Basque Historical Rights within the European Union. A path towards co-sovereignty

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Ikerketa honen helburua Espainiako konstituzio-erregimenaren izaera berezia aztertzea da, bai Euskal Eskubide Historikoen ikuspegitik eta bai Europako Batasunaren (EB) esparruan izan duen eboluzioaren aldetik.

Giltza-Hitzak: EBko zuzenbidea. Euskal Eskubide Historikoak. Konstituzio-zuzenbidea. Zuzenbide konparatua. Kosubiranotasuna.

Este estudio pretende analizar la situación peculiar del régimen constitutional español respecto a los Derechos Históricos Vascos, y su evolución dentro del marco de la UE.

Palabras Clave: Derecho de la UE. Derechos Históricos Vascos. Derecho constitutional. Derecho comparado. Cosoberanía.

Cette étude analyse la situation particulière du régime constitutionnel espagnol par rapport aux droits historiques des Basques, et son évolution dans le cadre de l'UE.

Mots Clé : Droit de l'Union Européenne. Droits historiques basques. Droit constitutionnel. Droit comparatif. Co-souveraineté.

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To my beloved father,
In gratitude for giving me the aim and will
to sometimes feel like an Anglo-Saxon

Ubinam gentium sumus?
Cicerón
(Catilinarias, I, 4, 9)

This study has been possible as a result of my condition
of Basque Visiting Fellow 2003/04 at Saint Antony´s College,
Oxford University, and under the aegis of the agreement
of the aforementioned College and the Basque Studies Society

INTRODUCTION

The subject matter of this report has to do with the complicated legal and political situation of the Basque Country regarding the construction, development and enforcement of EU Law.[1]

In this case, the Basque Country, as well asjust like many other sub-national bodies, is facing difficult legal and institutional challenges before the EU, due to its current difficulties to actively participate in any EU levels. Within the scope of the Spanish case, we can anticipate that the reason is a highly centralist and shortsightened reading of the constitutional reality built up by succesive Spanish central governments.[2]

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1. Just as an initial example it would be more than appropriate to quote the article by J. M. Castells Arteche, "Europa-Euskal Herria", *Euskonews & Media* num. 31, http://www.euskonews.com.

"¿Qué decir de las realidades infraterritoriales que pueden recibir un nombre genérico de Región? Aquí, la visión europea -de sus sujetos políticos protagonistas-, denota una cierta miopía: la región está bien como nivel de apreciación económica, pero es desechable si se trata de situarlas a niveles parejos a los Estados. Parece que su involucración participativa en las políticas e instituciones europeas es un dato positivo, digno de apoyo, pero en estricta subordinación al papel esencial de los Estados miembros".

2. G. Jauregui states very clearly in the following lines: "a la hora de establecer en el texto constitutional de 1978 las disposiciones necesarias para hacer factible el proceso de integración de España en las Comunidades Europeas, los constituyentes no tuvieron en cuenta la estructura autonómica del Estado y, en consecuencia, no previeron medida alguna tendente a regular la participación de las Comunidades Autónomas en los asuntos relacionados con la Unión Europea o con las actividades internacionales en general.

Los diversos Estatutos de Autonomía intentaron paliar, siquiera parcialmente, la ausencia de esta regulación en el texto constitutional. A tal efecto establecieron, de forma generalizada, diversas disposiciones tendentes a favorecer el ejercicio, por parte de las Comunidades Autónomas, de una cierta actividad *externa* tanto en la fase ascendente como descendente. Sin embargo, por una serie de razones cuya explicación excede el marco de este trabajo, lo cierto es que tales disposiciones estatutarias no ofrecían por sí mismas una base suficiente para articular, en toda su complejidad, la participación de los entes territoriales en la Unión Europea. ...

The decentralised structure of the Spanish legal system is well known as a mixture of characteristics that are proper of a real federal State and those and those that denote a preference only to have regions assume symbolic regional realities.[3] If we focus, for example, on the cases of the Basque Country and Navarre, it is clear that autonomous governments have an important number of legislative powers of considerable importance, virtue and utility of which may turn out to overlap due the unilateral cesion of sovereignity made by the Spanish government since it became a member of the European Community.[4]

Unfortunately, the facts are indeed telling us that, during all this process, the Spanish autonomous communities in general, and particularly the Basque territories have not been taken into account, being in many cases taken by surprise by the procedings and political will of succesive Spanish central governments. Throuhout the process, the Treaty of Rome has somehow also contributed with its amendments,[5] only leaving certain residual posibilities of participation for sub-national bodies, either at the institutional level or before the Court of Justice of the European Communities (CJEC).

In a different sense, and regardless of the intitial cesion of soveregnity that took place, the EC has been gradually assuming more and more competencies in different policies, and therefore imposing an inevitable influence in the legislative, excutive and developing of legislative powers of the autonomous communities, under which regime we have, of course to include, the Basque Country and Navarre,[6] whose levels and margins or political and legal maniouvre have been

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...

Como consecuencia de todo ello no tardaron en producirse importantes conflictos derivados de la pretensión de algunas Comunidades Autónomas de llevar a cabo actividades de carácter externo. Conflictos que se extendieron al ámbito del derecho comunitario tan pronto como se produjo el ingreso efectivo de España en la Unión Europea", véase su trabajo "La actividad internacional de la CAPV. La implicación europea", *Euskonews & Media* num. 36, http://www.euskonews.com.

3. E. L. Murillo de la Cueva understands that in other contexts, we have seen a much more proactive will for the sub-national participation in the process. The diference stands on certain other entities within the context of a long-term process, while in Spain it has only coincided with the domestic bulding of a new constitutional system as a whole and its adequate integration to the European reality. Hence, for him, the clear advances in decentralisation have not taken place within a similar process in the European level:

"Creo que no estamos ante un problema meramente cuantitativo, técnico o de eficiencia del sistema, sino de coherencia con decisiones políticas fundamentales que figuran en la Constitución". See his study "Comunidades Autónomas y política europea", IVAP-Civitas, 2000, pages 38 and 39.

4. The concept I am using generally during this study is the European Community (EC), and not the European Union, because whereas the principles inspiring the EC are those eventually aplicable and which may interfere with a certain enforcement of the Historicial Rights; it is also equally true that the EC is the entity mentioned throughout the EC Treaty, and this is basically due to the fact that it is indeed the EC that currently has legal personality and not the EU.

5. In the momento of editing this study both the Treaty of the EC and the EU Treaty are inforce with the amendments and article nomenclature after Niza Treaty entered into force on 1-2-2003.

6. The common foral root of both the current Basque Country and Navarre are clearly stated within the First Additional Clause of Constitution, as well as in its developed legal approaches afterwards. But in the other hand, in front of certain arguments against the historical and legal existence...

considerably reduced, without any kind of cooperation agreement proposed thereon by the central Government until well into the nineties.[7]

These and some other considerations that I will try to develop are the main reasons bringing me to a necessary reflection on a problem that is becoming tougher and with increasingly as well asdifficult solutions. We need to remember therefore that for the European institutions it is not a matter of relevance to know which is the entity responsible at the domestic level for the implementation and commitment with EC law, as long as it is indeed properly enforced. Thus, in the case of non-compliance, insufficient or incorrect implementation, EC law would only consider the member Stare directly responsible, regardless of its respective domestic rules or problems.

We are therefore facing complicated matters, but matters that are nonetheless thereby somewhat more interesting. One of the more recent considerations thereon took place in September 1997 in the Spanish case. While negoatiating the Treaty of Amsterdam, the Spanish government avoided, without providing any kind of reason whatsoever, the signatune of an annex Statement to the new Treaty as proposed by Germany, Austria and Belgium, in order to assume in positive law

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...of Euskal Herria, the same Basque Statute of Autonomy (Organic Act 3/1979, approved also by the Spanish Parliament, underlines on its first article:

"El Pueblo Vasco o Euskal Herria, como expresión de su nacionalidad, y para acceder a su autogobierno, se constituye en Comunidad Autónoma dentro del Estado español bajo la denominación de Euskadi o País Vasco, de acuerdo con la Constitución y con el presente Estatuto, que es su norma institucional básica".

The territorial concretion of the aforementioned has been ratified by the Spanish Parliament within articles 2.1 and 2.2 of the Basque Statute of Autonomy:

Art. 2.1: "Álava, Guipúzcoa y Vizcaya, así como Navarra, tienen derecho a formar parte de la Comunidad Autónoma del País Vasco".

Art. 2.2: "El territorio de la Comunidad Autónoma del País Vasco quedará integrado por los Territorios Históricos que coinciden con las provincias, en sus actuales límites, de Álava, Guipúzcoa y Vizcaya, así como la de Navarra, en el supuesto de que esta última decida su incorporación de acuerdo con el procedimiento establecido en la disposición transitoria cuarta de la Constitución".

See as well, the Judgements of the Constituttional Court of Spain 94/1985, of 29-7, and 99/1986, of 11-7.

7. In this context it is so important to distinguish the concepts of "cooperation" and participation as quoted by E. L. Murillo de la Cueva, in his work "Comunidades Autónomas y política europea", op. cit., pages 60, 61, 63 y 65. Following this author, participation is constitutionally assumed by sub-national entities, under the basis of genereal interest and in order to permit to specify under Constitution the scope of competencies for the central government in each subject. Participation is based therefore upon general interest as well as in the integration of Spanish regions within the same State. On the other hand, cooperation is a principle which searchs for using techniques of relation and linkages between goverments and/or administrations, and which shold be developen within the structures of the government while enforcing their same competencies: "La participación no tiene que quedar limitada en función de las competencias concretas de cada Comunidad Autónoma sino que responde a una exigencia estructural del Estado, a la necesidad de integración de los elementos de esa estructura dotados de autonomía política para la gestión de los intereses respectivos (arts. 2, 69.1 y 137 of the Spanish Constitution)". In fact, the constitutional importance of cooperation should not play it together with participation. A fluid relation among all administrations should be assumed in EC matters. If cooperation is useful to get closer to participation, the first would never substitute to the latter.

the participation of subnational entities within EC institutions. It is obvious that this has special political and legal consequences in countries like the aforementioned or in Spain, all of which have a clearly decentralised structure, and amongst which the enforcement of the community principle of subsidiarity should become a basic piece of the framework and exercise of competencies, either between the EC and the States, or as among these and their subnational entities.[8]

After all this, the situation has become irreversible as far as the Statement is concerned. Thus, Spain is actually the single decentralised country in the EC which is not a signatory of the mentioned Statement to foster regional or subnational participation within the context of the EC framework. This could have been avoided some time before, by establishing at least one representative of the Spanish autonomous communities inside the State delegation negotiating the Treaty. That is indeed what has been done by the Germans, the Austrians and the regions in Belgium.[9] In the Spanish case, the approach was different, thus representing an absolute lack of political will on the matter, always tending to avoid any kind of subnational participation in the State delegation in the UE Council of Ministers.[10]

By means of this peculiar situation, the Basque case, its domestic territories, as well as well as Navarre do have a serious lack of representation within the EC institutions; whereas, as refers to their locus standi before the Court of Justice of the EC they could only act through the indirect possibilities awarded for legal persons in order to apply to the Court, because sub-state bodies do not have the necessary direct legitimation.

Obviously, the purpose of this study is a direct participation of the Basque Country and Navarre before the EC, not in an independent sense, but in harmony with other Spanish interests based on the EC and the constitutional principle of solidarity.[11] This would imply the participation of the Basque Country and Navarre in the Committes of the Commission, in the Council of Ministers as well asas well as in the different working groups, as bodies which are permanent designers of

8. See therefore J. Loughlin, "The Regional question, subidiarity and the future of Europe", in "Whose Europe? National models and the Constitution of the EU", edited by K. Nikolaidis and S. Weatherill, Oxford, 2003.

9. E. L. Murillo de la Cueva, "Comunidades Autónomas y política europea", IVAP-Civitas, 2000, page 143, includes as well together with those three States, the most recent case of the United Kingdom.

10. A. Mangas Martín has also referred to this matter: "en todo lo relativo a la participación europea de las Comunidades Autónomas, el Estado ha carecido de estrategia y prácticamente todos los pasos positivos andados (...) se han logrado por la constancia de la lucha de las Comunidades Autónomas en todos los frentes, ya fuera el político, ya fuera el judicial"; see "La participación directa de las Comunidades Autónomas en la actuación comunitaria: fase preparatoria", en P. Pérez Tremps (coord.), "La participación europea y la acción exterior de las Comunidades Autónomas", Marcial Pons/Institut d´Estudis Autonòmics, Barcelona, 1998, page 542.

11. In the same sense we have the opinion of E. L. Murillo de la Cueva, "Comunidades Autónomas y política europea", IVAP-Civitas, 2000, pages 133, 143 and 146. Therefore, this author requests for a new implementation of the autonomic participation based upon the criteria of exclusive competencies under affected interests by EC decisions: ...

new policies and regulations, and both also are to be considered sources to count on in future treaties.[12]

This has been the way chosen by Germany, Austria and Belgium. In the first of these cases, the Länder already take part as obworkrs within the different bodies, while in the case of Belgium there is a rotatory system of representation to an extent that a Flemish minister might chair a Council of Ministers at the EC.

Some of the main ways to develop the aforementioned could be as follows:

1. The streghtening of the European parliament after the Treaty of Amsterdam and within the European Constitution

We all know about the poor real representation and legitimacy that this body has had when dealing with European citizens as true stakeholders of each member State's sovereignity. The Treaty of Amsterdam Treaty tries to avoid this phenomenom to a certain extent, by leaving apart the democratic deficit with new techniques and procedures which may provide the Parliament with its representative level as a real framework representing the EC sovereignity in all cases.

2. The presence of the Basque Country and Navarre within the EC Council and Commission (art. 203 Treaty of the EC)[13]

The aim in this case is to analyse the legal reality derived from the mentioned article, as inforce in the Treaty of Amsterdam version. The idea here is to analyse the juridical reality that emanates from the aforementioned article in its new wording in the Treaty of Amsterdam version and the consecquences that might derive from that wording for the Basque Country and Navarre as well as well as for other sub-state entities, and always taking into account the current model developed by countries like Germany, Austria or Belgium.

...

"La intervención autonómica en el proceso de formación de la voluntad estatal ha de basarse en el interés respectivo. El fundamento de esa simetría está en el artículo 137 CE que acude al concepto del interés para describir genéricamente el ámbito sobre el que ha de proyectarse la autonomía de los municipios, las provincias y las Comunidades Autónomas. En coherencia con ese criterio, los artículos 148 y 149 CE determinan las funciones que sobre las materias que allí se enuncian (competencias) son asumibles por las Comunidades Autónomas en virtud de sus estatutos para la gestión de dichos intereses".

12. According to E. L. Murillo de la Cueva: "el ejercicio por las Comunidades Autónomas de la función-poder que implica ser parte en el proceso de elaboración, preparación y decisión de los acuerdos del Consejo de Ministros de la Unión Europea no sólo es legítimo sino, también, conveniente cuando se discuten cuestiones en las que tengan un interés directo e inmediato. Condiciones que, en términos generales, cumplen mejor las Comunidades Autónomas que el Estado ya que es en su ámbito de actuación donde más inciden las políticas comunitarias. Por otra parte, esa presencia directa en la maquinaria comunitaria y, en particular, en los órganos decisorios, contribuye a impulsar y dinamizar la construcción europea y, en cierto modo, a acercarla a los ciudadanos, pues es evidente la mayor proximidad que tienen para ellos las instituciones autonómicas". See his work "Comunidades Autónomas y política europea", IVAP-Civitas, 2000, pages 123 and 124.

13. Former article 146 Treaty of the EC.

3. Sub-State entities before the Court of Justice of the EC, with particular reference to the Basque Country and Navarre

This will assume a legal approach of the consecquences of the Agreement dated 11-12-1997 reached during the Spanish Conference on EC-related matters, reference to the participation of Autonomous Communities during procedures before the Court of Justice of the EC. This agreement was signed by all the Spanish Autonomous Communities, with the single exception of the Basque Country.

4. Subsidiary means for locus standi before the Court of Justice of the EC for sub-State bodies: the Basque Country and Navarre as legal persons before the EC

This consideration will analyse the procedural legal scope within the CJEC to reach certain level of sub-State legitimation before the CJEC. However, it is indeed a formula that should not be disregarded and which currently offers diverse alternatives and unexplored possibilities.

All these previous considerations are only a preliminary scheme on the different reflections that, "lege ferenda", will inspire the content of this study. Therefore, it is important to consider –albeit only briefly- certain historical data on the legal framework which explains and presents the problem of historical rights in the different territorial contexts of Euskal Herria. There are many perspectives in this context under which we could analyse the meaning of the historical rights of the Basque territories. Any such perspectives could be considered valid, as long as their bases are solid and reasonable. However, I should underline here that my study is intended to follow their premises and historic or legal evolution as a true example of a legal framework that has been alive up to the present day, that still governs a good part of the public legal relationships of the Basque territories with the central State, such as the domestic structure of the Basque territories and their particularities with respect to the rest of the common Spanish provinces.[14]

The particular characterictic of the "foral" Basque regime has been constantly present within any historic anaylisis and is also quite clear within our constitutional and legal texts.[15] As a starting point, I also have to underline in these lines the

14. This is the point of view of many previous authors. Among them, I can mention T. R. Fernández, in his work "Los Derechos Históricos de los territorios forales", Madrid, 1985, as a true and fair view of the whole process.

15. Probably, the most important historic data in this scope was made by Antoine d´Abbadie in a surprising sense, and explained nowadays to us by G. Monreal in his interesting work, "El ideario jurídico de Antoine d´Abbadie", *Euskonews & Media* num. 16, http://www.euskonews.com.

Regarding the concept of "historic Constitution" developed by d´Abbadie, Monreal states that: "La superioridad de la constitución histórica la ve expresada y confirmada en dos formaciones políticas. En Inglaterra, el imperio más grande de la época, y en Vasconia, un pequeño país fragmentado en dos Estados y subdividido internamente en entidades poco relevantes....

curious and relevant consideration made by Loperena[16] on the very similar terms of the First Additional Clause of the Spanish Constitution (1978) and the Act of 25-10-1839.[17] If, as stated by this author, the Act of 25-10-1839 confirms the Basque and Navarrese "Fueros" (Rights) at the same time and by means of a common system, the First Additional Clause of the Constitution also confirms and respects the historical rights of those territories. As stanted by Loperena:

> una remite a una futura ley su adaptación a los mínimos de uniformidad que exigía la Constitución, y la otra con distinta expresión contiene idéntica propuesta. No debe seguir confundiéndose actualización de los derechos históricos con puesta en vigor de normas o instituciones del Antiguo Régimen, ya que la actualización en 1839 y en 1978 implica, simplemente, la adaptación del autogobierno foral a los parámetros convivenciales e institucionales establecidos en la Constitución. Ello significa necesariamente que el desarrollo normativo de la D. Ad. 1ª. admite distintas opciones políticas, diferentes respuestas legislativas; así, los "derechos históricos" (salvado el núcleo irreductible que protege la garantía institucional de los mismos) podrán dar lugar a regímenes forales sustancialmente distintos con el transcurso del tiempo en virtud de las sucesivas actualizaciones.[18]

...

Inglaterra, con 23 millones de Km^2 de extensión, era a la sazón la gran potencia mundial, modélica por su prosperidad creciente. Y para admiración de los franceses y de los continentales en general tiene un Derecho singular, integrado por el Common Law, -que para d'Abbadie son "costumbres o fueros"- y el Statute Law, o actos del Parlamento. Aporta nuestro autor una definición del Common Law, en la línea de Le Play ("una costumbre de tal modo antigua que la memoria de ningún hombre corre en contrario").

El segundo modelo de referencia constante es la constitución histórica de la Vasconia española. "Nacida de la experiencia y de la sabiduría de los siglos", se habría ido formando lentamente. Aquí sí cita expresamente a Le Play que "había llegado a la conclusión inesperada de que las mejores leyes de Europa se encuentran en algunos cantones suizos y en las Provincias Bascongadas de España, parte de cuyas leyes no están escritas, debiendo su fuerza a esta circunstancia, que permite modificarlas lentamente, según los cambios de las costumbres e ideas".

D'Abbadie llega a participar de la idea de que los orígenes de la constitución histórica inglesa están relacionados no con los anglos, jutos y sajones, que llegaron a la isla en el siglo VI y conformaron un sistema que durará cinco siglos, sino con los vascos, en "relaciones [de los británicos] con nosotros". Aludiendo genéricamente a historiadores ingleses que no cita, indica que "durante su dominación [la de los ingleses] en Guyena desde el siglo XII en adelante, los ingleses se iniciaron en la sabiduría de sus vecinos los bascos. Desde el siglo siguiente se adoptó aquélla [la constitución vasca] en las riberas del Támesis, y hasta hoy es fácil mostrar la identidad de muchas ideas fundamentales que hay en nuestros viejos fueros y las leyes inglesas".

16. D. Loperena, "Derecho histórico y régimen local de Navarra", Gobierno de Navarra, 1988, page 37.

17. Act of 25 October 1839.

"Artículo 1º. Se confirman los Fueros de las provincias Vascongadas y de Navarra sin perjuicio de la unidad Constitutional de la Monarquía.

Art. 2º. El Gobierno tan pronto como la oportunidad lo permita, y oyendo antes a las provincias Vascongadas y a Navarra, propondrá a las Cortes la modificación indispensable que en los mencionados fueros reclame el interés general de las mismas, conciliándolo con el general de la Nación y de la Constitución de la Monarquía, resolviendo entretanto provisionalmente, y en la forma y sentido expresados, las dudas y dificultades que puedan ofrecerse, dando de ello cuenta a las Cortes".

18. D. Loperena, "Derecho histórico y régimen local de Navarra", op., cit., page 37.

All the aforementioned contains basic legal consequences to currently intrepret with a practical sense the various perspectives and consquences deriving from the concept of Historical Rights.[19]

Another curiosity on the matter would bring us back to the Constitution in force just to speak about its Second Derogatory clause and in relation with all the aforementioned matters. This clause states that:

> en tanto en cuanto pudiera conservar alguna vigencia, se considera definitivamente derogada la Ley de 25 de octubre de 1839 en lo que pudiera afectar a las provincias de Álava, Guipúzcoa y Vizcaya. En los mismos términos se considera definitivamente derogada la Ley de 21 de julio de 1876.

This indeed represents a paradox within the whole analisys. When the Second derogaory clause of the Constitution derogates the Act of 25th October 1839 for Álava, Guipúzcoa and Vizcaya, the Constitution shows which are the difficulties of future central governments in interpreting the Basque and Navarrese regimes, as well as well as which were the problems for a certain part of Basque nationalism in its vision of the relationship between the Basque territories and the State itself, according to the Constitution.[20] As an outcome of all these disagreeements, we could well be facing one of the most important paradoxical items within the process of Spanish constitutionalism.

If the Second Derogatory clause of Constitution brings derogates the Act confirming the "foral" system of 1839, it incurrs in direct and express contradiction of the recognition and respect of the "foral" Historical Rights assumed by the First Additional clause of the Constitution. The approach is therefore difficult to understand if we do not take into account the political perspective previously mentioned. But this failure could become bigger, because the Derogatory clause only affects Álava, Gipuzkoa and Bizkaia, and does not quote Navarre at all.

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19. Concept that, in a different perspective and without constitutional caluse at all, in the French Basque couuntry is also present for the words of M. Lafourcade with regard to the peculiar identity of the French-Basque territories (Iparralde in Basque): "Dans une Europe en pleine mue, les Etats-nations, constructions artificielles, semblent aujourd'hui dépassés. Les revendications identitaires des minorités sont universelles. Pour éviter toute homogénéisation culturelle, chaque peuple doit prendre conscience de sa réalité et, pour cela, connaître son passé et retrouver son identité qu'il doit conworkr tout en s'adaptant à la société moderne. Or, le peuple basque, plus que tout autre, possède des caractères propres qu'il a préservés tout au long de son histoire, du moins en Iparralde jusqu'à la Révolution de 1789.

