UNIT 9. THE IMPLEMENTATION OF INTERNATIONAL LAW IN DOMESTIC LAW

1. The relationship between international law and national law
2. The integration of international standards into national law: reference to the Spanish case.
3. Conflicts between International Law and National Law.

THE RELATIONSHIP BETWEEN INTERNATIONAL AND NATIONAL LAW

- IL and national OK law are distinct legal systems. Differences deriving from their sources, their object, and their addressees. BUT this does not make them impenetrable to each other, nor does it prevent relations between them, which sometimes present areas of tangency and friction.
- Relationship between IL-NL: inevitable overlapping of their rules: apply in the same world whose structure revolves around the figure of the state.
  - The state is the transmission belt between international law and national law.
  - States are the creators of the rules that apply among themselves at the international level and are responsible for complying with and enforcing them.
  - Each state is responsible for creating and applying the rules of national law, as well as for ensuring the application of the international rules that bind it, by virtue of the phenomenon known as "functional splitting".
- Three fundamental principles concerning the systemic relationships:
  - States are bound to observe in good faith the obligations assumed under customary or conventional international law (*pacta sunt servanda*).
  - Principle of consistency between the state's action externally and internally: elimination of any antinomies or contradictions that may arise between the international rules applicable to the state and the rules of its national legal order.

- Principle of the primacy of international law by virtue of which the obligations assumed by the state by virtue of an international norm take precedence over those established by its national legislation.

- Practice shows that the relationship raises complex issues. The main one arises in cases where international rules are to be applied in the state system by national administrative and judicial bodies, since the latter are not always familiar with or inclined to apply rules belonging to a legal system other than the customary one.
  - It is more feasible to apply the rules contained in treaties than those of general or customary international law.
  - The direct application of international norms by national administrations and courts is only possible in the case of complete and finished international norms, which do not require any legislative or administrative development for them to be fully operational (so-called "self-executing" norms - *rara avis* in IL).
  - National legal operators experience greater difficulties in applying international norms in the national order when they affect sectors close to the hard core of state sovereignty, as is particularly the case in criminal law.
- Three distinct aspects:
  - the processes of mutual referral between international law and national law;
  - the ways in which national law integrates and takes over the rules of international law;
  - Situations of conflict that arise.

REFERRAL PROCESSES

A. From international law to national law

B. From national to international law

A. FROM INTERNATIONAL LAW TO NATIONAL LAW

- “TOP TO BOTTOM”.
- Relationship between IL and DL is produced by way of a "downward referral”
  - an international norm contemplates the use of national law channels for its application and enforcement.
  - Other cases, the reference may have a more substantive scope, either permissive or mandatory.
    - Permissive international rule may enable states to regulate a given situation by means of a national rule.
    - An international norm may establish an obligation to adopt certain national implementing measures that states must implement in their national legislation.

B. FROM NATIONAL LAW TO INTERNATIONAL LAW

- “BOTTOM- UP”.
- Cases of "upward reference", consisting in the drafting of internal rules that only acquire their full meaning by having recourse to international law.
  - May have a purely interpretative dimension, as is the case when the rule of national law states that its interpretation must be made in accordance with the relevant rules of international law.
  - can also have a material or substantive dimension, which occurs when the national rule refers to an international rule to determine its own content (this is what the doctrine calls "referral by reference").

INTEGRATION OF INTERNATIONAL LAW INTO NATIONAL LAW SYSTEMS

A. General considerations

B. Doctrinal approach

C. Spanish case:

C.1. Previous considerations

C.2. Reception of general international law

C.3. Reception of conventional international law

C.4. Reception of resolutions of international organizations

A. GENERAL CONSIDERATIONS

- “Integration”: ways or procedures by which the law of each country incorporates international norms into its national law and ensures their application.
- IL: incorporation is mandatory, although each state may do so in the manner established by its constitution and national laws.

B. DOCTRINAL APPROACH: MONISM AND DUALISM

- The doctrinal approach can be summarized in two major theories, the monist and the dualist.
- Monist doctrine (main representative is Hans Kelsen): the legal system forms a unitary system, comprising the international and national legal systems, in which each of the legal rules emanates from a higher rule that serves as its basis of validity. In this way the norms are graded up to the top of the pyramid where the fundamental norm or *gründnorm* (*pacta sunt servanda*) is found, which guarantees the unity of the legal system.
  - The main corollary: international norms can be applied directly in the national legal system as such, without the need for transformation into national rules by means of a national legislation source.
  - IL constitutes a universal system that stands above national legislation, thus asserting its primacy.
- Dualist doctrine (main representatives are Heinrich Trieppel and Dionisio Anzilotti): IL and DL are essentially different legal systems by reason of the legal sources, the content of the rules, the relationships regulated, and the addressees of the rules.
  - The practical consequence: the impossibility for international rules to be applied in the national legal system unless they are transformed into national rules by a source of national legislation.

