DEVELOPMENTS

The Spanish Constitution and the European Constitution: The Script for a Virtual Collision and Other Observations on the Principle of Primacy

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A. The conclusion of the Statement of the Constitutional Court no. 1/2004: Primacy of European Union Law and the ultimate safeguarding of national constitutional supremacy

The following reflections, that will focus exclusively on the *European primacy clause* in the light of the *Statement by the Constitutional Court no. 1/2004 of 13 December*, in particular with regard to its scope as regards the Spanish Constitution itself[1], may take as a starting point the conclusion contained at the last paragraph of FJ 4 of the Statement, which states as follows:

"In the scarcely-conceivable event that in the ultimate functioning of European Union Law this Law were to result irreconcilable with the Spanish Constitution, and without the hypothetical excesses of European Law with regard to the European Constitution itself being remedied by the ordinary channels provided for in the latter, ultimately the preservation of the sovereignty of the Spanish people and of the supremacy of the Constitution as it provides for itself could lead this Court to tackle the problems that would arise in such a case, and which from the current

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[1] Which was at the heart of the question (and not primacy as regards infra-constitutional Law), as may be clearly seen from the Opinion issued by the Council of State (dated 21 October 2004, file no. 2544/2004), which is at the root of the governmental request posed to the Constitutional Court and which states as follows: "The fundamental point on which the Treaty establishing a Constitution for Europe may enter into conflict with the current Spanish Constitution is [...] with regard to the supremacy of the Spanish Constitution [...]. The primacy of European Union Law [...] means that any rule of European Union Law, not only from primary legislation but also derived from it, shall prevail over the rules of the Law of the Member State, whatever its status, including constitutional law [...]. And Article 9.1 of the Constitution proclaims its supremacy with regard to the entire legal system, and Article 95.1 does likewise with regard to International Law". With regard to this Opinion, cf. V. Ferreres Comella and A. Saiz Arnaiz, *¿Realmente hay que reformar la Constitución Española para adecuarla a la cláusula de primacía de la Constitución Europea?*, ACTUALIDAD JURÍDICA ARANZADI, 645 (2004).

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point of view are considered to be non-existent, by way of the relevant constitutional procedures".

And the Constitutional Court adds:

"This is aside from the fact that the safeguarding of the said sovereignty is always ultimately assured by Article I-60 of the Treaty, a true counterpoint to its Article I-6, and which allows the primacy declared in the latter article to be defined in its true dimension, which may not override the exercise of a withdrawal, which remains reserved for the sovereign, supreme, will of the Member States".

I subscribe, *in general terms,* to the Constitutional Court's conclusion which is only partially explicit. I shall argue the path the Court takes to reach this conclusion, which features a series of deficiencies and its conclusion is none other than to reserve for itself the final competence to review European Law in the light of the Spanish Constitution (and specifically the primary Law constituted by the Constitutional Treaty[2] and its attached Protocols). Simply put, the primacy (and not supremacy, according to the Constitutional Court itself[3]) of the former over the Spanish Constitution is not accepted in absolute terms.

How has the caselaw of the Constitutional Court changed with regard to what was laid down in its Statement no. 1/1992, despite the proclamation of ultimate supremacy of the Spanish Constitution, also within the scope of the European Union?[4]

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[2] Despite the fact that the reform has been at pains to stress the "constitutional" content of the European construction, it continues to be formally based on an instrument which has for the moment been negotiated and signed as a "Treaty". Therefore the name "Constitutional Treaty of the European Union" seems to me to be more rigorous and accurate, and in fact this name was considered in the early debates on the reform. However, this does not constitute an impediment to also using the name of "European Constitution", which has a strong symbolic value which manifests an undeniable political will to continue down the path of "ever-closer union between the peoples of Europe", as was stated in the Preamble to the Treaty of the European Economic Community. "Convinced that, while remaining proud of their own national identities and history", witters the Preamble to the European Constitution, "the peoples of Europe are determined to transcend their former divisions and, united ever more closely, to forge a common destiny".

[3] FJ 4: "Primacy and supremacy are categories which act at different levels. The former refers to the application of valid rules; the latter refers to the procedures of rule-making". I shall return to this distinction later, which I consider to be unnecessary on account of being confusing.

[4] Which change is considered as being radical in the respective individual votes of the Judges J. Delgado Barrio, R. García-Calvo, and R. Rodríguez Arribas, and with which opinions I disagree for the simple reason that, as I have just pointed out, Statement no. 1/2004 continues to maintain the ultimate supremacy of the Spanish Constitution and, as I shall argue, *of the entire text* of the Spanish Constitution.

Let us begin by setting out briefly the situation in which we found ourselves prior to the Constitutional Treaty and the pronouncement by the Constitutional Court of December 2004, in order to gain a better understanding of the changes that each has wrought.

B. The current primacy debate.

I. The (inexorable and healthy) tension between the Court of Justice and the Constitutional (or Supreme) Courts of the Member States

As is currently well known, the absolute and unconditional nature in which primacy seems to be considered in the caselaw of the Court of Justice seems a long way from being accepted by the Constitutional and Supreme Courts of the Member States[5]. On the other hand, the said absolute and unconditional nature, from the European point of view itself, is otherwise subject to both theoretical and practical modulations.

II. European perspective: the absolute and unconditional nature of its judicial declaration, and its theoretical and practical modulations

From a theoretical point of view, it should not be forgotten that the jurisprudential principle of primacy is modulated by the text of the Treaties.

Allow me to explain: primacy ultimately implies the displacement – in the broadest sense – of the rules of national law in the event they contradict European Law. But the fact is that the said national rules, far from being a passive reality in terms of pure receipt, are presented as being an essential tool not only for the purposes of implementing Union Law, but also for the purposes of participating actively in the

[5] Cf. G.C. Rodríguez Iglesias, *Tribunales Constitucionales y Derecho Comunitario*, in: HACIA UN NUEVO ORDEN INTERNACIONAL Y EUROPEO. HOMENAJE AL PROF. M. DÍEZ DE VELASCO 1191 (1993). The Spanish Constitutional Court (Statement no. 1/1992), and the Danish Supreme Court (Judgements of 12 August 1996 and 6 April 1998) added to the well-known and significant case law of the *Corte Costituzionale* (Constitutional Court) and the *Bundesverfassunsgericht* (*Federal Constitutional Court*), when the Maastricht Treaty was ratified. "It should be borne in mind", states the aforementioned Opinion from the Council of State, "that the unconditional scope of the principle of the primacy of European Law ("Union Law" to use the expression in the heading of Article I-6) affirmed by the European Court of Justice, does not exactly coincide with the recognition of this principle as made by the Constitutional Courts of the Member States, given that they have defined certain constitutional limits on the efficacy of the rules of European Law in national Law".

substantive configuration itself of the said Law, especially in its "constitutional" form"[6].

In effect, it should not be forgotten that the constitutional traditions of the Member States were present at an early stage in the praetorian construction of the fundamental rights of the European Union (the "constitutional" side of the Union), on the basis of extending the methodology provided for at Article 215[7] of the then Treaty for the European Economic Community with regard to non contractual liability to the area of the general principles of Law. This inspiration drawn from the national constitutional traditions would be later set down at Article F.2 of the Treaty on European Union (Maastricht, 1992), which, in addition to setting forth in the Preamble the adherence of the Union to "the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law"[8], was to go on to proclaim that "The Union shall respect the national identities of its Member States, whose systems of government are founded on the principles of democracy". The Amsterdam Treaty (1997), for its part, was to transfer the aforementioned recital of the Preamble to the body of articles of the Union Treaty, and Article 6, which was untouched by the Nice reform (2000), was given the following wording, in so far as is pertinent for present purposes:

"1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.
2. The Union shall respect fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950, and as they result from the constitutional traditions common to the Member States, as general principles of Community law.
3. The Union shall respect the national identities of its Member States".

