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The European Convention on Human Rights in the Academic and Judicial Work of Pedro Cruz Villalón

by

Prof. Dr. Miguel Azpitarte (Granada)

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Pedro Cruz Villalón has made an essential contribution to the formation and development of Spanish constitutional law. Born in Seville (1946), he was awarded his doctorate from his city's university in 1975, when Franco's dictatorship was coming to its end yet it was still a folly to believe that a democratic regime was approaching. In 1986, he obtained his Constitutional Law Chair, at which time the teaching and growth of this scientific branch in Spain were flourishing. His responsibilities soon transcended the academic sphere when he was appointed to the Constitutional Court in 1992, then presiding over it from 1998 to 2001. Later, he would work as Advocate General of the Court of Justice of the European Union between 2009 and 2015, thereby giving his career an unquestionably European perspective. Today, he lectures at the Autonomous University of Madrid.

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This paper describes Pedro Cruz Villalón's thoughts on the European Convention on Human Rights in his work as a lecturer, constitutional judge and Advocate General. In the first section I analyse the concept of quality of law. This topic, in connection with his work in the European Court of Justice, opens up a reflection on the usefulness of the Convention in the process of European integration, and also on the Convention's relationship with the European Charter of Fundamental Rights. These aspects will be dealt with in the second section. Finally, I analyse Pedro Cruz Villalón's position on the matter of constitutional identity and its link with the Convention.

The interest in the use that Pedro Cruz Villalón has made of the Convention transcends his own work, since his work shows many of the topics that have woven European public law in the last half-century. It reflects the path trodden from the constitutional construction of national public law to the constitutional design of Union Law.

I. The Quality of Law

1. The Convention and the Quality of Law: The Dissenting Vote on the Spanish Constitutional Court Judgment 49/1999

The Constitutional Court Judgment 49/1999 is without a doubt one of the most prominent cases in Spanish case-law. It discussed the constitutional validity of a criminal procedure that used as evidence telephone conversations recorded with a judicial warrant, as well as the following investigations arising from them. Shortly before that decision, the ECtHR had reproached the Kingdom of Spain for the lack of a foreseeable regime concerning the interception of telephone conversations (case of Valenzuela Contreras v. Spain, (58/1997/842/1048)).

There were two matters that had to be clarified. Firstly, what to do with an inactive parliament that was not complying with its obligation to regulate the interception of telephone conversations with the due depth; and secondly, how to organise the safeguards protecting the secrecy of communications: the restriction of fundamental rights by law, the prior judicial warrant and the prohibition of the use of unlawful evidence. Needless to say, all of this fell within the context of the fight against organised crime, especially drug trafficking, concentrating on what was then the most important means of investigation: the interception of communications.

The majority of the Spanish Constitutional Court, in the words of Judge Tomás Vives Antón, revisited some of the conclusions that had already been established in the prior jurisprudence. The first was the idea that all fundamental rights must be defined by an Act of Parliament, even if the Spanish Constitution's text did not foresee it thus. It was deemed there was no longer a need for a literal interpretation of Article 18.3 of the Spanish Constitution, which conceived the prior judicial warrant to be the sole safeguard of the secret of communications (point of law 3).[1] Secondly,

[1] "3. Secrecy of communications is guaranteed, particularly of postal, telegraphic and telephonic communications, except in the event of a court order to the contrary." Boletín Oficial del Estado,

the two-fold function of the restriction of fundamental rights by law was accepted without debate as a safeguard for citizens in that any "state interference" would have to be authorised by the parliamentary representatives, as well as a condition for legal security because the parliamentary Act must "express each and every one of the conditions for the interception" (point of law 4). Along these lines, in the fifth point of law, the majority of the Constitutional Court listed in detail the "minimum demands concerning the content or quality of law", determined by the *Valenzuela* doctrine for interception of communications.

From here on, the majority of the Court drifted into murky waters. They introduced a rationale by which the lack of legislative regulation implies an "autonomous" breach of the fundamental right, but which only entails a "risk" for the fundamental right. This affirmation appears to rest on the doctrine of the ECtHR. It is worthwhile to see a quote of what was said:

"Deeming such a breach therefore entails the acceptance that the appellants have in effect faced that risk; but, similar to what happened in the case examined in STC 67/1998, it does not in itself necessarily imply the constitutional illegality of the actions by the jurisdictional bodies that authorised the interception."

Based on this premise, the Court concluded that the lack of density in the restriction of fundamental rights by law can be overcome by a judicial intervention that explains the seriousness of the offence leading to the interception of communications, identifies the persons involved in the facts, the duration of the interception, and the proportionality of the interception. To sum up, the majority of the Court gave preference to the judicial safeguard over the legislative one, up to the point where the former remedies the breaches of the latter.[2]

Pedro Cruz Villalón stood up against this result via a dissenting vote. First, he rejects the idea that the breach of the restriction of fundamental rights by law may be "neutralised" by the subsequent judicial warrant. For the purposes of this paper, I am primarily interested in the way that Pedro Cruz Villalón uses the ECHR. For Pedro Cruz Villalón, the key lies in the different place that the Spanish Constitution and the ECHR grant for judicial intervention in drawing up the safeguards to protect communications. He states in point 3 of his dissenting vote that:

"With regard to our constitutional system, I do not think we can say that the fundamental right has been breached due to a defect in the law and yet affirm that the injury can be offset by the judge, since the gaps in foreseeability are not susceptible be corrected *ex post facto*. The doctrine from the Huvig and Kruslin cases is that, provided the deficiencies in the law are not covered, the ECtHR will continue to consider breaches of the fundamental right."

We thus see how, based on the same text of the Convention and for the same text of the Spanish Constitution, Pedro Cruz Villalón's conclusions differ from the majori-

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https://www.boe.es/biblioteca_juridica/codigos/codigo.php?id=158&modo=2&nota=0&tab=2 (20.1.2021).

[2] This decision causes a disengagement of the three guarantees that govern the secrecy of communications: restriction by law, judicial warrant and exclusion of the illegal evidence. One is not linked to the other, but each one has its own legal regime and the violation of one does not necessarily have repercussions on the conviction.

ty's.[3] The majority places emphasis on the constitutionality on the previous judicial warrant, and specifically on its proportionality. But Pedro Cruz Villalón subordinates the judicial justification to the quality of the law and above all warns of the exaggerated weight given to the principle of proportionality, which in those days was an emerging factor in the Constitutional Court's case-law.

