.

1.4 *Democratic Control*

1.4.1 The level of democratic control, in particular parliamentary oversight, over the ratification of EU treaties and the subsequent treaty amendments is rather low. As

¹⁶ Declaration CC No. 1/2004, of 13 December, para. 2.

¹⁷ Prior to 2004, scholars had criticised the formalist understanding of Art. 93 of the Constitution adopted by the CC, see Pérez Tremps 1994, pp. 36–37. After 2004 and the development of the counter-limits doctrine under Art. 93, scholars understood that the CC had given some teeth to this provision, see Saiz Arnaiz 2005, pp. 56–70.

¹⁸ Article I-6 TECE.

¹⁹ Previously, the Council of State (*Consejo de Estado*) – the supreme consultative body of the Government – had concluded that a conflict existed and the Constitution should have been amended to give priority to EU law. Council of State Report of 21 October 2004.

mentioned above, the ratification of EU treaties needs to be authorised through an organic law, which requires an absolute majority in Congress. The requirement of an absolute majority indicates the need to reach a broader consensus than is necessary to pass ordinary legislation. Still, this majority is lower than the majority for constitutional amendment (three-fifths pursuant to Art. 167 or two-thirds pursuant to Art. 168). In practice, the need to achieve an absolute majority has not prompted a more profound debate regarding the ratification of EU treaties.

Besides the ratification process, the Constitution does not attribute a specific role to Parliament in the European policymaking process or in monitoring the Government when acting at the European level. It is not constitutionally mandatory for the Government to consult or inform Parliament when dealing with EU affairs. The Council of State (*Consejo de Estado*) – the supreme consultative body of the Government – has advocated for a constitutional reform that would enhance the role of Parliament in European affairs.²⁰

1.4.2 Moreover, a referendum is not compulsory and the ratification of EU treaties does not usually spur public debate. The Constitution provides for a consultative referendum in Art. 92. The President of the Government may decide to convoke a referendum of a non-binding nature regarding ‘political decisions of special importance’ with the authorisation of Congress. Indeed, the Government decided to call for a referendum regarding the TECE given the relevance of the constitutional treaty as a crucial moment in the European integration process.²¹ In practice, the debate in other Member States and the potential failure of the Constitutional Treaty pushed the Spanish Government to hold a referendum – without much doubt regarding a positive outcome – in order to bolster the legitimacy of the European Constitution.

1.5 The Reasons for, and the Role of, EU Amendments

1.5.1–1.5.2 The only two constitutional amendments that have been made were prompted by the EU for the reasons elaborated in Sect. 1.2.3. The first amendment was due to the decision of the Constitutional Court that declared an incompatibility between the Constitution and the Maastricht Treaty regarding the right of EU citizens to stand as candidates in local elections. The second amendment took place in the context of the economic and financial crisis mainly with the goal of enhancing the trust of the markets and European institutions and leaders regarding the limits to the public debt and deficit in Spain. Thus, the constitutional amendments regarding the EU have been rather limited in their scope, and the EU is only explicitly mentioned in Art. 135.

²⁰ Council of State Report of 16 February 2006 on the amendment of the Spanish Constitution, pp. 108–113.

²¹ See Sect. 3.3.

1.5.3 As a consequence of EU integration and the transfer of sovereign powers to the EU, national constitutions no longer regulate the exercise of public power within the state comprehensively. The scope and understanding of several constitutional clauses have been transformed, even though the wording remains the same.²² EU integration has had a major impact on the constitutional legal order.²³ For instance, domestic judges have acquired the power to set aside legislation that clashes with EU law, whereas under the Constitution they are not allowed to review legislation and must make a reference to the Constitutional Court. The system of sources of law now incorporates EU law, which has primacy and direct effect. The powers of the executive have been expanded vis-à-vis the legislative power, since the Government participates in law-making at the EU level as part of the Council and has an important role in the implementation and execution of EU law. Finally, in the field of fundamental rights, the Charter applies alongside the constitutional bill of rights when national authorities implement EU law.

Given the relevance of the process of integration from a constitutional perspective, several authors have argued that the Constitution should incorporate a specific ‘European integration clause’.²⁴ The current Art. 93 simply regulates the process for the ratification of international treaties, and it does not even explicitly mention the EU. A newly framed ‘integration clause’ might well include a procedural and a substantive prong. Procedurally, it would be advisable to reinforce the democratic legitimacy of the transfer of powers to the EU and the ensuing constitutional transformations by requiring a broader parliamentary majority and the holding of a referendum if a certain percentage of representatives ask for it. From a substantive standpoint, this clause might include the constitutional limits to integration and the basic principles of interaction with the EU.

2 Constitutional Rights, the Rule of Law and EU Law

2.1 The Position of Constitutional Rights and the Rule of Law in the Constitution

2.1.1 Title I of the Spanish Constitution, entitled ‘Fundamental Rights and Duties’, enshrines the Spanish bill of rights.²⁵ Title I is rather comprehensive since it

²² Walter 2001, pp. 193–196; von Bogdandy 2001, pp. 212–213.

²³ For an analysis of the impact of integration upon the content of the Constitution, see Pérez Tremps 2004, pp. 112–120; Bustos Gisbert 2009, pp. 401–428.

²⁴ Solazabal Echavarría 2005, pp. 44–46; Albertí Rovira 2006, pp. 457–482; Alonso García 2006, pp. 557–561; Cruz Villalón 2006b, pp. 70–74; Escobar Hernández 2006, pp. 483–489; López Castillo 2006, pp. 501–532; Mangas Martín 2006, pp. 533–556. See also the Council of State Report of 16 February 2006, on the amendment of the Spanish Constitution, pp. 40–108 (with a proposal to amend the Constitution and to add a ‘European integration clause’).

²⁵ For this section, see Ferreres Comella 2013a, pp. 235–251.

includes civil, political and social rights. The level of protection granted to those rights, however, varies. From the perspective of the robustness of constitutional protection, one can identify three groups of rights: (i) rights included in Chap. II, Sect. 1; (ii) rights included in Chap. II, Sect. 2; and (iii) principles on social and economic policy included in Chap. III.

All rights and freedoms in Chap. II are deemed to be directly binding on all public authorities and thus they are directly enforceable by courts; additionally, the regulation of these rights is reserved to Parliament (*reserva de ley*; Art. 53(1)).

Among the rights listed in Chap. II, those included in Sect. 1, such as the right to life, physical integrity, free speech, privacy and association, the right to vote and fair trial, among others, are granted a heightened protection. In the case of an alleged violation of these rights, after exhausting the available judicial remedies before the ordinary courts, individuals may submit an individual complaint to the Constitutional Court (*recurso de amparo*; Art. 53(2)). Also, these rights need to be regulated by an organic law, which requires an absolute majority in Congress (Art. 81). Furthermore, they can only be amended following the extraordinary procedure set out in Art. 168 of the Constitution.

Finally, Chap. III includes the so-called principles on social and economic policy, such as the right to healthcare and the right to housing. These rights are not directly enforceable by courts and following Art. 53(3) 'they may only be invoked before the ordinary courts in accordance with the legal provisions implementing them'. The same provision lays down that '[r]ecognition, respect and protection of the principles recognised in Chapter 3 shall guide legislation, judicial practice and actions by the public authorities'. They are thus interpreted as mandates to public authorities and must be taken into account upon the interpretation of other norms.

2.1.2 Even though there is no general constitutional provision stipulating the conditions under which restrictions on rights can be imposed, the Constitutional Court has addressed the issue in its case law. Although some rights, such as the right to be free from torture, might be regarded as absolute, rights can generally be restricted in order to protect other rights or general interests. Any restriction needs to be provided by law and justified under the proportionality principle. The principle of proportionality includes three steps according to which it is necessary to ask: 'first, whether the restriction is useful to achieve a legitimate goal; second, whether the restriction is necessary, in that no more moderate measure could be chosen to sufficiently satisfy that goal; third, whether the costs that the restriction entails are offset by the benefits that are to be achieved'.²⁶

Besides the possibility of restricting rights, the Constitution allows the Government to suspend certain rights in specific circumstances (Art. 55). First, in the course of an investigation of 'armed bands or terrorist groups' three rights may be suspended under certain conditions: the right of the arrested person to be brought

²⁶ Ibid. p. 246.

before a judge no later than 72 hours after arrest; the right to privacy regarding one's home and the secrecy of communications. Secondly, when the Government declares a state of emergency or siege, a list of rights may be suspended, which is very exceptional and in practice has never happened.

In general, according to Art. 10(2) of the Constitution, constitutional rights need to be interpreted according to the Universal Declaration of Human Rights and other international human rights treaties ratified by Spain. This provision has been commonly used with regard to the European Convention on Human Rights (ECHR) and the corresponding European Court of Human Rights (ECtHR) case law.²⁷

2.1.3 The principle of the rule of law is encapsulated in Art. 1(1) of the Constitution,²⁸ and further specified in Art. 9. In short, the principle requires that all public authorities abide by the law. Broadly, the principle requires respect of the separation of powers and the protection of individual rights. Indeed, Art. 9(1) confirms the binding nature of the Constitution upon public authorities and citizens, which was paramount after the dictatorship. As opposed to the constitutional tradition over the nineteenth century, the Constitution was no longer conceived as a political document of a programmatic nature, but rather as a binding norm at the top of the legal order.

More specifically, Art. 9(3)²⁹ lays down a set of techniques for the realisation of the rule of law principle. First, the hierarchical principle orders the norms in the legal system according to which superior norms prevail over inferior norms (*lex superior derogat legi inferiori*). Basically, the Constitution is at the top, followed by parliamentary legislation and finally governmental regulations. Respect for the hierarchical principle is a condition of validity of any legal provision.

Secondly, Art. 9(3) includes the principle of legal certainty and the principle of publicity. As such, a norm may only enter into force after publication. The main instrument for these purposes is an official bulletin called *Boletín Oficial del Estado*. Individuals cannot be bound by norms that are secret. Moreover, according to the principle of legal certainty, individuals need to be able to foresee what the applicable norms are and how they are going to be interpreted. The principle of legal certainty is key in the civil law tradition (see also Sect. 2.5).

Thirdly, the Constitution bans the retroactivity of norms that establish sanctions or restrict individual rights. Thus, the legislator may enact retroactive norms except in these circumstances. This ban on retroactivity is especially relevant in criminal

²⁷ Saiz Arnaiz 1999, pp. 156–169; Torres Pérez 2011, pp. 160–164.

²⁸ See Ferreres Comella 2013a, pp. 26–29.

²⁹ Article 9(3) reads as follows: ‘The Constitution guarantees the principle of legality, the hierarchy of legal provisions, the publicity of legal statutes, the non-retroactivity of punitive provisions that are not favourable to or restrictive of individual rights, the certainty that the rule of law shall prevail, the accountability of public authorities, and the prohibition of arbitrary action of public authorities.’

law and is linked to the principle of *nulla poena sine lege*. Finally, public authorities must exercise their power according to the principle of responsibility and non-arbitrariness.

2.2 *The Balancing of Fundamental Rights and Economic Freedoms in EU Law*

2.2.1 In the last decade, the Spanish legislator has worked to enhance the economic freedoms recognised in EU law. This has generated tensions with the subnational territorial entities and some groups – such as professional associations – which have rooted their opposition in the constitutional text.

