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20 años de la Carta de derechos fundamentales de la UE. Su aplicación por los Tribunales Españoles

Il Focus contiene i testi rivisti di alcune delle relazioni tenute in occasione del Convegno internazionale organizzato presso l'Universidad Pompeu Fabru di Barcellona (28/29 settembre 2020)

IMPLEMENTATION OF THE CHARTER OF FUNDAMENTAL RIGHTS BY THE SPANISH COURTS IN THE *JUNQUERAS* CASE

Maria Mut Bosque*

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1. Introduction

The following paper analyses the main decisions taken by the Spanish Supreme Court (SC) and the Spanish Constitutional Court in the *Junqueras* case. These decisions make explicit reference to the Charter of Fundamental Rights of the European Union (CFR). The objective of the paper is to determine whether these courts correctly implemented the CFR, given that, as outlined by article 51 of the CFR itself, it is the responsibility of Member States to use the CFR when they implement Union law, and furthermore, that

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the European Parliament requires the CFR to be implemented properly, in order to guarantee its coherency and global efficacy.

In the present case, EU law and the CFR came into play at the moment Oriol Junqueras was elected member of the European Parliament. When the Supreme Court asked the Court of Justice of the European Union (CJEU) for a preliminary ruling, the CFR gained an even more prominent role in the case. Accordingly, the SC rightly included a reference in its submission to art. 39 of the CFR and art. 3 of Protocol No. 1 of the European Convention on Human Rights (ECHR), which ensure the free expression of public opinion on the election of a legislative body. The SC therefore focused the debate around the interpretation of those articles, in connection with the scope of the immunity conferred by art. 9 of Protocol No. 7 on the Privileges and Immunities of the European Union[1].

The case being examined in this analysis falls under the so-called *procés* case (referring to the process of Catalan independence), in which the Supreme Court ultimately sentenced the former vice president of the *Govern de la Generalitat de Catalunya* (the Executive Council of Catalonia), Oriol Junqueras, for sedition, in conjunction with embezzlement, «*with the penalty of 13 years in prison and 13 years of disqualification, and a definitive stripping of all the honours, positions and public offices that the sentenced may have, even if they are elective, as well as the inability to obtain the same or any other honours or public positions, or to be selected for public office during the time of punishment*»[2].

During the course of the judicial process, the SC asked the CJEU for a preliminary ruling about the scope of the parliamentary immunity of Oriol Junqueras, with regard to the granting of a special penitentiary permit to be discharged from prison, which was requested so that he could complete his paperwork as an MEP. «*In their decision, the magistrates asked three questions to the CJEU in order to determine, in short, the interpretation of art. 9 of Protocol No. 7 when it refers to the immunity of MEP*»[3].

Although there was some debate[4] in relation to the necessity of seeking a preliminary ruling in this case, with the prosecutors not seeing it as necessary, the SC finally decided to seek one. In our opinion their decision was correct, as according to art. 267 Treaty on the Functioning of the European Union (TFEU)[5], when the question is raised in a case

[1] Noticias Jurídicas, Protocol (No. 7), On the Privileges and Immunities of the European Union. OJEU no. 306, on 17th December 2007, http://noticias.juridicas.com/base_datos/Admin/protocolo7.html#a9.

[2] Supreme Court. Criminal Chamber. Special case No.: 20907/2017, 14th June 2019, https://www.parlament.cat/document/intrade/249870.

[3] Poder Judicial España, *The court of the procés case seeks preliminary ruling from the CJEU about the scope of parliamentary immunity of Oriol Junqueras*, 1st July 2019, http://www.poderjudicial.es/cgpj/es/Poder-Judicial/Tribunal-Supremo/Noticias-Judiciales/El-tribunal-de-la-causa-del--proces--plantea-un-cuestion-prejudicial-al-TJUE-sobre-el-alcance-de-la-inmunidad-parlamentaria-de-Oriol-Junqueras.

[4] A. VÁZQUEZ, *Prosecutors against consulting the CJEU regarding the parliamentary immunity of Junqueras*, in *El Periódico*, 2019, 21st May, https://www.elperiodico.com/es/politica/20190627/fiscalia-contra-cuestion-prejudicial-tjue-inmunidad-europarlamento-7524883.

[5] Consolidated version of the Treaty of Functioning of the European Union, 2020. https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008E267:ES:HTML.

pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal has an obligation to seek a preliminary ruling from the CJEU. This is how the SC itself interpreted it, as it pointed out in section 6 of its decision of 1st July 2019 entitled "*Justification for seeking preliminary ruling*": «*When a criminal case, in which the question of preliminary ruling is raised, takes place before the Judicial Chamber for Criminal Cases of the Supreme Court, whose decision is not susceptible to right of appeal within the domestic procedural order, based on all of the above, we are obliged to submit a request for preliminary ruling to the Justice Court, in conformity with art. 267, paragraph 3, of the Treaty on the Functioning of the European Union*»[6].

2. Brief discussion on the implementation of the Charter of Fundamental Rights of the European Union

Prior to an analysis of the implementation of the Charter of Fundamental Rights of the European Union (CFR) in the distinct judicial decisions and procedural steps in the *Junqueras* case, we should make some brief remarks about the implementation of the Charter, as it deals with an atypical legal instrument that has complex legal implications that have been changing throughout the past few years. As Parejo points out, it is clear that, even today, we are far from the development of a true European constitution (as clearly evidenced by the failure to successfully adopt the Treaty that would have established a constitution for Europe). Such a constitution would act as a substitute for the current Treaties and other rules of primary law, and in it, among other things, the fundamental rights of the European Union would be regulated. Until this moment arrives (if it arrives at all!), there must be conformity (which in reality is not easy, given the difficulty of negotiating between Member States) to the body of regulation compiled in the Treaties of the European Union and the European Community (mainly the result of jurisprudential doctrine) as well as the existing Charter of Fundamental Rights[7]. Even before the Treaty of Lisbon, the CFR, existing in a very similar version to its current form, boasted an established existence, with the normative value of a political declaration, that is to say, without binding legal effect. The Charter only took direct effect after the Treaty of Lisbon came into force on 1st December 2009, as art. 6, section 1 of the Treaty of the European Union (TEU) establishes, when it became a binding source of primary law, with binding legal effects[8]. Similarly, according to Cruz Villalón, after the Treaty of Lisbon the CFR became a legal norm equipped with the highest status in the legal system of the

[6] Supreme Court. Criminal Chamber, special case No.: 20907/2017, 14th June 2019, p. 31, https://www.parlament.cat/document/intrade/249870.

[7] T. PAREJO NAVAJAS, *The Charter of Fundamental Rights of the European Union*, 2010, https://e-archivo.uc3m.es/bitstream/handle/10016/14569/DyL-2010-22-parejo.pdf?sequence=1.

[8] O. MARZOCCHI, *The protection of fundamental rights in the European Union*, European Parliament, 2019, https://www.europarl.europa.eu/factsheets/es/sheet/146/la-proteccion-de-los-derechos-fundamentales-en-la-union-europea.

