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Impact of European Integration on Substantive and Formal Constitutional Amendments in Spain in the Light of the Spanish Constitutional Court's Jurisprudence and Constitutional Practice

Introduction

The Constitution of Spain (*Constitución Española* – hereinafter referred to as CE)[1] is one of the constitutions of the member states of the European Union, in which the relationship between the state and the international organization is defined in the typical manner, that is, by means of the "European clause." However, it is clear that the process of integration of a member state into European structures and the implementation of EU law can take on a variety of formulas depending on the peculiarities of the constitutional systems of member states. It should also be borne in mind that European integration itself is a dynamic process based on two vectors: deepening, i.e., the permanent tightening of cooperation (the so-called "bicycle metaphor"), and widening, i.e., the opening of integration to more states. Thus, the impact of integration on member states, including Spain, is itself dynamic and challenging.

There is no doubt that EU law has behind it an effective system for guaranteeing its validity and effectiveness. In addition to the formal binding force based on the rules of international law, this system is based on two essential elements: the Court of Justice and national courts applying EU law. Thus, the Court of Justice, through its jurisprudential activity, has pushed through the principles of primacy of application and direct effect of the norms of European Community law, which must have resulted in the need for an appropriate arrangement of the relationship of Community law and, subsequently, EU law with the national law of individual member states, whose legal systems are based on the principle of the supremacy of their constitutions.

The purpose of the article is therefore to answer the question of how the process of European integration has influenced the Spanish constitutional system and what results this has produced. The subject of the research is, on the one hand, influences of

[1] BOE núm. 311, de 29 de diciembre de 1978.

a formal-legal nature, centered around the aforementioned European clause, but also, no less important, but perhaps even more important, influences of a substantive nature, projecting on the normative content of the Spanish Constitution. The analysis is carried out on the basis of normative material, that is, the provisions of the CE and the relevant organic laws, the jurisprudence of the Spanish Constitutional Court and the findings of the Spanish study of constitutional law. The ambition of this study is not, of course, to analyze in depth all the possible implications of EU law, but to verify the thesis of the multifaceted pressures of this law and the susceptibility of member state law to these influences.

Formal-legal impact

Referring to the influence of formal EU law on the content of the CE, it is important to keep in mind that it was already present at the stage of its creation, since Spain, emerging from political isolation after the Francoist era, needed a constitution that would allow it to join such international organizations as the European Communities and NATO. After all, in the case of Spain, it was not a matter of revising an already functioning constitution, but of enacting a new one that corresponded to the country's current needs.[2]

Therefore, even in the initial draft of the Constitution, Article 6 was devoted to this issue, establishing the possibility of a treaty or organic law to delegate the exercise of powers derived from the Constitution to institutions of international law on a parity basis (*en régimen de paridad*). Although the draft did not literally mention the European Communities, it was clear that Spain's inclusion in the integration process was one of the main reasons for this provision. Eventually, the issue was moved to Article 93 of the CE. It is therefore clear that the assessment of the impact of the European integration process on the Spanish constitutional system should be considered against the background of this provision, which is the equivalent of analogous provisions found in other EU member states referred to as "European clauses."[3]

The first sentence of Article 93 CE states that "by means of an organic law, authorization may be granted for concluding treaties by which powers derived from the Constitution shall be vested in an international organization or institution." The second sentence, on the other hand, is devoted to the enforcement of obligations under treaties thus concluded. According to this provision, "it is incumbent on the *Cortes Generales* or the Government, as the case may be, to guarantee compliance with these

[2] J.Á. Camisón Yagüe, *La influencia del proceso de integración europeo en la Constitución española de 1978*, "Ivs Fvgit" 2017, Nº 20, pp. 167–170.

[3] C. Closa Montero, *La ratificación de la Constitución Europea: procesos y actors* [in:] *La Unión Europea en perspectiva constitucional*, ed. A.M. Carmona Contreras, Pamplona 2008, pp. 207–228; P. Cruz Villalón, *La cláusula general europea* [in:] *Hacia la europeización de la Constitución Española. La adaptación de la Constitución española al marco constitucional de la Unión Europea*, ed. *idem*, Bilbao 2006, pp. 51–74.

treaties and with the resolutions emanating from the international and supranational organizations in which the powers have been vested."[4] Regardless of the assessment of these arrangements, it can therefore be concluded that the process of European integration in Spain is being constitutionalized.[5] Thus, the wording of Article 93 CE did not include any *expressis verbis* indication of material limitations on the scope of competencies whose exercise could be transferred. It is worth noting, however, that the provision implied (and still only does because the provision has not been amended) the possibility of transfer in the exercise of certain competencies, not their disposal to another entity.[6]

