The Spanish Constitution and International Law

Dr. Antonio Remiro Brotóns
Professor of Public International Law and International Relations
Universidad Autónoma de Madrid

The 1978[1] Spanish Constitution, like so many others, fails to provide a full, balanced and ordered response to the demands of the foreign action of the State on the constitutional level. What it does offer is a set of precepts and references some of which are scattered about in an unrelated manner.[2]

The aim of this paper is to first of all examine two issues that have been overlooked or dealt with only superficially by the Constitution: the principles of International Law that should govern the foreign action of the State (1) and how the general regulations of International Law fit into the domestic legal system (2). Once having looked at those two issues, I will move on to study the treaty regime (3) and finish

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[1] On the study of international issues concerning the 1978 Constitution more information may be obtained from my commentary of Title III, Chapter III (arts. 93–96) of the Constitution in *Comentarios a la Constitución española de 1978*, directed by O. Alzaga, Cortes Generales/Editoriales de Derecho Reunidas, Madrid, 1998, v. VII, pp. 491–651, and bibliography cited therein.

[2] A vague reference is made to Spain's position in the world in the last paragraph of the Preamble. In the first article of Title I, the Universal Declaration and Human Rights treaties are offered as criteria for the interpretation of constitutional regulations with respect to citizens' rights and freedoms (art. 10.2). Further on mention is made that the treaties are a source of important obligations on issues of double nationality (art. 11.3), aliens (art. 13.1), extradition (art. 13.3), protection of children (art. 39.4) and, in more generic terms, emigration (art. 42). Title II asserts the representative character of the King in international relations (art. 56.1) and his authority is specified in the active and passive accreditation of diplomatic representatives, the conclusion of treaties, declaration of war and the signing of peace pacts (art. 63). Title III chapter 1 states, with unfortunate generality, that the approval of projects and draft laws on "international affairs" may not be delegated to standing legislative commissions (art. 75.3) and in the following chapter *popular initiative* is completely ruled out regarding affairs of "international character" (art. 87.3). That brings us to the third and last chapter of this Title entitled *On International Treaties*. Here regulations are set out for the participation of Parliament in the conclusion and denunciation of treaties, its responsibility (and that of the Government) in the fulfilment of some of them, a prohibition on concluding treaties bearing stipulations that go against the Constitution and the incorporation of conventional provisions into the internal legal order (arts. 93–96). Further on in Title IV it is prescribed that "the Government directs foreign . . . policy" (art. 97) and finally in Title VIII a provision is made for the exclusive competency (of the central organs) of the State in "international relations" (art. 149.1.3).

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with a reflection on the importance of *democratisation* and *internationalism* as fundamental guidelines of State action abroad (4).

1. THE PRINCIPLES OF INTERNATIONAL LAW THAT SHOULD GOVERN THE FOREIGN ACTION OF THE STATE

Should the fundamental principles of International Law be expressed *eo nomine* in the Constitution? There are a number of differing opinions on this issue because along with purely technical legal considerations there are others that are ideological and political in nature.

The Constitutional statement of the principles governing State action *in international affairs* does not make such principles any more compulsory in the international arena. Of course the constitutional reference facilitates the test of their acceptance but abstract statements feed ambiguities and contradictions, more concrete statements can hinder immediate adaptation to change in international order and omissions can give rise to *a contrario* arguments. Moreover, the role of the *defenders of the Constitution* remains undefined in terms of their insisting upon respect for these principles. Clearly the incorporation of these principles, fitting them into an explicit constitutional framework for foreign action, strengthens the possibility for parliamentary and judicial control by facilitating the denouncement of certain behaviours, not only as infractions of International Law, but also as infractions against the Constitution. But to satisfy this objective it would be enough to put into place a global and automatic incorporation of the general norms of International Law in the domestic legal system.

Technical considerations, however, are not everything. Confirmation (even pragmatic) of the guidelines and principles of the State's international behaviour are part of the moralisation and education process of public opinion contributing to the germination of a collective national awareness in solidarity with the international community. They provide, as José Luis Sampedro pointed out in the constitutional process, *mobilising leverage*.[3]

However this idea was very poorly expressed in the 1978 Constitution. The initiatives (tabled by the socialists and communists) to include a wide-ranging and open statement of the principles guiding international relations were dismissed without debate. The search for consensus led to the minimalist, adorned and inflated allusion in the seventh and last paragraph of the Preamble to the will of the Spanish Nation to "collaborate in the strengthening of peaceful relations and effective cooperation amongst all the peoples of the World". Words all but void of meaning.

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[3] See *DSS-C*, 14 September 1978, n. 55, p. 2779.

2. THE INCORPORATION OF THE GENERAL NORMS OF INTERNATIONAL LAW IN THE DOMESTIC LEGAL SYSTEM

It is suggested that the constitutions of western European countries, ill-inclined to the statement of guiding principles to govern State action abroad in the style of revolutionary, socialist and third world constitutionalism, have been better disposed to proclaiming the domestic effectiveness of the general norms of International Law starting with the flourishing of internationalism that took place at the end of the First World War with article 4 of the German Constitution of 1919, the Weimar Constitution as the first reference followed immediately by Austria[4] and thereafter by a growing number, although not a majority and momentarily at a standstill, of Constitutions the drafting of which has fluctuated between a desire to adorn the text and a real vocation to come up with a relatively operational precept. The majority call for the compulsory and automatic incorporation of General International Law[5] although at times the wording is vague or ambiguous.[6]

It is advisable for the Constitution to contain a precept calling for the *global, immediate and permanent* incorporation of general norms of International Law. A precept of this nature strengthens the psychological validity of such norms on the domestic level and serves as a tool to more effectively fight against interpretive manipulation – such as that which occurred in the 1930's in Germany and Austria – seeking to reduce it to the very modest status of a legislative policy guideline.

It would, however, be naive to imagine international norms as fully defined provisions waiting at the legal borders of the State to enter thanks to the services of a constitutional precept. The reality of the situation is more complex and we should be aware at all times of the nature, the creation and the scope of these norms, usually customary.

The existence and content of an international custom often gives rise to conflict between states that practice different *policies* about the norm, unilaterally presented as Law in force. Codifying treaties – where they exist – have a useful but incomplete role. At any rate, once located and defined, the question may still be raised as to whether the norm may be *opposed* to a particular state bearing in mind that, unless it is a case of *ius cogens*, general norms are not binding in the case of *persistent objectors*.

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[4] Art. 9 of the 1920 Constitution.

[5] See, for example, the Constitutions of the Federal Republic of Germany (1949, art. 25), Greece (1975, art. 28.1, making its application to foreigners subject to reciprocity) and Portugal (1976, art. 8.1).

[6] See, for example, the Constitutions of France (1958, preamble, paragraph 13, reproduction of 14, subsection 1 of the 1946 Constitution) or Italy (1947, art. 10.1).

Moreover, the *usus* or *practice*, the basis or material element of these norms, is comprised of acts the realisation of which is not reserved to the state's *external* agencies (Ministry of Foreign Affairs, diplomatic and consular agents . . .) nor are they necessarily or exclusively implemented in the field of international relations. Statutes, regulations, judicial and administrative decisions may all play a role in the formation of international norms and provide proof of their existence, the precision of their content and the demonstration of their opposability. It is, in fact, not uncommon for the legislator (or the government exercising its regulatory authority) to incorporate the material content of general international norms into laws and regulations with a view to facilitating awareness, increasing the degree of legal security and guaranteeing respect for such norms, thus freeing the judicial and administrative bodies from a tedious and sometimes complex personal inquiry. Think, for example, of immunity from jurisdiction or enforcement or the tax privileges of foreign states and their agents. The law and regulations (or in their absence or complementary to them, case law and administrative practice) become, in these cases, a sort of *authentic* state interpretation of international norms. When recognising or enforcing such norms, it is not clear as to what degree state bodies are forming, transforming the norms or preconstituting the test of their opposability to the State.

Whether called for by the Constitution or not, the availability of state bodies is good for the enforcement of international norms the existence and content of which are backed by a legal or regulatory provision or by a judicial precedent. But the legislator, like the judge and any other organ of the State, is not only vulnerable to *making a mistake*, he may also make an *anachronistic* interpretation. Upon invoking an international norm the content of which differs from the internal regulations or judicial precedents that, expressly or implicitly, are supposed to reflect such norm, what would be the stance taken by the state organs? I do not believe that in this case the constitutional provision for global, automatic and permanent reception to General International Law would be enough *in and of itself* to curb the natural tendency to stick to the law (or precedent) rather than venturing out to explore a relatively uncertain norm. Only the existence of an administrative or judicial (constitutional) oracle resolving such doubts could satisfy the inquiry.

And what would happen if international norms were incompatible with the rnles of the internal legal system? Few state legal systems are clear on this point and *practice*, reverently upholding the principle of legislative sovereignty and limitation of the authority of judges, does not tend to recognise the superiority of international norms and, when it does, its operability depends on the powers attributed to judicial organs.[7]

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[7] See, for example, the Constitutions of the Federal Republic of Germany (1949, art. 25) and Greece (1975, art. 28.1). Also in France, the Constitutional Council admits their jurisdiction to examine the compliance of laws with norms of General International Law (decision of 30 December 1975).

However, the conflict between international and domestic regulations must not be exaggerated. The simple presumption that the legislator does not intend to violate international law, consecrated by case law in a number of different countries, is normally enough to assure, by interpretive channels, respect for international norms. And when this presumption fails, the most probable consequence is that state organs seek a way out by refusing to recognise the existence, content or opposability of the norm invoked; i.e. by negating the very existence of a conflict regardless of how obvious it may be.

As concerns the history of Spanish law, only the Constitution of the Second Republic (1931) ruled, in its article 7, that the State would comply with "the universal norms of International Law, *incorporating them into its substantive law*" (emphasis added). This wording would literally suggest compulsory but not automatic reception; a legislative policy guideline rather than a real rule of law. According to the interpretation of doctrine, however, article 7 produced a direct and immediate reception of General International Law into Spanish law and all that was needed was recognition by the courts of the universality of the norm.[8]

The life of the Republican Constitution was too short to assess the effect that Article 7 had on judicial and administrative practice but its positive influence on the promotion of the *internationalist* attitude adopted at that time by the Supreme Court regarding the enforcement of foreign judicial decisions is proven by its renouncement of the reciprocity criteria as a cause for refusal.[9] However, both before and after the short-lived Republican period, both practice and jurisprudence ignored international norms. Judicial organs in particular never openly rejected them but did not apply them conscientiously in any case. The occasional *obiter dicta* (using inappropriate terminology and technique) in which allusions are made to General International Law[10] and the rare *material* applications of customary norms that the judge does not identify as such[11] are stifled by cases in which the courts take decisions based on internal provisions instead of resorting to the pertinent international regulations.[12]

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[8] This interpretation was in line with the text passed by Parliament which was based directly on article 4 of the Weimar Constitution, clumsily corrected by the style commission. V. Pérez Serrano, N., *La Constitución Española*, Madrid, 1932, pp. 74–75; De Luna, A., *Prólogo* a la Colección de Textos Internacionales by M. Raventós and I. De Oyarzabal, Madrid, 1936, p. XIX. *Against*, supporting an interpretation more in line with the literal sense of the precept, De Castro, F., "La Constitución española y el Derecho Internacional Privado", *RDP*, 1931, no. 222, p. 74.

