Spanish Judicial Decisions in Public International Law 1999 and 2000

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I. INTERNATIONAL LAW IN GENERAL

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IV. SUBJECTS OF INTERNATIONAL LAW

1. Succession of States

– *ATS* 18 April 2000. Order for enforcement n. 178/2000

Mrs Cherkachina Valentina B. applied for an order for enforcement of the judgment pronounced by the Court of Pervomaysk (Murmansk), Russian Federation, on 16 April 1999 dissolving her marriage to Mr Cherkachine E. V. At the time the petition for divorce was filed with the Russian court, both spouses were Russian nationals residing in the Russian Federation. When the case is brought before the Supreme Court, the petitioner continues to be a Russian citizen residing in the Russian Federation.

Reporting judge: Mr. José Manuel Martínez-Pereda Rodríguez

"Legal Grounds:

"First: Given that there is a Convention between the Kingdom of Spain and the Union of Soviet Socialist Republics on judicial assistance in civil matters, signed at Madrid on 26 October 1990 (*RCL* 1997\1605), which entered into force on 22 July 1997, that the Union of Soviet Socialist Republics has ceased to exist, giving rise to the emergence of various States, among them the Russian Federation, and that the judicial decision to be recognized was passed by a State of the said Federation, this Court must deliver judgment on the applicability of the aforesaid Convention to the Russian Federation.

Having examined the Vienna Convention of 23 May 1969 (*RCL* 1980\1295 and *Ap.NDL* 13520) on the Law of Treaties and, chiefly, the Vienna Convention of 23 August 1978 on Succession of States in respect of Treaties, it must be concluded that when parts of a State separate in order to form one or more States, the prevailing principle is the continuity of treaties, whether or not the predecessor State continues to exist.

Such is the content of article 34 of the Vienna Convention of 1978, which establishes for the aforesaid case of succession of States that any treaty in force at the date of the succession of States in respect of the entire territory of the predecessor State continues in force in respect of each successor State so formed, with the exception, stated in paragraph two, that the treaty in question does not apply if the States concerned otherwise agree or if, as a result of the succession of States, application of the treaty would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation. It must therefore be concluded that none of the aforementioned exceptions applies to the case in hand and the Convention between the Kingdom of Spain and the Union of Socialist Soviet Republics on judicial assistance in civil matters, signed at Madrid on 26 October 1990, must therefore be considered applicable.

Second: Pursuant to article 21 of the said Convention, according to which 'decisions shall be recognized and enforced when issued after the entry into force of the present Convention. Decisions which, owing to their nature, should not be enforced, shall be recognized even if issued before the entry into force of this Convention, provided they are based on a jurisdictional rule recognized therein'. In view of the precept and the subject matter and nature of the pronouncements contained in the decision to be recognized, which do not require enforcement proper, the confirmation that is sought shall be subject to the requirements laid down by the treaty in question, the examination of which is incumbent upon the court referred to in art. 24.3. Consequently, and pursuant to art. 74 of the *LECiv*, which must be related to art. 56.4 of the *LOPJ* (*RCL* 1985\1578, 2635 and *Ap.NDL* 8375) with respect to this point, and to the aforementioned art. 24.3 of the bilateral Convention, the Court must abstain from passing judgment if, having heard the Prosecutor, it considers that it lacks jurisdiction 'ratio materiae', in which case the parties should exercise their right in the corresponding court".

2. State Territory. Regime of Spanish nationality in former colonies

– *STS* 7 November 1999, Contentious Administrative Division. Appeal in cassation 6266/1995

Here the TS overturns a National Court judgment of 3 March 1995 and rules that the appellant, a native of the former Spanish Sahara who exercised, within the

statutory period and in the correct manner, his right to acquire Spanish nationality, is entitled to obtain the said nationality.

Reporting judge: Mr Francisco González Navarro

"Legal grounds

Fourth: (...) A. The judgment that is being contested states that the appellants option of acquiring nationality on the basis of one years residence is not acceptable because he fails to fulfil the requirement of having been *born on Spanish territory*, since the Western Sahara – the birthplace of Mr Ahmed A. A. (whose Saharan name is Ahmed E. S.) – 'has never been a part of Spanish territory' according to the stated purpose of Law 40/1975 (*RCL* 1975\2315 and *Ap.NDL* 12250), and to the argument used in the judgment to deny him nationality, and which the Administration also employed in its decisions of 1993, and also, subsequently, the Treasury Counsel, in the legal proceedings.

To contest the foregoing, the appellant invokes the Decree of 4 July 1958, on 'Spanish territories of west Africa', according to which 'the coastline of the *territories of Spanish West Africa* is divided into two second-class coastal provinces denominated Ifni and Spanish Sahara, with Sidi Ifni and Villa Cisneros as their capitals', and also claims that both the Administration and the judgment infringe the principle or rule of non-retroactivity of laws laid down in article 9.3 *CE*.

As we shall see, this 'sub-ground' must also be accepted, though not because of the reasoning used by the appellant. In other words: the appellant rightly states that the judgment infringes article 22, paragraph three, point one, of the Civil Code, although the Court reaches this conclusion by means of a different argument.

B. Irrespective of the fact – which in other respects can by no means be considered insignificant – that preambles or stated purposes of legal rules lack direct binding force, the forcefulness with which the transcript of the 1985 Law is cited is striking, even though, at first sight, it would be refuted by this division into 'second-class' (sic) provinces introduced by the aforementioned decree of 1958.