The context, however, is clearly imbalanced in favour of the economic freedoms of EU law against other constitutional principles. The transposition of the Services Directive³⁰ has altered the competences scheme of all levels of the public administration. The competences of subnational territorial entities, *inter alia*, to establish authorisations for private services and to regulate the protection of the environment regarding hazardous private activities, have been curtailed. The Law 20/2013 of 9 December on the Guarantee of the Internal Market has accelerated this trend and has implemented the freedom of services far beyond the requests of the Services Directive – to all kinds of ‘economic activity’, in the words of this legislation.³¹ These initiatives have altered significantly the constitutional distribution of competences and the principles of political and administrative autonomy of Autonomous Communities and Municipalities.

Another example of these tensions is the debate surrounding the Draft Legislation on Professional Associations.³² The Draft, based on the freedom of services at the EU level and aimed at bolstering the free movement of services and persons, sought to dismantle several Professional Associations and to reduce their capacity to regulate and intervene in the spheres of activity of their members. The Professional Associations claimed that Art. 36 of the Constitution provided a special recognition of such associations and that the restrictions of the Draft were thus unconstitutional. Finally, the pressure led the Spanish Government to announce the withdrawal of the Draft.³³

³⁰ Directive 2006/123/EC of the European Parliament and of the Council of 12 December on services in the internal market, [2006] OJ L 376/36.

³¹ Several constitutional complaints against Law 20/2013 have been lodged before the CC by the Autonomous Communities of Andalusia, Canarias and Catalonia.

³² The Government issued a first Draft Legislation on 20 December 2013 and a second proposal on 11 November 2014.

³³ Cinco Días 15 April 2015.

2.3 Constitutional Rights, the European Arrest Warrant and EU Criminal Law

The Framework Decision on the European Arrest Warrant³⁴ (Framework Decision) was first implemented in Spain by Law 3/2003 of 24 March on the European Arrest Warrant. This law was later replaced by Law 23/2014 of 20 November on Mutual Recognition of Criminal Decisions in the European Union. Law 23/2014 includes a new general clause, according to which this law will be applied with respect for the fundamental rights, freedoms and principles enshrined in the Spanish Constitution, Art. 6 of the TEU, the Charter and the ECHR (Art. 3).

The relevant provisions in the Constitution are as follows:

Article 17

1. Every person has a right to freedom and security. No one may be deprived of his or her freedom except in accordance with the provisions of this article and in the cases and in the manner provided by the law.
2. Preventive arrest may last no longer than the time strictly necessary in order to carry out the investigations aimed at establishing the events; in any case the person arrested must be set free or handed over to the judicial authorities within a maximum period of seventy-two hours.
3. Every person arrested must be informed immediately, and in a way understandable to him or her, of his or her rights and of the grounds for his or her arrest, and may not be compelled to make a statement. The arrested person shall be guaranteed the assistance of a lawyer during police and judicial proceedings, under the terms to be laid down by the law.
4. An habeas corpus procedure shall be provided for by law in order to ensure the immediate handing over to the judicial authorities of any person arrested illegally. Likewise, the maximum period of provisional imprisonment shall be determined by law.

Article 24

1. All persons have the right to obtain effective protection from the judges and courts in the exercise of their rights and legitimate interests, and in no case may there be a lack of defense.
2. Likewise, all have the right to the ordinary judge predetermined by law; to defense and assistance by a lawyer; to be informed of the charges brought against them; to a public trial without undue delays and with full guarantees; to the use of evidence appropriate to their defence; not to make self-incriminating statements; not to plead themselves guilty; and to be presumed innocent.

...

³⁴ Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA), [2002] OJ L 190/1.

Article 25

1. No one may be convicted or sentenced for actions or omissions which when committed did not constitute a criminal offence, misdemeanour or administrative offence under the law then in force.

...

3. The Civil Administration may not impose penalties which directly or indirectly imply deprivation of freedom.

2.3.1 The Presumption of Innocence

2.3.1.1 In Spain, the competent authority to issue a European arrest warrant (EAW) is any judge or court hearing a criminal case. Law 23/2014 has set some specific conditions for the issue of an EAW, in addition to the general requirements established in the Framework Decision. The conditions are as follows: first, the case needs to meet the requirements laid down in the Law on Criminal Procedure to hold a person in preventive imprisonment, or the requirements of Organic Law 5/2000 of 12 January on the Criminal Responsibility of Minors, to decide on detention as an interim measure; secondly, a judicial authority may only issue an EAW to enforce a sentence of imprisonment if the substitution or suspension of imprisonment is not possible; and finally, the judicial authority may issue an EAW only if the prosecutor or the private accusation consider it necessary (Art. 39). These additional requirements contribute to specifying the proportionality principle as it is applied at the moment of issuing an EAW and to a better protection of the presumption of innocence.

According to Law 23/2014, the competent court to execute an EAW is the *Juez Central de Instrucción de la Audiencia Nacional*. Thus, execution is centralised in a single court for the whole national territory.

2.3.1.2 The European Commission Report on the implementation of the EAW offers data on the number of EAWs that have been issued and executed by each Member State.³⁵ According to the latest report, between 2005 and 2009, on average, Spain issued 533.8 EAWs per year and executed 73.4 EAWs per year.

The Centre for European Policy Studies Special Report offers valuable quantitative information in this regard. In the period between 2005 and 2011,³⁶ Spain issued 3,766 warrants, which means that Spain issued the fifth largest number of EAWs of all the Member States. Only 563 resulted in effective surrender, which represents a success rate of 14%. The entry into force of Law 23/2014, which as

³⁵ Report from the Commission to the European Parliament and the Council of 11 April 2011 on the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [COM(2011) 175 final]: http://ec.europa.eu/justice/criminal/files/eaw_implementation_report_2011_en.pdf.

³⁶ See Carrera et al. 2013, p. 6.

mentioned sets additional conditions for the issue of an EAW, might contribute to reducing the number of EAWs issued.

In turn, Spain received 8,702 requests for surrender (third largest number of EAWs received among the Member States), and 5,279 people were surrendered (in absolute terms, Spain is the state that has surrendered the largest number of people).³⁷ There is no provision for compensation due to surrender for people who are later acquitted.

The cases in which the execution of an EAW might give rise to the violation of fundamental rights might go unreported. NGOs and the media have denounced abuses in several countries. For instance, in Spain a documentary was launched about the case of Óscar Sánchez, who was accused of drug-trafficking and surrendered to Italy.³⁸ He spent 20 months in prison until it was discovered that he had been wrongly identified and he was eventually released. Cases such as this show that the right to the presumption of innocence might also be impinged upon as a consequence of the automaticity of the execution of EAWs.

2.3.2 *Nullum crimen, nulla poena sine lege*

No significant issues have arisen in Spain.

2.3.3 The Right to a Fair Trial and *In Absentia* Judgments

2.3.3.1 As it is widely known, the execution of the EAW for *in absentia* judgments has been a source of constitutional conflict in Spain. According to settled constitutional case law, the extradition of a person who has been convicted *in absentia* without making the surrender conditional on the opportunity to apply for a retrial violates the right to a fair trial (Art. 24(2) of the Constitution).³⁹

This interpretation of the right to a fair trial clashed with the 2002 Framework Decision on the EAW, and even more clearly after its amendment in 2009. According to the Framework Decision, if the person had information about the trial or had been represented by an appointed lawyer, surrender may not be refused or subjected to conditions.

³⁷ See also the quantitative information provided by the Council of Europe, *Note from the General Secretariat to the Working Party on Cooperation in Criminal Matters (Experts on the European Arrest Warrant): Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant – Year 2013*. 8414/2/14 REV 2 LIMITE COPEN 103 EJN 43 EUROJUST 70, Brussels, 31 July 2014: <http://www.statewatch.org/news/2014/aug/eu-council-eaw-ststs-2013-8414-rev2-14.pdf>.

³⁸ See: <http://blogs.ccma.cat/senseficcio.php?itemid=53778>.

³⁹ Judgment CC No. 91/2000, of 30 March, paras. 12–13 (this interpretation was contested within the Court, see the dissenting opinions).

In 2009, the CC was confronted with a case in which an English national, resident in Spain, had been sentenced in Romania to four years of imprisonment in his absence, although he had been represented by a lawyer of his choice. In its judgment, the CC held that the surrender of a person who has been condemned *in absentia* without making the surrender conditional on the possibility to obtain a retrial violates Art. 24(2) of the Constitution. Unfortunately for the applicant, he had already been surrendered by the time the CC decided the case.⁴⁰

Two years later, in a similar case involving an Italian national who had been condemned *in absentia* to ten years of imprisonment for the crime of bankruptcy fraud in Italy, the CC decided to make a preliminary reference to the Court of Justice of the European Union (CJEU) for the first time ever. This is the well-known *Melloni* case. The reference included three questions about the interpretation and validity of the relevant provision of the EAW Framework Decision and the interpretation of Art. 53 of the Charter.⁴¹

In a nutshell, the CJEU upheld the validity of the Framework Decision in light of Arts. 47 and 48 of the Charter.⁴² It did not even consider the CC's suggestion to interpret the Charter as providing a more extensive protection than the ECHR. The CJEU was satisfied with stating that the level of protection in the EU was compatible with the ECHR.⁴³ However, while states are allowed to provide for better protection than the ECHR, the CJEU rejected the possibility for the CC to grant a higher level of protection than the Charter in this case.⁴⁴

Eventually, the CC overturned previous case law and revised the interpretation of Art. 24(2) of the Constitution regarding *in absentia* judgments with the consequence that the standard of constitutional protection was lowered.⁴⁵

2.3.4 The Right to a Fair Trial

Within the domain of the right to a fair trial, the CC has held that, when a person has already consented to the execution of an EAW, the addition of new grounds for surrender without a previous audience amounts to a violation of the right to a fair

⁴⁰ Judgment CC No. 99/2009, of 28 September. See Izquierdo Sans 2010, pp. 218–225; Cedeño Hernán 2010, pp. 1–15; Fontanelli 2010, p. 372; Torres Pérez 2010, pp. 441–472.

⁴¹ About the preliminary reference, see among others, Arroyo Jiménez 2011, pp. 1–25; Revenga Sánchez 2012, pp. 139–150; González Pascual 2012, pp. 161–178; Pérez Manzano 2012, pp. 311–345; Torres Muro 2013, pp. 343–370.

⁴² Case C-399/11 *Melloni* [2013] ECLI:EU:C:2013:107. For comments on the CJEU preliminary ruling see, among others, De Boer 2013, pp. 1083–1104; Martín Rodríguez 2013, pp. 1–13; Skouris 2013, pp. 229–243; García Sánchez 2013, pp. 1137–1156; Groussot and Olsson 2013, pp. 7–35; Brkan 2013, pp. 139–145.

⁴³ For a critical appraisal of the CJEU reasoning regarding this issue, see Torres Pérez 2014, pp. 314–315; Díez-Hochleitner 2013, pp. 21.

⁴⁴ For the interpretation of Art. 53 of the Charter, see Sect. 2.11.

⁴⁵ Judgment CC No. 26/2014, of 13 February.

trial.⁴⁶ Also, the CC has held that the lack of a right to appeal the decision to execute an EAW does not violate the right to a fair trial, since this is not a decision about the merits of the case.⁴⁷

For the statistics and individual cases reported, see Sect. 2.3.1.2.