EU, while at the same time maintaining the clear status of a political declaration. Thus, the Charter is, in a true sense, the Declaration of Rights of the EU, and at the same time it is a Declaration of Rights of each and every one of the Member States, albeit only when «*they implement the Law of the European Union*»[9]. The double-headed nature of this rule results in the Charter being able to adopt an exclusive or "monopolistic" position, because the EU is subjected to only one charter of rights and liberties, leaving aside the complexity which emerges from the architecture of art. 6 of the TEU. On the other hand, when the Charter addresses the Member States, it finds a space that is to some extent "already occupied"; it must share this space with the declarations of rights and freedoms that are normally contained in the Member States' national constitutions, and this can result in legal problems[10]. In order to avoid this, there should be no perception that the CFR dictates each and every act of national public powers, but rather, that the CFR is only relevant when the law of the EU is implemented. Article 51 of the CFR limits its implementation within institutions and bodies of the Union and within the Member States when the law of the Union is implemented. This arrangement allows us to define the border between the spheres of implementation of the Charter and those of national constitutions and the ECHR[11].

3. Brief reflection on the Charter of Fundamental Rights of the European Union in relation to the European Convention on Human Rights

As we shall see in the later sections of this piece of work, the ECHR is mentioned more than the CFR in the different decisions and judicial steps which we are analysing. In this section, we will briefly examine why this is the case. In order to do this, we must bring ourselves back to the start of the European project of integration, which, at first, had primarily an economic nature; for this reason, there was no need to establish explicit rules about respect for fundamental rights, as that was already guaranteed under the 1950 European Convention on Human Rights and Fundamental Freedoms (ECHR), of which the Member States were signatories. The Treaties continued to be modified in order to bind the Union firmly to the protection of fundamental rights. The adoption of the CFR and its coming into force, along with the adoption of the Treaty of Lisbon, which is equipped with binding legal effect, are a guarantee of the protection of fundamental rights in the Union. Given that the ECHR is the main instrument for the protection of fundamental rights in Europe, and that all the Member States are signatories to it, the connection between the European Community and the ECHR seemed the most logical way to respond to the need to link the former with obligations related to fundamental rights. The European Commission repeatedly proposed (in 1979, 1990 and 1993) that the

[9] P.C. VILLALÓN, *The Impact of the Charter of Fundamental Rights on European Constitutionality*, *Constitutional Theory and Reality*, 2017, n. 39, pp. 85-101.
[10] P. C. VILLALÓN, *op. cit.*, p. 94.
[11] O. MARZOCCHI, *op. cit.*, p. 1.

EC should be linked to the ECHR. However, In 2010, right after the entry into force of the Lisbon Treaty, the EU opened negotiations with the Council of Europe on a draft Accession Agreement, which was finalised in April 2013. In July 2013, the Commission asked the CJEU to rule on the compatibility of this agreement with the Treaties. On 18 December 2014, the CJEU issued a negative opinion stating that the draft agreement was liable to adversely affect the specific characteristics and the autonomy of EU law. There are currently debates about how to overcome the issues outlined by the CJEU and to move forward with negotiations.[12] In this sense, Cruz Villalón points out that when the 2007 Treaty of Lisbon granted binding efficacy to the CFR, the CJEU ended up assuming competence over fundamental rights, a position that, contrary to what was expected, it did not seem willing to share with the Strasbourg court[13].

There is no doubt that the ECHR is currently the main instrument for the protection of human rights in Europe, and all the Members States are signatories to it, while the ECJ, in comparison to the ECHR, has barely any jurisprudence in the sphere of fundamental rights. However, there are variations in the tendency to use the ECHR instead of the CFR when it comes to the protection of fundamental rights that are related to aspects of EU law. It is crucial to understand that, especially after the Treaty of Lisbon came into force, the CFR became the main instrument for such purposes, while the ECHR has a subsidiary role, and, for this reason, the final guarantor of respect for such rights in the EU is the ECJ. However, as the European parliamentary report from 30th January 2019 on the implementation of the CFR shows, in the institutional framework of the Union, despite the pertinent advances made by the institutions of the EU to integrate the Charter in legislative processes and policy-making, it seems to still remain an undervalued instrument, whose full potential is not being realised. The general tendency is to focus more on preventing the infringement of the Charter and not on maximising its potential, despite the fact that the duty to foster its implementation is explicitly stated in the Charter itself[14]. The same report points out that, on a national level, national judges sometimes use the Charter as a source of positive interpretation, even in cases that do not fall within the scope of the implementation of EU legislation. «*More in general, however, that ambiguity, combined with a widespread 'awareness-gap' regarding the Charter and the lack of national policies aimed at promoting its application, lead to its substantial under-utilisation at national level. EU institutions and agencies could play a major role in filling these gaps by putting in place a wide-range of measures and actions aimed at supporting Member States in this regard*»[15].

[12] O. MARZOCCHI, *op. cit.*, p. 1.
[13] A. OLLERO, *The dialogue between the Constitutional Courts with the Court of Justice of the European Union: The Spanish case*, 19th Conference of the Constitutional Courts of Italy, Portugal, France and Spain, Seville, 27th October 2017., https://www.tribunalconstitucional.es/ActividadesDocumentos/2017-10-27-00-00/Texto%20integro%20de%20la%20ponencia%20de%20Espa%C3%B1a.pdf.
[14] B. SPINELLI, *Report on the implementation of the Charter of Fundamental Rights of the European Union in the institutional framework of the Union* (2017/2089(INI)), European Parliament, 30th January 2019, https://www.europarl.europa.eu/doceo/document/A-8-2019-0051_ES.html.
[15] B. SPINELLI, *op. cit.*, p. 1.

4. Chronology of the main legal proceedings on *Junqueras* case

With the aim of simplifying and organising the main proceedings and judicial decisions taken by the Supreme Court (SC) and the Constitutional Court (CC) on Junqueras case, we have considered to include the following chronological summary.

A) SUPREME COURT

- 12th February 2019: The so-called *procés* trial begins.
- 14th June 2019: The Supreme Court (SC) denies Junqueras permission to acquire the status of MEP.
- 16th June 2019: Junqueras Applies for reconsideration of the SC decision.
- 1st July 2019: The SC requests preliminary ruling from the Court of Justice of the European Union (CJEU).
- 14th October 2019: The SC final judgment on the *procés* case.
- 9th December 2019: The CJEU judgment on the request for a preliminary ruling of the SC.
- 9th January 2020: The SC decision regarding the CJEU judgment and plea.
- 9th January 2020: Precautionary measures. The SC Administrative Chamber.
- 15th January 2020: Application for reconsideration of the SC decision regarding the CJEU judgment.
- 29th January 2020: The SC judgment on the application for reconsideration of the SC decision regarding the CJEU judgment.

B) CONSTITUTIONAL COURT

- 28th November 2019: The CC Judgement on the writ of *amparo* for maintenance of the cautionary measure of custody, without bail.
- 28th January 2020: The CC Judgement on the writ of *amparo* for immunity for the Catalan Parliament.
- 20th July 2020: Application for the writ of *amparo* against the SC decision to not suspend the declaration of the judgement while the preliminary ruling was being resolved. Still pending resolution.

