The Spanish Constitution and Private International Law in constitutional jurisprudence

Dr. Julio D. González Campos
Emeritus Professor in Private International Law
Universidad Autónoma de Madrid

I. INTRODUCTION

1. Private international law (PIL) embraces those principles and norms that in a State-wide system regulate "legal relations entailing external dealings", to use the expression employed in *Spanish Constitutional Court Decision*[1] 43/1986 of 15 April. That is to say, those which have also been classified by the doctrine as "legally heterogeneous relations"[2] because they contain one or more elements connected with foreign systems and hence are subject to any contradictions or gaps in the regulation of any given matter that may arise from the different systems to which it is linked.

In the case of Spain, it must be remembered that, as a "plurilegislative State",[3] and moreover as a Member of the European Community,[4] to which the exercise of competences in these matters has been transferred,[5] both legal relations regulated by

---

[1] Hereafter, *STC*, followed by the year number and the date on which it was given. Since 1981, these have been published in the *Boletín Oficial del Estado* (*BOE*) as provided in art. 164.1 of the Spanish Constitution and are contained in the collection entitled *Jurisprudencia Constitucional* which the Office of the General Secretary of the Constitutional Court edits in conjunction with the *BOE*.

[2] The expression was coined by J. D. González Campos, *Derecho internacional privado. Introducción*, multi-copy from the U.A.M., Madrid, 1984, pp. 8 *et seq.*, amending the expression "heterogen verknüpten Sachverhalten" used by W. Wengler, *Internationales Privatrecht*, vol. I, Berlin, 1981, p. 3.

[3] Art. 149.1.8 of the Spanish Constitution of 1978 (hereinafter *CE*) as it relates to civil legislation. This matter is the exclusive province of the State, without prejudice to the power to "conserve, modify and implement" the particular civil rights that this article attributes to the Autonomous Communities.

[4] Founded on art. 93 of the *CE*, this was implemented by the Treaty of Accession of Spain and Portugal done at Lisbon and Madrid on 12 June 1985 and the Act relating to the conditions of accession and adaptations of the treaties, of the same date. In this connection see *Declaration of the TC of I July 1992*.

[5] In particular, in art. 65 of the EC Founding Treaty, introduced by the 1997 Treaty of Amsterdam, which from 2000 to date has caused the so-called "communitarization" of PIL.

Spanish Yearbook of International Law, Volume IX, 2003

PIL and regulating norms have three differentiated framing structures. Firstly there is an *internal* structure deriving from the coexistence of more than one set of civil laws within the State and of persons subject to different regional citizenships (*vecindad civil*).[6] Secondly there is an *intra-Community* structure reflecting the relations between Member States of the European Community and the Community rules of PIL that regulate these relations.[7] And thirdly, outside this sphere, there is a structure consisting of *relations with third States*, regulated by the rules of PIL contained in bilateral or multilateral international agreements[8] or, absent such agreements, by internally-generated rules of PIL.[9] What this means is that Spanish PIL is a complex legal system owing to the variegated sources of its rules – i.e., the State, the European Community and the international community.

2. As in other European constitutions, there is very little express regulation of purely PIL issues[10] in the Spanish Constitution (*CE*) of 1978. Strictly speaking, the only such regulation is contained in art. 149.1.8 whereunder the State possesses exclusive competence to lay down "rnles for the resolution of conflicts of laws". It should be remembered, however, that the provisions of the *CE* must necessarily apply to the entire legal system,[11] and hence specifically to the area of rules of PIL. Therefore, this area is decisively affected in particular by the provisions of Title I of the *CE* regarding "fundamental rights and duties" – that is to say, both the "rights and freedoms" recognised in Chapter Two thereof,[12] which are binding on all public powers, and the "principles" included in the following Chapter,[13] which must guide legislation and judicial practice, as provided in art. 53 section 3 of the *CE*.

---

cont.

Of the most recent studies on this subject, *cf.* the contributions from various authors in *Diritto internazionale privato e Diritto comnitario* (P. Picone, Director), Padua, 2004.

[6] Arts. 14 to 16 of the Civil Code (hereinafter, *Cc*). On this subject, *cf.* in general, A. Borrás, "Les ordres plurilégislatifs dans le droit international privé actuel", *Recueil des Cours*, t. 249 (1994), pp. 145 *et seq.* In particular, on the Spanish system, P. Domínguez Lozano, "Internal Conflicts and 'Interregional Law' in the Spanish Legal System", *SYIL*, vol. V (1997), pp. 43 *et seq.*; specially, definition (on page 46, note 9) of the terms *vecindad civil.*

[7] Created by virtue of art. 65 of the Treaty Establishing the European Community or included in Community Directives.

[8] Arts. 94 to 96 of the *CE*.

[9] The internally-generated general rules of PIL, other than those included among the special laws, are contained in arts. 21 and 22 of the Judiciary Act, Organic Law 6/1985 of 1 July (hereinafter *LOPJ*) with regard to the jurisdiction of the Spanish courts, in arts. 8 to 12 of the *Cc* with regard to the applicable law and in arts. 951 to 958 of the *LECiv.* of 3 February 1981.

[10] That is, excluding issues relating to Spanish nationality (art. 11 *CE*) and to the rights of aliens in Spain (art. 13 *CE*). *Cf.* in this connection J. C. Fernández Rozas and S. Sánchez Lorenzo, *Curso de Derecho internacional privado*, 3rd ed., Madrid, 1996, pp. 84 *et seq.*

[11] Art. 9.1 *CE*.

[12] Arts. I4 to 38 of the *CE*.

[13] Arts. 39 to 52 of the *CE*.

3. What this means is that our examination must be based not on constitutional precepts but on the judicial judgments wherein these have been applied to issues of PIL – particularly those given by the Constitutional Court "as supreme interpreter of the Constitution"[14] in the various constitutional proceedings that it considers. For although in the Spanish jurisdictional system the Supreme Court *(TS)* is "the highest judicial body" in "issues of ordinary legality", the Constitutional Court (*TC*) is the supreme authority in "issues of constitutionality".[15] We shall therefore be examining the judgments of the *TC* relating to the three problem areas of PIL: international jurisdiction of the Spanish courts, the applicable law or "conflict of laws" and the recognition and enforcement of foreign judgments in Spain.

4. To that end it will be best to build upon three general premises. The first is that in the politically complex State established by the *CE* of 1978, competence to dictate the rules of PIL, in both the internal and extra-Community dimensions of the system, lies solely with the State. This means that the Spanish system of PIL is uniform, since it bars the Autonomous Communities from acting in these matters. The second is that, within the limits set by the Constitution, the State legislator is free to configure the Spanish system of PIL – and hence, in pursuit of concrete objectives of legislative policy, to choose the appropriate form of regulation and the appropriate rule of PIL for each type of matter. The last is that the rules of PIL that deal with the three groups of problems mentioned above possess the rank of law.

II. INTERNATIONAL JURISDICTION

1. General aspects

A. The extent of jurisdiction

5. The legal system of international jurisdiction of the Spanish courts is set forth in arts. 21 to 25 of the Judiciary Act (*LOPJ*) of 1985.[16] The first point of interest here is that these rules are inspired by the principle of a *reasonable* connection between the matter at litigation and the personal or territorial sphere of the Spanish legal system.[17] This means, *a contrario*, that our courts cannot judge any suit arising out of external dealings. In the events regulated in art. 22, in civil matters, then, a Spanish national may seek a judgment on his legitimate rights and interests from his own courts ("justice by declaration"). In the excluded events, on the other hand, he must

---

[14] Art. 1.1 of Organic Law 2/1979 of 3 October, on the Constitutional Court.

[15] On the above distinction, see *STC* 114/1995 of 6 July and art. 123.1 of the *CE*.

[16] M. Virgós Soriano and F. Garcimartín Alférez, *Derecho procesal civil internacional. Litigación internacional*, Madrid, 2000, p. 45.