[9] See Supreme Court Decision of 5 June 1934 (Remíro Brotóns, A., *Ejecución de sentencias extranjeras en España. La jurisprudencia del Tribunal Supremo*, Madrid, 1974, pp. 349–353).

[10] See Supreme Court judgements of 21 March 1935, 29 January, 25 March and 9 May 1974 (notes by González Campos, J. D., *REDI*, 1976, pp. 480–499) and 18 December of the same year (note by Villan, C., *lb.*, 1977, pp. 1477–151).

[11] See Supreme Court judgements of 16 December 1927, 4 May 1963 and 29 May 1964. V. Pastor Ridruejo, J. A., "Jurisprudencia española sobre cuestiones de Derecho Internacional Público", *REDI*, 1964, p. 415, and 1965, pp. 42–44.

[12] See Supreme Court judgements of 6 June 1932, 13 May 1944, 26 February and 4 May

Difficulties regarding evidence and documentation encourages judges (and state organs in general) to stick to domestic law – antiquated may it be – which is said to reflect the demands of international life or transpose international norms.

It was understandable that the *Fundamental Laws* of the Franco regime lacked a provision comparable to article 7 of the 1931 Constitution. It is not comprehensible, however, that those responsible for the 1978 Constitution let themselves be influenced by the same provincial and distrustful mentality. The proposals (socialist and communist) to include a provision accepting the general norms of International Law as an integral part of the Spanish legal system were rejected because the constitutional committee was of the view that "the content of these regulations lacks precision",[13] an argument that apparently eased all consciences.[14] In light of the lack of influence that the internationalist stance had, there prevailed a sense of fear regarding the uncertainty of General International Law, mistrust of judicial discretion and a lack of will and imagination to grant the Constitutional Court jurisdiction in this field. An omissive attitude, out of touch with political, legal and cultural developments and with the present time was imposed with general conformism.

Lacking a constitutional precept regulating whether General International Law forms part of the Spanish legal system directly or only once it is handled by the legislator, doctrine got to work so that in *practice* the omission would not be interpreted as a negation of automatic adaptation. Led by the best of intentions, some felt there was an implicit constitutional precept while others assumed a tacit admission of compliance with international norms. In my opinion the most convincing were those who arrived at this same conclusion by means of a *principle of coherence* regarding State activity, both in the international and in the domestic plane.[15]

Ignorance of international norms *as a whole*, however, did not keep the Constitution, almost by accident, from attributing relevance to *some* of them in two specific areas: the first being that of fundamental rights and freedoms recognised in the Constitution, the precepts of which must be interpreted (article 10.2), "in compliance with the Universal Declaration of Human Rights" of 1948, which includes a set of imperative international norms. The second has to do with the amendment, suspension and termination of treaties the provisions of which "may only be repealed, amended or suspended in the manner provided for in the treaty itself or *in accordance with the general norms of international law* (article 96.1) (emphasis added). This should guarantee (under the auspices of the Constitutional Court) the protection of international *ius cogens*, at least with respect to treaties to which Spain is a party.[16]

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1964 (notes by González Campos, J. D., *REDI*, 1965, pp. 416–421 and 557–558), 5 January 1965 (note by González Campos, J. D., *ib.*, 1966, pp. 550–559), 14 January 1966 and 9 May 1974 (note by González Campos, J. D., *ib.*, 1976, pp. 490–499).

[13] *BOCG-Congreso*, 17 April 1978, no. 82, p. 1524.

[14] Only Professor Ollero attempted to bring the subject up again in the Senate but in the end his amendment was not put to a vote (*DSS*, 22 August 1978, no. 41, pp. 1704–1707).

[15] See González Campos, J. D., Sánchez Rodríguez, L. I. and Andrés, P., *Curso de Derecho Internacional Público*, 8th ed., Civitas, Madrid, 2003, p. 267.

[16] See under heading 7.

3. THE CONCLUSION OF INTERNATIONAL TREATIES

The *formation* or *conclusion* of an international treaty goes through, at least from an analytical perspective, two differentiated phases. The first, the *initial* phase, includes the *negotiation* process which, if successful, will lead to the *adoption* and *authentication* of the agreed text. The *final* phase covers the *conclusion* process of the treaty in the strict sense, the two fundamental highlights of which are the *expression of consent on the part of the State* to be bound by such treaty and the *transmission* of that consent to the others.[17] Constitutions in general (the Spanish Constitution being no exception) put special emphasis on the *expression of consent* involving, in principle, the Head of State (article 63.2), subjecting it (at least in some cases) to the authorisation of Congress and the Senate (articles 93 and 94.1). They do not, in contrast, become involved in the rest of the acts of the formation or conclusion of treaties which is left up to ordinary legislation and lower ranking provisions.

3.1. The role played by the legislative bodies (tbe Cortes Generales–Parliament) in tbe conclusion of treaties

International Law calls on domestic law to regulate the process by which a State decides to manifest its consent to bind itself by means of a treaty. But as Lucius Wildhaber pointed out years ago, there is no representative democratic system in which legislative authority is not involved in one way or another in this process.[18]

Given that the submission of *all* treaties to parliamentary authorisation – proposed at the dawn of modern constitutionalism – is incompatible with the intensity of current international relations and only appears to be feasible in the case of States with very limited relations,[19] a selection must be made that can take the form of a *positive* list (defining the types of treaties that must be authorised by Parliament) or the less common form of a *negative* list (defining the types of treaties not requiring authorisation).

The 1978 Constitution has a *positive list* system based on *material* criteria in compliance with which parliamentary authorisation is only compulsory in the case of treaties that, in light of their content, are included under one of the categories described

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[17] See Remíro Brotóns, A., *Derecho Internacional Público. 2. Derecho de los Tratados* Tecnos. Madrid, 1987, pp. 69 *et. seq.*; Remíro Brotóns, A., with Riquelme, R., Diez-Hochleitner J. Orihuela, E. and Pérez-Prat, L., *Derecho Internacional*, McGraw-Hill, Madrid, 1997, pp. 201 *et. seq.*

[18] Wildhaber, L., *Treaty-making-power and the Constitutions*, Basilea-Stuttgart, 1971, p. 243.

[19] Many of the countries that went down this path in the past have abandoned it by changing their Constitution (Holland in 1953) or their practice (Switzerland where treaties dealing with subjects that domestically are under the jurisdiction of the Federal Council no longer have to pass through the Assembly, and the United States where an avalanche of executive agreements, under the exclusive authority of the President, broke the rigid and reinforced dam of the Senate, on all the *treaties* conceived by the fathers of the Constitution), to the point of having affirmed that now no one follows it (see Wildhaber, L., *Treaty-making-power . . ., cit.*, p. 72).

in articles 93 and 94.1. As for concluding other treaties, it is enough to simply provide Parliament with immediate information (art. 94.2).

3.2. Qualification of the treaty

Assessment is an operation present in all systems to the degree that an instrument must always be identified as a *treaty*. In a *list* system, however, the qualification operation must follow its course because it is necessary to determine whether the treaty coincides with one or more of the types for which parliamentary authorisation is required (*positive* list) or not required (*negative* list). The operation will still need to be further completed in the event that authorisation systems vary according to the types of treaties. Therefore as concerns the 1978 Constitution, categorising a treaty under the article 93 type or under one of the types set out in successive paragraphs under article 94.1 is relevant because its treatment would be different in these two cases.[20] Finally, in all cases, the treaty must comply with the Constitution.

If qualification is the key element of the system, who should be responsible? In the hands of the Government wouldn't there be a risk of evading constitutional precepts by means of a convenient qualification? How should parliamentary control be organised? Should allowances be made for a judicial remedy in the case of conflict between the executive and legislative branches?

The first thing that should be mentioned is that the attribution of qualifying competence varies from one stage to another in the qualification process. The first of these stages (identifying an agreement as a *treaty*) can only be governmental. It goes without saying that the agreements not assessed as *treaties* are outside of the legal controls set out in chapter III of Title III of the 1978 Constitution and it is the government that decides on the nature of its commitment and even, under certain circumstances, the legal system in which its obligations are to be found.[21] It would, of course, be difficult to show that the government did not have the intention of assuming international legal obligations in a document entitled *treaty*, but in general the heading or denomination given is only an indication to identify that intention. A *communiqué* or even a *memorandum of understanding* could include a treaty but this would be more difficult to prove if one of the parties rejected it. Moreover, the government has an advantage in the sense that the criticisms it could receive for failing to comply with its constitutional duties with respect to *treaties* become evidence for the defence to the degree in which its behaviour, *bona fide*, supports its intention of situating itself on the periphery of *political* agreements.

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[20] It is not, however, important to identify the paragraph of article 94.I that is applicable because the process is the same for all. In fact in practice a simple reference to art. 94.I *in toto* is made (which makes things easier given the juxtaposition of the types and the habitual assignment of treaties to several of them).

[21] A state also concludes contracts subject to domestic legal regulations and may do so with other States and subjects of International Law. See Remíro Brotóns, A. *et al., Derecho Internacional, cit.*, pp. 184–186.

As part of the *informalisation* process of international relations characterising developments taking place over the last several years, the statistical explosion of agreements the legal nature of which is *uncertain* should come as no surprise. Legal experts may be uneasy but politicians and high ranking officials are happy with the rediscovery of a freedom of action which the establishment of democratic controls had been eroding. However, although *political* agreements contribute to the Administration's evasion of the controls that domestic law imposes upon it in the formation of treaties, they should not be delegitimised as instruments of foreign action the conduction of which is precisely the responsibility of governments (art. 97 of the Constitution).

In the event that the agreement is a treaty, its qualification in order to its parliamentary procedure continues to be, at least provisionally, governmental. Article 94 of the Constitution explicitly recognises this fact in stating in number 1 the types of treaties requiring the authorisation of Parliament and in number 2 that Parliament shall be immediately informed (by the government) of the *conclusion of all other treaties*.

If Parliament were in charge of the qualification of the treaties this would not only make it impossible to conclude agreements in *simplified form*,[22] hindering the flexibility of international relations but would also be in opposition to a *list* system.