C) OTHER RELEVANT DATES

- 23rd and 26th May 2019: Elections to the European Parliament
- 2nd July 2019: Official declaration of the results of the elections to the European Parliament by Spanish authorities.
- 7th January 2020: Junqueras was elected President of the European Free Alliance Group in the European Parliament.
- 10th January 2020: Statement from the President of the European Parliament, Sassoli, in which he recognises Junqueras as a MEP from the 2nd July 2019 to the 3rd January 2020.

5. Analysis of the implementation of the Charter of Fundamental Rights of the European Union by the Spanish Supreme Court

On 12th February 2019, the judicial process against Oriol Junqueras begins with the Supreme Court (SC) charging him with rebellion, sedition, embezzlement and disobedience. In the midst of this court case, on 23rd and 26th May 2019, the elections to the European Parliament take place, and as a result, Junqueras is elected an MEP. From the moment at which Oriol Junqueras is elected an MEP, general EU law and, in particular, the CFR come into play. On 14th June 2019, the SC denies Oriol Junqueras, the former vice president of the *Govern de la Generalitat de Catalunya* (the Executive Council of Catalonia), a special penitentiary permit to be discharged from prison so that he can attend the National Electoral Commission of 17th June in order to be sworn in as an MEP. Junqueras' legal representatives apply for a reconsideration of the SC decision on 16th June 2019, and in this application, for the first time, there is mention of the CFR, more specifically art. 39 and art. 51 of the CFR: the fundamental right to political participation and the need to implement the CFR when EU law is being implemented. Furthermore, the writ of *amparo* requests that, if the SC has doubts about the interpretation of any of the rules of EU law, the CFR amongst them, the SC seeks a preliminary ruling from the CJEU.

5.1. Application for reconsideration on 16th June 2019

On 16th June 2019, Junqueras' defence lodges an application for reconsideration of the SC decision of 14th June 2019 in which the former vice president was denied the special penitentiary permit[16].The decision in question makes no reference to any CFR rules. In contrast, the application for reconsideration does, and it explicitly mentions art. 39 of the CFR, which states that the right to active and passive suffrage in the elections to the European Parliament is a fundamental right of the European Union. Likewise, in this application, it is rightly noted that adherence to the CFR affects not only the institutions and bodies of the European Union but also the Member States when they implement EU law, as is established by art. 51 of the Charter[17].

5.2. Supreme Court's decision 1st July 2019

On 1st July 2019, the SC seeks a preliminary ruling from the CJEU, under clause 4 of its decision entitled "Justification for seeking preliminary ruling"; section 5 alludes to

[16] Supreme Court. Criminal Chamber, Special case No. 20907/2017, 14th June 2019, https://g8fip1kplyr33r3krz5b97d1-wpengine.netdna-ssl.com/wp-content/uploads/2019/12/14-june-junqueras.pdf.

[17] *El Nacional*, 'Junqueras asks the Supreme Court to consult with the Luxembourg Court', Full text of the appeal, 17th June 2019, https://www.elnacional.cat/es/politica/junqueras-supremo-tribunal-luxemburgo_395191_102.html.

art. 39 of the CFR in relation to art. 3 of Protocol No. 1 of the ECHR. The SC has doubts about the interpretation of the scope of parliamentary immunity recognised in the Protocol on the Privileges and Immunities of the European Union. The SC understands, through the jurisprudence of the ECHR (*Ždanoka v. Latvia* (GC) 16th March 2006, *Mathieu-Mohin and Clerfayt v. Belgium* 2nd March 1987, *Matthews v. The United Kingdom* (GC), *Labita v. Italy* (GC) and *Podkolzina v. Latvia*), that the said right simultaneously establishes a space for implied limitations, and therefore that there is a margin of appreciation for these limitations on the part of the Member States, as long as this does not minimise the rights that are being dealt with in such a way that they are affected on their merits and deprived of their efficacy, and that a legitimate objective is pursued and the means employed are not disproportionate[18].

An exemplary case for this last argument is the *Delvigne* case. In this case, on 6th October 2015, the CJEU first declared that the deprivation of the right to active suffrage imposed on Mr Delvigne was a limitation on the exercise of the right of active suffrage for citizens of the Union in the elections to the European Parliament, as enshrined in the CFR; however, the CJEU issued a reminder that limitations to the exercise of fundamental rights can be introduced as long as they are proportionate[19].

5.3. Court of Justice of the European Union decision on 19th December 2019

In a decision delivered on 19th December 2019, the Court of Justice (Grand Chamber) responds with the preliminary ruling sought by the SC about the scope of immunity specified in art. 9, paragraph 2 of the Protocol on the Privileges and Immunities of the EU. The decision explicitly refers to art. 39 of the CFR and establishes that the expected immunity in the said Protocol contributes to the efficacy of the right of active and passive suffrage that is guaranteed by art. 39 of the CFR. Consequently, in this case, the CJEU grants the CFR a semi-constitutional value, as a sort of parameter of constitutionality.

Paragraph 85: The immunity stipulated in art. 9, paragraph 2 of the Protocol about the privileges and immunities of the Union guarantees the protection of the proper functioning and independence of the European Parliament (…) after the official declaration of the electoral results, the ability to attend the first meeting of the new

[18] Court of Justice of the European Union, Justice Court verdict (Main Chamber) on 19th December 2019 regarding matter C-502/19, p. 30, http://curia.europa.eu/juris/document/document.jsf?docid=221795&doclang=ES.

[19] Court of Justice of the European Union, Verdict regarding judgement C-650/13 *Thierry Delvigne v. Commune de Lesparre Médoc and Préfet de la Gironde*, Press release no. 118/15. 6th October 2015, https://curia.europa.eu/jcms/upload/docs/application/pdf/2015-10/cp150118es.pdf#:~:text=En%201988%2C%20se%20impuso%20al,perpetuidad%2C%20de%20sus%20derechos%20c%C3%ADvicos.

parliamentary term, without any hindrances, in order to fill out the paperwork stipulated in art. 12 of the Electoral Act, and being allowed to serve during the new term[20].

Paragraph 86: In this way, the aforementioned immunity also contributes to the efficacy of the right of passive suffrage, guaranteed in art. 39, section 2, of the Charter of Fundamental Rights, which permits the expression of the free, secret, direct and universal right to suffrage, as enshrined in art. 14, section 3 of the TEU, and in art. 1, section 3 of the Electoral Act (see, as an analogy, the judgment of 6th October 2015, *Delvigne*, C-650/13, EU:C:2015:648, section 44), permitting those who have been elected MEPs to fill out the necessary paperwork to take office for the new term[21].

Paragraph 87: Therefore, by virtue of art. 9, paragraph 2 of the Protocol, about the privileges and immunities of the Union, a person like Mr Junqueras, who has officially been declared MEP should be seen to possess immunity, while he finds himself in pre-trial detention during the criminal proceedings for serious crimes, but has not been authorised to fulfil certain requirements, provided by national law after the declaration, nor authorised to travel to the European Parliament to participate in the first session[22].