- Organs of the state never apply the rules of international law as such, but only the internal norms that reproduce their content.
- This conception seems to imply that national rules take precedence over those of international law.

C. SPANISH CASE

C.1. Previous considerations

- The Spanish Constitution of 1978 follows an internationalist orientation that can be considered as essentially monist.
  - Tacitly recognizes the application of the rules of general international law in our legal system
  - Expressly proclaims the incorporation of the rules contained in treaties as soon as they are officially published.
  - It also includes provisions that give international norms primacy over the norms of Spanish national legislation, except for the constitution.

C.2. Reception of General International Law

- The Spanish Constitution assumes the application of the rules of general international law in our national legislation, although it does not express this directly by means of an explicit formulation.
- Deduced from the provisions of Article 96, paragraph 1, which expressly refers to the general rules of international law and equates them with the treaties that form part of the national legal system (and which have primacy over the laws).
- In practice:

- the automatic integration of the rules of general international law, whether they are rules existing at the time of entry into force of the constitution or new customary rules formed subsequently, has been generally recognized and applied by case law.
- It should be noted, in any case, that Spanish jurisprudential practice is not monolithic on this point, there having been discordant pronouncements in some cases, especially in matters related to criminal law.

C.3. Reception of Conventional International Law

- Automatic incorporation of international treaty law into Spanish national legislation is clearly expressed in the text of Article 96.1 of the constitution: validly concluded international treaties, once officially published in Spain, shall form part of the national legal system. Their provisions may only be repealed, modified, or suspended in the manner provided for in the treaties themselves or in accordance with the general rules of international law.
  - In line with the provisions of Article 1.5 of the Civil Code.
- Integration of treaties validly concluded in the internal order dependent on their official publication in Spain: publication determines that they become "part of the internal order" as such treaties, without being transformed into an internal norm, and are therefore applicable to regulate the legal relations to which they refer.
  - Norms contained in the treaties are automatically incorporated into our legal system and receive full application as soon as they are published, without any additional period of *vacatio legis* in this case.

- Publicity of norms is a requirement guaranteed by Article 9.3 CE, and in the case of treaties, their publication in the BOE must be:
  - "integral", that is, it must include the complete text of the treaty and all annexed or complementary instruments and documents (protocols, declarations, reservations, unilateral acts dependent on the treaty, etc.).
  - "continuous", i.e., it must include any subjective, temporal, spatial or material variation relating to the treaty and which may influence its application (accessions, amendments and modifications, denunciations or withdrawals, etc.).
- This does not mean that in practice the actions relating to publication are always carried out as diligently as would be desirable. In cases of treaties not being duly published in the BOE, the situation created can be resolved according to the following criteria:
  - At the national level:
    - the lack of publication renders the treaty unenforceable against individuals, in the sense that it does not create obligations for them that are enforceable by the state.
    - It is conceivable that individuals could invoke against the administration the rights that the unpublished treaty creates in their favor, because the administration cannot give as an excuse for applying a treaty its own non-compliance *("turpitudinem propriam non est allegans").*

- No private individual will be able to demand judicially against another the application of the provisions contained in an unpublished treaty, although this lack of publication could allow the injured party to demand the patrimonial responsibility of the state.

- At the international level, the lack of official publication of a treaty may give rise to the international liability of Spain.
  - Act 25/2014 on Treaties and other International Agreements: effectiveness, observance, enforcement, and prevalence of international treaties.
  - Article 28.2 of the act thus states that "international treaties validly concluded and officially published shall produce effects in Spain from the date determined by the treaty or, failing that, from the date of their entry into force".
  - Article 28 of the same act proclaims that "all public authorities, organs and agencies of the state must respect the obligations of international treaties in force to which Spain is a party and ensure proper compliance with such treaties".
  - Article 30 of the act states that "international treaties shall be of direct application, unless it is clear from their text that such application is conditioned to the approval of the relevant laws or regulatory provisions".