It is even more surprising that one of the most debated issues – and also one of the most obscure – in general theory of State is precisely the nature of its territory, so much so that for some time now there has been a need for a *topical* theory of State. By this we neither mean nor are saying that specialists in public law have lost interest in studying the notion of territory, since, as is well known, the consideration of territory as an element of the State goes back a long way. But nor can it be ignored that, at least as regards established or conventional knowledge which, owing to its nature, is common to everyone (*exoteric* knowledge), it is not common to find an explanation of facts such as the distinction between metropolitan territory and colonial territory; the legal treatment of this distinction cannot be understood if their political and even symbolical weight are pushed to one side. Analyses of this kind are rather

scarce and it seems that, for the time being, they are confined to the ambit of dissentient knowledge, that which is intended for only a few (*esoteric* knowledge).

To this unsatisfactory situation of scientific research must be added the changing attitude of colonial policy as a consequence of the equally changeable nature of international relations – a characteristic which, as is easily understandable, Spanish policy in Equatorial and western Africa has not been able to avoid and which is clearly seen in the related legislation which, if lacking any feature, it is precisely linearity; on the contrary, its appearance to any beholder is one of following a zigzagging course: a) first the said territories were simply considered to be *colonies*; b) then came the phase of *provincialization* during which it was attempted to put them on an equal footing with the mother country; c) and lastly there was the phase of *decolonization*, in the form of independence of Equatorial Guinea, cession in Ifni, and self-determination in Western Sahara.

And since our Court knows this, it is aware that the problem underlying the appeal in question is of considerable legal and constitutional importance, and therefore requires mature thought.

(...) It should be said that in this case the Court considers it appropriate to quote the sources from which it has drawn, not only on because the matter in hand is a delicate one or because, as far as possible this Supreme Court endeavours to maintain a fertile dialogue with scientific doctrine; rather, because in those decisions, the aforementioned state consultative body formulated the notion of 'national territory', a concept that inspires the interpretation to which the Spanish government has subsequently adapted the whole decolonization process and which is a key factor in resolving the problem of substance that the representation of Mr Ahmed A. A. has submitted to the judgment of this Court.

In order to understand properly the problem that concerns us, it is essential to realize that the expression *'Spanish territory'* has two meanings in legal doctrine: a *broad* sense that refers to all the physical spaces that are subject to the authority of the Spanish state and its laws and includes 'possessions'; and a *restricted* sense, which is the one that, to be precise, we should call 'national territory' strictly speaking, and from which colonies, possessions and protectorates are excluded.

It is true – and the appeal in cassation to be settled shows this – that *legal texts do not always explain the distinction between the expressions 'Spanish territory'* and *'national territory'*, even though, merely by drawing a distinction between them, it is possible to understand the meaning of those texts.

This is not the place to theorize about the contrasting characteristics that define each type of territory. But perhaps it is appropriate, in order to make the following statements intelligible, to point out that if – as indeed it is – territory is the area over which international law recognizes a States

sovereignty, the so-called *metropolitan* territory is an area that is linked, non-fungible, inalienable, imprescriptible, essential (in that it pertains to the essence of the State, to that without which a particular State would not be what it is), and whose integrity, precisely for that reason, is specifically protected, and furthermore with reinforced protection. In contrast, *colonial* territory is a territory that can be freely disposed of, fungible, alienable, prescriptible, accidental (not essential), protected with ordinary protection, whose value can be quantified in that it can be taken (as indeed it is taken) as a physical entity (therefore relating to concrete and even grossly pecuniary ideas).

Now, Guinea, Ifni and Western Sahara were Spanish territories that were not part of the national territory. And therefore the integrity of the national territory was not broken by the acts of law and state that established Guineas independence (until then it was *dependent* on Spain), the cession or, if preferred, the 'return' of Ifni to Morocco and the beginning of the process of self-determination of Western Sahara.

Indeed, a territory may only be considered 'national territory' if, *populated by a group of Spanish citizens enjoying full rights, it constitutes an administrative unit of Spanish local Administration – or of part of one such unit – and if, whatever its organization, it does not enjoy any another international personality or any other right to self-determination than that which corresponds to the nation as a whole.*

We should stress: *the Spanish Sahara* – and the same was true of Ifni and Equatorial Guinea – was, despite its denomination of province, *a Spanish territory* – that is, a territory subject to the authority of the Spanish state – *but not national territory.*