The Constitutional Court has spoken on the issue of the European clause on several occasions, in particular in two declarations: DTC 1/1992, on the Treaty on European Union, and DTC 1/2004, on the (unsuccessful) treaty establishing a Constitution for Europe. It is noteworthy, however, that the first Constitutional Court ruling on European law (STCE 28/1991) already recognized that "the Kingdom of Spain is bound by the law of the European Communities, both primary and secondary, which, to use the words of the Court of Justice, constitutes its own legal system, integrated into the legal system of the Member States and binding their jurisdictional authorities." While the Constitutional Court recognized the primacy of European Community law over national law, it described Article 93 CE as having only an organic-procedural character (DTS 1/1992), implying the thesis that by being limited to regulating the manner in which certain types of international treaties are concluded, this means that European law will not have constitutional force and rank, but only subconstitutional.[7] It is further evident from the DTC 1/2004 declaration that the function of Article 93 CE is not only to establish a procedure for the adoption of treaties that delegate "the exercise of powers under the Constitution," but the significance of this provision is also that it provides the basis for the substantive constitutional value of supranational integration.[8] It should

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[4] "Mediante ley orgánica se podrá autorizar la celebración de tratados por los que se atribuya a una organización o institución internacional el ejercicio de competencias derivadas de la Constitución. Corresponde a las Cortes Generales o al Gobierno, según los casos, la garantía del cumplimiento de estos tratados y de las resoluciones emanadas de los organismos internacionales o supranacionales titulares de la cession."

[5] A. López Castillo, *La Constitución y el proceso de integración europea* [in:] *La europeización del sistema político español*, ed. C. Closa Montero, Madrid 2001, pp. 126–161; P. Pérez Tremps, *Constitución española y Comunidad Europea*, Madrid 1994. Cf. B. Aláez Corral, *Globalización jurídica desde la perspectiva del Derecho constitucional español*, "Teoría y Realidad Constitucional" 2017, Nº 40, p. 259; M. Aragón Reyes, *La Constitución española y el Tratado de la Unión Europeala reforma de la Constitución*, "Revista Española de Derecho Constitucional" 1994, Nº 42, pp. 9–26; G. Ruiz-Rico Ruiz, *Experiencias de mutación constitucional en España*, "Revista Oficial Del Poder Judicial" 2020, Nº 11(13), pp. 241–283.

[6] On the deconstitutionalising potential of Article 93 CE and the threat of material subordination to a structure of imperial domination (estructura imperial de dominación) see: C. de Cabo Martín, *Constitución y reforma* [in:] *Constitución y democracia. 25 años de Constitución democrática en España*, ed. M.A. García Herrera, Bilbao 2015, p. 650.

[7] J.L. Prada Fernández de Sanmamed, *La integración europea y las garantías de la Constitución Española*, "Anales de la Facultad de Derecho. Universidad de La Laguna" 1996, Nº 13, p. 96.

[8] F.J. Matia Portilla, *Dos constituciones y un solo control: el lugar constitucional del estado Español en la Unión Europea (Comentario a la DTC 1/2004, de 13 de diciembre)*, "Revista Española de Derecho

also be noted that Article 93 CE, in addition to establishing the procedural requirement of an organic law, is also the starting point for the material limits of the integration process. Referring to these limitations, the Constitutional Court pointed out that, first and foremost, such a limitation on integration treaties is the text of the Constitution itself, whose supremacy means that European treaties cannot modify the content of the Constitution itself. The authority to amend the Constitution therefore cannot be ceded on the basis of the clause in Article 93 CE. The Constitutional Court has made it clear that under Article 93 CE, the *Cortes Generales* may cede or exercise "powers derived from the Constitution," but not dispose of the Constitution itself by contradicting or allowing its findings to be contradicted, since neither the power of constitutional revision is a "power" whose exercise is susceptible to cession, nor does the Constitution itself permit reform through any other channel than the procedure provided for in Title X, that is, through the procedures and guarantees established therein and by explicitly modifying its text.[9]

It is not without significance that the Constitution itself, from its very beginning, provided for a mechanism of preventive review of international treaties to safeguard against ratification of those that would be inconsistent with the CE (Article 95(2) CE). This procedure, which is carried out by the Constitutional Court, can only be requested by the government or the chambers; it is therefore ultimately up to these legislative and executive bodies to determine whether a treaty can be examined for compliance before ratification.[10] It is this procedure that was the basis for the Constitutional Court's issuance of the two declarations mentioned above (DTC 1/1992, DTC 1/2004).