The practice of the government, especially during the early years and despite having highly qualified consultation bodies (such as the International Legal Advisor of the Foreign Affairs Ministry and the Council of State) was erratic: some treaties were sent to the Parliament for authorisation or information while other similar ones were not. Fortunately the government's competence to assess a treaty does not mean that its decision will not be subject to scrutiny. Parliament itself as well as the Constitutional Court have the authority to verify governmental qualification of treaties.

As for Parliament, if the government decides to subject the conclusion of a treaty to parliamentary authorisation nothing stands in the way of Parliament's amending the governmental qualification of such treaty concerning the procedure – via article 93 or 94 – to follow. The debate on the authorisation for the accession of Spain to the *Atlantic Alliance* was the first time that parliamentary groups in the opposition (*Andalucista*, Socialist, Basque) tried to combat it with proposals for proceedings in accordance with article 93, and not 94.1 as the government claimed. The proposals were not upheld but no one argued against the grounds to make them. An executive ill-disposed to accept a new qualification by Parliament would probably have no other choice than to withdraw the treaty from parliamentary proceedings unless it were ready to raise a conflict of attributions filed before the Constitutional Court (arts. 59.3 and 73–75 *LOTC*).

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[22] See Remíro Brotóns, A., *Derecho Internacional Público. 2. Derecho de los Tratados, cit.*, pp. 69–70.

In the event that Parliament became aware of a treaty when informed of its conclusion in accordance with article 94.2 of the Constitution[23] or discovers this fact by some other means,[24] what recourse would it have in legal terms if it is felt that the conclusion of the treaty should have had its authorisation?

A situation of this nature arose when the Chamber of Congress Bureau disagreed with the government which, with the backing of the Council of State, considered that certain cooperation and technical assistance conventions and agreements involving expenses did not fall into the category covered by article 94.1, *d*, of the Constitution (treaties or conventions implying financial obligations for the Public Treasury) and therefore simply informed Parliament of their conclusion. The Chamber of Congress Bureau, under article 31 of its Rules, decided to reassess a whole series of treaties and proceed to approval or validation of their conclusion *a posteriori*.[25] The government did not object to this process, no doubt motivated by pragmatism: avoid conflicts with the legislative branch as long as the latter limited itself to demanding its privilege without creating internationally embarrassing situations. On occasion, treaty approval that the government considered under article 94.2 has been proposed for approval by Congress to make sure that the Chamber would not call for a revision of the qualification.

Naturally it is desirable that the government and parliament reach a sufficient degree of consensus on the meaning and scope of the types envisaged in articles 93 and 94.1 of the Constitution so as to avoid qualification conflicts but governmental surrender of its qualifying authority is taking things too far; if it ended up becoming a constitutional custom it would undermine the *list* system. If Parliament disagrees with the qualification of a treaty under article 94.2, an argument could be made for turning to the Constitutional Court and filing an application of unconstitutionality against the treaty, a possibility available even to minority groups in parliament (fifty deputies or fifty senators). The risk of a treaty's conclusion being declared unconstitutional from an extrinsic or formal viewpoint is always present although it is reassuring to know that statistically constitutional courts are not predisposed to making such declarations.

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[23] See under heading 3.7.

[24] This is what happened, for example, in 1980 when a question from a member of Parliament, M. V. Fernández España, led to the *discovery* of the Agreement with the Holy See concerning the renouncement of Spain's historic rights at Holy Sites the conclusion of which had not been subject to parliamentary approval despite the existence of arguments indicating that it should have been (*BOCG-Congreso*, Serie F, 1.073–I, 17 September 1980). The government's response was absolutely unconvincing (*ib.*, 5 November 1980).

[25] The practice of qualification began during the II legislative period with twenty-five cases. During the III legislative period, thirty-six qualifications were done. Subsequently their numbers began to diminish (eleven in the IV and four in the V) and practically disappeared by the VI legislative period.

3.3. Nature and scope of parliamentary intervention

The participation of Parliament in the conclusion of treaties leads to the granting (or not) of an *authorisation* of the validity of the expression of the consent to be bound, internationally relevant from a constitutional perspective, and not a mere requirement for its international entry into force or its domestic enforceability.

Parliamentary intervention is binding in only one sense. Parliament has the right to veto the conclusion of treaties described in articles 93 and 94.1 of the Constitution but once having obtained authorisation, the declaration of consent is up to the government. The fact that normally, subsequent to parliamentary authorisation, treaties are effectively concluded is the result of the practice of undergoing parliamentary proceedings only after the Council of Ministers has taken the decision to proceed to conclusion. The authorisation – a green light – is a permit and not a mandate for passage but it must be assumed that a person sitting at the wheel of his automobile with the motor idling at a traffic light is going to continue on his way once this traffic control mechanism allows.[26]

Although it is implicit in the principal meaning of the term that *authorisation* must be prior to granting consent, article 94.1 spells it out clearly.[27] The authorisation stage is also (except in cases of *early* authorisation) after the authentication of the text of the treaty meaning that Parliament may not exert its role by means of introducing amendments to the text and must either accept or reject it without modifying it.[28] The passing of an amendment, even if it were possible according to rules, would be equivalent to calling for a partial or total renegotiation of the treaty.[29]

Special protection of the *conventional block* does not extend to *reservations* not prohibited by the treaty[30] nor to interpretative statements because, in contrast to

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[26] Decree 801/1972 focuses on this situation (arts. 18.2, 21.2, 24.2 and 27.2): once authorisation is granted, the Ministry of Foreign Affairs prepares the instruments of ratification or accession and processes them without any further intervention on the part of the government.

[27] Acts of *a posteriori* authorisation are a form of sanction normally linked to re-qualification by the Chamber of Congress Bureau of treaties the conclusion of which has been communicated by the government in compliance with article 94.2 of the Constitution. See above heading 3.2.

[28] In comparative constitutional law it is unusual for Parliament to be granted jurisdiction to introduce amendments. This is the case of the United States Senate unless the fast track proceeding is applied to a request made by tormented Presidents who are unable to squeeze their commitments into an executive agreement and see no other way to close a treaty concerning which each one of the senators has his or her own agenda based on the state interests they represent or sectors to which they are sensitive.

[29] Refusal to grant the right to introduce amendments in treaties should not be confused with the right to amend paragraphs or articles of the act (whether it is a law or not) of authorisation which is always possible as long as it does not interfere with agreed obligations.

[30] Article 2.1, *d*, of the Vienna Convention on the Law of Treaties of 23 May 1969; also see art. 2, g, of Decree 801/1072 of 24 March. See Remíro Brotóns, A., *Derecho Internacional Público. 2. Derecho de los Tratados, cit.*, pp. 206 *et. seq.*

conventional clauses, they are unilateral acts of the State that are formalised in the international system at the end of the procedure of conclusion of the treaty thus making broader participation of the legislative branch possible (and recommendable within the framework of a democratic conception of foreign policy).[31] This is even more true of the *political* motions and declarations annexed to the act of authorisation. The practice and parliamentary Rules support this point of view.

Authorisation compromises the text of the treaty and all accompanying instruments brought to the attention of Parliament. The problem arises in determining whether the authorisation also covers subsequent agreements interpreting, developing, enforcing, extending, renewing or amending the original treaty. Bear in mind the growing wave of framework-agreements and the increasingly more frequent formation of joint committees to monitor treaties which can delete, add, amend or interpret the text, annexes or protocols, oversee the exchange of diplomatic notes or empower administrative authorities with the same objective of tailoring treaties to a changing reality . . .

Those supporting the inclusion of these *administrative agreements* in the authorisation granted at the conclusion of the treaty will argue that they are not really anything new but rather are mechanisms the purpose of which is to complement and revise and they may also have an instrumental or accessory nature.[32] Others, however, fear that this would facilitate a governmental practice with no control and therefore they propose to subject each agreement to the process required on its own merit excusing authorisation (if compulsory in compliance with the type of the agreement) only in the event that Parliament had made such arrangements upon authorising the conclusion of the treaty in question (an example of *early* authorisation).

The regime goveruing certain unilateral acts linked to a treaty are subject to the same criteria[33] but practice is not absolutely uniform in this sense. For example, it was the government's understanding that authority to accept the jurisdiction of the International Court of Justice by means of a declaration under article 36.2 of its statute allowed it to act without the authorisation of Parliament and this it did in 1990. If at some time in the future a reform were carried out on the United Nations Charter it would not seem that the provision (article 108) for entry into force for all members when two thirds had ratified it (including the permanent members of the Security Council) in accordance with their respective constitutional procedures would permit

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[31] See Remíro Brotóns, A., "Las reservas a los tratados internacionales y la competencia de las Cámaras legislativas", *REDI*, 1978–1979, pp. 65–86; Riquelme, R., "La tramitación de los tratados internacionales y el Reglamento del Congreso de los Diputados de 1982, *REDI*, 1982, pp. 425–429.

[32] In this sense the 1994 Dutch Law on the approval and enactment of treaties (article 7.1) excludes from parliamentary authorisation those agreements the purpose of which is to change the annexes of a treaty unless the *General States* had arranged for something different in the act of approval of the conclusion of the treaty.

[33] In this sense see the ruling of the Permanent Commission of the Council of State no. 53.158, of 18 May 1989.

the Spanish government to sit by with its arms crossed until this had come about and much less to cooperate in the success of the amendment with an expression of consent without the authorisation of Parliament.

3.4. Formation and formalisation of the will of Parliament

The treaty authorisation system under article 93 has some nonsensical elements resulting from the commission that tried to harmonise the constitutional projects of the Congress and Senate. The most notorious is the way in which an eventual discrepancy between the two houses of Parliament would be dealt with in the concession of the requested authorisation. With the will of Congress prevailing, it would have been logical to expect its confirmation to require a reinforced majority. Instead of that, however, article 90 literally permits a simple majority of congressional deputies to authorise the conclusion of a treaty opposed by the absolute majority of senators two months and one day after the veto in the senate. It is understandable that in light of a regulation that is half absurd and half perverse, the Rules of the Congress made a discrete *correction* of the Constitution requiring *at least* the vote of the absolute majority of the deputies of that house (art. 132).