[6] I refer to my work, *Community and National Legal Orders: Autonomy, Integration and Interaction* in: COLLECTED COURSES OF THE ACADEMY OF EUROPEAN LAW (Vol. VII, Book 1, 1999).

[7] Current 288 of the European Community Treaty, where the second paragraph provides: "In the case of non contractual liability, the Community shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties".

[8] It should be remembered that already in the Preamble of the Single European Act, the Member States had declared that they were "determined to work together to promote democracy on the basis of the fundamental rights recognized in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notably freedom, equality and social justice".

Meanwhile, from a practical point of view, the Court of Justice has on more than one occasion been able to get round the difficult position the primacy of the Union would have been left in when faced with an ultimate clash with constitutional traditions of the Member States. For example, in the light of a specific case, in 1989 the Court addressed its failure to extend the fundamental European right of the inviolability of the home to legal persons by referring them to the national laws (*Hoechst Case*)[9].

III. National perspective: the substantive emptiness of the clause for the integration and the supremacy of the Spanish Constitution

The European primacy clause is not absolute because it has to be interpreted within the context of the treaties and the ECJ practice. The same seems to be the case of the national limits to the European primacy clause: they too are not absolute, but interpreted by within the perspective of case-law of the Constitutional and Supreme Courts. This is accomplished by incrementally reducing the national limits on European integration, transitioning from the whole text of national constitutions to the core meaning of said texts. However, the adjudication of fundamental rights at the European level clearly reflects limitations of national sovereignty, and national identity imposed by member states on the extensive integration of the clause.[10].

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[9] I refer again to my work, *Community and National Legal Orders: Autonomy, Integration and Interaction*, *supra* note 6 at 183.

[10] In the German case, set forth by the Federal Constitutional Court in its *Solange II doctrine* (decision of 22 October 1986), the undermining of which in the Maastricht decision (12 October 1993) was "neutralized" (and this was confirmed in the decision of 9 January 2001) by the decision (which I shall refer to again later) of 7 June 2000 (*European banana import régime*): cf. W. Zimmer, *De nouvelles bases pour la coopération entre la Cour Constitutionnelle Fédérale et la Cour de Justice de Luxembourg? (à propos de BverfGE, 7 juin 2000, Solange III)*, EUROPE 5 (March 2001) ; I. Pernice, *Les bananes et les droits fondamentaux: la Cour Constitutionnelle alemande fait le point*, 3-4 CAHIERS DE DROIT EUROPEEN 427 (2001); A. López Castillo, *Un nuevo paso en la andadura iuscomunitaria del Tribunal Constitucional Federal de Alemania. El Auto (Sala Segunda) de 7 de junio de 2000*, 61 REVISTA ESPAÑOLA DE DERECHO CONSTITUCIONAL 349 (2001); J. Callewaert, *Les droits fondamentaux entre cours nacionales et européennes*, 48 REVUE TRIMESTRIELLE DES DROITS DE L'HOMME 1186 (2001).

In the French case, drawn from the Decision of the Constitutional Council of 29 October 2004 (*bio-ethical decision*), according to the services of the Constitutional Council (*La jurisprudence constitutionnelle française relative au droit communautaire à la veille de l'examen par le Conseil constitutionnel du traité établissant une Constitution pour l'Europe*, November 2004): "Only in the event there is an incompatibility with an express provision that is contrary to the French Constitution would the duty of transposition [of European Law] cease to be constitutional, even though it continues as a European duty". "Express provision" is taken to mean not only an explicit positive provision (non- judicial), but also a "special" provision in the sense of "special to France, i.e. without any equivalent in the European catalogue of fundamental rights and general principles of law, principles which are common to the Member States" (bearing in mind that the guiding principle of the caselaw of the Constitutional Council in this regard could be summarized, according to its services, by the maxim "disposer en toutes circonstances d'un juge et d'un seul").

Concerning the position of the Spanish Constitutional Court up until Statement no. 1/2004, the deficient "European reading" that it made of the Spanish Constitution (in particular of Article 93, the integration clause[11]) has been critically underlined.

We might now be told, in what I believe is in an excessively "natural way", that the organic-procedural understanding of Article 93 was highlighted in Statement no. 1/1992 by the circumstances of the case:

"With regard to Article 93 of the Spanish Constitution", the Constitutional Court explains, "we have said that this is a precept "of organic-procedural nature" […] This was the only aspect considered in Statement 1/1992 […] only for the purpose of establishing, in response to the doubt raised at the time, as to whether Article 93 of the Spanish Constitution was an appropriate mechanism to provide an exception to the limit that Article 13.2 of the Spanish Constitution laid down for the extension of the right to stand in local elections to foreigners, and concluding in the face of the contradiction with regard to the text of a substantive constitutional rule that the said precept does not include a channel for review which may be deemed to be equivalent to the constitutional reform procedures regulated at Title X of the Spanish Constitution. However, it is the channel provided for by the Constitution in order to transfer the exercise of powers arising from same to international organizations or institutions, thereby configuring, as we recognized in the said Statement, the scope of application and regulation of the exercise of the powers that have been transferred. What we said in Statement no. 1/1992 was therefore located within precise co-ordinates, which consisted at the time in the existence of a contradiction between Article 8 B of the Treaty Establishing the European Community, and the text of the Spanish Constitution (Article 13.2)[12]. It is within these co-ordinates in which the scope of some of the content of the said Statement must be understood when issuing the present Statement, which operates in a truly different context where, as we shall argue, such a contradiction with the text does not arise".

[11] Article 93 states: "Authorization may be granted by an organic act for concluding treaties by which powers derived from the Constitution shall be transferred to an international organization or institution. It is incumbent on the *Cortes Generales* [Parliament] or the Government, as the case may be, to ensure compliance with these treaties and with resolutions originating in the international and supranational organizations to which such powers have been so transferred".

[12] Article 13.2 currently states: "Only Spaniards shall have the rights recognized in Article 23, except in cases which may be established by treaty or by law concerning the right to vote and the right to be elected in municipal elections, and subject to the principle of reciprocity". The constitutional reform adopted on 27 August 1992, just added the words "and the right to be elected" to the paragraph.

The fact is that, despite the repeated doctrinal criticisms[13], the Constitutional Court has not tired of insisting exclusively on the said organic-procedural reading, ignoring its crucial substantive facet which *explicitly* appears now, at last!, in Statement no. 1/2004[14].

Let us leave aside Statement no. 1/2004 and concentrate on the caselaw so far: the European treaties are still no more than international treaties, and as such, they are *fully* under a requirement to comply with the Spanish Constitution.

This being the case, we shall now examine the changes that have been made to the situation described by the Constitutional Treaty and by Statement no. 1/2004.

C. Primacy Codified: The European Constitution

The inclusion (Article I-6) of the jurisprudential principle of primacy into the Constitutional Treaty is most significant. This inclusion is accompanied by a Declaration[15] pursuant to which "the [Inter-Governmental] Conference notes that Article I-6 reflects existing caselaw of the European Court of Justice and of the Court of First Instance".

