

# Spain

## *Tribunal Constitucional* on the European Constitution. Declaration of 13 December 2004.<sup>1</sup>

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### DOUBTS IN SPAIN AS TO THE CONSTITUTIONALITY OF THE PRIMACY OF EUROPEAN LAW

When thinking about the integration of the European sovereign states in the European Union, one does not need to be a euro-sceptic to perceive a big fish devouring little fish. Of course, the individuality of the different countries is assured in the European Union. Article I-5(1) of the European Constitution establishes that the Union shall respect their national identities inherent in their fundamental structures, political and constitutional, and their essential state functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. Europe is to be 'United in diversity'. Yet, however considerate the Union may be of the various European countries, unity can exist only by the grace of all member states' loyally fulfilling their European obligations. Article I-5(2) of the European Constitution requires this loyalty, as well as its negative expression: member states shall 'refrain from any measure which could jeopardise the attainment of the Union's objectives'. Within the legal framework of the European Union, such Union 'obligations' and 'objectives' can ultimately be determined only by the European institutions and not unilaterally by the member states. In this light, Article I-6 of the European Constitution seems key to the European legal order:

The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States.

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<sup>1</sup> The full text can be found on <[www.tribunalconstitucional.es](http://www.tribunalconstitucional.es)>. This website is only in Spanish.

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In other words, no member state can contravene European legal acts by invoking its internal, national law.

Article I-6, which had no equivalent in previous European treaties, prompted the Spanish government to request Spain's Constitutional Court [*Tribunal Constitucional*] to declare whether or not the European Constitution contradicts the Spanish Constitution. Article 95 of the Spanish Constitution [*Constitución Española*] establishes that the ratification of any international treaty containing provisions contrary to the Constitution shall require prior constitutional amendment and that the government may request the Constitutional Court to declare whether or not there is a contradiction.

The State Council [*Consejo de Estado*], the government's principal advisory body, had expressed its doubts as to the constitutionality of Article I-6 in its report of 21 October 2004. The State Council suggested that it might be better to introduce into the Spanish Constitution, following the example of other constitutional models, a clause that would generally and *a priori* recognise the constitutionality of European law, within the limits the Constitution making power may consider necessary. In the State Council's view, Article 93 of the Spanish Constitution, which authorises the conclusion of treaties by which powers derived from the Constitution shall be vested in an international organisation or institution, could and should be amended accordingly.

A few days after the State Council had delivered its opinion, Spain signed the Treaty on the European Constitution in Rome on 29 October 2004. On 5 November 2004, the Spanish government filed its request for a declaration with the Constitutional Court. The government asked the Court to pronounce itself on the question whether or not there exists a contradiction between Article I-6 of the Treaty establishing the European Constitution and the Spanish Constitution. Next to this first and main question, the government asked whether or not there is a contradiction between the Articles II-111 and II-112 of the Treaty, which are part of the Charter of Fundamental Rights of the European Union, and the Spanish Constitution. Thirdly, the government requested the Court to pronounce itself on whether or not Article 93 of the Spanish Constitution would allow the State to commit itself to the Treaty. The government's fourth and last question was what procedure for constitutional amendment would apply, if the Court found amendment of the Spanish Constitution to be necessary in order to ratify the Treaty.

Before analysing the Constitutional Court's Declaration, I will briefly make some remarks on this Spanish judicial body and the Spanish Constitution whose final interpreter it is.

### *The Tribunal Constitucional*

The *Tribunal Constitucional* is a tribunal at law, constituted by twelve professional justices appointed by the king, four of whom have been nominated by Congress,

four by the Senate, two by the government and two by the General Council of the Judiciary. The justices are appointed for nine years and renewed by thirds every three years. The Constitutional Court is not part of the ordinary judiciary [*Poder Judicial*]. It is an extraordinary judicial organisation and an independent constitutional body. The Court is often seen as the 'fourth power' in Spain's constitutional order, next to the traditional legislative, executive and judicial powers.