Moreover, the *mildness* of the system in place for the conclusion of these treaties is surprising; and even more so if compared with that of other European countries.[34] In one of its drafts the constitutional committee adopted a majority of three fifths of the total number of congressional deputies,[35] majority required today for the reform of the Constitution (art. 167), and it was a mistake to reject it. The requirement of a qualified parliamentary majority and alternatively or subsidiarily the approval of the citizens called on to vote, are objective barriers to the conclusion of these treaties but this is an advantage because the repercussions and practical irreversibility of

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[34] The Swedish *Governing Instrument* (1974, ch. X, art. 5) states that the decision must be adopted in the way established for the elaboration of the Fundamental Laws and, if possible, by a majority of five sixths of those present and voting equivalent to three fourths of the total number of members of the *Riksdag* (in the case of the transfer of jurisdiction directly attributed by the Constitution to the Parliament or to another specifically mentioned body), or by a majority of three fourths of those present and voting (in the case of the transfer of other judicial and administrative functions). The Danish Constitution (1953, art. 20.2) requires a majority of five sixths of the members of the *Folketing* or, if that majority is not attained, the majority necessary for the adoption of ordinary draft laws and approval by referendum. In this case for the *NOs* to prosper they must have a majority of at least 30% of the electors (art. 42). The Norwegian Constitution (art. 93) calls for a majority of three fourths based on a *quorum* of voters of two thirds of the members of the *Storting* which is the quorum required for constitutional reform. The Dutch Constitution (arts. 63 and 67) calls for two thirds of the votes cast in both houses which is the majority required for Constitutional amendment. The Luxembourg Constitution (arts. 37, paragraph 2 and 114 last paragraph) follows the same two thirds rule. And finally, the 1975 Greek Constitution (art. 28.2) requires a majority of three fifths of the total number of deputies.

[35] Draft of 30 August 1977, art. 7.3.

treaties of this nature call for their conclusion to have the broadest possible political and social backing.

Having said this, the requirement of an *organic law* to authorise the conclusion of treaties under article 93 would have made sense when the Constitution provided that the conclusion of other types of treaties (art. 94.1) required the approval of an ordinary law or at least going through the corresponding process. Within this framework its purpose was clear: make the conditions for approving treaties considered of greater importance more rigorous. This approach, more or less wise but at least coherent crumbled when an *ad hoc* procedure was passed for the authorisation of treaties under article 94.1. Having severed the relation between them, the authorisation regime under article 93 is not *reinforced* but simply *different* from that applicable to treaties under article 94.1.

Indeed, article 74.2 of the Constitution offers the Senate more decorous participation in the processing of treaties under article 94.1 than that offered by article 90 in the processing of treaties under article 93. Without the majority of the senators present in favour, treaties under article 94.1 cannot pass this stage. On the other hand, this majority may not be enough (if absolute majority is not reached) to veto one of the treaties under article 93. The discrepancy between the two houses of Parliament leads, in the first case, to a peer Joint Committee the mission of which is to come to an agreement. The second case lacks channels of composition and remedy. When a compromise is impossible, the predominance of Congress implies, in the case of treaties under article 94.1, raising the threshold of the required majority which does not happen in the case of treaties under article 93. All things considered, the authorisation of treaties under article 94.1 may end up needing, *at the end* of the process, that absolute majority of Congress which is required *from the start* with treaties under article 93, without mentioning the greater guarantees in terms of reflection and control that the rules set out in article 74.2 offer in the processing of treaties under article 94.1.

On this basis it is not worthwhile to demand the extension of the article 93 treaty regime to some of the article 94.1 types of treaties but this does not stand in the way of proposing that some of the latter should be subject to stricter rules. This is the case of treaties "affecting the territorial integrity of the State or the fundamental rights and duties established under Title I (of the Constitution)" (art. 94.1, *c*). How could one overlook the *imbalance* caused by requiring *organic laws* for the development of fundamental rights and public freedoms (art. 81.1) in the domestic legal system or the alteration of provincial limits (art. 141.1) and the possibility of proceeding without such laws in the conclusion of treaties affecting these very subjects?[36]

Particularly, the constitutional typification of treaties that affect the integrity of State territory should give rise to differentiated treatment, especially when it affects

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[36] In the constitutional process an amendment was tabled (no. 697) by the Communist Group to extend the regime established for treaties under article 93 to treaties affecting the territory but it was dismissed by the Constitutional Committee.

inhabited areas (and eventually the fundamental rights of the population). Constitutional law offered ideas in three directions: *a)* more demanding requirements in the formation of parliamentary will;[37] *b)* participation of the representative institutions of the affected communities;[38] and *c)* direct consultation of the population.[39] A proposal both late and ill-conceived was made in this sense.[40]

However, to the degree that the Constitution itself rules (art. 147.2, *b*) that the Statutes of Autonomy should contain the territorial boundaries of the Autonomous Communities, the question could be posed as to whether and to what degree the statutory crystalisation of the autonomous territory bears an influence on the regime of treaties affecting the territorial integrity of the State (art. 94.1, *c*). It could therefore be suggested that the territory of an autonomous community next to a foreign country or subject to claims by other States is constitutionally untouchable unless its Statute is reformed, which implies the reinforced participation of the representative bodies of the community and the population itself.

3.5. Measures to speed up the process

Speeding up the parliamentary processing of treaties so as to benefit the very dynamics of government action should involve measures compatible with the control of the Parliament. Of these measures, special mention should be made of the *tacit* authorisation (conceived by the Dutch Constitution, 1953, art. 61) which considers authorisation to be granted for the lapse of time from the deposit of the treaty at the houses of Parliament without a request for debate or the tabling of proposals for rejection, postponement or reservation.

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[37] See, for example, the Greek Constitution (art. 27.1) which makes any modification of borders subject to the approval of a law by absolute majority of the deputies.

[38] See, for example, the Austrian Constitution (art. 3.2) ruling that modifications of federal territory entailing at the same time the modification of a regional territory may only be carried out, except in the case of peace treaties, by means of constitutional laws agreed to by the Federation and the *Land* whose territory is to be altered.

[39] See, for example, the French Constitution (1946, art. 27; 1958, art. 53, last paragraph) ruling that no cession, exchange or granting of land shall be valid without the consent of the populations therein.

[40] A year and a half after the enactment of the Constitution a draft law was tabled by the *Grupo Andalucista* (*BOCG-Congreso*, series B, 11 July 1980, no. 99–1) which deployed an array of treaties ("that imply the integration of Spain in permanent institutionalised political or military alliances" which "entail the cession of military installations or the building of strategic bases" or that "affect the full sovereignty or territorial integrity of Spain") the conclusion of which would require an authorisation by a majority of two thirds of the votes in both houses and a popular referendum. The proposition (a tactical arm in the parliamentary battle against Spain's accession to the North Atlantic Treaty) included, without much care, the pretension of reforming the Constitution by means of ordinary legislation. Its consideration was rejected by a margin of 128 votes in favour, 158 against and 2 abstentions (*DSS-C*, Plenary, 10 March 1981), a surprisingly close vote considering the technical disarray of the proposal.

The 1978 Spanish Constitution has not heeded this sort of concern, however, and has even stood in the way of resolving these difficulties through parliamentary Rules. An example is article 75.3, based on article 72.4 of the Italian Constitution of 1947, which excludes the possibility of delegation in standing legislative commissions of the approval of laws regarding *international issues*. However, taking advantage of the fact that the prohibition refers to *laws*, it could be suggested that only the treaties under article 93, the conclusion of which must be authorised by *organic law*, must pass through the Plenary (which is very reasonable). Delegation in commissions or the implementation of measures such as *tacit* authorisation should be possible with respect to article 94.1 treaties (the authorisation of which is not linked to any *laws*).

While debating the draft Rules of the Congress which entered into force in 1982, an opportunity was missed, due to a lack of reflection, to incorporate this sort of authorisation into Spanish law.[41] However some specific measures are in place to move the process along as quickly as possible (besides measures taken from the legislative procedure).[42] Thus, the provision calling on the government to table its request within 90, and in exceptional cases 180, days following the decision taken by the Council of Ministers (art. 155.3), is complemented by the order calling on Congress to take its decision within a period of 60 days (art. 155.4). Naturally, the question is knowing whether the mandate is complied with and if it is not, what the consequences should be.[43]

3.6. Provisional application of treaties the conclusion of which must be authorised by Parliament

There are constitutions which, in *exceptional and urgent* cases permit the government, in the *supreme interest* of the State, to conclude treaties that in principle require

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[41] The spokesman from the *UCD*, the party in government at that time, Miguel Herrero R. de Miñón, proposed *in voce* in the Commission a provision according to which authorisation would be assumed as granted for the conclusion of one of the treaties under art. 94.1 in the event that, subsequent to government request, 60 days passed without an answer from Congress. The spokespersons from the Socialist party (Sotillo) and the Communist party (Solé Tura) claimed that the proposal contradicted arts. 94.1 and 74.2 of the Constitution. The objection was not very convincing (the former calls for parliamentary authorisation for a series of treaties and the second alludes to the majorities needed to support it without getting into the way how this should take place),but the proposal was postponed and, two weeks later, dismissed.

[42] The *urgency* procedure, allowing time limits to be reduced by fifty percent, has been applied with increasing frequency (once during the I legislative period, eleven times in the II, seven times in the III, thirty-seven times in the IV, forty-nine times in the V and thirty times (up to 13 June 1997) in the VI. Moreover, as of the II legislative period the *single reading* was applied for the processing of treaties (twenty-four in the legislative period mentioned, seven in the III, ten in the IV and one in the V).

[43] If the government must reinitiate the process, that would be equivalent to a tacit refusal (although not definitive) and would be contradictory to the objectives of the Rules. Logic encourages the affirmation of tacit authorisation in these cases.

parliamentary authorisation without said authorisation.[44] Others allow for the conclusion of treaties for limited periods of time thus excusing them from authorisation.[45] Neither of these two formulas, however, has been written into the Spanish Constitution to give flexibility to the intervention of the Parliament in cases in which urgency takes precedence over direct parliamentary control. The possibility of the Government resorting to a decree-law to take the place of parliamentary authorisation should specifically be rejected.

What does seem constitutionally possible is the total or partial *provisional application* of a treaty pending its entry into force, permitting a negotiating State to unilaterally end this situation by notifying the other States of its intention not to become a party to the treaty.[46] It is worth mentioning that this practice originated first in countries where *all* treaties – with some few exceptions (*negative list*) – require parliamentary authorisation for conclusion.[47]

The 1978 Constitution makes no mention of *provisional application* but there is nothing to prevent it and practice both before and after shows that it has been used without any dire consequences.[48] It has even been used in a relaxed way: cases in which there is no urgency but time had run out due to the idleness or poor planning on the part of the government; obligations that – due to their very nature – run out before the Parliament has the opportunity to state its opinion, transforming subsequent authorisation into a nonsense; treaties whose provisional application is prolonged indefinitely without ever initiating the parliamentary process.

Recourse to *provisional application* should be strictly limited in order to avoid abuse and deviation. In this sense the following considerations should be made: 1) provisional application is an exceptional instrument that should be used only in cases of extraordinary and urgent need; 2) if, in the domestic legal system, there are subjects under similar circumstances concerning which the government is not permitted to act via decree-law, this same motive should be used to reject the provisional application of treaties dealing with these subjects; 3) obligations whose enforcement gives

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[44] See, for example, the Swedish Constitution (ch. X, art. 2) that requires, in all cases, consultation of the Foreign Affairs Consultative Council.