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[13] Cf. A. Mangas Martin, *La Constitución y la ley ante el Derecho comunitario*, 2 REVISTA DE INSTITUCIONES EUROPEAS 599 (1991) (already criticising its description as exclusively organic-procedural in the Judgement of the Constitutional Court no. 28/1991); P. PÉREZ TREMPS, CONSTITUCIÓN ESPAÑOLA Y COMUNIDAD EUROPEA, 36-37 (1993); R. ALONSO GARCÍA, DERECHO COMUNITARIO: SISTEMA CONSTITUCIONAL Y ADMINISTRATIVO DE LA COMUNIDAD EUROPEA, 281 (1994); A. LÓPEZ CASTILLO, CONSTITUCIÓN E INTEGRACIÓN, 104 (1996) (putting forward a more modulated critique).

[14] The key question lies, in my opinion, in the erroneous line of argument that the Constitutional Court followed in 1992. At that time, it first of all reached the conclusion that there existed a contradiction between the Union Treaty and the Spanish Constitution, and then went on to argue that this could not be resolved by way of Article 93, which was an organic-procedural precept applicable to a certain type of treaties which, as with other types of treaties, was fully subject to Article 95.1 of the Constitution (pursuant to which, "the signing of an international treaty which contains provisions that are contrary to the Constitution shall require the prior amendment of the Constitution"). The starting point, now, is that Article 93 has "a substantive dimension" which, amongst other things, brings with it the opening of our legal system, including the constitutional text, to the European system, discarding on the basis of such an opening, in principle, a domestic constitutional control over the latter provided that it remains in line with the essential principles and values of our Constitution, which effectively occurs in the light of the subsequent examination of the Constitutional Court.

[15] Introduced under the *pro-tempore* Irish presidency at the request of the United Kingdom and Portugal (cf. IGC 43/03, PRESID 7).

Despite the fact that there is no shortage of criticisms regarding such a codification as "a wrong move, a brutal way of affirming the primacy"[16], whilst conceding that it may result in a reduction in the "flexibility" which attaches to caselaw[17], it will not eventually alter the essence of what I consider to be the inexorable[18] and healthy[19] current debate[20] in the terms as set forth[21]. Having said this, the Constitu-

[16] Cf. *Memorandum* submitted before the European Union Committee of the House of Lords by DUTHEIL DE LA ROCHÈRE AND A. ILIOPOULOU, THE FUTURE ROLE OF THE EUROPEAN COURT OF JUSTICE. REPORT WITH EVIDENCE, 6TH REPORT OF SESSION (2003-2004).

[17] Cf. the *Memoranda* also submitted before the House of Lords by L. Besselink and S. Weatherill. According to the Opinion issued by the Spanish Council of State on the European Constitution, the inclusion of primacy in the Treaty "has to have a more profound effect than the choice of a principle by way of case law – thereby capable of being applied with flexibility by way of the "dialogue amongst Judges" – if one does not wish to undermine the very effectiveness of the Treaty".

[18] Bearing in mind the constitutional pluralism attaching to the nature of European integration: cf. I. Pernice, *Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-making Revisited*, 4 COMMON MARKET LAW REVIEW 707 (1999); N. MacCormick, *Juridical Pluralism and the Risk of Constitutional Conflict* in: QUESTIONING SOVEREIGNITY. LAW, STATE AND NATION IN THE EUROPEAN COMMONWEALTH 104 (1999); F.C. MAYER, THE EUROPEAN CONSTITUTION AND THE COURTS. ADJUDICATING EUROPEAN CONSTITUCIONAL LAW IN A MULTILEVEL SYSTEM 20 (2003); K. Lenaerts, *Interlocking Legal Orders in the European Union and Comparative Law*, INTERNATIONAL AND COMPARATIVE LAW QUARTERLY, 873 (October 2003).

[19] Or can there be any doubt as to the beneficial influence on fundamental rights exerted by the Constitutional Courts of Germany and Italy in the short – by way of praetorian protection at a European level – medium – by way of the solemn political proclamation of the Charter – and long – by way of its inclusion in the European Constitution – term?

More specifically, and for purposes of example (within the context of the European banana-import régime), comparison may be made with the tussle between the German courts (including the Bundesverfasungsgericht), and the Court of Justice, which led the latter, as highlighted by G.C. Rodríguez Iglesias and A. Valle Gálvez, "to the acknowledgement in *Atlanta Case* of the power of the jurisdictional bodies to impose positive interim measures with regard to a national act based on a European Regulation (the refusal of which would have entailed, according to the Verwaltungsgericht Frankfurt am Main, the violation of the principle of effective legal protection by way of the granting of interim measures in favour of the private individuals against the administrative acts of the national authorities, which right is recognized, according to the case law of the German Constitutional Court, by section 4 of Article 19 of the Fundamental Act), and in *T. Port Case*, to interpret Regulation 404/93 to mean that the Commission may regulate cases of excessive rigour (given that had the opposite been the case, the application of the European Regulation could have led to an infringement of the right to property guaranteed by Article 14 of the Fundamental Act)", *El Derecho Comunitario y las relaciones entre el Tribunal de Justicia de las Comunidades Europeas, el Tribunal Europeo de Derechos Humanos y los Tribunales Constitucionales nacionales*, 2 REVISTA DE DERECHO COMUNITARIO EUROPEO 337 (1997), note 9. As a corollary to this tense but fruitful dialogue, the BVerfGE, by way of Decision 7 June 2000, declared inadmissible the question of unconstitutionality posed precisely by the *Verwaltungsgericht* Frankfurt am Main against certain precepts of the aforementioned Regulation 404/93, arguing, *inter alia*, that there were insufficient grounds with regard to the unconstitutionality of the rule that was challenged, in so far as it would have ignored the said dialogue as a result of which the Court of Justice would have acknowledged, as we have just seen, the necessity for an (interim) regulation of rigour arising from the guarantee of property.

tional Treaty does state more clearly and accurately the current theoretical modulations to the principle of primacy, placing them systematically in the text, in what I understand to be a consolidation of the multiple and dialectic constitutional nature of the European constitutional setting (comprising the European Constitution and the national constitutions, and completed, in the sphere of fundamental rights, by the European Convention for the Protection of Human Rights and Fundamental Freedoms[22]).

In fact, the primacy clause is *preceded* (Article I-5) by that of respect for the national identity of the Member States, "inherent – this is emphasized now – in their fundamental structures, political and constitutional, inclusive of regional and local self-government". And the clause for the respect of national identity is in turn preceded (Article I-2) by the clause for the identity of the Union itself, pursuant to which:

"The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."

What can we say, more specifically, about the national fundamental rights, that were already invoked by the German and Italian Constitutional Courts in the 1970s as limits to the primacy of European Law?

Article II-113 reproduces the Charter of Fundamental Rights of the European Union, that is now included in the Constitutional Treaty, under the heading "Level of protection" as follows:

"Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of

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[20] By way of example, cf. the national Reports submitted on the occasion of the 17th (Berlin, 1996) and 20th (London, 2002) Congress of the F.I.D.E. on this matter, respectively, NATIONAL CONSTITUTIONAL LAW VIS-À-VIS EUROPEAN INTEGRATION Y EUROPEAN UNION LAW AND NATIONAL CONSTITUTIONS.

[21] The same opinion is expressed by V. Ferreres Comella and A. Saiz Arnaiz in their comment that has already been referred. The French Constitutional Council, for its part, held in its Decision of 19 November 2004 (no. 2004-505, *Treaty establishing a Constitution for Europe*) that "it is apparent from the overall provisions of this treaty, and in particular from the connection between its Articles I-5 and I-6, that it does not alter the nature of the European Union or the scope of the principle of primacy of Union Law as may be seen […] from Article 88-1 of the Constitution".