The Spanish Constitution is binding on all citizens and public authorities in Spain, together with the other legal provisions (Article 9(1)). This means that the Constitution has direct effect, and, consequently, the Constitutional Court is not the sole interpreter of the Constitution. However, the Constitutional Court is, in the words of the Organic Law that regulates it, 'the supreme interpreter of the Constitution, independent from the other constitutional bodies and as such only bound by the Constitution and its own Organic Law'.

The 1978 Constitution has assigned a certain number of limited powers to the Constitutional Court, which have been specified and considerably expanded by the 1979 Organic Law. Roughly speaking, the Court has four constitutional tasks:

1. reviewing the constitutionality of laws (which in Spain can be enacted both by the national parliament, i.e., the *Cortes Generales*, and by the parliaments of the autonomous communities) and of regulations with the force of law;
2. hearing individual appeals for protection of fundamental constitutional rights and liberties [*recursos de amparo*];
3. solving disputes on jurisdiction between the state and autonomous communities or between autonomous communities; and
4. issuing, at the request of the government, Congress or the Senate, declarations on the constitutionality of treaties to which the Spanish state intends to commit itself.

The government's request of 5 November 2004 to the Constitutional Court was a request for such a declaration. It was the second of this sort, the first one being the request to the Court to declare whether or not there was any contradiction between the 1992 Maastricht Treaty and the Spanish Constitution. On that question, the Court issued a declaration on 1 July 1992 (DTC 1/1992).

#### SPANISH CONSTITUTION AND TREATY LAW

The pronouncement on the Treaty establishing the European Constitution was to become the second declaration of the *Tribunal Constitucional* under Article 95 of the Spanish Constitution. The Court handed down this declaration on 13 December 2004 (DTC 1/2004). All twelve court members participated in the deliberations. A majority of nine justices concluded that there is no contradiction

between the Treaty establishing the European Constitution and the Spanish Constitution and that, accordingly, no amendment of the Spanish Constitution is necessary. Three justices wrote individual dissenting opinions, all three contending that Article I-6 of the European Constitution is not compatible with the Spanish Constitution and that the Constitution ought to be amended before ratifying the Treaty establishing the European Constitution. In order to understand the reasoning of the majority opinion and the debate that has taken place among the Court's members, it is useful to point out some special features of the Spanish constitutional order.

The Spanish Constitution is considered to be the supreme rule of the entire Spanish legal order. No legal rule can be legally binding if its legal force cannot somehow be derived from the Constitution. The Constitution, 'based on the indissoluble unity of the Spanish Nation' (Article 2), is perceived as the supreme expression of Spain's sovereignty and the source and basis of the entire legal order. This conception of constitutional supremacy may be unproblematic within the internal legal order (although not unchallenged, for instance, by Basque traditionalist thinking that puts Basque 'historic rights' at the same level as, if not above, the Constitution). Yet, the supremacy of the Spanish Constitution becomes a more complex notion when one analyses the relationship between the Constitution and international law. The Constitution seems to leave no doubt that international treaties, once validly concluded and officially published in Spain, are binding, unless international law provides otherwise. Yet, the Constitutional Court has established in its case-law that these provisions do not, in any way whatsoever, challenge the supremacy of the Constitution (and, consequently, the final word of its 'supreme interpreter') within the entire Spanish legal order, including the international treaties that have been incorporated in it. Let us briefly consider how the Court has construed this.

Spain has a so-called monistic system. Validly concluded treaties, once officially published in Spain, automatically form part of the internal legal order (Article 96(1) Spanish Constitution). The Constitution adds to this that the provisions of such validly concluded treaties might only be repealed, amended or suspended in the manner provided in the treaties themselves or in accordance with the general rules of international law. In order to prevent a conflict between internally binding treaty law and constitutional provisions, Article 95(1) of Spanish Constitution provides that the ratification of international treaties that contain provisions contrary to the Constitution requires prior constitutional amendment. This is the context in which the Constitution provides for the government, Congress or the Senate to request the Constitutional Court to declare whether or not such contradiction exists (Article 95(2)). An 'internationalist' interpretation of these provisions could lead to the conclusion that an international treaty cannot be

challenged any more on reasons of unconstitutionality once the Spanish state has ratified the treaty. Article 95 of the Spanish Constitution must then be seen as a mechanism that prevents the ratification of unconstitutional treaties as much as possible, but without reducing the guarantee of Article 96 that all treaties will be legally binding internally once they have actually been ratified.

