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THE CONSTITUTIONAL DIMENSION OF THE COURT OF JUSTICE OF LUXEMBOURG AND THE SPANISH CONSTITUTIONAL COURT

Currently, the primacy principle of European Law is an unquestionable matter of fact, even though, after the reform of the Treaty of Lisbon[1], in contrast to the project of the European Constitution, the option was chosen not to formally recognize this primacy in the treaties, which implies an incumbency of Law whose basis was never explicitly affirmed in the Lisbon Treaty text[2].

If we ask ourselves why the primacy principle of European Union Law was left out of the reformed Treaty, the reason is the same that justified the suppression of the term «Constitution» of the prior Treaty that established a Constitution for the EU. And this occurred because «anchoring the primacy in the treaty itself implies, politically speaking, a move towards a Common European Constitutional Law for the Member States. The term «Constitution» was not ratified, ultimately, because it would clearly limit the sovereign rights of Member States; but we should not forget that the principle of primacy constrains both judges and public regional and state authorities»[3].

Some time ago, Haberle wrote that he saw the genesis of a Common European Constitutional Law emerging from the jurisprudence of the Constitutional Courts and from the scientific doctrine[4], as well as from the existing similarity of the norms concerning the EU. Now, the question is still: do we have a true constitutional legal system? Which, in turn, begs the question whether Community Law fulfils the characteristics of any Constitution, which, in the judgment of Díez-Picazo[5], should entail the following: be the product of the constituent power; be written; be sufficiently rigid so as to not be amended too easily; come before other laws; that its tenets enjoy adequate judicial protection; that it limit the powers and responsibilities of the branches of government; that it guarantee individual rights and liberties, as well as the relation between the Constitution and democracy.

Perhaps more convincing and specific is the view of García Roca[6], when he points out that the essence of a Constitution is indivisibly linked to the separation of powers, fundamental rights, the principle of democracy and political responsibility, drawing attention to the fact that, though European integration is taking on a more constitutional character the contents are from being such, as European institutions still follow no constitutional scheme of dividing power and, in addition, have no rules that articulate the democratic principle as any Member state does. Letus not forget that article 16 of the Declaration of the Rights of Men and Citizens (1789) stipulated that «any society in which the guarantee of rights is not assured, nor the separation of powers established, has no Constitution».

I would like to recall the reflection of Douglas-Scott[7]in the statement: «The EU's system of governance is incomplete. It lacks the legal means and administration, finances and coercive force of its member states and consequently relies on them to provide these in many instants. In this way the EU is not independent and self-sufficient but complements the states>>. And we cannot ignore that "the European constitutional standards are conditioned on and linked to national constitutional standards, while the national constitutional standards are transformed in their content by the European standards themselves"[8], which has led some to characterize this phenomenon as constitutional pluralism[9]. I would add that the legal system of the EU lacks «Demos and *Pouvoir Constituant*». As Zetterquist said: «The EU is seen both as a source for individual rights and for collective political decision-making without being a state. The question then is whether the EU signifies that we have, with the words of Neil MacCormick, moved beyond the sovereign state and entered a new political landscape based on the rule of law even in the chaotic international domain (MacCormick, p 123–136) or whether the sovereign state is very much alive and is merely awaiting the proper moment to announce that the rumours of its death have been much exaggerated and that the EU in itself (not being a state) is nothing more than, to borrow the classical words of Hobbes, «a kingdom of fairies»[10].

I would agree with Williams that we are still far from having a clear conception of the nature of the European Union, which one could state as follows: «The EU might be interpreted as a conceptual chameleon, shifting its purpose depending on the changing political, social, economic and legal environment as organization, the next, a state in the making. Then again a regime that crosses traditional boundaries, an entity that hovers amidst and between different collective regime-types». From here he sustains the argument that the EU «seems to have a floating charac-

ter, which, on the one hand, can be treated as an International Organization, while at the same time could be a State in the making»[11].

It is true that alone amongst European institutions, the European Parliament is directly elected by its citizens, and has slowly increased in power, above all in matters of legislation since the entry into force of the Treaty of Nice towards parity in decision-making with the European Council of Ministers. Nonetheless, in my opinion, the most important role in constitutionalizing Community Law has been the Court of Justice of the European Union, which, on the other hand, has undergone little change in its institutional structure[12] since the Treaty of Lisbon[13], as its composition, qualifications of its members and terms of office, have remained practically unaltered[14].