2.3.5 The Right to Effective Judicial Protection: The Principle of Mutual Recognition

Regarding the tension between mutual recognition and constitutional rights see Sect. 2.3.3 about trials *in absentia*.

2.3.6 Other Aspects of EU Criminal Law – The Principle of *Ne Bis in Idem*

According to the Framework Decision, the principle of *ne bis in idem* can, depending on the circumstances, be a ground for either compulsory (Art. 3(2)) or optional (Art. 4(2), (3) and (5)) non-execution of an EAW.

In a case before the CC, the applicant argued that the EAW issued by France to enforce a sentence of 20 years of imprisonment regarded the same acts for which a petition of extradition had been rejected in 1989. At that time, the extradition had been rejected on the basis of the principle of reciprocity, since the person accused was a Spanish national. The CC held that decisions in extradition procedures do not have the effect of *res iudicata* and may, in certain circumstances, be replaced by others. In that case, the reason to refuse the execution had to do with the existing legal framework, which had been modified following the Framework Decision on the EAW. In addition, the reason to request the surrender was not the same, since extradition had first been sought to prosecute the person and the subsequent EAW was issued in order to enforce the sentence.⁴⁸

2.4 The EU Data Retention Directive

2.4.1 The Constitution recognises the right to private and family life (Art. 18(1)), and provides as follows:

Article 18

1. The right to honour, to personal and family privacy and to the own image is guaranteed.

⁴⁶ Judgment CC No. 181/2011, of 21 November.

⁴⁷ Judgment CC No. 177/2006, of 5 June.

⁴⁸ *Ibid.*

2. The home is inviolable. No entry or search may be made without the consent of the householder or a legal warrant, except in cases of *flagrante delicto*.
3. Secrecy of communications is guaranteed, particularly regarding postal, telegraphic and telephonic communications, except in the event of a court order.
4. The law shall restrict the use of data processing in order to guarantee the honour and personal and family privacy of citizens and the full exercise of their rights.

Under this broad wording, the Constitution protects individuals from interferences by public authorities in the spheres of personal and family life. In addition, the Constitution enshrines two other more specific rights that are relevant in the overall constitutional debate about the EU Data Retention Directive.⁴⁹

First, the Constitution guarantees the secrecy of communications, with the exception of searches and seizures previously authorised by a court order (Art. 18 (3)). In well-established case law, the CC has held that this right protects the act of communication itself, without a necessary link to private life.⁵⁰ In other words, this right offers a formal protection of the communication process regardless of its content. Secondly, the Constitution contains a clear mandate for the legislator to limit the use of data processing in order to protect the private and family life of individuals (Art. 18(4)). Although it is formulated as a mandate, the CC has interpreted this provision as a truly individual fundamental right similar to the other rights recognised in Chap. II, Sect. 1.

These constitutional provisions have conditioned the implementation of the EU Data Retention Directive in the period 2006–2014, but only in relation to the safeguards on the access to data. The rule of blanket data retention has not been disputed. In this regard, the legislator has considered that the constitutional protection of personal data is fulfilled with the obligation to obtain a court order in the context of a criminal investigation of a serious crime.⁵¹ The legislator understands, in line with the spirit of the Directive, that the data to be retained do not reveal the content of the communications and, therefore, these are only circumstantial data. Nonetheless, and due to the specific formal protection of all types of communications guaranteed by Art. 18(3) of the Constitution, a court order is compulsory in the event of access to data by public authorities. Three exceptions to the compulsory court order regime should be highlighted: access to the International Mobile Subscriber Identity (IMSI) data regarding especially prepaid mobile phones;⁵² the

⁴⁹ Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, [2006] OJ L 105/54.

⁵⁰ The landmark judgment is Judgment CC No. 114/1984, of 29 November.

⁵¹ Article 7, Law 25/2007 of 18 October regarding the Retention of Telecommunications Data and Public Communications Networks.

⁵² Single Additional Provision Law 25/2007. The IMSI data is a combination of algorithms which prevents telecommunications fraud (it allows the identification of the mobile phone). However, the IMSI itself does not allow the identification of the buyer of the phone or the content of the communication. A court order is required to access this information beyond the access of the mere

investigation of terrorism and organised crime,⁵³ and the possibility of suspension of these rights when a state of emergency or siege is declared.⁵⁴

On the other hand, Spanish courts have only added a cautious interpretation of the scope of Law 25/2007 of 18 October implementing the EU Data Retention Directive. The legitimate aim of the access and use of the data retained, i.e. ‘investigation, detection and prosecution of serious crime’, must be determined case by case considering the nature of the offence and in accordance with the proportionality principle.⁵⁵ Spanish courts have declared that the expression ‘serious crime’ cannot automatically be interpreted in the sense of serious crimes as defined in criminal law (i.e. the formal definition under criminal law of a serious crime does not imply *per se* the existence of a legitimate aim for the purposes of Law 25/2007, which must be determined case by case). Yet ordinary courts have raised neither a constitutional challenge before the CC nor a preliminary reference to the CJEU. Only one, timid constitutional concern regarding Law 25/2007 has been voiced, *obiter dicta*, by the Spanish Supreme Court (SC), and this referred to the type of law regulating the data retention measures: since a fundamental right was at stake, the SC deemed an organic law to be more appropriate than an ordinary law.⁵⁶

The annulment of the EU Data Retention Directive by the CJEU⁵⁷ has not led to the invalidation of Law 25/2007. This implementing measure is still in force. After the annulment of the EU Data Retention Directive in 2014, the legislator has only introduced minor amendments regarding the sanctioning measures and the procedure for access to data. The procedure shall operate through an electronic format and only government agents – police, customs surveillance and intelligence officers – are able to request ‘essential information for the aims of the Law’.⁵⁸ There is no change to the rule of blanket data retention – or the data to be retained – and, therefore, in light of the inaction on the part of the Spanish legislator, it appears that the initiative of the EU legislator will be necessary to change the national law implementing the EU Data Retention Directive.

IMSI data, as well as to access the specific register of prepaid mobile phones created by the Single Additional Provision Law 25/2007 (Judgment SC No. 249/2008, of 20 May, para. 4).

⁵³ See Art. 55(2) of the Spanish Constitution and Art. 579(3) of the Law on Criminal Procedure, approved by the Royal Decree of 14 September of 1982.

⁵⁴ Article 55(1) of the Spanish Constitution allows the search and seizure of all types of communications in the case of a declaration of one of the two more serious exceptional situations (states of emergency and siege, but not the state of alarm). See also the Organic Law 4/1981 of 1 June regarding the States of Alarm, Emergency and Siege.

⁵⁵ Order of the Provincial Court of Madrid (Section 30) No. 572/2013, of 11 July, para. 2.

⁵⁶ Judgment SC No. 249/2008, of 20 May, para. 4. Under Art. 81 of the Constitution, an organic law is required to regulate the essential elements of some fundamental rights (rights under Art. 18 of the Constitution are included). As stated in previous sections, an organic law is a source of law with the force of legislation, which needs an absolute majority to be passed.

⁵⁷ Joined cases C-293/12 and C-594/12 *Digital Rights Ireland and Seitlinger and Others* [2014] ECLI:EU:C:2014:238.

⁵⁸ New Art. 6(2) Law 25/2007, as amended by Final Additional Provision 4(1) of Law No. 9/2014 of 9 May regarding Telecommunications.

The origin in EU law of the rule of blanket data retention may have well facilitated its incorporation into national law. It is uncertain whether an analysis based only on constitutional grounds would have led to a declaration of unconstitutionality. Arguably, the formal protection of communications, well established in the case law of the CC under Art. 18(3) of the Constitution, raises some doubts about the constitutionality of the rule. Ordinary courts, however, have not raised any constitutional challenge in the CC and, even for the cases in which a court order is not needed – in the case of the three exceptions mentioned above – they have upheld the measure.⁵⁹ It appears that for Spanish courts, the safeguard of a court order is enough to sustain the compatibility between the Constitution and the rule of blanket data retention. However, it should be pointed out that in the cases before the SC in which Law 25/2007 has been applicable, the SC has emphasised its nature as a national norm implementing EU law.⁶⁰ This nature has had an important impact on the reasoning of the SC and might have deterred it from submitting a constitutional challenge before the CC.

2.5 *Unpublished or Secret Legislation*

2.5.1 As seen in Sect. 2.1.3 on the rule of law, the publication of legal norms is a constitutional obligation established under Art. 9(3) of the Constitution. Moreover, Art. 2(1) of the Civil Code establishes that this general principle is applicable to all kinds of norms. This overall mandate is further reinforced by the Constitution with the obligation to publish State legislation (Art. 91) and international treaties (Art. 96 (1)). The legislation of Autonomous Communities must also be published according to each Autonomous Statute. Finally, administrative regulations with general and binding effects must also be published.⁶¹

Taking into account these constitutional and legislative references to the principle of publicity of norms, the CC has established a direct connection to the requirements of a democratic state.⁶² The CC has declared that only the publicity of norms guarantees the subjection of citizens to the legal system and the exercise of

⁵⁹ See Judgment SC No. 249/2008, of 20 May.

⁶⁰ Ibid. This SC judgment covers all the EU legislative history and the ECHR Convention system approach in the field of personal data. It also confronts, in some way, the case law of the CC with the aforementioned standpoints. The SC ultimately relied heavily on the new framework of Law 25/2007 and the EU Data Retention Directive, and considered all the previous considerations to have been overcome.

⁶¹ Article 52 of Law 30/1992 of 26 November of Rules on Public Administration and Administrative Proceedings. In October 2016, this provision will be derogated and replaced by a provision with identical effects: Art. 131 of Law 39/2015 of 1 October of Rules on Public Administrative Proceedings.

⁶² Judgment CC No. 179/1989, of 2 November, para. 2.

their rights.⁶³ In practice, secret or unpublished legislation has not been an issue in Spain under the 1978 Spanish Constitution.

In view of the above, it seems plausible to say that secret norms and measures in Spain would be declared at least – in line with the CJEU decision on the *Heinrich* case – to be without general and binding effects on citizens. Moreover, in light of the well-established constitutional principle of publicity and the strong position of the CC, secret norms would be declared invalid.

2.6 Rights and General Principles of Law in the Context of Market Regulation: Property Rights, Legal Certainty, Non-retroactivity and Proportionality

2.6.1 In the last two decades Spain has faced the liberalisation of several markets on the impulse of the EU. The telecommunications, energy and transport markets are examples of the decisive influence of the EU. In this transition from public monopolies to liberal markets, property rights, and principles like non-retroactivity, legal certainty and proportionality have been affected, *inter alia*, by unexpected changes in the regulatory framework and the imposition of public service obligations on private companies, the alteration of property rights and new regulatory bodies. Indeed, these troubles are commonly shared by all European countries that have faced liberalisation on the impulse and under the supervision of the EU.⁶⁴

As an example, changes in the legal framework of the renewable energy market have raised a huge debate in Spain. First, the elimination of the incentives to the renewable energy sector in 2012⁶⁵ and, secondly, the unexpected changes in the payment scheme of energy in 2014, which diminished the expected incomes of pre-existing renewable energy premises,⁶⁶ have led the renewable-energy sector to challenge these decisions before the Spanish courts alleging, *inter alia*, the infringement of the principles of legitimate expectations and legal certainty. EU law is at the forefront of this debate because these changes were made in order to implement Directive 2009/28/EC.⁶⁷ The resolution of this conflict, with the possible intervention of the European institutions, is still pending.⁶⁸

⁶³ Ibid.