[22] Called by the European Court of Human Rights "constitutional instrument of European public law" (Loizidou case, of 23 March 1995).

application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions".

Value of the Charter, indeed and as I have stated elsewhere[23], as a minimum standard of protection, that does not preclude higher standards of protection arising from the national Constitutions, to which is now added (section 4 of Article 112, added by the Convention on the Future of Europe and accepted by the IGC) the duty on the Union to participate, within the definition of the standard itself, at least in the wake of the common national constitutional traditions:

"In so far as this Charter recognizes the fundamental rights resulting from the common constitutional traditions of the Member States, the said rights are interpreted in harmony with the said traditions".

Section 3 of Article I-9, for its part, recalls that:

"Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law".

Basically, the Constitutional Treaty seems to discard, by way of all these provisions, the possibility of a clash with the hard constitutional core of the Member States by accepting, on the one hand, that the Union is based on the same values as its Member States; and on the other hand, that the Union shall in all cases respect the fundamental political and constitutional structures of the said States, including the restrictions on the exercise of public authority represented by the fundamental national rights, if these afford the individual more protection than arising from the European level.

[23] Cf. *The General Provisions of the Charter of Fundamental Rights of the European Union*, 4 EUROPEAN LAW JOURNAL (2002).

D. The Constitutional Court's script in its Statement no. 1/2004.

I. The virtual nature of the collision between the Spanish Constitution and the European Constitution (Act One)

This is how it is correctly understood by the Constitutional Court in Statement no. 1/2004, in which, after reaffirming the existence of

"material limits [which are imposed on the transfer of the exercise of powers deriving from the Spanish Constitution], not expressly contained in the constitutional precept [Article 93], but which are implicitly derived from the Constitution and from the essential meaning of the precept itself, [and that] are carried over in the respect for the sovereignty of the State, of our basic constitutional structures, and of the system of fundamental values and principles enshrined in our Constitution, in which fundamental rights attain their own substantive nature",

points out that Articles I-2, I-5, and II-113 of the European Constitution

"have the effect of enshrining the guarantee of the existence of the States and their basic structures, as well as their values, principles, and fundamental rights, which in no case may become unrecognizable following the phenomenon of the transfer of the exercise of powers to the supranational organization, the lack of which guarantee, or the lack of an explicit proclamation, justified in previous stages the reservations contrary to the primacy of European Law as against the various Constitutions by way of well-known decisions by the constitutional jurisdictions of some States, in what has become known in the caselaw as the dialogue between the constitutional courts and the ECJ. Put another way, the restrictions to which the reservations of the said constitutional jurisdictions referred are now proclaimed in an unequivocal way by the Treaty itself as being subject to our consideration, which has come to make its provisions compliant with the requirements of the Constitutions of the Member States".

With regard, in particular, to Article II-113, it goes on to express further on (FJ 6) that

"it may be clearly seen that the Charter is envisaged, in all cases, as a minimum guarantee, over which the content of each right and liberty may be developed until the content density ensured in each case by national Law is reached".

To this the Constitutional Court adds the "question of competence", raised by the German Federal Constitutional Court in its decision on Maastricht (12 October 1993) in order to reserve for itself ultimate control over the possible excesses of the

Union not rectified by the Court of Justice. The question, according to the Spanish Constitutional Court, turns out to have been "simplified and re-organized into terms that make the scope of the transfer of the exercise of powers verified by Spain more precise":

"The Union – the Constitutional Court points out – should exercise its non-exclusive powers [defined "with greater precision"] in accordance with the principles of subsidiarity and proportionality (Articles I-11.3 and 4); the phenomenon of expansion of powers, which was previously propitiated by the functional and dynamic nature of European Law, is rationalized and limited given that thenceforth, and pursuant to the "flexibility clause" as it is today set forth at Article I-18 of the Treaty, in case of lack of specific powers in order to pursue the necessary actions in order to obtain its objectives, the Union may only act through measures adopted by the Council of Ministers, unanimously, following a proposal by the Commission, and following approval by the European Parliament, and it is envisaged that the national Parliaments will participate within the framework of the control procedure for the principle of subsidiarity referred to at Article I-11.3 of the Treaty".

All of which leads the Constitutional Court to warn that

"the powers the exercise of which is transferred to the European Union could not, without a breach of the Treaty itself, be used as grounds for the European rule-making the content of which would contrary to the fundamental values, principles, or rights of our Constitution".

Thus, the line of argument of the Constitutional Court that has hitherto been set forth may be summarized as follows: 1) the Spanish Constitution features constitutional limits on integration; 2) such limits are also set forth in the Constitutional Treaty; 3) the infringement of those limits would result, initially and consequentially, in an infringement of the Constitutional Treaty itself.

Having established the foregoing, the Constitutional Court seems to accept that a correct interpretation of the Treaty by the political structure of the Union, and ultimately, by its supreme judicial guarantor, to wit, the Court of Justice, necessarily inspired by the Constitutions of the Member States, which provide the basis of the values of the Union itself, and at the same time showing respect for the national identities inherent to the respective fundamental structures (which interpretation is ultimately *pro-national Constitutions*), may not, in principle, lead to a clash with the Spanish Constitution determining the appearance of the primacy clause (it would be "scarcely-conceivable [...] that in the ultimate functioning of European Union Law, this Law were to result irreconcilable with the Spanish Constitution, without

the hypothetical excesses of European Law with regard to the European Constitution itself being remedied by the ordinary channels provided for in the latter").

II. The ultimate safeguarding of the supremacy of the Spanish Constitution (Act Two)

However, the Constitutional Court does not absolutely rule out that an incorrect interpretation may arise, with recourse in this case to the safeguard clause in favour of the Spanish Constitution (given the *supervened* unconstitutionality of European integration), the ultimate guarantor of which would be none other than the Constitutional Court itself ("ultimately, the preservation of the sovereignty of the Spanish people and of the supremacy of the Constitution as it provides for itself could lead this Court to tackle the problems that would arise in such a case [...] by way of the relevant constitutional procedures").

E. The Constitutional Court's argument: grey areas.

I. The merely partially-explicit nature of its conclusion

In my opinion, and as I said from the start, I have no objection, *in general terms*, to the reasoning of the Constitutional Court and to its conclusion, although said conclusion is only partially explicit, given that the premise on which the Constitutional Court bases its reasoning is, also and precisely, partial.

In effect, the reasoning of the Constitutional Court, right from the start, revolves around the possible unconstitutionality of *secondary* Union Law, and the problems that this could give rise to with regard to the principle of primacy. That possibility is immediately discarded bearing in mind that, upon admitting the "substantive or material dimension" of Article 93, the Constitutional Court acknowledges that this has the following effect:

"Once integration has taken place, it should be highlighted that the [Spanish] Constitution is no longer the framework for the validity of European legislation, but rather the Treaty itself, the signing of which implies the sovereign transfer of the exercise of powers deriving from the Constitution; however, the Constitution requires that the legal system accepted as a consequence of the said transfer be compatible with its basic principles and underlying values".

The Constitution cannot, therefore, deem itself to be the framework for the validity of secondary European legislation; having ruled out control over the aforementioned legislation in terms of (internal) constitutionality, its declaration of unconsti-

tutionality is consequentially also ruled out, and with it, the possibility of challenging the European principle of primacy[24].

