SEMINAR ON THE CHARTER OF FUNDAMENTAL RIGHTS
ANSWERS TO THE QUESTIONNAIRE: SPAIN

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A) GENERAL.

1. In the *Sala Tercera del Tribunal Supremo*, which is the Supreme Administrative Court of Spain, only a few cases concerning the EU Charter of Fundamental Rights have been heard since 1 December 2009. Strictly speaking, no more than half a dozen. What is even more remarkable is that the Charter played a secondary role in practically all those cases. The reason is that they were not cases raising questions of EU law and, consequently, invoking the Charter was an additional argument, if not to mere rhetoric.

As for lower administrative courts, it is difficult to get exhaustive information. It would be necessary to conduct a comprehensive (and inevitably long) research, looking at least at the judgements of the seventeen existing *Tribunales Superiores de Justicia* (i.e. administrative courts of appeal), not to mention the administrative judges of first instance. Having said this, there is no apparent reason to think that the application of the Charter in lower courts differs radically from what happens in the *Sala Tercera*.

2. The provisions of the Charter at issue in those cases were Articles 7, 8, 11, 17 and 41.

3. The Charter has been used in three main areas: administrative decisions touching upon private property (expropriation and planning), data protection, and questions regarding the media (privacy and freedom of speech). In addition, it has also been used to strengthen claims of good administration, especially the requirement of statement of reasons.

4. Only a recent reference for a preliminary ruling in the field of data protection deserves to be mentioned in this respect. It is as follows: according to Directive 95/46, in the absence of consent by the affected persons, processing personal data requires a legitimate interest. The statute that transposed Directive 95/46 into Spanish law added that, in such situation, personal data must be available from sources open to the public. An administrative regulation adopted for the implementation of that statute reproduced such additional requirement and, when challenged before the *Sala Tercera*, the question arose whether national legislation may add new conditions in this area. At first sight, this is not a problem about the Charter, but about the limits encountered by national law-makers in the transposition of EU directives. However, the Charter, whose Article 8 declares a fundamental right to data protection, can have a say in this case: if the aim of Directive 95/46 were simply to establish common rules for data protection (a sort of "internal market of data"), then new conditions would be difficult to justify; but, if its aim were also to develop a fundamental right, then it could be argued that national legislation may provide stronger safeguards.

On the other hand, it is worth mentioning that the Spanish Constitutional Court has just made a reference to the ECJ. It had never done it before. The question posed to the ECJ touches directly on the Charter: it deals with the interpretation of Articles 47, 48 and 53 in relation to the European order of detention.

B) SCOPE *RATIONE TEMPORIS*.

5. In principle, the Charter might be applied to facts that took place after its coming into force on 1 December 2009. This would certainly be the solution under Spanish law, where the general principle is that new rules do not have retroactive effect unless otherwise provided (Article 2 of the Civil Code). It is worth noting that this general principle is different from the ban on some forms of retroactivity (unfavourable criminal laws and laws restricting fundamental rights), which is established by Article 9 of the Constitution: whereas this is an absolute prohibition with constitutional status, whose breach makes legislation unconstitutional, the above mentioned general principle is simply a rule of interpretation meaning that retroactive effect may not be presumed.

Now, the problem is that the scope *ratione temporis* of the Charter is not a question to be decided under national law, but under EU law. It would be perfectly legitimate for the ECJ to introduce some special criteria concerning the application of the Charter to events happened before 1 December 2009. It could be argued, for example, that the rights declared by the Charter (or at least some of them) are part of the European *ordre public* and, consequently, should not be ignored regardless of time considerations.

In any event, it seems to be clear that the Charter can be used as an additional argument, even for cases arisen before its coming into force. Occasionally the real *ratio decidendi* of a judgement, consisting of the rules in force at the relevant time, can be strengthened by the quotation of a provision of the Charter that goes in the same direction.

6. The 2000 version of the Charter, which had been simply "proclaimed" by the Nice summit, was present in Spanish case-law. But, to the best of my knowledge, no judgement was decided exclusively on it. It was used to simply reinforce conclusions founded on existing law, either European or national.

C) SCOPE *RATIONE MATERIAE*.

7. There is no significant Spanish case-law on this point. However, the idea of falling within the scope of EU law for the purpose of Article 51.1 of the Charter should not be, legally speaking, problematic in two situations: implementation of EU law duties and derogation to fundamental economic freedoms. It is clear that such situations are governed by EU law. A different question is that the application of the Charter in such situations could be sometimes criticized on grounds of expediency or, to put it bluntly, for political reasons. As for the third conceivable situation, consisting of a "binding factor" with EU law, the problem is its undeniable vagueness. How binding must an indirect connection with European affairs be in order to justify the compulsory application of the Charter? Only the ECJ case-law will provide us with a solid answer.