Constitucional" 2005, Nº 74, p. 358; J.M. de Areilza Carvajal, *La inserción de España en la nueva Unión Europea: la relación entre la Constitución española y el Tratado constitucional. Comentario a la DTC 1/2004, de 13 de diciembre de 2004*, "Revista Española de Documentación Científica" 2005, Nº 73, p. 370.

[9] J.L. Prada Fernández de Sanmamed, *La integración europea*…, pp. 96–97; B. Aláez Corral, *Globalización jurídica*…, pp. 250, 258.

[10] Declaring in this manner in its 2004 opinion (DTC 1/2004) on the compatibility between the Spanish Constitution and the Treaty establishing a Constitution for Europe, the Constitutional Court stated that "the operation of ceding the exercise of powers to the European Union and the consequent integration of Community law with our own imposes unavoidable limitations on the sovereign powers of the State, acceptable only to the extent that European law is compatible with the fundamental principles of the social and democratic rule of law established by the national constitution. For this reason, the constitutional cession made possible by Article 93 CE also has substantive limitations that are imposed on the cession itself. These substantive limitations, which are not explicitly contained in constitutional provisions, but which are implicit in the Constitution and the meaning of its norms, result in respect for the sovereignty of the state, our basic constitutional structures and the system of fundamental values and principles enshrined in our Constitution, in which fundamental rights acquire their own substantive character." On this declaration, see inter alia F. J. Matia Portilla, *Dos constituciones*…, pp. 341–360; A. López Castillo, A. Saiz Arnaiz, V. Ferreres Comella, *Constitución española y Constitución europea: Análisis de la Declaración del Tribunal Constitucional (DTC 1/2004, de 13 de diciembre*), Madrid 2005; A. Rodríguez, *¿Quién debe ser el defensor de la Constitución española? Comentario a la DTC 1/2004, de 13 de diciembre*, "Revista de Derecho Constitucional Europeo" 2005, Nº 3, pp. 327–356; R. Alonso García, *Estudios críticos- Constitución Española y Constitución Europea: Guión para una colisión virtual y otros matices sobre el Principio de Primacía*, "Revista Española de Derecho Constitucional (Nueva Época)" 2005, Nº 73, pp. 349–351.

It is considered one of the most important, if not the most important, guarantee of the Constitution in the context of EU law, and its limited use of the subject matter regarding the Maastricht Treaty has been severely criticized.[11] The aforementioned Article 93 of the CE became the basis for Spain's accession to the European Union in 1986. Since, with the accession, Spain became part of the integration process, taking the entire *aquis communataire* (Article 2 of the *Tratado de Adhesión*[12]) as binding, this was fundamental to the entire legal system, both formally and substantively.

Accession to the Communities was followed in 1992 by the first of the formal amendments to the Constitution, resulting from the need to correct Article 13(2) CE, as pointed out by the Spanish Constitutional Court. The amendment was prompted by the ratification of the Maastricht Treaty, which made it clear that part of the right of EU citizens is the right to stand for election in local elections for EU citizens in all member states. The Constitutional Court, acting pursuant to Article 95(2) CE, stated in its Declaration of July 1, 1992, that "the provision contained in the future Article 8B(1) of the Treaty establishing the European Economic Community, as amended by the Treaty on European Union, is contrary to Article 13(2) of the Constitution in granting the right to stand for election in local elections to non-Spanish citizens of the European Union." In addition, the Constitutional Court indicated that in terms of the constitutional reform procedure that should be applied in this case, Article 167, which provides for a simpler way to amend the Constitution, should apply. As a result of the aforementioned declaration by the Constitutional Court, an adjustment of the Constitution to the EU Treaty was made, which consisted of adding the phrase "and passive" (*y pasivo*) in the wording of Article 13(2) CE. The provision thus acquired the following wording: "Only Spaniards are entitled to the rights recognized in Article 23, except for what, in accordance with the criteria of mutuality, may be established by treaty or law with respect to active and passive electoral rights in local elections."[13] It is also worth noting that EU law, followed by a change in Spanish law, as in the laws of other member states, entails a real qualitative change in the concept of "municipal self-government," which abandons its anchorage in the old structures of state sovereignty to open up to the new structures of supranational integration, accepting not only the electoral participation of non-citizens, but also their right to representation.[14]

The second of the amendments to the Spanish Constitution, also with a cause in the process of European integration, took place in 2011 and concerned the state's fis-

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[11] J.L. Prada Fernández de Sanmamed, *La integración europea*…, pp. 101–105. The DTS 1/1992 declaration itself has also been the subject of doctrinal criticism. See R. Alonso García, *Estudios críticos-Constitución Española*…, p. 345 and the literature referenced therein.