Son système juridique, qui servait de fondement à son organisation sociale, ne fut pas influencé par le Droit romain qui, partout ailleurs en Europe occidentale, modifia profondément la tradition juridique populaire. Conçu par et pour une population rurale, il a été élaboré à partir des maisons auxquelles s'identifiaient les familles et qui, comme elles, se perpétuaient à travers les siècles, donnant à la société basque une grande stabilité"; véase a tal fin su trabajo "Iparralde ou las provinces du Pays Basque nord sous l´ancien regime", *Euskonews & Media* num. 3, http://www.euskonews.com.

20. We have to remember here that the Act of 25 October 1839, under the title "confirmatory of "fueros"", was considered by a part of Basque nationalism as an abolition, even though its sense and aim were only to adapt the particular regimes in the Basque territories to the new Constitution during those days.

Should we therefore consider in that sense that the Act confirming the "foral"system of 25-10-1839 is still in force for Navarre? The legal answers could be various as well, if we forget the political courses of disagreements and quarreling which are present on the Basque reality up to the present. The same current of quarrels and disagreements was also present during the constitutional process with more political than legal arguments in most cases.[21]

In my view, the Historical Rights of the Basque Country constitute the logical transit from the historical concept of "Fueros" to the constitutional integration of certain territories which maintained a voluntary and uninterrupted political and juridical public will of identity duirng the whole of that process. The common point for both figures is its nature of agreement between two parties throughout history.[22] The distinction between both is the current difficulty to recognise that situation from the State and EU perspective. Among our jurists, Herrero de Miñon has brilliantly demonstrated the possible regimes for the integration of the Basque Historical Rights within the constitutional reality,

21. An interesting example of this was quoted by V. Tamayo Salaberría in her impressive work "La autonomía vasca contemporánea. Foralidad y estatutismo 1975-1979", IVAP, 1994, page 617. The author reminds us of a relevant event of our "foral" and constitutional history during the debate at the Spanish Parliament on the First Additional Clause of the Constitution about the Basque Historical Rights:

Sometido a votación el voto particular Nº 539 de UCD para mantener el texto de la Disposición Adicional primera tal como había salido del Congreso de los Diputados, fue aprobado por 129 votos a favor, 13 en contra y 78 abstenciones. Había decaído la Disposición Adicional salida de la Comisión Constitutional del Senado, que había suscitado tantas esperanzas, al parecer infundadas.

El Senador Monreal solicitó a la Presidencia información acerca del pronunciamiento de la Mesa del Senado, cuyo Vicepresidente era el socialista, Ramón Rubial Cabia, Presidente en aquel entonces del Consejo General del País Vasco, y uno de sus miembros el Senador navarro Jaime Ignacio del Burgo:

"El señor Presidente: ¿El señor Monreal para qué pide la palabra?

El señor Monreal Zia: Exactamente es para una cuestión no sé si de orden o no. Quiero elevar a la Presidencia una consulta. En esta Cámara existe el precedente, dado que no es fácil conocer el resultado de la votación de la Mesa, de que se haga una indicación de cuál ha sido ese resultado. Nuestro Grupo desearía saber los resultados de la votación de la Mesa.

El señor Presidente: Cuatro votos a favor y dos abstenciones.

El señor Monreal Zia: Si pudiera ser, nominátim.

El señor Presidente: Los miembros de la Mesa de Unión de Centro Democrático han votado a favor y los dos del Partido Socialista se han abstenido.

El señor Monreal Zia: Muchas gracias, señor Presidente".

22. Authors like T. Urzainqui clearly disagree with the idea of agreement, whereas they consider absolutely evident that the whole Basque territories were conquered through militar and violent means in different moments of history. See his enormous historical and legal works, to clarify as well the identity of Navarre as the Historical Basque State, while "Euskal Herria" remains as its cultural global identity mainly through language. In other words, both are the same body with different titles:

T. Urzainqui y J. M. Olaizola, "La Navarra marítima", ed. Pamiela, Pamplona, 1998.

T. Urzainqui, "Recuperación del Estado propio", Nabarralde, Pamplona, 2002.

T. Urzainqui, "Navarra sin fronteras impuestas", Pamiela, Pamplona, 2002.

T. Urzainqui, "Navarra Estado europeo", Pamiela, Pamplona, 2004.

pushing aside any kind of political disagreement on which many of the other studies were based.[23]

Nieto Arizmendiarrieta's words are also quite clear when he states that:

> la foralidad, la primacía del Fuero como fuente jurídica, sólo alcanza naturaleza de rasgo diferencial cuando se contrapone, ya en la época moderna, con las nuevas categorías jurídico-políticas de Estado y de Soberanía. En la época medieval, por el contrario, la foralidad era el rasgo común de los ordenamientos jurídicos.[24]

In any case, my aim here is not to go deeper into the historic analysis of the concept of Historical Rights, but to point out, at least briefly, some of the paradoxes of this singular legal institution at the domestic level, in order to go further into its particular integration at the EU level as well. As an introduction, it may be enough to make a flashback to the 19th century, just to understand without much of an effort the misunderstanding that then took place in terms of the common Spanish concept of "foral regime" in Spain.

The particular public institutions of the Basque territories, their taxation system, peculiarities in terms of military service for Basque citizens, customs, certain procedural specialities and their Civil Law would nor easily be undestood under the uniform system proposed by the liberal State in Spain. The Act of 25-10-1839, the 1841 Agreement Act, the last domestic war during the 19th century and the Act of 21-7-1876 were events that gave way to the new century with the same difficulties and disagrements, only resolved up to a certain extent through the covenants and partial agreements that have marked our recent history.

As quoted by Herrero de Miñón and T. R. Fernández, the Basque Historical Rights are much more that a mere accumulation of competencies and public bodies. They do represent a real legal and political concept, previous to our current constitutional reality and, therefore, cannot be derogated through any unilateral decision, once its legal nature as a contract or agreement have been provided for.[25]

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23. M. Herrero de Miñón, "La titularidad de los Derechos Históricos vascos", *Revista de Estudios Políticos*, nº 58, 1987.

M. Herrero de Miñón, y E. Lluch, "Constitutionalismo útil", en *Derechos Históricos y Constitutionalismo útil,* Fundación BBV, Bilbao 2000.

M. Herrero de Miñón, "Autodeterminación y Derechos Históricos", en *Derechos Históricos y Constitutionalismo útil,* Fundación BBV, Bilbao 2000.

M. Herrero de Miñón, "Derechos Históricos y Constitución", Taurus, 2000.

M. Herrero de Miñón, "El valor de la Constitución", Barcelona, 2003.

M. Herrero de Miñón, "España y Vasconia: presente y futuro (consideraciones en torno al Plan Ibarretxe", en "Jornadas de Estudio sobre la Propuesta Política para la convivencia del Lehendakari Ibarretxe", IVAP, Oñati, 2003.

24. E. Nieto Arizmendiarrieta, "Reflexiones sobre el concepto de Derechos Históricos", RVAP nº 54, 1999, pages 142 y 143.

25. See therefore their works, M. Herrero de Miñón, "Derechos Históricos y Constitución", Taurus, 1998 and T. R. Fernández, "Los Derechos históricos de los territorios forales", Civitas, 1985.

In order to conclude this brief introduction, I would also like to include the words by J. Cruz Alli (former President of Navarre), during his speech at the debate in the Spanish Senate on the General Commission of Autonomous Communities in 1994. He informed both the Senate as well asand the Spanish Premier of the possible consecquences deriving from the unfulfillment of those agreements derived from the actions of the Spanish Government, namely against the common institution of the Historical Rights of the Basque Country and Navarre. In this sense, and with regard to a constitutional conflict presented by the central Government and another certain autonomous community, against some of the competencies of the government of Navarre in accordance with its Historical Rights as recognised in the First Additional Clause of the Constitution, J. Cruz Alli declared:

> un hipotético (y siempre posible) pronunciamiento del Tribunal Constitutional favorable a la tesis que sostiene el Gobierno, señor Presidente, supondría plantear una gravísima cuestión de Estado, puesto que atentaría de forma radical y sustancial a la soberanía fiscal navarra, a sus derechos históricos y al modo en que Navarra se ha venido integrando dentro del Estado, y que ha venido siendo reconocido por los diferentes regímenes desde que se dicta la Ley Confirmatoria de los Fueros de 1839.
>
> En tal supuesto, señor Presidente, la Comunidad Foral de Navarra no iba a estar sola; cualquier pronunciamiento del Tribunal Constitutional que pusiera en duda o riesgo las facultades y derechos históricos de Navarra suscitaría, sin duda alguna y de forma inmediata, la plena solidaridad de las diputaciones forales, de los territorios históricos vascos y de su propio Gobierno. Todo ello provocaría un grave problema de enfrentamiento con el Estado.[26]

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26. Diario de Sesiones del Senado (Spanish Senate), V Legislatura, Comisiones, Nº 128, 1994, pages 62 and 63, Comisión General de las Comunidades Autónomas, (26-9-1994). By the way, during the following session and during his speech, J. Cruz Alli quoted again the figure of Mr. Ramón Rubial, present either at the Senate and during the former constitutional debate in 1978 on the First Additional clause and Historical Rights. Regardless of the curiousity, the words of J. Cruz Alli may proved again the agreement nature of Historical Rights and the evenual consecquences of their breach from the central Government, while stating as well some other historic references: "Señor Presidente (y con esto acabo), cuando se produjo esta impugnación hubo quienes, quizás desde un navarrismo exacerbado, pero no carente a veces de fundamento, recordaron un episodio que exactamente el año pasado había celebrado su centenario, la Gamazada. La Gamazada, que es un episodio que su señoría no conoce (y el señor Rubial sonríe, porque también lo conocen los ciudadanos de la Comunidad Autónoma vasca), fue muy importante en el respeto por parte del régimen liberal de los convenios económicos y de ese hecho diferencial que ha caracterizado a la foralidad vasca y a la foralidad navarra.

Desde el Gobierno de Madrid se pretendió imponer un sistema fiscal, sin contar con el pacto, sin contar con la negociación, y eso provocó, señor Presidente, una sublevación civil. Incluso hubo quien levantó una partida, pero se le mandó a casa. Y los navarros hemos recibido, como timbre de gloria, el ver que en el manifiesto foral que apoyó aquella oposición a la decisión del Gobierno de Madrid estaban nuestros abuelos, estaban nuestros bisabuelos. Somos, señor Presidente, un pueblo con memoria histórica, que la ejercitamos y la tenemos viva.

Y me voy a referir a una anécdota, y con esto acabo, señor Presidente. La primera vez que se lució en público una ikurriña fue de la mano de Sabino Arana en aquella manifestación apoyando desde el vizcaitarrismo la defensa de la foralidad de Navarra.

Por eso, señor Presidente, cuando ayer hacía una referencia a un problema que puede convertirse en común, lo hacía, no con historicismos, sino recordando aquello de Cicerón de que la historia es la maestra de la vida, y aquello que también dijo alguien: que el pueblo que no tiene sentido de la historia está privado de tener sentido del porvenir. ...

1. THE HISTORICAL RIGHTS OF THE BASQUE COUNTRY WITHIN THE SPANISH CONSTITUTION

1.1. The concept of Historical Rights in the First Additional clause of the Constitution[27]

The implementation and consecquences deriving from the Firts Additional clause of the Constitution go further than a mere theoretical study, proving that the method of reaching an agreement, in this context of territories, has been and still is a real and valid approach to resolve tough political disagreements. In our case, the question is doubly interesting if we consider that the agreement recognised by the First Additional Clause of the Constitution implies, in any case, an agreement on a legal and political historical relationship as the fruit of a previous "iter", that is nowadays historical, but within a constitutional recognition through the First Additional Clause of the Constitution on Basque Historical Rights.

It is therefore an agreement on the pre-existing agreement; an agreement that is oriented towards the future and which may attempt to deal with all the conflicts in such a major matter as the Basque integration within the Spanish constitutionalism. History, once again, shows us a clear will for agreement at the level of our public institutions. In the meantime, we are still looking for a final agreement to resolve violence and the political problems that the Basques have been experiencing for such a long time.

Indeed, the political agreement has been and is currently a real part of the political and legal culture of this land, given the fact that Historical Rights are also a agreement to a certain extent and so is the economic regime deriving from the former. This means a legal regime that is peculiar to us and aims to assume the diverse legal and political aims of a plural society, has reached its limits in the current and long-standing political situation. This kind of approach may help us reach the aforementioned political and social agreement, in order to allow the different sensibilities to live together without relevant disagreements.

...

Muchas gracias, señor Presidente. (Aplausos)".

Diario de Sesiones del Senado, V Legislatura, Comisiones, Nº 129, 1994, page 31, Comisión General de las Comunidades Autónomas, 27-9-1994.

27. First Additional Clause of the Spanish Constitution:

"La Constitución ampara y respeta los derechos históricos de los territorios forales.

La actualización general de dicho régimen foral se llevará a cabo, en su caso, en el marco de la Constitución y de los Estatutos de Autonomía".

"The Constitution protects and respects the Historical Rights of the "foral" territories. The general updating process of this regime shall be enacted, whenever appropriate, within the framework of the Constitution and the Statutes of Autonomy". The four quoted "foral" territories , within the context of this article, had been defined by the Spanish Constitutional Court as: Alava, Bizkaia, Gipuzkoa and Navarre.

The example of the constitutional agreement that derives from the First Additional clause of the Constitution is not easily to be implemented within our global conflict, even though history and facts prove that the negotiating capacity of our institutions, as well as well as the special nature of most of our regulations. The solution to the conflict deriving from this entire situation may also be presented as an agreement. The only thing that is currently lacking is therefore political will, the type of political will that is clearly visible when we talk of the "economic concert" (Basque financial regime with the central Government). Otherwise, albeit will be impossible to reach any kind of final solution within the field of Law if the necessary political will is not properly assumed by all parties.

The difficulties to elaborate a concept in this case are well known by everybody. In the case of Historical Rights, these are increasing. However, from the aforementioned ideas, I think we should be able to reach certain conclusions which are to a certain extent quite close to the concept of Historical Rights elaborated by Herrero de Miñón in many aspects. Therefore, I will follow his comments to guide me in this complicated task.

Herrero de Miñón gives the First Additional clause of the Constitution its own substance based on its very location within the Constitution, as a relevant part of the so called "regulatory group" fully intended to have both current and future legal value:[28]

> ante la Constitución, los Derechos Históricos son un a priori material caracterizado por la pre y para constitutionalidad. Ello se concreta en tres notas fundamentales:
>
> En primer lugar, los Derechos Históricos no son una creación de la Constitución. (...)
>
> En segundo término, al no derivar de la Constitución, los Derechos Históricos, por ella amparados y reconocidos, son inmunes ante la revisión constitutional. (...)
>
> Por último, los Derechos Históricos así concebidos, si bien es cierto que suponen una "reserva permanente de autogobierno", ello se debe no a la inderogabilidad de unas competencias determinadas, sino a la infungibilidad de un hecho diferencial, conscientemente asumido por el pueblo vasco y que da un "derecho de ser" con propia identidad.[29]

1.2. Extension and limits of the concept in the Constitution

The theses of Herrero de Miñón are once again of great value in this part, the conclusions of which may also mark the final purpose of this study. According to Herrero de Miñón:

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28. M. Herrero de Miñón, "Derechos Históricos y Constitución", op. cit., page 76.

29. Ibid, pages 86 and 87.

> los Derechos Históricos, como principio de infungible e inderogable identidad; como permanente reserva de autogobierno; y como forma de integración pactada a todos los niveles,

This is the character and legal single clause that sets an esentially different procedure for integration for the autonomy of the Basque Country and Navarre than that for any other territory within the Spanish Constitution. Thefeore:

> los Derechos Históricos sólo tienen una función: expresar un hecho diferencial en el seno de un conjunto y servir para organizarlo como tal. Como la nebulosa de La Place, no se hallan en el pasado sino en el futuro.[30]

The width and difficulty in concreting the concept, despite the approach made by Herrero de Miñón, force us to search within the constitutional context in which the extension and limits of this figure, be it historical or legal, are to be found and that context seems to have a considerable capacity to adapt its sense to diferent historical and juridical moments in our own history. What we may call one of the keypoints of this matter returns once more to my memory, through another brilliant intervention by this author, before a Basque auditorium that had asked him about the potential of the Historical Rights and their constitutional bounds. During that day, one of the attendants did not understand the link between Historical Rights and their limits for the principle of sovereingty as they stood in the Constitution with its superior hierarchy regardless of any other legal or constitutional consideration: "but, is there anything else even deeper than constitutional sovereingty?", was the question formulated from the floor. Herrero de Miñón received some help from a jurist that was also present in the event who explained where the limit of the constitutional Spanish sovereignity is:

> Article 1.2 of the Spanish Constitution: "La soberanía nacional reside en el pueblo español del que emanan los poderes del Estado".[31]

Sovereignity therefore depends on society, as it is dedicated to servicing the people, and following the relevant procedures for amendment or otherwise, society may decide on a constitutional reform, a substantial political change or even the eventual extension, reduction or updating of the Historical Rights with respect to the bounds and limits accepted by the Constitution. Is the principle of sovereignity within such limits? Not necesarily in mi view; but let us now consider certain other reasons in favour of this theory, together with the afore-mentioned words from Article 1.2 of the Spanish Constitution.[32]

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30. Ibid., page 93.

31. Debate during the conference "Constitución, Derechos Históricos y Autodeterminación", by M. Herrero de Miñón, *Aula de Cultura Diario Vasco*, Hotel María Cristina, San Sebastián, 26-11-1998.

32. If a certain society or State is allowed to have a specific constitutional regime and choose its different possibilities of legal public relations, it is indeed logical to assume that this same society may later modify its legal regime, its Constitution and, why not?, the principle of sovereignity located in that very Constitution as a part of it, and as a proportional part of each citizen's sovereignity within their singlar but relevant capacities for decision under the rule of law.

Better than assuming such an unclear concept as sovereignity in order to focus the scope of Historical Rights it is necesary to reconsider the debate on what has been called by Loperena, "the constitutional unity" as a clearer limit for Historical Rights, which is also legally posible to determine within our special constitutional context.

This approach also covers, on the one hand, a historical limit for Historical Rights, in that the agreement acts not only as the basis for determining competencies, but alas well as a means of resolving conflicts arisen between the central Government and the Basque territories. As a second step, for Loperena, the maximum limit in negotiating capacity for both parties is based upon the concept of "constitutional unity", under which the EU law has currently made important contributions in the constitutional level. This constitutional unity seems to be variable throughout history, but it may be possible to specify its concept somewhat more, as long as we can undestand it in a wider sense than that limited by the limit of competencies set in the Constitution in its chapter VIII. Therefore, we have to underline here that the First Additional clause of the Constitution is outside that chapter, and does not have any direct linkage with it, so, in that sense, it will not constitute an objective limit or boundary to Historical Rights.[33] However, according to Loperena:

> parece incuestionable que principios como el de unidad, solidaridad, igualdad o libre circulación de las personas y los bienes son de obligado respeto por los Territorios históricos, sin que ello prejuzgue los instrumentos de respeto a tales principios. Como ya estableciera el Tribunal Constitutional en la Sentencia de 28 de julio de 1981, los principios constitutionales obligan a todas las organizaciones que forman parte de la totalidad del Estado. Los derechos individuales y colectivos de los ciudadanos y lo garantizado institucionalmente no pueden ser controvertidos por ningún régimen precedente o vigente al punto de aprobarse la Constitución, o por un acuerdo posterior de actualización. Lo recogido en la Norma Suprema como ampliación, superación y profundización de libertades y derechos que se van ganando respecto de épocas anteriores son conquistas históricas que afectan por igual a todos los órganos representativos y a toda la actividad de todas las Administraciones e Instituciones públicas, incluidas aquéllas que tengan su fundamento en la D.A. 1ª.[34]

In conclusion, the point of reference for the mentioned "constitutional unity" as a limit for Historical Rights would not be the sovereignity of fundamental rights, but the State sovereignity itself which is, in any case, an institution that works for the citizens and their human rights. It is also obvous that EU law has a lot to say in all this complicated process.

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33. See in general D. Loperena Rota, "Unidad constitutional y actualizaciones generales y parciales de los Derechos Históricos", in *Jornadas de estudio sobre la actualización de los Derechos Históricos vascos*, UPV-EHU, 1985, pages 310 to 324.

34. Ibid., page 317.

1.3. The contributions of case-law

As quoted by Herrero de Miñón,

> la jurisprudencia del Tribunal Constitutional, aparte de insuficiente, es, en cuanto a los Derechos Históricos se refiere, manifiestamente contradictoria.[35]

Any study on the constitutional jurisprudence on the matter –however brief- will also show us the mentioned contradictions, as well as well as certain incorrect concepts that have been used. Constitutional Court Sentence 11/1984,[36] confirms very clearly that:

> las fuentes de las que nacen las competencias de los territorios históricos, por un lado, y de las Comunidades Autónomas, por otro, son necesariamente distintas. Los territorios forales son titulares de "derechos históricos" respetados, amparados y sujetos a actualización en el marco de la Constitución y de los Estatutos de Autonomía (...); por lo que la delimitación de las competencias de tales territorios podrá exigir una investigación histórica acerca de cuáles sean tales "derechos". Mientras que las competencias de las Comunidades Autónomas son las que éstas, dentro del marco establecido por la Constitución, hayan asumido mediante sus respectivos Estatutos de Autonomía; habrá que acudir, en consecuencia, a la Constitución, a los Estatutos de Autonomía y a otras posibles normas delimitadoras de competencias dictadas en el marco de las anteriores para saber cuáles sean las correspondientes a cada Comunidad.

Curiously, later on, the Constitutional Court stated in its Sentence 124/1984,[37] very different conclusions on the matter by saying that:

> la idea de Derechos Históricos de las Comunidades y Territorios Forales a que alude la Disposición Adicional 1ª. de la Constitución no puede considerarse como un título autónomo del que pueden deducirse específicas competencias.

The course keeps on deriving, however, with its Judgement 6/1988,[38] recognising mainly conlsusions extracted from pieces of the two aforementioned judgements.

Later on, perhaps the approach in Sentence 88/1993[39] may somewhat clarify the situation. The Constituional Court states in that case that:

> el sentido de la Disposición Adicional Primera CE no es el de garantizar u ordenar el régimen constitutional de la foralidad civil (contemplado, exclusivamente, en el

35. M. Herrero de Miñón, "Derechos Históricos y Constitución", op. cit., page 122.

36. Spanish Constitutional Court Sentence Sentence (2-2-1984).

37. Spanish Constitutional Court Sentence (18-12-1984).

38. Spanish Constitutional Court Sentence (26-4-1988).

39. Spanish Constitutional Court Sentence (12-3-1993).

> art. 149.1.8 y en la Disposición Adicional Segunda CE), sino el de permitir la integración y actualización en el ordenamiento postconstitutional, con los límites que dicha Disposición marca, de algunas de las peculiaridades jurídico-públicas que en el pasado singularizaron a determinadas partes del territorio de la Nación.