He states in his point 5:

"We have never doubted that the 'judicial decision' of Art. 18.3 CE is a decision justified through reasoning. Based on that, whatever 'justifying' means, it is an activity closely related to the 'quality of the law' […]: the quality of the formal law facilitates the justification; whereas its deficiencies make it difficult and at the same time more necessary […] I have some reservations arising from the core nature that the principle of proportionality is beginning to take on in our conception of fundamental rights, and which these points of law are good examples of: I do not think that it is essential to use it as a basis in order to make the constitutional requirements explicit in Art. 8.2 ECHR effective. Nor should it be forgotten, once again, that the ECtHR uses a model in which intervention by a judicial authority is not unavoidable; the needs arising from judicial control following an intervention, albeit administrative, may not simply be transferred to what among us will always be control over a judicial intervention. It is necessary to demand a 'quality' from the judicial ruling as regards its justification, which in the case at hand certainly was not concurrent, but I do not think we should go much further in determining it. […]"

In conclusion, if we have a good law, we will have a reasoned judicial decision. And if we have a good law, we will not need to verify the reasoned judicial justification.

2. The Quality of Law Beyond the Convention

Outside the Court, Pedro Cruz Villalón maintained his concern about the quality of law, as shown in his work "Control over the quality of law and the quality of control over the law".[4] In that essay he attempts to clarify the meaning of the concept "quality of law", trying to go beyond the ECtHR's doctrine. He understands that the term

[3] The dissenting vote also contains an important reflection on the rule of exclusion of evidence as a result of the breach of fundamental rights. In this case, more strictly than the majority (and than the dissenting vote from González Campos) he rejects the idea that an interference in the secrecy of communications due to a lack of quality in the law or in the judicial reasoning in this case may result in an exclusion of direct evidence from an interception of communications or of evidence arising from it. He does not see intention, gross negligence or seriousness of the breach, but simply error, which would be insufficient legal grounds to eliminate the evidence from the procedure.

What is interesting for this essay is that in Pedro Cruz Villalón's reflection the Convention is always present:

"And although this is not a decisive appreciation, it should be remembered that based on this we have abandoned the terrain of Art. 10.2 CE and in particular the ECHR, which considers this a problem to be solved basically by national legal systems (Schenk case of 12 July 1988, point of law 46); hence, in the Valenzuela case, the European Commission and the ECtHR later, they considered the complaint inadmissible in everything related to the repercussions of the violation of secrecy of communications in the final judgment. The implicit point of reference now becomes the United States, in other words, that of simple comparative law, and the categories drawn up by its Supreme Court since the beginning of this century, which have subsequently become highly nuanced."

[4] *Cruz Villalón*, Derecho Privado y Constitución 2003, 147.

has three possible meanings. The first could refer to the technical precision of the law; the second to its general and stable nature as well as its rationality and coherence within the entire normative system; and the third:

"It is redirected towards explicit or implicit constitutional principles arising from the modern idea of the rule of law: *Legal security* as *protection of trust*, legal certainty as certainty of the law, *prohibition of arbitrariness (reasonableness),* and *tolerability* (in the sense of *Zumutbarkeit*). All of this is extended in broad concepts that have been fundamental: *proportionality, ponderation*, without ruling out the horizon of *subsidiarity*." (Italics by Pedro Cruz Villalón)

And following this array of instruments, he adds conclusively: "There is no constitutional jurisdiction that prides itself on not daring to use these tools." I consider that this is the primary thesis of the article in question, since Pedro Cruz Villalón maintains that the concept of the quality of law must condition the quality of control over the law, to the point that he states:

"From the beginnings of the theory of control over constitutionality, a typology of the forms of unconstitutionality has been handled, which has grown in complexity […] It would be a question, in this sense, of articulating a specific form of "thickness" (*Dichte*), to use the German expression, of the control corresponding to this form of unconstitutionality" (p. 154).

The essay gives two significant insights. The first is related to the formal concept of law, dominant in the Spanish doctrine, according to which everything resulting from the legislative procedure is law, regardless of its quality. Faced with this position, Pedro Cruz Villalón states on page 151:

"[…] The [Spanish] Constitution, in addition to all of the above, contains a general mandate, of a substantive nature, which is projected onto the law as such more-or-less diffusely. In other words, there has always been a material preconception of the law by the Constitution. [But] it is another thing for this constitutional image of the law, considered abstractly, to be formulated in more-or-less express terms, or for it to have to be found in the broader category of the rule of law."

This text enables us to link the essay I am commenting on to Constitutional Court Decision 49/1999 seen above. In the dissenting vote, Pedro Cruz Villalón affirmed, albeit tangentially: "I have some reservations arising from the central nature that the principle of proportionality is beginning to adopt in our conception of fundamental rights […]". We could say that in 2003 such reservations had disappeared and principles such as proportionality (and we could add legitimate expectations and arbitrariness) would be called upon to take up a central role in controlling the quality of the law.[5]

[5] At this point, it is necessary to draw attention to a small text by *Cruz Villalón*, Una nota sobre la evaluación legislativa: el caso de las leyes "constitucionalmente sensibles" (A note on legislative evaluation: the case of "constitutionally sensitive" laws), in: Pau/Pardo (editors), La evaluación de las leyes. XII Jornadas de la Asociación Española de Letrados de Parlamentos, 2006, 201. Here he reflects on the opportunity to control (not necessarily in a jurisdictional way) the persistence of the reasons that justified certain laws. He specifically refers to what he calls constitutional development laws. First he distinguishes the "laws that imply a development of the Constitution in accordance with the sign of the times" and which in some way do not need to be monitored, as would be the case of a partial decriminalisation of abortion, the total abolition of the death penalty or a suspension of compulsory military service (204). On the other hand, there would be other laws that entail "some restriction or perhaps

This transition from the quality of law towards control over fairness, as the author himself points out, is to be found naturally in an evaluation prior to judicial control. However, this does not preclude an *a posteriori* jurisdictional examination. And this is where Pedro Cruz Villalón deploys a whole battery of proposals related to the Constitutional Court.

In terms of procedural law, it is particularly worth noting his idea of expanding the action against unconstitutionality, reaching

> "… all those who have participated in the parliamentary deliberation […] It would ultimately mean that all the arguments of constitutionality that may have arisen in parliamentary debate may be transferred to the supervisory body." He adds: "It is possible that this approach may need to include the caution of an admission process for an appeal against unconstitutionality […]" (both quotes on p. 165).