The CJEU concludes (in paragraph 92 of its decision) that, in the light of these considerations, it is necessary to respond to the referring court that the existence of the immunity mentioned in art. 9, paragraph 2 of the Protocol on the Privileges and Immunities of the Union implies that the pre-trial detention imposed upon the person who possesses such immunity must be lifted, in order that he can travel to the European Parliament and fulfil the required formalities once there. However, if the national court believes that the pre-trial detention should remain in place following the acquisition by the concerned party of MEP status, it will have to request, without delay, that the European Parliament suspends the said immunity, in accordance with art. 9, paragraph 2 of the same Protocol.

5.4. Decisions on 9th January 2020 by the Criminal Chamber and Administrative Chamber of the Supreme Court

In its decision on 9th January 2020, the Criminal Chamber of the SC indicates that, on an exceptional basis, the CJEU decision allows it to maintain the preventive measure of requiring Junqueras to remain in custody, as long as the judicial body considers it to be necessary, after a well-assessed judgment, if this is justified by the seriousness of the charges and the continuation of a clear and ongoing risk of escape and reoffending, and as long as the suspension of immunity is for as short a time as possible. The Chamber explains that if the elected person acquires this status while the trial has already begun, it is evident that the principle of immunity is devalued as a result of the court proceedings.

[20] Supreme Court. Criminal Chamber. Special case No. 20907/2017, 14th June 2019, p. 21, https://g8fip1kplyr33r3krz5b97d1-wpengine.netdna-ssl.com/wp-content/uploads/2019/12/14-june-junqueras.pdf.
[21] Supreme Court. Criminal Chamber, Special case No. 20907/2017, *op. cit.*, p. 21.
[22] Supreme Court. Criminal Chamber, Special case No. 20907/2017, *op. cit.*, p. 21.

«*On balance*, – concludes the Chamber – *one who takes part in electoral procedures while he is already being tried, even if he ends up being elected, does not get to possess immunity, in accordance with national law. They cannot determine the outcome of the case, nor, even less so, the delivery of the judgment. Considering all of this, in accordance with art. 9, paragraph 1 of the Protocol of Immunities, this was not, nor is, a necessary authorisation of the Parliament*»[23]. In this decision, the SC makes reference neither to the CFR nor to the possible breach of art. 39 of the CFR. Likewise, in its decision on 9th January 2020, the Administrative Chamber of the SC, which rejects the precautionary measure requested by Junqueras' defence to prevent the National Electoral Commission making a decision on 3rd January to strip Junqueras of his MEP status, makes references to art. 39 of the CFR, but only while replicating the arguments of the defence, and fails to recognise the possible breach of Junqueras' right to active suffrage, as enshrined in the said article.

5.5. Application on 15th January 2020 for reconsideration of the decision of 9th January 2020

The decision of the Criminal Chamber of the SC on 9th January 2020 causes the defence of Oriol Junqueras to apply for reconsideration on 15th January 2020; the application states that the defence considers the SC's decision to be in breach of the law and the fundamental rights of the EU, as it has taken the most restrictive decision, which contradicts these fundamental rights. Therefore, the defence alleges that there has been a breach of the claimant's fundamental right to passive suffrage (art. 23.2 EC, art. 39.2 CFR, art. 3.1 Protocol No 1 ECHR)[24], the voters' right to active suffrage, and the institutional protection of the European Parliament, with the structure of the European Parliament having been disturbed. Junqueras' defence sees the "*extensive and absolute*" interpretation of immunity (paragraph 92 of the CJEU's decision) as a result of clarity, and states that if the court wants to maintain this (clarity) following an individual's acquisition of MEP status, it has to request the European Parliament to suspend this immunity. The defence states that the court cannot reinterpret that interpretation of the CJEU, but rather must implement its own judgment[25].

In the same vein, the State's legal counsel has previously requested that the Criminal Chamber of the SC approve the application for reconsideration filed by the legal representatives of Oriol Junqueras against the decision of the High Court not to grant him

[23] Poder Judicial España, The Second Chamber of the Supreme Court agrees to not proceed further with the freedom of Oriol Junqueras nor the petition request to the European Parliament once he is concretely been judged', 9th January 2020, http://www.poderjudicial.es/cgpj/es/Poder-Judicial/Noticias-Judiciales/La-Sala-Segunda-del-Tribunal-Supremo-acuerda-que-no-procede-la-libertad-de-Oriol-Junqueras-ni-la-peticion-de-suplicatorio-al-Parlamento-Europeo--una-vez-que-ya-esta-condenado-en-firme

[24] Supreme Court. Administrative Chamber. Decision 9th January 2020, recurso n. 5/2020, https://www.civil-mercantil.com/sites/civil-mercantil.com/files/PDF1_9.pdf.

[25] Application for reconsideration of the Decision of 9th January 2020. Full text, El Nacional, https://www.elnacional.cat/uploads/s1/98/22/57/9/4-5834770297760253793.pdf.

a special penitentiary permit so that he could take office as an MEP. The State's representative, in support of the *procés*, considers it necessary to allow Junqueras to travel both to the National Electoral Commission and to the headquarters of the European Parliament, to fill out the necessary paperwork. In their submission, this body has also requested that the Chamber do whatever is possible so that the former vice president can perform his representative role, while he keeps his status as an MEP, in accordance with the decision of the CJEU on 19th December of the previous year[26].

However, in a submission prior to 21st January 2020, the State's legal counsel argues that «*at least from 3rd January 2020, and in any case, up to the present moment, Mr Junqueras no longer has the status of MEP*» and, therefore, upon the loss of the appeal put forward by Junqueras' defence, the application for reconsideration should be dismissed[27].

5.6. Decision by the Supreme Court on 29th January 2020

Finally, in its decision on 29th January 2020, the SC dismisses Junqueras' application for reconsideration and declares that it will not grant Junqueras the immunity acknowledged by the CJEU, nor will it ask the European Parliament for consideration of his request, because, from 14th October 2019, Junqueras would not just have been in pre-trial detention, but rather he would have been sentenced to 13 years in prison and disqualification, and, therefore, would not have been eligible for MEP status[28]. Likewise, the SC sees no need to seek another preliminary ruling, as the defence of Oriol Junqueras requests, to guarantee the right mentioned in art. 39 of the CFR, because «*the Chamber holds no doubts about the scope and consequences of the CJEU's decision in this main piece, nor about the precepts of EU law that are mentioned and implemented in the order under appeal*»[29].