⁶⁴ For a general overview of the liberalisation of certain markets piloted by the EU and the issues of national reception – from the political, institutional, cultural and legal points of view – see the seminal work of Majone 1996.

⁶⁵ Royal Decree-Law 1/2012, of 27 January.

⁶⁶ Law 24/2013, of 26 December and Royal Decree 413/2014, of 6 June.

⁶⁷ Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources [2009] OJ L 140/16.

⁶⁸ Several Autonomous Communities have lodged constitutional challenges and conflicts of competence (Catalonia, Andalusia and Extremadura) before the CC. Also, renewable energy companies and environmental associations have brought several actions for judicial review of the

2.7 *The ESM Treaty, Austerity Programmes and the Democratic, Rule-of-Law-Based State*

2.7.1 The Treaty Establishing the European Stability Mechanism (ESM Treaty) imposes on Spain a mandatory contribution in the capital stock that amounts to 11.9037% of the total capital stock of the ESM.⁶⁹ Spain would be obliged to contribute 83,514 million EUR should the maximum calls allowed under the ESM Treaty be made. This corresponds to 19.73% of Spain's yearly budget for 2014 and 7.89% of its GDP in 2014.⁷⁰

These data show that the ESM Treaty, if the calls were activated, would heavily determine the budget, and Spain's financial and expenditure obligations. The budgetary autonomy of the State, specially the prerogatives of the Government and Parliament regarding the drafting and approval of the State's general budget, as well as the financial autonomy of the Autonomous Communities, could be jeopardised by the capital calls from the ESM.⁷¹ The ESM Treaty, the imposition of limits to the public debt and deficit (in the TSCG), the European Commission supervision of Member States' budgets prior to their approval (Two-Pack obligations) and the imposition of additional measures to fix macroeconomic imbalances (MIP framework) are factors which challenge the principle of financial autonomy of the Member States.

Despite this significant impact, a serious constitutional debate about the ESM Treaty provisions has not been launched. The possibility to submit this Treaty to an *ex ante* review by the CC –pursuant to Art. 95 of the Constitution – was not even raised, and the CC has not addressed the issue after the ratification and entry into force of the Treaty either. In the context of the debate about the TSGC, the CC has

administration (more than 100 have been heard by the SC since 9 September 2014). The Association to Support Renewable Energies (*Coordinadora de Apoyo a las Energías Renovables*), which includes more than 50 entities from this sector, has stated that it is preparing legal action at the EU level against the measures taken. Nonetheless, until now, the international strategy lead by international investors has been to present actions before international arbitrators under the Energy Charter Treaty: several actions have been brought before the International Centre for Settlement of Investment Disputes (ICSID), the Stockholm Chamber of Commerce (SCC) and the United Nations Commission on International Trade Law (UNICTRAL).

⁶⁹ Annex I ESM Treaty, Contribution Key for the Kingdom of Spain. The capital stock after the contributions of all the states amounts to 700,000 million EUR.

⁷⁰ The total amount of the yearly budget for 2014 is 423,231 million EUR (Law 22/2013 of 23 December regarding the General Yearly Budget for 2014). The yearly GDP for 2014 was 1,058,469 million EUR according to data provided by Eurostat and *Instituto Nacional de Estadística* (the Spanish Statistical Office).

⁷¹ In Spain, the Government drafts the general state budget and Parliament approves it by passing a law. Parliament can amend the budget during the legislative process, but any amendments implying an increase of the expenditures or a decrease in the incomes must be approved by the Government (Art. 134 of the Constitution). In relation to the Autonomous Communities, the Constitution recognises their financial autonomy and they are entitled to draft and approve their own budgets (Art. 156 of the Constitution).

declared that the central Government – based on its coordination powers and competence on general economic planning – can intervene and supervise the Autonomous Communities' budgets, to guarantee budget stability, and that these powers do not unlawfully impinge upon the financial autonomy of the latter.⁷²

In this regard, the incorporation of the fiscal compact golden rule (budget stability or surplus) in national law, 'preferably', in the words of the TSCG,⁷³ by means of a constitutional provision, is another example of a mandate coming from the EU without being preceded by a thorough constitutional and democratic debate as discussed in greater detail in Sect. 1.5.

The need to gain access to financial markets at reasonable interest rates moved Spain to go further in the introduction of the golden rule of budget stability. Instead of passing a bill, Spain established at the constitutional level the absolute priority of the payment of public debt over other national expenditures in the amendment to Art. 135 (see Sect. 1.2.3), which included para. 3 according to which: '... Loans to meet payment on the interest and capital of the State's Public Debt shall always be deemed to be included in budget expenditure and their payment shall have absolute priority. These appropriations may not be subject to amendment or modification as long as they conform to the terms of issue. ...'.

Spain changed its priorities and expressed a strong payment commitment to the financial markets over other public expenditures, for instance in the social, education or welfare fields. Again, this important rule, meaning a shift in the balancing of the rights of citizens with those of the international creditor community, especially in the economic, social and cultural spheres, was introduced together with the incorporation of the golden rule and without a thorough constitutional and democratic debate.

In short, the severe impact of the economic and financial crisis in Spain have placed the country in a difficult position in negotiating and discussing the economic and financial measures to fight the crisis at the European Union level.

2.7.2 Other initiatives such as Eurobonds and the Banking Union were seen in Spain as alleviating measures to overcome the economic and financial crisis, especially to decrease dependence on the financial markets to get loans. For these reasons, the measures were generally uncontested from the constitutional perspective.

2.7.3 Nonetheless, some debates and contestation from the constitutional perspective have taken place in relation to certain austerity measures introduced by the Spanish Government. Despite the fact that Spain has not been subject to an official bailout, the banking rescue programme of Spanish financial institutions in 2012, the negative alert mechanism reports and the recommendations of the European Commission and the Council to carry out structural reforms have obliged Spain to launch several austerity programmes that have affected civil servants and other

⁷² Judgment CC No. 215/2014, of 18 December.

⁷³ Article 3(2) TSGC.

public employees, and the quality, access and organisation of public services. Some of the measures and their origin will be addressed in greater detail in Sect. 3.5.

From the constitutional perspective, public employees have challenged the suspension of certain benefits before Spanish courts on the grounds of legitimate expectations and the prohibition of retroactivity. One of the contested measures was the suppression of the ‘extra pay’ of December 2012 by Royal Decree-Law 20/2012 of 13 July (the extra pay is included in the annual salary of an employee but is paid in two specific months, normally in December and June, together with the monthly payment). The decision was taken on 15 July and, therefore, the period between 1 June and 14 July could have generated a proportional payable right of the ‘extra pay’. Lower judges and courts had decided differently on the issue, and finally several of them requested the CC to rule on the constitutionality of this measure. The Spanish Government and some Autonomous Communities had decided, before the resolution of the case by the CC, to reinstate this proportional amount of the ‘extra pay’. Therefore, the CC declared the constitutional questions referred by the ordinary courts to be extinguished – without entering into the merits – since the object of the claims in these cases no longer existed.⁷⁴

The reform of the labour market as a consequence of the austerity programmes has also had a special impact on public employees.⁷⁵ Most notable were the 5% reduction in the wages of public employees⁷⁶ and the possibility for the public administration to suspend or unilaterally modify collective agreements in the public sector for economic reasons.⁷⁷ Both measures have been contested based on arguments of their incompatibility with the right to collective bargaining and trade union freedoms (Arts. 28 and 37 of the Constitution). However, the CC upheld the decrease in salary,⁷⁸ and the new power of the public administration to suspend or modify collective agreements has only been condemned by the International Labour Organization (ILO).⁷⁹

Finally, the healthcare reform introduced by the Government as part of its austerity measures has also been challenged before the CC.⁸⁰ The exclusion of illegal immigrants from the public healthcare system, except in cases of emergency situations, pregnancy and minors, and the pharmaceutical co-payment mechanism have been contested from the point of view of the constitutional right to

⁷⁴ Judgment CC No. 83/2015, of 30 April, regarding the extinction of the preliminary reference sent by the *Audiencia Nacional* (National High Court). The other preliminary references will follow this same result.

⁷⁵ See Luz Rodríguez 2014, pp. 128–139.

⁷⁶ Royal Decree Law No. 8/2010, of 20 May.

⁷⁷ Article 32, Law 7/2007, of 12 April of the Basic Public Employees’ Statute (as amended by Royal Decree Law n° 20/2012 of 13 July).

⁷⁸ Judgment CC No. 85/2011, of 7 June.

⁷⁹ 371st Report ILO, of 13–27 March 2014.

⁸⁰ Royal Decree Law No. 16/2012 of 20 April.

healthcare.⁸¹ The European Committee of Social Rights has considered that such denial of access to healthcare for illegal immigrants is contrary to Art. 11 of the European Social Charter.⁸² Moreover, several Autonomous Communities have decided to secure universal access to healthcare for illegal immigrants. The Government has challenged the norms adopted by the Basque Country and Navarra before the CC. The judgment is still pending but, in the meantime, the CC has lifted the suspension of these norms.⁸³ Also in relation to the healthcare system, the CC has declared unconstitutional the legislation of the Autonomous Communities of Catalonia and Madrid establishing the obligation to pay one euro per prescription.⁸⁴ However, this judgment should be read in light of a conflict of competences, i.e. the Autonomous Communities cannot impose extra charges in the healthcare system on their own (or without the intervention of the national Government).

2.8 *Judicial Review of EU Measures: Access to Justice and the Standard of Review*

2.8.1 Judicial review of EU measures in Spain through the preliminary ruling mechanism is, in practice, very limited due to the inaction of national judges. In the period 2006–2014, national courts submitted a total of 178 references for a preliminary ruling, out of which only one was a request for a preliminary ruling on the validity of an EU measure.⁸⁵ Lower courts have been the most active in submitting references about the interpretation of EU law, with the submission of a total of 140,⁸⁶ while the SC has submitted 37 requests. The sole submission of a request for a preliminary ruling on the validity of an EU measure was made by the CC in *Melloni* (see Sect. 2.3.3). These data show that Spanish courts are very reluctant to ask the CJEU to decide on the validity of an EU measure.

2.8.2–2.8.5 On the other hand, the CC has sustained a long-standing position of not assessing the legality of EU measures: conflicts between EU law and national law,

⁸¹ To date, the only decisions of the CC are the Orders CC No. 239/2012, of 12 December and No. 114/2014, of 8 April, in which the CC partially lifted the suspension of the legislation of the Autonomous Communities of the Basque Country and Navarra on the ground that the benefits of the exclusion of illegal immigrants cannot outweigh the right to healthcare. See also Sect. 3.5.

⁸² Conclusions XX-2 of the European Committee of Social Rights, November 2014.

⁸³ Order CC No. 239/2012, of 12 December; Order No. 114/2014, of 8 April.

⁸⁴ Judgments CC No. 71/2014, of 8 May and No. 85/2014, of 29 May.

⁸⁵ Data extracted from search in <http://curia.europa.eu/> (Period of search: 1 January 2006 to 1 September 2014).