Pedro Cruz Villalón also makes a structural proposal: constitutional judges' term of office must be extended from nine to twelve years, ceasing at retirement age. But what does this have to do with the quality of law? In order to understand this we have to recall one of the ideas in the essay that we are commenting on, which underlines the residual nature of constitutional control of law, to the point that Pedro Cruz Villalón stated at the time, "…it is not so clear that in our legal system there is a fully operational model for controlling the constitutionality of laws" (p. 163).

According to him, the reason for this reduced control over the law is the court's lack of willingness to control the law. That is where his structural proposals come in. As regards retirement as a limit, it is clear that he intends to prevent Supreme Court judges entering the Constitutional Court at the end of their career. As for the extension of the mandate to twelve years, he wishes to avoid continually recomposing the court and thus give it stability to improve the quality of control over the law. Though it is not explicit, I believe that the conclusion that can be drawn is obvious: control over the quality of law, insofar as it moves within malleable parameters, requires a strong court. Such strength can only be built upon the continuity and dedication of the constitutional judges.

3. The Convention, the Charter of Fundamental Rights and the Quality of Law: Scarlet and Digital Rights

Years later, Pedro Cruz Villalón would again tackle the problem of the quality of law, but this time to elucidate the meaning of the restriction of fundamental rights by law in the Charter of Fundamental Rights of the European Union. I must refer first to his Opinion delivered on 14 April 2011 in *Scarlet*, C-70/10. This case considered the conformity with EU Law of a national judge's warrant ordering an Internet service

modulation of rights" (italics from Pedro Cruz Villalón), for example, the law on video surveillance or on political parties. "These are laws that are unquestionably 'constitutionally sensitive'. All of them contain options that must be periodically contrasted with the real situation". And along with these we would find those that "so intimately touch our human condition and that are so conditioned by scientific-technical progress that they need to be responsibly monitored in every society that considers itself to be truly democratic" (205). We are thus faced with another type of control (over constitutionality): a control over necessity.

provider to install communications screening software that would prevent certain files from being exchanged. This measure was intended to protect intellectual property, though as Pedro Cruz Villalón stresses from the outset, the matter also dealt with privacy, data protection and freedom of expression, fundamentals rights whose definition and guarantees correspond to the Charter and the Convention. This circumstance obliged him to work with the latter by virtue of Article 52.3 of the Charter (paragraphs 30–34).

I would like to distinguish this case from *Digital Rights* by underlining that in *Scarlet* the control over the restriction of fundamental rights by law was projected onto the State and not onto intervention by the EU. Based on this premise, the conclusions are canonical in applying the ECtHR's doctrine on the quality of law: "The 'law' must therefore be sufficiently clear and foreseeable" as regards the measures, though this does not stop it from giving the judicial power or the government administration scope for discretion provided that the manner in which it exercises such scope is sufficiently clearly defined (paragraphs 95). This clarity can be obtained via appropriate legal advice (paragraphs 98) or through consistent decisions (paragraphs 99).

This transfer *en bloc* of the ECtHR's doctrine regarding Article 52 of the Charter ultimately puts forward a standard of democracy. Thus, in note 93, Pedro Cruz describes the idea of the primacy of law, which would be the theoretical basis for the criterion of quality of law. He says in it (excluding the copious jurisprudential references from the ECtHR that he includes to support his assertion):

"The principle of the supremacy of the law, which is included in the preamble to the ECHR, means that domestic law offers a certain protection against the arbitrary infringements by the public authorities of the rights which it guarantees. Although that principle 'implies, *inter alia*, that an interference by the executive authorities with an individual's rights should be subject to an effective control which should normally be assured by the judiciary, at least in the last resort, judicial control offering the best guarantees of independence, impartiality and a proper procedure' […]"

To sum up, the idea of the primacy of the law places the law and its quality at the core of the legal system, which simply makes it feasible to control intervention by the government as regards rights and, in turn, to control the control exercised by the judicial power over administrative (governmental) action. However, it should not be forgotten that the ultimate goal of this primacy of law is to curb arbitrariness. At the heart of the reflection is once again the balance of the safeguards to fundamental rights as seen in paragraph 113:

"113. Allow me to add a few final observations. The Charter, just like the ECHR, by requiring that any 'limitation' (or 'interference' or 'restriction') on rights and freedoms is 'provided for by law', refers, very specifically, to the role of the law, of Law strictly speaking, as a source of *tranquillitas publica* in the extremely sensitive area with which we are concerned. However, the Charter does not only want the law to 'pre-exist' any limitation on rights and freedoms, but also wants that limitation to respect its 'essential content', which almost unavoidably calls for the legislature to define the border between the limitation on the right and the territory, in principle intangible, of that essential content. Similarly, the Charter requires any limitation on the exercise of the rights and freedoms which it recognises to observe the principle of proportionality, satisfy the principle of necessity and effectively pursue objectives of public interest recognised by the European Union or respond to the need to protect the rights and

freedoms of others. In the light of all these conditions, it is the very existence of that 'law' which, once again, is lacking, in my view, 'law' understood to be 'deliberated' law, that is, democratically legitimised. Indeed, only a law in the parliamentary sense of the term would have made it possible to examine the other conditions in Article 52(1) of the Charter. *In that regard, it could be argued that Article 52(1) of the Charter incorporates an implicit requirement for a 'deliberated' law, in line with the intensity of public debate.* However, it is the express requirement of a law, as 'prior law', which is at issue here. Since it has been established that this is lacking in the present case, it is possible to reply to the first question posed by the national court." (Italics are mine).

The pre-existence of the law is a necessary condition to bring into play the other safeguards: the essential content and the principle of proportionality. Therefore, it has a logical pre-eminence that reminds us of the thesis that at the time supported his dissenting vote for Constitutional Court Decision STC 49/1999, in which he questioned the possibility of neutralising the quality of law by means of a subsequent judicial intervention via warrant. According to Pedro Cruz Villalón, a judgment of proportionality cannot replace the predetermination included in written law.

In summary, Pedro Cruz Villalón includes an additional element that would mark a difference between the Charter and the ECHR. I am referring to the phrase that I have transcribed in italics and in which Pedro Cruz Villalón attempts to link the concept of quality of law to an act arising from parliament, thus overcoming the formal concept of the law. It is obvious that a classic doctrine is reflected in the Advocate General's thesis, making the democratic principle a key part of the design of fundamental rights. Without that democratic principle, the formal division of powers is lost. Let us remember that this structural division stems from the law, then continues with administrative (governmental) application of the law and ends up in judicial control of that administrative application. Without parliamentary law, foreseeability would be constructed by the executive power with its regulations, or by constitutional or ordinary judges with their case-law.