[17] M. A. Amores Conradi, "La nueva estructura del sistema español de competencia judicial internacional en el orden civil: art. 22 *LOPJ*", *REDI*, vol. XLI (1989), pp. 113 *et seq.* M. Virgós Soriano and F. Garcimartín Alférez, *op. cit.* pp. 53 *et seq.*

apply to the courts of another State, if these possess jurisdiction over the case in point and their judgment is enforceable in Spain ("justice by recognition").[18]

6. This general characterisation of the Spanish rules on international jurisdiction was accepted by *STC* 140/1995 of 28 September.[19] This judgment stated that while it might be claimed that litigating in another State "produces difficulties and burdens for the plaintiff, it is equally true that such a claim has no constitutional transcendence, as stated in *STC* 43/1986 of 15 April".[20] It goes on to say that, as evidenced by the examination of the criteria used in the said precepts to attribute international jurisdiction to our courts, the Spanish legislator did not wish:

> ". . . to attribute unlimited scope to the competence of the Spanish courts, but only a reasonable scope according to the proximity or connection of the facts with respect to our legal system. Therefore, in many cases Spanish nationals wishing to bring legal action against a foreigner will have to do so through the competent court of another State, as is the case in the instance under advisement".

B. Unilateral character of Spanish rules on jurisdiction

7. In the second place, the Spanish legal rules on international jurisdiction are "unilateral". This means that as regards lawsuits on a given matter that arise out of foreign dealings, these rules only establish the circumstances in which the Spanish courts possess jurisdiction. As regards excluded circumstances, they do not determine which foreign court may try the case, as that is determined by the rules of the other States, whereas the rules on the same issue contained either in a Community act, such as Council Regulation (EC) number 44/2001 of 22 December 2000 or else in an international agreement as is the case of its antecedent the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, done at Brussels on 27 September 1968, impose a "distribution" of jurisdiction among the courts of the Member States bound by these instruments.[21]

---

[18] The distinction is from T. Pffeifer, *Internationale Zuständigkeit und processuale Gerechtigkeit*, Frankfurt am Main, 1995.

[19] *Jurisprudencia Constitucional*, t. XLIII (September–December 1995), pp. 125 *et seq.*, on p. 145. In this case the debate before the *TC* centred on whether immunity of the defendant in respect of the civil jurisdiction in proceedings concerning the lease of a property, based on art. 31.1 of the 1981 Vienna Convention on Diplomatic Relations, was or was not contrary to the right to effective judicial protection as recognised and guaranteed in art. 24 of the *CE*.

[20] *Jurisprudencia Constitucional*, t. XIV, p. 431, where it adds that the entity requesting protection was that which "in exporting its goods abroad has established a point of connection with a system of whose requirements and conditions it cannot be ignorant and which the Spanish authorities must respect in the interest of security of international dealings".

[21] On the distinction, *cf.* J. D. González Campos, in *Derecho internacional privado* (A. P. Abarca Junco, Director), vol. I, Madrid, 2003, pp. 369 *et seq.*

8. Although the jurisprudence of the *TC* contains no reference to the second of the above cases other than to allude to "international conventions, not applicable here", the unilateral nature of the Spanish rules on interuational jurisdiction was in fact clearly stated in *STC* 61/2000 of 13 March,[22] in connection with a suit between two nationals of the United States, one of whom was habitually resident in Spain, on the amendment of an earlier US divorce decree as regards visiting and maintenance rights. In that suit the appeal court had declared itself incompetent to hear the case pursuant to art. 55 of the Civil Procedure Act (*LECiv.*). However, the *TC* has denied that this rule of competence among Spanish courts is applicable to the case, as it is a problem of international judicial competence. In justification of this judgment it stated that:

> ". . . when a court finds that it lacks judicial competence or 'jurisdiction' (according to the terminology used in the heading of Book I Title I of the *LOPJ*, which contains the rules regulating such competence), it would be meaningless to name another court as being competent, since this would be tantamount to ordering courts of another sovereign State to judge the substance of the matter. This explains why in cases of lack of international competence, courts find absence of competence pure and simple but do not name any other court as competent to judge the matter".

2. International jurisdiction and effeetive judicial protection

A. Access to jurisdiction

9. As noted earlier citing *STC* 140/1995 of 28 September, the Spanish legislator did not wish "to attribute unlimited scope to the competence of the Spanish courts" in the regulation of these matters. This may mean that if our courts do not possess international jurisdiction in a particular circumstance, a Spanish national will have to litigate in another State. Such a consequence could conflict with the constitutional right to effective judicial protection which art. 24.1 of the *CE* recognises for all persons, nationals and foreigners.

In effect, according to the jurisprudence of the *TC*, the essential core of the fundamental right to judicial protection in this precept consists in "access to jurisdiction", so that a court will pronounce judgment on the substance of the legal disputes brought before it.[23] Nonetheless, it has also declared that art. 24.1 of the *CE* does not recognise an "absolute or unconditional right to jurisdictional services, but rather a right to obtain these by means of the available procedural channels and subject to their concrete legal disposition". So that, as a right to service, the fundamental right

---

[22] *Jurisprudencia Constitucional*, t. LVI (January–April 2000), pp. 735 *et seq.*, on pp. 742–743.

[23] *STC* 61/2000 of 13 March, which cites *STC* 13/1981 of 22 April; 21/1981 of 15 June; 119/1983 of 14 December; 93/1984 of 16 October and 36/1997 of 25 February.

of judicial protection "is shaped by the legal rules, which determine its specific scope and content and establish the requirements and conditions for its exercise".[24]

The legislator is therefore empowered to set limits in that regulation upon the access of our courts to international jurisdiction, provided that such limits be "reasonable and proportionate" in respect of the ends that it may legitimately pursue within the framework of the Constitution. Nonetheless, it should be borne in mind firstly that the legal rules setting these limits must be interpreted in light of the criterion *pro actione* in order to prevent it barring judgment of a case "on the basis of mere formal aspects or unreasonable constructions of the procedural rules".[25] Secondly, since a ruling of inadmissibility denies access to action, constitutional control needs to be all the more strict, "given that this right lies at the heart of effective judicial protection".[26]

B. Two applications of the constitutional doctrine

10. The first appears in *STC* 140/1995 of 28 September, mentioned above, which raises the issue of the constitutional legitimacy of the immunity of diplomatic agents from the civil jurisdiction as a limitation on the international jurisdiction of the Spanish courts. In this respect the *TC* has stated, firstly, that this limitation possesses "a double root, objective and reasonable," in the rules of international law that determine the sovereign equality of States and peaceful cooperation. Secondly, it states that the limitation is also warranted objectively "by the obligations that International Law places upon States in establishing the scope and the boundary of the jurisdiction of its courts" – as is provided in art. 21.2 of the *LOPJ*, since such jurisdiction "must operate within the ambit that International Law allows to the State in these matters", otherwise it could run the risk of international liability.

Finally, as regards proportionality the *TC* considers, firstly that the immunity of a diplomatic agent from the civil jurisdiction does not prevent a private individual from lodging a complaint with the Ministry of Foreign Affairs, and if appropriate with the Spanish courts, claiming liability of the State. Secondly, such immunity does not deprive the private individual of access to jurisdiction, although he or she must go to the courts of the State accrediting the diplomatic agent as provided in art. 31.4 of the 1961 Vienna Convention, "which in the circumstances of the present case implies that the applicant for protection could have taken her action for payment of rent to the Italian courts". In short, then, this circumstance is no different from others in which a national must litigate in another State "as evidenced by an examination of the forums having international judicial competence in civil matters contained in art. 22 of the *LOPJ*".[27]

---

[24] *STC* 140/1995 of 28 September, which cites *STC* 172/1991 and 107/1992.

[25] *STC* 61/2000 of 13 March, which cites, of the most recent, *STC* 120/1993 of 19 April and 115/1999 of 14 June.

[26] *STC* 16/1999 of 22 February.

[27] *Jurisprudencia Constitucional*, t. XLIII (September–December 1995), pp. 141–145.

11. The second is *STC* 61/2000 of 13 March, also cited above. In this judgment the *TC* stated in the first place that a ruling of incompetence affected the "essential core" of the fundamental right to effective judicial protection and access to jurisdiction, and therefore it must be verified whether there is a clear lack of proportion between that judgment and the purposes served by the legal system of international jurisdiction. Regarding the reasons for the rules on this subject, the judgment goes on to say that

> ". . . the rules governing international jurisdiction (i.e., the circumstances in which a State's system attributes competence to judge a suit to its own courts – always within the limits imposed by International Law – which configure the notion of State jurisdiction) all obey, first and foremost, a dual and relatively contradictory constitutional requirement. On the one hand, no-one can be required to exercise unreasonable diligence or accept excessive burdens in order to be able to exercise the right of defence in trial; hence, the defendant in a civil action may be subjected to a given jurisdiction if the circumstances of the case are such that exercise of the right of defence cannot be considered to entail disproportionate costs. On the other hand, from a procedurally active standpoint, it is necessary to ensure that there is a reasonable possibility, given the circumstances, of acting before the courts".