The Court of Justice of the European Union (CJEU) in Luxembourg encompasses three distinct courts (Court of Justice, General Court, and Civil Service Tribunal) that exercise the judicial functions of the European Union (EU), which aims to achieve greater political and economic integration among EU Member States. However, the Civil Service Tribunal only considers labour disputes raised by EU civil servants against EU institutions. The CJEUhas competence to hear individual complaints of alleged human rights violations, which are decided by the General Court and may be reviewed on appeal by the European Court of Justice**.**

Originally established in 1952 as the Court of Justice of the European Coal and Steel Communities to ensure observance of the law «in the interpretation and application» of the EU treaties, CJEU currently holds jurisdiction to:

review the legality of institutional actions by the European Union;

ensure that Member States comply with their obligations under EU law; and,

interpret European Union law at the request of the national courts and tribunals.

The CJEU hears complaints brought by individuals through the subsidiary General Courtunder three circumstances under Article 263 of the Treaty on the Functioning of the European Union (TFEU). First, individuals may bring a «direct actions» against anybody of the EU for acts «of direct and individual concern to them». Second, individuals may bring «actions for annulment» to void a regulation, directive or decision «adopted by an institution, body, office or agency of the European Union» and directly adverse to the individual. Third, individuals may bring «actions for failure to act» that can challenge an adverse failure of the EU to act, but «only after the institution concerned has been called on to act. Where the failure to act is held to be unlawful, it is for the institution concerned to put an end to the failure by appropriate measures». General Court judgments and rulings on an individual action may be appealed, only on points of law, to the Court of Justice.

The EU recognizes «three sources of European Union law: primary law, secondary law and supplementary law. The main sources of primary law are the Treaties establishing the European Union. Secondary sources are legal instruments based on the Treaties and include unilateral secondary law and conventions and agreements. Supplementary sources are elements of law not provided for by the Treaties. This category includes Court of Justice case-law, international law and general principles of law».

An essential, primary source of EU human rights law is the Charter of Fundamental Rights of the European Union, which covers the civil, political, economic and social rights protected within the EU. The Charter binds EU bodies, and also applies to domestic governments in their application of EU law, in accordance with the Treaty of Lisbon.

The CJEU also views the European Convention of Human Rights as embodying principles of law applicable in EU Member States. *See, e.g.,Criminal Proceedings against Gianfranco Perfili*, Case C-177/94, Judgment of 1 February 1996. In that case, the Court stated: According to settled case-law, where national legislation falls within the field of application of Community law, the Court, when requested to give a preliminary ruling, must provide the national court with all the elements of interpretation which are necessary in order to enable it to assess the compatibility of that legislation with the fundamental rights – as laid down in particular in the European Convention of Human Rights – the observance of which the Court ensures. However, the Court has no such jurisdiction with regard to national legislation lying outside the scope of Community law (see the judgment in Case C-159/90 Society for the Protection of Unborn Children Ireland v Grogan and Others [1991] ECR 1-4685, paragraph 31).

Thus, although the primary goal of the EU has been economic and political integration, the CJEU has decided many cases that deal with fundamental rights. *SeeDefrenne v. Sabena*, Case 43/75, [1976] E.C.R. 455 (non-discrimination); *Prais v. Council*, Case 130/75, [1976] E.C.R. 1589 (freedom of religion); *Union Syndicale-Amalgamated European Pub. Serv. Union v. Council*, Case 175/73, [1974] E.C.R. 917 (freedom of association); *VBBB & VBVB v. Commission*, Joined Cases 43 & 63/82, [1984] E.C.R.19. (freedom of expression); and other cases dealing with the legality of anti-terrorism measures.

Without question, since its inception and through its jurisprudence, «the Court of Justice has developed the content of the Treaties to reach an authentic legal system translated into a Law that consecrates the foundation of a Union ever stronger between the European peoples, eliminating the barriers that divide Europe, strengthening the unity of economies, successively suppressing the restrictions on international exchange. But this true and autonomous Law is afflicted by gaps, highlighting the role of the Court of Justice through the systematic, logical, or teleological interpretation»[15].

We should keep in mind that what the Court of Luxemburg has achieved is to give a foundation to the primacy of Community Law and its direct application in the national legal systems of the member states, which has led to the conclusion EU law has a constitutional character by referring to the Treaties as a basic constitutional charter[16]. In the context of the opinion elaborating Article 228 of EECT of April 26, 1977 (Nº 1/76, ECR 743), in the decision Verts, the Court of Justice insisted on this last aspect, stating that the European Community is founded on

the rule of law, which implies that no institution can exclude itself from jurisdictional control by Community Law. As well, the Court of Luxembourg has reinforced in its jurisprudence on the protection of fundamental rights guaranteed by EU Law, given its affirmation of article 6 Treaty of Nice [Principles; Fundamental Rights; Relations Between the Union and the Member States] «(1) The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States».