I wish to stress in this point that, independently of the incorrections and unclear terms, there is not a single Sentence from the Constitutional Court on the relationship between the Historical Rights of the Basque territories and the EU process. There are, indeed, as we will see, certain pronouncements on the role of sub-national entities in general within the EU bodies and policies, but never through the concept of Historical Rights as stated by the First Additional clause of Constitution.[40] Therefore, if the authors of the Constitution were not aware of the potential role of this clause in the future, the same goes for the interpreters of Constitution in Spain, as the direct heirs of the generally unclear situation mentioned above, both during and after the process of elaboration of the current Spanish Constitution.[41]

1.4. The Economic Concert or Agreement as a particular and common example of the Historical Rights for the Basque territories[42"43]

The recent agreement on financial matters between the Basque and the central governments opens a new horizon on the economic Concert and its future within the legal and political EU framework. Once again, the facts tell us that mere political will, properly focused in an agreement between parties, may transform a dispute into a clear success and provide the economic Concert and its

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40. One of the clarifying Sentences is number 153/1989, according to which:

"la dimensión externa de un asunto no puede servir para realizar una interpretación expansiva del artículo 149. 1. 3º CE que venga a subsumir en la competencia estatal toda medida dotada de una cierta incidencia exterior, por remota que sea, ya que si así fuera se produciría una reordenación del propio orden de distribución de competencias entre el Estado y las Comunidades Autónomas".

41. Some positive exceptions to this vision from the Constitutional Court have been quoted by G. Jauregui in his work, "La actividad internacional de la CAPV. La implicación europea", Euskonews & Media num. 36, http://www.euskonews.com, where he states and underlines the distinction between the pure internactional activity and the EU integration process:

"el Tribunal Constitutional ha puesto las bases para una adecuada distinción entre actividades internacionales y comunitarias. Así, en la ya tantas veces citada Sentencia 165/94, señala que: "Por consiguiente, cabe estimar que cuando España actúa en el ámbito de las Comunidades europeas lo está haciendo en una estructura jurídica que es muy distinta de la tradicional de las relaciones internacionales. Pues el desarrollo del proceso de integración europea ha venido a crear un orden jurídico, el comunitario, que para el conjunto de los Estados componentes de las Comunidades europeas puede considerarse a ciertos efectos como "interno". En correspondencia con lo anterior, si se trata de un Estado complejo, como es el nuestro, aún cuando sea el Estado (sic) las Comunidades europeas y no las Comunidades Autónomas, es indudable que éstas poseen un interés en el desarrollo de esa dimensión comunitaria".

42. See the work of I. ZUBIRI, "El sistema de Concierto Económico en el contexto de la Unión Europea", Círculo de Empresarios Vascos, Bilbao, 2000.

43. See the recent Judgment of the CJEC of 11-9-2008.

regulations with a wider and better future, as guaranteed by the constitutional clause on this matter.[44]

In this analysis, we wish to underlline that this kind of solution for specific applications of the economic Concert is in a certain sense an agreement that derives from a preceding legal institution that was also reflected in the first additional clause of the Constitution with regard to the Historical Rights of the Basque territories. We are therefore facing an agreement on a subject that includes a previous matter seeking to avoid proceedings in the relevant courts, namely the Court of Justice of the European Communities on this esential matter for the Basque Country and Navarre.[45]

At the legal level, this agreement should have diferent consecquences, amongst which the most important would imply the territories bordering the Basque Country renouncing to their claims, as finally did happen.[46] This was, of course, a commitment of all those territories, which did also agree to respect the covenants between the Basque and central governments. In this sense, the document and its follow up developments should constitute an interesting issue for the institutional relations of the central Government, the Basque Government, certain other autonomous governments and the Court of Justice of the EC.

Nevertheless, another consideration to take into account brings us to the conclusions of General Advocate Saggio before the CJEC when quoting the contradictions of certain taxation regulations derived from the Basque economic concert with Spain, and EU law principles. This seems to be important because in the case of not reaching the mentioned agreement, it seems certain that the CJEC may have to follow the thesis elaborated by Saggio,[47] that basically contains the global problems of the matter from a purely taxation-related perspective and its eventual breaches of the principle of freedom of establishment and the prohibition of the so-called State aids by the EU. Regarding to the first of these matters, Saggio mantains that:

> el Tribunal de Justicia ha subrayado en varias ocasiones que la libertad de establecimiento constituye uno de los principios fundamentales de la Comunidad y que las normas que la establecen atribuyen a sus destinatarios derechos absolutos que únicamente pueden limitarse cuando existan intereses considerados preferentes, como son las razones de orden público, seguridad y salud públicas

44. This also proves that the alternative resolution of disputes, through agreements or covenants is a valid a real formula. It attains, in many occasions, better and longer-lasting results than any jurisdictional sentence. Nevertheless, during October 2000, the EU institutions opened a new proedure against the Basque tax policies previous to 1995, after the mentioned agreement. In this case, the procedure was opened by a company located in the same territory in which another company that had been funded was also located.

45. La lectura de la historia demuestra nuevamente la tradición pactista de los Territorios Forales.

46. The legal reason for this lies under articles 77 and 78 of the Procedural Regulation of the CJEC.

47. Matters C-400/97, C-401/97, C-402/97 before the CJEC, preliminary ruling requested by the Tribunal Superior de Justicia del País Vasco.

> (artículo 56 del Tratado CE, actualmente, tras su modificación, artículo 46 del Tratado CE). Sólo en tales supuestos taxativos y excepcionales puede estar justificada la existencia de legislaciones nacionales discriminatorias. Consideraciones de mero carácter económico, como la pérdida de ingresos fiscales o la lucha contra el fraude fiscal, no pueden justificar la existencia de restricciones de un derecho fundamental garantizado por el Tratado.[48]

With respect to the eventul conideration of these tax regulations as State Aids, Saggio speaks very clearly againts them:

> Las referidas partes distinguen, en efecto, entre las medidas fiscales adoptadas por el Estado, cuyo ámbito de aplicación está limitado a una zona determinada del territorio, por una parte, y las medidas de carácter general, adoptadas por una autoridad competente dentro del mismo territorio, por otra. Mientras que en el primer caso sigue existiendo un elemento de selectividad por lo que respecta a los sujetos pasivos, ya que la medida está limitada, en cuanto a su ámbito de aplicación, a una parte de los sujetos pasivos que puedan ser sus destinatarios, en el segundo caso el elemento de selectividad no existe, ya que la medida tiene como destinatarios a todos los sujetos pasivos, que están sometidos, con arreglo a las normas de atribución de competencias, a la normativa fiscal de las autoridades locales.
>
> En consecuencia, añaden las citadas partes, desde este punto de vista, las normas de atribución de competencias en materia fiscal a las autoridades de los Territorios Históricos no son distintas de las normas que regulan el reparto de competencias entre autoridades fiscales soberanas de dos Estados miembros de la Unión Europea. Las divergencias entre sistemas tributarios no pueden constituir una ayuda de Estado en el sentido del artículo 87, mientras que el único remedio a las distorsiones causadas al mercado es la adopción de medidas de armonización de las legislaciones nacionales. Considerar, por el contrario, que el reparto de competencias en materia fiscal entre el Estado y los Territorios Históricos es contrario a las disposiciones del Tratado en materia de ayudas equivaldría a emitir un juicio de valor sobre la estructura constitutional del Estado español.
>
> No puedo compartir dicha opinión. El hecho de que las medidas examinadas sean adoptadas por colectividades territoriales dotadas de competencia exclusiva con arreglo al Derecho nacional parece, como ha señalado la Comisión, una circunstancia meramente formal que no es suficiente para justificar el trato preferencial dado a las empresas comprendidas dentro del ámbito de aplicación de las Normas Forales. De no ser así, el Estado podría fácilmente evitar la aplicación, en parte de su propio territorio, de las disposiciones comunitarias en materia de ayudas de Estado simplemente introduciendo modificaciones al reparto interno de competencias en determinadas materias, para poder invocar el carácter «general», para ese determinado territorio, de las medidas de referencia.[49]

48. In point 22.

49. Legal grounds 36 & 37.

Meanwhile, the Government of Navarre followed the procedure very closely but refused to sign a similar agreement, as it considered that this may be in breach of its regulatory autonomy in taxation-related matters and financial affairs.[50] Should the agreement not have been signed, thus putting an end to end the dispute, current articles 220 and 234 of the EC Treaty would have been directly applicable to bring the issue before the CJEC. But none of them accepts the possibility of the EC court modifying a Constitution or its institutional framework; as that is an issue that remains a competency of the domestic level, of course. Nevertheless, there are some voices doubting that approach, but the legal analysis of the problem and of the role of the CJEC do not allow this court to deal with affairs that are not included within the scope of the EC Treaty. Therefore, it is important to underline here which the procedure could be as well as the role of this court, in accordance with its procedural regulations for a preliminary ruling, brought by the Spanish jurisdiction regarding the Basque tax and financial regulations. A preliminary ruling cannot in any case undermine the autonomy of both procedures, nor the particular domestic judiciary, this being fully sovereign within the context of its domestic Law. Thus, the CJEC issues sentences under this procedure, but only affecting the lawfullness of the EC regulation, while the domestic judge should decide on the conflict applying the sense given to EC Law by the European court.[51] In line with all the aforementioned, the EU judiciary are not in charge of judging political options; their role deals with certain domestic regulations and their lawfulness with EU Law. The latter, as we all know, has a prior force to that of the domestic Law of the member states, Constitutional Law included, according to the CJEC. Fortunately, neither the domestic courts nor the CJEC have been enabled to judge political options, but only regulations deriving from those options within the EU context. This basically means analysing wheteher or not such regulations comply with the principles of free competition and freedom of estabhilsment, and not only regarding to the Basque economic concert, but in terms of its enforcement in the entire aforementioned mentioned EU framework. What is imposible for the CJEC to deal with is to define Spanish constitutional categories. It is not its role or competency. Incidentally, its sentences may be discussed from a legal approach and maybe also politically, thus eliminating any doubts by reasoning on the sentences based upon EC and EU treaties and all the other regulations. The CJEC is not allowed to modify the domestic constitutional scope at all. The only thing it might be able to do is, during a procedure, to express the suitability of that regime with the EU Law, to advise the domestic judiciary and legislative on the necessity to adapt the legal framework to the regulations and principles that

50. This is a very relevant fact, because it might help us to understand topics on the colours of certain different governments. Hence, the Government of Navarre refused to sign a similar agreement claiming in many ways then same considerations that brought the case to the court by other governemnts of the same colour. This paradox is only due to the everlasting political conflict between the Basque Government and the central one.

51. Therefore, the EC judge should not make any pronouncement on domestic Law. Its role must not deal, under a preliminary ruling, to decide on the lawfullness of a domestic regulation with EC Law. To conclude, the CJEC should provide to the domestic judge with the relevant elements to interprete which are the lacks or not of both regulations and decide uopn that.

Spain should be complying with as a EU member, bearing in mind that EU Law has an even prior and direct effect, thanks to the constitutional provisions given by articles 93, 95 and 96 of the Spanish Constitution.[52] Therefore, opinions might be legitimate, of course, but legally contrasted, not based upon arbitraryness but analysing the matter from the perspective of Law, in scpecific situations on the impact of regulations which may also be relevant for other matters in the future, such as in the scope of social security or public health, if they are not adapted to the requirements of free competition, for example. The CJEC does not act in breach of any Constitution nor may modify any Constitution in any way, because the States have decided to assume an express, unilteral and voluntary cession of sovereignity to the EC, the court of which should lead the way to present EC Law as a proper Law of every member State that also decided to accept all the aforementioned process without any constitutional erosion whatsoever. Therefore, it is useful to recall the constitutional amendments provided for in certain States to make their Constitutions suitable to the EC Law. There is no constitutional erosion or breach whatsoever, but a real process of constitutional integration of the whole legal framework. Nevertheless, there are also certain disagreements with this process proceeding from the domestic constitutional courts, the main reason for which to exist are their respective constitutions. The CJEC defined the prior force of EC Law as an important tool for the EC system. This means that EC Law should have the same effect in the complete scope of member states avoiding any kind of erosion or unfulfilment proceeding from domestic levels, constitutions included. This does not mean any constitutional breach whatsoever, because EC Law was previously assumed in the Constitution, nor can it mean that the CJEC could produce a domestic amendment by itself, because its role is limited to controlling the primacy of EC Law in order to allow domestic bodies to proceed following any other domestic consideration on the matter.[53] Returning to the Basque economic concert, the force of which has been already questioned at the Spanish domestic level reagarding its adecquate development within the EU context, we have to remember that, under its general principles (article 3 of the Law 12/1981 on the Economic Concert), its limits and characteristics are also mentioned in relation to the Basque taxation system. Expressly quoted among them is, inter alia, the: "sometimiento a los Tratados o Convenios internacionales firmados y ratifica-

52. This means that the CJEC cannot decide at his own risk, but as real guardian of the EU Law and with full commitment therefore. Hence, it will decide if the economic concert. So, it will decide if this system or its deriving regulations agree with EC Law, according to their shape, their will and their objectives; but not only in terms of their appearance. Instead it should define a reasoned judgement of their real identity as regulations and their final aims. Because, for Law, things are what they are, not what they seem to be.

53. The Spanish Supreme Court explains this clearly in its Sentence dated 24-4-1990 considering that: "las normas anteriores que se opongan al Derecho comunitario deberán entenderse derogadas y las posteriores contrarias, habrán de reputarse inconstitutionales por incompetencia (arts. 93 y 96.1 de la Constitución española), pero no será exigible que el juez ordinario plantee la cuestión de inconstitutionalidad para dejar inaplicada la norma estatal, porque está vinculado por la jurisprudencia del TJCE que tiene establecido el principio pro comunitate". We cannot therefore talk about infra constitutionality of EC Law or of a possible conflict with the Constitution because, due to the express will of the mentioned Constitution, EC Law is assumed together with its direct primacy and force.

dos por el Estado español o a los que éste se adhiera" (art. 3.1.5º Law 12/1981). The clause is clear but seems to have been forgotten. If the Concert goes further, or its regulations do so, it will breach EC Law, as well asas well as the Spanich Constitution, together with the Statute of Autonomy and with the Law on the Economic Concert as well, because the legal system is increasingly becoming a globally interlinked process and system.[54] It is not therefore a matter of adopting a strong attitude of constitutional defence, but accepting the obligations deriving from EC Law as well as from the EC framework as a whole, and of course in global and interlinked terms. Should we do this otherwise, the system may appear to be incomplete, and a mere reading of our domestic reality would not be enough to explain the integration process to an organisation with its proper, sovereign, direct and priority Law. However, we will see during the coming chapters how some of the basic porinciples of the EU and its Law might be in contradiction with certain regulations adopted in the Basque and Navarrese particular financial system.[55] Therefore, the role of the Historical Rights and the State bodies before EC institutions is absolutely essential to control, update and develop this figure recognised by the Constitution.[56]

2. THE HISTORICAL RIGHTS BEFORE THE EUROPEAN UNION

2.1. Within the phase of building EU Law[57]

As a brief introduction, let me just recall some of my previous reflections on the matter, in a perspective that I undestand is still currently in force:

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54. The monitoring of the aforementioned system is the duty of the domestic courts and the CJEC.

55. The conclusions previously quoted, and issued by Saggio before the CJEC speak very clearly anyway.

56. According to X. Iriondo: "la posición constitutional de las regiones se ha visto debilitada desde que España se introdujera en la Unión Europea y como consecuencia de las delegaciones competenciales que el Estado ha tenido que hacer a los órganos de la Unión Europea. Principalmente en el sector financiero (poniendo en entredicho incluso el concierto económico) y en los ámbitos comunitarizados como pesca, agricultura, industria, transporte y medio ambiente. Se han creado determinados órganos para cooperar sobre temas europeos e incitar la participación de las regiones (Conferencias, Asambleas), pero, a pesar de ello, su escasa operatividad y los resultados hasta ahora obtenidos hacen cuestionar toda la construcción europea. Ahí radica la cuestión. La región no puede defender ni representar sus intereses, dado que su participación no está prevista en los órganos decisorios de la Unión Europea. Y ésa es una clara infracción del principio de subsidiariedad, porque quien en última instancia decide no es ni la legítima titular de las competencias, ni la institución más cercana a los ciudadanos, sino que es el Estado", see his article "Europa y Euskal Herria: luces y sombras", *Euskonews & Media* num. 29, http://www.euskonews.com.

57. Together with the works emntioned in this chapter, issue no. 40 of the *Revista Vasca de Administración Pública*, Sept.-Dec 1994 contains some others: S. Magiera: "Participación de los Estados alemanes (Länder) en los asuntos europeos tras la reforma constitutional de 1992". Y. Lejeune: "La participación de las regiones en Bélgica" J. Bengoetxea: "La participación de las Autonomías en las Instituciones Comunitarias" J. L. Diego: "La participación de las CC.AA. en el proceso de adopción de decisiones de la Unión Europea: Un balance y una propuesta".

Pursuant to the opinion of various authors, art. 146 of the Treaty of the European Community[58] should allow widely the participation of sub-state bodies representatives at the Council, taking as an example thereto the system already adopted by decentralised countries such as Germany or Belgium.[59] We must take into consideration as well the necessity for sub-state bodies somehow to take part in the development of their respective States´ will, with regard to community bodies, excluding in any case the power of the formers with respect to the "treaty making power" or the "ius representationis", as exclusive competencies of Member States. This latter possibility is based on art. 146 TEC, the main objectiveof which is to confer the State´s representation to a ministry-level authority, independently of its domestic scope of competencies. Therefore, the idea seems to be open before the Council, while in the Spanish case, we are still hoping for a definitive and real system of regional participation before the main community levels.[60] The subject is about to be resolved during the stage of enforcement of Community Law, but meanwhile, for the stage of formation of Community Law the question appears extremely foggy, only assessing a few advances at the Spanish level which deal with mere applications of the coordination principle between the State and the Autonomous Governments whilst in Germany, Austria or Belgium the matter presents a different and more hopeful view.[61] For Dalmau i Oriol, the reason for the Autonomous Communities to participate at the European level is linked with a main conclusion that appears to derive from the same legality of the Spanish constitutional system.[62] Regarding such matters, I would at least also like to make a brief comment on the paper of the General Commission for the Autonomous Communities and the Conference for European Community Affairs in this case following Cienfuegos Mateo's opinion.[63] This professor recognises the problems to be resolved by both bodies, giving them a positive mark during their action. With respect to the General Commission, it is at least doubtful from my point of view to presume a general satisfaction of the Autonomous Communities for the work done. The Basque and Navarre case is only an example of the displeased feeling, in front of what could be considered as an absolute absence of State political will to face up to the whole question, following the course of Germany, Belgium or Austria. In accordance with Dalmau´s line, Cienfuegos maintains the necessity of a solution to the problem, taking into account that the Spanish Constitution demands an effective tool for Sub-state bodies to intervene in the formation and enforcement of Community Law as directly and as clearly linked with each other as possible. All the

58. Art. 203 TEC after Amsterdam Treaty.

59. Austria could be also included among the mentioned States.

60. In the same line, E. L. Murillo de la Cueva, "Comunidades Autónomas y política europea", IVAP-Civitas, 2000, page 124.

61. See, for example, Judgment of the Spanish constitutional Court 165/1994, on the Basque Government delegation in Brussels.

62. C. Dalmau i Oriol, "Propuestas y aspiraciones de las CC.AA. sobre la articulación de mecanismos para garantizar la participación autonómica en la toma de decisiones en el seno de la Unión Europea", *Autonomías* num. 22, July 1997, Barcelona.

63. M. Cienfuegos Mateo, "La intervención de las CC.AA. en cuestiones relativas a las Comunidades Europeas a través de la Comisión General de las CC.AA. y la Conferencia para asuntos relacionados con las Comunidades Europeas"; *Autonomías* num. 22, July 1997, Barcelona.

> aforementioned matters were studied during a recent Seminar on "Regionalism and European Integration", organised by the Basque Studies Society on December 1998, with the attendance of some of the authors mentioned in the present study. In the Seminar we were once again faced with the poor will of States reference to the mentioned purpose of regional integration in the European process. Even more so, the term used then was "regional blindness" for the past situation and "short-sightedness" for the current one, with respect to the Member States' attitude in Martín y Pérez de Nanclares' words.[64] In my opinion, the principle of subsidiarity might be the object of a proper interpretation and application, in order to find a solution for a large problem on time, which neither political will nor current Law seem to be decided to resolve.[65]

However, the enforcement of this principle of subsidiarity has yet to become a reality in the EU level and so to say also in any of the domestic current levels. Pariente de Prada divides the possibilities of sub-national participation in the development of EU Law into direct or indirect options, provided that neither of them reachs a satisfactory level from the perspective of the Spanish Autonomous Communities in general.[66] For this author the situation is not satisfactory at all:

> claramente insatisfactoria, debido a la absorción de competencias autonómicas por parte del Estado en función de que se trata de un ejercicio "ad extra" de las mismas. Se deben articular mecanismos que proporcionen una influencia real de las Comunidades Autónomas en la creación de la posición española en el exterior, sobre todo en materia comunitaria, y ello no sólo para conseguir dar respuesta a toda una serie de aspiraciones políticas que han sido propuestas reiteradamente sobre todo por las Comunidades denominadas "históricas", sino, como veremos, para conseguir que la fase descendente sea más fluida y se consiga una participación y una implicación real en ella de las Comunidades Autónomas.[67]

Regarding direct participation, these aspirations have been assumed mainly through offices opened in Brussels and through the whole of the difficult approach of bilateral relations between the autonomous communities and the State, especially in the case of the Basque Country. In fact, the conclusions of Pariente de Prada are once again quite clear on the matter:

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64. J. Martín y Pérez de Nanclares: "La posición de las CC.AA. ante el Tribunal de Justicia de las Comunidades Europeas", *IVAP*, 1996.

65. X. Ezeizabarrena Sáenz, "Brief notes on the Historical Rights of the Basque Country and Navarre with regard to Community Law", *IUS FORI*-Revista de la Facultad de Derecho de la Universidad del País Vasco, num. 1, 1999, pages 21 and 22.

66. See therefore, I. Pariente de Prada, "La participación de las Comunidades Autónomas en la creación del Derecho Comunitario: Estudio particular del caso de la Comunidad Autónoma del País Vasco", at *Estado autonómico y hecho diferencial de Vasconia*, IVAP-Eusko Ikaskuntza, Colección Lankidetzan num. 15, 2000, pages 79 to 107.

67. Ibid., pages 87 and 88. Obviously, the exchange of competencies quoted by Pariente de Prada has even problems in the Basque case, where some of the powers deriving from the Firts Additional clause of Constitution might be directly sue by the EU without any direct means for procedural intervention thereon.

> sin temor a equivocarnos, podemos afirmar que el modelo de relaciones entre el Estado y las Comunidades Autónomas y en concreto el modelo vasco son un rotundo fracaso, si atendemos a los resultados. El sistema de remisión de los asuntos comunitarios a la Conferencia multilateral, para que de ésta los asuntos sean enviados y tratados posteriormente en las Conferencias Sectoriales es excesivamente lento, las Conferencias Sectoriales no se reúnen, y cuando se reúnen no tienen en el orden del día temas como la ejecución del Derecho comunitario y la participación en ella de las Comunidades Autónomas.[68]

The landscape analysed cannot therefore be termed as optimistic, and may not become any better if we consider, in particular, that we refer in the Basque case to competencies directly linked with their identity and deriving directly from the constitutional recognition at domestic level, that have not already been really enforced or even explained within the EU.[69] As quoted by Murillo de la Cueva:

> la autonomía no se tiene que contemplar exclusivamente en su dimensión interna sino, también, en su proyección exterior.[70]

According to him:

> carece de fundamento constitutional la persistencia de la idea según la cual la autonomía puede subordinarse a una genérica exigencia de garantía de la unidad estatal en su vertiente exterior y, particularmente, al principio de la responsabilidad internacional del Estado.[71]

2.2. Within the phase of enforcing EU Law

I shall now make reference to the problems faced by the Basque Country and Navarre during the so-called phase of EU Law building. This means that administrations are directly enforcing EU regulations, without any competency or procedure from the CJEC. In this regard difficulties crop up once again as there is no clear protection of the Historical Rights deriving from the First additional

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68. Ibid., page 106.