What is the reason that the Spanish Constitution cannot be deemed to be a framework for the validity of secondary European rules?

The reason is that, pursuant to Article 93, said validity may only be compared in the light of the European legal system[25], provided that this shares the basic principles and values that govern the Spanish legal system.

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[24] I have recently been stressing the importance of channelling national judicial control over secondary European Law towards its natural field, which is none other than the European legal system itself, with the Treaties at the summit, in: EL JUEZ ESPAÑOL Y EL DERECHO COMUNITARIO 120 (2003); and *El juez nacional como juez europeo a la luz del tratado constitucional* in: CONSTITUCIÓN EUROPEA Y CONSTITUCIONES NACIONALES 600 (M. CARTABIA, B. DE WITTE AND P. PÉREZ TREMPS, EDS., 2005). It should furthermore be noted that this ruling out of internal constitutionality control over secondary Law is the general consensus gleaned from the national constitutional jurisdictions at the Conference, dedicated precisely to that question – *Contrôle de constutionnalité et Droit communautaire dérivé* – organized by the French Constitutional Council on 26 and 27 September 1997 (cf. the General Report and the Conclusions, in Cahiers du Conseil Constitutionnel, 1997, no. 4). And it should also be noted that the doubts that the question raised for the organizer of the Conference itself have to a great extent been dispelled during June and July 2004: cf. its Decisions of 10 June 2004 (no. 2004-496, *confidence in the digital economy*), 1 July 2004 (no. 2004-497, *electronic communications and audio-visual communication services*), and 29 July 2004 (no. 2004-498, *bio-ethics*, and no. 2004-499, *protection of personal data*).

[25] It should be borne in mind that the Constitutional Treaty clearly attempts to inherit the legacy of the European Community, continuing along the path, as we have already seen and as was contained in the Preamble to the European Economic Community Treaty, of "ever-closer union between the peoples of Europe". "Convinced that, while remaining proud of their own national identities and history," the Preamble of the Constitutional Treaty now states, "the peoples of Europe are determined to transcend their former divisions and, united ever more closely, to forge a common destiny". And the way in which to forge that common destiny is going to continue, is to be inspired by the traditional dynamism of a progressive deepening of integration, which will manifest by intensification, and as the case may be, expansion, of the Community or supra-national rules for the functioning of the Union in the management of the powers transferred by the Member States. Proof of this is the very first article of the new Treaty, pursuant to which "reflecting the will of the citizens and States of Europe to build a common future, this Constitution establishes the European Union, on which the Member States confer competences to attain objectives they have in common". For which, it continues, "the Union shall coordinate the policies by which the Member States aim to achieve these objectives, and shall exercise on a *Community basis* the competences they confer on it".

Thus the desire to inherit a certain *modus operandi* is explicit, giving continuity in substance to an expression, the "Community" method, which otherwise would have run the risk of having to accept a reduced relocation for the purposes of European integration *history*. And the said inheritance is accepted, as I was saying before, in terms of intensification and expansion of the integration, which are intended to become more coherent and systematic.

Therefore, in contrast to the classical way the Union is presented as a Greek temple resting on three well-differentiated pillars, to wit, the European supra-national pillar and the inter-governmental pillars dedicated to Common Foreign and Security Policy, and to Co-operation in the Areas of Justice and Home

As from that point, the Constitutional Court is going to make an effort to demonstrate, by way of a *generic* control of constitutionality exercised over the European *primary* Law (the Constitutional Treaty), that the Union and Spain share such basic principles and values.This leads it to reaffirm its premise ("the powers the exercise of which is transferred to the European Union could not, without a breach of the Treaty itself, be used as grounds for the European rule-making the content of which would be contrary to the fundamental values, principles, or rights of our Constitution"), with the final proviso that its discourse could be altered if at some unlikely moment these ceased to be shared (which change would arise, in my understanding, in the sense – as we shall see – of bringing the open-style interpretation of the Spanish constitutional text to an end, and embarking on a rigid control over the European constitutional text[26]).

The Constitutional Court does not however give a clear answer to what happens if, even accepting its reasoning *in totum*, a contradiction, beyond the generic confluence surrounding basic principles and values, is observed between specific precepts of the Spanish Constitution and specific precepts of the European Constitution (the latter supporting, as the case may be, secondary European rules, and taking into account the fact that the Court of Justice cannot exert validity control over primary Law, but only interpret it up to the *contra constitutionem* limit).

I put forward a specific example. Let us imagine that it had been the European Constitution, and not the Maastricht Treaty, that had incorporated the right of citi-

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Affairs (the clear separation of which began to be distorted, especially with regard to this third pillar, by the Treaty of Amsterdam), the Constitutional Treaty puts forward a more homogeneous vision of the Union, concentrating on its supra-national aspects, adjusted in intensity both up or down within the common framework of Title V of Part I, dedicated to the "Exercise of Union Competence". The starting point is therefore going to be the said Title V which, after setting forth the legal instruments the Union is acknowledged as having for the exercise of the powers granted under the heading of "Common Provisions", inspired by Community methodology, goes on to define, by way of "Specific Provisions", its role in the field of Common Foreign and Security Policy (including as an integral part the Common Security and Defence Policy) and in the so-called Area of Freedom, Security and Justice; which particulars "on the down" in supra-national terms, will be accompanied by particulars "on the up" contained in the Chapter dedicated to "Enhanced Cooperation", the aim of which, as the name suggests and as is set forth in its provisions, consists in "further the objectives of the Union, protect its interests and reinforce its integration process".

However, we do not lose sight of the fact that this effort aimed at greater clarification in the process of the conceptual cohesion of the Union is carried out within a wider context of clarification of the exercise of European public authority, as well as the limits on the said exercise vis à vis the citizen, which aspects emphasize the "constitutional" content of the new Treaty.

[26] In my opinion, under no circumstances could such a change result in a control over operating directly over secondary European Law, but rather, and having previously given the Court of Justice the opportunity to state its opinion on the matter, over primary European Law.

zens of the Union to stand in local elections. Let us also imagine that a request had not been issued to the Constitutional Court in this regard within the framework of prior control. What would have happened in the future?

Another example, that is this time directly related to an important innovation in the European Constitution: let us imagine that in the future a doubt could arise regarding the constitutionality of the provision at Article IV-444 allowing the Spanish Parliament to directly veto a simplified review of Part III[27]. What would happen then?

It is difficult to find an answer in Statement no. 1/2004, for the simple reason that, as was said before, the Constitutional Court concentrated its reasoning and its conclusion on the aptitude of the European Constitution to exclude secondary Law in the light of principles and values shared with the Spanish Constitution, thereby rejecting a domestic control on the basis of internal constitutional parameters that would clash with the principle of primacy. However, what about a possible concrete and precise collision with the European Constitution itself? Is the Constitutional Court signing a blank cheque that goes further than due respect to the threshold that the generic essential principles and values represent?

I do not consider that it is within the spirit of Statement no. 1/2004 to ascribe a capacity of constitutional "self-rupture" to Article 93 with the only limit being the "hard core" as represented by the "sovereignty of the State", our "basic constitutional structures" and the "system of fundamental values and principles enshrined in our Constitution, in which fundamental rights attain their own substantive nature"[28], in similar terms to those defended on the occasion of the Maastricht Treaty by the Council of State[29] and firmly rejected in Statement no. 1/1992[30]. I rather be-

[27] In France, for example, the Constitutional Council, in its aforementioned Decision of November 2004, considered that "the right that is recognized to the French Parliament to oppose an amendment of the Treaty pursuant to the simplified procedure provided for at Article IV-444, means that it is necessary to review the Constitution with the aim of allowing the exercise of such a prerogative".