6. Implementation of the Charter of Fundamental Rights of the European Union by the Constitutional Court in the *Junqueras* case

In a judgment delivered on 28th November 2019 in response to the writ of *amparo* 814-2018, the Constitutional Court (CC) explicitly mentions the CFR. This writ of *amparo* was submitted by Mr Oriol Junqueras i Vies in relation to the decisions made by the examining magistrate and board of appeal of the Criminal Chamber of the SC concerning the maintenance of his pre-trial detention without bail. The full CC ended up

[26] Noticias jurídicas, *The Legal Counsel of the State asked the Supreme Court to accept the appeal by Junqueras and allow him to take his seat as MEP*, 30th December 2019, http://noticias.juridicas.com/actualidad/noticias/14741-la-abogacia-del-estado-pide-al-supremo-que-estime-el-recurso-de-junqueras-y-le-permita-tomar-posesion-como-eurodiputado/.
[27] Supreme Court, Criminal Chamber, special case No. 20907/2017, *op. cit*., p. 9.
[28] Supreme Court, Criminal Chamber, special case No. 20907/2017, *op. cit*., p. 9.
[29] Supreme Court, Criminal Chamber, special case No. 20907/2017, *op. cit*., p. 9.

dismissing this writ of *amparo*, as they did not believe it resulted in a breach of the rights to ideological freedom and free speech, to political participation, to legal defence before an impartial court predetermined by law, to the presumption of innocence or to criminal legality, or to the right to a private and family life. However, in this judgment, there was a dissent in the separate votes of judges Valdés Dal-Ré, Xiol Ríos and Balaguer Callejón. These judges disagreed with the judgment and believed that the writ of *amparo* should have been issued, because there had been a breach of the right to exercise representative duties[30]. In this judgment, the CC refers to art. 7 of the CFR, which relates to the right to respect for private and family life, home and communications. However, it states that «*the invocation of art. 8 of the ECHR does not correspond to the fundamental right of being eligible for constitutional protection as mentioned in Section 1, chapter 2, heading 1 of the Spanish Constitution (SCO), which includes protection within our constitutional order, within this vital space, which art. 7 of the CFR refers to (Judgment 186/2013, on 4th November, Legal Basis 6)*».

In the Legal Basis of Judgment 186/2013, the CC had clarified that «*our constitution does not recognise a 'right to family life' on the same terms in which the jurisprudence of the European Court of Human Rights has interpreted art. 8.1 ECHR. However, it has been observed that, by any means, the vital space protected by this 'right to family life' as outlined by arts. 8.1 of the ECHR and 7 of the CFR, and more specifically, in regard to the matter at stake, the autonomous matters of emotional, family and cohabiting relationships, are lacking protection within our constitutional order*»[31].

For this reason, it can be concluded that the CC would not utilise the CFR when it comes to protecting Junqueras' right to family life, but would instead utilise the Spanish Constitution. According to the Constitutional Court, the constitutional system of Spain relies on similar principles to those of art. 7 of the CFR, established in "our Magna Carta, which guarantees the free development of the personality (art. 10.1 SCO) and assures social, economic and legal protection of the family (art. 39.1 SCO) and of children (art. 39.4 SCO), whose effectiveness, as is shown in art. 53.2 (SCO) cannot be realised through writ of *amparo*, but this does not limit the fact that its recognition, respect and protection will advise the court practice (art. 53.3 SCO).

In the resolution of this writ of *amparo*, we believe the CC was right to decide not to utilise the CFR, given that, as indicated in art. 51 CFR, the Charter should be utilised when the public authorities of the Member States are implementing EU law. In this case, the court was dealing with a question of internal law, in regard to Junqueras' status as a Member of the Catalan Parliament, and, therefore, the correct thing to do was to use the Spanish Constitution.

[30] Government of Spain, Judgment 155/2019, delivered on 28th November 2019. Writ of *amparo* 814-2018, Official State Gazette, no. 5, on 6th January 2020, pp. 841-903, https://www.boe.es/diario_boe/txt.php?id=BOE-A-2020-173.
[31] Constitutional Court, *Catalogue of the jurisprudence of the Constitutional Court regarding the Law of the European Union*, 2020, http://hj.tribunalconstitucional.es/es/Resolucion/Show/23678.

A judgment is still awaited on the writ of *amparo* lodged by Junqueras' legal representatives on 20th July 2020, appealing against the decision by the Criminal Chamber of the SC not to suspend the pronouncement of judgment concerning the *procés* while the preliminary ruling sought by this legal body itself before the CJEU, regarding the parliamentary immunity of Junqueras, was being resolved. We believe that in regard to this judgment it will be necessary for the SC to refer to the CFR, more specifically to art. 39 of the CFR, which recognises the right to be a voter and to participate in elections to the European Parliament, given that the refusal to suspend the SC's judgment could be in breach of the very right found in the said article. In this sense, the CC cannot argue, on the grounds that it is not part of the parameters for constitutionality under the Spanish system, that it is not appropriate to implement the CFR, as, in accordance with art. 51 of the CFR, all public bodies of Member States must implement the CFR when issues of EU law are being addressed, and, in this case, there is no doubt that it is a question of EU law. According to the Parliamentary Report on the implementation of the CFR in the institutional framework of the Union[32], it is the duty of the legal bodies of Member States to determine whether the Charter has not been adequately implemented at a national level in such a way that its global coherency and efficacy has been undermined. Consequently, the CC, as a public legal body of the Spanish state, must determine whether the SC has adequately implemented art. 39 of the CFR by not suspending its judgment and by denying Junqueras the opportunity to fill out the necessary paperwork to acquire MEP status. In this sense, regarding the interpretation and implementation of EU law by national judges, the CC has accepted the possibility of examining some complaints which have a constitutional basis. It has asserted as follows: … although it is not the duty of the Constitutional Court to control the appropriateness of the activity of national judges in regard to EU law, the complaints raised contain a clear constitutional basis and are part of the object of protection of the writ of *amparo*. This is mainly for two reasons: firstly, because the claimants ask the Court to determine whether the contested legal decisions are irrational and arbitrary, and, therefore, are contrary to the right to effective legal protection, ex art. 24.1 of the Spanish Constitution, in that the judgment given by the CJEU in a preliminary ruling is purposefully not addressed, … which is decisive for the resolution of the dispute. Secondly, because we are being asked to determine if … there has also been a breach of art. 24.1 of the Spanish Constitution by point-blank rejecting the exceptional case of annulment of proceedings urged by the claimants for the restoration of their right to effective legal protection as a result of failure to apply EU law[33].

The CC should consider whether, in this case, there should be another preliminary ruling regarding the possible failure by the SC to implement art. 39 of the CFR correctly. Traditionally, the CC has been reluctant to seek preliminary rulings, given that it is not the CC's duty to guarantee either the correct implementation of EU law or its correct

[32] B. SPINELLI, *op. cit.*, p. 1.
[33] Constitutional Court, *Catalogue of the jurisprudence of the Constitutional Court regarding the Law of the European Union*, *op. cit.*, p. 1.

enforcement by public authorities, nor is it its duty, as a general rule, to seek preliminary rulings from the CJEU. However, there are situations in which, in order to perform its role correctly as the guardian of constitutional guarantees, the CC, whilst it is considered a jurisdictional body as outlined in art. 267 CJEU, can consider it appropriate to seek a preliminary ruling from the CJEU. That is what was decided in the so-called *Melloni* case, in which an interpretive preliminary ruling was sought by means of decision 86/2011 (issued in the writ of *amparo* 6922-2008, which was decided by judgment 26/2014): In the present writ of *amparo*, this Court faces a problem whose solution depends, greatly, on the interpretation and validity of the relevant provisions of EU law … the control of regulation which we must implement in order to judge the constitutionality of the Decision of the First Section of the Criminal Chamber of the National High Court … must henceforth be composed of the rules of EU law that protect the corresponding fundamental rights, as well as those rules which regulate the European arrest warrant, from which the constitutional importance of interpretation that must be attached to the provisions of EU law clearly derives … And this Constitutional Court meets the requirements of article 267 of the TFEU, insofar as it is a "jurisdictional body" in the sense of the aforementioned precept [and] the decisions of our jurisdiction are not prone to judicial remedy under the conditions of article 10.1 of Protocol No. 36 about the transitional arrangements of the Treaty of Lisbon, in relation to the previous art. 35 of the TEU and Organic Law 9/1998, on the 16th December [ATC 86/2011, Legal Basis 4 e)][34].