In this case, that reasoning led the *TC* to conclude that, the courts having declared themselves incompetent on the basis of a rule unrelated to the sphere of international jurisdiction, the principles and requirements observed have been of different orders, denying the relevance of the above-mentioned purposes and of the concrete rules that serve them, which constitutes a violation of the right to effective judicial protection. In this respect the *TC* declared that:

> "International jurisdiction in civil matters is determined by the legal regulation thereof, namely by art. 22 *LOPJ*, leaving aside the various international conventions. It is in these rules, and only in these, that we must seek as a point of departure the answer to the question of whether it is possible for our courts to consider a given claim, for it is only these rules that meet the various requirements which in some cases can produce the important consequence of the Spanish State declining to afford judicial protection in a specific case".[28]

These, then, are the rules that have to be applied by the ordinary courts as appropriate to the circumstances of the case. It is not up to the *TC* to determine whether or not these courts possess international jurisdiction over the action; its function is confined to guaranteeing that the courts provide judicial protection as the Constitution requires them to do.

---

[28] *Jurisprudencia Constitucional*, t. LVI (January–April 2000), pp. 743–745. English text in *SYIL*, vol. VII (1999–2000), pp. 311–314.

III. CHOICE OF LAW

1. General aspects

12. In the Spanish legal system the rules of PIL are identified with those of "conflicts of laws", as can be seen in art. 149.1.8 of the *CE*. This is also true of the sector of applicable law, even with a certain type of rules of conflict known as "multilateral", as evidenced by the preference shown for such rules in the Preamble to *RD* 1836/1974, of 31 May, on the reform of the Preliminary Title of the Civil Code (*Cc*). However, the very rules introduced by this provision run counter to that general aspiration, including as they do both "unilateral" rules of conflict (arts. 10.4 and 11.3 of the *Cc*) and an "imperative material rule" or rule of immediate application (art. 9.6 paragraph 3 of the *Cc*). This illustrates the pluralism of techniques of regulation and of PIL rules in any state system, which can be expanded if such regulation further distinguishes "localising" multilateral rules of conflict from those that pursue a material outcome,[29] as in the case of the rules in art. 9.7 or art. 11.1 of the *Cc*.

13. Given the predominance of multilateral rules of conflict in this sector of Spanish PIL, it is hardly surprising that it should be these rules that are examined by the jurisprudence of the *TC*, as we shall see later on. Nonetheless, *STC* 132/1991 of 17 June[30] constitutes an exception with regard to a foreign judgment that was challenged in the *exequatur* procedure as lacking legal grounds, in which the court had applied "the conventions of commercial practice" – that is, a material law created by private individuals – in ruling on the parties' claims.[31] It also alluded, if in different terms, to the "imperative material rules" on foreign trade in respect of exchange control and the exportation of grain, which rules the appellant invoked to justify the impossibility of performing its contractual obligation, since under these rules this constituted an "unlawful obligation" in Spain. However, the *TC* rejected this argument as lacking constitutional relevance, given that:

> ". . . having regard to the lawfulness of the obligation, apart from the fact that in the challenged judgment the *TS* expressly described the 'object of litigation' as 'lawful in Spain', the plaintiff confined itself to raising a question of ordinary legality on which it does not fall to this Court to pronounce – namely, the infringement of certain Decrees on grain production, exportation of goods and exchange control as causing the obligation to be unlawful – it being the task of the courts of ordinary jurisdiction and not this Court to determine the lawfulness or otherwise of such obligation, in terms of legality which as such fall without the competence of this Constitutional Court".

---

[29] On pluralism of rules of PIL, *cf.* J. D. González Campos, *op. cit.* (2003), pp. 111 *et seq.*

[30] *Jurisprudencia Constitucional*, t. XXX (May–August 1991), pp. 322 *et seq.*, in particular pp. 333–335.

[31] On the modern *lex mercatoria*, *cf.* the analysis by J. C. Fernandéz Rozas, *Ius mercatorum. Autorregulación y unificación del Derecho de los negocios transnacionales*, Madrid, 2004, pp. 77 *et seq.*, with abundant references on pp. 449 *et seq.*

2. Competence to decree rules on conflicts of laws in the internal dimension of the system

A. Distribution of competence under art. 149.1.8 of the CE

14. As noted earlier, in Spain, which is a politically complex State possessing Autonomous Communities with legislative powers, art.149.1.8 of the *CE*, relating to civil legislation, attributes to the State the sole competence to establish "rules to settle conflicts of laws". As the *TC* has noted, given the general nature of the expression, this competence "must be construed as extending both to conflicts with the civil laws of other States and to what are known as internal conflicts – that is, conflicts that may arise among the various different civil laws current in Spanish territory";[32] whereas according to the same article of the Constitution, the Autonomous Communities are competent in respect of "conservation, modification and implementation" of the particular civil law of the Autonomous Community.

What this amounts to, according to *STC* 88/1993 of 12 March,[33] is that the *CE* establishes "a guarantee of civil law status" through the political autonomy "of those Communities that possess their own civil law, by allowing their Statutes of Autonomy to provide for competences to conserve, modify and implement it".[34] Further, as a consequence of this attribution of competences "it admits that conflicts or contradictions of rules on the same matters may arise among the different civil laws coexisting in Spain", to cite *STC* 236/2000 of 16 October.[35]

15. However, this distribution of competence has raised a number of problems of interpretation as to the scope of the Autonomous Communities' competence regarding their own civil law. In the first place, the reservation in respect of "foral or special civil laws" is rendered in art. 149.1.8 of the *CE* by the expression "wherever these exist". In the case of the Community of Valencia, where a regional civil law existed up to the abolition of their *Fueros* in the early 18th century, all that survived was a customary law based on that historical law.[36] This issue was resolved by *STC* 121/1992 of 28 September,[37] which ruled that the broad reference to "foral or special civil laws" in art. 149.1.8 of the *CE* encompassed not only written rules in force

---

[32] *STC* 236/2000 of 16 October, cit. *infra*.

[33] *Jurisprudencia Constitucional*, t. XXXV (January–April 1993), pp. 887 *et seq.* The sentence transcribed is on p. 891. English text in *SYIL*, vol. III (1993–1994), pp. 462 *et seq.*

[34] *Cf.* J. J. Alvárez Rubio, "La actual configuración de los presupuestos generales del sistema español de Derecho interregional", *R. Vasca Administración Pública*, no. 48 (1997), pp. 9 *et seq.*

[35] On this instance, *cf.* E. Zabalo Escudero, "Pluralidad legislativa y conflictos de leyes internos en el ordenamiento español", *Cur. DI Vitoria* (1994), pp. 253 *et seq.*

[36] On the enlargement of the material scope of the civil law of Galicia by the regional legislator, *cf.* S. Alvárez González, "La Ley 4/1995, de 24 de May, de Derecho civil de Galicia", *REDI* (1995), no. 2, pp. 473 *et seq.*

[37] *Jurisprudencia Constitucional*, t. XXIV (September–December 1992), pp.139 *et seq.*, in particular pp. 152–153, relating to Law 6/1986 of 15 December on the Government of Valencia, on historical Valencian leases.

prior to the approval of the Constitution "but also regional or local civil rules of customary origin predating" the Constitution, and thus it had been established in its Statute of Autonomy.[38]

In the second place, there was a problem regarding the limits of "implementation" of an Autonomous Community's own civil law when a post- Constitution regional law regulates *ex novo*, entirely or partially, a civil institution not covered by the previously-existing written law, as was the case of adoption with respect to Aragon. *STC* 88/1993 of 15 March had ruled in this respect that implementation of regional civil law implies legislative action, which makes organic growth possible and recognises not only the historical nature and current effect of this law but also the future vitality "of the prior civil legislation". However, in this judgment of the *TC* such legislative action is confined "to regulating institutions linked in some way to those that are already regulated" by that legislation, with due regard for "the peculiar principles informing foral law". Such a linkage between types of matters in my view is certain to cause problems.[39]

B. The exclusive competence of the State

16. The right of the State to competence in respect of "rules to resolve conflicts of laws" was examined in *STC* 156/1993 of 6 May[40] in connection with a provision of the Compilation of the Civil Law of the Balearics as amended in 1990, which contained a "unilateral rule" declaring that its provisions were applicable to "persons residing" in the territory of the Autonomous Community "without the need to prove their regional citizenship" (*vecindad civil*). This affected the nexus established in art. 14.1 of the *Cc* to determine the personal status of Spaniards – "regional citizenship" (*vecindad civil*), which would be replaced by simple "residence" in that Autonomous Community. The *TC* declared in response that in this case there was no need to exactly define the scope of the State's competence:

> ". . . since there is no doubt that in any case this incorporates the adoption of the rules of conflict and the definition of each element thereof, a highly relevant one of which is the determination of the points of connection through which in cases of inter-regional dealings, one of the bodies of civil law coexisting in Spain becomes applicable".