This thesis has particular continuity in *Digital Rights*, C-293/12. The facts are well known: a Directive imposed a general obligation on electronic communication service providers to maintain, for a specified period of time, a considerable amount of data generated within the context of electronic communications sent by citizens throughout the entire territory of the EU. The intention with this obligation was to ensure the availability of said data for the purposes of investigation and prosecution of serious criminal activities.

The key to the Opinion delivered on 12 December 2013 can be found in paragraphs 109 and 114. In 109, Pedro Cruz Villalón specifies the meaning of the restriction of fundamental rights by law in the field of the European Union's Law. He takes the opportunity to include a material element, which is none other than the quality of law in the light of the ECtHR's case-law. Specifically, he affirms (109):

"That said, the Court's concept of the requirement of being 'provided for by law' must, having regard to Article 52(3) of the Charter, be close to that adopted by the European Court of Human Rights, that is to say, it must go beyond a purely formal requirement and cover also the lack of precision of the law ('quality of the law'), (86) to express it in the simplest terms possible."

Paragraph 114 concerns the hypothesis that this quality of law is solved by delegating vertically, with the Directive ordering the State to comply with the quality of the law. Pedro Cruz Villalón's response requires a long quotation, which in my opinion contains all the necessary elements to understand the concept of the restriction of fundamental rights by law in Union law (114–117):

"114. Thus presented, the issue which arises is none other than whether the requirement that any limitation on fundamental rights must be 'provided for by law' may be fulfilled by such a general referral, even if accompanied by express mention of the rights guaranteed by Directive 95/46 and Directive 2002/58.

115. It is necessary in that regard, first of all, to explain that a situation in which the European Union restricts itself to adopting legislation harmonising provisions invariably adopted by the majority of the Member States is not comparable to a situation in which the European Union decides, additionally, to make such legislation applicable generally.

116. In the first case, the European Union can proceed as it did with Directive 2002/58, that is to say, essentially leave to the national legislatures the task of ensuring that the legislation adopted on their own initiative and entailing a limitation on fundamental rights contains all the guarantees necessary to ensure that the limitations and their application ('access') comply with all the quality of law requirements and the principle of proportionality.

117. In the second case, on the other hand, where the limitation on fundamental rights stems from the legislation of the European Union itself and is therefore attributable to it, the European Union legislature's share of the responsibility is quite different. In the case of directives, it is clear that it will be for the Member States to set out in detail the guarantees necessary to regulate the limitation on fundamental rights in an instance such as the present one. However, the European Union legislature must also play a leading role in defining those guarantees. It is from that perspective that it is necessary to examine compliance with the quality of the law requirement."

To put it as simply as possible, if Union law harmonises interventions on fundamental rights that are already generally provided for in the States, then the quality of law will be satisfied in the national law. On the other hand, if it is Union Law that is creating *ex novo* an intervention in the fundamental right, then it is necessary for the European source of law to include at least elementary safeguards (paragraph 123).

II. What is the Convention for?

Reading between the lines of Pedro Cruz Villalón's works dealing with the process of European integration and especially with the Charter, one can see his view as regards the constitutional role of the ECHR. His conclusions emphasise a two-fold usefulness of the ECHR, depending on how we analyse it in its relationship with national constitutional law or with Union Law.

In terms of its usefulness related to national constitutional law, Pedro Cruz Villalón did not need many explanations because Article 10.2 of the Spanish Constitution gave him a firm foothold.[6] As a judge of the Constitutional Court, he used the

[6] Article 10.2 "The principles relating to the fundamental rights and liberties recognised by the Constitution shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements thereon ratified by Spain", Boletín Oficial del Estado, https://www.boe.es/biblioteca_juridica/codigos/codigo.php?id=158&modo=2&nota=0&tab=2 (20.1.2021).

ECHR as an interpretive criterion in defining the content of our fundamental rights. Years later he underlined the position of the ECHR in relation not only to the Spanish Constitution, but to national constitutions in general. In 2002, during his stay at the *Wissenschaftskolleg*, he analysed the ongoing European constitutional debate. The Constitutional Treaty was an opportunity for the Union to equip itself with a supreme rule in the image and likeness of national constitutions. In that brief but rich analysis, after concluding that Europe could be considered a "constitutional zone", he affirmed:[7]

"In this general context, an institution such as the European Court of Human Rights, beyond the function of protection and safeguarding of individuals in exercising their rights and public freedoms, has a decisive influence on the consolidation of this constitutional panorama. The European Convention on Human Rights' system works as well as a *lingua franca* of rights in Europe by providing a common European bedrock for each of these rights and freedoms".

Thus, the ECHR, by virtue of its specific protection of rights, would have the overall result of consolidating a common bedrock, in other words, participating in forming a common European constitutional law. In addition, in this task of harmonising or setting up a constitutional heritage, Pedro Cruz Villalón suggests the influence of the ECHR and its Court on political legitimacy, in a way comparable to the work done by Article 16 of the Universal Declaration of the Rights of Man and of the Citizen.[8]

Pedro Cruz Villalón's reflections are much more intense concerning the contemporary problem of the extent to which the Union needed a Charter of Rights when the use of the ECHR had served to build up a system of protection comparable to the national systems. At this point, in my opinion, Professor Pedro Cruz Villalón's thinking has evolved along with the events themselves and three phases can be distinguished in his work: the Charter as a text subordinate to the ECHR; the Charter as a text that provides a political extra compared to the ECHR; and the Charter as a text that has been freed from the ECHR.

However, before developing these three phases, Pedro Cruz Villalón stresses that the debate about the Charter is basically a discussion on the constitutionalisation of the Union, which is why he affirms that "having a Charter of Rights of such breadth is beginning to look like having a Constitution, and hence the significance of eventually granting validity to the Charter";[9] and in another text he says "Today, however, Constitutions are also increasingly identified here with rights, in such a way that few 'elements' are admitted that are as consubstantial to the idea of Constitution as rights and freedoms".[10]

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[7] *Cruz Villalón*, La Constitución inédita (The Unpublished Constitution), 2004, 27.
[8] *Cruz Villalón* (fn. 7), 27.
[9] *Cruz Villalón*, La Constitución inédita (The Unpublished Constitution), 2004, 51.
[10] *Ibidem*, 35.