[12] Ley Orgánica 10/1985, de 2 de agosto, de Autorización para la Adhesión de España a las Comunidades Europeas, BOE núm. 189, de 8 de agosto de 1985.

[13] It is worth bearing in mind, however, that in referring to this change, it has been commented in Spanish law studies that there are many other areas of the Treaty on European Union that can create antinomies of much greater weight, importance and depth between it and the CE than the issue of the passive electoral right. See J.Á. Camisón Yagüe, *La influencia del proceso*…, p. 172.

[14] P. Pérez Tremps, *Las reformas de la Constitución hechas y por hacer*, Valencia 2018, p. 33 *passim*.

cal stability.[15] Undoubtedly, the background for this reform was the global economic crisis that severely affected Spain, as well as the obligations associated with participation in the eurozone, which determined the need to limit the growth of the budget deficit and public debt to ensure the stability of the common currency and prices. Spain was no exception, as reforms to many member states' constitutions were the result of pressure from EU law to adopt measures taken to contain the crisis.[16] It should be noted in this regard that a number of legal solutions in this regard had already been adopted earlier under Law No. 18/2001, of December 12, 2001, General Law on Budgetary Stability[17] and Organic Law No. 5/2001, of December 13, supplementary to the General Law on Budgetary Stability.[18]

Again, the procedure under Article 167 CE was followed, noting that the entire procedure lasted only one month, a relatively short period of time given the importance of the changes made. A brief review of the process shows that there was no political doubt about the need for this reform. The procedure began in the Congress of Deputies on August 28, 2011, when, acting under Rule 146 of the Rules of Procedure of the Congress of Deputies, the two largest parliamentary groups (PSOE and PP), made a joint motion requesting that the draft be considered as a matter of urgency, in a single reading in plenary. After the mode was approved in plenary, amendments were submitted (with the exception of one, all were rejected), and the proposal to reform Article 135 of the CE was voted on (316 for, 5 against). The passed text was sent to the Senate, where it was also approved as proposed (233 for, 3 against). Thus, in both chambers, the three-fifths majority required by CE Article 167(1) was easily achieved. As no referendum was requested within 15 days (Article 167(3) CE), the King approved and promulgated the reform on September 27. On the same day, the text of the amendment was announced in the *Boletín Oficial del Estado* (BOE).

The introduction of the budgetary discipline solutions in question into the Constitution, which also took place in other member states (Slovakia, Slovenia, Italy and Hungary) was undoubtedly influenced by German solutions.[19] According to the new wording of Article 135 CE, all public administrations will conform to the principle of budgetary stability. It is beyond the scope of this paper to analyze the changes in detail, but it should be mentioned that the subsequent provisions of Article 135 CE allow for deviations from this principle, but within the limits set by the European Union, as well as the limits set by the organic law. In addition, Article 135(4) establishes a number of exceptions to these general rules. Thus, it is permissible to exceed the limits on

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15 BOE, núm. 233, de 27 de septiembre de 2011.

16 A. José Menéndez, *La mutación constitucional de la Unión Europea*, "Revista Española de Derecho Constitucional" 2012, Nº 96, pp. 41–98.

17 Ley 18/2001, de 12 de diciembre, General de Estabilidad Presupuestaria, BOE núm. 298, de 13 de diciembre de 2001.

18 Ley Orgánica 5/2001, de 13 de diciembre, complementaria a la Ley General de Estabilidad Presupuestaria, BOE núm. 299, de 14 de diciembre de 2001.

19 Ł. Kielin, *Constitutionalisation of fiscal rules in times of financial crises – a cure or a trap?*, "Financial Law Review" 2021, No. 22(2), p. 94.

the structural deficit and the amount of public debt in exceptional situations, such as natural disasters, economic recession or emergencies (*situaciones de emergencia extraordinaria*), which are out of the state's control and threaten its financial stability. The approval of an absolute majority of the Congress of Deputies is required to declare that these exceptional circumstances have occurred, which allow the established limits to be exceeded. The aforementioned 2001 finance laws were significantly modified in 2006, however, after the amendment of Article 135 CE, the current Organic Law 2/2012, of April 27, on Budgetary Stability and Financial Sustainability,[20] was adopted. This Organic Law has also already been modified several times, including by Organic Law 6/2015,[21] dated June 12.