69. These aspects have been linked withe the principle of effective participation by E. L. Murillo de la Cueva, "Comunidades Autónomas y política europea", *IVAP-Civitas*, 2000, pages 108-109. In his concept, effective participation searchs for a real enforcement of political autonomy at every Spanish autonomous community: "Supone que más allá de esas competencias hay un interés autonómico que ha de ser atendido, que está necesitado de una expresión institucionalizada y formal. (...) Por eso, la preservación del principio de participación efectiva, surgido de la contraposición entre las exigencias de la integración europea (y la consiguiente absorción de competencias a favor de la Unión Europea que implica ex art. 93 CE), no es sino la misma preservación del principio constitutional de autonomía cuya salvaguardia es esencial para mantener el equilibrio básico en que se apoya la organización territorial del poder en la Constitución de 1978".

70. E. L. Murillo de la Cueva, "Comunidades Autónomas y política europea", IVAP-Civitas, 2000, page 29.

71. Ibid., page 32.

clause of the Constitution. My starting point will therefore initially focus on the opinion of the Spanish Constitutional Court thereon:

> la adhesión de España a la Comunidad Europea no altera en principio, la distribución de competencias entre el Estado y las Comunidades Autónomas. Así pues, la traslación de la normativa comunitaria derivada al Derecho interno ha de seguir necesariamente los criterios constitutionales y estatutarios de reparto de competencias (SSTC 252/1988, 64/1991, 76/1991, 236/1991 y 79/1992). Por consiguiente, la ejecución del Derecho comunitario corresponde a quien naturalmente ostente la competencia según las reglas del Derecho interno «puesto que no existe una competencia específica para la ejecución del Derecho Comunitario» (STC 141/1993).[72]

Hence, we should consider the possibilities available in order to determine whether or not certain Basque regulations or legislative powers may be enacted in breach of EU Law or, viceversa, whether or not certain EU regulations could be enacted also in contradiction with the aformentioned legislative powers, even in front of the very Constitution (First Additional clause). Without dealing with the jurisdictional problem coming up later, it seems obvious that the dispute has a clear constitutional level, either in the EU level or in the domestic one. The most relevant authors state that both autonomous and State regulation, as well ascould be directlymisled by direct enforcement of EU Law. In case of contradiction between EU Law and certain legislative powers deriving from the First additional clause of Constitution, the Basque Country, as wellas well as Navarre, should have to consider that even the domestic constitutional scope of powers might have to be altered by the new competencies assumed in many cases by the EU. The rule for legal legitimation therefore is based, in my view, in the EC Treaty as the constitutional rule that may deal with those amendments. Therefore, one of our major tasks would be to decide if the legal basis coming from the EU is sufficiently contradictory with the Historical Rights of the Basque Country and Navarre in order to make our constitutional recognition in Spain impossible to enforce.[73] We have to take heed in this respect, to the words of Muñoz Machado, quoting the resistence of many authors from Navarre to the consideration of their Amendment Law (Ley de Amejoramiento) as an Statute of Autonomyautonomous law in the same level as the rest in Spain.[74] According to him:

> la mayor resistencia de los foralistas a considerar que la Ley de Reintegración y Amejoramiento del Fuero de Navarra sea un Estatuto de Autonomía, es debida a su convicción de que las normas básicas que contienen los derechos forales y los

72. Judgment of the Constitutional Court 102/1995.

73. The aforementioned would jeopardise one of the main characteristics of the Adtional clause of the Spanish Constitution, such as the impossibility of unilateral derogatgion, due to its contractual nature that cannot be amended by either party.

74. Some of them, for example, maintain the impossibility for the Constitutional Court to control the legislation coming from the Parliament of Navarre, arguing that it derives not from an autonomous law but from an agreement. The same happened with certain parts of the Constitution which were in breach of radical "foral" traditions in Navarre, such as for instance, the divorce law, which for some time was arguably not in force in the mentioned territory for those reasons.

> amejoran, han sido tradicionalmente leyes paccionadas y así también lo deben seguir siendo en la actualidad constitutional.[75]

The aforementioned provides but a brief idea of the problems for Basque Historical Rights, bearing in mind the shift from the Constitution towards the EU-level legal framework.

2.3. Basque Historical Rights before the Court of Justice of the EU[76]

This matter, together with the defense of those rights before the CJEC has become familiar to us with regard to the different disputes submitted to that jurisdiction on the Basque economic regime as well as well as on the residual case of Navarre. However, these matters are only examples of a much more global problem, even in domestic constitutional levels. If such matters are not resolved internally, they should not be resolved in the EU level or in its court of justice either.[77] But the conflict goes further, because, as we have seen, given the fact that any autonomous community in Spain, and moreover the ones receiving powers from the first additional clause of Constitution, may suffer the impact of this situation in its competencies, it seems fairly logical that they should also have a certain level for particpation within the EU framework as well as well as before the CJEC as the monitoring body of EU Law. It is necessary to remember, once again, that by virtue of article 96.1 of the Spanish Constitution, EU Law is also domestic Law with direct effect and force. This means that, even when enforcement competencies may continue under the relevant administration, certain others might be altered or directly affected.[78] Therefore, and regardless of the singular nature of the EU towards institutional integration, we can clearly see within the EU context certain principles which are still present in International Law and international relations among States, whereas, as we all know, direct legitimation of persons or bodies nor being States before international courts is strictly forbidden.[79] Some of these esential problems mentioned

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75. S. Muñoz Machado, "La Disposición Adicional Primera de la Constitución", en Derecho Público Foral de Navarra: El Amejoramiento del Fuero, Gobierno de Navarra-Civitas, 1992, page 240.

76. See Sudgment of the CJEC of 11-9-2008.

77. Just as example, we have the situation of the Basque taxation regulations before the CJEC. Considering the lack of status for the Basque Government to appear as defendant as well as is also the case of our provincial governments (Diputaciones Forales), and even providing that the conflict was presented by the central Government, it is the State that is in charge of defending the regime derived from Basque Historical Rights at the CJEC.

78. Article 58.2 Lorafna (Autonmy Act for Navarre) in the case of Navarre and, in general, Judgement of the Constitutional Court 44/1982, 8 July.

79. This means that sovereignity melts towards supranational bodies, but it does not in the case of sub-national entities, affecting decentralised States as Spain. It is not therefore absolutely fair to consider the EU as a real structure for integration, because that process only relies on States with residual sub-national participation and no participation at all in the case of citizens. This is once again the problem of International Public Law, from the democrathic deficiencies in the UN to the exclusive relevance of States in the international level, where they keep building the Law that ciutizens are not legitimated to invoke, except in the case, of course, of Human Rights.

here can be approached through one of my previous works oin the matter, regarding the procedures available before the CJEC and the basis for sub-national intervention therein: "Therefore, and as we will see, the Court only indirectly accepts the legitimation of Sub-State bodies before the it".[80] With regard to action for annulment, articles 230 and 231 of the TEC restricts sub-national legitimation:[81]

> the Treaty does not expressly accept the legitimation of Sub-State bodies, the actionsof which by now are to be upheld on procedures such as actions brought by legal persons in most cases. In any case, we are faced with a serious problem, because in decentralised countries those bodies are nearly always the destinataries of a considerable amount of Community Law, with no legitimation at all before the competent Court thereto. Fortunately, the Court usually recognises the aforementioned legitimation through the indirect expedient of legal persons, and even States are dealing with the problem, adopting for that purpose some kinds of domestic co-ordination systems, to guarantee that the different regions are allowed to appear before the jurisdiction of the CJEC.[82]

In the specific case of appeals in cases of inactivity (article 232 TEC),[83] the conclusion is very similar to that in the former case:

> There is no express legitimation in this procedure for Sub-State bodies, and only the Agreement mentioned on footnote 11,[84] between the State and the Autonomous Communities somehow tends to ease the current problem.[85]

The same is happening in the action for unfulfillment stated, after the amendments of the Treaty of Amsterdam, in aricles 226, 227 and 228 TEC. Finally, regarding the possibilities of sub-national intervention within the preliminary ruling of article 234 TEC, neither parties or the General Advocate are legitimated to be present during the domestic process, because this is only restricted to the domestic judge. Nevertheless, it should be an important part of the role of parties, to convince the domestic judge of the need to request a preliminary ruling. Therefore, the role of the lawyer of the interested party on the application of EU Law is to state it is essential within a domestic lawsuit. It is in this point where the represntati-

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80. X. Ezeizabarrena Sáenz, "Brief notes on the Historical Rights of the Basque Country and Navarre with regard to Community Law", op., cit., page 23.

81. Articles. 173 and 174 TEC in the previous version to Amsterdam Treaty.

82. X. Ezeizabarrena Sáenz, "Brief notes on the Historical Rights of the Basque Country and Navarre with regard to Community Law", op., cit., page 23. See therefore the Agreement between the central government and the autonomous communities (Acuerdo entre la Administración General del Estado y las Administraciones de las CC.AA. relativo a la participación de las CC.AA. en los procedimientos ante el TJCE) (BOE num. 79, 2-4-1998, page 11352).

83. Art. 175 TEC before the Treaty of Amsterdam.

84. The reference is again to the "Acuerdo entre la Administración General del Estado y las Administraciones de las CC.AA. relativo a la participación de las CC.AA. en los procedimientos ante el TJCE" (BOE num. 79, 2-4-1998, page 11352).

85. X. Ezeizabarrena Sáenz, "Brief notes on the Historical Rights of the Basque Country and Navarre with regard to Community Law", op., cit., page 23.

ves of the Basque Country and Navarre have the possibility, albeit always indirectly, to claim the enforcement of EU Law before the domestic jurisdiction, in order at least to suggest the submission of the preliminary ruling on the matter before the CJEC.[86] Among our authors, Martín y Pérez de Nanclares studied the question in depth.[87] His analysis cannot be more frustrating, because the there is no direct means to defend the interests derived from Historical Rights of the Basque Country and Navarre before the CJEC. So this may only be possible depending on the State's political will or, on whether the very State may wish to directly represent those interests on behalf of any of both governments, provided that those interests derive from a basic constitutional clause. However, this is very difficult to imagine due to the habitual disputes or conflicts on comepetencies we still suffer in Spain. The constitutional principles of cooperation and coordination would not seem to be enough to resolve the problem through a certain degree of agrement on the matter thar could also be enforced in the EU level and jurisdiction. The study by Martín y Pérez de Nanclares clearly advocates for introducing a series of amendments in the TEC or, eventually, in specific restrictive interpretations of its procedural regulations.[88] Hence, one of the main necessities quoted is to interpret article 230. 4 TEC in an extense sense in order to extend the legitimation of sub-national entities to include action for annulment:

> el mantenimiento de una interpretación restrictiva respecto de las regiones desentonaría abiertamente con la tendencia manifestada por el Tribunal en otros aspectos al interpretar extensivamente la legitimidad procesal activa de entes que, en realidad, no representan un verdadero interés general, v. gr. al reconocérsela a federaciones de industrias, asociaciones profesionales o sindicatos carentes, en ocasiones, incluso de personalidad jurídica propia.[89]

Martín y Pérez de Nanclares also talks of the idea to amend sub-national participation as against actions (article 230 TEC). This would mean to give the Basque Country and Navarre a suitable judicial control on their competencies, including Historical Rights, as against eventual EU action in breach of EU Law. The same approach is taken regarding the amendment of action for omission (article 232 TEC) by means of giving sub-national entities a new path for active legitimation against any refusal to act from the EU Parliemant, Council or Commission.[90] The Historical Rights of the Basque Country and Navarre require amendments in

86. I have to underline in this regard that only in the case of no appeal available at the domestic level, the court is obliged by article 234 III TEC to present the pquestion for preliminary ruling at the CJEC.

87. Specially in his work on the matter: J. Martín y Pérez de Nanclares: "La posición de las CC.AA. ante el Tribunal de Justicia de las Comunidades Europeas", IVAP, 1996.

88. The idea is present as well from my view even though from this work we can talk as well about basic principles in the EU and its democrathic deficit as far as reegarding public and sub-national participation within the framework which is still building already.

89. J. Martín y Pérez de Nanclares: "La posición de las CC.AA. ante el Tribunal de Justicia de las Comunidades Europeas", op., cit., pages 76 to 78.

90. Ibid., pages 79 to 84.

the aforementione line and, these would in any case be gratefully accepted by the complex EU political and legal framework. Nevertheless, current practical reality is based on a very diffrent path than this explained here. As refers to Spain, the first legal consideration of the matter took place with an Agreement (1990) called "Acuerdo de 29 de Noviembre de 1990 de la Conferencia Sectorial para asuntos relacionados con las Comunidades Europeas para regular la intervención de las Comunidades Autónomas en las actuaciones del Estado en procedimientos precontenciosos de la Comisión de las Comunidades Europeas y en los asuntos relacionados con el Tribunal de Justicia de las Comunidades Europeas que afecten a sus competencias".[91] The foreword of this Agreement explains its objectives for sub-national participation in the EU process within Spain, always by means of principles of common colaboration and without any kind of direct legitimation for autonomous communities or a clause to have the central government defending strictly sub-national interests on thier behalf and in accordance with the Constitution. Just quoting directly the mentioned foreword:

> la Conferencia Sectorial creada en el Ministerio para las Administraciones Públicas ha venido abordando esta cuestión con la perspectiva de articular, bajo la premisa del principio de colaboración, un procedimiento eficaz de participación de las Comunidades Autónomas en las actuaciones de nuestro Estado, tanto en fase precontenciosa como en fase jurisdiccional, que afecten a las competencias de aquéllas.[92]

The truth about this 1990 Agreement is that its articles 5, 6 and 7 established a regime for the matter by means of simple obligations of mutual information and colaboration that are not really developed in full terms. According to article 6:

> en los supuestos de interposición de recurso ante el Tribunal de Justicia de las Comunidades Europeas, cuando el posible incumplimiento tenga su origen en una disposición, resolución o acto emanado de los órganos de una Comunidad Autónoma, o en la omisión de los mismos, ésta podrá designar asesores para que participen en las reuniones que sean necesarias con los Agentes nombrados para la adopción de las posiciones a mantener por el Reino de España ante el Tribunal de Justicia.[93]

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91. This Agreement was published by a Resolution dated 7-9-1992, from the Subsecretaría del Ministerio de Relaciones con las Cortes y de la Secretaría del Gobierno, BOE no. 216, 8-9-1992, page 30.853. For a more adquate study of this sort of agreements, see M. Cienfuegos Mateo, "La intervención de las CC.AA. en cuestiones relativas a las Comunidades Europeas a través de la Comisión General de las CC.AA. y la Conferencia para asuntos relacionados con las Comunidades Europeas", in Autonomías num. 22, Barcelona, July 1997.

92. E. L. Murillo de la Cueva, "Comunidades Autónomas y política europea", IVAP-Civitas, 2000, pages 103 and 104, is very critical with the fact the the agreements in these conferences were not approved as covenants. This seems to bring about difficulties, whilst the solution depends on the existing political mechanisms and have no relation whatsoever with public interests. According to that author, we should try to deal with the matter avoiding any mutual exclusions, in order to grant that participation is not only limited to the negotiating position and that it should be extended to reporting and to the defence of proposals before the EU. Otherwise the principle of real participation is obviously lacking before the EU Council of Ministers.

93. It is clear then that the representation will be assumed by the State, it being the matter for autonomous governments only in terms of mere colaboration or advice.

Article 7 regulates indirect intervention through the preliminary ruling, in which case:

> la Secretaría de Estado para las Comunidades Europeas informará a la Comunidad Autónoma respectiva de las cuestiones prejudiciales suscitadas por cualquier órgano jurisdiccional español siempre que el asunto tenga su origen en una disposición, resolución o acto emanado de los órganos de dicha Comunidad Autónoma, o en la omisión de los mismos. La Secretaría de Estado para las Comunidades Europeas lo examinará con la Comunidad Autónoma, a instancia de ésta, a los efectos, en su caso, de presentar observaciones ante el Tribunal de Justicia.[94]

Finally, article 5 of the Agreement is the provision establishing the duties of information correpsonding to the central government towards the autonomous communities in the case of an action for unfulfillment filed against Spain. It is, in any case, a very mild provision without any concern for control thereon, as well as in the previous cases.[95] Nevertheless, the procedure has suffered some substantial amendments by means of another Agreement (11-12-1997), the so called "Acuerdo de 11 de Diciembre de 1997 de la Conferencia para Asuntos Relacionados con las Comunidades Europeas, relativo a la participación de las Comunidades Autónomas en los procedimientos ante el Tribunal de Justicia de las Comunidades Autónomas".[96] From the moment of its entering into force, the relevant matters shifted substantially for the Basque Country and Navarre, because the former refused to sign the Agreement due to its shortcomings related to their participation in the different procedures before the CJEC.[97] Nevertheless, the changes were substantial taking into account the fact that the 1997 Agreement derogates the 1990 Agreement regarding the appeal for unfulfilment of article 169 TEC[98] and the previous regime on preliminary rulings. In order to anlyse the 1997 Agreement we can proceed as follows according to its terms:[99]

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94. This critiscism could also be extended hereon with the additional particularity that the duty of information quoted on article 7 would also be suitable in the case of legal instruments proceeding even from another aotonomous community, because, indeed in these cases the procedural interests would be extensive as well to those governments not directly involved within the preliminary ruling of the CJEC.

95. On the lack of eventual control on this mechanism, see also E. L. Murillo de la Cueva, "Comunidades Autónomas y política europea", IVAP-Civitas, 2000, pages 69 and 70.

96. This was presented within the framework of a real law of parliament thanks to Law 2/1997, Ley 2/1997, 13 March, reguladora de la Conferencia para Asuntos relacionados con las Comunidades Europeas (regulating the conference on matters related to the EC). Published through Resolution 24-3-1998 from the Subsecretaría del Ministerio de la Presidencia, BOE num. 79, de 2-4-1998, page 11352.

97. Meanwhile, one of the aspects criticised by the Basque Government was the tendency of placing every autonomous community under equal regimes in this regard. That was not fair according to the constitutional reality of the different entities and was extremely relevant regarding the special and financial regulations of the Basque Country and Navarre.

98. Article 226 TEC after the Treaty of Amsterdam.

99. Although there is not a single procedure stated in order to control the effectiveness of this agreement.

– **Regarding the action for annulment**

The first article of the 1997 Agreement states that whenever an autonomous community considers that a EU rule or action with eventual legal effects should be appealed against by Spain before the CJEC, due to determined legal reasons or because of its invading their competencies or affecting subnational intetests, it should inform the President of the "Comisión de Seguimiento de la Conferencia". The same would apply when the autonomous community may consider that Spain may have to intervene as a third party within a procedure before the CJEC. Later on the definitive determination is a discretional but reasoned decision of the central Government, providing the Government of the autonomous community is heard on the matter (articles 2 and 3 of the 1997 Agreement). Article 4 states the obligation to maintain permanent contact between both governments whenever there is an appeal pending before the CJEC, while the autonomous government is allowed to appoint lawyers to assist the Spanish representative during the procedure. Article 5 states that:

> cuando el Reino de España quiera impugnar una disposición comunitaria ante el Tribunal de Justicia que afecte a alguna Comunidad Autónoma, lo pondrá en su conocimiento, para que, en el plazo de veinte días naturales, formule las observaciones que estimen pertinentes. Igualmente, si una Comunidad Autónoma decidiese interponer un recurso o una demanda de intervención, lo pondrá en conocimiento previamente del Presidente de la Comisión de Seguimiento, a través del miembro de su Consejo de Gobierno que forma parte del Pleno de la Conferencia para Asuntos Relacionados con las Comunidades Europeas, para que el Estado, en el plazo de veinte días naturales, formule las observaciones que estime pertinentes.

– **Regarding the appeal for inaction or omission (article 232 TE C) and the appeal for unfulfilment (article 227 TEC)**

According to articles 7 and 9 of the 1997 Agreement, the possibilities for intervention of the autonomous community are reduced here to the petition they may present before the central Government in order to pursue relevant action from the EU. The procedural requirements are basically established in articles 1 to 4 of the 1997 Agreement.

– **With regard to the perliminary rulings (art. 234 TEC)**

Article 10 of the 1997 Agreement states that the central Government should comply with a general duty of information to autonomous communities regarding the preliminary rulings presented before the CJEC by any jurisdictional body of a member State, provided that the matter was due to a regulation, act or resotion proceeding from an autonomous community, or eventually, by an omission or State regulation affecting thier competencies. The possibilities for autonomus communities are reduced afterwards to requesting State intervention and therefore articles 2 to 4 of the 1997 Agreement are applicable.

–Regarding the appeal for unfulfilment (art. 226 TEC)

In this case we shall follow article 11 of the 1997 Agreement, which basically includes the duty of information from the Ministry of Foreign Affairs towards autonomous communities regarding any other claim, requests, consultative opinions or any other communication whatsoever that may affect their competencies. When there is an appeal before the CJEC because of an unfulfilment caused by actions or regulations from autonomous communities or through their omissions, there is a possibility for the autonomous government to appoint advisors or lawyers to assist the general advocate during the procedure before the Court of Justice. Therefore, this is the legal regime and as we can see sub-national participation in the Spanish case does not go further than establishing certain duties of mutual colaboration, coordination and information, the appointment of advisors and a mere indirect participation through the preparatory meetings in each procedure. So the perspective lacks a more reasonable and substantive approach, which, if it does not really take place, is placing the Historical Rights of the Basque Country and Navarre as recognised by the Spanish Constitution in its First Additional clause at risk.[100]

2.4. The role of the First Additional clause of the Constitution as a guarantee of the Historical Rights before the EU

All the aforementioned does not have any legal justification whatsoever either in the Spanish Constitution or in the Treaty of the EC. A different matter would be the need to harmonise those issues in such cases in which the histotical rights may present contradictions in front of the basic objetives of EC Law, although these distinctions cannot be easily percieved in theoretical terms. The thesis of the consttitutional agreement between the Basque Country and Navarre on one hand and the State on the other seems to grant this interprteation, even though its translation into EC levels is not obvious. When the Spanish Constitution states its respect for Historical Rights it is doing so consciously in a determined historical, social and legal context, with full certainty on the need to adapt our system to the EC reality.[101] Furthermore, when it states the possibility to update such Historical Rights it is doing so either from the domestic level or from the EC and international levels as well by means of the Constitution, basically through articles 93, 95 and 96.[102] The explanation therefore is quite easy to understand from the legal viewpoint but not so much from the political approach. According to article 93 of

100. E. L. Murillo de la Cueva shares this pespective considering these conferences as preparatory models for a new constitutional regime of sub-national participation within the EU. See his work "Comunidades Autónomas y política europea", IVAP-Civitas, 2000, pages 70, 71 and 113.

101. We have to quote here article 3.1 of the Spanish Civil Code, although its application is not enforced very often: "Las normas se interpretarán según el sentido propio de sus palabras, en relación con el contexto, los antecedentes históricos y legislativos, y la realidad social del tiempo en que han de ser aplicadas, atendiendo fundamentalmente al espíritu y finalidad de aquéllas".