The fact is that, as we shall see, 'province' has a very different meaning in colonial law than it has in local legislation. *The 'provincialization' of Equatorial Guinea, Ifni and Western Sahara did not constitute a special characteristic of the Spanish local system, but something quite different: an improvement on the colonial system,* a step forward on the road towards decolonization, which enabled modern political structures to be established. And in this respect it should be said that the so-called 'provincialization' of those Spanish colonies was not a technique of political assimilation but rather an instrument to improve the administrative organization with a view to 'promoting the well-being of its inhabitants by fostering progress in all areas of life and accepting the sacred task of assuring their future' (Stated purpose of the Law of the *Jefatura del Estado*, 20 December 1963 [*RCL* 1963\2465], on the bases for the system of self-government in Fernando Poo, and Río Muni). It was therefore not a case of specialty but rather of heterogeneousness. And we should stress that the decree of 1958 was insufficient to create a true province. For converting a colony into a province entails altering the national territory and any alteration – however large or small – of national territory requires the intervention of the Cortes, pursuant to current law and also

according to the law in force during the period in which the 'conversion' took place (art. 9, Organic Law of the State of 1967 and art. 14.I of the Law on the Cortes). Admittedly, the Law of 30 July 1959 (*RCL* 1959\1056) was drawn up in respect of Guinea, and the Law of 19 April 196I (*RCL* 1961\577) in respect of Western Sahara; but neither law validates that provincialization, as they merely 'structure the organization and system of government' of the administrative entities, the aforementioned, which had existed since the Decree of 21 August 1956 to which the Decree of 4 July 1958, invoked by the appellant, refers.

It is also important to remember at this point the United Nations doctrine on colonization and self-determination under which decolonization was begun and carried out. This doctrine was obviously taken into consideration in the related processes for Guinea, Ifni and Western Sahara. A fundamental reference in this connection is the Declaration on the granting of independence to colonial countries and the peoples, known as the Carta Magna of decolonization [UNGA Resolution 1514 (XV), adopted at the 947th plenary meeting on 14 December 1960], which states, among other things: 'The General Assembly... *Considering* the important role of the United Nations in assisting the movement for independence in Trust and Non-Self-Governing Territories. *Recognizing* that the peoples of the world ardently desire the end of colonialism in all its manifestations [...] Declares that: Any attempt aimed at the total or partial disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations...'.

C. Since the appellant states, as a second ground for appeal, that Western Sahara was a Spanish province and considers that the judgment infringes the decree of 4 July 1958 on Spanish territory in West Africa, and since, as the questions raised in the first ground and in this other one are connected, this Court finds itself obliged to deal with them jointly, we need to address in greater detail the concept of 'province' in colonial law.

Basically, what we need to establish is when a territory is or is not colonial, irrespective of the name given to this territory and how this has been done. And in this connection it should be pointed out that this question has been discussed at length since the time of the League of Nations. Subsequently, as a result of the work carried out within the United Nations, a system of assumptions and indications has been drawn up which constitute a general standard for making assessments and naturally do not preclude the need to analyze 'the circumstances of each specific case'.

(...)

D. We must now analyze the case in point: the scope to be given to the expression 'Spanish territory' that article 22 of the Civil Code uses in subparagraph 3.1.

We have already stated that the expressions 'Spanish territory' and 'national territory' have been used rather loosely in Spanish legislation. When

this occurs in texts that postdate the time Spain ceased to have colonies, possessions or protectorates, this is not a problem. They can simply be taken to be synonyms. Such is the case of *LO* 7/1985, of 1 July, on the Rights and Freedoms of Aliens in Spain, article 11 of which mentions Spanish territory (n. 1) and national territory (n. 3).

The problem arises when, as in this case, it is necessary to apply regulations that are contemporary with these situations of territorial heterogeneousness (not to be confused with geographical dispersion).

The contested judgment fails to recognize the appellants right to acquire Spanish nationality through one years residence, on the grounds, taken from the stated purpose of Law 40/1975, of 19 November, on decolonization of Western Sahara, that this territory has 'never been part of Spanish territory'. Aside from the fact that it attempts to give regulatory force to the preamble to a law, this interpretation contradicts the findings – as we have seen – of an analysis at length of the legal situation of the Western Sahara in the three phases referred to above. During the three stages (colonization 'provincialization', decolonization), the Western Sahara was, as stated in Chapter XI of the Charter of the United Nations, a 'non-self-governing territory', that is, one of the 'territories whose peoples have not yet attained a full measure of self-government' (art. 73), that is, a territory different from 'national territory strictly speaking'.

Indeed, Spain, having recourse to the decree on 'provincialization', initially denied to the United Nations that Guinea, Ifni and Western Sahara were heterogeneous territories and delayed this recognition from 1957 until March 1961. But thereafter it rectified its stance, which was manifestly unsustainable, and began to provide the United Nations with information 'in advance and of its own free will' on these territories.

Now, the appellant was born in Villa Cisneros in 1952 and the Judge in Charge of the Civil Registry of La Laguna states in a report issued on 11 July 1991, which is included in the records of the case, that the appellant was born 'on Spanish territory', that his parents 'were originally Spanish', and that he has resided legally in Spain for more than three years.

Bearing in mind the foregoing and our extensive reasoning on this point, there is more than sufficient basis to conclude that the interpretation of the Court in question must be refuted and, insofar as that interpretation caused the appellant to be denied the nationality to which he is entitled (the Court acknowledges he is a resident since 1991), the second 'sub-ground' analyzed should be upheld and the judgment should be overturned and, effectively, this Court sets it aside.

(...)