[45] See, for example, the Dutch Constitution (art. 62, *c*).

[46] Art. 25 of the Vienna Convention on the Law of Treaties of 23 May 1969. See Remíro Brotóns, A., *Derecho Internacional Público. 2. Derecho de los Tratados, cit.*, pp. 248 *et. seq.*

[47] Holland, for example, Constitution of 1953 (art. 62, *d*).

[48] Decree 801/1972 of 24 March alluded to provisional application, without regulating it, taking its permissiveness for granted (arts. 20.2 and 30). See Andrés, P., "La aplicación provisional de los tratados internacionales en el Derecho español", *REDI*, 1982, pp. 31–78. During the two first legislative periods of the 1978 Constitution the provisional application of treaties was not included in the information transmitted by the Government to Parliament at the commencement of the parliamentary procedure for its conclusion. In the III legislative period, according to data available, provisional application was applied to five treaties, during the IV to forty-five, during the V to twenty-eight, and during the VI (up to 13 June 1997) to twenty-five.

rise to practically irreversible situations should also be excluded from the scope of provisional application; 4) very careful attention must be paid to the provisional application of treaties that entail an erosion of citizens' rights granted through former treaties; 5) once provisional application has been agreed, the treaty should be *immediately* forwarded to Congress to commence the process of authorisation without delay; 6) a time limit should be established for provisional application; 7) the transposition in the domestic legal system of the clauses provisionally applied and their prevalence or not over legal provisions could be the subject of specific rules; and 8) if parliamentary authorisation is turned down, the government must immediately notify the other States of its intention not to become a party to the treaty, terminating provisional application at this very moment.

3.7. Treaties which can be stipulated without parliamentary intervention

Treaties which are not of the type described in arts. 93 and 94.1 of the Constitution may be concluded without parliamentary authorisation with the prior agreement of the Council of Ministers.[49] The number of treaties in question depends upon the strictness with which said types are interpreted. Art. 94.2 obliges the government to immediately inform Congress and the Senate of the conclusion of these treaties. During the first two legislative periods there were more treaties sent to Parliament on an informative basis than for authorisation[50] but as of the III these numbers were inverted.[51]

Art. 94.2 has given constitutional rank to a practice dating back to the 19th century but does not specify the term within which the obligation must be fulfilled[52] and it is surprising that the parliamentary Rules have been used to establish time limits applicable to treaties subject to authorisation but not to treaties sent to Parliament on an informative basis despite the fact that there is a greater need to establish a time limit in this second case. Article 94.2 does, however, use the adverb *immediately* leaving the government no excuse for delay. The information must be provided as soon as the treaty is concluded and this is not the case if it is not sent to the Parliament until it is published in the *Official State Gazette* (Spanish initials *BOE*).

The fact that a treaty has been concluded is the first item of information due and from a restrictive reading of art. 94.2 it could even be deduced that it is the only information which the government is under obligation to communicate. It would,

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[49] This last observation is not stated in the Constitution (see, in contrast, the Portuguese Constitutions of 1976, art. 200).

[50] During the I legislative period, 107 treaties were sent to Parliament for authorisation and 116 on an informative basis. During the II, 110 and 138 respectively.

[51] During the III legislative period, 198 treaties were sent to Parliament for authorisation and 138 on an informative basis. During the IV, 260 and 98 respectively; during the V, 214 and 50 and during the VI (up to 13 June 1997) 116 and 28.

[52] In other countries said term is precised. In the United States, for example, the *Zablocki Case Act* established the obligation of reporting executive agreements to Congress within a period of 60 days after their entry into force.

however, be deplorable to shield oneself in the most basic of literal interpretations in order to maintain secrecy when comparative constitutionalism offers elegant and discreet formulas which, like the most notable cookbooks, leave it up to the *chef* to decide on the amount of certain ingredients: such as providing *appropriate* information or information subject to the *interest and security of the State* (weighted, of course, by the executive).[53] Now, the congressional Regulation complicated this task by insisting that the government provide *the texts of the corresponding treaties or conventions* (art. 159). Fortunately for the government, if it does not comply with this, no specific legal consequences have been anticipated.[54]

Aside from informing the members of parliament, what exactly is the objective of the information? The congressional record bears witness to more than a century and a half old and unexpected debate between those in favour of directly *burying* government communications in the archives and those who would like them to be sent to the Commissions for discussion.[55] Basically the debate revolved around the eternal issue of the scope of parliamentary power over the (re)qualification of treaties and the consequences of it. Under the 1978 Constitution the Congress Bureau has exhibited notable enthusiasm in defending what it understands as congressional prerogative.[56] The Rules of this house call for communication of the treaty to the Foreign Affairs Commission *for informative purposes* (art. 159). The Senate Rules specify the natural consequence that competent commissions may inform the Plenary (art. 146). From that point a whole set of political initiatives is possible because the objective of the information, in addition to facilitating its reaction if it considers that its competences have not been respected, is to allow Parliament the proper exercise of political control over the foreign action of the government (art. 66.2 of the Constitution).

4. CONFORMITY OF TREATIES WITH THE CONSTITUTION

From a *traditional* perspective it has been affirmed that the Constitution limits the State's freedom to make commitments on the international level. Otherwise, a treaty that prevailing over or deviating from the Constitution would do serious damage to

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[53] See, for example, the constitutions of Belgium (1993, art. 68.1, paragraph three concerning war) and Greece (art. 36.1).

[54] Upon studying Spanish-Guinean relations years ago, Rodríguez Carrión, A. observed that 12 of the 18 treaties concluded between 30 October 1979 and 23 October 1980 had not been communicated to Parliament (see "Regulación de la actividad internacional del Estado en la Constitución", Revista de Derecho Político (UNED), 1982, pp. 109–110). Neither was communication provided to Parliament regarding the exchange of notes between Spain and France by which the latter committed to making compensation payment for damages caused by shots fired by a French patrol vessel against the fishing vessels *Valle de Atxondo* and *Burgoamendi.*

[55] *D. de S.*, 29 January 1846, no. 26.

[56] See *supra* heading 3.2.

its condition as Fundamental Law. Furthermore, some constitutional precepts call for prohibitions and specific limitations on the formation of treaties. This is the case of article 13.3 of the Constitution, according to which extradition agreements with another state are prohibited in the case of political crimes. Therefore, in order to conclude a treaty that fails to respect these limitations, the Constitution must first be revised.

But, why not allow, under certain conditions, the stipulation of treaties that diverge from constitutional principles? The relationships between the former and the latter have been historically more complex than what is reflected in a linear affirmation of constitutional supremacy. Some constitutions (Cyprus 1960 and more recently that of Bosnia and Herzegovina 1995) are rooted in treaties and treaties have been the instruments by which in the past one of the parties has had the obligation to constitutionally accept a form of State, proclaim its neutrality, set up a dynasty or prohibit the re-election of its highest ranking officials.[57] There are also cases of constituents that, by their own free will, have constitutionalised treaty obligations in order to guarantee the highest level of compliance[58] or have even made declarations of the supra-constitutionality of a treaty or some of its clauses limiting the very constituting power of the State.[59]

The traditional position arrives at conclusions which are too obvious and exaggerated because it fails to point out that although constitutional reform has absolute value and a general scope, the incorporation of a treaty which diverges from the

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[57] See Mirkine-Guetzevitch, E., *Droit Constitutionnel International*, Paris, 1933 (Spanish translation by L. Legaz, Madrid, 1936, pp. 61 *et. seq.*) a compendium of classic examples.

[58] The 1931 Spanish Constitution included (arts. 76 and 77) international commitments of Spain in relation with the processing of ILO draft conventions, the registration of treaties in the League of Nations and declaration of war.

[59] The Constitution of Weimar (art. 178) ruled that the Versailles peace treaty provisions (1919) could not be changed. Article 149.1 of the Austrian Constitution incorporated section V of part 3 of the Treaty of Saint Germain (1919) on the protection of minorities as a constitutional law. The 15 May 1955 treaty on the establishment of an independent and democratic Austria is also considered constitutionalised. Article 181 of the Constitution of Cyprus granted constitutional rank to the guarantee treaty between Great Britain, Greece and Turkey and to the treaty of alliance between the latter two and Cyprus (annexes I and II of the Constitution). Obviously these examples only serve to show that legal exorcisms are ineffective when accompanied by a lack of faith in the legal system to deal with certain vital problems. They are still resorted to, however, in the most compromising situations. The Constitution of Bosnia and Herzegovina, annex 4 of the General Framework Agreement for Peace (Dayton-Paris, 21 November–14 December 1995) not only confirms that the rights and freedoms of the European Convention on Human Rights and Fundamental Freedoms and its protocols will be applied directly and will prevail over any other law in Bosnia and Herzegovina (art. II.2), but also considers the Constitution to be unchangeable (art. X.2) with regard to the protection of human rights established at *the highest level* (art. II.1) including, for reference purposes, approximately fifteen international conventions (art. II.7 and Annex 1 of the Constitution) and a specific human rights agreement between the Republic of Bosnia and Herzegovina and its *Entities* presented as Annex 6 of the General Framework Agreement for Peace.

Constitution has a relative value and specific scope, is an exception to a regulation that conserves its applicability and does not seek to modify the Fundamental Law but rather to give it a degree of *flexibility*.[60] Governments' willingness to conclude this type of treaty is an exception but this is not a scholarly hypothesis. Facilitating the conclusion of a treaty to serve important objectives by means of international cooperation and even integration schemes, avoiding unnecessary and complicated constitutional amendment represents a progressive and internationalist position. Although it is not common for constitutional texts to express matters in these terms (if they express them at all), when the 1978 Spanish Constitution was under debate there were already precedents.[61]

4.1. Article 95.1 of the Constitution

The constitutional Committee was virtuous in including in the 5 January 1978 preliminary draft a provision (art. 55.3) according to which "when a treaty is contrary to the Constitution, its conclusion must be authorised by means of the procedure envisaged for constitutional revision." So the Committee favoured a moderately progressive criteria. *Progressive* because it admitted exception to constitutional precepts via treaties but only *moderately* because such exceptions were always conditioned to acquiring authorisation by following the procedure – especially slow and complex in the preliminary draft of 5 January[62] – for constitutional reform. Other more advanced constitutions, even imposing a stricter authorisation regime than that applicable to any other type of treaty, do without the added solemnity and requirements that tend to accompany constitutional revision or reform proceedings.[63]

I do not know whether after having tabled the proposal, the authors were overwhelmed by dramatic opinions such as that of the Dutch Constitutional commentator who considered the willingness to admit exceptions to precepts through conventional channels[64] *suicide* for state sovereignty, or by a new reading of the Constitution of

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[60] Treaties are sometimes the forerunners in the conquest of a new democratic constitution. In the months following the death of General Franco in Spain, the signing of the United Nations Pacts on civil and political rights and on economic, social and cultural rights (1966) was verified. Some of the provisions of these pacts could be considered incompatible with the literal meaning of the Fundamental Laws of the Franco regime. Rapid ratification of these pacts meant the assumption of international obligations that decidedly pointed to constitutional change and set the stage for the dogmatic part of the future Constitution. See Remíro Brotóns, A., *Las Cortes y la política exterior española* (1942–1976), Valladolid, 1977, pp. 37–38.