7. Final Considerations about the actions of the Supreme Court and Constitutional Court regarding the implementation of the Charter of Fundamental Rights of the European Union in the *Junqueras* case

From the moment when Oriol Junqueras was elected as an MEP, EU law in general, and the Charter of Fundamental Rights of the European Union in particular, came into play. More concretely, when the SC asked for a preliminary ruling from the CJEU, the CFR gained an important role in this case. In its verdict of 1st July 2019 the SC referred to art. 39 of the CFR, which recognises the right to active and passive suffrage in the framework of free elections, and for this reason the decision of the SC to seek a preliminary ruling was sound, as, from a legal standpoint, they had the duty to do so as the SC is a court of last resort. Likewise, once again soundly, the SC has referenced the CFR in its various decisions regarding the scope of European parliamentary immunity possessed by Junqueras. In this respect, the SC has complied with art. 51 of the Charter itself, which indicates that Member States must utilise the CFR when they implement EU Law.

After the Treaty of Lisbon came into force on 1st December 2009, the CFR became a source of primary law with binding legal effect. It became a legal norm with the

[34] Constitutional Court, *Catalogue of the jurisprudence of the Constitutional Court regarding the Law of the European Union*, *op. cit*., p. 1.

maximum range in the legal system of the EU. The Charter is a complex norm of a double-headed nature that has adopted a "monopoly" of exclusivity within the EU, because the EU is subject to only one charter of rights and freedoms. On the other hand, when the Charter addresses Member States, it finds itself having to share space with the Declaration of Fundamental Rights and Freedoms, which is usually contained within the respective national constitutions. This can lead to legal problems. In order for this not to happen, the CFR should not be misinterpreted as being imposed on each and every act carried out by national public authorities; rather, it is imposed only those acts that implement EU law.

However, it is also the duty of the national public authorities to implement the CFR correctly, and in the *Junqueras* case there are doubts about whether the SC correctly interpreted art. 39 of the CFR in relation to the scope of parliamentary immunity, which was raised by the SC itself in the preliminary ruling of 1st July 2019. Some scholars deem that the SC incorrectly applied the CFR, and therefore, that there was also a breach of art. 47 of the CFR, because, in this case, the SC judges also acted as EU judges, and, as a result, it was their duty to implement the law of the EU correctly. Pavioni believes that Oriol Junqueras possessed the parliamentary immunity found in art. 9, paragraph 2 of the Protocol on the Privileges and Immunities of the Union, having been officially declared elected. Therefore, the SC should have allowed him to travel to the European Parliament to perform his parliamentary duties and fulfil the requirements set by the local electoral law, as this immunity implied the lifting of the pre-trial detention imposed upon him[35]. In this sense, Ordóñez Solís states that «*the prohibition decision by the Supreme Court and what stopped Mr Junqueras from attending the inaugural meeting of the European Parliament, without having dealt with the mandatory request, was against the law*»[36].

In the same vein, it was declared on 30th December 2019 that the State's legal counsel had asked the Criminal Chamber of the SC to accept the application for reconsideration sought by the representatives of Oriol Junqueras against the High Court's decision not to allow him the special penitentiary permit to take office as an MEP. The representatives of the State during the *procés* considered his travel, both to the National Electoral Commission and to the headquarters of the European Parliament in order to fill out the necessary paperwork, to be justified. In their submission, this legal body also asked the Chamber to do whatever was possible to enable the former vice president to perform his representative duty, while maintaining his status as an MEP, in accordance with the decision of the CJEU. However, in a submission prior to 21st January 2020, the State's legal counsel argued that, at least from 3rd January 2020, and in any event, at the date of the submission, Mr Junqueras no longer had the status of an MEP.

It is worth bearing in mind that the institutions of the European Union could have had a more important role when it came to determining whether the SC had carried out a correct implementation of art. 39 CFR or could have breached art. 47 of the CFR (the

[35] N.M. PAVIONI, *Las inmunidades parlamentarias*, in *Integración Regional & Derechos Humanos/Revista Regional Integration & Human Rights/Review*, 2020, p. 146.
[36] D. O. SOLÍS, *Crónica de la Jurisprudencia del Tribunal de Justicia de la Unión Europea*, in *Cuadernos Europeos de Deusto*, 2020, n. 62, pp. 189-223.

right to effective legal protection and a hearing before an impartial judge). The European Commission could, for example, have embarked upon an infringement procedure against Spain, but, clearly, it did not do this. The European Parliament also did not adopt an active role in the defence of Junqueras' immunity. The MEP Diana Riba, a fellow member of Junqueras' parliamentary group, put forward a request on 20th December 2019 to the President of the European Parliament to take urgent measures, on the basis of its internal regulations, to confirm the immunity of Junquera[37].

On 13th January 2020, the President of the European Parliament announced that Junqueras' parliamentary seat had been vacant with effect from 3rd January 2020, and dismissed the request for urgent measures to protect his parliamentary immunity.

On 17th January 2020, Junqueras' defence lodged an appeal for the annulment by the General Court of this announcement by the European Parliament.

Furthermore, on 20th February 2020, Oriol Junqueras lodged an appeal for the annulment of the President of the European Parliament's decision of 10th December 2019, in which the President had rejected MEP Mrs Diana Riba's petition, filed on behalf of Oriol Junqueras, MEP, for the protection of the immunity of Mr Oriol Junqueras as a MEP. In Junqueras' appeal, there is reference to breaches of articles 39, 20, 21, 1 and 2, as well as 41, 1 and 2 of the CFR[38]. In this context, it was submitted that because the CFR (or, more concretely, the aforementioned articles) has come into force as primary EU law, it grants individual subjective rights to MEPs in relation to the European Parliament, which must correctly interpret articles 7 and 9 of the Internal Regulation of the European Parliament. This regulation gives a status of immunity to MEPs in Europe, which is egalitarian and does not allow discrimination based on the grounds of nationality, or, at the very least, applies domestic rights that force the European Parliament to accept the petition for that immunity to be protected, with all the guarantees protected by the said rights.