Sixth: A. From what has been said so far, it is clear that this Court must issue a new judgment in which, on the aforementioned grounds, we must declare and do declare that the interested party is entitled to obtain Spanish nationality.

a) He is entitled to obtain Spanish nationality: first, because, having been born in Western Sahara, he properly exercised the option offered by Decree 2258/1976, of 10 August, and the express refusal on the part of the Administration is totally ungrounded and purely arbitrary. On the one hand, he is proven to have been born in Western Sahara and, on the other, nobody has stated or even attempted to prove that the appellants conduct and way of life have at any time been contrary to public interest or policy. The administrative appeal lodged against this express refusal failed to obtain any response at all from the Administration and, anyway, the interpretation of the contested judgment, in that it places the weight of the consequences of the Administrations failure to perform its duty to settle the matter, is contrary to the case-law of this Supreme Court and also of the Constitutional Court. This Court considers it necessary to place special emphasis on correcting this erroneous interpretation and the unlawful consequence which, in this case, it has had for the appellant, who has been unjustly denied the Spanish nationality to which he is entitled through having exercised the aforementioned option laid down in Decree 2258/1976, of 10 August, there being no legal reasons for preventing this. All this has been reasoned at length in the third Ground of this judgment.

b) Such a right must likewise be recognized pursuant to article 22, subparagraph 22.3 of the Civil Code since, having been born in Spanish territory – which is what Western Sahara was – as reasoned at length in the fourth ground of this judgment, he has furnished proof of having resided legally and continually for more than one year prior to the application.

B. Likewise, pursuant to the provisions of article 71 with respect to the second temporary provision of the new *LJCA* of 13 July 1998 (*RCL* 1998\1741), we must reverse and do reverse the administrative decision on which the contested judgment is based, and the Administration must take the necessary means to fully recognize and re-establish the appellants acknowledged situation.

(...)".

3. Diplomatic immuuity

– *STSJ* Madrid n. 1092/2000, 12 July 2000 (Jurisdiction for suits under administrative law) Appeal 3880/1997

The 5th Chamber of the Division of Contentious Administrative Proceedings of the Superior Court of Justice (TSJ) of Madrid allows the appeal lodged on behalf of Mrs Maureen-Elisabeth A. against the decision of the Madrid Regional Economic Administrative Court (TEAR) on 17 September 1997. The question raised is whether foreign embassies in Spain are obliged to withhold tax from their employees wages that are subject to Personal Income Tax (IRPF).

The TSJ reverses the decision of the TEAR on the basis of the obligation of foreign embassies in Spain to withhold tax from wages paid as they are legal

persons not distinguishable from the State they represent and as such are subject to Spanish law.

Reporting judge: Mr Eduardo Calvo Rojas

"Legal grounds:

First: (...) The issue is basically the same as those dealt with in Appeals 188/1997 and 2110/1996 (JT 1999\1428) – lodged in relation to wages paid by the Embassies of Canada and the United States of America, respectively – and we will therefore merely reiterate the considerations stated in our judgments 1128 and 1140, both pronounced on 8 July 1999, and in the aforementioned Appeals 188/1987 and 2110/1996.

Second: The question of whether or not the Embassies of foreign countries are obliged to withhold tax from the wages subject to *IRPF* paid to their employees has been addressed by this Court on several occasions, though it has been dealt with differently depending on whether the fiscal year in question was governed by Law 44/1978, of 8 September (*RCL* 1978\1936 and *Ap.NDL* 7157) or subject to Law 18/1991, of 6 June (*RCL* 1991\1452 and 2388).

In the case of fiscal years prior to 1992, this Court has stated that Law 44/1978 did not provide for a general and abstract obligation to withhold tax; rather, it referred the obligation to withhold tax to cases established in the relevant regulations, and having examined these cases we concluded that there was no regulatory provision allowing Embassies to be considered bound by the aforementioned obligation (cfr. articles 10 and 36 of Law 44/1978 and 147 of the *IRPF* Regulations approved by Royal Decree 2384/1981, of 3 August [*RCL* 1981\2532, 2931; *RCL* 1982, 29 and *Ap.NDL* 7171], considered in the light of articles 7 and 9 of Law 61/1978, of 27 December [*RCL* 1978\2837 and *Ap.NDL* 7226], regulating Corporation Tax, Law of 27 December 1987 [*RCL* 1987\2660 and *RCL* 1988, 590] and article 19 of the Regulations approved by Royal Decree 2631/1982, of 15 October [*RCL* 1982\2783, 2941 and *Ap.NDL* 7240]). In this connection, see, among others, our judgments n. 1370 of 3 October 1996 (Appeal 1308/1995), n. 757 of 11 June 1998 (Appeal 1355/1995) and n. 1728 of 1 December 1999 (Appeal 1811/1996). But the situation is different under Law 18/1991, which marked a substantial change in the aforementioned system.

In the opinion of this Court, the entry into force of Law 18/1991 marked a major change in the aforementioned scheme since article 98.2 of the said Law 18/1991 does establish a general obligation to withhold tax, which applies to all legal persons and entities that pay wages that are subject to the tax. The reference to legal persons, an expression that includes all those, other than natural persons, regarded by law as capable of maintaining legal relationships, must necessarily include foreign States, whether they operate in their own right or through a specific office such as an Embassy. The correlate of the condition of legal person, exercise of personality, is furthermore clearly evidenced by the very hiring of employees to which the wages relate. The

consideration of a foreign State as a legal person in the eyes of domestic law is but the primary and most obvious consequence of the recognition of the said State through the protocols whereby formal diplomatic relations are accredited. And therefore, the answer to the question of whether the Embassy should be subject to Spanish laws should be affirmative.