1. The Charter Subordinate to the Convention

Let us now return to the evolution of Pedro Cruz Villalón's thinking as regards the Convention and the Charter. His first stance is to be found in a text from 2004 entitled "The Charter, or the unwelcome guest (a look at Part II of the Treaty/Constitution for Europe project)".[11] The main thesis of that work stresses that the Constitutional Treaty was designed to operate without the Charter in the belief that a sufficient system of protection already existed. The Charter was to end up "embedded" in the Treaty, "without making the slightest effort to adapt the rest of [the Treaty's] text to the new presence", in such a way that it was conceived as "an *expendable* document to the extent that its inclusion has not been accompanied by a simultaneous dismantling of the system of protection of rights currently in force" (120; italics by Pedro Cruz Villalón). But not only was the classic mode of protection of rights via principles not dismantled; rather, it retained a privileged place, or at least one superior to the Charter itself. The Charter was subordinated through its Articles 51–53, applicable provisions, which Pedro Cruz Villalón defines as "articles of surrender", resulting in a Charter that is "*watered down* from the point of view of its legal incidence" (121; italics by Pedro Cruz Villalón).

Pedro Cruz Villalón places paragraph 3, Article 52 among these articles of surrender. His analysis is especially interesting in comparing the latter to Article 10.2 of the Spanish Constitution, which basically stresses the different function of the ECHR depending on whether it relates to the national law or European Union law:

"The differences, however, are radical: [in the Charter] no instrument for interpretation is planned, but a mandate of identity: its meaning and scope will be *equal*. In this way, the most *classic* rights, those least likely to be found in other Parts of the Constitution, *are* those of the Convention, literally the same ones."

2. Paradigm Shift and the Added Value of the Charter

If the Charter is an unwelcome guest, if its legal effectiveness is watered down and if the content of its rights is regulated by external sources, most especially the ECHR and constitutional traditions, then what is it for? With its legal significance neutralised, Pedro Cruz Villalón attempts to emphasise its "added value". I am referring to his short essay, "The 'added value' of the Charter 'in relation to' the European Convention on Human Rights",[12] which includes a speech he gave to a delegation from the ECtHR that was visiting the Court of Justice. The central question revolves around Article 6 of the TEU, with its concurrent call to the ECHR (source of principles and subject to ratification) and to the Charter.

In this text, Pedro Cruz Villalón describes the function of the Convention in relation to EU law. In Article 6 of the TEU and 52 of the Charter, a "non-deviation principle" is established, which is especially binding on the Court of Justice. Further-

[11] *Ibidem*, "La Carta, o el invitado de piedra".

[12] *Cruz Villalón*, in: Igualdad y democracia: el género como categoría de análisis jurídico: estudios en homenaje a la profesora Julia Sevilla (Equality and Democracy: Gender as a Category of Legal Analysis: Studies in Tribute to Professor Julia Sevilla), 2014, 209.

more, by virtue of the accession mandate, in future the ECtHR is to carry out the work of a "Court of Auditors", like the work it does with respect to any legal system in the States that have ratified the ECHR.

This two-fold function of the ECHR, which is not only about control, but also truly affects the concrete definition of fundamental rights in the European Union, makes the answer to the question about the Charter's purpose even more relevant. What does it add to the Convention? A legal paradigm shift from a law of principles (and judges who create) to a positive law (and judges who interpret). Pedro Cruz Villalón states:

"On the whole, and summing up: I see the 'polity' that is the Union in a moment of adaptation in the matter of fundamental rights. Over roughly half a century the Union has built up a very complex and in the end distinctly peculiar system of protection of fundamental rights and freedoms, both in substance and as to remedies. It has been a system essentially based on non-written general principles, with a very marked presence of judge-'made' law. Now, in the coming years we shall see the Union engaged in a shift towards a model of 'constitutional rights', largely comparable to the one of most of the Member States. For the CJEU this essentially means abandoning the logic of creativity flowing from the notion of general principles for a logic of interpretation of the written law, the interpretation of the Charter of Fundamental Rights of the European Union."

What practical significance does this paradigm shift have? Without a doubt, this paragraph points out many ideas that touch upon various elements that are the essence of constitutional law. Some time after, as Advocate General, he would give us an illustrative example of the consequences that this new perspective can bring with it.

3. The Freed Charter

I am referring to his Opinion delivered on 12 June, *Åkerberg Fransson*, C-617/10, which has become one of the capital cases of the Court of Justice's contemporary doctrine. Clarification was needed as to whether according to the Charter it was feasible in the field of VAT for the same offence to result in an administrative penalty and then in another criminal one, too.

The problem that I am now interested in highlighting is the situation faced by Pedro Cruz Villalón. It has already been seen that he maintained an interpretation of Article 52.3 of the Charter, identifying a non-deviation principle. Nevertheless, in *Fransson* he underlines the unusual situation that Protocol 7, whose Article 4 lays down the rule of *non bis in idem*, had not been ratified by all Member States. In these circumstances, the mandate is asymmetrical (paragraph 70) because there is "clearly and expressively a considerable lack of agreement between the Member States" (paragraph 73). It is a lack of consensus that is also a manifestation of the deep-seated nature in some Member States of the two-fold punitive power: "That widespread existence and well-established nature could even be described as a common constitutional tradition of the Member States" (paragraph 86), which according to Pedro Cruz Villalón leads to a relativisation of the non-deviation mandate in the interpretation:

"85. For all those reasons, I believe that the requirement that the Charter is to be interpreted in the light of the ECHR must be qualified when the fundamental right in question, or an aspect of it (as is the case of the applicability of Article 4 of Protocol No 7 to the ECHR to the imposition of both administrative and criminal penalties for the same offence), has not been incorporated fully into national law by the Member States. Further, even where, in such circumstances, the fundamental right and the case-law of the European Court of Human Rights in that regard constitute a principle which inspires Union law, I believe that the obligation to place the level of protection provided for in the Charter on an equal footing to that provided for in the ECHR is not as effective."

The Charter has been freed from the ECHR. Thus we enter the classic terrain of constitutional interpretation that deals with facts through the normative text, with no more tools than the classic interpretative principles. In order to get around the punitive duality, as opposed to the ECHR's doctrine, Pedro Cruz Villalón relies on the criterion of literal interpretation of Article 50 of the Charter, since this article has differences compared to Article 4 of Protocol 7, especially the express mention in the Charter's Article 50 by which "No one shall be liable to be tried or punished again in criminal proceedings", thereby underlining the criminal nature of the offence. However, Pedro Cruz Villalón opens up the path to a modification in this conclusion via the Rule of Law clause and its principles of proportionality and the prohibition of arbitrariness, which would oblige the national judge to take into account the administrative punishment when laying down the criminal sentence.