---

[38] *Cf.* R. Arenas García, "Derechos forales, derechos locales y derecho consuetudinario en España: origen histórico y determinación de su ámbito de vigencia territorial". *R. Jurídica de Asturias*, no. 21 (1997), pp. 93 *et seq.*

[39] On this limitation, *cf.* the dissenting votes of Judges C. Viver Pi-Sunyer and J.D. González Campos to *Decision 88/1993 of 15 March*, in *Jurisprudencia Constitucional*, cit. pp. 895–898 and 898–901 respectively. Also, J. Delgado Echeverría, "Doctrina del Tribunal Constitucional sobre la competencia legislativa autonómica en materia de Derecho civil", *R. Aragonesa Administración Pública*, no. 4 (1994), pp. 361 *et seq.*

[40] *Jurisprudencia Constitucional*, t. XXXVI (May–August 1993), pp. 65 *et seq.*

As a result of which, according to the *TC*, following the precedent of the Constitution of 1931, the Constitution of 1978:

> ". . . opted, wrongly, for a state system, and hence a uniform system of inter-regional civil law and thus barred the Autonomous Communities from introducing their own systems for the resolution of conflicts of laws, whether by dint of defining points of connection other than those provided in the general legislation, or alternatively by redefining, altering or manipulating such points of connection."

These premises prompted the *TC* to declare the challenged rule unconstitutional, given that "it breaches the unity of the state system of inter-regional law" and, as a corollary, tends to expand the scope of application of Balearic law given that it is easier to acquire mere residence than regional citizenship (*vecindad civil*).

17. A word of warning, however: while in the above judgment the *TC* stated that, "This is, in short, a matter which is entirely removed by art. 149.1.8 from the regulatory action of the Autonomous Communities and attributed 'in all cases' to the State legislator", that statement was made in connection with inter-regional civil law as regulated in arts. 14 to 16 of the *Cc*, which is the law that is supposed to be uniform.

However, if we take into account both the material and the spatial ambits of the legislative competences of the Autonomous Communities, then the foregoing conclusion has to be qualified. As regards the material scope, this is because unless the State has decreed "basic rules" on a matter, there will be legal diversity *ratione materiae* in the regulations of different Autonomous Communities "in the sphere of public legal relations"; for in the sphere of "private legal relations" competence lies exclusively with the State in accordance with points 6 and 8 of art. 149.1 of the *CE* relating to commercial and civil legislation, as declared in, among others, *STC* 264/199, of 22 July.[41] And as regards the territorial scope, it is because the territory of an Autonomous Community is the spatial ambit in which it exercises its competences and therefore an Autonomous Community can only regulate cases where there are significant circumstances linking them to itself. As a result, "unilateral" rules of conflict are often applied in regional legislation, and this can raise difficulties depending on the connecting factors used. Moreover, this unilateral approach means that along with the direct legal effects arising *ad intra* from the linkage between case and Autonomous Community, there may also exceptionally be certain effects *ad extra*.[42]

---

[41] *Jurisprudencia Constitucional*, t. XXVI (May–August 1993), pp. 1225 *et seq.*, specifically p. 1248. As to the above distinction, an Autonomous Community, for example, can establish a register of traders and certain administrative requirements for access to that register, but it lies outside its province to regulate legal capacity or the condition of a trader, "the establishment of which is clearly a matter for the State in accordance with art. 149.1.6" of the *CE*, as was declared in *STC* 225/1993 of 8 July, *ibid.*, p. 808 *et seq.*, specifically, pp. 847–849.

[42] *Cf.* the jurisprudence of the *TC* on the two aspects cited by J. D. González Campos, "El marco constitucional de los conflictos internos en España", in *Europäischer Binnenmarkt, IPR und Rechtsvergleichung* (Hommelhoff/Jayme/Mangold, Editors), Heidelberg, 1995, pp. 7 *et seq.*

C. The limits of the State legislator

18. As mentioned earlier, *STC* 156/1993 of May stated, in passing, one of the characteristics of "multilateral" rules of conflict: namely, that regional citizenship (*vecindad civil*) as a common nexus in the Spanish system of inter-regional law "assures a like ambit of application of all the Civil Codes" current in Spain. This affirmation was seized by the Autonomous Community of Aragon as the basis of its appeal against State Law 11/1990 of 15 October reforming the *Cc*, in application of the principle of non-discrimination by reason of sex, and as a result arts. 14.3 and 16.3 of the Code were amended.

In the case of the first of these articles, the reason for the amendment was that after using several criteria to determine "regional citizenship" (*vecindad civil*), the ending clause prescribes, in default of such criteria, attribution of "the common civil citizenship". And in the second case the reason is that it provides that the effects of marriage are to be governed by the terms of art. 9 "and failing these, by the *Cc*", adding that "In the latter case, the property regime of the *Cc* shall be applied if under the personal laws of both partners a system of separation of property prevails". In the opinion of the appealing Autonomous Community, these solutions violated two "implicit principles" that affect the relations among the civil laws current in Spain – namely, "equality" and "reciprocity" between different systems – by opting in favour of the "common civil citizenship" and the common civil law.[43]

19. In resolving that appeal, *STC* 226/1993 of 8 July first qualified the scope of the principle of equality, stating that art. 149.1.8 of the *CE* only allows "a position of parity" among the different civil laws by attributing competence to establish rules of conflict in this matter to the State, "which in principle assures – as we noted recently in *STC* 156/1993 – 'a like ambit of application of all the civil codes' current in Spain". It then added that in decreeing such rules the State is not carrying out "a task free of any constitutional link or limitation", since the preference for the common civil law over the particular laws of the Autonomous Communities could "indirectly prejudice the competence of Autonomous Communities with respect to their own civil laws".

In this connection the *TC* has stated that the essence of the first of these limits, which is consubstantial with a system of resolution of conflicts of laws which, like Spanish inter-regional law, ". . . is not based on the unconditional pre-eminence of either of the codes that may come into conflict, is that:

> "the points of connection for determining personal subjection to one or other law (in this case citizenship) must, in principle and as far as possible, be determined according to abstract or neutral circumstances, and the same can be said, with the same rider, of the criteria used by the rules of conflict in art. 16 of the Civil Code.

---

[43] S. Alvárez González, "Igualdad, competencia y deslealtad en el sistema español de Derecho interregional (y en el Derecho internacional privado)", *REDI* (2001), nos. 1 and 2, pp. 49 *et seq.*

> In this way, as the *TC* noted in *STC* 156/1993, 'a like ambit of application of all the civil codes' coexisting in Spain is preserved".

Nevertheless, the *TC* then goes on to introduce an exception to that limit based on the principle of legal safety enshrined in art. 9.3 of the *CE*,[44] since there is no ruling out the possibility that in certain cases the above-mentioned approach would not provide:

> ". . . the clear and certain solution that security in dealings necessarily requires, in which event the State legislator can and must directly determine which is the specific regional citizenship [*vecindad civil*] of the subject and also which is the concrete civil law applicable in the event of conflict. A solution of this kind cannot in itself be considered unconstitutional in any way, provided of course that it is given the form of a default or 'closing' clause".

Regarding the friction between the principles of "equality" and "legal security", the *TC* finally notes that the legislator must "insofar as it is possible" adopt the approach of remittals and abstract and neutral connections and weigh up "the balance between the two requirements". After all, it is up to the legislator to remove this friction and not the *TC*, which is only empowered to judge "whether the solution established in the rule is arbitrary or manifestly groundless, which in the present case it is not".

20. In the case resolved by *STC* 236/2000 of 16 October,[45] the principle of equality enshrined in art. 14 of the *CE* is once more invoked, but within a very different ambit from the previous case. Here it is invoked, in order to have his paternity acknowledged, by the presumed biological father of a child who possessed Navarrese regional citizenship (*vecindad civil*) through his mother. The application was denied by the *TSJ* (High Court of Justice) on the ground that such a claim was not allowable to the father of a child born out of wedlock under Navarrese civil law, which was applicable to the case pursuant to art. 9.4 as it relates to art. 16.1 of the *Cc*, given the regional citizenship (*vecindad civil*) of the son. The appellant denounced this judgment before the *TC* as violating the said principle, arguing that he had been discriminated against by reason of the son's regional citizenship (*vecindad civil*), considering that his application would have been accepted had the common civil law been applied.