D) REVIEW *EX OFFICIO* (ON ITS OWN MOTION).

8. Under Spanish law, judicial review of administrative action is adversarial, as opposed to inquisitorial. This means that the court must decide the case not only according to the claims made by the parties (usually a private person and an administrative body), but

also within the limits of the reasons invoked by them. This principle is explicitly stated by Article 33 of the *Ley de la Jurisdicción Contencioso-Administrativa* (i.e. the code of procedure for administrative courts). What should be stressed is that the court is bound by the parties' legal arguments, not only by their petitions. So, contrary to what happens in civil matters, it would be unlawful for an administrative court to uphold a claim for a legal reason not argued by the litigant.

Having said this, Article 33 allows administrative courts hearing cases in first instance (not in appeal) to put a question to the parties: if the court thinks that the case could be decided on a different legal reason, it has to submit such alternative legal reason to the parties and, after having heard them, it may take its decision on it. This gives some room for application of rules *ex officio*, without breaking the essentially adversarial nature of the process. Needless to say, the possibility offered to administrative courts by Article 33 can be used to apply the Charter when it is not invoked by the parties.

E) DISTINCTION BETWEEN RIGHTS AND PRINCIPLES.

9. The declaration of rights made in the Spanish Constitution draws a neat distinction between fundamental rights and what the Constitution itself labels as "principles governing the economic and social policy". Whereas rights in the strict sense of the term are enumerated in Chapter 2 of Title I, the immediately following Chapter 3 is devoted to principles. One can wonder whether such Spanish constitutional arrangement was one of the sources of inspiration for the Convention that drafted the Charter.

The idea of principles governing the economic and social policy can be seen as a compromise. As is well known, there is no consensus about the expediency of introducing social rights into constitutions: on the one hand, demands to safeguard the basic aspects of the welfare state are understandable; but, on the other hand, to shape them as rights that can be directly claimed reduces the margin for different political majorities to conduct different economic and social policies, not to speak of budgetary implications. Trying to face this difficulty, the Spanish constitution-drafters found a half way, namely establishing social guarantees but not in the form of rights. They are principles which, according to Article 53.3 of the Constitution, need legislative implementation to be claimed. So the principles governing the economic and social policy are not directly applicable by courts.

This statement, however, has to be nuanced in two ways. Firstly, some of those principles may, as an exception, have direct application provided that their wording is unconditional. The clearest example is Article 39.2 of the Constitution, that proclaims the equality among children no matter if born of wedlock or not. At the beginning of 1979, a few weeks after the promulgation of the Constitution, the Ministry of Justice found that the traditional distinction drawn by the Civil Code between legitimate and illegitimate children had been tacitly repealed by Article 39.2 of the Constitution.

Secondly, lack of direct application does not amount to lack of binding nature. The principles governing the economic and social policy are not merely programmatic declarations. On the contrary, they enjoy at least the same minimal legal force as any other constitutional provision: a statute in contradiction with one of such principles can be invalidated as unconstitutional.

10. In the Spanish Constitution, the distinction between rights and principles follows a "geographical" criterion: as has just been explained, principles are located in Chapter 3 of Title I and, on excluding their direct application, Article 53.3 of the Constitution explicitly refers to principles declared in Chapter 3. This makes interpretation simpler, because only as an exception can a principle enjoy direct application, or vice versa a right be conditioned to legislative implementation.

The Charter does not have an equivalent formal yardstick and, therefore, determining whether a given provision embodies a right or a principle is purely a matter of interpretation. Probably the safest standard is to look how provisions are phrased. Some of them, especially in the title on Solidarity, use clauses such as "in conformity with EU law and national legislation". This is a clear signal that we have to do with a principle, not a true right. But, whenever such a literal indicator is not present, the only possible way to differentiate between rights and principles is to determine whether a given provision, in order to be effective, inevitably needs legislative implementation: if the answer is yes, then it is a principle for the purpose of Article 52.5 of the Charter.

11. Under Spanish law, there would be no good reason to use a limited standard of review when examining the compatibility of administrative regulations with the principles declared by the Charter. One reason is that, even though principles lack direct application, they are undoubtedly binding on law-makers; and the idea of law-makers includes administrative bodies passing regulations or secondary legislation, which is subject to review by administrative courts. According to Article 62.2 of the *Ley de Régimen Jurídico de las Administraciones Públicas* (i.e the statute on administrative procedure), the illegality of administrative regulations takes always the form of absolute or radical nullity, which implies, among other things, that it may be declared at any time. In this context, the use of a limited standard of review would not make sense.