The dogmatic results do not end here, since Pedro Cruz Villalón also establishes the different place that the ECHR and the Charter hold within the system of sources. By this I mean the point of the preliminary ruling, in which the Court of Justice is questioned about a Swedish case-law which derogates the application of national law due to a contradiction with the ECHR or the Charter but only if there is "clear support in the provisions of the Charter and the ECHR and in the case-law of the European Court of Human Rights" (paragraph 102). Ultimately, it is a matter of deducing whether a national court can establish a modification to the primacy and direct efficacy of both legal texts.

As for the ECHR, Pedro Cruz Villalón follows the doctrine established by the Court of Justice in *Kamberaj* (Case 571/10, ECLI: EU: C: 2012: 233). He maintains the idea that it is possible to distinguish between the effectiveness of the ECHR's fundamental rights, which are principles of European Union Law, and, on the other hand, "the ECHR as such [which] is not a legal instrument that has been formally incorporated into European Union law" (par. 109). This circumstance, he adds, will change when the EU accedes to the ECHR. Therefore, he has nothing to say about national rules that organise the Convention's relationship with national law.

The solution is different as regards the Charter. The national criterion of clear support cannot be turned into "a condition which affects the rigour of the review which national courts normally carry out when they apply Union law" (par. 114), since that would end up undermining the principle of efficacy in protecting Union law.

The two dogmatic results are valuable in themselves: the Charter must be interpreted autonomously when the ECHR lacks consensus, and the Charter, not the ECHR, enjoys the attributes typical of Union law (primacy and direct effect). None-

theless, I would like to change the perspective and assess the matter in terms of its results. If we look closely, the relativization of the mandate provided for in Article 52.3 of the Charter serves to protect the unique aspects of the Member States. In the absence of ratification of a Protocol of the Convention, or the existence of reservations to the Treaty, one could opt to interpret the Charter in the same way that the ECtHR interprets the Convention, imposing a type of interpretation, even if this resulted in shifting the delimitations of the fundamental rights entrenched in some Member States and which are even a constitutional tradition. However, Pedro Cruz Villalón prefers to use the Charter as an instrument that makes room for the Member States' constitutional idiosyncrasies. Thus, we come to another of the great topics in European constitutional law: constitutional identity.

III. Possibilities and Limits to Constitutional Harmonisation

1. Absolute Rights?

In this section I would like to begin with Pedro Cruz Villalón's dissenting vote on Spanish Constitutional Court Decision STC 91/2000, which is the first in a series on extradition (subsequently the European arrest warrant) which some time later would give rise to the well-known *Melloni* case. Decision 91/2000 judged whether the extradition to Italy of a person sentenced *in absentia* for very serious crimes observed the right of effective judicial protection before a court. The Constitutional Court was up against so-called indirect violations. These are situations in which the Spanish public powers violate fundamental rights when "they recognise, approve or give validity to judgments adopted by foreign authorities" (point of law 6). In this case, the binding nature of the Spanish Constitution is modified so that it is not "unconditional" as regards the essence of the right, but would be projected onto what the majority of the Court calls "absolute right", "by virtue of its universal validity", because "[the rights] belong to the person as such and not as a citizen, […] those [rights] that are essential for human dignity" (point of law 6).

How is this absolute right identified? According to the majority of the Constitutional Court, two paths must be followed. Firstly, the essential contents of the right are established and from there on an assessment is made as "to what extent they are inherent in the dignity of the human person […]". Then, using Article 10.2 of the Constitution, international law is also evaluated, mainly the ECHR.

This second step dominates the reasoning of the majority of the Constitutional Court, which dedicates the whole of point of law 13 to "deducing" from various sources (including Article 6.3 of the ECHR) the prohibition of a trial *in absentia* when there can be no subsequent appeal. However, in point of law 14, in an apodictic style, the majority of the Constitutional Court state that the absence of the defendant for very serious crimes in the oral hearing not only affects dignity, but also makes the idea of a fair trial "a chimera."

Apparently Pedro Cruz Villalón does not deny the two baseline premises: that it is possible to appreciate indirect violations; and faced with them, the controlling canon is absolute right. However, he disputes the consistency of the concept of indirect vi-

olation when it comes from a State that is part of the ECHR. He says specifically referring to Italy:

"Dealing with the substance, the first statement that I understand must be made is that the category of 'indirect violations' must be subjected to a decisive relativisation when we are dealing with States that for half a century have been integrated into the same community of rights and freedoms, understood to be the one made up of common recognition for a table of rights and freedoms, and effectively subjected to a supranational legal body which all persons subject to the sovereignty of their corresponding States can access directly and freely. Such is our case, of course, in which this community exists under the indicated terms: there is a European Convention on Human Rights, whose Article 6 is decisive in the matter, as well as a jurisdictional authority responsible for ensuring the effectiveness of these rights: the European Court of Human Rights. On the other hand, the authorities accused of direct violation of the right are authorities of a State which, far from having just entered this community, has been part of it since its very foundation." (PL. 2)

The practical conclusion, then, is that in order to determine the existence of an indirect violation, beforehand there must have been a failure "of the attempt via the supranational instance referred to above to obtain a conviction of the State that has allegedly directly violated or is going to directly violate the right […]". Such an analysis would imply a hypothesis of a prior judgment by the ECtHR before the Constitutional Court intervenes.

He also relativises the second premise about absolute right. He accepts that the search for essential content or for content shared with other States are the ways to proceed (the latter before the former). However, he opens up a third way: transnational content, which essentially ends up neutralising the other two. The fourth point of law says:

"4. I believe, however, that the task of investigating the absolute content of the right to a fair trial (Art. 24.2 CE) is unnecessary when there is a supranational rule about whose constitutionality there are no doubts, and which specifically addresses the problem of the extradition of those convicted *in absentia* […]. Since from the point of view of constitutionality, which is what interests us here, what matters is the existence of a canon in force in Europe since 1983 that enables us to identify content that is "transnational" so to speak concerning the right to defence projected onto the convictions *in absentia*, in order to determine whether there has been an indirect violation."