102. The constitutional perspective of this article has been analysed by P. Pérez Tremps, "Las competencias en materia internacional y la Unión Europea", in *Autonomías* nº 22, Barcelona, July 1997.

the Constitution there is the requisite of an "Organic Law" in order to submit constitutional competencies towards an international organisation, such as the EC, and article 95.1 also states a very important requisite that is usually forgotten:

> la celebración de un tratado internacional que contenga estipulaciones contrarias a la Constitución exigirá la previa revisión constitutional.[103]

This means that any international treaty signed by Spain and containing contradictions with the Constitution requires a compulsory previous amendment of the Constitution. Therefore, there is a recognition of the Additional clause of the Constitution not only at the domestic level but also by the EC Law, at least in such cases in which the Constitutional Court and the CJEC do not otherwise express their criteria through an eventual opinion in the first case (article 95.2 of the Constitution) or through a preliminary ruling in the second case (article 234 TEC). Thereby, the First Additional Clause of the Constitution is the rule that legally grants the particular regime of the Basque Country and Navarre before the EC.[104] This guarantee is extensive to every example of those Historical Rights recognised by the Constitutional Court within its jurisprudence on the matter. The problem, thus, is that the metioned guarantee is not real until the central government decides to assume its role and thus defend the constitutional reality and an extensive interpretetion thereon through the Constitution and the Statutes of Autonomy of the Basque Country and Navarre. Meanwhile, while we wait for that constitutional guarantee to come even before the EC from each Member State in general, it is only political will and agreement which could become a proper means for resolving this matter especially at the EC level. Aldecoa Luzarraga follows this path:

> el acuerdo político no debería demorarse más. En el ámbito interno se ha alcanzado un muy satisfactorio nivel de autonomía y descentralización política que, sin embargo, no se ve correspondido en sus justas y correlativas dimensiones en el

103. The second paragraph of this article 95 states that: "el Gobierno o cualquiera de las Cámaras puede requerir al Tribunal Constitutional para que declare si existe o no esa contradicción".

104. This consideration is present as well in the words of G. Jauregui, "La actividad internacional de la CAPV. La implicación europea", op. cit.: "No es éste el lugar para incidir sobre el debate en torno al concepto del "hecho diferencial" en el que se sustenta las relaciones de carácter bilateral. Es cierto que bajo el mismo subyacen realidades muy diversas. Sin embargo, más allá de los matices -en cierto caso importantes- en torno a su contenido, lo que importa reseñar aquí son dos aspectos. En primer lugar, que el hecho diferencial supone un hecho constitutional objetivo reconocido y recogido por la Constitución y los Estatutos de Autonomía, y que incluso se refleja en la realidad política a través de los propios partidos políticos y sindicatos. En segundo lugar, que ese hecho se concreta en una serie de competencias específicas conectadas con las lenguas propias, los derechos históricos, el derecho civil, etc... La asimetría, por lo tanto, no alude a situaciones de hecho o a relaciones políticas, sino a la diversidad en la posición jurídica de las diversas Comunidades Autónomas. De ello se deriva la necesidad de no caer en una doble tentación. De una parte, y dada la dificultad para plasmar normativa e institucionalmente la diferencia, la tentación de considerar la homogeneidad como una solución prácticamente inevitable. De la otra, la tentación de establecer una heterogeneidad, o para ser más exactos, una bilateralidad de hecho carente de reflejo jurídico, y que funcionaría al albur de la coyuntura política de cada momento. Frente a esa doble tentación, se impone la necesidad de buscar fórmulas de equilibrio respetuosas con los hechos diferenciales y, al mismo tiempo, acordes con el principio de seguridad jurídica".

> ámbito externo. Un acuerdo de estas características tendría además como consecuencia el valor añadido de posibilitar una participación más dinámica del Estado español en la Unión Europea. Significaría la implicación directa de la pluralidad de poderes políticos y sociales existentes en el Estado en un proyecto, el comunitario europeo, de indudable e innegable interés para el conjunto de España. Significaría, por último, una muestra de que, también en España, el principio de lealtad federal tan común en la praxis política alemana, aquí en versión de lealtad constitutional, es un camino de doble sentido, y puede tener plasmación entre nosotros. (...) Lo que es válido para un sistema de tres copartícipes, como Bélgica, probablemente no podría aplicarse a un sistema de diecisiete como el español. En cualquier caso, lo que sí es trasladable es el espíritu y la voluntad política por encontrar fórmulas adecuadas que solucionen el problema.[105]

Another guarantee that is present within the Historical Rights is the one represented by the so called "distinguishing fact" of the Basque case within the First Additional Clause of the Constitution and inside the context of the "constitutionality block" in Spain.[106] Hence, when the Spanish Constitutional Court designs a historical and legal concept of Historical Rights it is doing so within that block, as a fundamental category which is present in the essence of the Constitution. It is therefore like a series of characteristics present in each Member State of the EC and not to be forgotten by the latter regardless of the State´s dilution of sovereignty towards the EC. Article 28.1 of the Law on the Constitutional Court ratifies the aforementioned in this sense:

> para apreciar la conformidad o disconformidad con la Constitución de una Ley, disposición o acto con fuerza de Ley del Estado o de las Comunidades autónomas, el Tribunal considerará, además de los preceptos constitutionales, las Leyes que, dentro del marco constitutional, se hubieran dictado para delimitar las competencias del Estado y las diferentes Comunidades Autónomas o para regular o armonizar el ejercicio de las competencias de éstas.

Thus, the inclusion of the First Additional clause of the Constitution within the so called constitutionality block is clear, together with the Basque Statute of Autonomy as well as the one corresponding to Navarre. Therefore, to conclude, the constitutional recognition works not only in terms of cometencies but also from the view of a recognition of the particular legal facts of the Basque Country and Navarre as "foral" territories, their institutions, their Public Law deriving from the former and also the rights of those citizens within a system that is also included of course in the EC and is equally recognised by the European bodies. A dif-

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105. F. Aldecoa Luzarraga, "En busca de un pacto político a favor de la acción exterior y comunitaria de las Comunidades Autónomas", in La acción exterior y comunitaria de los Länder, Regiones, Cantones y Comunidades Autónomas, Vol. I, IVAP, pages 322 and 323.

106. According to J. Cruz Alli, that concept was born within French Law through the interpretation made therefore by the "Conseil Constitutionnel" as: "principios y reglas de valor constitutional, incluidos los principios fundamentales reconocidos por las leyes de la República". See his work "Los Hechos Diferenciales y la Constitución de 1978", in *Estado Autonómico y Hecho Diferencial de Vasconia*, Eusko Ikaskuntza, Colección Lankidetzan 2000, no. 15, page 161.

ferent matter is the possibility of the CJEC to control eventual contradictions of the Basque and Navarre systems with EC Law and regardless of the domestic Spanish particularities or any other from a member State. This consideration may be linked with the very important approach to Historical Rights as collective rights that also represent a particular example of self-government will and historical, political and legal identity.[107] This idea has been reflected on by Nieto Arizmendiarrieta understanding the concept of collective rights in the following terms: "de forma instrumental, esto es, como un refuerzo de los derechos individuales", in order to avoid having the former prevail as against individual rights:

> En tal sentido, desde una concepción liberal, los derechos colectivos sólo pueden reputarse legítimos cuando traten de proteger al grupo del impacto de decisiones externas. Es decir, cuando un grupo o comunidad intente proteger su existencia e identidad específica limitando las decisiones de la sociedad en la que está englobado.[108]

This colective will is historically present within the context of the Basque territories regarding their self-government and identity, discarding any external approaches with intentions of common grounds for the whole of Spain. Therefore, we can state that the First Additional clause of the Constitution peacefully contains and assumes the existenceexistence of these Historical Rights that are, furthermore, collective in character and peculiar to a certain community with population, territory and distinct institutional public bodies created throughout its history.[109] Additionally, the Additional clause of the Basque Statute of Autonomy, which is a Organic Act approved by the Spanish parliament,[110] states very clearly the Basque peoples are entitled to claim those Historical rights in generic terms,

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107. In this context it is well known the thesis of various authors abount the pretended non exisstance of the co called "collective rights". Theeon, article 2 of the Spanish Constitution is clear recognising and granting the right to aotonomy of regions and nationalities, within the constitutional framework. It is obviously a formal collective right even recognised by the Spanish Constitution.

108. E. Nieto Arizmendiarrieta, "Reflexiones sobre el concepto de Derechos Históricos", *RVAP* num. 54, 1999, pages 164 and 165.

109. Regarding the territories entitled to claim those Historical Rights of the Firts Adtional clause, the major authors and interpretations, as well as the Constitutional Court recognised them for the "foral" territories of the basque Country and Navarre as the oned expressly referred to by the Acts of 25-10-1839 and 21-7-1876, as well as in implicit terms by the same First Additional clause. A different question might be the Basque and Navarre implementation of those rights (Basque Country with three provinces for example). I would not go further with this matter because I consider it out of the boundaries of my study, which is only intending to affirm the existence of those Historical Rights in fron of the EC level. Nevertheless, and considering that the rule refers only to the "foral territories", this should not denay the aforementioned; indeed Navarre did assume those rights as autonomous community and so is the case for the Basque autonomous community through its Statute of Autonomy and the Act of Historical Territories (LTH) by means of the updating procedure therefore. Anyway, the work of M. Herrero de Miñón, "La titularidad de los Derechos Históricos vascos", *Revista de Estudios Políticos*, num. 58, 1987, grants widely the aforementioned.

110. The First Additional Clause of the Statute of Autonomy of Navarre (Lorafna) has a very similar content to the Basque one, and both rules prework final clauses for safeguarding of Historical Rights in both cases: ...

together with the recognitionrecognition in the first Additional clause of the Constitution, already mentioned:

> la aceptación del régimen de autonomía que se establece en el presente Estatuto no implica renuncia del Pueblo Vasco a los derechos que como tal le hubieran podido corresponder en virtud de su historia, que podrán ser actualizados de acuerdo con lo que establezca el ordenamiento jurídico.[111]

2.5. The modification on the concept of sovereignty within the EU and the lackings of the system

The entire historical, institutional and legal framework I have been analysing within the mere constitutional perspective of Spain is even more complicated with EC Law and its absortion of competencies. This matter is really important if we consider that the EC does not have a real and proper administration, and is therefore obliged to use the administrations of the member States in order to enforce EC rules and policies within each country. This aspect, often denied, makes the situation and the real enforcement of EC Law in many ways more complex. Anyway, we have to underline that at least in the EC level a substantial modification in the classic concept of sovereignity is still taking place, leaving a substantial part thereof for a supra-national body with a specific Law, with direct and prior force as well asas well as with ad hoc jurisdictional control similar to that of the CJEC or any constitutional domestic court the role of which is the due control of the legal grounds of public regulations and actions within the rule of Law. Although this amendment towards EC levels is clear, it is difficult to see the same process happening towards bub-national bodies, regions or autonomous communities in the Spanish case. On the other hand, the existence of important problems to resolve within the system is clearly seen throughout this work especially in those States in which, like Spain, while decentralised, have not introduced any machanism in the domestic or EC levels in order to allow sub-national entities to take part in the European process. These considerations do have full legal grounds in the Basque case, according to Historical Rights recognised by the Constitution. A different matter would be to also recognise that, despite the amendments in the concept of sovereignity, the central Government has been unable to explain before the EC the legal particularities of the Spanish Constitu-

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...

"La aceptación del régimen establecido en la presente Ley Orgánica no implica renuncia a cualesquiera otros derechos originarios e históricos que pudieran corresponder a Navarra, cuya incorporación al ordenamiento jurídico se llevará a cabo, en su caso, conforme a lo establecido en el artículo 71".

111. The clause is still alive therefore and points us to think on a regime of transition for the Basque Country and Navarre, while Historical Rights wait for updating completely, resolving the linkages between the four territories and within each of them (First Additional Clause of the Cosntitution, Transitoru clause 4 of Constitution, articles 2, 8, 26 and Additional clause of the Basque Act of Autonmy Statute, and Additional clauses 1 and 2 of the Navarre Statute of Autonomy; any of them nearly waiting still for real use).

tion, while this is indeed happening in some other places, terms and matters. Some time before that, Jauregui was anticipating that:

> la noción de una soberanía exclusiva y hermética ha sido siempre más un mito que una realidad, un mito que ha servido más para legitimar la supresión de la competencia política, tanto en asuntos internos como internacionales, que para poder ejercer un poder real.[112]

The problem, however, focuses on the myth of sovereignity that is still appearing under strange shapes in the EC context, even though there are indeed important developments, most of them not favourable for Sub-national bodies, such as the Basque case in Spain and, furthermore, even with reference to many citizens of the EC in certain matters of administrative action.[113] And this is also relevant if we consider the scope of action for Historical Rights at the domestic level, in peculiar issues that are currently out of the hands of the member States.[114] There is still a path to explore in those matters in which the action of the State has virtually disappeared, to leave legal space for the autonomous communities in our case in order to defend the aforementioned constitutional reality present in the concept of Historical Rights. Some of these considerations and contradictions within the EC system have been mentioned by Jauregui, specially regarding the basic institutional lackings:

> Así, por ejemplo, la UE carece de un lugar concreto de autoridad suprema. Es cierto que el Tribunal de Justicia de la Comunidad Europea puede invalidar leyes y decisiones específicas de los Estados miembros pero, en general, las decisiones constituyen el resultado de la negociación entre esos Estados. No existe un actor hegemónico que sea responsable en última instancia de tomar y aplicar decisiones vinculantes para todos, ni ninguna institución capaz de llevar a la práctica un elemento tan consustancial a todo Estado como es el ejercicio del monopolio de la violencia. Tampoco existe una estructura de cargos formalmente centralizada. La UE no posee una jerarquía de funciones cuyo vértice sea una autoridad central. La mayor parte de la división de funciones se rige por el principio horizontal de distribución de competencias, y no por el principio vertical de jerarquía. Se produce, de este modo, una red formal e informal de interacciones horizontales y de continuas negociaciones entre los actores a diversos niveles,

112. G. Jauregui, "La globalización y sus efectos en el principio de soberanía", in *La institucionalización jurídica y política de Vasconia*, with J. M. Castells & X. Iriondo, Eusko Ikaskuntza, Colección Lankidetzan, 1997, page 38.

113. So, despite the dilution of sovereignity we are only facing normally economic aspects at the EC level. Neither international relations, defense nor Human Rights have defenitely assumed this process. The complete opposite happened in the case of the single currency, for example, with the market and commercial implications since 2002.

114. The case of the Historical Rights of the Basque fishing fleet is also a good example, in front of EC Regulations in breach of those rights as well as well as important environmental regulations deriving from the TEC and derived Law. See therefore X. Ezeizabarrena, "Problemática y régimen jurídico de la pesca con redes de enmalle a la deriva: especial referencia al Derecho Comunitario", *Actualidad Administrativa*, num. 42, 1998.

> cada cual con su base de poder independiente. A primera vista, la ausencia de un poder central jerárquicamente estructurado podría ser entendida como una fórmula de salvaguarda del poder de los Estados miembros. Sin embargo, la libertad de personas y mercancías, así como la unión de mercado y monetaria supone una ruptura con la rígida territorialidad en la que se fundamenta el sistema estatal europeo clásico. Ello trae como consecuencia un considerable desmantelamiento del poder estatal actual en Europa. Como puede verse, nos encontraríamos ante un nuevo tipo de Estado (más exactamente organización política, pues llamarla Estado resulta arriesgado, al menos si lo entendemos en su sentido clásico) todavía sin perfilar, pero con unas características y elementos básicos radicalmente diferentes de los conocidos hasta ahora.[115]

All these series of emerging factors have fostered substantial amendments in the classic concept of sovereignity, either in the external scope or in the domestic one of the EC. Meanwhile, the view is totally different with respect to domestic purposes in the State level towards their sub-national entities, especially within the Spanish context. The new EC sovereignity is therefore shared among member States and the rest of the sovereignity at domestic levels is more or less shared within every decentralised member State. Only the relevant cases of Austria, Belgium and Germany have had constitutional amendments to resolve this problem, while Spain keeps in track without resolving such a peculiar situation, leaving this for the EC level or even for the CJEC in certain cases such as those one affected by the Basque Historical Rights.[116] Another important contradiction of this process at the international level, but specially within the EC, is linked with the negative approach made by States to the right to self-determination even in contexts in which the typical concepts of Statehood have been somewhat softened. The question is not only in contradiction with some EU developments, it also explains the lackings and disfunctions of the EU and international systems while, according to the opinion of Herrero de Miñón finally linking with the Historical Rights recognised to the Basque people by the Constitution.[117] Herrero de Miñón links the enforcement of this reight to self-determination not with the nature of a colonial territory, but indeed with the existence of an identity and a historically postive will existenceto exist as a politically and legally distinct entity which is clearly present

115. G. Jauregui, "La globalización y sus efectos en el principio de soberanía", op., cit., page 47.

116. Actually in one of my preceeding works on the matter I was clearly quoting the same terms: "it is clear for the future that, if Community Law does not adopt the necessary measures to assume the Sub-State bodies legitimation before Community institutions with regard to eventual disputes affecting regional legislative competencies and possibly in breach of Community Law, we will be in front of many different jurisdictional conflicts to be solved before the CJEC and the respective Constitutional Courts of the Member States, as well asand in both in many of the cases", see therefore X. Ezeizabarrena, "Brief notes on the Historical Rights of the Basque Country and Navarre with regard to Community Law", op., cit., page 25.

117. See in general M. Herrero de Miñón, "Derechos Históricos y Constitución", op. cit., pages 259 to 281. Certain political actors within the whole Spain have not properly understood his interpretation.

in the Basque-Spanish case[118] by means of the Historical Rights.[119] But, lets follow his analysis:

> 1º "El pueblo capaz de autodeterminarse no tiene por qué ser sólo un pueblo colonial. (...). La condición jurídico-internacional del territorio no condiciona la existencia ni del derecho de autodeterminación, ni de su titular, el pueblo.

118. The question is different in the Basque-French case due to the absence of a constitutional clause thereon for their territories and their, Historical Rights if any. However, certain privileges and important notes of self-organisation close to the "foral" system in the Sothern Pyrenees were quoted by M. Lafourcade in her work, "Las instituciones tradicionales y públicas de la Vasconia continental", *Euskonews & Media* num. 38, http://www.euskonews.com: "las tres provincias vascas gozaban en Francia de las mayores prerrogativas. La más importante de éstas era una total autonomía financiera. Cada una de ellas, pagaba las imposiciones reales bajo la forma de una suma global. En Laburdi y en Zuberoa, la milicia del país, compuesta de mil hombres, estaba organizada por el Biltzar. El Biltzar disponía de un amplio poder reglamentario y era una asamblea legislativa que velaba por la conservación de las costumbres, que podía modificarlas en el caso de que estuvieran anticuadas o inadaptadas. En este organismo se debatían los tratados amistosos que el país firmaba con los Vascos de Vizcaya o de Guipúzcoa, regulando, en tiempo de guerra como de paz, las relaciones comerciales y el reparto de las aguas de pesca. En Baja Navarra, los tratados llamados fazerías, que organizaban el empleo de los pastos, tenían lugar incluso entre valles vecinos de un lado a otro de la frontera. Laburdi conservó, también de manera muy excepcional en Francia, el mantenimiento de sus caminos y puentes hasta la Revolución francesa. Los habitantes rechazaban cualquier intrusión de la administración regia, al contrario de lo que sucedía en Zuberoa y en Baja Navarra, donde el peso de la Nobleza local paralizaba las reivindicaciones populares. Pero Laburdi corrió la misma suerte que las otras provincias con el advenimiento de la Revolución francesa. La noche del 4 de agosto puso fin a los privilegios, en especial al estatuto particular de los países y comunidades de habitantes. La Baja Navarra, que había rechazado delegar representantes en los Estados Generales bajo pretexto de ser un reino soberano y no una provincia francesa, había enviado finalmente una delegación al rey para defender su lista de agravios, pero ésta se negó a sentarse en los Estados, confiando sus intereses a los diputados de Laburdi. Zuberoa había esperado la apertura de los Estados en Versailles para proceder a las elecciones de sus diputados, pero dos de ellos abandonaron al momento la asamblea. Los Laburdinos designaron sus representantes, con el mandato imperativo de conservar la constitución particular del país, pero votaron el abandono de los privilegios; pronto se arrepintieron y defendieron después la creación de un departamento vasco. Pero no fueron escuchados. Las miras dogmáticas de Sièyes llevaron la propuesta a la Asamblea y, por el decreto del 4 de marzo de 1790, las tres provincias vascas se reunieron en Béarn para formar el departamento de los Bajos Pirineos, con Pau como capital. La nación francesa, una e indivisible, había englobado a las provincias vascas. De esta manera culminaron los revolucionarios la obra unificadora de la monarquía. En nombre de una libertad y de una democracia abstractas que desembocaron en Robespierre y en Napoleón, una minoría de ideólogos aniquilaron las libertades reales de la secular democracia vasca. La ley, «expresión de la voluntad general», vino a suplantar al derecho consuetudinario. Una última tentativa de salvar el País Vasco tuvo lugar a comienzos del siglo XIX. Aprovechando la restauración del Imperio por Napoleón, el diputado Garat escribió en 1808 a Savary, duque de Rovigo, quien mandaba el ejército francés en España, para pedirle la autonomía de los Vascos en el seno de un Estado que reuniera a las siete provincias, federado en la Europa napoleónica. Pero la Europa de Napoleón resultó efímera. El siglo siguiente conoció el triunfo de los Estados naciones".

119. M. Herrero de Miñón, "Derechos Históricos y Constitución", op. cit., pages 270 & 271. Let me just underline here that the limit of the First Additional clause of the Constitution is, according to this rule and its interpretation, in the concept of "constitutional unity" as stated by the Law of 1839 or in the framework of the current Constitution. Later on I will point out also which is the trail blazed by Herrero de Miñón in order to avoid those limits mainly through the clauses declaring the future and eventual granting of Basque Historical Rights (Additional clause of the Basque Statute of Autonomy, as well as First Additional Clause of the Navarre Statute of Autonomy).

> (...).[120] La voluntad de ese pueblo, el "nosotros" democrático, sólo es posible una vez que se ha determinado el sujeto que así se afirma y que tiene que ser dada desde una instancia trascendente.[121]"[122]

2º Historical Rights are justified within the Marx and Hegel concepts of "nations with history":

> El sujeto "pueblo" no se improvisa, ni siquiera se inventa. Como tantos otros fenómenos culturales, especialmente el lenguaje, procede del fondo del tiempo y siempre cambiante, está-ya-siempre-ahí. Su versión jurídico-política es lo que algunas tradiciones políticas, entre otras la vasca, denominan Derechos Históricos. (...) Son los Derechos Históricos los que sirven de marco de referencia a la legitimación democrática, porqué las opciones democráticas pueden darse en ellos, pero no sin ellos, porque más allá de los mismos no se sabe determinar el sujeto de la propia autodeterminación.[123]

3º The Historical Rights of each nation with history are the ones opening the possibility towards self-determination. This is right the sense of the Additional clause of the Basque Statute of Autonomy as well as for the First Additional clause of the Navarre Statute of Autonomy, with their respective linkages with Historical Rights of Basque and Navarre people.[124]

4º The elements of self-determination, therefore, can only be defined by means of an objective social reality and previously existing political entity:

> No se trata de un derecho individual, ni siquiera colectivamente ejercido, sino de un derecho del pueblo. Pero esta categoría existencial no la da la naturaleza, porque no consiste en "sangre y tierra" sino en cultura, esto es, historia. No es un derecho humano, pues, sino un derecho histórico. (...). Así, a mi entender, la autodeterminación vasca no puede prescindir de su raíz foral y lo que supone de articulación paccionada. En otros términos, espacio, población, ordenamiento

120. This interpretation agrees perfectly with article 3.1 of the Spanish Civil Code, regarding the obligation to interpret rules in agreement with the context and the social reality of every context. Otherwise, the right for self-determination would only be possible in the contexts of colonial situations; and this, indeed, does not follow the reality of the last decades in the international legal and comparative practice of the Supreme Court of Canada sentence (20-8-1998) for the case of Quebec, as well asor for various situations such as the one in Northern Ireland, the Czech Republic, Slovakia, Estonia, Lituania, Latvia, Timor or Gibraltar. Furthermore, note that this particular historical interpretation on self-determination rights is coming from the same States currently denying its eventual exercise.