(2) The Union shall recognise the rights, freedoms and principles set out in the Charter of Fundamental Rights added to this Treaty as a Protocol. The Union shall accede to the European Convention for the Protection of Human Right and Fundamental Freedoms. Such accession shall not affect the Union's and the Community's competences as defined in this Treaty or in the Treaty establishing the European Community. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law».

This constant effort to constitutionalize the legal system of the EU could be considered an isolated and anecdotal instance, had the Court of Luxembourg not reiterated this concept one year after the decision on Verts in the decision concerning the Hoechst case[17]. In this case, the Court judged the constitutionality of the measures adopted by the Commission, differentiating and defining the concepts of illegality and unconstitutionality. In this context, it was stipulated that illegality results from not knowing the procedure envisioned in the regulation in question, whereas unconstitutionality results from violating a fundamental right recognized as a general principle of law by the Court of Justice[18]: «In this order of ideas, the Court makes a distinction between two levels: between the control of Community legality that encompasses the control of legality *strictu sensu* and the control of constitutionality that encompasses the control of conformity to the general standards enunciated in the Treaties»[19].

Along the same lines, one should also refer to decision nº 1/91, paragraph 21, which establishes the EEC. Although in the form of an international convention, this does not diminish the fact that it serves as a Constitutional Charter for a Community of Law[20].As we can see, this line of reasoning continues the constitutionalization of the jurisdictional system envisioned by the Treaties: the jurisprudence of the Court of Luxembourg makes Community law a supreme standard, giving it constitutional characteristics in addition to explicitly referring to it as a Basic Constitutional Charter. The Court of Justice reiterates its position in the Order given in case 2/88, of July 13, 1990, in which it refers to what was earlier established in the decision *Verts* and makes once again clear that the Court has its own its own legal system integrated into the legal systems of the Member States. It should not come as a surprise that within the doctrine, some voices have assured that the Court of Justice acts as a true Constitutional Court, and the academic debate throughout the years has revolved around the words used by the Court, such as: «Constitution, Constitutional Charter, as well as the message transmitted by the same, searching amongst these for commonalities that exist between the Treaties and the national Constitutions, as well as the role of the Court of Justice and the national Constitutional courts»[21]. Also delving into this same issue, one should not forget the judgments of the CFI of 21 September 2005, Kadi / Council and Commission (T 315 /01) and Yusuf and Al Barakaat International Foundation / Council and Commission (T 316 / 01).

Having said all this, nonetheless, I would agree with Balaguer Callejón in affirming that the EU Court of Justice cannot be considered as a «Constitutional Court in practice», and this because the normative system that it should guarantee is not recognized as a Constitution. The author explains that «the more the Court of Justice has approached constitutional matters, the more it has stopped acting as a Court, and the more it has acted as a Court, the more it has distanced itself from constitutional matters»[22].

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Curiously, both jurisdictional authorities are «in essence the guardians and supreme interpreters of the Constitutions and the Constitutional Treaties, an aspect which is covered in the Magna Charta of the same»[23]. They have the mission to respect the Law, within a broad range of action that permits them to work creatively and to efficiently cooperate in the construction of European Community Law in the case of the EU Court of Justice and the internal constitutional Law in the other two cases. The Spanish Constitutional Court is empowered as the ultimate interpreter of the nation's Constitution, making it unique within the legal system as it enjoys autonomy and independence from other courts[24]. Nonetheless, the Spanish Constitutional Court has been accused of being strongly politicized due to the way its members are elected, which also seems to match the profile of the European Court of Justice[25].

Another aspect that the two jurisdictional authorities share in common lies in the impulses they give to the progress of Law in the constitutional sense, as guardians of the same, which implies that the identity of the Constitutional Court, as is the European Union Court of Justice, is neither closed nor invariable. Indeed, one can say that the two are in permanent evolution, which implies that the positions of these Courts within the legal system should always be defined with caution and not in a fixed manner.

As regards the powers accorded within the constitutional framework, the European Union Court of Justice overlaps significantly with the Constitutional Court of Spain in many of its functions. As regards the European Court, its functions are ultimately very similar to the ones a national Constitutional Court exercises in a politically decentralized state. In this respect, the European Court of Justice is called upon to decide on the competencies of the Communities and the Member States; to maintain an institutional equilibrium between the different community authorities; to safeguard the respect for fundamental rights and the general principles of the European Community

by both the Institutions and the Member States; to pronounce upon the relationship between Community Law and national Law; to exercise regulatory power to establish its own Rules of Procedure (even though this requires approval by the Council), and so on.