⁸⁶ The *Audiencia Nacional* (National High Court) has sent 3 references; the *Tribunales Superiores de Justicia* (High Courts of Justice of Autonomous Communities) 33; the *Audiencias Provinciales* (Provincial Courts) 22; *Juzgados de primera instancia de todos los órdenes jurisdiccionales* (Courts of First Instance) 80. Other administrative courts have sent 2 references.

and the validity of EU measures have been considered non-constitutional issues.⁸⁷ Therefore, these conflicts and their resolution have been left to the ordinary courts. In this line, the CC's recent case law shows an effort to emphasise the role of ordinary courts as EU judges. In this context, the CC has stated that the failure to submit a preliminary reference when mandatory and to disapply national law that is in conflict with EU law could amount to a violation of the constitutional right to a fair trial (Art. 24 of the Constitution).⁸⁸ Moreover, the CC has declared that, in certain cases, EU law has constitutional relevance and, therefore, the CC itself might submit a preliminary reference.⁸⁹ Notwithstanding these recent developments and the efforts of the CC, ordinary courts remain quite inactive in submitting preliminary questions regarding the validity of EU law.

It is difficult to compare the standard of national judicial review to the one deployed by the CJEU. There are neither official statistics nor scholarly work regarding the success rate of challenges against legislative measures brought before the CC. The data obtained from a statistical research carried out by the authors shows an indicative success rate of approximately 30% of challenges against legislative measures (period from 2006–2014).⁹⁰ This rate includes legislation declared partially or fully invalid or declared constitutional following a specific interpretation in conformity with the Constitution. This indicative success rate shows that the national standard of review is higher than the one sustained by the CJEU with regards to the annulment of EU law by the EU courts in 2001–2005 (success rates of 6.8% in the General Court and 16.1% in the CJEU).⁹¹

In relation to ordinary courts, there is also a lack of official statistical data and scholarly research regarding the standard of judicial review of administrative regulations and acts. Some studies suggest that the standard of judicial review varies depending on the field of administrative action. In areas like licensing or sanctions, ordinary courts exercise a strict scrutiny,⁹² while in areas like economic regulation – telecommunications and the energy sectors – courts maintain a more deferential approach, with success rates of less than 25% against acts of the regulatory bodies.⁹³ These rates in the regulatory field could indicate a softer national judicial

⁸⁷ For all, see the judgments CC No. 28/1991, of 14 February; 64/1991, of 22 March; 147/1996, of 19 September; 13/1998, of 22 January.

⁸⁸ Judgments CC No. 78/2010, of 20 October (*Metropole* case) and No. 145/2012, of 2 July (*Iberdrola* case).

⁸⁹ Order CC No. 86/2011, of 9 June (preliminary reference to the CJEU, case *Melloni*) and the derived judgment of the CC on the merits No. 26/2014, of 13 February.

⁹⁰ This research has been carried out based on the Annual Reports and Statistics published by the CC. However, this data is partial and therefore the conclusions and the success rate calculated by the authors are not definitive and should be taken as mere indicators.

⁹¹ Tridimas and Gari 2010, p. 170.

⁹² Fernández Rodríguez 2009, pp. 34–79.

⁹³ Esteve Pardo 2009, pp. 899–902; Betancor Rodríguez 2012, pp. 619–620.

review standard than the one sustained by the General Court and the CJEU when reviewing the decisions of the European Commission (success rate of 35%).⁹⁴ However, the national standard of review cannot adequately be compared with the CJEU standard due to the lack of publicly available data. Thus, it is not possible to make a conclusive assessment of this issue.

2.8.6 No significant issues have arisen in Spain.

2.9 Other Constitutional Rights and Principles

2.9.1 The implementation of EU law has entailed challenges in Spain regarding the rule of law, the separation of powers doctrine and the territorial distribution of power. Three examples in this regard include: the obligation imposed by EU law to create independent regulatory bodies in certain markets, the increase of administrative regulations to implement EU measures and the weakening of the political autonomy of the Autonomous Communities.

In the energy and electronic communications sectors, the 2009 EU legislation has left no room for Member States to design their regulatory bodies: they must be separated and independent from the legislative and the executive powers.⁹⁵ In countries like Spain, unfamiliar with such administrative agencies outside the banking and financial sectors, the incorporation process of this new institutional design has been uneasy and has altered the traditional balance among the three branches of power. Several scholars have voiced concerns regarding the independence and judicial and parliamentary oversight of these regulatory bodies.⁹⁶ Following its creation, the European Commission expressed doubts about the independence and attribution of powers to the new Spanish super-regulator – with powers to regulate the energy, telecommunications, audiovisual, transport and postal sectors, as well as its monitoring and sanctioning powers to ensure effective competition in the market.⁹⁷ The Spanish Supreme Court has recently referred a

⁹⁴ Tridimas and Gari 2010, p. 170.

⁹⁵ Article 35(1)(4), Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity, [2009] OJ L 211/55; Art. 39(1)(4) Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas, [2009] OJ 211/94; Art. 3 Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services, [2009] OJ L 377/37.

⁹⁶ Solanes Mullor 2014, pp. 443–463.

⁹⁷ Before 2013, Spain regulated these sectors through specialised and separate independent regulatory bodies. In 2013, Law 3/2013 of 4 June created the National Markets and Competition Commission (*Comisión Nacional de los Mercados y la Competencia*), which merged almost all the

case to the CJEU for a preliminary ruling on the compatibility of the creation of the new super-regulator with EU law in these fields.⁹⁸

A similar problem arises also in relation to the increasing prominence of the executive vis-à-vis the legislative branch in implementing EU law. The obligation to comply with the deadlines for the implementation of directives and the necessity to directly apply EU regulations have justified the use of governmental regulations instead of legislative acts and, especially, the use of Royal Decree-Laws.⁹⁹ Royal Decree-Laws are in theory an exceptional legislative prerogative of the Government for ‘extraordinary and urgent situations’ (Art. 86 of the Constitution). A clear example of the misuse (and abuse) of Royal Decree-Laws is the implementation of the Services Directive by some Autonomous Communities whose Governments transposed it by Royal Decree-Law when the transposition deadline had already elapsed.¹⁰⁰

The approval of several national legislative measures under the pressure of EU law has undermined the political autonomy of the Autonomous Communities. First, Organic Law 2/2012 of 27 April on Budget Stability and Financial Sustainability has regulated the implications of the golden rule incorporated in Art. 135 of the Constitution and limited the financial autonomy of the Autonomous Communities. Article 135 of the Constitution requires the Autonomous Communities to pass balanced budgets, limits their capacity to issue public debt and, overall, imposes the supervision of their financial system by the Central Government and European institutions. In addition, the material powers and competences of the Autonomous Communities have been constrained as a consequence of legislative measures at the central level such as Law 20/2013 of 9 December on the Guarantee of the Internal Market (see Sect. 2.2). Finally, some austerity measures launched by the Central Government have had an impact on the self-organisation and personnel of the Autonomous Communities. For instance, the Central Government has imposed a reduction of the salaries of the civil servants of the Autonomous Communities, and recently the CC has upheld this measure declaring that the Central Government is

existing specialised independent regulatory bodies (only the Stock Exchange Commission – *Comisión Nacional del Mercado de Valores* – was excluded). The European Commission raised doubts about the transition process and the independence of the appointed members of the existing regulatory bodies, which were dismissed before their mandate had expired. The powers of the new body were curtailed and some regulatory powers were reassigned to the Government. See in this regard the joint letter of the General Directorates of Competition, Energy, Telecommunications, Economy and Finance of the European Commission, sent to the Spanish Government on 29 November 2012, as well as the letter by Neelie Kroes, Vice-President of the European Commission, sent to José Manuel Soria, Spanish Minister of Industry, Energy and Tourism, on 11 February 2013.

⁹⁸ Order SC No. 5896/2015, of 3 July. The Spanish Supreme Court relied on the Hungarian case in which the CJEU decided that the dismissal of the appointed members of independent regulatory bodies before their mandate had expired was an attack against the independence of the regulators, and ruled that the creation of one super-regulator could not justify the dismissals (see Case C-288/12, *European Commission v. Hungary* [2014] ECLI:EU:C:2014:237).

⁹⁹ Sánchez Gutiérrez 2012, pp. 1–21; Alonso García 1990, pp. 297–302.

¹⁰⁰ Jiménez Asensio 2010, pp. 197–224.

entitled to take such measures and, therefore, to delve into the organisational structures of subnational entities.¹⁰¹

2.10 Common Constitutional Traditions

2.10.1 The CJEU has repeatedly declared that the constitutional traditions common to the Member States were one of the main sources of inspiration behind the interpretation of EU fundamental rights as general principles of EU law. Reference to the common constitutional traditions became a rhetorical clause that contributed to the legitimacy of sheer judicial activism in creating fundamental rights for the EU. The Lisbon Treaty retained the general principles of EU law as sources of fundamental rights ‘as they result from the constitutional traditions common to the Member States’ (Art. 6(3) TEU). Nonetheless, after the entry into force of the Lisbon Treaty, the Charter has displaced the general principles of EU law as the main source of EU fundamental rights in the CJEU case law. Still, Art. 52(4) of the Charter declares that ‘[i]n so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions’.

2.10.2 The use that the CJEU has made of the comparative method has been sharply contested in the literature and regarded as discretionary and superficial.¹⁰² Despite the erratic use of the ‘common constitutional traditions’ clause, taking into account the pluralist nature of the EU compound polity, the coexistence of the Charter and the national constitutions, and the supranational nature of the CJEU, there are good reasons to make use of the comparative method in order to give meaning to Charter rights. Without denying the autonomy of EU fundamental rights, the CJEU ought to take into consideration the existence of common trends and divergences regarding the interpretation of fundamental rights. As argued elsewhere,

[t]his inter-state comparison would help to transcend superficial differences and to strengthen common understandings, while fostering an in-depth appraisal of pervasive particularities. In this way, the CJEU should seek to capture elements of commonality and assess elements of divergence in order to articulate an interpretation that reflects a synthetic understanding.¹⁰³

In order to perform this comparative analysis, the CJEU could obtain the information needed from several sources, including the CJEU Service of Research and Documentation, the Advocate General Opinions; non-judicial actors in procedures before the CJEU such as the Commission, Member State Governments and the parties; and also judicial actors, such as the national courts and the ECtHR.¹⁰⁴

¹⁰¹ Judgment CC No. 81/2015, of 30 April 2015.

¹⁰² Torres Pérez 2009, pp. 158–159; De Witte 1999, p. 878.

¹⁰³ Torres Pérez 2009, p. 168.

¹⁰⁴ *Ibid.*, pp. 162–166.

2.11 Article 53 of the Charter and the Issue of Stricter Constitutional Standards

2.11.1 In *Melloni*, the CJEU had the chance to interpret Art. 53 of the Charter for the first time and held that:

Article 53 of the Charter confirms that, where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised.¹⁰⁵

Following the CJEU's interpretation of Art. 53 of the Charter, the chances to provide for more protective standards under national constitutions are rather limited.¹⁰⁶ Arguably, in situations not totally determined by EU law, such as in *Åkerberg Fransson*,¹⁰⁷ it might be possible to allow for better protection according to the national constitution, but only as long as the primacy, unity and effectiveness of EU law are not undermined, as the CJEU also stated in *Åkerberg Fransson*.

In practice, it will not always be easy to determine the margin of manoeuvre left to the Member States. Moreover, whether primacy, unity and effectiveness are compromised is a matter of interpretation. Indeed, we believe that the CJEU should not exclude the possibility for restrictions on those principles to be justified in certain circumstances, such as the need to respect national constitutional identity (Art. 4(2) TEU).