Substantive impacts

However, the only two formal amendments to the Spanish Constitution to date, which were implied by the process of European integration, to which the previous section was devoted, do not deplete the issue of the impact of this process on Spanish constitutional law. As already mentioned in the introduction, this intensifying process has, moreover, resulted in a number of changes of a substantive nature that did not require formal CE amendment procedures. The phenomenon of substantive constitutional change, moreover, has a broader dimension and is not necessarily exclusively related to the integration process. As Benito Aláez Corral points out, Spanish constitutional law is experiencing a process of substantive globalization of the law, as reflected in the homogenization of some of the principles and values of constitutionalism, a consequence of the supranational and international openness that the CE provides and that allows for the integration of existing or future globalized regulations of certain constitutional issues. This is undoubtedly helped by the globalization of media and culture, which is leading to an understanding of the value of constitutionalism as part of humanism, not only among leading political elites, but also in civil society, with the subsequent pretension of legal systems to appear as humanistic as possible, emulating the achievements in law that are taking place in other democratic countries. This author cites as an example of the globalization process the recognition of the right to same-sex marriage, which has grown from just one country in 2001 (the Netherlands), to twenty-three in 2017.[22]

With regard to material pressures on the integration process, this phenomenon was already defined by the Constitutional Court in DTC Declaration 1/1992 as "modu-

[20] Ley Orgánica 2/2012, de 27 de abril, de Estabilidad Presupuestaria y Sostenibilidad Financiera, BOE núm. 103, de 30 de abril de 2012.

[21] Ley Orgánica 6/2015, de 12 de junio, de modificación de la Ley Orgánica 8/1980, de 22 de septiembre, de financiación de las Comunidades Autónomas y de la Ley Orgánica 2/2012, de 27 de abril, de Estabilidad Presupuestaria y Sostenibilidad Financiera, BOE núm. 141, de 13 de junio de 2015.

[22] B. Aláez Corral, *Globalización jurídica*…, pp. 261–262.

lation." The Court noted that Union law, although it cannot modify the Constitution, serves to modulate "the scope of application and not the wording of the (constitutional) principles that […] established and ordered" competencies. This concept, along with that of constitutional mutation (*mutacion constitucional*), has been accepted in Spanish constitutional law doctrine, where the presence of this process is demonstrated in many areas.[23]

One of the substantive changes concerned the constitutional principle expressed in Article 1(1) of the CE, according to which Spain is a social and democratic state governed by the rule of law. Meanwhile, the European Union's treaties are, in principle, an expression of the ideas of the neoliberal capitalist model, which thus causes serious violations of the form of the social state, which was particularly intensified in the face of the economic crisis that began in 2008 and the policies being implemented to address it, which were also embodied in the formal amendment of Article 135 of the CE.[24] The progressive influence of the market economy in the Community sense, referred to as European market constitutionalism, has thus led to a situation of contradiction between the Constitution and reality, characterized by the formal survival of the principle of the social state expressed in the text of the CE and the simultaneous material deconstitutionalization of its postulates.[25] In this sense, the primary law of the EU thus constitutes a constitution in the material sense, which affects national legal systems, including the Spanish system.[26]

As already mentioned, one of the areas of Spain's legal order that has been significantly affected by the integration process is the territorial organization of the state. This applies precisely to the substantive changes made by the modulation method, particularly in the division of competencies between the state and the autonomous communities.[27] As already mentioned, fundamental to this issue is the principle that EU law does not affect the internal division of competencies between the state and the autonomous communities (counter-limit clause, enshrined in Article 4.2 TEU), and therefore cannot modify this division.[28] As the Constitutional Court noted, community law in itself is not a direct criterion of constitutionality in constitutional processes, but "it cannot be ignored that the very interpretation of the system of division

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[23] R. Bustos Gisbert, *La Constitución red: Un estudio sobre supraestatalidad y Constitución*, Oñati 2005; A. López Castillo, *Constitución e integración. El fundamento constitucional de la integración supranacional europea en España y la RFA*, Madrid 1996; P. Pérez Tremps, *Constitución española y Unión Europea*, "Revista Española de Derecho Constitucional" 2004, Nº 71, pp. 103–121.

[24] J.Á. Camisón Yagüe, *La influencia del proceso…*, p. 176.

[25] Cf. A. José Menéndez, *La mutación constitucional…*, pp. 87–97; B. Aláez Corral, *Globalización jurídica…*, pp. 265–267.