One further reason to reach such conclusion is that, contrary to what happens in other legal systems, judicial review of administrative action in Spain is not channelled through "grounds of review" (*cas d'ouverture*), such as lack of competence, violation of essential procedural requirements, etc. Article 70 of the *Ley de la Jurisdicción Contencioso-Administrativa* provides that application for judicial review must be upheld whenever the challenged regulation or administrative decision incurs in "any infringement of the legal order". This open method of review makes it difficult to adopt limited standards. In other words, courts are not legally required to have any special deference towards secondary legislation, not to speak of individual administrative decisions.

12. As was said before, principles governing the economic and social policy may not be directly applied by courts. So an individual administrative decision in contradiction with one of those principles would not be invalid. A different consequence would follow, of course, in case of contradiction with legislation that implements that principle.

More complex is the question with respect to administrative regulations or secondary legislation. Implementation of principles in the sense of Article 53.3 of the Constitution may sometimes be achieved through secondary legislation. Contrary to what happens with fundamental rights, there is no general *Gesetzvorbehalt* or *reserve de loi* in this field. So an administrative regulation that, in the absence of relevant primary

legislation, violated a principle might be held invalid, for the same reason that a statute in contradiction with that principle would be unconstitutional. Having said this, some principles are so vague that it is hard to say when they are truly violated.

F) SCOPE AND INTERPRETATION OF RIGHTS AND PRINCIPLES.

13. A doctrine about such an important issue as the limitation clause of Article 52.1 of the Charter cannot be elaborated here. Nevertheless, two observations can be made. One is that the European Convention on Human Rights does not have a general limitation clause, but each provision envisages how the corresponding right may be limited and the wording is not exactly the same from one provision to another. Although this has not prevented the Strasbourg Court from establishing some common criteria about limitation of rights, the fact is that there is room for a differentiated treatment of the various rights.

The other observation is that, in my personal opinion, something more than an "objective of general interest" is needed in order to justify the restriction of a fundamental right. I do not say that only in the name of values with a "constitutional" status might fundamental rights be limited, but a particularly relevant public need must be at stake and, needless to say, with full respect for proportionality. In this sense, the approach usually followed by the Strasbourg Court seems to be more suitable than the criteria concerning restrictions on the internal market freedoms.

G) DIRECT EFFECT.

14. Concerning international treaties, Spain follows a monistic approach. Article 96 of the Constitution provides that, once published in the official journal, international treaties are part of the domestic legal order. This means that international treaties may be invoked by any person and must be applied by courts, in the same way as statutes or administrative regulations. Thus, international treaties enjoy direct effect in Spanish law. Their position in the hierarchy of norms is roughly equivalent to that of primary legislation, although the may not be repealed by subsequent statutes.

Now, given that the Charter has the same legal value as the EU treaties according to Article 6 of the Treaty on the European Union, it has to be considered as part of an international treaty for the purpose of Article 96 of the Spanish Constitution and, consequently, it has direct effect in the domestic legal order not only as primary EU law but also as an international treaty.

It is worth noting, however, that the Charter was officially published in Spain independently from the Treaty of Lisbon. In fact, its revised version of 2007 was included into the Organic Law 1/2008, whose main object was to authorise the ratification of the Treaty of Lisbon. So the Charter was part of an organic law (primary legislation to all effects) before the Treaty of Lisbon came into force. It is unclear the intention behind such an unusual measure. Does it mean that the Charter was already part of the Spanish legal order in the period between the adoption of the Organic Law 1/2008 and the coming into force of the Treaty of Lisbon? Does it mean, furthermore, that the Charter would have been part of the Spanish legal order even if the Treaty of Lisbon had not been finally ratified by all Member States? The answer to these questions is far from obvious, but fortunately it has no practical relevance at present.

15 and 16. For the reasons stated above, the Charter has direct effect in the Spanish legal order, with the only exception of those provisions that for their vagueness are inherently unsuitable for direct application.

17. As said before when dealing with principles, there is no good reason in Spanish law to adopt a limited standard of review in cases where the Charter is at issue.

18. It is well known that remedies for breach of EU law belong, in principle, to the competence of Member States, subject of course to the so-called principle of equivalence end effectiveness. In the absence of specific EU law remedies, national law may envisage any effective remedy which is equivalent (not necessarily identical) to that used in similar domestic situations.