121. The mentioned relevant body is, in fact, the first additional clause of the Constitution. Nevertheless, in the actual EU context, the EU itself might be able to assume this role provided that there are two EU members involved and quoted by the Basque Statute of Autonomy. A similar approach was adopted by the EU without any provision whatsoever on Historical Rights for the cases of Northern Ireland, the Tcheck Republic or Serbia.

122. M. Herrero de Miñón, "Derechos Históricos y Constitución", op. cit., page 270.

123. Ibid., pages 270 & 271.

124. Ibid., page 271.

> institucional y demás elementos definitorios, lo son de la autodeterminación por constituir otros tantos factores materiales de integración.[125]

5º Furthermore, and as a consecquence:

> el título histórico constitutivo es a priori material del cuerpo político, la autodeterminación del mismo no puede trascenderlo. (...) Sería contraria a la propia noción de autodeterminación la negación de la propia identidad. (...) Habría que atender a ese a priori material que el Derecho Histórico es, para determinar el qué y el cómo de la autodeterminación.[126]

6º Finally:

> dando ya por establecido que el sujeto de la autodeterminación es una unidad política, constituida como tal en virtud de determinados títulos históricos, cabe preguntarse en qué consiste la autodeterminación.[127]

We can anticipate here one of his conclusions stating that:

> la autoidentificación en la que la autodeterminación consiste, ha de responder a los títulos históricos y a las señas de identidad que configuran a cada pueblo que se autodetermina. La autodeterminación no es una invención arbitraria, sino necesidad histórica.[128]

Herrero de Miñón goes further through this question with two main conclusions deriving from the previously mentioned: support of Historical Rights, as a previously existing objective reality, and a national community that may, eventually foster its democratic will:

> Es claro que ni la raza, ni la geografía, ni la lengua, son signos identificatorios suficientes y, sin embargo, lo son los títulos históricos que configuran una personalidad colectiva y diferenciada en un territorio concreto, esto es, un cuerpo político que la voluntad nacional puede animar. Un pueblo que puede desplegar la conciencia de sí mismo porque ya existe en virtud de sus Derechos Históricos. Así, en el caso vasco, es el pueblo vasco y no otro o una facción del mismo, titular de unos derechos reconocidos en la Adicional Primera y actualizados en la Adicional única del Estatuto.[129]"[130]

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125. Ibid., pages 271 & 272.

126. Ibid., page 272.

127. Ibid., page 272.

128. Ibid., pages 279 & 280.

129. I would also include as well as a current example of updating on the matter the provisions of the First Additional clause of the Statute of Autonomy of Navarre.

130. M. Herrero de Miñón, "Derechos Históricos y Constitución", op. cit., page 280. He adds in this point that: "tales Derechos Históricos, en cuanto a priori material, posibilitan, pero también delimitan, cualquier despliegue de voluntad autodeterminante, que ha de respetar la identidad originaria, v gr., en sus aspectos territoriales, institucionales, relacionales y culturales".

> "¿Cabe la autodeterminación, así entendida, en nuestro bloque de constitutionalidad? La experiencia histórica y comparada, a la que se ha hecho alusión más atrás, demuestran que ni su exclusión ni su inclusión expresa sirven en realidad para nada en una sociedad abierta. Pero el principio, en sí mismo, puede ser resorte de integración voluntaria y, por ello, es útil plantear la cuestión. La Constitución, en efecto, contiene cláusulas radicalmente unitarias en su Preámbulo y en sus artículos 1.2 y 2 que, por excluir cualquier atisbo de autodeterminación, excluyen también la integración voluntaria, la relación paccionada o concertada e incluso los poderes originarios que se articulan en competencias residuales (art. 149.3 CE). Pero la Adicional Primera añade (=adiciona) algo más. (...) La interpretación "principial" del marco constitutional, única coherente y, además útil, exonera a los titulares de Derechos Históricos de las leyes de la Constitución, de su letra y de su retórica.[131] Así sería posible, por ejemplo, invertir en el caso de los titulares de Derechos Históricos, el sistema del artículo 149.3 y atribuirles los poderes no explícitamente concertados con el Estado por la doble vía de los artículos 149.1 y 150.2 de la misma norma fundamental.[132] Por otro lado, ya no se discute que la Adicional Primera sea, cuando menos, si no un título autónomo de competencia, sí una norma de competencia. Pero tales normas pueden significar dos cosas bien diferentes: ya una regla de producción de normas, ya la remisión a todo un sistema jurídico tercero y lo que ello significa. (...). Esta sería la interpretación adecuada para la Adicional Primera que no significa una mera regla de producción normativa, sino el reconocimiento de una realidad jurídico-política distinta. Ahora bien, este reconocimiento implica tanto el que dicha realidad tercera se autodetermine democráticamente, algo inherente a un cuerpo político en una sociedad abierta, como la permanente invitación a dicha realidad tercera para su voluntaria y concertada integración.[133]

This thesis by Herrero de Miñón is not devoid of difficulties when resolving the concepts of unity[134] or constitutional framework.[135] We have previously analysed this but my contribution will consist, in the coming lines, of an interpretative option that may workwork to avoid the mentioned problems within the EU legal system while assuming the amendments obworkd within the concept of sovereignty in the

131. As I will explain here, my interpretation is similar but pointing out furthermore, that Historical Rights may workwork to avoid the limits of the VIII Chapter of the Constitution, being as they are entitled to claim a constitutional reform in order to go over and above its framework, but never, disregarding fundamental rights or assuming such competencies as are even forbidden to the Spanish Parliament through EC Law. In the same line, see, D. Loperena Rota, "Unidad constitutional y actualizaciones generales y parciales de los Derechos Históricos", op. cit., pages 316 and ss.; even though the Sentence of the Constitutional Court of 12-10-2000 seems to admit the possibility of not including fundamental rights (in this case, article 14 of the Constitution) by means of Navarre's Historical Rights to legislate on its own Civil Law, for example.

132. The reference is directly made to specific exceptions to the rules of the VIII Chapter of the Constitution, but not to general exceptions that might clash with fundamental rights as a general category.

133. M. Herrero de Miñón, "Derechos Históricos y Constitución", op. cit., pages 280 & 281.

134. "Constitutional unity" was the limit for the Law of 25-10-1839.

135. "Constitutional framework" is the current limit for the First Additional clause of the Constitution.

EU, by means of the domestic provision contained in the First Additional clause of the Constitution. This means that Historical Rights shall be enforced before the State because it has recognised them in the domestic constitutional level, but also before the EU, if we consider that the very State has constitutionally recognised them towards the EU. A different matter would be to assume that, in my view, those Historical Rights do also grant their defense by the Basque territories before the EU, instead of the Spanish Government who is not entitled to do so or to defend such rights, as an institution that is only recognising them by means of the Constitution. But let us see those considerations in the following section.

3. THE THESIS OF THE CONSTITUTIONAL AGREEMENT TO AVOID THE LACKINGS OF THE SYSTEM

3.1. Historical Rights as a constitutional agreement

The existence of an original constitutional agreement in force through Basque and Navarre Historical Rights should be useful for us to avoid the mentioned problems either in the domestic or EU level. Firstly, the Additional clause of the Basque Statute of Autonomy as well as well as the First Additional clause of the Statute of Navarre do permit, or at leat recognise the possibility of updating Historical Rights even over and above the constitutional framework mentioned by the First Additional clause of the Constitution. However, according to Loperena such powers as are even limited to the Spanish parliament are not available for the territories entitled to enforce Historical Rights.[136] This means that any enforcement of the constitutional clause, or of the Basque Statute of Autonmy or the Statute of Navarre with the aim of permiting these territories to avoid the constitutional framework would require a new agreement or formal negotiation with the State through its Parliament,[137] in order to deal with the

136. D. Loperena Rota, "Unidad constitutional y actualizaciones generales y parciales de los Derechos Históricos", op. cit., pages 316 & 317. This is an essential consideration because those basic principles mentioned by Loperena, in particular the Fundamental Rights, would not be available to anybody within the constitutional framework. In this regard the EU basic pricnciples are also involved by means of articles 93, 95 and 96 of the Constitution. These should not be available for the disposal of Historical Rights either, nor should they be even from the view of a constitutional amendment within the EU context.

137. A recent Sentence of the Spanish Constitutional Court seems to have a different approach, while assuming a violation of article 14 of the Constitution through the particular regime in force in Navarre to claim for the father´s rights and entitlement towards a natural son according to the Civil Code of Navarre, as against the wider regime in force in the general Spanish Code (article 133 et seq.), and all these by means of the Historical Rights clause allowing Navarre to legislate freely in this matter. See the Sentence of the Constitutional Court dated 12-10-2000 stating that: "no estamos ante supuestos sustancialmente idénticos, sino, como se ha dicho, ante realidades históricas y legislativas plurales y diferenciadas que han encontrado apoyo, en todo caso, en la vigente Constitución. La cual justifica la posibilidad de que exista en esta materia un tratamiento específico, aunque sea como aquí más restrictivo, por medio de la legislación autonómica de desarrollo, y que la pluralidad de ordenamientos en que se manifiesta para ser tal implique, en fin, que cada uno se mueva en un ámbito propio, puesto que, sin excluir, naturalmente, la existencia de relaciones interordinamentales, están fundados, pues, en la separación respecto de los demás; separación que se expresa, así, en un sistema privativo de fuentes del Derecho, las cuales se producen en el ámbito propio de la organización de que el ordenamiento surge".

constitutional amendment therefore required with the EU-level consecquences thereon.[138] The clear question is the existence of an expressly recognised path within the Constitution, which should be also recognised before EU Law. Moreover, the matter laso has a procedural way out according to articles 166 and 87 of the Constitution, whereby Autonomous Communities are even allowed to claim for a constitutional amendment.[139] According also to J. Cruz Alli:

> cuando en el lenguaje político español se habla de los "hechos diferenciales" se alude a las características de algunas Comunidades Autónomas a las que se reconoce una identidad propia. Los "hechos diferenciales" son signos de identificación de un pueblo y testimonio de su personalidad cultural, histórica o política diferenciada, que se apoya en hechos históricos, en diferencias culturales, en instituciones, en sus estructuras normativas, en la propia percepción como comunidad singular y en la voluntad colectiva de mantenerla. La Constitución pretendió resolver el problema de la integración de los hechos nacionales y de los hechos diferenciales que, como señas de identidad de los diversos pueblos que integran España, debían ser tomados en consideración como parte de su identidad y, al mismo tiempo, de la plural identidad colectiva.[140]

That pretension for integration and the identity solution for diverse nations or peoples within the constitutional framework demands a direct recognition from the central Government and, especially, within its linkages to the EU. Going back to the constitutional limits of Historical Rights, another of their polemic examples with regard to the Constitution is provided in the Basque Statute of Autonomy and may not seem to appear constitutionally possible without the provision for recognition of Basque Historical Rights. I am now talking about the capacity for self-organisation of every single Basque province, as well as about the common institutions of the Basque Country. Therefore the Basque Country has, in fact, an arbitral commission regulated by article 39 of the Basque Statute of Autonomy,[141] regulated afterwards by a Law dated 30-6-1994, dealing with any dis-

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138. On the contrary, if the way to enforce those provisions is not intended to go above and beyond the framework of the Constitution, the constitutional amendment would not be necessary, and a simple approach for self-government would then be the solution.

139. Article 166 of the Spanish Constitution: "La iniciativa de reforma constitutional se ejercerá en los términos previstos en los apartados 1 y 2 del artículo 87". Article 87 of the Spanish Constitution: "La iniciativa legislativa corresponde al Gobierno, al Congreso y al Senado, de acuerdo con la Constitución y los Reglamentos de las Cámaras. Las Asambleas de las Comunidades Autónomas podrán solicitar del Gobierno la adopción de un proyecto de ley o remitir a la mesa del Congreso una proposición de ley, delegando ante dicha Cámara un máximo de tres miembros de la Asamblea encargados de su defensa".

140. J. Cruz Alli, "Los hechos diferenciales en la Constitución de 1978", *Euskonews & Media* num. 98, http://www.euskonews.com.

141. Article 39 of the Basque Statute of Autonomy: "Los conflictos de competencia que se puedan suscitar entre las Instituciones de la Comunidad Autónoma y las de cada uno de sus Territorios Históricos se someterán a la decisión de una comisión arbitral, formada por un número igual de representantes designados libremente por el Gobierno Vasco y por la Diputación Foral del Territorio interesado, y presidida por el Presidente del Tribunal Superior de Justicia del País Vasco, conforme al procedimiento que una Ley del Parlamento Vasco determine".

putes on competencies between the Basque common institutions and the three provinces into which the Basque Autonmous Community is currently divided (Araba, Gipuzkoa and Bizkaia). This matter is of great importance because neither the Statute of Autonomy nor the Law by which this Commission is set up explains the legal nature thereof, nor the force or value of its acts, decisions or the appeals thereon. But this issue is even more complicated with the latest amendments in the Law regulating the Constitutional Court (articles 75 bis et seq) and the new Law on Administrative Jurisdiction (1998). In the first case, this is due to the so-called "conflicts in defense of local autonomy", that provide the Basque provinces with their legitimation to bring conflicts of this kind before the Constitutional Court, as an alternative claim, to the corrent possibility to submitt them to the Arbitral Commission mentioned by article 39 of the Basque Statute of Autonomy. However, it is indeed the very Law regulating the Constitutional Court which excludes the Basque provinces from that type of appeals before the Constitutional Court (Additional clause 4); this means that there is no jurisdictional appeal against such matters and this produces a clear blank space in such a relevant constitutional matter, that has been regulated by the Basque Statute of Autonomy in a different manner. We could reach the same conclusion by means of the exclusion pointed out by the first and second additional clauses of the Law on Administrative Jurisdiction (1998), according to which it is not a competency of this jurisdiction to decide about appeals against decisions of the aforementioned Commission. As we can see, the jurisdictional blank space is obvious in this context in breaches of some constitutional provisions such as article 24.1 (the right to effective jurisdictional control) and 24.2 (the right to a legally determined judge), article 106.1 (the principle of jurisdictional control of administrative actions), article 117.3 (the principle of exclusive jurisdictional control, article 117.5 (the principle of jurisdictional unity) and article 123.1 (the principle of final control by the Supreme Court). In my view these latter examples and some others[142] do clearly ratify the existence of an original constitutional agreement on Historical Rights between the State and the Basque Country that allow the latter to assume self-government and organisation systems that might be at odds with certain constitutional principles. This agreement has even received the grant of jurisdiction from the Constitutional Court. If there is no doubt on the reality of the agreement, the pending matter would be to see the central government assuming and defending it as a real part of such an agreement, but not only in the domestic level but also when the EU enforces the pro-

142. There are at least two additional examples concerning Navarre (Statute of Autonomy) the existence of which seems to be unknown in most cases. According to article 61.1 c) of the Navarre Statute of Autonomy: "la competencia de los órganos jurisdiccionales radicados en Navarra se extiende en el orden contencioso-administrativo a todas las instancias y grados cuando se trate de actos dictados por la Administración Foral". This lacks the control of the Supreme Court in contradiction with the mentioned principles, but without any possibility of claim or appeal whatsoever. In the same line, article 69 of this Statute provides a special system for the resolution of disputes between the central Government and the Government of Navarre on matters related with this Statute by means of a Board of Cooperation. This is of course regardless of the duties of the Constitutional Court and the other jurisdictions, without claryfing in any manner the framework and constitutional background of this peculiar system nor the relationships between the Board, the Constitutional Court and the other jurisdictions. This is also proof of the potential of the clause on Historical Rights whenever political will meets such challenges.

vision for updating Historical Rights provided in the First Additional clause of the Constitution.[143]

3.2. The EC-EU as a singular international treaty[144]

The problems in order to reach a peaceful institutional agreement on all the aforementioned matters are even more numerous when we talk about the EU as the result of an international treaty, and therefore, about the concept that does not allow sub-national entities to take part directly within the EU decision-making processes. However, there are real examples of EU mediation in contexts located far from the EU itself, and there are indeed therefore tools available within the Treaty of the EC as well as in the Treaty of the EU to be able to assume such considerations, even in the specific case of Basque Historical Rights. Therefore, we should claim for a general updating procedure in the sense of the First Additional clause of the Constitution, looking for that process also within the EU. But let us now analyse which the legal approach of both treaties is in all these regards. The first important issue is the distinction of terms in the case of article 1 of the Treaty of the EU, as against articles 1 and 2 of the EC Treaty. While the former seems to assume the notion or concept of "peoples", the latter articles do follow the concept of "Contracting parties" and "Member States". The matter might be a simple bet in favour of concept ambiguity or rethorical recognition of the peoples in the European Union, regardless of the positive approach within the legal framework. But both treaties design an organisation of a special nature in contrast with other treaties, for example, that do not follow the path of institutional integration, such as is the case with the EU in comparison with certain other treaties and international instruments that do not support such a strict integration process even with administrative and jurisdictional control thereon as in the case of the EU. Therefore, we can talk of the EU as the real result of an international treaty. However, there is a clear will for integration and this also requires us to deal with sub-national participation in different terms in all levels. This means that as an international organisation looking for integration, and now more so than ever before with the constitutional project, the sub-national approach recognised in domestic levels should become a part of the EU framework, just like with the national constitutional laws. In order to assume this task, the exis-

143. This also means that the State could ssume it directly before the EU bodies or allow the other parties of this agreement on Historical Rights to do so on their own as constitutional bodies entitled to assume such Historical Rights within the Constitution. This would become an updating procedure of Historical Rights not only inside the new constitutional scope, but also abroad with Spain inside the EU scope together with this agreement on Historical Rights as recognised by the Constitution even vis à vis the EU.

144. According to E. L. Murillo de la Cueva, in "Comunidades Autónomas y política europea", IVAP-Civitas, 2000, pages 64 & 65: "la transferencia de competencias constitutionales a la Unión Europea ex artículo 93 CE refuerza la idea de la necesidad de participación autonómica en la medida que el cumplimiento del Derecho que emana de sus instituciones es una obligación constitutional que, según el reparto competencial interno, sólo las Comunidades Autónomas pueden cumplir es su respectivo territorio cuando afecte a sus atribuciones, tal y como ha declarado el Tribunal Constitutional en la repetida STC 252/1988".

tence of a singular international treaty should not be an obstacle or difficulty because its nature is right in that very sense towards the integration of political wills; wills that should be born from every single body conforming the States. In fact, the essential characteristic of the EU is to operate a real transnational integration of democratic principles in force in all member States. This also demands more attention for those cases in which reality shows a constitutional background for decentralisation of political power in different organisations and legislative powers. If the consideration of the EC and EU Treaties as classic international instruments do not allow for this interpretation, the same will for integration within both treaties and their special nature do follow that direction.[145] This is also present in various provisions in the mentioned treaties, with Basque Historical Rights included as follows:

a) Article. 6.3 TEU: Respect for national identities of the Member States (article 5 of the Project of European Constitution)

This provision does not only demand maintaining domestic particularities of every State within the EU, but also the real recognition of the national particularities within various Member States. Some of them are the so-called "distinguishing facts" of the Basque Country and Navarre with their constitutional recognition in full force.

b) Articles 2 & 3 TEC as limits for a global and integrated system.

If the mentioned national identity, or in our case, the Historical Rights of the Basque Country and Navarre do not find legal contradictions with these provisions, the EU and its bodies would not imply any problems in terms of the participation of sub-national entities in the process of decision making and enforcement of the EU legal framework.[146] Moreover, the principle of subsidiarity requires so, and so does the mere peaceful enforcement of the rules and provisions for the whole system. Therefore, the problems are not really within the legal provisions of treaties nor in will of the EU, but are in the political approach made in common by Member States, leaving apart from the process, in the Spanish case, the Autonomous Communities even though they are directly affected by the EU Law as they are likewise by every State provision. Finally, various authors also support the interpretation I defend here. In this line, according to Pérez Tremps, the distinction between an international treaty (or even international relations) and the EU process seems to be clear in order

145. Other authors, in a different sense, do follow the classical approach of the TEC and the TEU as international treaties that would not open up sub-national entities capacity for participation any more than the Committee of the Regions in its consultative status. In this regard States do agree normally by means of their own particular views on every State's constitutional scope and its external approach before the EU. Nevertheless, my interpretation follows the idea of considering sub-national entities as integrated parts of the States before the EU: if the competency of an Autonomous Community in Spain may breach EU Law, the State becomes the liable body, it seems to me that we need to recognise possibilities for them to take part in the complete process.

146. A different thing would be to see the central Spanish Government assuming this challenge and facilitating the legal tools for this purpose. Actually the EU has not refused to deal with the issue and neither have several Member States.

to ease sub-national participation in those matters of their respective competencies:

> el parámetro constitutional de las actuaciones autonómicas en materia europea viene formado por los distintos títulos competenciales materiales.[147] Las relaciones internacionales tienen una dimensión política y general, frente al carácter sectorial y técnico de las actuaciones externas, tal y como se indicó en la STC 17/1991. En la realidad comunitaria europea, las actuaciones que se llevan a cabo tienen, básicamente, una dimensión sectorial y técnica, como consecuencia misma de la idea de integración, y así lo ha puesto de manifiesto la ya citada STC 165/1994. (...) Lo que en el momento mismo de la integración podía tener una dimensión general y, por tanto, susceptible de encuadrarse en las relaciones internacionales,[148] la práctica y el funcionamiento ordinario y continuado de los poderes públicos pueden haberlo convertido en una cuestión técnica y sectorial, y, en cuanto tal, encuadrable en un título competencial concreto.[149]"[150]

Another important author like PAREJO ALFONSO does also maintain the view of the EU process as something different from the classical international approach seen in the Spanish Constitution under the title of "international relations.[151]

He distinguishes a certain evolution if we consider the moment when Spain came into the EC and we may point out difficulties in seeing such a distinction at a time when we were only talking exclusively about negotiating, signing and ratifying specific international treaties.[152] According to him there is a different approach in the following terms:

> una vez producida la plena incorporación, aquellas relaciones puedan y deban diferenciarse de las internacionales en sentido estricto y propio; tanto más, cuanto más avance en el terreno político la integración europea.[153]

This means, and this is extremely important, that when the integration process is now clear in many matters, the distinction between purely international matters and the singular integration into an organisation such the EC and the EU

147. We should not forget that the Historical Rights of the Basque Country and Navarre, according to the Constitution, do follow and design powers and competencies directly linked with the EU.

148. This affects the typical competencies of the central Government.

149. This is a specific competency that in many cases would correspond to the autonomous community, normally in the case of the Basque Country and Navarre through their Historical Rights clause.

150. P. Pérez Tremps, "Las competencias en materia internacional y la Unión Europea", op. cit., page 76.

151. L. Parejo Alfonso, "La participación de las Comunidades Autónomas en el proceso de adopción de decisiones de la Unión Europea", in La acción exterior y comunitaria de los Länder, Regiones, Cantones y Comunidades Autónomas, Vol. I, IVAP, page 76.