Embassies, or their governments through them, operate in Spain and are therefore subject to Spanish laws (*cfr.* article 13 of the Civil Code and enforceability of the regulations laid down in the Preliminary Title [*RCL* 1974\1385 y *NDL* 18760] of the Code). On the basis of the foregoing the only possibility of exclusion would be through the existence of specific rules such as international treaties. But this is not the case. Indeed, on the contrary, article 41.1 of the Vienna Convention of 18 April 1961 (*RCL* 1968\155, 641 and *NDL* 26103), to which Spain acceded on 21 November 1967, establishes the obligation of States to respect the laws and regulations of the receiving State. Therefore, it is difficult to understand how the *TEAR*, in its contested decision, ruled, without citing any precepts, that they are exempt from statutory obligations.

Third: From the foregoing arguments it is inferred that foreign States when operating in Spain are fully subject to Spanish law unless a specific regulation states otherwise and that, therefore, they are obliged to withhold taxes as established in article 98.1 of the Law of 18/1991. In other respects, this conclusion is corroborated by various administrative precedents such as, on the one hand, the reply given by the Directorate General for Taxes to the consultation on the matter in question submitted on 25 March 1996 and, on the other, subsequent decisions delivered by the same court that issued the decision that is being contested such as the Madrid *TEAR* decision of 26 November 1998 with respect to claim n. 203/1997, allowing a question like the one we are dealing with (see the reference to these precedents in our aforementioned judgments 1128 and 1140 of 8 July 1999 in Appeals 188/1987 and 2110/1996.

Having thus confirmed the Embassy's obligation to withhold taxes, the adjustment to the gross base that the claimant calls for should not be refused on the grounds of the final subparagraph of article 98.2 of Law 18/1991, which excludes it in the case of wages established by law – a circumstance which would presumably be applicable if the wages paid had been envisaged in a foreign regulation. The Court denies such an interpretation, which is contrary to article 1 of the Civil Code, since according to the Spanish regulation legality is defined in the aforementioned precept as a source of law and completely excludes any foreign regulation not incorporated into an International Treaty that is not in turn incorporated into Spanish law in the manner provided in paragraph 5 of the aforementioned precept. Therefore, as far as the dispute is concerned, it is irrelevant whether the wages stem from the application of an internal regulation of the country which the Embassy represents, from an employment contract or from any other contractual relationship.

4. Consular immunity

– *STSJ* Basque Country, Social Division, 9 December 1999. Appeal for reversal n. 2112/1999

Judgment is passed on an appeal for reversal lodged against an original judgment confirming the suit filed by Mrs Maria del Coro S. A. against Mr Pablo Alberto S. S. and the Embassy of the Federal Republic of Germany on dismissal, ruling that the dismissal of the plaintiff on 31–12–1998 was unfair, jointly sentencing the defendant undertakings to choose between them, within five days of service of this Judgment, to immediately readmit the plaintiff under the same conditions as prior to her dismissal.

Reporting judge: Mrs. Garbiñe Biurrun Mancisidor

"Legal grounds

(...) Fifth: Pursuant to article 191 c) *LPL* the appellant, the Federal Republic of Germany, complains that the joint responsibility of the so-called group of undertakings constitutes an infringement of case-law, pointing out the factors that the Supreme Court requires in order to establish the existence of such a group and stating that one of the joint defendants, Mr. S., does not belong to the German diplomatic representation in Spain; rather, that he has the status of Honorary Consul and as such undertook the obligations on his own behalf, not as an extension of the Federal Republic of Germany. The appellant adds that this position, unlike that of ambassador, authorizes Mr. S. only to mediate in the cooperation between Germany and Spain and to promote trade and cultural relations between them, and to assist German nationals. It also points out that if the defendant Consul were identified as part of the German State, article 43 of the Vienna Convention (*RCL* 1968\155, 641 and *NDL* 26103) on Consular Relations of 24–4–1963 (*BOE* of 8–3–1970) should be applied, according to which he would enjoy immunity from jurisdiction, and would not be subject to the Spanish courts.

Let us first analyse the question of the Consul's supposed immunity before going on to deal with the group of companies.

A) Article 43 of the aforementioned Vienna Convention effectively establishes immunity from jurisdiction for consular officers and consular employees, as it states that they shall not be amenable to the jurisdiction of the judicial and administrative authorities of the receiving State in respect of acts performed in the exercise of consular functions. This precept is applicable to the plaintiff, despite his status of Honorary Consul, and despite being embraced by Chapter II of the Convention which deals with career consular officers, since article 58.2 extends this to honorary consular officers.

Consular functions are furthermore listed in article 5 of the Convention, and are common to career and honorary consuls, since the article is contained in Chapter I, which refers to consular relations in general. These functions are: protecting the State they represent and its nationals; furthering the development of relations between the two States, and reporting; issuing

passports and other documents to nationals of the sending State; helping and assisting nationals, acting as notary and civil registrar; safeguarding, within the limits imposed by the laws and regulations of the receiving State, the interests of nationals of the sending State; transmitting judicial and extrajudicial documents or executing letter rogatory; exercising rights of supervision and inspection in respect of vessels and aircraft and extending assistance to the same; and performing other functions entrusted to a consular post by the sending State.

As stated earlier, it is clear that article 43 of the Convention only attributes immunity to acts performed in respect of the aforementioned consular functions, not to others. It is also clear, in the opinion of this Court, that by no means is the hiring of consular personnel or the possible vicissitudes deriving from such an engagement a consular function that is immune to the action of the Spanish courts, and this claim must therefore be dismissed, as there is no such infringement as alleged.