[28] This "hard core" is, to a great extent, reflected in the Preliminary Title, the Section 1 of Chapter II of Title I and the Title II of the Spanish Constitution, subject to an especially rigorous procedure – that of Article 168 – in order to be amended.

[29] Opinion of 20 June 1991 (file no. 850/91), in which it considered that it was possible to evade Title X of the Constitution ("Concerning Constitutional Amendment") by way of Article 93, with the limit of "those constitutional matters which may only be reformed by way of the procedure of rigidity aggravated by Article 168 of the Constitution" (in the same line, cf. Opinion of 9 April 1992, file no. 421/92). The thesis supported at that time by the Council of State has been recently revived by its current President, F. Rubio Llorente, for the purposes of defending a reform "so that it says [Article 93] what the Council of State wanted to read in it, and which in its current drafting, as the Constitutional Court stated, it clearly does not say" (*La necesidad de una reforma constitucional*, Conference given on 28 October 2004 at the Centro de Estudios Políticos y Constitucionales, contained on its website).

lieve[31] *it opens the door to European readings of the Spanish Constitution, creating a favourable atmosphere for more flexible 'pro-communitate' interpretations (especially in the context of ex-post controls*[32]*); that is to say, it shapes a legal framework to allow ultimately judges to overcome, when confronted with European Law, what could 'prima facie' appear to be insurmountable collisions with the Spanish Constitution*.

II. The one-directional nature of its reasoning: the scope of the integration clause and of the withdrawal clause

The above conclusion, however, requires us to go beyond the excessively-unidirectional reasoning of the Constitutional Court, in which the multiple and dialectic dimension, very much a part of the European constitutional arena, is notable for its absence.

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[30] FJ 4: "Pursuant to Article 93, Parliament may, in summary, transfer the exercise of 'powers derived from the Constitution', not to dispose of the Constitution itself, contravening or allowing the contravention of, its provisions, given that, neither is the power of constitutional review a 'competence' the exercise of which is capable of being transferred, nor does the Constitution allow itself to be reformed by any way that is not its own Title X".

[31] And this is essentially at the root of what I consider to be the main change of Statement no. 1/2004 as regards Statement no. 1/1992.

[32] I do not believe that it is in the spirit of the Constitution to put the interpretative method within the framework of *ex-ante* and *ex-post* control on the same level, bearing in mind, as was acknowledged by Statement no. 1/1992 and is now repeated by Statement no. 1/2004, "the disruption that an eventual declaration that an agreed rule is unconstitutional would cause to the foreign policy and international relations of the State".

In fact, I consider that, despite the firmness of Statement no. 1/1992, its pronouncement could have been (and in my opinion, ought to have been) otherwise (in the light, *inter alia*, of the solid arguments arising in the request) with regard to the scope of Article 13.2 of the Constitution, if it had arisen not within the framework of an *ex- ante* control, but rather *ex- post*.

At this point, the Report of the Court of Justice by M. Wathelet and S. van Raepenbusch (admittedly on a personal basis) on the occasion of the XII Congress of the European Constitutional Courts Conference, held in the Palais d'Egmont in Brussels from 14 to 16 May 2002 (LES RELATIONS ENTRE LES COURS CONSTITUTIONNELLES ET LES AUTRES JURIDICTIONS NATIONALES, Y COMPRIS L'INTERFÉRENCE EN CETTE MATIÈRE, DE L'ACTION DES JURIDICTIONS EUROPÉENNES. RAPPORT DE LA COUR DE JUSTICE DES COMMUNAUTES EUROPEENNES) may be brought in. "Certainly", they state, "it corresponds to the national jurisdictions of the Member States to determine the scope and the limits of the constitutional grounds that allows a State to transfer powers to the Community". But, they go on to say, "it would be very desirable that this control should be exercised beforehand, prior to the ratification of the Treaty, or at least, if done *a posteriori,* within a reasonable period" (to which they add that, in any case, "it is incumbent on the ECJ to decide on the validity of community acts, and respect for the powers attributed to the Community and to each one of its Institutions is naturally understood to be a control angle").

In effect, the Constitutional Court only makes an effort to make explicit the pressure exerted by the national Constitutions on the European Constitutional Treaty, whilst overlooking the pressure that the latter in turn is called to exert over the former[33] (except in the specific field of fundamental rights, where the Constitutional Court emphasizes[34] that the interpretative efficacy which ought to be ascribed to the Union Charter pursuant to Article 10.2 of the Spanish Constitution[35], should be understood to be "without prejudice to its value with regard to Union Law, integrated in our *ex* Article 93"). In our case, in addition to at the behest of the principle of sincere co-operation (Article I-5.2), by order of the Spanish Constitution itself, specifically Article 93, the "substantive or material dimension" of which is not only that it "cannot be ignored"[36], but also (as is underlined by the Constitutional Court[37] in what appears to be a rather rhetorical manner in the light of the direction it subsequently takes) that it should be read in the form of "the 'ultimate basis' for our joining the process of integration and our being bound by European Law".

Therefore, whilst Articles I-2, I-5, and II-112.4 impose interpretations of the European Constitution that are *pro-national Constitutions*, also Article 93, if one wishes to be consistent with integration and, going beyond mere rhetoric to the limit of the consequences of its consideration as ultimate basis of our link to the Union, imposes interpretations of the Spanish Constitution that are *pro- European Constitution*. In other words, preventing ultimate conflict between Union Law and the Spanish Constitution, which determines the appearance on the scene of the limit on primacy and the national counter-limit, is not just in the hands of a Court of Justice that must exert itself, because this is what is required of it in the terms laid down in the European Constitution, by way of reconciling the values of the Union with the supreme values of the Member States, including Spain, on which the former are grounded; it is also in the hands of a Constitutional Court that must exert itself, because this is required of it by a teleological reading of Article 93, on avoiding

[33] P. Cruz Villalón refers to "reciprocal metaconstitutionality". LA CONSTITUCIÓN INÉDITA. ESTUDIOS ANTE LA CONSTITUCIONALIZACIÓN DE EUROPA 73 (2004). It should not be forgotten that the violation of the principles and values of the Union, not only thwarts accession –to the Union- and determines the relations –of the Union– with third-party States, but also may give rise to the suspension of the rights resulting from Union membership (Article I-59).

[34] FJ 6.

[35] Which, by the way and as it happens, sows the seeds for the expansion of the Charter beyond the scope of Union Law. Article 10.2 states: "Provisions relating to the fundamental rights and liberties recognized by the Constitution shall be interpreted in conformity with the Universal Declaration of Human Rights and international treaties and agreements thereon ratified by Spain".

[36] FJ 2, seventh paragraph *in fine*.

[37] FJ 2, fifth paragraph.

unilateral and isolated readings of the principles and values (and other non-basic features) of the Spanish Constitution.

In any case, and in the "scarcely-conceivable"– according to the Constitutional Court – event that the clash were unavoidable in terms of interpretation and insurmountable in terms of reform, the safeguarding of the sovereignty of the Spanish people and of the supremacy of the Constitution,

"is always ultimately assured by Article I-60 of the Treaty, a true counterpoint to its Article I-6, and which allows the primacy declared in the latter article to be defined in its true dimension, which may not override the exercise of a withdrawal, which remains reserved for the sovereign, supreme, will of the Member States".