[26] A. Bar Cendón, *La Constitución de la Unión Europea: contexto, reforma y virtualidad*, "Revista Valencia d'Estudis Autonòmics (Ejemplar dedicado a Europa en la encrucijada)" 2004, Nº 43–44, pp. 100–153; A. Lasa López, *La ruptura de la constitución material del estado socialla constitucionalización de la estabilidad presupuestaria como paradigma*, "Revista de Derecho Politico" 2014, Nº 90, p. 239.

[27] A.M. Caemona Contreras, *Las comunidades autónomas* [in:] *Hacia la europeización de la Constitución Española…*, pp. 175–216.

[28] DTC 1/1992, and in a number of other rulings, such as: STC 128/1999, STC 45/2001, STC 33/2005, STC 173/2005, STC 22/2018.

of powers between the state and autonomous communities does not take place in a vacuum (STC 102/1995)." However, while it may not be a formal influence, it turns out that the complexity of the integration process has an impact on the interpretation of the rules of this division of powers, particularly in situations of competency conflicts, where "paying attention to how an institution has been configured by a community directive can be not only useful, but even mandatory in order to correctly apply the internal system of division of powers to it."[29] As Pablo Pérez Tremps writes, in many cases the scope of the authority of the state and the autonomous community to carry out obligations arising from the integration process is determined in light of the nature of those obligations, depending primarily on whether they impose uniform goals to be achieved.[30] This was confirmed in the jurisprudence of the Constitutional Court as early as the aforementioned STC 252/1988 and confirmed in a number of others.[31]

EU law affects the Spanish legal system in a similar way also in the field of fundamental rights, an influence that has its basis primarily in Article 10(2) CE.[32] Evidence of this impact in the case of fundamental rights can be found in Article 2 of Organic Law 1/2008, authorizing the ratification of the Lisbon Treaty, which explicitly states that the principles relating to fundamental rights and freedoms recognized by the Constitution shall also be interpreted in accordance with the provisions of the Charter of Fundamental Rights. As enumerated by Aláez Corral, this applies precisely to those fundamental rights provided for by the CE, the subject matter and content of which fall more within the Union's competence, such as equality and non-discrimination, freedom of movement, freedom to conduct business, data protection, but also freedom of expression, the right to political association (insofar as European political parties exist), the right to political participation or access to public positions and functions.[33]

In the case of fundamental rights, therefore, the impact is through the determination of the content of a given constitutional right by the norms of EU law,[34] and sometimes in the case law of the CJEU itself, a spectacular example of which was the Melloni case, concerning the right to a fair trial in the field of criminal and judicial cooperation,

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29 STC 13/1998.

30 P. Pérez Tremps, *Articulo 93* [in:] *Comentarios a la Constitución Española*, eds. M. Rodríguez-Piñero y Bravo-Ferrer, M.E. Casas Baamonde, Madrid 2018, p. 300. This author gives examples of matter in which the modulation method has found its application and confirmation in the decisions of the Constitutional Court. See also Á. Sánchez Legido, *El Tribunal Constitucional y la garantía interna de la aplicación del Derecho Comunitario en España (A propósito de la STC 58/2004)*, "Derecho Privado y Constitución" 2004, Nº 18, pp. 403–404.

31 STC 79/1992, STC 117/1992, STC 29/1994, STC 213/1994, STC 148/1998, STC 128/1999, STC 21/1999, STC 235/1999, STC 45/2001, STC 95/2001, STC 38/2002. See also A. Ruiz Robledo, *Las implicaciones constitucionales de la participación de España en el proceso de integración europeo*, "Revista Jurídica de Asturias" 1998, Nº 22, p. 105.

32 B. Aláez Corral, *Globalización jurídica*…, pp. 261–262. This author considers Article 10(2) CE as the second of the gateways, along with Article 93 CE, that allow for the substantive globalization of Spanish constitutional system.

33 *Ibid.*, p. 268.