In Spanish administrative law there are basically two remedies: the annulment of unlawful regulations and administrative decisions, and what Articles 31 and 71 of the *Ley de la Jurisdicción Contencioso-Administrativa* call "recognition of an individualised situation". This rather enigmatic term includes any declaration that could be favourable for the winning party. In practice, those declarations can adopt two forms: either the recognition of a right (e.g the restitution of property unduly taken by the administration, the appointment to a position, etc.), or the reparation of damages caused by the administration. These would be also the available remedies in cases concerning a breach of the Charter by a Spanish administrative body. Needless to say, damages must be proved, because the violation of a fundamental right does not automatically involve an economic (or moral) loss.

H) INTERPRETATION METHODS.

19. To the best of my knowledge, the Explanation has not been used by Spanish administrative courts so far. However, as said above, the Charter has normally been quoted as an additional argument.

20. The interpretation of the Charter is not different from the interpretation of any other bill of rights. Interpretation in the field of fundamental rights has to face two specific problems: the use of a particularly vague language, and the frequent connection with controversial moral and political questions. So the interpretation of the Charter will have to follow the usual patterns in this field, as can be found in the case-law of the European Court of Human Rights and national constitutional courts. The really peculiar aspect of the Charter is its being part of EU law. This implies a need to reconcile fundamental rights declared in the Charter with the general principles of EU law, such as supremacy, *effet util*, etc.

I) RELATIONSHIP BETWEEN EU CHARTER AND ECHR.

21 and 22. There is no example of a case where a Spanish administrative court had to choose between applying the Charter or the European Convention on Human Rights. However, if the text of the relevant provision is identical in both documents, the court could apply both of them simultaneously. Spanish courts are not prevented from founding their decision on two (or more) rules which lead to the same result.

A different question is what happens if Strasbourg and Luxembourg do not adopt the same interpretation for the same text. At present, this question seems to be less conflictive than some years ago, when the divergence in cases like *Matthews v. United Kingdom* (18 February 1999) or *Dangeville v. France* (16 March 2002) was obvious. The reason is that now the Treaty of Lisbon acknowledges a certain superiority of the European Convention on Human Rights in this field: actually, Article 52.3 of the Charter makes it clear that the European Convention must guide the interpretation of those provisions of the Charter that have an equivalent in that document. In addition, the new version of Article 6 of the Treaty on the European Union envisages EU accession to the European Convention on Human Rights, which is also an indication of that superiority. Nevertheless, the pre-eminence of Strasbourg over Luxembourg is not explicitly recognised by any provision of EU law and, in this context, the heart of the matter is that the ultimate judicial authority of the legal system to which the Charter belongs sits in Luxembourg.

J) RELATIONSHIP BETWEEN THE EU CHARTER AND THE "CONSTITUTIONAL TRADITIONS" OF THE MEMBER STATES.

23. I have no information about any Spanish judgement that conducts a comparative research in order to ascertain the existence of a common constitutional tradition and, consequently, to justify a given interpretation of the Charter. However, this is not surprising, because the ECJ itself has not made an intensive use of that notion either. The idea of common constitutional traditions is rather equivocal: beyond the great principles of democracy and rule of law, whose observance is a pre-requisite to be a member of the EU according to Article 49 of the Treaty on the European Union, there is a remarkable variety of constitutional arrangements among Member States. Furthermore, Article 5 of the Treaty on the European Union requests respect for the Member States' national identity, which probably involves the recognition of a wide margin of institutional autonomy. This helps to understand why, in many aspects, constitutional traditions need not be similar.

24 and 25. Even if it is not strictly necessary for the application of the Charter, it would be useful to have easy access to updated information about the way constitutional issues are dealt with in other Member States. Good comparative arguments can enrich one's own judicial function.

K) RELATIONSHIP BETWEEN THE EU CHARTER AND OTHER INSTRUMENTS.

26. In Europe, the only international treaty about human rights that has its own court is the European Convention on Human Rights. This means that other international treaties do not have an "official interpreter"; and therefore, leaving aside diplomatic initiatives, their interpretation will inevitably be decentralized. In Spain, since duly concluded international treaties are part of the national legal order, the interpretation of those having some connection with the Charter will be in the hands of national courts. Only the ECJ would be in a good position to introduce some unified criteria in this filed.

L) OTHER.

27. There is an association of judges with an interest in EU law, but it does not have an official status.

28. None. This is a comprehensive questionnaire.

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