Although the text and history of the Constitution seem to support such an internationalist interpretation, the legislature that drafted the Organic Law regulating the Constitutional Court took an outspoken contrary, 'constitutionalist' view. The Organic Law has expanded the Constitutional Court's jurisdiction to questions on the constitutionality of treaties that are already part of the Spanish legal order. The Constitutional Court itself has fully embraced the Organic Law's conception of the Spanish legal order, *inter alia*, in its Declaration on the constitutionality of the Maastricht Treaty (DTC 1/1992, 1 July 1992). It has confirmed and emphasised the Constitution's supremacy over all and any other rule within Spain's legal order, including ratified international treaty law. For that purpose, the Court refers to Article 96(1) of the Spanish Constitution. That provision establishes that *validly* concluded treaties form part of the internal legal order. The Constitutional Court then reasons that treaties that are in contradiction with the Constitution have not been concluded *validly*. Consequently, such treaties do not form part of the internal legal order. Otherwise, the treaty-making bodies could produce *de facto* constitutional amendments disregarding the applicable rules for constitutional reform. Therefore, the Constitutional Court has not only the power but also the obligation to purge the Spanish legal order of unconstitutional rules in treaties, just as any other unconstitutional rule that claims legal force within the Spanish legal order. In principle, the Court will first try to make a constitutional interpretation of the international rule, declaring unconstitutional other interpretations and applications. This way, the Court avoids having to declare the rule itself unconstitutional. Even so, the Court holds the ultimate remedy of expelling the unconstitutional treaty rule from the Spanish legal order.

The Court has never resorted to this ultimate remedy. In fact, it should be interesting to see how the Court would actually expel a treaty provision from the Spanish legal order. Article 39(1) of the Organic Law prescribes that the Court must declare such an unconstitutional provision void. However, if the Constitutional Court should come to the conclusion that a treaty provision is unconstitutional, this conclusion will not necessarily lead to the consequence that the provision is void under international law. Only under extreme circumstances contemplated by international law may the provision be void or voidable, such as in the circumstances defined in the Articles 46 to 53 of the 1969 Vienna Convention on the Law of Treaties. Given these restrictions under international law, it seems very unlikely that the Constitutional Court would actually bar the application of a

treaty provision, let alone set it aside or declare its nullity. We may safely assume that the Court will do so only under extreme circumstances, probably when an international crisis is imminent, if not already a fact, and Spain's sovereignty is at issue.

Does this mean that the declared supremacy of Spain's Constitution over international treaties, including the Treaty establishing the European Constitution, is a paper tiger? Is it simply an interesting theoretical framework without any practical meaning? Or is there more to it? This is the question that revolves in one's mind whilst reading the Constitutional Court's Declaration of 13 December 2004.

#### THE DECLARATION OF 13 DECEMBER 2004

The majority based the Court's decision in its Declaration of 13 December 2004 on eight *fundamentos jurídicos* [legal grounds]. In the first of these, the Court noted that its decision is a decision at law: if the Court holds that a provision in the treaty is incompatible with the Spanish Constitution, either the Spanish Constitution must be amended before the treaty is ratified or the treaty cannot be ratified. Then the Court passed on to answer the government's questions.

*a) Does Article 93 of the Spanish Constitution provide sufficient power to the treaty-making body in order to commit Spain to the European Constitution?*

Implicitly changing the order of the government's questions, the Court, in its second *fundamento jurídico*, analysed the meaning and scope of the first sentence of Article 93 of the Spanish Constitution. This provision reads: 'By means of an organic law, authorisation may be granted for concluding treaties by which powers derived from the Constitution shall be vested in an international organisation or institution'. The Court recalled that the wording of this provision, although definitely not implying a procedure for constitutional amendment, was intended to make it possible for Spain to join the European Communities by transferring or attributing the exercise of competencies that derive from the Constitution. Article 93 of the Spanish Constitution makes it possible for other legal orders to be incorporated in the internal Spanish legal order. Although autonomous legal orders by origin, they are called to co-exist together with the internal legal order.