Another ground relates to a misunderstanding of the Court of Justice's judgment of 19th December 2019 (C-502/19, *Junqueras i Vies*) and a misunderstanding of the right to the protection of immunity in accordance with article 39 of the CFR, article 9 of the Protocol on the Privileges and Immunities of the European Union, and articles 7 and 9 of the Internal Regulation: it was argued that in the said judgment, the Court had recognised the claimant's status as an MEP, and had established that the Spanish Institutions should have asked the European Parliament for his immunity to be lifted. The claimant's status as an MEP was also recognised by the European Parliament, and therefore by denying the petition for the protection of his immunity, there was a breach of the judgment and of the rights of Mr Junqueras as an MEP in the present case, according to the articles cited above.

[37] Court of Justice of the European Union, decision by the Vice President of the Justice Court on 3rd March 2020, http://curia.europa.eu/juris/document/document.jsf?text=&docid=224062&pageIndex=0&doclang=es&mode=lst&dir=&occ=first&part=1&cid=18477288.

[38] Parliament of Catalonia. Junqueras i Vies/Parliament (Issue T-100/20). Appeal lodged on 20th February 2020 (2020/C 114/21), https://www.parlament.cat/document/intrade/69099049.

The last ground was the alleged breaches of article 39 of the CFR, article 9 of the Protocol on the Privileges and Immunities of the EU, *in totum*, and articles 7 and 9 of the Internal Regulation of the European Parliament. It was argued that, by not having protected Mr Junqueras' immunity and not having demanded that the European Parliament accept the petition for the protection of his immunity, there was a total breach of the immunity granted by article 9 of the Protocol on the Privileges and Immunities of the European Union[39].

On 3rd March 2020, as provided in the decision by the Vice President of the General Court of the European Union, the request for provisional measures made by Mr Junqueras, in which he asked for the suspension of the dismissal of the request made on 20th December 2019, was also dismissed. The VP of the General Court considered this new request for suspension to be unacceptable, since it did not take into account that the European Parliament had decided to dismiss the earlier request from 20th December 2019. Likewise, according to the cited decision, Junqueras' request seemed to violate the system of division of powers, enshrined in article 266 of the TFEU, under which a judge of the European Union cannot step into the European Parliament and take over its decision-making with regard to the implementation of a judgment that overrides an act carried out by that institution. The VP of the General Court outlined that, in principle, the judge hearing the application for interim measures cannot give directions to entities that are not part of the dispute, such as, in this case, the Spanish authorities. A cassation appeal was lodged in response to this decision by the representatives of Junqueras before the Court of Justice. In its decision made on 8th October 2020, the Court of Justice dismissed the appeal concerning the demand for interim measures[40].

Finally, despite the dismissal of the cassation appeal, we are still waiting for the decision on the main matter at stake. In regard to this, the decision of 3rd March 2020 referred to above clarifies that the General Court will give a definitive verdict on this matter at a later date and that, in any case, a decision on interim measures does not prejudge the result of the main action.

In the motion for resolution of 23rd November 2020 placed before the European Parliament by the MEPs Riba and Daly, there is explicit mention of the Charter of Fundamental Rights: It reminds us that the make-up of the European Parliament should accurately and entirely reflect the freedom of expression of the choice made by citizens of the EU, through direct universal suffrage, which respects the people who wish to be represented by a given mandate; it outlines that the decision to not allow Oriol Junqueras, elected Member of the European Parliament, to take his seat in the European Parliament not only violates his political rights, but also the rights of the 1.2 million European citizens who voted for him; it reminds us that, in accordance with the judgment delivered by the Court of Justice of the European Union (C-502/19), Oriol Junqueras, elected MEP, has

[39] Parliament of Catalonia, Junqueras i Vies/Parliament, *op. cit.*, p. 1.
[40] Court of Justice of the European Union, Decision by the Vice President of the Justice Court regarding the matter C-201/20 P(R), Press release 131/20, 8th October 2020, https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-10/cp200131es.pdf.

the right to occupy his seat in the European Parliament, and given that the European Parliament is the only body which is able to suspend the immunity of its MPs, any actions must be carried out in accordance with the Charter[41].

At a state level, the defence of Junqueras believed it necessary to resort to seeking a writ of *amparo* from the Constitutional Court.

On 13th of February 2018 Junqueras' representative lodged a writ of *amparo* against the decisions made by the examining magistrate and the Criminal Chamber of the Supreme Court, in regard to the maintenance of the pre-trial detention, without bail. The writ of *amparo* referred to breaches of the rights to ideological freedom and expression, to political participation, to a proper legal defence, to an impartial judge predetermined by the law, to the presumption of innocence and to criminal legality, as well as the right to a private life. There was partial dismissal of the writ of *amparo* due to its untimely nature: the pre-trial detention had been extended because of a proportionate, justifiable and well-founded legal decision. On 28th November 2019, the Constitutional Court dismissed Junqueras' writ of *amparo*. In its verdict, which expressly mentions the CFR, the CC dismissed the appeal, as it did not believe that there had been a breach of the said rights and freedoms. However, in the judgment, there was dissent through the separate votes of three of the judges, Valdés Dal-Ré, Xiol Ríos and Balaguer Callejón, who disagreed with the judgment and believed that the writ of *amparo* should have been accepted because there had been a breach of the right to exercise representative duties[42].

In this judgment, the CC refers to art. 7 of the CFR, which provides for a right of respect for private and family life, home and communications. However, the court stated that "the invocation of art. 8 of the ECHR does not correspond with the fundamental right of being eligible for constitutional protection as mentioned in Section 1, chapter 2, heading 1 of the Spanish Constitution (SCO), which includes protection within our constitutional order, within this vital space, which art. 7 of the CFR refers to (Judgment 186/2013, on 4th November, Legal Basis 6).

In the Legal Basis to its Judgment 186/2013, the CC had clarified that «*our constitution does not recognise a 'right to family life' on the same terms in which the jurisprudence of the European Court of Human Rights has interpreted art. 8.1 ECHR. However, it has been observed that, by any means, the vital space protected by this 'right to family life' as outlined by arts. 8.1 of the ECHR and 7 of the CFR, and more specifically, in regard to the matter at stake, the autonomous matters of emotional, family and cohabiting relationships, are lacking protection within our constitutional order*»[43]. For this reason, it can be concluded that the CC will not utilise the CFR when it comes to protecting Junqueras' right to family life, but will instead utilise the Spanish Constitution. According to the Constitutional Court, the constitutional system of Spain relies on similar

[41] D. RIBA GINER, C. DALY, *Motion for Resolution, European Parliament*, A9-0226/2020, 23rd November 2020, https://www.europarl.europa.eu/doceo/document/A-9-2020-0226-AM-070-070_ES.pdf.
[42] Government of Spain, Judgment 155/2019, *op. cit*., p. 875.
[43] Constitutional Court. Judgment 186/2013, on 4th November 2013, Official State Gazette no. 290, on 4th December 2013, http://hj.tribunalconstitucional.es/es/Resolucion/Show/23678.

principles to those of art. 7 of the CFR, established in "our Magna Carta, which guarantees the free development of the personality (art. 10.1 SCO) and assures social, economic and legal protection of the family (art. 39.1 SCO) and of children (art. 39.4 SC), whose effectiveness, as is shown in art. 53.2 (SCO) cannot be realised through writ of *amparo*, but this does not limit the fact that its recognition, respect and protection will advise the court practice (art. 53.3 SCO).

