

## The Reception of European Community Law in Spain

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### I. Community Law and the Spanish Constitution

#### A. Community Law and the Spanish Constitutional Reform

Article 93 of the Spanish Constitution reads as follows:

‘By means of an organic law, authorisation may be granted for concluding treaties by which the exercise of powers derived from the Constitution shall be vested in an international organisation or institution.’

This provision was conceived in view of Spain’s eventual membership of the European Community. So far, Article 93 has only been applied to European integration issues. Membership to the EC presupposes a mutation of constitutional principles that affect the three powers of the State as well as the different spheres of the Administration. Doubts regarding the Treaty on the European Union’s compatibility with the Spanish Constitution were expressed before the Constitutional Court, regarding the right to passive suffrage that Article 19(1) EC will concede to all Member State citizens in local elections.<sup>1</sup> For the first time, in a declaration of 1 July 1992, the Spanish Constitutional Court exercised prior control of the constitutionality of treaties, under Article 95(2) of the Constitution, thereby requiring the first reform of the Constitution since its promulgation.<sup>2</sup> Indeed, the Constitutional Court, in disagreement with the position maintained by the Government and the Spanish *Consejo de Estado*, concluded that Article 93 of the Constitution was not sufficient to overcome the contradiction found, and subjected the ratification of the Maastricht Treaty to the prior revision of the Constitution.

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<sup>1</sup> This matter is examined from a constitutional perspective in L. Aguilar, “Maastricht y la problemática de la reforma constitucional,” (1992) 77 *Revista Española de Derecho administrativo*, 57-92. This matter was not as far reaching as that presented for the same reason before the French Constitutional Council, which also affected both the Economic and Monetary Union and the visa policy. See its decision of 9 April 1992 in (1992) *Revue générale de droit international public*, 507-522. See also Favoreu, “Le contrôle de constitutionnalité du Traité de Maastricht et le développement du droit constitutionnel international.” (1993) *Revue générale de droit international public*, 39-66.

<sup>2</sup> Declaration of 1 July 1992. The text is reproduced in (1991) 19 *Revista de Instituciones Europeas*, 633-655. It should be added that the Constitutional Court can also exercise a *posteriori* control. Although the Court itself has warned that this procedure has negative effects on the State’s foreign policy.

## B. The Constitutional Irrelevance of the Conflict between Spanish Law and EC Law

Judgment 28/1991 of the Spanish Constitutional Court of 14 February 1991 upheld a previous decision of the same Court (Case 132/89 of 18 June 1989) according to which Community law cannot be used as a parameter of the constitutionality of domestic law. In other words, the conflict between a Community norm and a domestic norm lacks constitutional relevance: EC membership -according to the judgment- 'does not mean that because of Article 93 [of the Spanish Constitution] the norms of European Community Law have been given constitutional rank and force, nor does it imply that the occasional infraction of these norms by a Spanish provision necessarily entails at the same time an infringement of the aforementioned Article 93 of the Constitution.'<sup>3</sup> Thus the Court declared its lack of jurisdiction to decide upon questions involving the appeal of unconstitutionality based on the alleged incompatibility of Spain's Organic Law of the General Electoral Regime (*Ley Organica de Regimen Electoral General*), which prohibits the double parliamentary mandate and the Act relative to the election of the European Parliamentary representatives by direct universal suffrage as of 1976.

The position adopted by the Spanish Constitutional Court coincides with pronouncements of constitutional case law in other Member States<sup>4</sup> and with authoritative doctrinal opinions.<sup>5</sup> It departs, however, from the position held by the Supreme Court in a decision of 24 April 1990, which describes posterior norms that are contrary to Community law as 'unconstitutional for incompetence'.<sup>6</sup> There are doubts as to whether the decision of the Constitutional Court was the most appropriate from a Community perspective. This is so because from an EC standpoint the formal derogation - by appealing to unconstitutionality - of a national law contrary to Community legislation not only does not impair the direct effect and primacy of Community law but it actually guarantees the respect of both principles. This theory is based on the jurisprudence stemming from the Case 168/85 Commission v. Italy [1986] ECR 2945, in which the Court of Justice of the European Communities (ECJ) demanded the derogation or formal modification of internal law incompatible with Community law.<sup>7</sup> The question solved in the *Simmenthal* Case (35/76 [1976] ECR 1871) is somehow different in the sense that it involves the conflict between domestic law and EC legislation in the face of ordinary jurisdiction, which should apply EC

<sup>3</sup> Case 132/89, of 18 June, paragraph 4.

<sup>4</sup> This was the criterion of the German Bundesverfassungsgericht and of the French Conseil Constitutionnel. See Olmi, "Les hautes juridictions nationales, juges du droit communautaire," (1987) *Liber Amicorum Pierre Pescatore*, 499-536.

<sup>5</sup> R. Iglesias, "Problemas juridicos de la adhesion de Espana a la Comunidad Europea," (1984) *Cursos de Derecho Internacional de Vitoria-Gasteiz*, 216; P. Tremps, « Justicia comunitaria, justicia constitucional y tribunales ordinarios frente al derecho comunitario, » (1985) 13 *Revista Espanola de Derecho Constitucional*, 157-181.

<sup>6</sup> Rep. 2747. in (1990) 69 *Noticias/C.E.E.*, 49-52.