B) The case-law of the Supreme Court, continuing with the doctrine established in the Judgment of 30 June 1993 (RJ 1993\4939), determines the component elements of a group of companies. These elements are basically the following: single management; confusion of assets, including elements or means of production; performance of work in an undifferentiated manner for group companies simultaneously or successively; an external appearance, even if minimal, of unity; and abusive use of the legal form, to the detriment of employees, by formal division of responsibilities.

In the case we are dealing with there is evidently no group of companies since there are not two differentiated companies linked by any of the aforementioned links; rather, the Consulate is effectively part of the sending State, in this case, Germany. Hence the privileges and immunities embraced by the previously mentioned law.

This is further backed by the account of proven facts as to the financing of the consulate, since its income comes, on the one hand, from the charging of consular fees for the services performed, on which it reports on a half-yearly basis to the German Embassy (third proven fact) and, on the other, from the contribution made by the Embassy itself to the administrative expenses of the Consulate.

Therefore, since all the Consulates income comes either directly from the German State or from the performance of consular functions on behalf of that State, we must conclude that the claimant worked for the German State, albeit in the Consulate against which the action was brought, and therefore, there being no need to resort to the doctrine relating to groups of companies, as there was no such group, the sentence passed on the Federal Republic of Germany is appropriate as it was the claimants employer.

Therefore, albeit for different reasons to those stated in the contested Judgment, the decision is lawful, and this last ground of the appeal must therefore be dismissed and the original Judgment confirmed.

Sixth: It is appropriate to sentence the appellant enterprise to pay the costs of this case, since the appeal was dismissed, as it is not entitled to legal aid (article 233.1 *LPL*), and the loss of the sums deposited, which will be assigned as provided by law".

V. THE INDIVIDUAL IN INTERNATIONAL LAW

1. Human Rights and Fundamental Freedoms

a) Right to effective protection of the court

– *STC* 147/1999, 4 August (Chamber n. 2). Application for a declaration of fundamental rights 4971/1998

In this case the TC deals with an application for a declaration of fundamental filed in connection with the National Court decision that Mr Pedro Leone Etchart be extradited to Italy to serve a prison sentence for murder and possession of weapons. The right to effective protection of the court is considered to have been infringed. The trial had taken place in Italy, the defendant having failed to appear, and the appellant claims that it did not respect the proper guarantees. The Court rules that the right to effective court protection and to a trial with full guarantees for the appellant was violated and orders that the National Court decision be set aside and the proceedings be resumed from the moment prior to the delivery of the decision.

Reporting judge: Mr. Vicente Conde Martín de Hijas

"Legal grounds

Fourth: Now, from the compulsory perspective of art. 24 CE, interpreted as stated in art. 10.2, in accordance with the international treaties and agreements on this matter to which Spain is a party, which in this case take us to art. 6 of the European Convention on Human Rights (hereinafter ECHR) and logically to the case-law applied to it by the European Court of Human Rights (hereinafter Eur. Court H.R.), we must recognize that the appellant is right regarding the alleged violation of his fundamental right to effective court protection and proper defence, since the guarantees bound to this precept of our Constitution were not observed. Although it may be held to be grounded, the line of argument employed by the National Court cannot be described as having a proper legal basis, since the interpretation on which it is based with respect to compliance with art. 2.3 of the Law on Passive Extradition does not conform to the criteria laid down in the Constitution, in this respect following the case-law of the Eur. Court H.R. regarding criminal proceedings in which the accused fails to appear and safeguarding of the accused's right to defence in such proceedings, applied to similar cases.

Indeed, in the Colozza case (Judgment of 12 February 1985) and T. v. Italy case (Judgment of 12 October 1992), the Eur. Court H.R. allowed the claims

of the appellants on the understanding that the proceedings in which the appellants were convicted, in their absence, had failed to respect their right to a fair trial (art. 6.1 ECHR). Both decisions are based on the findings that, on the one hand, neither the system whereby the plaintiff was notified of the opening of the proceedings against him nor the presumption of waiver of right to legal assistance of his choice conform to the requisites of art. 6. 1 ECHR; and on the other, that the 'late appeal' is not an appeal that safeguards the guarantees of the aforementioned precept of the ECHR.

First, the manner in which the accused was notified of the commencement of the proceedings does not conform to the requisites of art. 6.1 ECHR – bearing in mind that this took place at the accused's last known address, we fail to understand why the proceedings were transferred to a contracting State to ensure the effective enjoyment of the rights guaranteed in art. 6 of the Convention (Eur. Court H.R., Colozza case, judgment of 12 February 1985, para. 28, and Eur. Court H.R., T v. Italy case, judgment of 12 October 1992 paras. 27 and 29).

Second, the assumption that the plaintiff waives the right to the assistance of a lawyer of his own choice, being appointed an assigned counsel in view of his failure to appear, does not conform to the requirement that 'waiver of the exercise of a right guaranteed by the Convention must be established in an unequivocal manner' (Eur. Court H.R., Colozza case, Judgment of 12 February 1985, para. 28). Nor does the risk of paralysing the exercise of the public action given the impossibility of holding a trial by default constitute sufficient grounds for justifying 'a complete and irreparable loss of the entitlement to take part in the hearing. When domestic law permits a trial to be held notwithstanding the absence of a person 'charged with a criminal offence' who is in Mr. Colozza's position, that person should, once he becomes aware of the proceedings, be able to obtain, from a court which has heard him, a fresh determination of the merits of the charge' (Eur. Court H.R., Colozza case, judgment of 12 February 1985 para. 29).