In cases where higher constitutional levels of protection are at issue, a more balanced and deferential approach by the CJEU would be advisable, instead of giving absolute preference to primacy, unity and effectiveness. Article 53 of the Charter could be interpreted as incorporating a mandate for the CJEU to allow for higher levels of constitutional protection, if there are no other rights or general interests that should prevail in the particular case.¹⁰⁸ A more deferential approach would allow the CJEU to accommodate diversity. For instance, the CJEU could have shown more deference in the review of affirmative action measures, such as in *Kalanke*¹⁰⁹ or *Abrahamsson*.¹¹⁰

In Spain, there are some instances in which EU law has had the effect of lowering the standards of rights protection. In addition to the EAW and the Data Retention Directive, in joined cases *ASNEF* and *FECEMD* for example,¹¹¹ the CJEU was questioned about the compatibility between the Data Protection

¹⁰⁵ See the *Melloni* case, supra n. 42, para. 60.

¹⁰⁶ Torres Pérez 2014, pp. 329–331, has criticised the CJEU's approach.

¹⁰⁷ Case C-617/10 *Åkerberg Fransson* [2013] ECLI:EU:C:2012:340.

¹⁰⁸ Torres Pérez 2014, p. 331.

¹⁰⁹ Case C-450/93 *Kalanke v. Frei Hansestadt Bremen* [1995] ECR I-03051.

¹¹⁰ Case C-407/98 *Abrahamsson and Anderson* [2000] ECR I-05539.

¹¹¹ Joined cases C-468/10 and C-469/10 *ASNEF* [2011] ECR I-12181.

Directive¹¹² and a domestic provision according to which data had to appear in public sources in order for the processing of personal data to be allowed in certain circumstances. The CJEU declared that ‘Member States cannot add new principles relating to the lawfulness of the processing of personal data to Article 7 of Directive 95/46 or impose additional requirements that have the effect of amending the scope of one of the six principles provided for in Article 7’.¹¹³ In particular, the CJEU considered that the national provision was precluded by the Directive since ‘it excluded in a categorical and generalised manner, the possibility of processing certain categories of personal data, without allowing the opposing rights and interests at issue to be balanced against each other in a particular case’.¹¹⁴

Thus, national legislation was precluded from providing better protection. The case did not reach the Constitutional Court, and it might actually be that the level of protection set by the EU legislator was compatible with the Constitution. Still, as a result of European integration, the level of protection of the right to privacy has been lowered.

Also, in the context of immigration, EU law might have had the effect of restricting certain fundamental rights. According to the Return Directive,¹¹⁵ third country nationals can be detained up to 6 months while they are awaiting expulsion. This period may be extended for a further 12 months. Several Member States amended their respective legislation following the transposition of the Return Directive to increase the maximum length of detention, such as Greece, Italy, Spain and Hungary. In Spain, the maximum length of detention increased from 40 to 60 days. Greece and Italy went from 6 months and 3 months, respectively, to 18 months each. Thus, in some countries, the room for manoeuvre left by the Directive had the effect of worsening restrictions on the right to liberty.

Also, according to Art. 15(3) of the Return Directive: ‘In every case, detention shall be reviewed at reasonable intervals of time either on application by the third-country national concerned or ex officio. In the case of prolonged detention periods, reviews shall be subject to the supervision of a judicial authority.’ In the *Mahdi* case,¹¹⁶ the CJEU held that ‘EU law does not preclude national legislation from providing ... that the authority which reviews the detention of a third-country national at reasonable intervals ... must adopt, on the conclusion of each review, an express measure containing the factual and legal reasons justifying the measure adopted. Such an obligation would arise solely under national law’. Given the serious restriction on a fundamental right allowed by the Directive, revision should

¹¹² Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, [1995] OJ L 281/31.

¹¹³ Joined cases C-468/10 and C-469/10 *ASNEF*, supra n. 111, para. 32.

¹¹⁴ *Ibid.* para. 48.

¹¹⁵ Directive 2008/115/EC of the European Parliament and the Council of 16 December on common standards and procedures in Member States for returning illegally staying third-country nationals, [2008] OJ L 348/98.

¹¹⁶ Case C-146/14 *Mahdi* [2014] ECLI:EU:C:2014:1320.

not be limited to rubber-stamping a previous decision to hold a person in custody. Indeed, a reasoned decision should be required as a matter of EU law, and this should not just be left to the Member States to decide. To be sure, in this context, the CJEU allowed for better protection at the Member State level, but it did not require it as a matter of EU law. This approach, however, might have an adverse effect and lead to a lowering of the standards of rights protection in other Member States.

2.12 Democratic Debate on Constitutional Rights and Values

2.12.1–2.12.3 The adoption (and implementation) of the Framework Decision on the EAW and the Data Retention Directive have not spurred a robust democratic debate, and public deliberation has been rather lacking. However, scholars have shown concern and adopted a critical position towards these instruments.¹¹⁷

In Spain, to our knowledge, there has been no situation in which constitutional issues have arisen and have been referred to the Constitutional Court at the stage of implementing EU law. In any event, we would support a recommendation to suspend the application and carry out a review of EU measures, if important constitutional issues were raised by a number of constitutional courts.

If an infringement proceeding has been initiated against a Member State and it alleges that implementation is hindered because an unconstitutionality has been identified in accordance with the domestic system of control of constitutionality, EU institutions should take this argument seriously and examine the possibility to embrace the interpretation of the fundamental right at stake at the EU level or rather to accommodate diversity, along the lines developed in the previous section. Moreover, the constitutional identity clause (Art. 4(2) TEU) may well have some bite in this context.

2.13 Experts' Analysis on the Protection of Constitutional Rights in EU Law

2.13.1 While EU law has contributed to furthering the protection of constitutional rights in certain fields, it has undermined the level of protection in others. On the one hand, for instance, the protection afforded by the Spanish Constitution to the right to non-discrimination has been enhanced by making reference to EU law

¹¹⁷ Regarding the EAW, see Arangüena Fanego 2003, pp. 11–95; Fonseca Morillo 2003, pp. 69–95; De la Quadra-Salcedo Janini 2006, pp. 277–303. Regarding the Data Retention Directive, see Rodotà 2006, pp. 53–60; Vilasau 2006, pp. 1–15.

provisions and the CJEU case law. As such, the notion of indirect discrimination on grounds of sex is built on the CJEU case law and the relevant Directives.¹¹⁸ Also, regarding non-discrimination on grounds of sexual orientation, which is not explicitly mentioned in the Constitution, the CC has referred to the Charter and several Directives that explicitly ban discrimination on this ground.¹¹⁹

Moreover, the CJEU case law has had an important impact regarding the protection of the right to housing in the context of the economic crisis and the creeping number of evictions in Spain. However, the CJEU has approached these cases from the perspective of consumer protection and the right to a fair trial, rather than the right to housing as such.¹²⁰

On the other hand, EU integration might also have the effect of undermining the national standard of rights' protection. In Spain, the *Melloni* case stands out as a clear example of the lowering of standards of constitutional protection to fulfil obligations under EU law, since the CC had no choice but to overrule settled case law after the preliminary ruling.

Regarding the right to privacy and the protection of personal data, while the CC had made use of the Charter to reinforce the constitutional protection in certain cases, the implementation of the Data Retention Directive mandated the incorporation of the blanket data retention rule that has not been amended after the annulment of the Data Retention Directive by the CJEU. Also, as seen above, internal legislation providing for higher protection of personal data was declared incompatible with EU law. With regard to immigration, national legislation was amended to increase the maximum length of detention of third country nationals who are subject to return procedures under the umbrella of the Return Directive.

In the context of the economic and financial crisis, the adoption of austerity measures to fulfil obligations of budget stability has led to curtailing social rights,¹²¹ such as the right to healthcare. The reform of the healthcare system has been challenged before the CC and the decision is still pending.

On the whole, there are several fields in which EU integration has led to a reduction of the levels of protection that individuals once enjoyed. In some cases, the lowering of standards has clashed with the Constitution. Nonetheless, even if the lower protection does not impinge upon the Constitution, it is disturbing that the level of rights protection is eventually reduced as a consequence of obligations derived under EU law.

¹¹⁸ See, among others, judgments CC No. 147/1995, of 16 October; 240/1999, of 20 December; 253/2004, of 22 December; 3/2007, of 15 January.

¹¹⁹ Judgment CC No. 41/2006, of 13 February.

¹²⁰ See Sect. 3.5.

¹²¹ González Pascual 2014, pp. 117–120.

2.13.2–2.13.4 How could such an unwelcome result be avoided? Admittedly, EU integration might imply reducing the level of constitutional rights protection in some instances. The EU general interest or other competing rights might justify a restriction on the level of constitutional protection, but only when such an outcome is strictly necessary and cannot be avoided.

Within the domain of the EU, first of all, throughout the legislative process, the potential violation of the Charter or the need to give room to allow for better protection at the national level should be taken into consideration.¹²² Once legislation has been adopted and a case reaches the CJEU, the Court should not disparage claims regarding constitutional protection for the sake of an absolute understanding of primacy and effectiveness. The CJEU might consider whether to embrace the constitutional understanding as the most adequate interpretation of the corresponding Charter right or accommodate diversity through the exercise of deference. The use of the comparative method by the CJEU in interpreting fundamental rights could be helpful for identifying common trends in the EU, as well as the adequate scope of deference.¹²³ In any event, and particularly if the outcome involves lowering the standards of rights protection, enhanced responsiveness to arguments grounded on the constitutional protection of fundamental rights would be advisable, given the pluralist nature of the EU and the pervasive contestation of its ultimate authority. For instance, in *Melloni*, one might agree that the countervailing interests and values, such as the need to effectively fight crime and protect victims' rights, in a context of mutual recognition, outweighed individual protection, as the person concerned had been informed and represented by lawyers of his choice. Nonetheless, a better articulation of the balancing of the conflicting rights and principles would have been welcomed, instead of an absolute understanding of primacy and effectiveness of EU law, since, in the end, the CJEU mandated the CC to lower the level of constitutional protection.¹²⁴

In turn, a more proactive role for domestic courts, and particularly constitutional and supreme courts, in highlighting the standard of protection of constitutional rights through a robust use of the preliminary reference would facilitate the awareness of the impact of EU law on the constitutional system, and offer the CJEU the possibility to interpret the Charter accordingly or accommodate diverse interpretations. In the end, the building of a set of common rights can only successfully be achieved through the cooperation of domestic courts and the CJEU through a process of continuous dialogue, understood as the exchange of arguments in order to reach common understandings about the interpretation of fundamental rights.¹²⁵

¹²² De Witte 2013, pp. 1523–1538.

¹²³ Torres Pérez 2009, pp. 153–155.

¹²⁴ Torres Pérez 2014, p. 318.

¹²⁵ Torres Pérez 2009, pp. 179–184.

3 Constitutional Issues in Global Governance

3.1 *Constitutional Rules on International Organisations and the Ratification of Treaties*

3.1.1 The Government is charged with the negotiation and ratification of international treaties. However, in some cases, the prior consent of Parliament is necessary. According to the Spanish constitutional framework, international treaties are classified into three types taking into account the degree of participation of Parliament in the ratification process. First, international treaties that transfer constitutional powers to international organisations are subject to the consent of Parliament through an organic law, which requires an absolute majority (Art. 93 of the Constitution). Secondly, legislative consent by simple majority is required in the case of international treaties on specific matters, such as treaties that involve fundamental rights or financial obligations for Spain (Art. 94(1) of the Constitution).¹²⁶ Finally, in all other instances, the Government shall simply inform Parliament of the conclusion of international treaties and agreements (Art. 94(2) of the Constitution).