<sup>7</sup> Case 168/85, [1986] ECR 2945. See in this respect M. Martin, "La obligacion de derogar o modificar el derecho interno incompatible con el derecho comunitario. Evolucion jurisprudencial." (1987) 14 *Revista de Instituciones Europeas*, 311-335.

law preferentially and directly without awaiting the previous formal repeal of the domestic norm.<sup>8</sup> Moreover, the legal reasoning behind Case 28/91 [1992] ECR I-4165 refers to EC law as ‘infra-constitutional,’ an ‘unfortunate and unnecessary’ description<sup>9</sup> because it suggests a hierarchical subordination of EC law to Constitutional law, contrary to the case-law of the Court of Justice of the European Communities.<sup>10</sup>

### C. Fundamental Rights and Freedoms

Judgment 64/91 [1992] ECR I-4737 extends the declaration of the Constitutional Court concerning the incompetence to deal with the possible contradiction between internal acts and Community law to the constitutional guarantee for the protection of fundamental human rights and freedoms. In other words, Community law is not the canon of constitutionality for human rights issues.<sup>11</sup> By virtue of Article 10(2) of the Spanish Constitution of 1978 EC legislation may serve to interpret the scope of human rights and public freedoms that are protected by the Constitution, although it should be understood that this interpretation is only effective *in bonus*.<sup>12</sup> Hence, the synergic effect of the Spanish Constitution and Community law is clear as regards human rights since the EC in turn looks at the common constitutional traditions of its Member States for the general principles of law.<sup>13</sup> However, the question remains whether constitutional control can be exercised on EC law in this area. The Spanish Constitutional Court guarantees the protection of fundamental human rights infringed by national authorities in the application of EC law, just as its German counterpart does.<sup>14</sup> According to the Court, Spanish national authorities are not ‘Community’ organs; not even when they apply Community law, because they are permanently tied to the Constitution.<sup>15</sup> This approach is fully acceptable

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<sup>8</sup> Case 106/77, [1978] ECR 629.

<sup>9</sup> R. Iglesias, “Tribunales Constitucionales y Derecho Comunitario,” (1993) *Hacia un nuevo orden internacional y europeo (Homenaje al Profesor Diez de Velasco)*. See also the commentary on this judgment in S. Legido, “Las relaciones entre el derecho comunitario y el derecho interno en la jurisprudencia del Tribunal Constitucional,” (1991) 11 *Revista Espanola de Derecho Constitucional*, 175-191, at 184. The judgment of the Spanish Supreme Court of 17 April 1989, more evasively, described Community law as ‘paraconstitutional’, an adjective that correctly seems to suggest the absence of hierarchical relations with respect to the Spanish Constitution. Rep. 2747.

<sup>10</sup> See Case 11/70, *Internationale Handelsgesellschaft*, [1970] ECR 1135.

<sup>11</sup> See the main text in (1991) 18 *Revista de Instituciones Europeas*, 674-685. A commentary on this decision appears in S. Legido, “Las relaciones entre el derecho comunitario y el derecho interno en la jurisprudencia del Tribunal Constitucional,” (1991) 11 *Revista Espanola de Derecho Constitucional*, 175-191, at 191.

<sup>12</sup> Article 10(2) of the Spanish Constitution establishes that ‘The norms relative to fundamental rights and freedoms recognized by the Constitution will be interpreted in compliance with the Universal Declaration of Human Rights and the international treaties and agreements on the same matter ratified by Spain.’ The possibilities of Community law in this area were pointed out in judgment 28/1991 of 14 February and reiterated in judgment 145/1991 of 1 July.

<sup>13</sup> See ex-Article F.2 of the Treaty on the European Union, which codifies the judicial *acquis* in this area.

<sup>14</sup> See R. Iglesias and Woelker, “Derecho Comunitario, Derechos fundamentales y Control de Constitucionalidad: la decision del Tribunal Constitucional Federal Aleman de 22 de octubre de 1986”, (1987) 14 *Revista de Instituciones Europeas*, 667-681.

from a constitutional standpoint, but it does not fit in with EC principles as demonstrated by the case law of the Court of Justice of the European Communities.

It should be added that the Spanish Constitutional Court, in the aforementioned decision of 22 March 1991, reproduces the adjective 'infraconstitutional' in reference to Community law, a qualification that has posed certain questions and concerns lately.

## II. Conclusions

In the broad axis which articulates the relationship between Community law and Spanish law, we have tried to focus mainly on the application of Community law by the Spanish judicial organs, as they constitute the final and most important guarantee of the effectiveness of such legal order in Spain. There is a general acceptance of the principles of Community law, which is consistent with the pro-European disposition of the Spanish society. Nevertheless, some disagreements still remain within the judiciary and among scholars in relation to specific problems concerning the reception of the European Community's legal order. In this respect, the Supreme Court has caused a serious dissidence in refusing to review a national law on the basis of the Community directive which it claims to be implementing.

Spanish Constitutional case-law concerning Community law has been oriented along the following discernible lines. First, the existing conflict between EC law and Spanish legislation does not have constitutional relevance. Second, EC law in itself is not the object of constitutional review whereas national law implementing Community legislation is. Third, the Spanish Constitutional Court has described EC law as 'infra-constitutional'. Fourth, the Constitutional Court has denied that EC law carries out a tacit Constitutional reform. Lastly, it has asserted that EC legislation must be applied in Spain in agreement with the internal distribution of competences between central bodies and the Spanish Autonomous Communities. Following the words of former Judge Rodriguez Iglesias of the Court of Justice of the European Communities, it is not possible to explain the relationship between the constitutional order and the Community order with reference to exclusivist approaches. The solution must be found only through mutual coordination and understanding.

To sum up briefly, the adjective 'infraconstitutional' was not given by the Spanish Constitutional Court to EC law but to the conflict between infraconstitutional Spanish domestic law and EC law. In any event, in the Declaration of the Maastricht Treaty the capacity of the Spanish Constitutional Court to control *a posteriori* the constitutionality of the Maastricht Treaty is recognised.

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<sup>15</sup> In its declaration of 1 July 1992, it is stated that 'Spanish public authorities are no less subject to the Constitution when they act in the international or supranational relations than when they exercise their competencies *ad intra*.'