The line taken here is once again excessively one-directional. Not just because once the sovereign decision to "withdraw voluntarily" has been taken, the way in which this is to be carried out must then be negotiated with the Union[38], but rather because, as the Constitutional Court itself seems to implicitly admit that its natural arena is precisely is one of assuming the ultimate primacy of Union Law once the unavoidable clash in terms of interpretation has been recognized, and after conciliation by way of amendment of the Spanish Constitution (or the European Constitution[39]) has failed. In other words, the withdrawal clause does none other than consolidate, in my opinion, the dual nature (or multiple nature if one takes into account the other national Constitutions) of the European constitutional framework: it reinforces the ultimate sovereignty of the Member States[40], which decide to with-

[38] Article I-60.2: "A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article III-325(3). It shall be concluded by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament".

[39] Which was done for example in Maastricht with the Union and Community Treaties, adopting the Protocol on Article 40.3.3 of the Irish Constitution in order to overcome the hypothetical conflicts between the free provision of medical services –contained in European Law– and the protection of the *nasciturus* –provided for in the Irish legal system (hypothetical conflicts that, by the way, had remained unresolved following a careful operation by the Court of Justice –*Grogan Case*- in terms of, as I have called elsewhere, "judicial pragmatism" –DERECHO COMUNITARIO 654 et seq.- also a manifestation of the practical modulations to primacy to which I referred *ut supra*).

[40] Against the supposed "permanent limitation" of sovereignty referred to by the Court of Justice in Flaminio Costa, to which it has never — save for error — referred again and which was contested by the German Federal Constitutional Court in its Judgement on the constitutionality of the Maastricht Treaty: "Germany is one of the 'lords of the treaties', which justified its accession to the Union Treaty, subscribed for an unlimited period of time (Article Q TUE) with the desire to remain as members for a long time, although, in the end, they may annul such membership pursuant to an act to the contrary"; a

draw from the Union precisely when faced with the impossibility of assuming the also-ultimate primacy of the European Constitution over their own Constitutions. It is, ultimately, a legal clause with strong symbolic content (as it offers an improbable, in political terms, sovereign exit to the State that does not manage to alter its constitutional framework to that which is properly European), which, for the purpose of strengthening the primacy of European Law (along the lines of "anyone who is not happy in the club, is free to leave"), entails a decisive strengthening of its "autonomous" nature[41] (as it makes express provision, not just for denouncement, but also for the procedure to be followed and its consequences, which emphasizes in turn the "constitutional" nature of the new Treaty), different from both the international and the national of the Member States in which, nevertheless, it is integrated (taking into account the fact that the silence of the current Treaty on facing ultimate conflict between national and European constitutional rules determines a sort of inevitable *vis atractiva* in favour of general International Law).

III. Primacy, Supremacy?

With regard to other considerations, I think that it is not only unnecessary, but also extremely worrying, that the Constitutional Court has made a conceptual incursion into the world of "primacy" and "supremacy". "Primacy", we are now told, operates at the level of "the application of valid rules", and is based "on the differentia-

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rejection, therefore, of the permanent limitation of sovereignty proclaimed by the Court of Justice, which reappears on the occasion of the irreversible nature of the progression of the Community into the third stage of the Economic and Monetary Union affirmed by the Protocol of the Union Treaty dedicated to the transition to the said stage, with the Constitutional Court stating that Monetary Union, configured "as a community that is committed to long-term stability and that in particular ensures the stability of the value of money", would not oppose, "by way of ultimate ratio", to "the separation of the Community in the event the Community is attained deficiently with the aim of stability".

The Spanish Constitutional Court had maintained a similar line, where in its Statement no. 1/1992 it recalled the Flaminio Costa doctrine with its "limitation of 'sovereign rights' to use the expression of the Court of Justice", thereby avoiding any reference to the "permanent" nature with which the Court of Justice had assessed, also expressly, said limitation.

Omission which was also made by the Belgian Cour de Cassation in its *Le Ski* judgement, of 27 May 1971, a leading-case, curiously, for the recognition of the primacy of European Law on the exclusive basis of International Law, in general, and of European Law, in particular. Cf. H. Bribosia, *Report on Belgium, in The European Courts and National Courts* 17 (A.M. SLAUGHTER, A. STONE AND J.H.H. WEILER, EDS., 1997).

[41] Intensified, furthermore, by the fact that it is the Union that, as we have seen, has to negotiate with the State with regard to the manner of the withdrawal, with the final agreement being concluded by the Council by way of a qualified majority following the consent of the European Parliament. Cf. K. Lenaerts and D. Gerard, *The Structure of the Union according to the Constitution for Europe: The Emperor is Getting Dressed*, 3 EUROPEAN LAW REVIEW 306 (2004).

tion of the fields of application of different rules, which are in principle valid, of which, however, one (or more of them) has the capacity to override others by way of its preferential or prevailing application due to different reasons" (this in contrast to "supremacy", which principle operates at the level of "procedures of rule-making" and which determine the "invalidity" of the rules that contradict what has been provided imperatively in others "of a superior hierarchical nature").

Having understood primacy in these terms, and having been assumed by the Constitutional Court that the relations between the legal system of the European Union and the Spanish legal system operate, globally, in accordance with these terms, the conclusion could not be more simple: under no circumstances can the former give rise to the invalidity of the latter in the event of a contradiction, but rather at the most a displacement or lack of application[42].

As a result, administrative jurisdiction is incapacitated, at the drop of a hat to do that which, with all correctness from my point of view, it has been doing up until now in the most natural way, to wit, annul regulatory or governmental provisions (not having the force of parliamentary acts) that have been directly challenged before it by reason of infringing European rules, including when said provisions are backed up by parliamentary acts[43] (over which, in contrast, they may not issue judgements with regard to their validity[44]).

Therefore the Constitutional Court incurs once again in the same error in which it incurred in its Judgement 28/1991, by generalizing the classification of the contradiction between European Law, taken as a whole, and national Law, also considered globally, as a pure problem of "selection of the applicable rule".

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[42] This thesis has been defended in our academy by J.L. REQUEJO PAGÉS, SISTEMAS NORMATIVOS, CONSTITUCIÓN Y ORDENAMIENTO. LA CONSTITUCIÓN COMO NORMA SOBRE APLICACIÓN DE NORMAS 57 (1995).

[43] Cf. for example, the Judgement of the Supreme Court of 26 January 2000 (Ar. 10108), in which it is emphasized that "the eventual compatibility of the governmental rule that has been challenged in a administrative judicial appeal with a parliamentary act is not an obstacle to the courts of this jurisdictional order being able to acknowledge that the governmental rule does not conform with Community law and, in application of the principle of the primacy of Community law over national law, annulling it".

[44] And which, in addition to the lack of jurisdiction of the Constitutional Court itself to intervene in this regard as it considers contradiction with Community Law not to be a problem of "constitutionality", makes it impossible for them, arguably and already prior to Statement no. 1/2004, to be annulled with *erga omnes* effect.

The error, in both cases, has consisted in extending a line of argument intended for domestic provisions of the rank or force of law to regulatory rules[45]: as it is not possible to directly challenge before the ordinary judges laws on the grounds that they are contrary to European Law, it was evident that the room for manoeuvre of the aforementioned was reduced to a control in terms of pure inapplicability (i.e. with regard to selection of the applicable rule, held the Constitutional Court then; excluding any judgement as to its validity, it now says), in the event of challenging the application of a law in specific cases. But administrative jurisdiction, in contrast, seemed to be required (and in fact did so, and I believe it should continue doing so) to maintain intact, aside from the pure "selection of the applicable rule", its powers to control regulations on the grounds that they were contrary "to Law", including European Law, within the framework of direct appeals, i.e. in terms of validity and with *erga omnes* effects[46].