And finally, although the contracting States are free to regulate the means of allowing the guarantees laid down in art. 6.1 ECHR., 'the resources available under domestic law must be shown to be effective and a person 'charged with a criminal offence' who is in a situation like that of Mr. Colozza must not be left with the burden of proving that he was not seeking to evade justice or that his absence was due to force majeure' (Eur. Court H.R., Colozza case, judgment of 12 February 1985, para. 30). In this respect, the 'late appeal', the only remedy Italian legislation provides for, 'does not satisfy the criteria mentioned above. The court hearing the appeal can determine the merits of the criminal charge as regards the factual and legal issues only if it finds that the competent authorities have failed to comply with the rules governing declarations that an accused is 'latitante' or governing service on him of the documents in the proceedings; in addition, it is for the person concerned to prove that he was not seeking to evade justice' (Eur. Court H.R,

Colozza case, judgment of 12 February 1985, para. 30, and Eur. Court H.R., T. v. Italy case, judgment of 12 October 1992, para. 30).

Fifth: In the light of the aforementioned case-law, it should be pointed out, on the one hand, that the procedural circumstances of the case in hand are identical to those that gave rise to the Judgments of the Eur. Court H.R. in the Colozza and T. v. Italy cases, insomuch as the proceedings were served to the last known domicile of the appellant, leading him to be declared 'latitante' (willfully evading the execution of a warrant) for failing to appear in court and that, subsequently, a defence counsel was officially appointed – there having been no unequivocal waiver of the right to legal assistance of choice – and notified of the subsequent stages of the proceedings. Therefore, we do not understand the *ratio decidendi* of the National Court decision confirming that Mr Pedro Leone Etcharts right to be heard by a court, right to be informed of the charges against him and right to defence were respected in the Italian proceedings that gave rise to the conviction. Nor can the declaration that the 'late appeal' allows a new proceedings with unlimited jurisdiction be said to be reasonably grounded in Law since, even though the appeal allows a fresh decision on the merits of the criminal charge as regards the factual and legal issues, this is only possible if the 'late appeal' is successful and, in accordance with its rules, it is the responsibility of the person concerned to prove that he was not seeking to evade justice. As a result, it cannot be said that the decision contested in this proceedings complies with the guarantees required by art. 2.3 of the Law on Passive Extradition".

– *STC* 127/2000, 16 May (Chamber 1). Application for a declaration of fundamental rights n. 3501/1996

In this case the TC hears the appeal brought by Mr Patxi Mirena Goenaga Arrizabalaga against the Judgments of the Criminal Division of the Supreme Court and National Court finding him guilty of committing a crime of aiding an armed organization. The appellant claims alleged violation of the rights of a detained person to court protection, to a trial with full guarantees, not to give evidence against himself, not to declare himself guilty and to be presumed innocent. The TC decides to dismiss the appeal

Reporting judge: Mrs. María Emilia Casas Baamonde

"Legal grounds

4. (...) The European Court of Human Rights has also recognized that 'Although not specifically mentioned in Article 6 (art. 6) of the Convention, there can be no doubt that the right to remain silent under police questioning and the privilege against self-incrimination are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6. By providing the accused with protection against improper compulsion by the authorities these immunities contribute to avoiding miscarriages of justice and to securing the aims of Article 6 ' (Eur. Court H.R.

John Murray judgment, para. 45, and Funke judgment, para. 44). The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense the right is closely linked to the presumption of innocence contained in art. 6 para. 2 of the Convention' (Eur. Court H.R., Saunders v. United Kingdom case, judgment of 17 December 1996, para. 68).

(...) As for the specific circumstances of this case, it should also be pointed out that there is no instance of police questioning conducted without the presence of a lawyer (Eur. Court H.R., Murray v. United Kingdom case, judgment of 8 February 1996, Judgment of the Supreme Court of the United States, Miranda v. Arizona, 384 U.S. 436, 1966); rather, the statements were given to an examining Judge and in the presence of a court-appointed counsel. Nor did the examining Judge, when taking the statement, totally omit to notify the deponent of his rights as a detainee in solitary confinement. On the one hand, although the record of the information supplied to the accused regarding his rights does not literally quote what is provided for this purpose in art. 520.2 a) and b) *L.E.Crim.*, and there is no record of an information sheet on these rights having been signed by the appellant, similar to the one in the police report, the record of the proceedings (sheet 1028) states that he was informed of his rights as follows: 'I am the Judge of the Central Court of Preliminary Investigation number one, acting in Court number five... The representative of the public prosecutor is present, so is the court clerk and a duty solicitor has been called to provide legal aid because you are being held in solitary confinement, according to a decision issued by myself. You are therefore not entitled to be freely designated a counsel. However, you will be subsequently, during the trial, when the solitary confinement is lifted. And nor has your family or any other person you may designate been informed that you are here.