Thus, in the opinion of the appellant, the principle of equality should exclude both regional citizenship as a nexus for determining which of the laws current in Spain is the personal law applicable, and the entire system of inter-regional civil law. His position is purely and simply that the civil law current in Spain applicable to his case should be the one that most favours it. This is perhaps the reason why the *TC* grounds

---

[44] *Cf.* the difference regarding this criterion in the dissenting vote of Judge J.D. González Campos, in *op. cit.*, pp. 881–883.

[45] *Jurisprudencia Constitucional*, t. LVIII (September–December 2000), pp. 344 *et seq.* *Cf.* the critical examination of this decision by S. Alvárez González, *op. cit.*, *REDI* (2000), nos. 1 and 2, especially on pp. 55 *et seq.*

this decision on art. 149.1 of the *CE*, and specifically the reservation in favour of the particular civil law of the Autonomous Communities, taking the view, as noted earlier, that the said provision admits that "that conflicts or contradictions of rules on the same matters may arise among the different civil laws coexisting in Spain", although it attributes to the State competence to establish rules on "conflicts of laws". And examining these rules, the *TC* refers to the content of art. 14 and of arts. 9.4 and 16.1 of the *Cc*, taking the view that the complaint of an alleged violation of the principle of equality really arises from the fact that the Navarrese civil law on the matter is more restrictive than the *Cc*. Such an argument misses the point that "the applicability of the foral civil law of Navarra is the consequence of a provision made by the legislator in the rules of PIL referred to earlier. And therefore, what the appellant raises is a contradiction of rules "which the legislator has resolved precisely" by means of these provisions. Nor can the said principle be considered to have been violated by the challenged judgment, which applied the Navarrese civil law "on the basis of submission of the issue to the 'personal law of the son', who in this case possessed Navarrese regional citizenship through his mother (art. 9.4 *Cc*)".

3. Constitutionality of the rules on applicable law

A. Introduction

21. Adopting the same solution as other European States,[46] in reforming the Preliminary Title of the *Cc*, Decree 1836/1974 of 31 May established in art. 9.2, and in art. 9.3 by remittal to the former where there was no marital agreement, that both personal and property relations between spouses were to be governed by the "last national law of the husband at the time of marriage". This rule of PIL was grounded in two ideas that had long predominated in the past and still did so at that time – namely, that the members of a family are hierarchically related, and that a single law must be established for the family, based on that conception, which had determined that the nationality of the wife should be dependent on that of the husband.[47]

But then, following the entry into force of the Spanish Constitution in 1978, the doctrine[48] took the position that this last connecting factor was contrary to the general clause on equality in art. 14 and at the beginning of art. 32.1. And even although

---

[46] Art. 14 of the *Cc* of Greece, 1940, 18 of the *Cc* of Italy, 1942 and 53.2 of the *Cc* of Portugal, 1967. *Cf.* the Comments by M. Aguilar Benítez de Lugo on arts. 9.2 and 9.3 of the *Cc* of 1974 in *Comentarios al Código Civil y Compilaciones Forales* (M. Albaladejo, Editor), t. I, Madrid, 1978, pp. 146 *et seq.*

[47] J. D. González Campos, *Derecho internacional privado. Parte especial*, Oviedo 1990, pp. 242 *et seq.* Note that until the reform of the *Cc* in Law 14/1975 of 2 May on the legal situation of married women and the rights and duties of spouses, the "strict unity of the family" meant that marriage "of itself automatically" affected the acquisition, loss or recovery of Spanish nationality, as stated in the Preamble to this Law.

[48] J. D. González Campos *et al.*, *Derecho internacional privado. Parte especial*, vol. II, Oviedo 1984, pp. 180–181.

this consideration was also contemplated, in passing, in a *TS* (Bench 1) Judgment of 6 October 1986,[49] despite reforming the sector of family law in 1981,[50] the legislator did not amend the relevant precepts of PIL until Law 11/1990 of 15 October on reform of the *Cc*, in application of the principle of non-discrimination by reason of sex.[51]

However, that did not prevent problems of transitional law arising,[52] as witness *STC* 39/2002 of 14 February,[53] when a court questioned the constitutionality of the rules of PIL contained in sections 2 and 3 of art. 9 *Cc*, since in the proceedings *a quo* one of the issues was the dissolution of the marital economic regime of persons possessing Catalan regional citizenship (*vecindad civil*) and common law citizenship who married in 1984, established their conjugal residence in Catalonia and did not change it thereafter. It was therefore essential to determine which civil law was applicable to that regime at the time the marriage took place.

B. Unconstitutionality of the later and closing connecting factor in art. 9.2 Cc.

22. When the *TC* was called on to resolve this issue, the fact that those conflict of laws rules in which a criterion of connection was the husband's nationality stood in contradiction to the constitutional principle of equality had already been established by the constitutional courts of Germany[54] and Italy,[55] and also by the European Court of Human Rights,[56] whose judgments are cited in *STC* 39/2002 of 14 February 2002. It is therefore hardly surprising that the *TC* should decide "to declare unconstitutional and repealed by the Constitution, art. 9.2 of the *Cc* in the wording of the

---

[49] See the comments on this decision by M. A. Amores Conradi in *REDI* (1987), pp. 239 *et seq.*

[50] Law 11/1981 of 13 May amending the *Cc* in matters of filiation, parental authority and marital economic regime and Law 30/1981 of 7 July amending the regulation of marriage in the *Cc* and laying down the procedure to be followed in actions for annulment, separation and divorce.

[51] On sections 2 and 3 of art. 9, amended in 1990, *cf.* M. A. Amores Conradi in *Comentarios al Código Civil y Compilaciones Forales* (M. Albaladejo/S. Díaz Alabart, Directors), 2nd ed., t. I, vol. 2, Madrid 1995, pp. 182 *et seq.*

[52] On these problems, *cf.* M. A. Amores Conradi, "La nueva ordenación de la ley aplicable a los efectos del matrimonio", *R. Jurídica Castilla-La Mancha*, no. 11–12, pp. 39 *et seq.*, in particular pp. 44 *et seq.*, and the comments by A. Borrás in *Comentarios a las reformas del C.c.* (R. Bercovitz, coord.), Madrid 1993, pp. 453 *et seq.*

[53] Not yet published in *Jurisprudencia Constitucional*. See the text with comments by H. Rodríguez Pineau in *REDI* (2002), no. 1, pp. 243 *et seq.*

[54] Decisions of the *Bundesverfassungsgerichtshof* of 3 February 1983 and 8 January 1985, in *Verf. G. E.* 63,181 and 68,384. *Cf.* comments in *IPRax* (1983), pp. 223 *et seq.* and (1985), pp. 290 *et seq.*

[55] Decision of the Italian *Corte Costituzionale* of 5 March 1987, *cf. RDIPP* (1987), pp. 297 *et seq.*

[56] Decision of 22 February 1994 in *Burghartz v. Switzerland*, in connection with the family name.

text approved hy Decree 1836/1974 of 31 May, in that part which says 'by the personal law of the husband at the time of marriage'".

In reaching this conclusion, the *TC* considered that the constitutional requirements for an action on equality were met in this case and went on to state that:

> ". . . there can be no doubt that in establishing the national law of the husband at the time of marriage as the point of connection, albeit residual, for determination of the applicable law, art. 9.2 *Cc* introduces unequal treatment between man and woman despite the fact that both are in the same legal position vis-à-vis the marriage. The challenged precept therefore stands in contradiction not only of art. 14 *CE* but also of the more specific terms of art. 32 *CE*, according to which men and women have the right to marry in full legal equality, since there is no constitutionally acceptable justification for preferring the rules related to the man".

Further in this respect,

> ". . . the challenged rule is contrary to the Constitution irrespective of whether the outcome of its application is more or less favourable to the woman in any particular case. That will depend on the substantive regulation of the marital regime that is applicable, but before that there is constitutionally proscribed discrimination in the use of a point of connection that is not formally neutral in the conflict of law rule. The very use of a connecting factor that awards preference to the male, in breaching the formal neutrality of a rule of conflict, constitutes a violation of the right to equality".

Having upheld the unconstitutionality of the challenged precept, the *TC* declared that it was up to the courts ". . . using the means placed at their disposal by the legal system, to fill any gap that the annulment of the challenged precept might cause in the procedure for determining a subsidiary point of connection" – the justification for this, although not expressed, being that this is a simple question of "ordinary legality".