Besides the participation of Parliament in the process of ratifying international treaties, the Spanish Constitution also attributes a role to the CC. Prior to ratification, the Government or Parliament may consult the CC and seek a decision stating whether there is a conflict between the Spanish Constitution and the treaty (Art. 95(2) of the Constitution). In the case of a declaration of incompatibility, the treaty may only be ratified if the Constitution is amended accordingly. The CC's intervention prior to ratification is not mandatory, since the CC only intervenes at the request of the Government or Parliament; however, if an action for *ex ante* review of an international treaty is lodged, the decision of the CC is binding.

These provisions do not establish any explicit limit to the delegation of constitutional powers or the values, principles or objectives that should be respected by international organisations of which Spain is a member. Neither of these provisions contains a reference to any specific international organisation. Only in the context of the Spanish membership in the European Union and the implications of EU law for national law has the CC stated its position in relation to the limits of delegation of constitutional powers to international organisations. The legal scholarship has also debated this issue in connection with the EU debate.¹²⁷

¹²⁶ The treaties are the following: '(a) of political nature; (b) of a military nature; (c) affecting the territorial integrity of the State or the fundamental rights and duties established under Part 1; (d) implying financial liabilities for the Public Treasury; (e) involving amendment or repeal of some law or requiring legislative measures for their execution'.

¹²⁷ See Sect. 1.3.

3.2 *The Position of International Law in National Law*

3.2.1–3.2.2 The Constitution establishes that international treaties shall be part of the internal legal system once officially published (Art. 96(1)). Thus, the Constitution encapsulates a sort of ‘moderate monism’, in the sense that only official publication is required for an international treaty to be binding domestically.

There is consensus about the position of international law in relation to domestic legislation (leaving aside the Constitution). Article 96(1) of the Constitution establishes that the provisions of an international treaty ‘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’. Thus, it is understood that international law enjoys ‘passive resistance’ vis-à-vis domestic legislation in the sense that domestic legislation cannot modify international law. Consequently, Spanish judges are allowed to directly set aside domestic legislation in the case of incompatibility with international law. Yet, international treaties are not deemed to be hierarchically superior to legislative norms, since their interaction is established in terms of applicability rather than validity.

The position of international law with regard to the Constitution is still an open debate confronting constitutional and international law scholars. For constitution-*alists*, international law is subordinated to the Constitution¹²⁸ because: (i) Art. 95(1) of the Constitution requires the prior amendment of the Constitution in the case of ratifying a treaty that is incompatible with the Constitution; and (ii) the CC is able to declare an international treaty unconstitutional after its ratification.¹²⁹ For international lawyers and scholars, these reasons are inconclusive and they argue for the superiority of international law over the Constitution.¹³⁰

Beyond this debate, the special status of international treaties on human rights ratified by Spain should be highlighted. According to Art. 10(2) of the Constitution, fundamental rights and freedoms recognised by the Constitution shall be interpreted in conformity with the Universal Declaration of Human Rights and other international treaties and agreements protecting human rights. These treaties, therefore, are considered to be a constitutional canon of interpretation.

3.3 *Democratic Control*

3.3.1 The Constitution does not give a decisive role to Parliament in the ratification and oversight of international treaties. The Government is in charge of the negotiations at the international level, while Parliament shall consent prior to the ratification by means of a simple or qualified majority depending on the type and

¹²⁸ See the seminal work of Pérez Royo 1998, pp. 167–172.

¹²⁹ Article 27(2)(c), Organic Law 2/1979 of 3 October on the Spanish Constitutional Court.

¹³⁰ For instance, see Marín López 1999, pp. 65–67.

content of the treaty.¹³¹ In certain cases, the role of Parliament is reduced to a minimum and it must only be informed of the ratification of the treaty.

In the case of treaties falling under Art. 93 of the Constitution, there are no specific rules that qualify the legislative process for organic laws. In the case of treaties falling under Art. 94(1) of the Constitution, the authorisation does not have a legislative nature and the process contains some specificities (Art. 74(2) of the Constitution): the legislative initiative can only originate in Congress and, in the event of a disagreement between Congress and the Senate, a Mixed Committee will be constituted; if the disagreement persists, Congress will decide by qualified majority. These specific rules bolster the role of the Senate in comparison with its role in the ordinary legislative process, although Congress retains the last word.

Despite these rules, the effective involvement of and control by Parliament in the ratification process is doubtful. The Government has the ‘qualification power’, i.e. determines the type of treaty (i.e. decides whether Arts. 93, 94(1) or 94(2) is applicable to a treaty, see above) and therefore also decides on the level of participation of Parliament. In this decision, the Government has to request the opinion of the Council of State – the supreme consultative body of the Government – but this opinion is not binding.¹³² Parliament, however, has reassessed the qualification on several occasions.¹³³ The Government also decides on the provisional application of a treaty, with the possibility to delay the submission of the treaty to Parliament for consent.¹³⁴ Most importantly, experience shows that parliamentary debates are without substance, being, in the vast majority of cases, a mere formality.¹³⁵

The subsequent control mechanisms of Parliament for scrutinising the application of a treaty or the activities of the international organisation do not improve this poor initial role of Parliament. The Constitution does not foresee any special mechanism and the relevant international treaty determines the role of Parliament. We are only aware of special mechanisms in relation to the role of national parliaments in the European Union (Protocol No. 1 to the TFEU).

3.3.2 In line with the limited oversight of Parliament, referendum is scarcely used in Spain in the ratification process or subsequent oversight of an international treaty. There is neither a specific provision establishing the obligation to hold a referendum nor the ban of this instrument for this purpose. As stated above, Art. 92 of the Constitution allows the Government to call a consultative referendum on ‘political decisions of special importance’. This kind of referendum, which is not binding, has been used only twice, precisely regarding international treaties. These two experiences have shown that the referendums were used for strategic political decisions

¹³¹ See Sect. 3.1.

¹³² Article 5(1)(e), Law 50/1997 of 27 November on the Government and Art. 22(1), Organic Law 3/1980 of 22 April on the Council of State.

¹³³ Izquierdo Sans 2002, pp. 24–27.

¹³⁴ *Ibid.* p. 19.

¹³⁵ *Ibid.*, pp. 29–30.

rather than to enhance the democratic legitimacy of the ratification of a particular treaty.

Spain became a member of the North Atlantic Treaty Organization (NATO) on 30 May 1982, in the context of strong social and political contestation against it. In October 1982, the recently elected socialist Government had advocated for Spain's withdrawal from NATO. However, international commitments and alliances made the new Government change this initial position. In 1986, the Spanish Government decided to call a referendum to enable citizens to have a say on the continuity of the country's membership to NATO.¹³⁶ The Government mounted a political campaign in favour of remaining in NATO. The referendum was used on this occasion to legitimise a controversial change of the Government's position rather than to enhance democratic legitimacy.

The second and last referendum was held in 2005 by the Spanish Government prior to the ratification of the Treaty Establishing a Constitution for Europe, as mentioned before.¹³⁷ Again, the referendum was used strategically to achieve political purposes at EU level – to bolster the EU Constitution against more sceptical countries – rather than to exclusively enhance democracy in the national sphere where the positive outcome could be clearly anticipated before the referendum. The turnout was rather low (42.32% of the voters).

3.4 *Judicial Review*

3.4.1 The CC is in charge of reviewing the constitutionality of international treaties. According to Art. 95(2) of the Constitution, the CC can be consulted on whether an international treaty is compatible with the Constitution prior to its ratification (*ex ante* judicial review). In the case of no prior consultation, a ratified treaty can also be declared unconstitutional according to Art. 27(2) of Law 2/1979 of 3 October (*ex post* judicial review).

In practice, the CC has hardly ever reviewed the constitutionality of an international treaty. Only on two occasions – in 1992 and 2004 – was the CC consulted prior to ratification, first in relation to the Maastricht Treaty and secondly with regard to the Treaty Establishing a Constitution for Europe, which were discussed in Sects. 1.2.3 and 1.3.

The judicial review of international law is even more limited due to the fact that ordinary courts are not entitled to review international treaties. As mentioned above, a conflict between domestic legislation and a treaty should be resolved in favour of the treaty, which entails the disapplication of domestic legislation ('passive resistance' of treaties). In the case of the suspected incompatibility of a treaty with the Constitution, the judge should submit a question of constitutionality to the CC. In

¹³⁶ Royal Decree 214/1986 of 6 February.

¹³⁷ Royal Decree 5/2005 of 14 January.

any event, if the CC were to find that the Constitution and a treaty were incompatible, it would declare the respective international legal provision to be unconstitutional, but it would not have the power to annul it. Consequently, that provision could not be applied internally, and Spain might incur responsibility under public international law.

3.5 *The Social Welfare Dimension of the Constitution*

3.5.1–3.5.2 The 1978 Spanish Constitution encapsulates economic, social and cultural rights, but provides a lower level of protection for them than in the case of civil and political rights (see Sect 2.1.1). Most of these rights are categorised as ‘principles governing economic and social policy’ (Title I, Chap. III).¹³⁸ Only some social rights, such as the right to education, are placed in the section providing maximum protection within the Constitution. This lower level of protection for the majority of social rights means that an individual complaint before the CC is not available and, most importantly, that the legislator enjoys more leeway when regulating economic, social and cultural rights. In short, constitutional constraints and barriers are weaker in this field.¹³⁹

Despite the lower level of constitutional protection, Spain has developed a strong social welfare state, including a universal public healthcare system, a solid social security system (with unemployment benefits, public pensions and disability pensions), strong social services and, finally, a public educational system in all levels (primary, secondary and higher education). Globalisation and, in particular, the consequences of the global economic and financial crisis have had a negative impact on the Spanish social welfare state, which has been subject to strong pressure. Financial markets, international organisations, the EU and the IMF at the forefront have pressed Spain to adopt an agenda of structural reforms, i.e. a severe austerity reform programme.¹⁴⁰

In April 2009, the European Commission initiated an excessive deficit procedure against Spain.¹⁴¹ Moreover, Spain has been signalled as a country with

¹³⁸ *Inter alia*, within Chap. III, the Spanish Constitution recognises the right to social security (Art. 41), the right to healthcare (Art. 43), the right to environment (Art. 45) and the right to housing (Art. 47).

¹³⁹ See Art. 53(3) of the Constitution for the diminished protection of economic, social and cultural rights that are recognised in Chap. III. For a common understanding amongst the Spanish scholarship of social rights as non-enforceable rights, see Díaz Crego 2012, pp. 17–20.

¹⁴⁰ The Spanish Governments have taken measures in all fields, *inter alia*, the reduction of protection in the case of unemployment, the reform of public pensions and cutting funding to the public education and the healthcare systems. For the implications for the Spanish constitutional system, see González Pascual 2014, pp. 116–127.