152. Ibid.

153. Ibid., page 77.

seems to appear clearer than it did before. These examples may workwork to look at this reality in a much more flexible sense, and thus, once the initial process is finished, we may behold a global framework of States politically integrated by principles, objectives and common systems of administrative and jurisdictional control. It is indeed this common ground that tends to overcome the narrow limits of strict international relations in the classic sense towards participation of sub-national entities within the other bodies conforming the global EU system, specially those that even have legislative powers in substantive matters and that affect the good functioning of a system that they shall have to enforce on a daily basis.[154]

3.3. The EC-EU as sum of constitutional agreements

The consideration of the EC-EU system as a global sum of diverse States towards integration, the domestic particularities of which are present in their respective Constitutions may be suitable, in my view, to produce the EU assumption of all such aforementioned particularities. It would constitute a fruitful challenge for those wills shown towards the domestic levels of the member States, as well as towards the peculiar and constitutional EU level.

In order to channel this and assume its real dimension we may use, as an example, the institution of Human Rights. They are an inherent requisite to belonging to the EU system and they are characteristic of every single one of the Member States. Article 6.1 of the TEU is clear therefore (article 2 in the Project of Constitution). This is an essential matter because the EU assumes "ab initio" that the nuclear part of its legal regime is not going to be directly controlled by the EU, but through the common constitutional traditions of the Member States. This is indeed directly linked with sovereignty and rights of individuals that are entitled to claim such rights before any administrative or jurisdictional body whatsoever.

So, the real existence of a sum of constitutional agreements seems to be a suitable procedure to recognise such Human Rights at the EU level, even though the EU itself lacks of the tools to Project them directly. Therefore, there is a principle of mutual trust for the protection of Human Rights in each domestic level. If this is so in such a nuclear matter of our legal systems, there should be a similar principle of mutual trust in order to recognise and assume the participation of subnational entities within the whole process, especially in the case of those with legislative and enforcement powers or even collective Historical Rights in terms of the subjects entitled to them, but which are indeed singular regarding their material content and the potential updating procedures in the case of the Basque Country and Navarre.[155] This process took place without any relevant problems within the

154. Direct participation that, in the cases of Basque Country and Navarre, do have one of its sources through Historical Rights.

155. Historical Rights that would find again their limits in terms of updating in Huamn Rights, rights as they are recognised within the EC-EU context and as a relevant part of their tradition. More even now with the constitutional project pending.

context of Human Rights, where there had been previously a huge distance among the different systems for protection within each Member State. Nowadays, finally, there is a growing mutual impact in this regard, mainly through the enforcement of the general principles of Law and the jurisprudence of the ECHR.

This has not been an obstacle for the EC-EU system to develop certain frameworks for the protection of Human Rights in those matters directly linked with the principles and objectives of European Law. Thus, Human Rights continue being a relevant part of the EC-EU tradition as a nuclear point with at least three sources of recognition and assumption of Human Rights:

a) The EC-EU Law with the mentioned limits.

b) International Law, especially trough the ECHR.

c) The domestic Law of each Mamber State.

It was actually the existence of a common constitutional tradition that helped substantially the developments mentioned in terms of Human Rights. And this may work as well to reach similar approaches in those cases where Historical Rights of certain sub-national entities might be lacking protection even though benefiting from a direct constitutional recognition in the Spanish case and regardless of their constitutional domestic level. This might also be considered a breach of EU Law in such cases in which those Historical Rights did not contravene European Law whatsoever. Indeed, far from the theoretical distance between the Spanish Constitutional Court and the CJEC we are now facing a mutual situation of interlinkages within the context of Human Rights. And this process has been based upon the implementation in both bodies of the general principles of Law as the interpretative pillar of all matters concerning European Law. Therefore, the inexistence of a real positive charter of Human Rights at the EU level, despite of the recognition made by article 6 TEU, has not been an obstacle for the EU to assume the respect for such rights through the jurisprudence of the CJEC which was also inspired, inter alia, by those common general principles of Law of the Member States.

Therefore, if in such matters as Human Rights, the importance of the domestic regime is extremely clear in terms of real protection in the EU level, EU bodies, Member States. Eventually, the CJEC should also take up the challenge to define to what extent the constitutional Basque Historical Rights would be considered in this case before the EU, in order to determine their limits. In a nutshell, to find those common grounds and limits would be a task of the CJEC, the opinions of which would undoubtfully follow the grounds supported by the Spanish Constitutional Court, as the latter did in direct enforcement of article 10.2 of the Spanish Constitution.[156]

156. Article 10.2 of the Spanish Constitution: “Las normas relativas a los derechos fundamentales y a las libertades que la Constitución reconoce, se interpretarán de conformidad con la Declaración Universal de Derechos Humanos y los tratados y acuerdos internacionales sobre las mismas materias ratificados por España”.

Within this process, the domestic jurisdictional bodies have been adapting themselves to the portrait made by the CJEC on the relationship between the EU and the domestic levels. The conclusion is therefore clear and may suggest certain considerations in order to adequately interpret the figure of Historical Rights before the European system as a whole:

1. The CJEC clearly stipulated that European law had direct and prior enforcement effects. This means that any damage or impact provoked by a Member State in citizens and in breach of EC-EU Law will produce liability to be assumed exclusively by the Member State concerned.

2. To control the aforementioned situation the domestic courts have a main role in the supreme level by means of Constitutional Courts or similar figures, through the control of the constitutionality of every violation, the control of the superiority of domestic Constitutions as well as through the implementation of EU Law. That is indeed a mission of the domestic jurisdictions (Spanish Constitutional Court for cases of Human Rights and Historical Rights).[157]

However, current reality does not provide real consideration for such Historical Rights within the EU, as a substantive part of one of these agreements or covenants that are now present in the EU. The reason therefore is due to a lack of political will within the Spanish domestic level. An example of this situation is the way Germany, Belgium or Austria dealt with the issue in an absolutely different way from that of Spain and did so in accordance with the peculiar nature of the European Traties as the sum of constitutional Treaties that assume EU objectives and principles as well as the institution of Human Rights.

The lack of the principle of subsidiarity at sub-national and local levels is another problem in this coxtext that shows the evidence of an inexistent political will within certain Member States to comply with article 5 of the EC Treaty. Indeed, the last paragraph of this provision states some of the limits we have been analysing, and even affect directly the implementation and domestic updating of the Historical Rights as recognised by the Spanish Constitution. This means that the EU-EC actions do also have certain limits within the objectives provided by the EC Treaty. Therefore, provided that Historical Rights do not affect those objectives, they may have a presumption of legality in the EU and domestic levels, in accordance with their constitutional recognition and assumption.

Finally, the implementation in the European level of the constitutional reality within every social, territorial and legal scope demands distinguishing the existence of these sub-national complexities that are not easily defined under the general concept of “Regions”. We find here that domestic realities with a constitutional recognition within the Member States which may require peculiar treat-

157. In this regard both the Spanish Constitutional Court and the similar European domestic bodies are obliged to guarantee EU Law, and even requesting for example the preliminaru ruling before the CJEC as soon as they need an interpretative criteria of the European Court, according to article 234 of the EC Treaty.

ment in order to implement that constitutional scope and singular approach. That is also the case in particular for those entities with legislative powers, such as the cases of the Basque Country and Navarre in accordance with, inter alia, their Historical Rights and within certain of the most relevant competencies.[158]

To conclude, the Basque and Navarre Historical Rights have been unable to present their peculiarities at the EU level while some other sub-national entities did so within some other Member States. In the cases of the Basque Country and Navarre, their respective scope of competencies has been some times violated by the EU-EC system. Even though many authors recognise the federal approach of the European Treaties, this is not so easilily perceived in the case of those Historical Rights analysed here. The principle of respect for national identities of the Member States (Article 6 of the EU Treaty)[159] may grant the legitimation of the Spanish domestic agreement on Historical Rights.

The so-called "useful constitutionalism" in terms of Herrero de Miñón and Lluch requires an implementation of this question at the EU level, and that seems to be granted even by the Spanish Constitution. For these authors it is a challenge in the following terms:

> felizmente la Constitución y el Estatuto dan cauce para ello porque se trata de normas flexibles (se pueden modificar de acuerdo con sus propias cláusulas de reforma, aunque no lo creo necesario en el caso de la Constitución) y, más aún, abiertas (al remitirse ambas a unos Derechos Históricos que legitimarían una situación constitucional especialísima y pactada, como ya ocurre en Navarra, sin que nadie se escandalice). La autonomía vasca es fruto de un pacto político que trasluce la propia letra del Estatuto y así lo ha reconocido la doctrina más aséptica. La revisión del Estatuto, de acuerdo con sus propias previsiones abriría, así, la vía al pacto político y quien pacta se autodetermina.[160]

Herrero de Miñón follows again this idea in very clear words:

> es mediante pacto como el pueblo vasco puede ejercer, frente a terceros, sus derechos históricos para asegurarse un ámbito de soberanía, noción que ciertamente tiene más de paccionado que de autista. En efecto, desde Laband y Jellinek sabemos que la soberanía no puede definirse por su contenido competencial,

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158. It is obvious the necessity to distinguish the facts for German Länder, basque Country or Navarre for example, and some other cases as the French Departments or the British counties. The case of Historical Rights demands, at least three main approaches:

a) More participation of the Basque and Navarre Parliaments in the EU institutional activities;

b) Participation of both delegations within the EU Council of Ministers;

c) Direct standing to claim of both entities before the CJEC in matters of their respective competencies.

159. Article 5 for the Project of Constitution.

160. M. Herrero de Miñón y E. Lluch, "Constitucionalismo útil", in *Derechos Históricos y Constitucionalismo útil,* Fundación BBV, Bilbao 2000, page 17.

> sino por su cualidad formal: la competencia sobre la propia competencia. No es soberana la autoridad que tiene más potestades y recursos, sino quien decide sobre qué potestades y recursos ha de tener o, al menos, quien puede impedir que otro lo haga por él. De ahí que cuando una relación institucional y competencial se establece y garantiza por vía de pacto, de manera que sólo con la aquiescencia de ambas partes pueda instaurarse y modificarse, se entre en el ámbito de la cosoberanía o de la soberanía compartida. Si es soberano quien decide sobre la competencia, será cosoberano quien tiene la competencia de codecidir. A estos efectos, es evidente que tanto el Estatuto de Euskadi como el Amejoramiento del Fuero de Navarra contienen elementos de pactismo capaces de articular una relación de cosoberanía.[161]

A similar approach is followed by J. Cruz Alli who even introduces linkages with the EU process stating that:

> la disposición adicional primera es un auténtico camino para el desarrollo de los derechos históricos en los aspectos ya señalados. Reconocimiento de identidad colectiva dentro del Estado, con derecho al más amplio autogobierno dentro de la unidad constitucional. Atribución de competencias que hagan efectivo dicho autogobierno, articulándolas con la competencia estatal y la derivada de la presencia dentro de la Unión Europea, que no puede ser utilizada por el Estado para reducir los ámbitos competenciales.[162]

3.4. The Historical Rights of the Basque Country as a paradigm of similar contexts within the EU (Germany, Austria and Belgium)

Regardless of the existence of some other different examples, the following comparative study will focus on three significant examples in the EU level. Thay do prove a different approach to this issue of sub-national entities from the viewpoint of the central governments, even though they do not have a similar figure such as the one that relies upon Historical Rights for example. The cases of Germany, Austria and Belgium allows us to analyse the matter with an optimistic view with regard to the future implementation of Basque Historical Rights in the EU. Nevertheless, this requires a proper political lecture with proportional grounds to the constitutional importance of Historical Rights that the central government should be assuming in front of the different EU bodies.[163]

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161. M. Herrero de Miñón, "Autodeterminación y Derechos Históricos", in *Derechos Históricos y Constitucionalismo útil,* Fundación BBV, Bilbao 2000, pages 219 & 220. He concludes stating that:

"a la luz de lo expuesto, el problema consiste en señalar los cauces mediante los cuales desarrollar por vía de pacto el potencial de los derechos históricos hasta convertirlos en instrumento de autodeterminación"; see Ibid., page 221.

162. J. Cruz Alli, "Paz y Fueros. Los Derechos Históricos como instrumentos de pacificación", in *Derechos Históricos y Constitucionalismo útil,* Fundación BBV, Bilbao 2000, page 329.

163. That political will is the present within the new Statement attached to Treaty of Amsterdam. It was presented by Germany, Austria and Belgium in order to give a positive answer in terms of sub-national participation in the EU. This Statement, however, was not signed by Spain.

a) The case of the German Länder

According to Schefold:

> las disposiciones constitucionales complementarias del 21 de diciembre de 1992 han reforzado de un modo decisivo los derechos de intervención del Bundestag y del Consejo Federal y, por ende, la protección de las competencias regionales en torno al proceso decisorio de la Unión Europea. Por medio de derechos de aprobación y posibilidades de intervención los Länder disponen de múltiples modalidades de participación.[164]

This author quotes as well the existence of important restrictions in order to participate in the practical approach by means of the ample scope of competencies reserved to the federal legislation by articles 73 and 74 of the German Constitution.[165] In any case, the main distinction with regard to the Spanish situation lies in the role of the Länder as a direct player within the process for adoption of European policy-making.[166] But let us analyse briefly which are the constitutional provisions in Germany as well as certain provisions developing that global regime of the Lánder participation in the EU level with special consideration to article 23 of the German Constitution.[167]

It is extremely important to direct our attention to this provision as the key element chosen in order to determine the consecquences of the European process for the Länder in the constitutional level, as well as their participation thereon with the exception of what is called by article 23.1 of the German Constitution the "transfer of sovereign rights", which are an exclusive competency of the State, and by virtue of a Law to be accepted also by the Federal Council.[168] It is in any case article 23.2 of the German Constitution which designs and limits Länder participation in the EU integration process:

> en los asuntos de la Unión Europea intervendrán tanto la Cámara de Representantes como, a través del Consejo Federal, los Länder. El Gobierno Federal deberá informar a la Cámara de Representantes y al Consejo Federal exhaustivamente y a la mayor brevedad posible.[169]

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164. D. Schefold, "La participación de los Länder alemanes en el proceso de adopción de decisiones de la Unión Europea", in *La acción exterior y comunitaria de los Länder, Regiones, Cantones y Comunidades Autónomas*, Vol. I, IVAP, page 142. This author affirms in fact that:

"el Comité de las Regiones (...) tiene bastante menos peso en comparación con las posibilidades participativas que la Ley Fundamental brinda a los Länder", Ibid.

165. Ibid.

166. Ibid., page 143.

167. This provision was introduced by a Law to amend the Constitution of 21-12-1992, BGBl I, 24-12-1992, page 2086.

168. The translation of the different articles analysed here comes from the Comparatuve Code published by IVAP-Gobierno Vasco, 1996, "La acción exterior y comunitaria de los Länder, Regiones, Cantones y Comunidades Autónomas", Vol. II, page 25.

169. Ibid.

Here is a clear difference in this apprach with the one in force in Spain for the Autonomous Communities. The German constitutional recognition of the peculiar situation of the Länder makes it possible that any decision or administrative act ignoring the provisions of articles 23 et seq. Of the German Constitution may be declared inconstitutional thanks to the formal and material control that is recognised by the Constitution with regard to the position of the Länder before the EU.[170]

The German Constitution goes further by including some pioneer provisions, which at present are quite far from reality in the Spanish case but in force in the German constitutional system since 1992. In this sense, article 23.4 of the German Constitution establishes that the Federal Council shall take part in the decision making of the State in that it might have to intervene in the domestic level in a similar matter, or in the case of a competency of the Länder. Meanwhile, article 23.5 also stresses the aforementioned system to guarantee legilstaive competencies before the EU level. This is a crucial point because the German Constitution includes not only Länder legislative powers, but also their bodies and administrative procedures in its scope of protection of Länder competencies, and thus providing all such competencies with direct constitutional protection through the Federal Council, the opinion of which is to be abided by regardless of the national responsibility of the State.

Article 23.6 closes the circle of linkages between the Länder and the EU by providing the former with the possibility to appear before the CJEC in order to defend their competencies under dispute. In this regard, it maintains that in the case of exclusive legislative powers of the Länder affected, State representation would be transferred to a representative of the Länder appointed by the Federal Council, under the coordination of the Federal Government that grants the national responsibilities of the State.[171] This is a singular and pioneering provision in Comparative Law that makes it possible to have the institutional defense of Germany assumed by a representative of the Länder by means of a transfer of responsibility or what is tantamount to an exercise of co-sovereignty. The constitutional assumption of these considerations grants them the highest possible protection; and this also means that any regulation or administrative act may become inconstitutional by breaching such provisions.

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170. We should not forget that this situation within the Spanish case has been assumed without any kind of constitutional recognition. This might be either in breach of the European Treaties as well as infringing upon the regime of the Spanish Constitution on Historical Rights (First Additional clause). The problems lie in the absence of a position on the matter in the Constitution. This implies that sub-national participation is arranged by sectorial conferences the decisions of which lack any legal nature. So the autonomous communities do not have a procedure for monitoring that process before the EU. That is formally recognised for the Länder in the German case, thanks to the mentioned constitutional amendment.

171. Ibid. In this regard, article 23. 7 of the Constitution requires therefore an Law with the approval of the Federal Council. This was an Law dated 12-3-1993, for cooperation between the Federation and the Länder in EU matters whose main aspects will be refered to below, BGBl I, 19-3-1993, page 313.

But the German provisions go even further. Article 50 of the Constitution declares that the Länder, through the Federal Council, shall intervene in the legislation and adminsitration of the Federal State as well as in EU matters.[172] Regarding the composition and functions of the Federal Council, articles 51 and 52 are applied with direct participation of the Länder in both cases.

On the other hand, article 79.3 of the German Constitution provides the system with a final granting clause for the Länder to guarantee the control of their institutional participation. In fact, this article declares the unlawfulness of any amendment of the Constitution affecting the division of the federation in Länder, their participation in that legislation and in the principles quoted by articles 1 and 20.[173] The importance of this provision stands, in my view, on very similar grounds to that of the First Additional Clause of the Spanish Constitution for the case of Basque Historical Rights. I am only talking about a similarity because there is no similar provision or recognition of any Historical Rights or title deeds to the Länder whatsoever; there is, however, like in the Spanish Constitution, a constitutional guarantee in order to respect a territorial, institutional and political reality that is clearly distinct from others and that has become part of the State as a whole together with the need, which has been fulfilled, to take part in the whole process as a relevant part of the State.[174]

It seems to me that this approach is also present within the context of the Bavarian Constitution when it assumes previously exisitng rights of the Bavarian people that are also perfectly assumed within the German Constitution. Hence, according to article 178 of the Bavarian Constitution, "Bavaria shall accede to a future democratic federal state. This shall be based on a voluntary federation of individual German states whose separate state existence is to be guaranteed". The concept of historical titles and voluntary co-sovereignty is clearly visible here.

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172. Ibid., page 28. This provision was modified by a constitutional amendment dated 21-12-1002, BGBl I, 24-12-1992.

173. Código Comparado, IVAP-Gobierno Vasco, 1996, "La acción exterior y comunitaria de los Länder, Regiones, Cantones y Comunidades Autónomas", Vol. II, page 32.

174. Ibid.

- Art. 79. 3 of the German Constitution:

"Será inadmisible cualquier modificación de la presente Ley Fundamental que afecte a la división de la Federación en Länder, al principio de participación de los Länder en la legislación o a los principios consignados en los artículos 1 y 20". Article 1 refers to the protection of human dignity, while article 20 refers to the basic principles of the German Constitution.

- First Additional clause of the Spanish Constitution:

"La Constitución ampara y respeta los derechos históricos de los territorios forales.

La actualización general de dicho régimen foral se llevará a cabo, en su caso, en el marco de la Constitución y de los Estatutos de Autonomía".

- Article 178 of the Bavarian Constitution. Accession to a federal state

"Bavaria shall accede to a future democratic federal state. This shall be based on a voluntary federation of individual German states whose separate state existence is to be guaranteed".

As I have said before, German legislation developed those provisions by means of the Law dated 12-3-1993, on the co-operation between the Federation and the Länder on EU matters.[175] In this regard there is also an Agreement dated 29-10-1993 signed by the Federal Government and the Länder about co-operation on EU matters.

Therefore, the German case proves that the existence of a clear political will is sometimes enough to permit the constitutional implementation of the mechanisms and criteria to include the participation of sub-national entities with legislative powers in the EU process to defend their interests before EU bodies, notwithstanding the principle of States´sovereignty, nor interferring with the general interest protected by the State. We should not forget that sub-national entities are also parts of those States with competencies and constitutional recognition, as in the cases analysed.

b) The case of the Austrian Länder

The main distinction with regard to the Spanish case is once again the constitutional recognition of the situation through the Austrian Constitution in order to defend the interests of the Länder before the EC-EU contexts.[176] Nevertheless, and glancing through the Austrian Constitution, it is easy to find certain similarities with the German case and a fair distance with the Spanish situation in this regard.

The first constitutional reference on such aspects is article 16.1 of the Austrian Constitution, accoring to which the Länder within their competencies may conclude international treaties with States bordering with Austria or with their federal entities.[177] Even though this provision does not rerer expressly to the EU, its nature shows, as in the German case, a constitutional will introduced by succesive amendments in order to ease the treaty-making power of the Länder, namely within their competencies. The same provision, according to paragraphs 2 to 5, has a deeper approach by means of establishing mutual duties of information between the Land and the Federal Government (art. 16.2), the capacity to denounce international treaties by the Länder (art. 16.3), the effective implementation of international treaties by the Länder (art. 16.4) and their right of supervision of the enforcement of such treaties by the federation in certain competencies (art. 16.5).

But the Austrian constitutional provisions make a deeper approach on the role of the Länder within the European integration process thanks to article 23 D.

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175. Ibid., page 33.

176. A very interesting vision on this matter can be found at I. SEIDL-HOHENVELDERN, "Los Länder austríacos y la Unión Europea", in *La acción exterior y comunitaria de los Länder, Regiones, Cantones y Comunidades Autónomas*, Vol. I, op. cit., pages 173 a 200.

177. Código Comparado, IVAP-Gobierno Vasco, 1996, "La acción exterior y comunitaria de los Länder, Regiones, Cantones y Comunidades Autónomas", Vol. II, page 58. This constitutional provision was introduced by a Law of constitutional amendment dated 29-11-1988, BGBl nº 53, 20-12-1988.

1 of the Austrian Constitution. This rule provides a duty of information from the Federation to the Länder, on any matter within their competencies projected by the EU framework, providing the Länder with the opportunity to have a position thereon.[178] On line with this provision, article 23. D. 2 also provides an important rule for those cases in which the Federation may receive a common position from the Länder on EU projects affecting their legislative powers. In those cases, the Federation shall be bound by the mentioned common position of the Länder within the negoriations and voting at the EU level. In fact, the provision concludes by stating that the Federation may only be allowed to difer from that position in accordance with compulsory reasons of foreign policy and integration, in which case they should inform the Länder about such reasons inmediately.

The direct participation of the Austrian Länder in EU decision-making is therefore constitutionally provided by article 23. D. 3 of the Constitution, according to which if a EU project affects matters within the legislative powers of the Länder, the Federal Government may transfer the participation within the European Council to a represenatative of the Länder. This faculty shall be granted by means of co-participation of the relevant members from the Federal Government in mutual cooperation. The second paragraph also refers to the representative of the Länder, and the latter, according to article 142, will answer before the National Council for those matters corresponding to the Federation; and before the Parliaments of the Länder for those matters under their legislative powers.[179] Finally, article 23. D. 4 of the Austrian Constitution refers to the development of sections 1 to 3 of article 23. D, and this development is to take place by means of an Agreement thereon to be signed by the Federation and the Länder. Nevertheless, the main point is once again the constitutional recognition of the Länder´s role within the European process. However, there is no reference in this case to their position before the CJEC, a matter that therefore depends on political will and consensus among the parties.

c) The case of the Communities and Regions in Belgium

The Belgian regime has a very ample reference to the regional question regarding Community Law, either in the Constitution or in succesive amendments thereon, as well as within the new rules and intergovernmental agreements approved to regulate the process as a whole.