[61] See the Fundamental Law of the Federal Republic of Germany (art. 79.1) and the Constitutions of Austria (arts. 44.2 and 50.3), Iceland (art. 21) and Netherlands (arts. 63 and 64). Also the 1972 Moroccan Constitution (art. 31.3).

[62] See arts. 157–159.

[63] See, for example, the Constitutions of Austria (arts. 44.2 and 50.3), Iceland (art. 21), Netherlands (arts. 63 and 64) and the Federal Republic of Germany (art. 79.1).

[64] See V. Panhuys, H. F., "The Netherlands Constitution and International Law", *AJIL*, 1953, p. 556.

the 5th French Republic.[65] The fact that, without providing any explanation, they did a complete flip in their position (accepting an amendment from the Catalonian minority) incorporating in the 17 April preliminary draft (art. 88) that the conclusion of a treaty containing stipulations contrary to the Constitution would require, in all cases, prior constitutional revision. From that point forward, a silent, unwritten and generalised conformism permitted the incorporation of the traditional position in the definitive text with only slight changes in wording.

The affirmation that "the conclusion of any international treaty containing stipulations contrary to the Constitution shall require prior constitutional amendment" (art. 95.1) is not very imaginative, not at all bold and even goes against the grain of the liberal sense of article 93. It would have been better to say nothing at all and provide an opportunity for the permissiveness, through interpretative channels, of such treaties observing the constitutional revision requirements in their conclusion. Article 95.1 provides no such chance and as a result, upon identifying a material contradiction between treaty and Constitution, the only way to save the former while respecting its terms is to revise the affected constitutional precepts. Only then could the parliamentary authorisation procedure be initiated or continue on its course. This has already been done one time. The case was the incompatibility of article 8B of the European Community Treaty introduced by the Treaty of the European Union (1992) with art. 13.2 of the Constitution in relation with the attribution of passive suffrage in municipal elections to European Union citizens who are not Spaniards. In its declaration of 1 July 1992, the Constitutional Court admitted that the treaty provision was contrary to the precept of the Constitution and the constitutional precept had to be reformed in accordance with the procedure set out in art. 167 before granting parliamentary authorisation to conclude the treaty.

If the Constitution is not revised one of three paths can be taken: to forget the treaty, to renegotiate its conflictive clauses or to table reservations, if possible, in order to neutralise the legal effects of the provisions that the Constitution cannot tolerate.[66]

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[65] "If the Constitutional Council, summoned by the President of the Republic, by the Prime Minister or by the Chairman of either of the two Chambers, declares that an international commitment contains a clause contrary to the Constitution", states art. 54 of the 1958 Constitution, "authorisation to ratify or pass it shall not be possible until the Constitution is first reformed." This precept, generally echoed in the Constitutions of French-speaking countries, was considered at that time (quoc Dinh, N., "La Constitution de 1958 et le Droit International", *Revue de Droit Public*, 1959, p. 515) an expression of the *nationalist tendency* of its principal authors. Vallee, Ch., "Note sur les dispositions relatives au Droit International dans quelques Constitutions récentes", *AFDI*, 1979, pp. 270–272, highlights the relationship between the French and Spanish constitutions on this point.

[66] For example, when Spain became party to the European Convention on Human Rights a reservation to article 11 was tabled due to a possible conflict with article 28 of the Constitution.

4.2. Constitutionality controls of treaties

Presuming and/or proclaiming that treaties must conform to the Constitution, the question must be posed whether and to what degree the system is equipped with suitable and sufficient legal controls to verify this. If the answer to these questions is negative, claims of unconstitutionality will play a part in the doctrinal, political and diplomatic debate but the domestic institutions must enforce the treaty once it is concluded and published.

These situations are verifiable where the constitutionality control of treaties continues to be ignored or even, as is the case in the Netherlands, where judges are specifically prohibited from looking into them.[67] This is not the situation, however, perceived in states such as Spain that can exercise this control opting for solutions that vary in relation to the bodies to which they are attributed and the moment at which verification must be made.

Based on the 1978 Constitution, preventive and *a posteriori* controls of the constitutionality of treaties have been put in place and are administered by the Constitutional Court. Specific preventive control is set out in article 95.2 of the Constitution, developed in article 78 of the Court's Organic Law (*LOTC*). Non-specific preventive control is set out in art. 79 of the same Law for the organic laws[68] which can include art. 93 treaties by virtue of the fact that their conclusion must be authorised via organic law. Concerning the *a posteriori* controls, the questions which left the Constitution in the air (article 161.1, *a* refers exclusively to "laws and provisions with the force of law") have been clarified by the *LOTC* (art. 27.2, *c*) with the mention of *international treaties* among the texts susceptible to a declaration of unconstitutionality.

Now, if *a posteriori* controls indistinctly protect both the material dimension (intrinsic) and the formal dimension (extrinsic) of the constitutionality of treaties, the same is not true for preventive controls. The specific control of article 95.2 of the Constitution (art. 78 of the *LOTC*) is practically exclusive to the intrinsic or material dimension, covering the extrinsic or formal only to the degree that it comes within it[69] but not when it is raised with respect to a treaty that conforms intrinsically with the Constitution.[70] In contrast, the non-specific control of article 79 of the *LOTC* deals

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[67] See art. 120 of the Constitution in force (former art. 60.3).

[68] Indeed, according to article 161.1, *d* of the Constitution, the Constitutional Court is competent to hear cases "on other subjects attributed to it by the Constitution or organic laws."

[69] Unless in case of supervened unconstitutionality, as a consequence of precepts or interpretations enacted or established subsequent to the conclusion of the treaty, extrinsic unconstitutionality always accompanies the intrinsic because, given that stipulations of treaties incompatible with the Constitution are prohibited, the stipulation of a treaty the clauses of which are considered unconstitutional will be inevitably irregular.

[70] The enforcement of preventative control applied to the extrinsic dimension of the constitutionality of treaties set out in article 95.2 of the Constitution can theoretically be conceived from the inclusion in such treaties of clauses on their formation (for example, the way consent is expressed, the body expressing such consent . . .) which, due to their wording and bearing in mind the substantive obligations they envisage, are in conflict with constitutional precepts concerning the treaty conclusion process. But normally by the time this information is made known the treaty is already stipulated.

mostly with the extrinsic or formal dimension of the constitutionality of the type of treaties concerned.[71]

4.3. Constitutiouality coutrols applied to treaties and International Law

Although according to International Law a State cannot invoke its own provisions in order to justify its failure to perform a treaty, the manifest violation of a domestic rule of fundamental importance concerning the competence to conclude treaties can be invoked as invalidating its consent, eventually leading to nullity of the treaty.[72] In this sense the development of a constitutionality control of a judicial nature can have a positive influence on the ordered and strict approach to this cause for nullity, as it would be possible to conceive the unconstitutionality decision as requisite *sine qua non* for an allegation of this cause in the international system and, at any rate, should be a main element on which to base such nullity.

The fact that International Law attributes a certain relevance to state provisions (and decisions) does not mean that it necessarily takes them on as its own. An international body is not subject to the conclusion that may be reached by a domestic court regardless of its rank or status. In this sense it should be pointed out that: 1) art. 46 of the Vienna Convention on the Law of Treaties has been worded in such a way that it is very clear that recognition of an infraction of state rules as the cause of nullity of a treaty is an *exception*; 2) International Law can absorb the cases in which the treaty is declared incompatible with pre-existing constitutional precepts but not those in which its unconstitutionality is supervened;[73] 3) the subsequent behaviour of the State can be considered as acquiescence of the validity of the treaty (art. 45, *b*, of the Convention); and 4) the final decision concerning the cause for nullity depends on the outcome of the proceedings envisaged in arts. 65 and 66 of the Convention. The moral of the story is that it is risky to test the capacity of International Law in order to assimilate constitutional precepts and the decisions enforcing them.[74]

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[71] Despite everything it is possible to support its application to the intrinsic or material dimension to the degree that the challenge of an organic law of authorisation revolves around the conflict between treaty stipulations and the Constitution thus making the article 93 formula unfeasible for its conclusion.

[72] Arts. 27 and 46 of the Vienna Convention on the Law of Treaties of 23 May 1969. See Remíro Brotóns, A., *Derecho Internacional Público. 2. Derecho de los Tratados*, cit., pp. 153 *et. seq.*, 334 *et. seq.*

[73] In this case art. 46 of the Vienna Convention does not apply because from the point of view of the formation of the will of the State to comply, the treaty is *(tempus regit actum)* unobjectionable. Unfortunately practice shows (and this should come as no surprise) that the majority of the allegations of the unconstitutionality of treaties are of this nature; sudden or *unexpected* unconstitutionality.

[74] In the event that the cause for nullity is not upheld, the only option left to the State to avoid a situation of non-compliance and the ensuing international responsibility is to table an amendment to the treaty or call for its termination especially proceeding, if permitted by the treaty, to its denunciation.

Under these circumstances what is asked of state legislators from an international(ist) perspective is that they consider the compatibility of treaties with constitutional precepts *before* and not *after* taking on commitments. It is the role of domestic law to protect the Constitution but it should also eliminate (or reduce as much as possible) the possibility of conflicts and contradictions with the international legal system by preventing (or drastically restricting) the *a posteriori* revision of the constitutionality of treaties and articulating in any case specific rules adapted to their particular condition. A network of effective preventive controls would even allow for the establishment of the constitutionality of treaties in force under the *iuris et de iure* presumption although this design is difficult when the conclusion of a treaty is not subject to parliamentary authorisation and unfeasible, given its very nature, in cases of *supervened* unconstitutionality.