The Constitutional Court has got itself into a refined labyrinth again, the exit to which must involve, at least, circumscribing its generalized conceptual incursion into the world of primacy-supremacy to the exclusive field of those rules of the rank or force of law.

IV. The silence with regard to the extension of primacy to "European Union" Law

It should finally be taken into account that primacy is proclaimed in favour of Union Law *in genere*, i.e. including that which is adopted in the field of Common Foreign and Security Policy, notwithstanding its limited control by the Court of Justice[47] (an issue that did not merit, despite its importance, any consideration by the Constitutional Court[48]).

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[45] It is obvious that I am assuming that the line of argument of the Constitutional Court does not cover the Constitution itself; otherwise we would be in the impossible situation of covering up a clear overruling of Statement no. 1/1992 (which is in turn at odds with the very reasoning of Statement no. 1/2004: cf. in this regard V. FERRERES COMELLA, LA CONSTITUCIÓN ESPAÑOLA ANTE LA CLÁUSULA DE PRIMACÍA DEL DERECHO DE LA UNIÓN EUROPEA (2005).

[46] Control in such terms and with such effects over the regulatory rules that the new Administrative Jurisdiction Act 1998 would extend to the field of indirect challenges – i.e. in the event of challenging its application acts – activating, as the case may be, after having performed the selection of the applicable rule, the "question of illegality".

[47] With regard to Common Foreign and Security Policy, the starting point for the Constitutional Treaty (Article III-376) is the traditional exclusion of the competence of the Court of Justice *ratione materiae*.

[48] Or it inadvertently forgot about it, as happened to the Council of State: "It should be borne in mind", reads its Opinion on the European Constitution, "that the unconditional scope of the principle of *the primacy of European Law* (*"Union Law" to use the expression in the heading of Article I-6*) affirmed by the European Court of Justice, does not exactly coincide with the recognition of this principle as made by the Constitutional Courts of the Member States …".

In fact, if there is an ongoing debate about whether primacy is exclusive to the European pillar[49] or if this may be extended also with regard to the second and third pillar of the Union[50], it does not appear, in contrast, that there exists a debate on its general scope in the Constitutional Treaty[51].

Beyond the debate on whether it is possible to have primacy disconnected from direct effect[52], raises the difficult question about its extension to an area in which the control of the Court of Justice is limited[53]. One does not need to go very far for an example: it is not at all clear if primacy in the field of Common Foreign and Security Policy should be argued even in the absence of any judicial control, including that of the European Court[54], or if it should be argued in so far as the control over

[49] To this effect, for example, K. LENAERTS AND P. VAN NUFFEL, CONSTITUTIONAL LAW OF THE EUROPEAN UNION 605 (1999).

[50] To this effect, for example, A. Von Bogdandy and M. Nettesheim, *Ex Pluribus Unum: Fusion of the European Communities into the European Union*, 3 EUROPEAN LAW JOURNAL 283-284 (1996).

[51] Cf. Lenaerts and D. Gerard, *The Structure of the Union according to the Constitution for Europe: The Emperor is Getting Dressed*, cit., 301.

[52] Cf. in this regard the aforementioned REPORT OF THE HOUSE OF LORDS, THE FUTURE ROLE OF THE EUROPEAN COURT OF JUSTICE, 35-36.

[53] Bearing in mind, nonetheless, that the aforementioned starting point of the Constitutional Treaty in terms of exclusion of the jurisdiction of the Court of Justice, becomes immediately pointed when said competence is admitted (second paragraph of Article III-376) with regard to "proceedings brought in accordance with the conditions laid down in Article III-365(4) [which regulates the capacity of natural or legal persons to challenge the activity of the Union directly before the courts of the Union], reviewing the legality of European decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter II of Title V [with regard to the CFSP]".

It is, therefore, clear, that irrespective of the powers that the Court of Justice now has, and that the Constitutional Treaty takes on in Article III-376 itself, in order to ensure that the CFSP measures and procedures do not infringe the competences of the European Community (second paragraph *ab initio*), as well as in order to try economic sanctions adopted as part of the Community framework in the application of decisions adopted in the field of CFSP, the Court of Justice now has explicit powers over matters of CFSP itself that restrict the legal sphere of natural or legal persons.

The Constitutional Treaty, for its part, also includes the possibility —currently precluded— of subjecting international agreements entered into in the scope of CFSP to a prior constitutional control on the part of the Court of Justice (Article III-325.11) (cf. notwithstanding the doubts that this raises for G. Gaja in his *Memorandum* presented to the House of Lords, in THE FUTURE ROLE OF THE EUROPEAN COURT OF JUSTICE).

[54] Which absence, as is recalled –and applauded– by T. Tridimas in his *Memorandum* presented before the House of Lords, is familiar to many Member States concerning respective foreign policies; cf. also in this regard the significant contributions by H.J. Papier –President of the German Federal Constitutional Court– and R. Errera –honorary French Council of State member– emphasizing the wide margin of discretion attributed to the national executives in this matter.

the Union by the national judges and courts is accepted and once it has been overcome[55].

F. By way of conclusion: a Spanish version of "Solange II"

By way of conclusion, it may be highlighted that the main difference in Statement no. 1/2004 compared to Statement no. 1/1992, is in the emphasis that is now placed on the substantive nature of Article 93 of the Constitution, which leads the Constitutional Court, even whilst acknowledging the ultimate supremacy of the Spanish Constitution over any other legal rule, including the European Constitution, to accept a pro-European opening-up of our constitutional text, which shall be maintained "for as long as" Spain and the Union continue to share the same essential principles and values that the European Constitution now consolidates.

What does –or ought– this new climate of "constitutional tolerance" translate into[56]?

On the one hand, it translates into forcing the Spanish judge to accept his/her role as, at the same time, a European judge, encouraging dialogue with a Court of Justice that, on the basis of shared essential principles and values, is called to guarantee the respect for both the European and Spanish Constitutions at their very heart. On the other hand, in making the interpretation of the Spanish Constitution more flexible, without renouncing its ultimate supremacy (handling, should the case arise and above all in the context of *ex-post* control, "benevolent" canons of constitutionality), within the framework of a European legal system that is presumed to be compatible with the Spanish Constitution, as it shares the same essential principles and values.

With regard to Spain, it should be recalled that Article 2 b) of the Administrative Jurisdiction Act 1956 excluded from its jurisdiction the hearing of cases on "questions arising with regard to the *political acts* of the government, such as those that affect the defence of the national territory, international relations, the interior security of the State and military command and organization, without prejudice to the compensation that may be appropriate, the determination of which does correspond to administrative jurisdiction". On the history of the political act and its abolition first with the 1978 Constitution and then with the new 1998 Act, cf. S. MUÑOZ MACHADO, TRATADO DE DERECHO ADMINISTRATIVO Y DERECHO PÚBLICO GENERAL. TOMO I 585 (2004).

[55] So as the House of Lords itself concludes (point 103, note 30), it is debatable whether the *Foto-Frost doctrine* (which proclaims the monopoly of the Court of Justice over *negative* trials of the validity of European Law) would be applicable here.

[56] I take this expression from J.H.H. WEILER, DOS VISIONES NORTEAMERICANAS DE LA JURISDICCIÓN DE LA UNIÓN EUROPEA 67 (2000).