23. In closing this section, there are two events worth noting subsequent to the above *TC* decision. Firstly, in connection with the jurisprudence of other countries, a decision of the Portuguese Constitutional Court, 90/03 of 14 February,[57] constitutes a different solution from that of the Spanish *TC*, founded on the non-retroactivity of

---

[57] See text at http://tribunalconstitucional.pt/jurisprudencia. This was a case in which the spouses, a German and a Portuguese national, married before the 1976 Constitution came into force and were divorced in 1987. To determine their marital economic regime, this raised the issue of whether the applicable provision was art. 53.2 of the *Cc* as it was in force at the time the marriage took place, in which the closing clause remitted to the national law of the husband. The Decision of the *TC*, based on the Portuguese doctrine of PIL, rejected the husband's appeal from the decision of the *TS*, in which he moved that the said precept be declared unconstitutional, arguing that the mandate of the rule of conflict before its reform "was operative at the time of the marriage and hence, in obedience to the principle of immutability of the economic regime, the new rule of conflict cannot be applied retroactively".

a conflict of law rule reformed after the Portuguese Constitution of 1976. Secondly, in a judgment given on 10 September 2002, while acknowledging the ruling of *STC* 39/2002 of 14 February,[58] the *AP* (Provincial High Court) of the Balearics overturned the judgment *a quo* on grounds similar to those of the Portuguese Constitutional Court decision, further citing in justification the principle of legal security enshrined in art. 9.3 of the *CE*. In light of the approach adopted in this decision, the problem of the retroactivity or otherwise of a rule of conflict that is contrary to the constitutional principle of equality seems likely to arise again before the Spanish *TC* sometime in the future.

4. Proof of foreign law and the duty of the Judge

24. Of the problems of application of multilateral rules of conflict, that relating to proof of the foreign law designated by such rules has been addressed by five recent judgments of the Constitutional Court: 10/2000 of 17 January, 155/2001 of 2 July, 33/2002 of 11 February, 29/2004 of 4 March and 34/2004 of 8 March. In these decisions we can trace a line of jurisprudence that establishes a direct connection between this problem and the constitutional right to adequate means of proof (art. 24.2 of the *CE*) and to effective judicial protection without defencelessness (art. 24.1 of the *CE*). Note that the reason for rejection of the appeal for protection in the case of *STC* 29/2004 of 4 March was failure to invoke these fundamental rights before the courts.

25. In the case of *STC* 10/2000 of 17 January,[59] concerning an action for marital separation in which the common nationality of the parties determined the applicability of the law of Armenia under art. 107 *Cc*,[60] the plaintiff requested that proof of the law regarding the dissolution of marriage be sought via letters rogatory, or failing that, that the Spanish law be applied. It was not possible to produce proof in the proceedings at instance; proof was again requested on appeal and was admitted, but was likewise unsuccessful. A motion was therefore entered to suspend the proceedings until such proof was forthcoming, and the *AP* ordered new letters rogatory, which went astray and were not returned. The Court therefore decided to summon the parties and carry on with the proceedings, which were pursued despite a new motion for suspension from the appellant. The *AP* finally gave its judgment, confirming the original judgment dismissing the complaint, due to the impossibility of proving the Armenian law.

---

[58] Text in *REDI* (2003) no. 1, p. 411, with comments by H. Rodríguez Pineau, on pp. 412 *et seq.*

[59] *Jurisprudencia Constitucional*, t. LV (January–April 2000), pp. 132 *et seq.*

[60] Amended by Organic Law 11/2003 of 29 September, the Preamble of which states that "application of the spouses' common national law hinders access to separation and divorce for certain persons resident in Spain", specifically foreign Muslim women, and therefore "their personal autonomy must take precedence over the criterion whereby their national law is applicable". To this end, the new wording of the precept is allowed, whereby in certain circumstances the Spanish law can be applied to separation or divorce in place of the foreign law identified by this rule of conflict.

Addressing this procedural situation, the *TC* began by pointing out that while it was the duty of the person invoking the foreign law to prove it, a matter belonging to the province of ordinary legality, paragraph 2 of art. 12.6 *Cc*, in force at the time, empowered the Judge to investigate the content of that law using whatever means of enquiry he deemed necessary. And that possibility:

> ". . . in cases like the present one may transcend the bounds of mere ordinary legality to which it belongs in principle . . . and become a matter of constitutional importance in light of art. 24 *CE*, given that in adopting this decision the court is always obligated to afford the parties in the proceedings at issue effective protection of their rights and legitimate interests, particularly when the foreign law is applicable by prescription of the Spanish law and as a consequence of the asseverations of the parties in litigation".

It then goes on to state that the failure of proof of the foreign law was attributable to the attitude of the *AP*, in "holding the hearing and delivering judgment before the return of the second letters rogatory". Also, the appellant had shown diligence in attempting to prove the Armenian law, furnish *prima facie* evidence and requesting new letters rogatory, and she had been prejudiced by dismissal of her suit. The court therefore concluded that

> ". . . the *AP* has not only frustrated the production of evidence decisive to uphold the claim of the appellant for protection . . . which in itself is injurious to Mrs. Charlouian's right to use the most adequate means of proof (art. 24 *CE*), but it also left her defenceless (art. 24.1 *CE*) in dismissing her application for separation precisely because of the failure of the said proof, which was solely attributable to the court".

26. The origin of the case of *STC* 33/2002 of 11 February[61] is in the dismissal of a British employee by a British company which he served in Madrid following a transfer from his previous post in London. He had signed a contract with the company in which he agreed to be bound by English law. In connection with this contract the employee sued for unfair dismissal under Spanish labour law, in response to which the employer moved for dismissal of the claim on the ground that the English law that was to govern the contract had not been proven. The court *a quo* accepted this motion and rejected the subsidiary application of Spanish law as this would mean benefiting the party who had failed to provide proof. This judgment was confirmed by the *TSJ* of Madrid.

However, the *TC* admitted the appeal for protection on the ground of violation of art. 24.1 of the *CE* in connection with the right to obtain a judgment on the substance

---

[61] Not yet published in *Jurisprudencia Constitucional*. *Cf.* the website of the *TC*. On the doctrine of the *TC* and *TS*, *cf.* A. P. Abarca Junco and M. Gómez Jene, "Alegación y prueba del Derecho extranjero en el procedimiento laboral: A propósito de la *STS* (Sala de lo Social) de 22 de enero de 2001", *R. Española D. del Trabajo*, no. 119 (2003), pp. 713 *et seq.*

of the claim, which argued that the courts "used the failure to prove the foreign law as justification for not examining the plaintiff's claim" and thus:

> ". . . introduced a non-existent objection, which unreasonably prevented the adoption of a decision on the substance of the claim. And indeed, in view of the lack of proof of the foreign law (the law that both courts considered applicable in this case), the courts opted not to rule on the claim brought by the plaintiff (nature of his dismissal) and further refused to do so through subsidiary application of the *lex fori* – that is, Spanish labour law. The fact is that the said objection (lack of proof of the foreign law) was groundless, for the defendant having been the party that invoked English law, it fell to the defendant (and not to the plaintiff) to accredit its substance and validity as provided in art. 12.6 *Cc*, currently in force . . . But despite that, it was the plaintiff who was required to furnish proof, without at any time being given the opportunity to do so through the appropriate procedural channels . . . It is obvious, then, that the plaintiff was unreasonably denied a judgment on the substance of his claim (in like manner to the case examined in *STC* 10/2000 of 31 January, *FJ* 2)".

27. The issue of the burden of proof lying with the party invoking a foreign law and the subsidiary application of the *lex fori* also arises in *STC* 155/2001 of 2 July and *STC* 34/2004 of 8 March,[62] which dealt with contracts of employment for service in overseas organs of the Spanish State. These contracts, after certain clauses, contain another whereunder all other conditions of employment are to be governed by the labour regulations of the country where the services are rendered.[63] In the first of these cases, this entailed the application of the regulations in force in the People's Republic of China, as argued by the State's Attorney against the subsidiary application of Spanish law in the Judgment *a quo*, which argument was accepted by the *TSJ* of Madrid. In the second case, the foreign law, this time Yugoslav, was again invoked by the Administration and was again accepted by the same court.