In the resolution of this writ of *amparo*, we believe the CC was right not to utilise the CFR, given that, as indicated in art. 51 CFR, the Charter should be utilised when the public authorities of the Member States are implementing EU law. In this case, the court was dealing with a question of internal law, in regard to Junqueras' status as an Member of the Catalan Parliament and, therefore, the correct thing to do was to use the Spanish Constitution.

A judgment is still awaited regarding the writ of *amparo* lodged by Junqueras' legal representatives on 20th July 2020, appealing against the decision by the Criminal Chamber of the SC to not suspend the pronouncement of judgment concerning the *procés* while the preliminary ruling sought by this legal body itself before the CJEU, regarding the parliamentary immunity of Junqueras, was being resolved. We believe that in regard to this judgment it will be necessary for the SC to refer to the CFR, more specifically, to art. 39 of the CFR, which recognises the right to be a voter and to participate in elections to the European Parliament, given that the refusal to suspend the SC's pronouncement of judgment could be in breach of the very right found in the said article. In this sense, the CC cannot argue, on the grounds that it is not part of the parameters for constitutionality under the Spanish system, that it is not appropriate to implement the CFR, as, in accordance with art. 51 of the CFR, all public bodies of Member States must implement the CFR when issues of EU law are being addressed, and, in this case, there is no doubt that it is a question of EU law. According to the Parliamentary Report on the implementation of the CFR in the institutional framework of the Union[44], it is the duty of the legal bodies of Member States to determine whether the Charter has not been adequately implemented at a national level in such a way that its global coherence and efficacy has been undermined. Consequently, the CC, as a public legal body of the Spanish state, must determine whether the SC has adequately implemented art. 39 of the CFR by not suspending its judgment and by denying Junqueras the ability to fill out the necessary paperwork to acquire MEP status. In this sense, regarding the interpretation and implementation of EU law by national judges, the CC has accepted the possibility of examining some complaints which have a constitutional basis. It has asserted as follows: … although it is not the duty of the Constitutional Court to control the appropriateness of the activity of national judges in regard to EU law, the complaints raised contain a clear constitutional basis and are part of the objective of protection of the writ of *amparo*. This is mainly for two reasons: firstly, because the claimants ask the Court to determine whether the contested legal decisions are irrational and arbitrary, and, therefore, are

[44] B. SPINELLI, *op. cit*., p. 1.

contrary to the right to effective legal protection, ex art. 24.1 of the Spanish Constitution, in that the judgment given by the CJEU in a preliminary ruling is purposefully not addressed, … which is decisive for the resolution of the dispute. Secondly, because we are being asked to determine if there has also been a breach of art. 24.1 of the Spanish Constitution by point-blank rejecting the exceptional case of annulment of proceedings urged by the claimants for the restoration of their right to effective legal protection as a result of failure to apply EU law[45].

The CC should consider whether, in this case, there should be another preliminary ruling regarding the possible failure by the SC to implement art. 39 of the CFR correctly. Traditionally, the CC has been reluctant to seek preliminary rulings, given that it is not the CC's duty to guarantee either the correct implementation of EU law or its correct enforcement by public authorities, nor is it its duty, as a general rule, to seek preliminary rulings from the CJEU. However, there are situations in which, in order to perform its role correctly as the protector of constitutional guarantees, the CC, whilst it is considered a jurisdictional body as outlined in art. 267 CJEU, can consider it appropriate to seek a preliminary ruling from the CJEU. That is what was decided in the so-called *Melloni* case, in which an interpretive preliminary ruling was sought by means of decision 86/2011 (issued in the writ of *amparo* 6922-2008, which was decided by judgment 26/2014).

In the present writ of *amparo*, this Court faces a problem whose solution depends, greatly, on the interpretation and validity of the relevant provisions of EU law … the control of regulation which we must implement in order to judge the constitutionality of the Decision of the First Section of the Criminal Chamber of the National High Court … must henceforth be composed of the rules of EU law that protect the corresponding fundamental rights, as well as those rules which regulate the European arrest warrant, from which the constitutional importance of interpretation that must be attached to the provisions of EU law clearly derives … And this Constitutional Court meets the requirements of article 267 of the TFEU, insofar as it is a "jurisdictional body" in the sense of the aforementioned precept [and] the decisions of our jurisdiction are not prone to judicial remedy under the conditions of article 10.1 of Protocol No. 36 about the transitional arrangements of the Treaty of Lisbon, in relation to the previous art. 35 of the TEU and Organic Law 9/1998, on the 16th December [ATC 86/2011, Legal Basis 4 e)][46].

As a final reflection, it is necessary to reemphasise the remark made in the report of 30th January 2019 by the European Parliament on the implementation of the Charter of Fundamental Rights of the European Union, within the institutional framework of the Union, that «*notwithstanding relevant progresses made by the EU institutions to integrate the Charter into the legislative and decision-making processes, it still appears to be an under-evaluated instrument, not exploited to its full potential. The general tendency is that of focusing on avoiding its violation rather than on maximising its potential(3),*

[45] Constitutional Court, *Catalogue of the jurisprudence of the Constitutional Court regarding the Law of the European Union*, *op. cit.*, p. 1.
[46] Constitutional Court, *Catalogue of the jurisprudence of the Constitutional Court regarding the Law of the European Union*, *op. cit.*, p. 1.

despite the fact that the duty of promoting its application is clearly spelled out in the Charter itself (article 51(1))»[47]. The same report points out that, on a national level, national judges sometimes use the Charter as a source of positive interpretation, even in cases that do not fall within the scope of implementation of EU legislation. More generally however, this ambiguity, paired with a wide 'deficit of awareness' in regard to the Charter, and the lack of national policies dedicated to fostering its implementation, has led to its considerable underutilisation on a national level. Therefore, it is vital that both the institutions of the EU and the Member States understand the importance of the CFR when it comes to protecting the fundamental rights of European citizens about questions related to EU law[48].

ABSTRACT: This paper analyses the main decisions taken by the Spanish Supreme Court (SC) and the Spanish Constitutional Court (CC) in the *Junqueras* case that make explicit reference to the Charter of Fundamental Rights of the European Union (CFR). The objective is to determine whether these courts correctly implemented the CFR, given that, as outlined by article 51 of the CFR itself, it is the responsibility of Member States to use the CFR when they implement Union law, and, furthermore, that the European Parliament requires the CFR to be implemented properly, in order to guarantee its coherency and global efficacy.

KEYWORDS: Charter of Fundamental Rights of the European Union – Oriol Junqueras – Spanish Supreme Court – Spanish Constitutional Court – Court of Justice of the European Union.

[47] B. SPINELLI, *op. cit.*, p. 1.
[48] B. SPINELLI, *op. cit.*, p. 1.