The Court then emphasised that, once the legal order of the European communities had been integrated, 'the frame of validity' [*el marco de validez*] of Community law was no longer the Constitution, but the Treaty itself, 'the making of which causes the sovereign act of assigning the exercise of powers derived from the Constitution, although the Constitution demands that the Legal Order that has been accepted as a consequence of the assignment be compatible with its basic principles and values'. The Court acknowledged that the integration of Commu-

nity law in the Spanish legal order entails inevitable limits to sovereign state powers, which are 'only acceptable to the extent that European law is compatible with the fundamental principles of the social and democratic State, subject to the rule of law, established by the national Constitution'. The Court then admitted that these substantial limits are not explicitly mentioned in the Constitution but must be implicitly derived from the Constitution and the essential meaning of Article 93 of the Spanish Constitution itself. These limits imply respect for State sovereignty, for Spain's basic constitutional structures and for the system of fundamental values and principles recognised by the Spanish Constitution, especially its fundamental rights. As long as these limits are observed, which is the case, Article 93 allows the adherence to a treaty that assigns to other legal orders the exercise of powers derived from the Constitution.

*b) Primacy of European law over the Spanish Constitution?*

After its remarks on the meaning and scope of Article 93 of the Spanish Constitution, the Court examined the constitutionality of Article I-6 of the European Constitution. This provision, as we recall, reads: 'The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States'.

First, in *fundamento jurídico* 3, the Court scrutinised the meaning of Article I-6 within the context of the European Constitution. The Court observed that Article I-6 intends to reflect no more than the existing case-law of the Court of Justice of the European Communities and that the primacy of Union law is limited to the area where the European institutions exercise the powers assigned to them. That primacy is not imposed as a superior hierarchy but as an 'existential requirement' of Union law in order to achieve direct effect in practice and uniform application in all member states.

According to the Court, the Articles I-2 and I-5(1) of the Treaty guarantee sufficiently that Spain's basic constitutional structures and the fundamental rights recognised in the Spanish Constitution will be observed. Interesting is the Court's observation in this context that Article II-113 of the Treaty expressly establishes that nothing in the Charter shall be interpreted 'as restricting or adversely affecting human rights and fundamental freedoms as recognised (...) by the Member States' constitutions'. These provisions, amongst others, guarantee the existence of the states and their basic structures, as well as their values, principles and fundamental rights. The absence of these guarantees justified the reservations the constitutional courts of some states made with regard to the primacy of European law as such guarantees had not been laid down in the previous and present European treaties. In other words, said the Court, the limits those other courts' reservations referred to are now unequivocally proclaimed in the Treaty itself, which has

accommodated its provisions to the exigencies of the member states' constitutions. The Court also emphasised (1) that the Spanish state transfers sovereign powers only for specific purposes or, in the case of non-exclusive competences, in accordance with the principles of subsidiarity and proportionality, and under the national parliaments' control (Article I-11(3) and (4) of the Treaty); and (2) that the Spanish state can recover its sovereign powers by withdrawing voluntarily from the Union (Article I-60). In sum, the Treaty does not substantially change the existing situation. Rather, it should be noted that the competences the exercise of which has been transferred to the European Union could not, without breaching the Treaty itself, serve as a basis for the production of European law whose contents are contrary to the values, principles or fundamental rights of the Spanish Constitution.