¹⁴¹ Council Decision 2009/417/EC of 27 April 2009 on existence of an excessive deficit in Spain. The Council’s Recommendations 15764/09 ECOFIN 775 UEM 301; 12171/12 ECOFIN 669 UEM 252; 10560/1/13 ECOFIN 478 UEM 173 OC 361 to Spain with a view to bringing an end to the situation of an excessive government deficit, follow upon the procedure.

macroeconomic imbalances by the Alert Mechanism Report (AMR).¹⁴² Following this mechanism, Spain was subject to an in-depth review and, as a result, was requested to adopt reforms in the labour market and the social security scheme (with special attention to the pension system). Finally, despite the fact that Spain has not been subject to a formal bailout, the banking rescue programme for Spanish financial institutions in 2012 has implied, in practice, an international intervention in several Spanish financial institutions. The memorandum of understanding signed between Spain and the Troika (the European Commission, the European Central Bank and the IMF) has imposed obligations on financial institutions, but the State is the ultimate accountable party and has to accept the austerity reform programme as a condition for access to the financial assistance granted by the Troika. Precisely, based on the reports of the Troika and the financial assistance provided to the Spanish financial institutions, the Government has challenged several Autonomous Communities' laws protecting the right to housing in the CC, alleging that these laws can jeopardise financial stability;¹⁴³ these have been declared unconstitutional¹⁴⁴ or temporarily suspended by the CC.¹⁴⁵ In short, Spain has launched a massive austerity programme that has impacted all areas of the welfare state. *Inter alia*, health and education expenditures along with social assistance to dependents have been reduced, and the conditions for receipt of public pensions have been made more restrictive.¹⁴⁶

The austerity reform programme has been widely contested politically by the leftist parties and socially by NGOs and other platforms. Yet, with some exceptions,¹⁴⁷ ordinary courts and the CC have not been able to confront the challenges to the social welfare state. So far, the CC has remained a passive spectator.

¹⁴² Alert Mechanism Report 2014 COM (2013) 790 final of 13 November 2013 (Spain was signalled as a country with 'excessive imbalances', the worst classification) and Alert Mechanism Report 2015 COM (2014) 904 final of 28 November 2014 (the Commission reclassified Spain as a country with only 'imbalances', recognising the improved position of the country).

¹⁴³ Law 4/2013 of 1 October on Measures to Protect the Social Function of Housing of the Autonomous Community of Andalusia and Law 24/2013 of 2 July on Urgent Measures to Guarantee the Right to Housing of the Autonomous Community of Navarra. *Inter alia*, this legislation provides for the temporary suspension of evictions.

¹⁴⁴ In a recent judgment, the CC has declared unconstitutional some housing measures launched by the Andalusian Government through Decree-Law 6/2013 of 9 April. This Decree-Law included some measures that were subsequently incorporated in Law 4/2013 of 1 October, now temporarily suspended by the CC. The declared unconstitutionality is based on the use of the Decree-Law (this instrument cannot be used to regulate the right to property) and the lack of competence of the Autonomous Communities to expropriate inhabited houses in the context of an eviction procedure. Again, the CC has not approached the right to housing from a substantive point of view and has only faced it indirectly in light of a source of law issue or a conflict of competences between territorial entities. See Judgment CC No. 93/2015, of 14 May 2015.

¹⁴⁵ Order CC No. 69/2014, of 10 February and No. 115/2014, of 8 April.

¹⁴⁶ See González Pascual 2014, pp. 117–120.

¹⁴⁷ See Sect. 2.7.

Moreover, for instance, the CC struck down a law passed by the Autonomous Community of Andalusia to enhance the right to housing.¹⁴⁸

Paradoxically, in certain cases, protection in the social welfare area has come from the CJEU, the ECtHR and the Committee on Economic, Social and Cultural Rights (CESCR). Facing the inaction of the CC, in the last years ordinary courts have turned towards the CJEU seeking collaboration to deal with some of the negative effects of the economic crisis.¹⁴⁹ For instance, the CJEU gave protection to Spanish citizens against evictions, declaring the Spanish mortgage law unfair for the consumer.¹⁵⁰ The Spanish legislation did not allow, in mortgage enforcement proceedings, for the debtor to claim the existence of unfair terms or for the competent court to stay this kind of proceeding to adopt interim measures.¹⁵¹ Moreover, a debtor against whom mortgage enforcement proceedings were brought was precluded from lodging an appeal against any decision of the judge of first instance to dismiss his objection to enforcement.¹⁵² The decisions of the CJEU in the *Aziz* and *Sánchez Morcillo* cases, declaring the Spanish legislation incompatible with EU law (based, *inter alia*, on incompatibility with Art. 47 of the Charter), have had a significant impact in the context of the economic crisis and have led to the amendment of Spanish mortgage law. On the other hand, the ECtHR is timidly providing protection also in this field through interim measures aimed at paralysing evictions.¹⁵³ Finally, in the first decision taken under the individual communication mechanism provided by the Optional Protocol, the CESCR concluded that Spain violated the right to housing (Art. 11 of the International Covenant on Economic, Social and Cultural rights, in conjunction with Art. 2.1) because its courts failed to take all reasonable measures to adequately notify Ms. I.D.G that the lending institution had filed a mortgage foreclosure against her.¹⁵⁴

¹⁴⁸ See *supra* n. 144.

¹⁴⁹ Gómez Pomar and Lyczkowska 2014, pp. 7–10.

¹⁵⁰ See Iglesias Sánchez 2014, pp. 955–974.

¹⁵¹ Case C-415/11 *Aziz* [2013] ECLI:EU:C:2013:164.

¹⁵² Article 695(4), of Law 1/2000 of 7 January on Civil Procedure; Case C-169/14 *Sánchez Morcillo and Abril García* [2014] ECLI:EU:C:2014:2099.

¹⁵³ Interim measures taken by the ECtHR in the *A.M.B. and others* case on 12 December 2012, the *Mohamed Raji and others* case on 31 January 2013 and in the *Salt* case on 15 October 2013. However, the ECtHR has not decided on the merits of either case. In *A.M.B. and others* the ECtHR lifted the interim measures and declared inadmissible the complaint because of the non-exhaustion of domestic remedies (case *A.M.B. and others v. Spain*, no. 77842/12, decision of 28 January 2014). In relation to the *Mohamed Raji* case, the ECtHR struck the application from its list of cases (case *Mohamed Raji and others v. Spain*, no. 3637/13, decision of 16 December 2014) because the Madrid city council decided not to enforce the demolition and eviction proceedings. In the *Salt* case, on 6 November 2013, the ECtHR lifted the interim measures because the Spanish authorities gave guarantees of alternative housing for the families concerned.

¹⁵⁴ Decision CESCR on the individual communication No. 2/2014, of 17 June 2015 (reference E/C.12/55/D/2/2014).

3.6 *Constitutional Rights and Values in Selected Areas of Global Governance*

Global governance has influenced and transformed certain values of the Spanish constitutional framework. The fight against terrorism – global and national – and the phenomenon of immigration are only some examples.

First, the transformations of Spanish criminal law on terrorism and organised crime should be highlighted. Beyond the EAW, these transformations have implied serious challenges to the rule of law and the principle of proportionality. These changes include the criminalisation of new conducts such as the extension of the concept of terrorist crime to mere collaboration with the aim to constitute a terrorist organisation (Art. 576(1) of the Criminal Code, approved by Organic Law 10/1995 of 23 November), the ‘individual terrorism’ conduct without connection to a criminal organisation (Art. 577 of the Criminal Code), or the mere defence of terrorism (Art. 578 of the Criminal Code). In connection to this, the close relationship of Spain with the United States in fighting terrorism has raised strong criticism in relation to the collaboration of Spain in the secret detention and unlawful inter-state transfers of suspected terrorists.¹⁵⁵

Secondly, also in the context of the fight against terrorism, the law adopted in Spain to ban political parties (Organic Law 6/2002 of 27 June on Political Parties) is still contested. The right of association (Art. 22 of the Constitution) and the right to vote (Art. 23 of the Constitution) are at the forefront of the debate. The measures introduced by Organic Law 6/2002 were highly controversial, including, *inter alia*, the regulation of a specific procedure of illegalisation before a specialised section of the SC (Art. 11), the effects of the illegalisation decision for future associations (Art. 12), and the detailed clauses for illegalisation of a political party (Art. 9). This has led to the characterisation of Spain as a militant democracy. Yet in several judgments, the ECtHR has endorsed these measures.¹⁵⁶ Moreover, the so-called *Parot* doctrine adopted by the SC in 2006, aimed at extending the sentence of terrorists whose convictions are about to end, raised serious issues in relation to legal certainty, unexpected changes in the case law and the principle of non-imposition of heavier penalties than the ones that were applicable at the time that the criminal offence was committed. Eventually, this doctrine was declared incompatible with the ECHR by the Strasbourg Court.¹⁵⁷

¹⁵⁵ Marty, D. *Alleged secret detentions and unlawful inter-state transfers of detainees involving Council of Europe member states*. Report of the Parliamentary Assembly of the Council of Europe (Committee on Legal Affairs and Human Rights), 12 June 2006.

¹⁵⁶ See for instance, case *Etxebarria and Others v. Spain*, nos. 35579/03, 35613/03, 35626/03, 35634/03, judgment of 6 November 2009.

¹⁵⁷ In 2006, the SC ruled that for crimes committed before the current Criminal Code came into effect in 1995, reductions would no longer apply to the accumulative maximum sentence of 30 years, but to the absolute total term of the sentence (judgment SC No. 197/2006, of 20 February). The CC ratified and declared constitutional this interpretation by the SC (judgment CC No. 114/2012, of 24 May). The ECtHR declared a violation of Arts. 5(1) and 7 of the ECHR (see *Del Río Prada v. Spain* [GC], no. 42750/09, judgment of 21 October 2013).

Finally, the global phenomenon of immigration, combined with the economic and financial crisis, has also produced tensions in relation to welfare rights, the right to a fair trial, the right not to be discriminated against and, above all, the more basic principle of human dignity. Several humanitarian crises on Spanish borders – the attempt by immigrants to surpass the fences of Ceuta and Melilla – have been a constant in the last years. The refortification of the fences, the treatment of the incoming immigrants by the police – reported deaths and mistreatments on the fences – and the deportations by public authorities are some of the challenges for the more basic human rights on Spanish soil. Along the same line of fighting illegal immigration, a 2003 reform established a mechanism for the automatic expulsion from Spanish territory of illegal immigrants sentenced to prison for less than six years.¹⁵⁸ The law does not provide for proportionality or a balancing test for taking into account all the personal and general interests in a particular case. The SC, however, reinterpreted this article in a constitutional spirit and introduced a balancing test.¹⁵⁹

As it has been put, the Spanish constitutional system is ‘under stress’.¹⁶⁰ European and global governance, and particularly the economic and financial crisis, have had a deep impact on basic constitutional values and principles such as the welfare state, the territorial distribution of power and the democratic legitimation of governmental powers. The consequences of this new scenario are hard to predict and might result in social contestation against the transformed constitutional framework. Indeed, there are already social and political signs in this direction, such as the emergence of new political parties and groups deeply opposed to the austerity measures. In any event, it seems necessary to recast the relationship between the Global-European spheres and the national constitutional order so as to reinforce basic principles such as democracy, the rule of law and a high level of protection of fundamental rights.

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¹⁵⁸ Article 89 of the Criminal Code, as amended by Organic Law 11/2003 of 29 September.

¹⁵⁹ See for all, judgment SC No. 588/2012, of 29 June.

¹⁶⁰ González Pascual 2014, pp. 116–127.

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