2. On Constitutional Identity

As we have just seen, Pedro Cruz Villalón understood "absolute" in 2000 to mean something to be shared. Twenty years on, the situation has changed. One example of the contemporary reality was "the new constitutional plurality", which he highlighted in his essay "National Constitution and European Constitution", with which in my opinion he basically pointed out that we were (and are) facing a phenomenon that does not fit into the known categories, especially into that of a federal state, and pre-

cisely for this reason he is seeking new concepts and therefore new rules for stabilisation.[13]

There are four distinguishable principles in Pedro Cruz Villalón's work with which to handle this pluralism: constitutional heritage, reciprocal metaconstitutionality, adaptation of the national constitution to the Union's, and constitutional identity. In this essay I would like to focus on the first and last of these. Constitutional heritage is of interest because the ECHR, as we have seen, is a part of it; whereas constitutional identity deserves attention because it works as an antithesis to the trends of constitutional harmonisation and to some extent, according to Pedro Cruz Villalón, it reflects a transformation in the understanding of constitutional theory. Nevertheless, a brief explanation of all of these principles is necessary to get a complete view.

To understand the first (constitutional heritage), it is worth keeping in mind that:

"Constitutions come into the modern world, so to speak, with their 'harmonisation programme' included, paradigmatically recognisable in Article 16 of the Universal Declaration of the Rights of Man and of the Citizen of 26 August, 1789 […] It is a programme with a very intense ethical side […]"[14]

The contemporary manifestation of this harmonisation programme would be included in Article 6 of the TEU, which is an expression of constitutional heritage in which the ECHR stands out,

"… since it is precisely this supranational system of protection for human rights to which one can attribute a broad European-wide harmonisation in the field of human rights. It is even largely responsible for the 'common European constitutional law' formula."[15]

However, European constitutional law, with the ECHR at the forefront, has proven to be insufficient in two ways: in terms of solving legal conflicts, as seen in the previous section, because it does not always reflect the necessary consensus; and also in terms of political legitimacy, since the problems of power in the integration process require more than shared fundamental rights. It is in the need to cover this deficit that I believe the principles of metaconstitutionality and adaptation of the national constitution to the EU's both make sense.

Reciprocal metaconstitutionality indicates a relationship of interaction, which Pedro Cruz Villalón defines as follows:

"Indeed, that is how one may define the phenomenon by which the basic legal system of one handles mandates intended to be valid in the basic system of the other, and vice versa. Based on this observation, it is possible to speak of a phenomenon of 'metaconstitutionality' in the sense that a basic legal system is intended to work as a metaconstitutional regulation of another basic system."[16]

When identifying the regulations in a national constitution that carry out this function, Pedro Cruz Villalón looks at those that impose conditions on the integration

[13] *Cruz Villalón* (fn. 7). In this same work, an approach is made on the different conceptual variants that have been proposed: weak constitutionalism, constitutional union (Verfassungsverbund), dual constitutionalism, and its own proposal for "constitutional agreement".

[14] *Cruz Villalón* (fn. 9), 46.

[15] *Ibidem*, 51.

[16] *Cruz Villalón* (fn. 9), 139.

process, especially those referring to the democratic principle. Other constitutional norms are discarded, as are those that recognise EU law's system (primacy, direct efficacy) or those that reorganise the division of competences in the internal system. On the other hand, in the Treaties this task would be met by Article 2, which includes the values on which the Union is based and which "are common to the Member States". To sum up, the rules that carry out a metaconstitutional function establish a constitutional framework in a material sense;[17] in a way, they have a similar function to the homogeneity clauses in the federal States, so that both metaconstitutionalities must coincide, at least setting out a common trend.[18]

It is legitimate to wonder what difference there is between European constitutional law and those metaconstitutional rules. If I have understood Pedro Cruz Villalón correctly, the former (of which the ECHR is a qualified part) would carry out the function of political legitimacy (in addition to a legal function). The latter, which is intrinsic in the rationale of the homogeneity clauses, has a functional and structural sense, "neutral in value", and which arises "[…] when the nation States, for whatever reasons, agree to a process of coming together, in such a way that a new political community is generated from different ones without the units integrated in it disappearing".[19]

We now have the outline to easily distinguish the third principle: adapting the national constitution to EU law. Pedro Cruz Villalón refers to adaptation of a State's regulations to the successive reforms that have become characteristic of the integration process,[20] as happened for example with Articles 13.2 and 145 of the Spanish Constitution.[21] The principle of metaconstitutionality would influence the constituent power, whereas the principle of adaptation would impose "duties to act" on the power to amend the Constitution. Such influences "govern" the national constitution to the point that Pedro Cruz Villalón considers it is feasible to set out a new normative category called "Member State Constitution".[22]

It is in this context that the principle of constitutional identity emerges, which balances out the others, especially the principle of constitutional heritage. The first difficulty lies in its duality, since it is a principle of EU law expressly included in Article 4.2 while at the same time being a principle of a national constitutional law, which has scarcely been included in constitutions but is often used by constitutional courts to reshape the contours of EU law's primacy.

We therefore have "two European narratives".[23] There is the narrative of the Court of Justice, dealing with "identity in lowercase letters", and as far back as 2013, when Pedro Cruz Villalón devoted specific attention to it, he foresaw the features that this category would be given in the Court of Justice's case-law. This is an "everyday" argument, yet another among those that can be used by Member States to derogate

[17] *Ibidem*, 145.

[18] *Cruz Villalón* (fn. 9), 48. Villalón (fn. 7), 146.

[19] *Cruz Villalón* (fn. 9), 48.

[20] *Cruz Villalón*, (fn. 7), 74.

[21] *Cruz Villalón* (fn. 7), 140.

[22] The complete legal regime of this category, at least in outline, can be found in *Cruz Villalón*, Cuadernos Manuel Giménez Abad 12 (2016).

[23] *Cruz Villalón*, Anuario de la Facultad de Derecho de la Universidad Autónoma de Madrid 2013, 501.

the application of fundamental freedoms. Constitutional identity thus loses any intention of being absolute and becomes "relativised" by working alongside other criteria in the definition of fundamental freedoms. Cruz Villalón welcomes the fact that constitutional identity serves to "give national constitutions a presence in the understanding of the Union's legal system".[24]

A different issue is raised by the national identity recognised in national constitutional law. Pedro Cruz Villalón had to tackle this as Advocate General, through his Opinion in *Gauweiler*, which is a good example of constitutional détente.[25] In the aforementioned case, it was necessary to elucidate whether the decision of the European Central Bank (ECB) to buy public debt in secondary markets complied with EU law. The category in question worked in a dramatic setting, as the Advocate General explained well: the German Federal Constitutional Court warned that it reserved successive control after the Court of Justice established the interpretation of the European law (paragraphs 33 and 34), which for Pedro Cruz Villalón means "intrinsically or conceptually, the possibility that it will in fact depart from the answer received" (paragraph. 36), which he plastically defines as "a breakdown in the European 'constitutional compact' underlying the integration process" (paragraphs 38 and 52).