Following from that interpretation of the Treaty establishing the European Union, the Court found, in its *fundamento jurídico* 4, that there is no contradiction between the proclaimed primacy of European law over Spanish national law in Article I-6 of the Treaty and the Spanish Constitution's proclamation of supremacy. Primacy and supremacy are categories of different orders. Supremacy refers to the hierarchy between rules, causing the invalidity of inferior contradicting rules. Primacy, however, does not cause the invalidity of a contradictory rule, but merely requires that the application of the priming rule prevails over the application of that contradictory rule, regardless of the latter's hierarchic position. Thus, although supremacy will normally imply primacy, there may be an exception to that primacy if the supreme rule contains a provision that a lower rule may set aside or lead to non-application of the supreme rule itself within a certain area. Article 93 of the Spanish Constitution is such a provision, according to the Court. This constitutional provision assumes the primacy of Union law within the scope assigned to it, in accordance with what is now being recognised in Article I-6 of the Treaty. Thus, there is no contradiction between Article I-6 and Article 9(1) of the Spanish Constitution.

Yet, the Court's majority must have appreciated that this analysis is somewhat inconclusive. In fact, the reasoning of the Court does not explain what is to happen if the European institutions enact a European law that exceeds the scope of the powers assigned to them by the member states and, more importantly, who is to decide whether or not those powers have been exceeded. Despite the guarantees the Court read in the European Constitution that European law would necessarily comply with the Spanish Constitution, the Court made one final reservation for itself:

In the event, which is difficult to conceive, that in the later dynamics of the Law of the European Union this law should end up being irreconcilable with the



Spanish Constitution, and assuming that the hypothetical excesses of European Law with regard to the European Constitution itself were not remedied by the ordinary procedures foreseen in it, the conservation of the Spanish people's sovereignty and the supremacy of the Constitution that this people has given to itself could, in last instance, trigger this Court to consider the problems, inexistent from the current perspective, which may arise in such event through the pertinent constitutional procedures, notwithstanding the fact that the safeguard of the sovereignty at stake could always eventually be secured through Article I-60 of the Treaty, the real counterpoint of its Article I-6, and which allows to define the true boundary of the primacy proclaimed in this Article, incapable of barring the exercise of a withdrawal, which is reserved to the sovereign, supreme will of the member States.

Thus, the Court accepted the primacy of the European law and it trusts that the correct application of the European Constitution will ensure that the making and application of European law will also comply with the basic principles and limits set by the Spanish Constitution. But the *Tribunal Constitucional* did not want to rule out that, under special circumstances and notwithstanding other international remedies, it may intervene if the European institutions do not effectively repair the excesses of European law.

c) *The constitutionality of the Charter of fundamental rights*

The Court then turned to the second question: is there a contradiction between the Articles II-111 and II-112 of the Treaty with the Spanish Constitution and especially its Article 10(2)? Actually, the government did not really see a contradiction, but rather asked the Court for an elucidation of the way the Charter would fit into the Spanish legal order in relation to the Spanish Constitution and the European Convention on Human Rights.

In its *fundamento jurídico* 6, and not very surprisingly, the Court agreed that there is no contradiction between the European and the Spanish Constitution. The Court found that the European Constitution actually reduces the existing complexity. Under Article 10(2) of the Spanish Constitution, Spanish courts have always had the duty of interpreting Spanish fundamental rights in accordance with the European Convention and the case-law of the European Court of Human Rights. The fact that Article II-112(3) of the European Constitution expressly states that the fundamental rights in the Charter must be interpreted in accordance with the equivalent fundamental rights in the European Convention and the provision in Article I-9(2), that the European Union shall accede to the European Convention, will simplify the existing system. Yet, the Court subtly noted that 'it is completely clear that the application by the national court, as

European court, of the fundamental rights of the charter will have to imply, almost without exception, the simultaneous application of the correlative national fundamental right ...'.

The Court did not say what should happen if a fundamental right in the Spanish Constitution has no equivalent in the Charter and application of European law would entail a breach of that Spanish fundamental right. The Court noted that the exact application of the overall system of protection of fundamental rights would have to be done on a case-by-case basis, in accordance with the constitutional procedures before the *Tribunal Constitucional*. But also in this context, the Court quoted, for the second time, Article II-113 of the European Constitution, which provides that nothing in the Charter may be interpreted 'as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of 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'. According to the Court, this provision clearly shows that the Charter is conceived, in any event, as a minimum guarantee, on top of which the contents of each right and freedom can be expanded to include all of the rights and freedoms secured by the internal law.