Neither of these concerns is foreseen in the Spanish constituent process nor in the subsequent legislative development of constitutional justice.[75] Thus the regulation could not be on the mark. Preventive controls are few and narrow. The action to raise such controls is taken away from those who have the greatest interest in following up on them. The incomplete and poorly conceived range of prophylactic measures is compensated for by therapeutic remedies that go against international indications. The repair control doors are flung wide open to the very ones who were not permitted to prevent the conflict. Moreover, the prior declaration of the unconstitutionality of a treaty is considered compatible with its revision *a posteriori*. From an international(ist) perspective the pretension is disturbing: a large number of constitutional precepts are very general, *delphic* clauses formulated in a vague, generic fashion with modular objectives suiting the ideological and political needs of the interpreter, of the time and of the circumstances. Should treaties also be in a constant state of revision, be forever provisional? Experience has shown that the most critical situations faced by constitutional courts have to do with applications concerning the unconstitutionality of treaties.[76]

The authors of the *LOTC* have ignored the implications of International Law and have therefore been unable to come up with any rule whatsoever bearing the specificity of the situation in mind. Regulation of the effects of the judgement is, in this respect, especially unfortunate. The *general effects* from the date of its publication in the *BOE*, the nullity *tout court* of unconstitutional provisions, the immediate enforcement on all public authorities, do not fit well with international norms. A reading of the rules in place in other countries that deal with this issue would have allowed for

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[75] Only in relation to the draft Constitution was there a brief debate in the Senate regarding the convenience of judicial control of the constitutionality of treaties but it was racked with domestic concerns. See *D. de S., Comisión de Constitución*, 14 September 1978, no. 55.

[76] One of the clearest examples was from the Constitutional Court of the Federal Republic of Germany when it ruled in favour of the constitutionality of the European Union Treaty (1992) in its decision of 12 October 1993 linking it to a specific interpretation of its clauses, treading upon a field which the Court of Justice of the European Union claims.

the discovery of *ad hoc* solutions such as granting the Constitutional Court the faculty to extend for a certain period of time the enforcement of a treaty declared unconstitutional,[77] thus providing the government with the opportunity to implement acts leading to international nullity (amendment or termination) of the treaty in a more hygienic manner.

Rules of this type are even more advisable when the unconstitutionality of the treaty is *supervened*. In the domestic system, an irresistible tendency towards the prevalence of constitutional precepts is noted when the latter are not the frnit of a specific modification within the framework of an unchanging system but are rather an expression of a substantial reform of the state's fundamental principles. These changes can serve as ammunition when certain causes are invoked for the termination of treaties but their effectiveness in this respect and in avoiding international responsibility for failure to comply with agreed obligations has not been proven.

In light of these circumstances it would seem advisable to make some suggestions. An advanced official publication of the treaty could allow for the three month period during which it is possible to file applications would expire or lapse before the treaty's entry into force. Also the incorporation of denunciation clauses in treaties when possible, especially in the case of those concluded without the authorisation of Parliament, would provide the government with the instrument needed to transpose an eventual declaration of unconstitutionality to the international legal system; the general criteria of conservation of a text allowing for an interpretation at least in compliance with the Constitution should stimulate continence.[78]

One should bear in mind the general reticence of the courts to declare the unconstitutionality of a treaty, precisely because of its international implications. In relation with this assumption the full meaning of the words of Eduardo García de Enterría can be appreciated when he pointed out that in light of the importance of the decision due to its effects and the political nature of the conflict to be resolved with the judicial method, and the discretionary power granted by a large number of constitutional precepts, the constitutional judge, more than any other, must not lose sight of the *consequences* of his judgements.[79] One must believe that the *LOTC* conceived the *a posteriori* control of the constitutionality of treaties as an emergency aid in a sea of coral; relying on the experience, imagination and boldness of the pilots to sail through troubled waters.

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[77] See, for example, the Austrian Constitution (art. 140, a, 1) which allows the Constitutional Court to extend the enforcement of treaties for a maximum period of two years in the case of treaties declared unconstitutional (for treaties concluded with the authorisation of the National Council) and for a period of one year (for the rest). Also see the 1976 Portuguese Constitution (art. 280.3).

[78] In the judgement delivered by the Constitutional Court (Second Chamber) on 26 January 1981, the principle of interpretation in accordance with the Constitution was applied to former domestic provisions based on the *Concordato* with the Holy See of 1953. The principle was later confirmed by a wealth of jurisprudence.

[79] García De Enterría, E., *La Constitución como norma y el Tribunal Constitucional*, Civitas, Madrid, 1981, pp. 179–180.

5. INCORPORATION OF TREATIES INTO DOMESTIC LAW: THE MEANING OF PUBLICATION

Automatic reception of treaties is a tradition in Spain although during the course of its legal history, only the Constitution of 1931 made specific mention which according to some confirmed and according to others denied this fact.[80] At any rate, both before and after, case law has shown the direct enforcement of legal rules contained in treaties[81] and the legal doctrine of the Council of State highlights the continuity of the automatic reception regime.[82] It is also true that there have always been *dualists*, especially among specialists of the different branches of domestic law. In some cases, however, their position is a reflection of an erroneous and exorbitant assessment of the meaning of acts such as the *ratification* or the *publication* of treaties while in other cases it ignores the distinction that must be made, with respect to enforcement, between self-executing provisions and those that are not. The Constitution, therefore, simply confirms the tradition when it states that "Validly concluded treaties, once officially published in Spain, shall form part of the internal legal order" (art. 96.1, subsection one).

In a strict sense the treaties in force which have not been duly published, regardless of whether they have passed through Parliament or not as part of their conclusion process, should not be enforced by state operators even if they became acquainted with it through other channels or the treaties have been submitted to them by the interested individuals (for example via a certification from the Ministry of Foreign Affairs); and this is independent of the patrimonial responsibility of the Administration because of the non-publication or delay in the publication of a treaty when it causes damages to individuals. Practice suggests, however, that the constituent went too far surely due to the desire to put an end to a routine that left a significant number of treaties out of the *BOE*, and refutes that state bodies systematically abstain from enforcing the provisions of a treaty that has not been duly published.[83]

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[80] Art. 65, paragraph 1 of the Constitution: "All international conventions ratified by Spain and registered at the League of Nations and that have the status of international law shall be considered a constituent part of Spanish legislation *which must adjust to such conventions*" (emphasis added).

[81] More than three hundred judgements of the Supreme Court delivered at very different periods support this thesis: see, for example, the judgements of 27 April 1859, 16 March 1935, 14 December 1963, 8 February, 6 May 1974, 22 March 1978.

[82] See opinions of 25 September 1958, 3 July 1970 and 4 April 1974.

[83] This was the case prior to the Constitution (see, for example, the Supreme Court judgement of 24 May 1958, 30 September 1959, 14 July 1964 or 26 June 1974) and after: for example the Supreme Court judgement of 28 November 1980 was incidentally based on the so called Madrid Accords of 14 November 1974 concluded by Spain with Morocco and Mauritania, never officially published and endorsed by the Law on the Decolonisation of Sahara of the 19th of the same month and the order of the 24th. Also enforced by bodies of the Spanish administration were agreements reached with Equatorial Guinea between 30 October 1979 and 23 October 1980 mentioned by the friendship and cooperation treaty of this latter date but never published in the *BOE*.

As long as the treaty does not imply duties for citizens, the enforcement of international commitments made by government bodies informed by specific circuits of official information is not, in and of itself, reprehensible. In some cases because in certain sectors (such as the military) international cooperation calls for discretion. In other cases because it benefits individuals. With respect to judicial bodies (and always within the same limits) it could be held that, as a result of non-publication, the party interested in the enforcement of the treaty with regard to the administration will be obliged to provide a reliable and updated copy of the text in force. If that is the case publication, proposed as a condition for the direct enforcement of the treaty by the Constitution (art. 96.1) and the Preliminary Title of the Civil Code (art. 1.5), would be practically transformed into a mere condition for opposition to private individuals. State bodies may not, under any circumstances, impose obligations on subjects of domestic law based on treaties which have not been duly published.

6. CONCURRENCE WITH OTHER NORMS: *RANK* OF TREATIES

The second and last sub-section of article 96.1 of the Constitution calls for consideration of the effects of the treaty with regard to other norms, both international and domestic.

When the domestic legal system has proceeded to the reception of the general norms of International Law,[84] the stance taken by the state body responsible for *situating* a treaty with respect to other international norms and obligations should not be any different than that of an international body. Therefore, the following must be borne in mind: 1) that *ius cogens* prevail over all other norms and that the United Nations Charter takes precedence over all other conventional obligations;[85] 2) as for the rest, there is no hierarchy between international norms and obligations regardless of their source (treaty or custom), the principles of *speciality* and *posteriority* applied in a supplementary manner. The tangibility of treaties as written instruments and their *particular* character with regard to custom explains the habitual (but not inevitable) preference afforded them over customary norms; and 3) the concurrence between treaties raises problems that can be very complex especially when imposing order on the relationship between successive treaties on the same subject[86] and when incompatibility is detected between treaties concluded with different subjects.[87]

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[84] See *supra* heading 2.

[85] See art. 103 of the United Nations Charter and art. 30.1 of the Vienna Convention on the Law of Treaties of 23 May 1969.

[86] This case should not be confused with the *amendment* of a treaty, its *modification* in the relations between some of its parties and the *succession* of one treaty for another. See Remíro Brotóns, A., *Derecho Internacional Público. 2. Derecho de los Tratados, cit.*, pp. 407–422.

[87] As regards these problems see Remíro Brotóns, A., *Derecho Internacional Público. 2. Derecho de los Tratados, cit.*, pp. 326–331; Roucunas, E., "Engagements paralleles et con-

When the treaty concurs with domestic law rules, the stance taken by state bodies can be divergent and in contrast with that of international bodies. In the case of the latter, the pre-eminence of the treaty is absolute.[88] In the case of state bodies, the pinnacle of legal order is the Constitution and that is why it is said that treaties are *infra-constitutional.* In practice, the conflict is more theoretical than anything else unless the direct enforcement of constitutional precepts is recognised and/or, as mentioned above, a jurisdictional control mechanism is in place for its protection . . .[89]

Having assumed the constitutionality of the treaty, its rank in the hierarchy of sources of a state's legal system is determined in the *special reception or transformation* regimes by the formal act of incorporation of the treaty into the domestic system. In the case of *automatic reception* regimes practically all would agree that treaties at least have the rank or force of *acts* or *statutes* which is enough to rule in their favour in the event of a conflict with the *former* acts but not with the *subsequent* ones. This is the reason why the *supra-legality* of treaties has been called for to guarantee respect for the international obligations of the State.[90]

Constitutional Texts and case law have parted ways dazzled by passionate doctrinal discourse with very little margin for compromise. Overdramatisation is uncalled for, however. First of all there are treaties which envisage their relation with state laws, treaties that limit their scope to establishing a minimum standard and are based on the most favourable law principle, treaties that seek to improve upon and fill out rights recognised by domestic law, treaties that guarantee privileged treatment in relation with applicable legislation, treaties that subordinate cooperation in a sector to conformity with legal regulations, treaties that require a certain legislative task or behaviour from the parties, treaties that refer back to domestic law or seek out its complicity in the regulation of some aspect of the subject at hand, treaties that in providing for the *most favoured nation clause* can end up enforcing the laws of the States parties. There are also laws (frequent in the field of private international law)

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tradictoires", *R. des C.*, 1987, t. 206, pp. 9 *et. seq.*; Weckel, P. H., *La concurrence des traités dans l'ordre international*, Paris, 1993.