– Arts. 127, 128 & 130: Treaty making power and international cooperation of the Communities within their own competencies.

178. Código Comparado, IVAP-Gobierno Vasco, 1996, "La acción exterior y comunitaria de los Länder, Regiones, Cantones y Comunidades Autónomas", Vol. II, page 60.

179. Ibid. It is important to stress here how the Länder representative deals with this position due to its constitutional recognition However, the important point here lies in the position of this representative who is responsible for the management of such a negotiation before the Federal Council in those cases in which such negotiations take place on behalf of federal competencies, and he is responsible before the Parliaments of the Länder when he acts on behalf of the legislative powers of the Länder.

– Art. 167: The King´s competencies on international relations, notwithstanding the competencies of the Communities and Regions for treaty-making power and international cooperation within certain competencies, with the regulatory scheme theretofore. Allow me to say here that this provision contitutionally recognises a real and practical example of co-sovereignty.

– Art. 168: The duty of direct information to the Regional and Community Councils on any negotiation or amendment of the EC-EU treaties. Pursuant to the extension made by article 1.1 of the Special Act of 5-5-1993.

– Art. 169: constitutional mechanism for the substitution of Regions or Communities failing to comply with EC-EU and/or international obligations, even during procedures before the CJEC. This means clearly that sub-state entities in Belgium do have a clear position, mainly as defendants, at the CJEC, and within another practical example of real co-sovereignty.

According to Van Boxstael,

> basándose en el antiguo artículo 81 de la Ley especial de reformas institucionales del 8 de agosto de 1980, las Comunidades y las Regiones han sido incluidas dentro de la delegación belga en las dos conferencias intergubernamentales sobre la Unión política y sobre la Unión económica y monetaria cuyos trabajos terminaron con ocasión del Consejo europeo de Maastricht los días 9 y 10 de diciembre de 1991.[180]

Also according to this author, the participation of the Communities and Regions of Belgium within the decision-making process of Community Law is a perfectly assumed fact nowadays. Despite the constitutional silence on the matter, the possibility is properly regulated through a General Agreement on Cooperation (8-3-1994), signed by the Federal State, the Communities and the Regions.[181] Pursuant to article 4 of this Agreement there is a body composed by the different ministries affected by foreign policy, which is in charge of the appointment of the Belgian delagation. Meanwhile, article 5 clarifies that the representatives of the various affected administrations shall negotiate in equal terms, while the representative of the Federal Ministry of Foreign Affairs shall only assume a coordinating role.[182]

In any case, pursuant to the opinion of Van Boxstael,

> la participación de las Comunidades y de las Regiones en la elaboración de los tratados de base se extiende en adelante más allá del nivel gubernamental;

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180. J. L. Van Boxstael, "La participación de las Comunidades y Regiones belgas en la elaboración y ejecución de decisiones de la Unión Europea", in *La acción exterior y comunitaria de los Länder, Regiones, Cantones y Comunidades Autónomas*, Vol. I, op. cit., pages 276.

181. Agreement whose basis is article 92 bis 4, of the Special Act on institutional amendments of 8-8-1980, as amended by article 3.1. 2 of the Special Act of 5-5-1993.

182. J. L. Van Boxstael, "La participación de las Comunidades y Regiones belgas en la elaboración y ejecución de decisiones de la Unión Europea", op. cit., page 277.

de hecho,

> el artículo 16. 2, apartado 2, nuevo de la ley especial de reformas institucionales[183] extiende a los Consejos de Regiones y de Comunidades una prerrogativa que el artículo 168 de la Constitución reconoce a las Cámaras legislativas federales: la de estar informados de las negociaciones en curso dirigidas a una revisión de los Tratados constitutivos de las Comunidades Europeas así como de los tratados y actos que posteriormente los han modificado o completado, y tener conocimiento del proyecto de tratado antes de su firma.[184]

Regarding the participation of the Belgian Communities and Regions at the EU institutional level Van Boxstael states that

> Bélgica se ha mostrado generosa a la hora de distribuir entre las colectividades federadas que la componen las prerrogativas que obtiene, en el plano internacional, de su participación en instituciones internacionales o supranacionales. Las reglas que rigen su representación ante las instituciones comunitarias en las que participa (el Consejo de la Unión europea y el Comité de representantes permanentes) constituyen una aplicación especial de esos principios generales.[185]

But the most relevant point, from a comparative approach, is the possibility to enable a sub-national representative within the Council by means of appointing a member of the fedrated governments instead of the State´s representative. Once again according to Van Boxstael,

> Esta habilitación se ha incluido en el artículo 81, 6, nuevo, de la ley especial de reformas institucionales,[186] según el cual los Gobiernos de Regiones y de Comunidades están autorizados a comprometer al Estado dentro del Consejo de las Comunidades Europeas, cuando uno de sus miembros representa a Bélgica, según lo establecido en alguno de los acuerdos de cooperación a los que se refiere el artículo 92bis, 4bis.[187]

Indeed, it was thanks to this latter provision that the Agreement was reached between the State, the Communities and the Regions (Agreement dated 2-3-2994, on the Belgian representation within the EU Council of Ministers).[188]

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183. This article refers to the amended version, by article 1.1 of the Special Act of 5-5-1993.

184. J. L. Van Boxstael, "La participación de las Comunidades y Regiones belgas en la elaboración y ejecución de decisiones de la Unión Europea", op. cit., pages 277 and 278.

185. Ibid., page 280.

186. This Law was modified by article 2 of the Special Law dated 5-5-1993.

187. J. L. Van Boxstael, "La participación de las Comunidades y Regiones belgas en la elaboración y ejecución de decisiones de la Unión Europea", op. cit., page 281.

188. Ibid. However, according to the same author, it was not necessary to wait for the mentioned agreement to assume sub-state representation on behalf of Belgium before the EU Council: ...

Another fundamental question refers to the participation of communities and Regions in the definition of the position of the State before the EC-EU context. In this regard, former article 81 of the Special Law on institutional amendments dated 8-8-1980 was being interpreted in a very extensive manner, providing that in those matters of Sub-State competencies, the governments of the Belgian Communities and Regions shall necessarily take part in the definition of the position of Belgium as a Member State. Later on, article. 6. 3. 7 of the Special Law (introduced by an amendment through the Special Law dated 8-8-1988) clearly determined the obligation of the central Government to organise a specific framework together with Sub-State bodies in order to prepare for negotiations and follow up on the work of EU bodies in those matters within the scope of competencies of the Belgian Communities and Regions.[189]

Regarding their role before the CJEC, there is also a clear political will therefore that is reflected in order to let sub-state bodies defend their interests before the court who deals with the real control of the enforcement and compliance with Community Law. According to Van Boxstael,

> el legislador belga se ha esforzado por ofrecer a las Comunidades y a las regiones que ha establecido un acceso mínimo a la jurisdicción europea, confiriéndoles de alguna manera, como órganos del Estado belga, una especie de sustituto de la "legitimación activa" y de la "legitimación pasiva" que sigue faltándoles.[190]

Reference to "locus standi" the formula is to be found in article 81.7 of the Special Law on institutional amendments dated 8-8-1980.[191] This provision allows the governments of the Communities and Regions to request, with compulsory effect, to be allowed by the federal government to present the relevant appeal or claim reference to matters of sub-state competencies.[192] Once again, and in a similar way to that of Germany or Austria, instead of the legal void of the Spanish case, the virtue of the Belgian system is to recognise legitimacy by means of a compulsory delagation of functions under the relevant jurisdictional control in the event of a breach by the State.

With regard to the eventual posistion of the sub-state entities as defendants, the question has been resolved through an incomplete and only residual consideration. The federal government may, in the course of the procedure, substitute the

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"desde la entrada en vigor del Tratado de Maastricht, un protocolo adoptado en el seno de la Conferencia interministerial de la política exterior ha repartido el derecho de representación del Estado entre las autoridades federales, regionales y comunitarias", para el periodo que restaba de presidencia belga en la UE, finalizado el 31-12-1993; Ibid., pages 281 & 282.

189. Ibid., page 292.

190. Ibid., pages 308 & 309.

191. This provision was amended by article 2 of the Special Act of 5-5-1993.

192. See J. L. Van Boxstael, "La participación de las Comunidades y Regiones belgas en la elaboración y ejecución de decisiones de la Unión Europea", op. cit., page 309.

organs of a Community or Region, liable for any breach claimed by European Law towards Belgium. This peculiar formula now seems to become compulsory by virtue of article 16.3. 2 of the Special Law on institutional amendments.[193] The main point is that this provision enables the participation of communities and Regions in Belgium within the procedure establshed before an international or supranational jurisdiction, and this becomes a condition for the direct enforcement of the mechanism of substitution refered to in article 169 and article 16.3 of the Belgian Constitution. The crux of the matter is that this provision has made the participation of the Communities and Regions affected in a procedure before an international or supranational jurisdiction compulsory, as a prerequisite for the direct execution of the mechanism of substitution refered to in article 169 of the Constitution and article 16.3 of the Special Law on institutional amendments of 5-5-1993.[194] As we can see, the path for participation is not only guaranteed but also assumed through an eventual control thereon thanks to this peculiar provision.

The conclusion Van Boxstael came to cannot be clearer, also reflecting the blank spaces of the Spanish system as compared with the Belgian system, and even though the latter does not have any constitutional recognition of Historical Rights or titles for the Communities and Regions. For this author,

> el constituyente y el legislador han aprovechado plenamente las oportunidades que les ha ofrecido el Tratado sobre la Unión Europea y han abierto a las autoridades comunitarias[195] y regionales, en todos los campos de su competencia, las puertas de la Unión. Han multiplicado las ocasiones de una expresión autónoma de sus preocupaciones, de un interés directo por la decisión, de una responsabilidad real europea.[196]

4. CONCLUSIONS

– The Basque Country and Navarre are facing challenges of a difficult legal nature within the EC-EU context, due to the current lack of Sub-State participation theretofore. In the Spanish case, this linked to a particular reading, which is far apart from the constitutional reality on the matter which has been generally carried out by succesive central Governments.

– Despite the initial cession of sovereignty from Spain towards the EC-EU context, the latter has been assuming competencies in various scopes,

193. This provision refers to its version modified by article 1 of the Special Law dated 5-5-1993.

194. Pursuant to the quoted provisions, there is a substitution mechanism, which allows the federal authority, instead of the Communities and Regions that do not comply with the Law, to assume the enforcement measures required by International and/or European Law under certain established requirements. See J. L. Van Boxstael, “La participación de las Comunidades y Regiones belgas en la elaboración y ejecución de decisiones de la Unión Europea”, op. cit., pages 310 to 313.

195. The term “comunitarias” here refers to the Belgian Communities as Sub-State bodies.

196. J. L. Van Boxstael, “La participación de las Comunidades y Regiones belgas en la elaboración y ejecución de decisiones de la Unión Europea”, op. cit., page 314.

with direct influence in the competencies and powers of Autonomous Communities. Among these, the Basque Country and Navarre have also suffered a considerable descent in their political and legal possibilities within the European process.

– The Basque Country, its Historical Territories, and Navarre do not now enjoy a direct means of participation before the EC-EU bodies. Meanwhile, their respective actions before the Court of Justice of the EC can only be assumed through the provisions regulating this issue for legal persons; Autonomous Communities do not have any direct active legitimation to become parties before the CJEC.

– Basque Historical Rights represent the logical transit from the concept of "Fueros" to the constitutional integration of certain territories which have maintained along history a particular and non-stoped vocation for a public legal and political will or identity. The common feature for both figures is their nature of agreement between equal parties. The distinction relies on the problem to recognise that peculiar situation from the view of the State and the EC-EU context.

– The consecquences derived from the Spanish Constitution First Additional clause go one step beyond a mere theorethical approach, demonstrating that agreements in this particular context have been and still are a real formula to resolve political disputes which were far apart in an initial stage. In the case of the Basque Country and Navarre, the question presents a double interest, because the agreements pointed out in the mentioned clause is a sort of agreement proceeding from a peculiar historical relationship that is reflected at the constitutional level through the direct recognition of Basque Historical Rights.

– The point of reference of "constitutional unity" as a limit for Historical Rights should be analysed within the binding sovereignty of Human Rights, and not within the classic concept of the sovereignty of the State, which must be designed for the enjoyment of individuals and their Human Rights. The role of European law theretofore is a keypoint of the whole process.

– There is not a single Sentence by the Spanish Constitutional Court on the relationship between Basque Historical Rights and the EC-EU context. There are, indeed, certain judgements on the role of autonomous communities in general before the European context, but never through the peculiar notion of Historical Rights recognised by the Spanish Constitution. If the drafters of the Constitution did not know initially of the potential possibilities of this provision, the same happened to the Constitutional Court as the direct heir of this general situation during and after the drfating of the definitive constitutional text on Historical Rights.

– The Basque "Economic concert" has been in under question in the domestic level, regarding to its adequate role within European Law. In any case, even within its general principles (art. 3 of Law 12/1981, on the Economic

Concert), the limits and nature of this financial and taxation system within the Basque Country are mentioned. Among them, the respect and fulfillment of international agreements or treaties signed and ratified by Spain are quoted (art. 3.1.5 of the Law 12/1981). The meaning of this clause is clear but seems that everybody avoids applying this provision. If the "concert" goes beyond that or its provisions do so, those rules may be in breach of European Law, the Spanish Constitution, the Basque Statute of Autonomy and the very Law on the Basque "Concert" mentioned, because the legal system is more than just a global and interlinked framework of rules and principles.

– The formula of direct participation of autonomous communities in Europe has been arranged mainly through the establishment of delegations in Brussels, together with the well-known Spanish bilateral relations composed by representatives of both autonomous communities and the central government.

– Eventually, some legislative powers of the Basque Country and Navarre may be in contradiction with certain provisions or principles of European Law; at the same time, a European rule might be either in contradiction with Sub-State legislative powers in the Basque case, and therefore lacking the fulfillment of the First Additional clause of the Spanish Constitution. The Sub-State rule, as well as the one enacted by the State itself, would be directly precluded by the direct and prior force of Europeal Law. If there is a contradiction, the Basque Country and Navarre should assume that the domestic constitutional framework has been suddenly modified by the new competencies assumed by the EC-EU bodies.

– The interests represented by means of the Historical Rights or titles by the Basque Country and Navarre are still searching for an adquate formula to appear before the Court of Justice of the EC. This challenge right now depends on the political will of the central government or, eventually, on the defense of those rights by the central government, provided that they do belong to a constitutional provision like the First Adtional clause of the Spanish Constitution.

– The paths for autonomous communities to take part in the EC-EU context are based only upon mutual duties of information and co-ordination, the appointment of advisors and the indirect participation through preparatory meetings. This approach lacks a substantive solution of the problem, and places the Historical Rights recognised for the Basque Country and Navarre through the aforementioned constitutional clause at risk without any judicial control at all.

– The constitutional recognition made by this clause has an approach which relates it with competencies, but we are also talking about the so-called "facts of distinction" that explain the peculiar legal and political nature of the Basque territories, their institutions, their Public Law and, therefore, the rights of citizens within this system including the EC-EU scope. This is

not precluding the possibility of the CJEC to control certain provisions of the system, according to European Law, without judging at all the peculiar domestic issues of the Spanish system or of any other system whatsoever.

– There is a series of emerging factors within the European context that are involving and producing amendments in the concept of sovereignty; that are clear both from abroad and from the Member States towards the EC-EU bodies. This perspective, however, seems to be different in the domestic level in decentralised States towards their Sub-State entities with noteworthy blank spaces in the Spanish case. The new sovereignty in the EU is shared by the member States, while the pending sovereignty in the domestic level is relatively shared within decentralised member States. Regardless of the useful examples of Austria, Belgium and Germany, assuming this problem through constitutional amendments and domestic agreements required theretofore, Spain is first waiting to resolve the matter in the domestic level, thereby transferring towards the European context and jurisdiction a singular domestic concern concerning the Historical Rights of the Basque Country and Navarre before the EU.

– Historical Rights or titles should be enforced and claimed before the central Government because it is the body that recognises and assumes them in the constitutional level; but they may have to be implemented and enforced before the EC-EU, provided that Spain recognises them within its Constitution and in front of the EC-EU. A different matter would be to decide on whether the Basque Country and Navarre should be in charge of the defense of those rights before the EU instead of the central Government. We should not forget therefore that this central government is not entitled by the Constitution for this purpose but it is indeed the main body that recognises the existence and role of those rights within the Constitution.

– The existence of an originary constitutional agreement is demonstrated by the constitutional recognition of Basque Historical Rights made by the Spanish Constitution . This should become a way forward to avoid future problems in domestic or EU levels. Unless the Additional clauses of the Basque and Navarre Statutes of Autonomy were unconstitutional both provisions allow for updating processes of Historical Rights to overcome the boundaries mentioned by the First Additional clause of the Spanish Cosntitution. However, if those powers that are banned to the Spanish Parliament are also limits to the subjects entitled to enforce Historical Rights, any exercise of such provisions with the aim of releasing the Basque Country and Navarre from the constitutional framework would require a new agreement or negotiation by the Basque Country and Navarre with the Spanish Parliament in order to assume the constitutional amendment required with the subsequent implications in the EC-EU context.

– These conclusions may ratify the existence of an originary constitutional agreement on Historical Rights between Spain and the Basque territories. That covenant was the path allowing the Basque Country and Navarre to mantain organisation and self-government systems that may follow certain

rights and basic constitutional principles. This agreement received the acceptance even from the jurisdictional approach of the Spanish Constitutional Court. If the reality of that agreement is clear, there is still a lack of assumption from the central government as a party thereto, and not only in the domestic level but also towards the EU, exercising the possibility of updating the Historical Rights recognised by the Spanish Constitution.

– The EC framework is the result of an international treaty with all its main elements included. However, there is also a well-founded will for integration within the European treaties and this requires designing different paths for Sub-State participation in decision-making, enforcement and judicial implementation of Community Law. Therefore, as an international organisation striving for integration, the existing Sub-State recognition within domestic constitutions should become part of the "community roots", as domestic Constitutional Laws. In this sense, the existence of a singular international treaty should not constitute an obstacle because its particular approach is to integrate wills proceeding from every single institution and organism composing the Member States, including also their citizens.

– Another perspective would follow the classic approach towards the EC and EU Treaties as international treaties that do not legitimate Sub-State bodies beyond their consultive participation within the Committe of Regions. In this approach there is also a certain State centralised approach based on domestic constitutional reality. On the other hand, my view would be that that Sub-State bodies are indeed active parts of the States before the EC-EU bodies: if the legislation or administrative enforcement made by a Spanish autonomous community does not comply with Community Law, the State then becomes accountable thereon. This means that there is still a need to recognise that autonomous communities can take part in the decision-making, implementation and enforcement processes of Community Law.

– Once the initial period concluded after the formal birth of this international organisation, we are now facing a global framework of interlinked States with mutual relations on the basis of a series of principles, objectives and systems for control and monitoring at administrative and judicial levels. This minimum common ground tends to go beyond the limits of the strict competencies on international relations, in order to allow the rest of entities composing States, in particular those with legislative powers, to take part in the whole system they are directly involved in on a daily basis.

– The consideration of the EC as a sum of wills coming from different States with domestic constitutional particularities, should produce the Community assumption of Sub-State participation in every Community scope; that would be somehow the product of those democratic wills towards domestic constitutional levels, but also towards the foreign scope, within the constitutional European level.

– The existence of a sum of constitutional agreements is a path of recognition of Human Rights at the European level, although the EC has no sys-

tem of direct control over such rights. There is, therefore, a presumption of mutual trust in order to protect Human Rights in every domestic level. If that process has taken place within such an important area of our legal systems, the same mutual confidence should be granted to the peculiarities of each domestic constitutional level, as well as legislative and executive decentralisation, facts of distinction or, of course, collective Historical Rights with regard to the bodies entitled thereby, but which are distinct with reference to their current content and their possible updating processes in the cases of the Basque Country and Navarre.

– The Historical Rights of the Basque Country and Navarre have been not been explained in the Community level nor has the existence of this constitutional agreement that has been already assumed in the context of other member States. In the case of the Basque Country and Navarre their respective competencies there have been a series of problems in certain cases in the EC-EU context. Even though many authors do recognise the federal nature of the treaties, the matter seems to be unclear reference to the aforementioned Historical Rights. The principle of respect for national identities of Member States (art. 6.3 EU Treaty) should be granted the same legitimacy before the Community as that of domestic agreements on Historical Rights.

– This comparative analysis has focussed on three very paradigmathical examples in the EU, the study of which demonstrates a different assumption of Sub-State participation within the European process by governments of member States. This is clear even in certain cases where there is no constitutional recognition of the nauture of Historical Rights for the Basque case. The examples of the Länder, in Germany and Autria; and the Communities and Regions in Belgium, may facilitate an analysis of the Basque case with a more optimistic approach regarding the defense of the Historical Rights before the EU. Nevertheless, this perspective would require of an appropriate political reading to be assumed by the central Spanish government for it to be also explained and represented at the Community levels.

– Various constitutional provisions had empowered the rights of intervention of the Bundestag and the Federal Council during 1992 and, thus also the protection of the competencies of the German Länder within the decision making process of the EC-EU. The formula is basically through the rights of approval and possibilities for direct intervention.

– The implementation of the peculiar situation of the autonomous communities in Spain in front of the EC system has been assumed without any constitutional approach thereupon, and eventually in breach of some provisions of the European treaties and also lacking the protection of competencies derived from Historical Rights within the First Additional clause of the Spanish Constitution. This problem still continues as a consequence of the absence of a direct constitutional approach to this matter. As a result, the autonomous communities are obliged to base their participation

through bilateral conferences depending on the various topics. The decisions of these conferences do not have any kind of legal nature whatsoever while there is also a complete lack of procedure to control such decisions. This leads to a situation of total unsuitability for controlling decisions that may imply impacts on the powers of autonomus communities. In the meantime, Germany presents its example of mutual participation by means of the constitutional amendment provided thereto.

– The German case demonstrates that the existence of adequate political will is enough to introduce the constitutional amendments required to allow for the participation of autonomous communities and to allow them to defend their competencies before EU bodies. That is not at all in breach of the principle of sovereignty nor does it interfere with the general interests to be represented by the State central government, but to which Sub-State entities are also relevant parties. Thus, this is particularly clear in the cases of entities with legislative powers or that have a constitutional recognition, as is the case of the Historical Rights recognised under the First Additional clause of the Spanish Constitution.

– The basic distinction between the Austrian and the Spanish cases is once again the constitutional recognition made by the Austrian Constitution on the Community issue and its implications for the interests of the Länder and their competencies regaring the EC-EU system. The Austrian case bears some relevant similarities with the German approach, together with a considerable difference with the Spanish constitutional reality which is still showing no constitutional concern on Sub-State participation before the EC.

– The Belgian regime has a whole range of references to the Sub-State issue and Community Law, either within the Constitution or in its various amendments. This is also clearly seen in the new rules and regulations and in the inter-governmental agreements approaching the matter in depth.

– As happens with the German and Austrian cases, the Belgian system recognises the legitimacy of Sub-State bodies before the EC-EU system by means of a compulory duty of substitution, which is even suitable for the jurisdictional control thereon in the case of unfulfilment by the State.

– Despite of the absence of any recognition of Historical Rights or titles within the Belgian system for Communities and Regions, there is however a constitutional and regulatory approach to the European Treaties and their possibilities to ease Sub-State participation before all EU institutions.

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