With regard to the complaint based on art. 24.1 of the *CE* in *STC* 155/2001 of 2 July, the *TC* on the one hand expressed a reservation as to the application by the court *a quo* of the right referred to in art. 10.6 *Cc* when the 1980 Rome Convention is in force in our legal system, and hence it is art. 6 *Cc* that is applicable. This is reiterated, in similar terms, in *STC* 34/2004 of 8 March. The first of these decisions then goes on to add that:

> "On the other hand . . . that art. 12.6 paragraph 2 of the *Cc*, which was in force at the time and has since been replaced by art. 281 of the *LECiv.*, Law 1/2000 of

---

[62] Not yet published in *Jurisprudencia Constitucional*. *Cf.* the website of the *TC*.

[63] A similar solution to that in arts. 32 and 33 of the *Gesetz über den Auswärtigen Dienst, B.G.B.*, I, p. 1842 as we find in the Judgment of the ECHR of 30 April 1996, case C-214/94, *Ingrid Boukhalfa* (*Recueil*, p. I–2253), in a case similar to those examined by the Spanish *TC*. On the ECHR Judgment, *cf.* the critical comments of O. Lhoest in *CML Rev.* 38 (1998), pp. 247 *et seq.*

7 January, determines that it is up to the person invoking the foreign law to accredit its content and validity, and Chinese law here was invoked as the law applicable to the case by the State's Attorne . . ."

On this point *STC* 34/2004 of 8 March reproaches the latter for failing to accompany such invocation with the slightest shred of proof, especially considering that "it was easier for the Administration to prove the Yugoslav law given that according to its submissions, it was applying that law to two employees of that nationality". *STC* 155/2001 of 11 February goes on to deal with the constitutional aspect of the problem in light of its doctrine on the requirement of adequate grounding of judicial decisions. The Judgment of the *TSJ* of Madrid offered no grounds for having departed from "the doctrine laid down in this matter by the *TS*, whereby absent proof of the foreign law invoked in an action, Spanish law must apply, as repeatedly concluded by the jurisprudence". It adds that this jurisprudential doctrine:

". . . is certainly more respectful of the content of art. 24.1 *CE* than the solution adopted in the challenged Judgment, which was to consider the action lapsed, since Spanish law, in substitution of the applicable law, can also provide the answer founded on law that the cited constitutional precept demands in a case entailing external dealings".

IV. RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGEMENTS AND DECISIONS

1. Introduction

28. Within the "sheaf of fundamental rights" relating to proceedings, art. 24 of the *CE* includes the right to enforcement of judicial decisions in their own terms; as otherwise judicial protection would not only be ineffective but would be meaningless. Moreover, there exists an obligation "to comply with judgments and other firm decisions of judges and courts, as established by art. 118 of the *CE*. In fact, having regard to foreign judicial and arbitrational decisions enforcement of which is requested in Spain, the jurisprudence of the *TC*, from *ATC* 74/1984 of 24 October to *STC* 132/1991 of 17 June, addresses three specific subjects.

The first concerns the need to initiate a special procedure for enforcement in Spain of a judgment given in another State. This is what is known as *exequatur*, whose controlling function is subject to certain limitations. In that procedure all that has to be determined – and this is the second subject – is whether the judgment or decision issued in another State meets the requirements legally established in the internal laws, or where appropriate in the applicable international or Community laws. This makes it in principle a matter of ordinary legality; however, among these requirements it is particularly important that the foreign judgment or decision not be contrary to Spanish "public policy", which embraces fundamental rights that can militate indirectly against such judgments or decisions.

2. The exequatur procedure aud its function

29. In the procedure regulated by arts. 955 to 958 of the *LECiv.* of 1881, the *TS* was the body competent to deal with applications for *exequatur* (art. 955), until the provision was recently reformed by Law 62/2003.[64] This procedure consists essentially of the request and the documents that must accompany it, and a hearing of the party against whom enforcement is requested (art. 956), who may furnish whatever evidence he may deem appropriate in order to oppose enforcement. There is therefore no requirement for "a contradictory debate or the allocation of time for evidence" as stated in *STC* 54/1989 of 23 February[65] in response to the appellant's allegation that the latter was not only given a hearing but was awarded "unilaterally time for evidence". Here, the *TC* added that:

> "*Exequatur* is not a contentious procedure organised around a complaint, but a process of homologation. Therefore, the procedural situation of the party against whom enforcement is requested is not so much that of a defendant as of a person who cooperates, along with the Prosecutor's Office, in the verification that the Spanish court is required to undertake regarding the conditions on which granting of the *exequatur* depends and in checking that the interest of the party requesting it is consonant with the interest of the State to whom application for *exequatur* is made".

30. *STC* 132/1991 of 17 June contains a later comment on the limits of this procedure in connection with the allegation that a Judgment given in Algeria in respect of which the *TS* had granted *exequatur*, was not grounded in law in that in the appellant's view it was not based on any jurisprudential rule or principle. In this respect the *TC* stated that while it is proper in this process to inquire whether the foreign judgment could infringe a fundamental right, nevertheless,

> ". . . the verification of such guarantees by the Judge dealing with the Exequatur does not entitle him to review the substance of the matter, as that would be to overstep the bounds of his function, which is homologation. In effect, the Spanish *exequatur* regime is configured, as regards both its regulatory sources and whatever exceptions may arise specifically in connection with conventions and positive reciprocity, as an autonomous procedure of homologation or recognition, in respect of which a review of the substance must be considered in principle as antithetic to the function of homologation or recognition, which in the event of such a review would be impaired by a process of internalisation or "nostrification" alien to that function".

Therefore, the issue that the applicant for protection raised first with the *TS* then with the *TC* was not in fact the lack of legal grounds for the foreign judgment,

---

[64] Also arts. 56.4 and 85 of the *LOPJ* as reformed by Organic Law 12/2003 in relation to arts. 955 and 958 of the *LECiv.*

[65] *Jurisprudencia Constitucional*, t. XXIII (1989), pp. 583 *et seq.*, in particular p. 591.

"but her disagreement or dissatisfaction with the judgment and the evaluation of the facts made by the foreign court, her purpose being to have this *TC* review and examine their grounds, a function not proper to it and which oversteps the bounds of a constitutional appeal for protection".

3. Conditions of recognition and enforcement

31. In the absence of an applicable international treaty or Community rule, the conditions governing the recognition and enforcement of a foreign judicial or arbitrational decision are contained in arts. 952 to 954 of the *LECiv.*[66] These comprise a legal regime which, as *STC* 98/1984 of 24 October[67] recalls, since *ATC* 74/1984 of 8 February[68] the *TC* has considered to belong to the ambit of "ordinary legality". This view is consolidated doctrine, as we shall now see.

32. In effect, regarding the challenge raised by an applicant for protection to the interpretation of arts. 65.2 and 8.2 of the Treaty between Spain and Switzerland of 10 November 1896, the above cited *STC* 98/1984 of 24 October stated that the verification:

". . . . of compliance with such requirements and the interpretation of the rules establishing them are issues of ordinary legality and strictly a jurisdictional function in which this Court neither can nor ought to interfere; it is not our task, in observance of art. 24, to judge the sequence in the process of interpretation and application of the law undertaken by the judges *a quo*. For if errors have been committed in these tasks, there will be an infringement of legality but by no means will there be a violation of the Constitution".

This doctrine is reiterated in similar terms to those transcribed above in *STC* 43/1986 of 15 April in connection with a North American judgment for which *exequatur* was granted by the *SC*, and in *ATC* 795/1988 of 20 June, to both of which we shall be returning. It was reiterated again in *ATC* 147/1987 of 11 February[69] in connection with a judgment given in Mexico, for which *exequatur* had been denied; against this denial it was argued before the *TC* that the SC had ignored the principle of reciprocity. And lastly, it arose in *STC* 54/1989 of 23 February and in *STC* 132/1991 of 17 June, both mentioned above.

---

[66] *Cf.* M. Virgos Soriano and F. Garcimartín Alférez, *op. cit.*, pp. 439 *et seq.* Also, M. Amores Conradi, "Eficacia de resoluciones extranjeras en España: pluralidad de regímenes, unidad de soluciones", *Cur. DI Vitoria* (1995), pp. 267 *et seq.*

[67] *Jurisprudencia Constitucional*, t. X (1984), pp. 113 *et seq.*, in particular p. 118.

[68] *Jurisprudencia Constitucional*, t. VIII (1984), pp. 885 *et seq.*

[69] *Jurisprudencia Constitucional*, t. XVIII (1987), pp. 858 *et seq.*, in particular p. 860.