Faced with the challenge posed by the German Constitutional Court, Pedro Cruz Villalón's response is blunt, rejecting the premise outright in paragraphs 59 and 60:

"59. The first is that it seems to me an all but impossible task to preserve this Union, as we know it today, if it is to be made subject to an absolute reservation, ill-defined and virtually at the discretion of each of the Member States, which takes the form of a category described as 'constitutional identity'. That is particularly the case if that 'constitutional identity' is stated to be different from the 'national identity' referred to in Article 4(2) TEU."

Moreover, Pedro Cruz Villalón does not limit himself to demonstrating the operational consequences that the hardest version of national identity would have on the Union's legal system. He also stresses the error in rationale implied by the German Constitutional Court's thesis when it claims singularity in a shared constitutional context. Pedro Cruz Villalón's tone is reminiscent of his dissenting vote in Spanish Constitutional Court Decision 91/2000, in which he argued that only what is common can be absolute:

"60. Such a 'reservation of identity', independently formed and interpreted by the competent – often judicial – bodies of the Member States (of which, it need hardly be recalled, there are currently 28) would very probably leave the EU legal order in a subordinate position, at least in qualitative terms. Without going into details, and without seeking to pass judgment, I think that the characteristics of the case before us may provide a good illustration of the scenario I have just outlined."

Nevertheless, Pedro Cruz Villalón does not reject all possibility of successive control by the German –Constitutional Court; rather, he proposes an alternative solution based on loyal cooperation, which would prevent the German Constitutional Court from wielding control in open contradiction to the Court of Justice's decision (paragraph 63), which should be "sufficient and final" (paragraph 67).

[24] All of the quotes, *ibidem*, 513.

[25] Opinion delivered on January 14, 2015, Gauweiler, C-62/14.

At this point we can conclude that Pedro Cruz Villalón believes that what is absolute can only exist in what is shared. His theoretical concern about the use of what is absolute to protect what is singular is nothing new. Around 2004, when he published his book on *The Unpublished Constitution*, he vouched for the principle of the uniqueness of the national constitution, understood to mean "the EU Constitution's relinquishment of dealing with the national constitution as just another element, undifferentiated, of national legal systems; an element upon which it would come to be projected as upon any other rules from [national legal systems]".[26] And he points out that national constitutions are a basis for harmonisation but also for uniqueness, insofar as they are an expression of the constituent power, even stating: "To sum up, national constitutions always contain at least a nucleus of differentiation, in other words, a nucleus of their own identity, which manifests itself as broadly resistant to assimilation".[27]

It was not until his departure from the Court of Justice when these tentative suggestions took on their final form. I necessarily have to refer to his short essay published in 2017, entitled "Between proportionality and identity: the keys to exceptionality at the present time".[28] In that article, he reviews how the handling of exceptional situations has evolved. First they were structured based on the criterion of temporality, setting a limited duration. Later they were regulated by the principle of proportionality. And today they are structured on the principle of identity.

Pedro Cruz Villalón tells us that temporality loses its consistency as of the moment when new forms of the extraordinary become normalised, or in other words, which become part of ordinary law with no special limits to their validity over time. As for the principle of proportionality, he shows his usual doubts, now even greater upon studying the principle's use in controlling extraordinary situations:

"By its nature, the principle of proportionality involves an element of discretion that is more-or-less appreciable but in no way avoidable, which can be recognised by both the legislator and the administration (government). This element is in principle sufficiently important to be subject to judicial review. However, it is very likely that the judge, on exercising his or her control, will feel obliged to respect this space for discretionary decision-making attributed to the other public powers. There is thus a risk that this control over proportionality may be reduced to prohibiting arbitrariness, which is far from sufficient in the matter we are dealing with."

Pedro Cruz Villalón's thesis is that the principle of identity must be complementary to that of proportionality; the latter represents what is flexible, the former what is stable. But constitutional identity is a "delicate" concept:

"The constitution as an idea should correspond to an idea shared by the Union in the strict sense and by all of its Member States. Even so, there is also undoubtedly a hard core in the individual constitution of each of the national communities that will find it difficult to coincide among all the States that make up the Union." He adds: "Thus the demand arose to build an identity arsenal, that is, an ultimate core of convictions that should not give in to contingencies, however difficult they may be […] the red lines […] the terrain of what is crucial."

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[26] *Cruz Villalón* (fn.7), 73.
[27] *Cruz Villalón* (fn. 9), 48.
[28] *Cruz Villalón*, Revista de Derecho Constitucional Europeo 27 (2017).

But who should define that ultimate core of convictions? Faced with this question, we must go back to his work "'Active' legitimacy and 'passive' legitimacy of the Constitutional Courts in the European constitutional space", from 2014.[29] In that text, after reviewing the legitimacy of constitutional courts based on their jurisdictional nature and their control of the law, he crucially points out the importance that constitutional courts are gaining in handling constitutional identity:

"The true problem is found at the moment when the Constitutional Courts claim a legitimacy capable of asserting itself successfully against that of the Parliaments, as if the Constitution's superior legitimacy that necessarily, or at least in principle, must be recognised could be claimed, also as a postulate, and in equal measure, by a constitutional judge […] But sometimes there is something more. Increasingly often, the constitutional courts speak in the name of a non-revisable system of law, insofar as the latter is included in the core of the Constitution, a core that serves as the ultimate source of legitimacy for the Constitution itself."[30]

Confronted with the risk of a separation between the constitutional court and its political community, Pedro Cruz Villalón calls for a two-way "repatriation":

"[…] the repatriation of constitutional justice would involve the incorporation of a committed dialogue of the political communities with their corresponding constitutional courts. […] Moreover, from a functional perspective, repatriation could also mean that the task of deciding on the constitutionality of the *res publica*, that is, the task of deciding on the core of the Constitution, each time it arose, should be a much more 'shared' task […] Put another way, the content of what belongs to the foundation of the corresponding ultimate constitutional determination should not be something which the community simply becomes aware of, or simply 'finds out' on reading a certain constitutional sentence."[31]

[29] *Cruz Villalón*, Teoría y realidad Constitucional 33 (2014), 141.
[30] *Ibidem*, 147.
[31] *Ibidem*, 140–141.