Now, as we know, the jurisdiction of the European Court of Justice extends across the territory of the Member States that form the EU, and its decisions are to be enforced according to Art. 280 TFUE, which produces some perplexity and casts doubt on the constitutional function of the European Court of Justice, as it lacks the necessary instruments to enforce its own decisions, and leaves it up to the National Courts to put these into force and fulfil that which has not been put into action.

In conclusion, «A supra-statal court like the ECJ is thus not only desirable but also indispensable for the legitimacy of a European constitutional order that is not a state. From the point of view of constitutionalism it is not desirable that the EU actually evolves into a European sovereign state since this would represent a danger of power concentration on a new level. In this regard, a supra-statal legal order with a strong court may be preferable to a sovereign democratic state. This would also be the position most consonant with the aims of post world war two when state sovereignty was seen as a potential problem, not as the only solution, of democratic government»[26].

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[1] The Treaty of Lisbon, which was signed on 13 December 2007 by the 27 Heads of State or Government of the Member States of the Union, comes into force on 1 December 2009. It amends the two fundamental treaties – the Treaty on European Union (TEU) and the Treaty establishing the European Community, with the latter to be known in future as the 'Treaty on the Functioning of the European Union' (TFEU). Only the European Atomic Energy Community or 'Euratom' will remain (Protocol No 1 amending the Protocols annexed to the Treaty on European Union, to the Treaty establishing the European Community and/or to the Treaty establishing the European Atomic Energy Community).

[2] MARTÍNEZ ARRIBAS, F.: «El sistema de competencias de la Unión Europea previsto por el Tratado de Lisboa», in *Código Constitucional de la Unión Europea*, Edit. Andavira, 2011, p. 101.

[3] Vid. LÓPEZ DE LOS MOZOS DÍAZ-MADROÑERO, A.: «La normativización de la jurisprudencia del Tribunal de Justicia de las Comunidades Europeas», *Revista Europea de Derecho Público Comparado*, nº 3, 2008, p. 11.

[4] HABERLE, P.: «Derecho Constitucional Común Europeo», in *Revista de Estudios Políticos*, nº 9, 1993, p. 7.

[5] DÍEZ-PICAZO, L.M.: «Reflexiones sobre la idea de constitución europea», *Revista de Investigación Educativa (RIE)*, Vol. 20–2. 1993, pp. 541 and ff.

[6] GARCÍA ROCA, J.: «Originario y derivado en el contenido de la Carta de los Derechos Fundamentales de la Unión Europea: los Test de Constitucionalidad y Convencionalidad*», Revista de Estudios Políticos (Nueva Época)*, nº 119, January-March 2003, pp. 165 and ff.

[7] DOUGLAS – SCOTT, S.: *Constitutional Law of the European Union*, Edit. Pearson Education, England, 2002, p. 519.

[8] MARICA, ANDREEA: *Unión Europea y el Perfil Constitucional de su Tribunal de Justicia*, Thomson Reuters. Aranzadi, Pamplona, 2013, p. 99. BUSTOS GISBERT, R.: «Tribunal de Justicia y Tribunal Europeo de Derechos Humanos: una relación de enriquecimiento mutuo en la construcción de un sistema europeo para la protección de los derechos», in *Integración europea a través de derechos fundamentales*, Centro de Estudios Políticos y Constitucionales, Madrid, 2009, p. 150.

[9] Vid. ibid, p. 99. Vid. MACCORMICK, N.: *Questioning Sovereignty. Law, State and Practical Reason*, Oxford University Press, 1999, pp. 104 and ff.

[10] Also, vid. ZETTERQUIST, OLA: «International Courts and Supra Statal Democracy – Part of the Problem or the Solution?».

[11] WILLIAMS, A.: *The Ethos of Europe Values, Law and Justice in the EU*. Chapter I: «The Ethos of Europe: an introduction», Edit. Cambridge, Studies in European Law and Policy, 2010, p. 2.

[12] RUIZ JARABO COLOMER, D.: «El Tribunal de Justicia de la Unión Europea en el Tratado de Lisboa», *Revista de Noticias de la Unión Europea*, nº 291, abril 2009, pp. 31 y ss.