34 STC 64/1991, STC 130/1995, STC 224/1999, STC 53/2002. Cf. J.L. Prada Fernández de Sanmamed, *La integración europea*…, p. 100; Á. Sánchez Legido, *El Tribunal Constitucional*…, pp. 404–405.

in which the Constitutional Court requested a preliminary ruling that led to the CJEU's judgment, which was fully addressed in STC 26/2014.[35] As Josu de Miguel Bárcena notes, fundamental rights leave little room for normative autonomy for particular state or regional legislatures, and therefore little room for differentiation. Sooner or later, as recent CJEU jurisprudence shows, there will be unification in conceptual and cultural terms, leading to the prevalence of a more general catalog over a more specific, territorially limited ones.[36] It seems, therefore, that Spain is an excellent example of the realization of this trend.[37]

The modulating effect can also be spoken of in other fields. In this context, Pérez Tremps reports on the impact on the system of sources of law, in terms of which the harmonization of Spanish law with EU law has gone quite smoothly, with such influences appearing, as in other member states, as restrictions on the use of decree-law to implement EU law or the use of legislative delegation techniques for the same purpose.[38] Another level is economic issues, especially the provisions of Title VII of the Constitution, which are today interpreted in light of EU law (the concept of public service, restrictions on monopolies, the principle of fiscal stability).[39] Other examples, moreover, are the adaptation of public administration to the requirements of EU law and the perception of the role of the national judge as an EU judge.

Conclusions

The most significant conclusion that can be drawn from the above considerations is that EU law based on the principles of "direct applicability" and "direct effectiveness" substantially influences Spanish constitutional law, and it is the strongest factor influencing the Spanish legal order since the enactment of the CE in 1978.[40] It is a rather

35 F.J. Matia Portilla, *Primacía del derecho de la Unión y derechos constitucionales. En defensa del Tribunal Constitucional*, "Revista Española de Derecho Constitucional" 2016, Nº 106, pp. 479–522. See also STC 145/1991 and STC 12/2008 on the principle of equality between men and women or STC 138/2005 and STC 273/2005 regarding the protection of minors.

36 J. de Miguel Bárcena, *Justicia constitucional e integración supranacional: cooperación y conflicto en el marco del constitucionalismo pluralista europeo*, "Revista Iberoamericana de Derecho Procesal Constitucional" 2008, Nº 9, p. 109; M. Fondevila Marón, *El control de convencionalidad por los jueces y tribunales españoles. A propósito de la STC 140/2018, de 20 de diciembre*, "Anuario Iberoamericano de Justicia Constitucional" 2019, Nº 23(2), p. 454.

37 On recent CT case law, including the use of preliminary questions to the CJEU on fundamental rights see X. Arzoz, *Avoiding the rain or learning to dance in it: The hesitations of the Spanish Constitutional Court*, Preprints Series of the Center for European Studies Luis Ortega Álvarez and the Jean Monnet Chair of European Administrative Law in Global Perspective, 2023, No. 1, pp. 14–17.

38 R. Alonso García, *El juez español y el Derecho Comunitario*, Valencia 2003.

39 J.L. García Guerrero, *La desconstitucionalización de la Constitución Económica española* [in:] *Constitución española e integración europea. Tendencias del Derecho Constitucional de la integración*, ed. L. Gordillo Pérez, Valencia 2018, pp. 261–309; B. Aláez Corral, *Globalización jurídica*…, pp. 265–266; P. Pérez Tremps, *Las reformas*…, p. 71 and the literature cited therein.

40 The paradox is that the only explicit mention of the European Union in the Constitution is indirect, and was only found in Article 135 after it was amended in 2011.

aggressive impact imposing changes in the Constitution of both a formal and substantive nature, which is not altered by the fact that the supremacy of Community law may be subject to certain limitations under the national Constitution.[41] In view of the fact that there were only two amendments, it can be concluded that the substantive impact is more significant, and with and overcoming the economic crisis, the integration process will continue to progress.[42] Of course, it should not be forgotten that this is happening *de jure* with the consent of Spain expressed in respect of the principle of state sovereignty, on the basis of the provisions contained in Article 93 of the CE and taking into account the material limits of this influence. Hence the positive verification of the thesis of the constitutionalization of this process.[43]

On the other hand, the substantive modifications of the Constitution presented in the article prove the thesis of the europeanization of Spanish law, and, consequently, one cannot lose sight of the danger of the actual subordination of constitutional content to EU law and, consequently, the erosion of the Constitution.[44] According to some Spanish scholars, the substantive modifications on the socio-economic field concerning the introduction of Community law, which have been made without a formal change, are inconsistent with it, and not in the sense of the so-called constitutional mutations (*mutación constitucional* – which is the term used for legitimacy purposes, often to describe constitutional irregularities), but as actual violations of the Constitution in material and formal terms, as it is inappropriate to argue that it is "the European Union's exercise of competences derived from the Constitution," when the Constitution establishes something quite different and even the opposite.[45]

Spanish constitutional/legal scholarship already includes claims that in the clash with the Union Treaties, it is the national constitutions that give way, in such a manner that they are effectively subordinate to the Treaties, and thus cease to be "supreme principles."[46] The resulting rigidity of the Constitution is therefore of little significance here in the face of the breadth of changes of a substantive nature.[47] Thus, while the Spanish Constitution in the formal sense remains a rigid constitution, when viewed in the category of a substantive constitution it has proven to be a flexible constitution and susceptible to external influences, which can be considered even in the format of a crisis of state sovereignty.[48] In this sense, the protection of the constitution provided by the Spanish Constitutional Court appears to be ineffective.[49]

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41 Cf. A. López Castillo, A. Saiz Arnaiz, V. Ferreres Comella, *Constitución española*…, p. 70.