4. Respect for fundamental rights in the foreign proceedings and its place in puhlic policy

A. Introduction

33. As from *STC* 43/1986 of 15 April, there is an important exception to the rule that the requirements established by Spanish law for enforcement of a foreign judicial decision belong to the sphere of "ordinary legality": namely, that the *TC* may not examine these ". . . except, obviously, in the event of violation of a fundamental right protected by the Constitution" – a violation in which the Spanish judicial decision granting or denying *exequatur* may be "directly" involved. For example, if there is insufficient justification, the judgment is either patently erroneous or arbitrary. But, to take a line from *STC* 91/2000 of 30 March,[70] it may also be "indirectly" involved if *exequatur* is granted despite failure in the foreign proceedings to respect rights that are recognised and guaranteed by the *CE*. It is this second aspect of constitutional jurisprudence that we examine in closing this study.

34. The last mentioned *STC* highlights the fact that in the jurisprudence of the ECHR this rule was first articulated in a Judgment of 7 July 1989 on *Soering v. the United Kingdom* in connection with extradition and persisted in the Judgment of *26 June 1992* in *Drodz & Janousek v. France and Spain* in connection with enforcement of a criminal judgment in France. We might add that it has recently become consolidated in civil matters with the Judgment of 20 July 2001 in *Pellegrini v. Italy*.[71] Be it said that the position of the *TC*, from a perspective tied to a traditional requirement for *exequatur*, namely that the foreign judgment not be contrary to the "public policy" of the forum, is earlier, having been stated in *STC* 43/1986 of 15 April. There, the *TC* explained that this notion, which is expressed in art. 954 of the *LECiv.*:

> ". . . has acquired a new dimension since the Constitution of 1978. Although the public rights and freedoms guaranteed by the Constitution are only fully effective where Spain exercises its sovereignty, our public authorities, including judges and courts, cannot recognise or admit judgments given by foreign authorities where such judgments violate the fundamental public rights and freedoms that the Constitution guarantees to Spaniards and foreigners. Thus, in Spain the public policy of the forum has acquired a different meaning, particularly inasmuch as it incorporates the requirements of art. 24 of the Constitution"

---

[70] *Jurisprudencia Constitucional*, t. LVI (January–April 2000), p. 1135.

[71] *Cf.* J. D. González Campos, "Reconocimiento y ejecución de decisiones judiciales extranjeras y respeto de los derechos fundamentales relativos al proceso", in *Homenaje al Prof. Carrillo Salcedo, in press* (2005) and the jurisprudential and doctrinal references indicated there. On the Spanish jurisprudence regarding the "public policy" clause, *cf.* J. C. Fernández Rozas and S. Sánchez Lorenzo, *op. cit.* (1996), pp. 553 *et seq.*

35. This doctrine was reiterated and refined in *ATC 795/1988 of 20 July*[72] and is also contained in *STC 132/1991 of 17 June*.[73] In the first of these decisions the Court declared that violation of fundamental rights in the *exequatur* process:

> ". . . can only be imputed to the relevant Decree of the *TS* in so far as it recognises and authorises the enforcement of a firm judicial decision which although perfectly valid and lawful according to the *lex loci*, nonetheless from the standpoint of the fundamental rights protected by the Spanish constitutional order may be judged to infringe any of these rights".

Hence, as the cited *ATC 795/1988 of 20 July* makes clear, the violation of a fundamental right therefore

> ". . . has its origin in the enforcement, although the violation that may have been constituted by that foreign judgment – which, we repeat, will be such only from the internal point of view of the *lex fori* and only insofar as it is recognised and enforcement authorised will it become real and effective, as it is projected or reflected in the Spanish judicial decision granting the *exequatur*. Hence, in such cases a Decree of the Spanish *TS* will entail a violation of the fundamental right concerned, and it is from that Decree that the violation will stem, even although the root cause may lie elsewhere".

B. The extent of control

36. There are two particular points regarding the extent of control that are worth highlighting in the jurisprudence of the *TC*. Firstly, with regard to the spatial ambit of this "indirect" control, which a Spanish court must exercise in the *exequatur* process, it must be remembered that in its judgment on *Pellegrini v. Italy* cited above, the ECHR declared that it is obligated to act itself if the foreign judicial decision for which *exequatur* is requested was given in a State that is not a party to the European Convention of 1950 on protection of fundamental rights and freedoms. In a later judgment on admissibility given on 15 January 2004 in the *Lindberg* case, the ECHR did not pronounce on the event that both States are parties to the 1950 Rome Convention or on the control of substantive fundamental rights.

We would note that the rnlings made in the *TC* decisions mentioned earlier do not refer to this last aspect. We would also note in particular that reference was made in *STC 43/1986 of 15 April* in connection with a judgment given in the United States, and likewise in *STC 59/1989 of 23 February* – and again in *STC 132/1991 of 17 June* in connection with a judgment given in Algeria. The case resolved by *ATC 795/1988 of 20 June*, on the other hand, concerns a judicial decision from France. In short, then, it would be fair to say that control in the *exequatur* process must be exer-

---

[72] *Jurisprudencia Constitucional*, t. XXl (1988), pp. 1202 *et seq.*
[73] *Jurisprudencia Constitucional*, t. XXX (1991), pp. 322 *et seq.*

cised both over judgments given in States that are not parties to the 1950 Rome Convention and over decisions from States that are parties to the Convention.

37. Secondly, with regard to the fundamental rights that must be respected in the *exequatur* process, we would note on the one hand that *STC 43/1986 of 15 April* made a general reference to "the rights and freedoms that the Constitution guarantees" as being part of Spanish "public policy", although it went on to state that this concept "incorporate[d] the requirements of art. 24 of the Constitution" – that is, the fundamental rights relating to judicial proceedings. This general scope is also mentioned in *ATC 795/1988 of 20 June*, where it refers to "the fundamental rights protected by the Spanish constitutional order".

On the other hand, *STC 59/1989 of 23 February*, in light of the circumstances of the case stresses "the guarantees contained in art. 24 of the Constitution". One of these is a guarantee that a judgment given on the substance of a matter will include "the facts on which the judgment is based, and these facts shall have been sufficiently proven". Reference is also made to "the guarantees contained in art. 24 *CE*" in *STC 131/1991 of 17 June*, albeit it notes incidentally that this not being the case, consideration is not given to "the event that a foreign judgment might be alleged to infringe some other fundamental right". Which brings us back to the line of jurisprudence whereby the scope of control in the *exequatur* process is supposed to be general.

It must be said, nonetheless, that the last decision cited appears to allude to another important aspect of respect for fundamental rights in the *exequatur* process, which is a point at issue in the doctrine:[74] whether such rights must be as firmly operative vis-à-vis a foreign judicial decision as vis-à-vis a domestic judicial decision, or whether their effect is "attenuated". And indeed, in connection with the alleged lack of legal grounding of the foreign judgment, *STC 131/1991 of 17 June* states that it is up to the judge of the *exequatur* to determine

> "... whether the foreign judgment meets the requirement of resting on adequate legal grounds and, if appropriate, compliance with such requirement is homologated, inasmuch as the criteria for grounding in the Spanish legal system do not necessarily cover the foreign system".

38. Finally, it will have been noted that the jurisprudence of the *TC* on the control of foreign judgments with regard to fundamental rights is centred exclusively on the *exequatur* procedure, where such control is possible. Nonetheless, the recent Community regulation in this respect is founded on the "principle of mutual recognition", and hence the tendency is towards the suppression of *exequatur*.[75] This means

---

[74] *Cf.* on this aspect my study in *Libro Homenaje al Profesor Carrillo Salcedo, op. cit.* (2004) and the references to the doctrine indicated there.

[75] *Cf.* arts. 41 and 42 of Regulation (EC) no. 2201/2003 of 23 November and Regulation (EC) no. 805/2004 of 21 April, creating a European Enforcement Order for uncontested claims. See also the Commission's provisions in its Green Paper on Maintenance Obligations, 15/4/2004, COM (2004) 254-final. On the relevance of this principle to the Draft Treaty establishing a Constitution for Europe, *cf.* arts. III–158.4 and III–170 of the Draft Treaty.

that in the other Member States, a judicial decision must in principle be recognised and enforced "without any possibility of opposing the recognition" – despite the possibility that the defendant's fundamental rights may not have been respected in the proceedings in the State of origin. This could undoubtedly produce conflict between the Community regulations and the rights recognised by the Constitution, particularly those included in art. 24, if the person against whom enforcement is directed appeals to the *TC* for protection. However, such an event has yet to occur and therefore the solution must be left open here.