[13] With the reform of the Treaty of Lisbon, it has been established that «The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts «. See Art. 19 of the EU treaty after the reform of Lisbon, as the new treaty introduces Title III comprising "Dispositions concerning the Institutions", Art. 13–19. The jurisdiction of the CJEU is now settled in the treaty, specifically in the dispositions of Art. 19 that maintains the content of Art. 220 of the Treaty on the European Community: "1. The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed. Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law. 2. The Court of Justice shall consist of one judge from each Member State. It shall be assisted by Advocates-General. The General Court shall include at least one judge per Member State. The judges and the Advocates-General of the Court of Justice and the judges of the General Court shall be chosen from persons whose independence is beyond doubt and who satisfy the conditions set out in Articles 223 and 224 of the Treaty on the Functioning of the European Union. They shall be appointed by common accord of the governments of the Member States for six years. Retiring judges and Advocates-General may be reappointed. 3. The Court of Justice of the European Union shall, in accordance with the Treaties: (a) rule on actions brought by a Member State, an institution or a natural or legal person; (b) give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the institutions; (c) rule in other cases provided for in the Treaties".

[14] We can only argue that a new aspect of the Treaty of Lisbon concerns the putting into practice a new, independent Committee that evaluates the suitability of candidates proposed by the Member states. Based on Art. 254 of the TFEU, the EU council is accorded, upon prior petition by the President of the Court of Justice of the EU, the power to adopt a Decision that set the standards of how the Committee functions and a Decision on how its members are designated. These two Decisions have been adopted and are in force since March 1, 2010. See the Decision by the Council of February 25, 2010, that sets the standards for the functioning of the committee envisioned in Art. 255 of the TFEU (2010/124/EU), DOUE L, 50/18, 27.02.2010. See the Decision by the Council of February 25, 2010, that designates the members of the Committee envisioned in Art. 255 of the TFEU (2010/125/EU), DOUE L, 50/20, 27.02.2010.

[15] MARICA, ANDREEA: *Unión Europea y el Perfil Constitucional de su Tribunal de Justicia*, op. cit., p. 114.

[16] One good example is the case Parti Ecologiste Les Verts / Parlamento Europeo, 294/83 de 23.04.1986, Rec. 1986, ap. 23.

[17] Case 46/87, Hoechst AG contra Comisión, 26.03 1987, de las Comunidades Europeas, 1987 ECR 1549.

[18] FERNÁNDEZ ESTEBAN, M.L.: «La noción de Constitución Europea de la Jurisprudencia del Tribunal de Justicia de las Comunidades Europeas», *Revista Española de Derecho Constitucional*, Año 14, Enero-Abril 1994.

[19] MARICA, ANDREEA: *Unión Europea y el Perfil Constitucional de su Tribunal de Justicia*, op. cit., p. 90.

[20] See the ruling on Art. 228 (2) of the Treaty on the EEC on the Project of the Treaty of the European Economic Area dated December 14, 1991. In this ruling, the Court of Luxembourg was consulted by the Commission regarding Art. 228 of the TCEE, concerning the compatibility of the same with the Agreement of the EEA. The consultation resulted in ruling 1/91 of the Court of Justice, in which the TCEE was declared incompatible with the EEA.

[21] MARICA, ANDREEA: *Unión Europea y el Perfil Constitucional de su Tribunal de Justicia*, op. cit., pp. 91–92.

[22] BALAGUER CALLEJÓN, F.: «Los Tribunales Constitucionales en el proceso de integración europea», *Re.DCE*, nº 7, January–June 2007, pp. 327–375. MARICA, ANDREEA: *Unión Europea y el Perfil Constitucional de su Tribunal de Justicia*, op. cit., p. 184.

[23] MARICA, ANDREEA: *Unión Europea y el Perfil Constitucional de su Tribunal de Justicia*, op. cit., p. 186.

[24] With respect to the Spanish Constitutional Court, see. art. 1 Chap. I of the LOTC.

[25] MARICA, ANDREEA: *Unión Europea y el Perfil Constitucional de su Tribunal de Justicia*, op. cit., pp.192–194.

[26] Vid. ZETTERQUIST, OLA: «International Courts and Supra Statal Democracy – Part of the Problem or the Solution?».

Summary

Cristina Hermida del Llano. **The constitutional dimension of the court of justice of Luxembourg and the Spanish constitutional court.**

The court of justice of the European Union has recently gained an unexpected new constitutional character. We analyse and consider the similarities and differences between the court of justice of the European Union and the Spanish Constitutional Court, focusing on the judicial architecture currently present in the european union sphere

Key words: European Union, Court of justice of the European Union, Spanish Constitutional Court, fundamental rights.

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