#### d) *Final remarks and declaration*

In its final remarks, in *fundamentos jurídicos* 7 and 8, the Court observed that the third and fourth questions needed no further answering, in light of the Court's reasoning. In consequence, the Court declared that there is no contradiction between Articles I-6, II-111 and II-112 of the European Constitution and the Spanish Constitution, that Article 93 of the Spanish Constitution provides the State with sufficient power to ratify the Treaty and that there is thus no cause for a declaration on the fourth question asked by the government, on how the constitution should be modified.

#### FINAL NOTE

If we summarise the *Tribunal Constitucional's* reasoning, the rationale seems to be the following. The European Constitution claims the primacy of its law over all internal law, including constitutional provisions. This is not as such unconstitutional, because such primacy follows from the constitutionally consented transfer of the exercise of domestic constitutional powers to international institutions, such as the European Union. The European Constitution guarantees the basic principles of democracy, the rule of law and the respect for fundamental rights

and liberties as the Spanish Constitution does, whilst it also guarantees the identity and basic structures of the state. In view thereof, there is no reason to assume that the declared primacy of European law over Spanish law, whatever its nature, is unconstitutional on an abstract level.

This declaration of the constitutionality of Article I-6 *in abstracto* can obviously not in itself assure that each and every rule of European law made and confirmed under the European Constitution will be in accordance with the Spanish Constitution. It is not entirely clear whether or not the majority of the Constitutional Court will accept some deviation under European law from the Spanish Constitution, for instance as long as such deviation does not breach the aforementioned basic principles of the Constitution. It seems that the majority does not wish to answer this question directly.

The dissenting justices assumed that the majority's holding does allow such deviation, seeing a clear breach with the Court's case-law (e.g., STC 58/2004, 19 April, *fundamento jurídico* 11) in which the Court seemed to reject any primacy of European law over the Constitution. For if such deviation, however insignificant, is allowed, the inevitable consequence would be that the Spanish Constitution could be amended *de facto*, a consequence that is not foreseen, let alone justified, in Article 93 of the Spanish Constitution. The dissenters' plea for amending Article 93, expanding the powers of the Spanish treaty-making power so that the primacy of European law could be guaranteed in Spain, even if it should be in contradiction with the Spanish Constitution, is appealing. It would definitely take away uncertainties, at least to a large extent, about the potential unconstitutionality of particular European laws. However, it appears that the majority is comfortable with the idea that the Constitutional Court – and thus the Spanish state – controls the emergency brake.

The assertion of one of the dissenters, don Roberto García-Calvo y Montiel, that the ratification of the Treaty without prior amendment of the Spanish Constitution would reduce the Spanish Constitution to a paper tiger [*'papel mojado'*], 'a rag that can be waved any time we find it convenient, but that should not be taken too seriously', may seem an overstatement. Yet, the metaphor is appealing and not far beyond the point. For even if one assumes that the threat that European law could be declared unconstitutional in Spain will not be too serious from a legal perspective, it may still be a very serious threat under specific political and international circumstances. And, frankly, it seems that this is what the Constitutional Court had tried to make clear in its judgment. Rather than interpreting the Spanish Constitution, the Court had settled its own interpretation of the European Constitution. In that interpretation, the European Constitution remains an international instrument that, despite its confederate and federal features (if any), is not forcing Spain, or any other member state, to irrevocably and irremediably

hand over its sovereign powers to the European Union. Spain stays in control of the legal order applicable in Spain. The *Tribunal Constitucional* thereby declared that the big fish Europe is not devouring the little fish Spain, but that it is still the Spanish Constitution that, under its own conditions, allows the flexible accommodation of the European legal order within the Spanish legal order. The question therefore remains: will the jaws of the Spanish legal order be big and strong enough to prevent the European legal order from escaping from its grip and eventually swallowing the Spanish legal order? To be continued.