[88] See, for example, the consultative opinion of the International Court of Justice on the *applicability of the obligation of arbitration by virtue of section 21 of the Agreement of 26 June 1947 regarding the headquarters of the United Nations* of 26 April 1988 where we are reminded that the pre-eminence of International Law over domestic law is a fundamental principle consecrated by international case law as of the arbitral judgement in the *Alabama (1872)* case and reflected in article 27 of the Vienna Convention on the Law of Treaties of 23 May 1969. See Remíro Brotóns, A., *Derecho Internacional Público. 2. Derecho de los Tratados*, cit., pp. 157–164 and 331–332.

[89] See *supra* heading 4, where these considerations are appropriately explained.

[90] Some, focusing on their different nature, approach the relationship between treaties and laws not in terms of *rank* but rather in terms of *competence* (see, for example, the Spanish Supreme Court judgement of 26 November 1991). This approach is especially useful in cases in which there is a transfer of competences from state bodies to those of a supranational organisation. Not even in these cases, however, is it possible to avoid concurrence and eventually the conflict between regulations from different sources applied to the case.

that specifically refer to treaties for the regulation of certain subject matter in which case there is no doubt (as stated in an old Spanish Supreme Court Judgement) as to the *preferential obligatory force*.[91]

Moreover, when the conclusion of a treaty has been authorised by the legislative chambers its possible conflict with the subsequent acts can be resolved in its favour without making the need for a formal and direct declaration of superiority, taking advantage of interpretative resources as revealed by case law in different countries (United States, Switzerland . . .): thus, the presumption of *iuris tantum* that the legislator understands as reserved the enforcement of conventional pre-existing provisions in force, the consideration of the treaty as *lex specialis*, preference for exegesis of the law to be in accordance with the treaty . . . The decision could also be taken to enforce the law, transferring the conflict to a different plane, the international, in light of the fact that the clauses of the treaty are not self-executing and lack the essential internal measures for enforcement.

The elasticity of these remedies of course has a limit. If the Constitution is silent and the subsequent law expresses a will to abrogate all that which opposes it, regardless of its basis, or said will is deduced beyond a shadow of a doubt from the wording of the text, radically incompatible with the treaty, even if it is perversely presented as an *interpretation* of said treaty, the conflict will be inevitable as will the clash between those favouring the supra-legality of treaties and those fully rejecting it; exceptional but real cases.

If the prevalence of the treaty is to be made effective it must be granted some judicial guarantee. In states (such as the Netherlands) which lack specific judicial organs to protect the Constitution, it is up to ordinary judges to establish this supremacy. But in those countries where there is an *ad hoc* guardian of constitutional precepts the following question could be posed: to what degree may an ordinary judge not apply legislative mandates that he/she interprets as incompatible with the treaties (the case of the Federal Republic of Germany and France)[92] or should this competence be reserved to the Constitutional Court (the case of Italy).

A realistic evaluation should be made of the consequences of unconditionally promoting, based on the last subsection of art. 96.1, the superiority of treaties (all treaties) over the law instead of viewing it as a programatic declaration, a directive aimed exclusively at legislators. Those that radically proclaim the supra-legality of treaties move between the obsession of not compromising the international responsibility of the state and the conviction that only their position is *progressive*. If the former is

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[91] Judgement of 16 March 1917. Eighteen years later the same Court (judgement of 16 March 1935) confirmed that "when a domestic provision, establishing a certain regulation, safeguards 'that set out in the treaties', it should be understood that when the latter appear the assumption is that the former (the treaty) is incorporated into the precepts that amend the law while it is in force".

[92] In order for the prevalence of a treaty to be recognised over domestic law the French Constitution of 1958 requires its enforcement by the other party, a condition whose scope has been the subject of much debate.

laudable, the second is not at all certain because it depends on the respective contents of the treaty and the law in question. For example, it would have been deplorable to respect what was known as the *slave trade* granted by the Spanish Crown in America to very respectable monarchies over a law abolishing slavery. If we go further back in history, so as to not upset the ideological foundations of the readers of this text, mention could be made of some illustrative cases of the so called *liberal triennium* (1820–1823). If we look in on the 18 September 1820 session of the Congress we would be witness to a debate regarding a draft making Spanish territory an inviolable sanctuary for political exiles and we would sense the uneasiness of secretaries of state and deputies aware that some of the proposals could go against international commitments. Despite everything, the liberals opposed an addition safeguarding the treaties. "A resolution by Congress", exclaimed Istúriz, "should be over and above any treaty in the world".[93] No restrictions should stand in the way of legislation that seeks to be the most generous to *émigrés*. Also in those days, the Decree of 15 March 1821 abolished *for all time* the jurisdictional privileges of aliens of the equality of all individuals under the law with no consideration of the treaties in force. Should the state have put compliance with a conventional regressive obligation before the sovereign will to move forward with the law in the establishment of a progressive principle? It is not treaties *per se* but rather the imperative norms of international law which merit the protection of state bodies and, if need be, protection from treaties themselves.

Be things as they may, the supremacy of treaties over laws can only apply to those which are *validly concluded*. Bearing in mind that according to art. 94.1, *e*, of the Constitution the consent of the State to be bound by treaties involving the *amendment or repeal of any law* requires prior authorisation from Parliament, treaties whose conclusion was not authorised by the Parliament may not prevail over pre-existing laws because, if such laws are really affected, the conclusion of said treaty would have been unconstitutional and a declaration from the Constitutional Court in this sense could be called for.[94]

A more sensitive problem arises concerning the relation of treaties stipulated without the intervention of Parliament during the subsequent legislation. That authorisation is clearly compulsory in the case of treaties that *require legislative measures for their enforcement* (art. 94.1, *e*) and therefore the declaration of unconstitutionality hangs over treaties concluded without such authorisation. But not all treaties require such measures (some treaties have self-executing clauses while for others simple regulatory development suffices) and the question must be posed, given that they have been *validly concluded*, whether they take precedence over laws. A quick glance at case law reveals that the emphasis on the superiority of treaties has always referred

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[93] See *D. de S.*, 18 September 1820, no. 76.

[94] Think specifically of the expressed limits and guidelines imposed at times by laws on the government's negotiating power.

to those concluded with the authorisation of Parliament[95] and the Council of State assumes that when this is not the case, the status of the treaties will be of a "merely administrative or regulatory character given that it proceeds exclusively from the Executive Branch".[96] In order to defend Parliament's freedom to legislate, a lessening of the status of treaties concluded without its authorisation must be admitted, similar to that introduced in the practice of the United States in drawing a distinction between *treaties* and *executive agreements* of the President despite all the difficulties on the international and probably the constitutional level[97] that the enforcement of this criteria involves.[98]

7. DEMOCRATISATION AND INTERNATIONALISM IN THE FOREIGN ACTION OF THE STATE

The 1978 Constitution has discretely accepted the democratisation of foreign policy by offering Parliament a role similar to that of the legislative bodies of democratic European countries but the constituents, pressed by more thorny and urgent problems, lacked the grace needed to establish Spain's position in the international society. The fact of simply being a democratic state implies the protection of the basic values of contemporary international law such as human rights and public freedoms. This is not enough, however. Within its primary fundamental normative framework the state must manifest its willingness to cooperate in the fulfilment of the objectives of a pacific international society and in observance (domestic as well) of the law that it wants to govern its relations. In this sense the Spanish Constitution has expressed a blurred and fragmented internationalism which is not in harmony with the spirit behind Spanish foreign policy up to the year 2000 at least.

Despite everything, although it seems like an *accident* of the constituent process, the last subsection of art. 96.1 of the Constitution has been instrumental in *fundamentalising* in the domestic system the international norms regarding nullity, suspension, termination and revision of treaties, today codified in the Vienna Convention of 23 May 1969 (to which Spain is party) by stating that the provisions of treaties that form part of the Spanish legal system may only be repealed, modified or suspended in the way set out in the treaties themselves or in accordance with the general norms of international law. This precept could give quite a bit of leeway to Constitutional Courts willing to experience all of its consequences, especially with

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[95] See, for example, Supreme Court judgements of 10 January 1933, 17 December 1968, 22 February 1970, 17 June 1971.

[96] See Council of State decision no. 46.901 of 7 March 1985.

[97] See Carro, J. L., and Gómez-Ferrer, R., "La potestad reglamentaria del Gobierno y la Constitución", *Revista de la Administración Pública*, 1978, num. 87, pp. 201–202.

[98] Considerations regarding the rank of treaties concluded without the participation of parliament are applicable to those that are the object of provisional application. *Against*, Andrés, P., "La aplicación provisional . . .", *cit.*, pp. 74–75.

regard to due respect of international *ius cogens* which, by its very nature, does not admit an opposing agreement. The level of abstraction of the fundamental principles of international order should not intimidate individuals who are experienced in the interpretation of precepts such as those of a constitutional nature and it would not be useless to mention that the Vienna Convention, in addition to declaring that the incompatibility of a treaty with an imperative norm of international law is cause for its nullity (if the latter is prior) and cause for its termination (if it is subsequent), states (art. 30.1) that the obligations of the Charter of the United Nations shall prevail in the event of conflict with obligations taken on by virtue of any other treaty.

Events such as the government's handling of the request for extradition of General Pinochet filed before Great Britain by the judge of the National Court which deals with crimes of genocide, terrorism and torture of which the former Chilean dictator was accused, was an encouraging sign. Instead of taking a discretional decision on its own based on the authority granted by the Constitution (art. 97) to act in matters of foreign affairs, the government took the stance that this prerogative was only applicable within the limits, explicit or not, that the Constitution itself imposes on the foreign action of the State: in the case at hand, the independence of the Judiciary and its competence to pursue crimes against international law, independent of their location, the nationality and status of those involved and the disturbing consequences that this persecution may have on relations between Spain and the Republic of Chile. In these times that is the only way to give real content to a state that calls itself *democratic* and where *rule of law* reigns.

However, this criteria was not behind the government initiative when the United States and other allies called on Spain's cooperation in the execution of armed operations in third countries without the compulsory authorisation of the United Nations Security Council making such operations internationally illegal. Have foreign policy considerations thus brought us to the limits of *democracy* and *rule of law*? The decision taken by Spanish citizens in the 2004 general elections to withdraw their confidence in *Partido Popular* – the political party responsible for this policy – leads one to think that just the opposite has occurred: it is Spanish democracy which has extended rule of law to international relations condemning the government that wanted to steer it outside of the law.