C.4. Reception of resolutions of international organizations

- Question of integration and internal effectiveness of those resolutions of international organizations that are of a binding nature and are likely to affect the legal relations that unfold at the level of national legislation:
  - Article 93 CE “an organic law may authorize the conclusion of treaties by which powers derived from the constitution are transferred to an international organization or institution" and adds that the Government and the General Corts are responsible for ensuring compliance with the resolutions of these bodies.
- The fulfillment of this constitutional mandate has followed in practice: an itinerary progressively oriented towards the automatic reception of the binding norms contained in resolutions of international organizations in the Spanish national legal system.
  - Certain decisions of the UN Security Council, which are binding by virtue of Article 25 of the charter
  - Normative acts of the European Union which, in accordance with the constituent treaties, have direct effect and primacy over the law of the member states.

CONFLICTS BETWEEN INTERNATIONAL AND NATIONAL LAW

A. The perspective of international law
B. The national law perspective: comparative constitutional law approaches
C. The Spanish Constitution of 1978

A. THE PERSPECTIVE OF INTERNATIONAL LAW

- IL and DL have frictions arising from the incompatibility between international norms and national legislative provisions. In such cases, a normative conflict arises that must be resolved by applying criteria of rank or preference to determine which rule has primacy.
- Normative conflicts between IL and DL may be analyzed.
  - from the perspective of international law;
  - or from the point of view of national law.
- From the point of view of IL: international norms, both customary and conventional, prevail over national norms or practices in case of conflict between the two. The state cannot be obliged to modify the rules of its internal law that are contrary to international law, but their maintenance may constitute an internationally wrongful act and give rise to international responsibility.
  - Proclamation of undisputed supremacy over national legislation, regardless of the rank of the incompatible national rule and the position that national legislation itself adopts in this respect.
- International jurisprudence:
  - Arbitral judgment rendered on 14 September 1872 in the Alabama case between the United States and Great Britain.

- The Permanent Court of International Justice: national laws, judicial decisions, or administrative measures of states are "mere facts" in the eyes of international law and has insistently pointed out that national laws cannot prevail over the provisions of a treaty.
  - *"A state may not invoke its own constitution vis-à-vis another state in order to avoid its obligations under international law or treaties in force".*
- ICJ: principle of the pre-eminence of international law over national law in its advisory opinion of 8 April 1988, on the applicability of the arbitration obligation contained in the UN Headquarters Agreement.

B. THE NATIONAL LAW PERSPECTIVE: COMPARATIVE CONSTITUTIONAL LAW

- Some national constitutions:
  - Refer to the value of the general rules of international law in the national legal order by affirming the priority of international rules in case of collision (Constitution of the German Federal Republic 1949).
  - Regarding treaties, various national constitutions recognize their primacy over national laws (Constitution of the United States of 1787; French Constitution of 1958; Greek Constitution of 1975 ; Constitution of the Kingdom of the Netherlands of 1983).
- Dominant trend in comparative constitutionalism: recognition of the primacy of the rules of international law, whether customary or conventional, over those of national law (principle of coherence between the internal and international actions of the state and international responsibility).

C. SPANISH CONSTITUTION

- In cases of conflict between international and national law, Spanish legislation recognizes the primacy of international norms, apart from the constitution itself.
  - Primacy of international norms over national legislation:
    - both customary and conventional over Spanish national legislation can be deduced from the provisions of the final paragraph of Article 96.1 of the constitution. Clear that both the general rules of international law and those contained in validly concluded treaties take precedence over the rules of Spanish national legislation, which may not derogate, modify, or suspend them.
    - Our courts usually resolve conflicts between treaty norms and prior or subsequent national norms by recognizing priority for international treaty law by virtue of the cumulative effect of Articles 9, 3, and 96.1 of the constitution.
    - Act 25/2014 on Treaties and other International Agreements confirms the effectiveness, observance, and direct enforcement of treaties in our legal system, as well as their prevalence over ordinary national rules of any kind.
  - Primacy of the constitution over international norms: the hypothesis of a head-on collision is implausible for two main reasons.

- Firstly, the Constitutional Court has adopted an open-minded and conciliatory orientation that seeks to circumvent possible conflicts by means of an integrative interpretation.
- Secondly, our constitution provides in Article 95 that the conclusion of treaties containing stipulations contrary to the constitution requires prior constitutional review, with the government or any of the chambers being able to request the Constitutional Court to declare whether such contradiction exists (normally, following an opinion of the Council of State).