42 P. Pérez Tremps, *Las reformas*…, p. 88.

43 Cf. A. López Castillo, A. Saiz Arnaiz, V. Ferreres Comella, *Constitución española*…, p. 70.

44 J.Á. Camisón Yagüe, *La influencia del proceso*…, p. 179.

45 C. de Cabo Martín, *Teoría Constitucional de la Solidaridad*, Madrid 2006, pp. 90–92; J.Á. Camisón Yagüe, *La influencia del proceso*…, p. 176.

46 See also L. Peña y Gonzalo, *No es la Constitución la norma suprema* [in:] *Conceptos y valores constitucionales*, eds. L. Peña, T. Ausín, Madrid 2016, pp. 261–398.

47 C. de Cabo Martín, *Capitalismo, democracia y poder constituyente* [in:] *Teoría y práctica del poder constituyente*, ed. R. Martínez Dalmau, Valencia 2014, p. 19.

48 Cf. B. Aláez Corral, *Globalización jurídica*…, p. 259.

49 Cf. A. Rodríguez, *¿Quién debe ser el Defensor*…, pp. 327–356; X. Arzoz, *Avoiding the rain*…, pp. 17–19.

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Summary

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Impact of European Integration on Substantive and Formal Constitutional Amendments in Spain in the Light of the Spanish Constitutional Court's Jurisprudence and Constitutional Practice

The purpose of the article is to answer the question of how the process of European integration has influenced the Spanish constitutional order. Taking the European clause set out in Article 93 of the Spanish Constitution as a starting point, it analyzes both impacts of a formal-legal nature,

but also influences of a substantive nature affecting the normative content of the Spanish Constitution. The study demonstrates that EU law, based on the principle of "direct applicability" and "direct effect," intensively influences Spanish constitutional law and has been the strongest factor influencing the Spanish legal order since the enactment of the Spanish Constitution in 1978. Thus, while the Spanish Constitution in the formal sense remains a rigid constitution, when viewed in the category of a substantive constitution, it has proved to be flexible and susceptible to external influence, despite the fact that this occurs *de jure* with the consent of Spain expressed in respect of the principle of state sovereignty, on the basis of the provisions contained in Article 93 of the Spanish Constitution.

Keywords: Spanish constitution, European Union law, hierarchy of norms, European integration.

Streszczenie

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Wpływ integracji europejskiej na materialne i formalne zmiany konstytucji w Hiszpanii w świetle orzecznictwa hiszpańskiego Trybunału Konstytucyjnego i praktyki ustrojowej

Celem artykułu jest udzielenie odpowiedzi na pytanie, w jaki sposób proces integracji europejskiej wpłynął na hiszpański porządek konstytucyjny. Przyjmując za punkt wyjścia klauzulę europejską zawartą w art. 93 hiszpańskiej konstytucji, przeanalizowano zarówno zmiany o charakterze formalno-prawnym, jak i materialno-prawnym, wpływające na treść normatywną hiszpańskiej konstytucji. Przeprowadzone badania pokazują, że prawo UE, oparte na zasadzie „bezpośredniego stosowania" oraz „bezpośredniego skutku", intensywnie wpływa na hiszpańskie prawo konstytucyjne i jest najsilniejszym czynnikiem wpływającym na hiszpański porządek prawny od czasu uchwalenia hiszpańskiej konstytucji w 1978 r. O ile zatem konstytucja hiszpańska w sensie formalnym pozostaje konstytucją sztywną, o tyle rozpatrywana w kategorii konstytucji materialnej okazała się konstytucją elastyczną i podatną na wpływy zewnętrzne, mimo że następuje to *de iure* za zgodą Hiszpanii wyrażoną w poszanowaniu zasady suwerenności państwowej, na podstawie przepisów zawartych w art. 93 konstytucji hiszpańskiej.

Słowa kluczowe: konstytucja Hiszpanii, prawo Unii Europejskiej, hierarchia norm, integracja europejska.