The Civil Guard have arrested you for allegedly collaborating with *ETA*, specifically for providing an *ETA* commando consisting of Antonio Cabello, Iñaki Ormaechea and Miguel Ruiz de Equilaz with accommodation; this accommodation may have been at the house of Ander Beristain... You are informed that you are entitled not to answer any questions you do not wish to, you are entitled not to answer at all if you so wish, and that of course you may state as much as you wish about these facts'. Furthermore, the first of the statements made before the examining Judge signed by the appellant (sheet 492) records that he had been 'previously informed of his constitutional rights and of the obligations laid down in the Criminal Procedure Law', the name of the duty solicitor and the agreement that the statement be made using a tape recording.

(...)

Now, as the European Court of Human Rights has stated (Judgment of 8

February 1996, Murray case, para. 46 *et seq*), in order to establish whether this right has been violated, it is necessary to consider 'all the circumstances of the case' and the 'degree of compulsion inherent in the situation'. To this end, it should be borne in mind, first and foremost, that the complaint is predominately formal, insofar as the appellant does not claim in any way that the aforementioned statement was made against his will and subject to any sort of compulsion. Second, nor can it be inferred from the facts that the detainee was constrained or compelled to give a statement in any way, given the presence during the statement-taking of the Judge, court clerk – guarantor of attestations – and solicitor, who was expressly asked whether she thought that the detainee had been sufficiently informed of his rights and answered affirmatively, and did not protest. From the circumstances of the case, in which the statements were taken in the form of tape recordings which, according to a literal transcription that was certified and sent by the Clerk of Central Court of Preliminary Investigation n. 5, contain the questions asked directly by the Judge and the appellants answers, nor can it be deduced that the statement was made against his will. Lastly, nor can the existence of a certain coercion to give a statement or cooperate with justice be deduced from the applicable legislation, since failure to cooperate is not punishable (Eur. Court H.R., Saunders case, judgment of 17 December 1996), and silence does not have an adverse effect the accused (Eur. Court H.R., Murray case, judgment of 8 February 1996).

Therefore, the fact that the statement was given before the examining Judge in the presence of a Solicitor and was recorded on tape, and the absence of any coercion in the same, render innocuous the formal insufficiencies of the terms employed to inform the deponent of his rights to remain silent, not to give evidence against himself and not to plead guilty, especially bearing in mind that, as they are construed by the appellant, the expressions used – 'you are entitled not to answer any questions you do not wish to, you are entitled not to answer at all if you so wish, and that of course you may state as much as you wish about these facts' – imply that the appellant was informed of his right to remain silent, since, although, admittedly, the right not to testify against oneself and not to plead guilty and the right not to incriminate oneself cannot be identified with the right to remain silent, if the right not to incriminate oneself is a constituent element of the right to remain silent (Eur. Court H.R., Saunders case, judgment of 8 February 1996, para. 68), the general notification of the right to remain silent can be held to include the information that the deponent is entitled not to testify against himself and not to plead guilty. In conclusion, there is no evidence of the existence of the reported constitutional violations".

b) Right to free expression and to freedom of information

– National Court decision (Criminal Court, Division 4) 12 January 1999. Appeal against refusal of leave to appeal n. 74/1998

In this decision the National Court dismisses the appeal filed against the decision of Central Court of Preliminary Investigation n. 5. The aforesaid decision established, as a precautionary measure, the closure and suspension of a newspaper and radio station owing to the evidence that these media belonged to the ETA terrorist group. The parties in question considered their right to free expression and information had been violated.

Reporting judge: Mr. Carlos Cezón González.

"Legal Grounds:

First: The Court of Preliminary Investigation, pursuant to articles 129 and 520 of the Penal Code, issued an order for the temporary closure and suspension from activity, also temporary, of undertakings 'Orain', 'Ardatza', 'Hernani Imprimategia' and 'Erigane', which indirectly signified the closure of the newspaper Egin and the radio station Egin Irratia. The first matter that the Court must therefore analyze when settling the motion to set aside these precautionary measures, is whether the Spanish Constitution allows the closure, albeit temporary, of a communications medium.

We take articles 20 and 10, second paragraph, of the Spanish Constitution, and article 10 of the European Convention on Human Rights (*RCL* 1979\2421 and *Ap.NDL* 3627) to have been reproduced.

Freedom of expression, including freedom to receive or transmit information or ideas, serves the purpose of forming public opinion. Free information is the basis of a free political opinion on which the constitutional values of political pluralism and freedom rest (article 1, paragraph 1 of the Constitution). The European Court of Human Rights has stated that freedom of expression not only guarantees the right to inform the public, but also the right of the latter to receive proper information (Eur. Court H.R., The Sunday Times case, judgment of 26 April 1979,) and is one of the main fundaments of a democratic society and one of the most important factors of progress and individual development (Eur. Court H.R., Lingens case, judgment of 18 July 1986,). Hence the prevalent or preferential position of freedom of expression insofar as it is exercised through the normal channels of formation of public opinion (*STC* 159/1986 [*RTC* 1986\159], 165/1987 [*RTC* 1987\165] and 171/1990 [*RTC* 1990\171]).

The Constitutional Court, in *STC* 240/1992 (*RTC* 1992\240), stressed this predominant if not hierarchic position which the right to freedom of information enjoys over the so-called personal rights enshrined in article 18, paragraph one of the Constitution, and underlined its dual nature of individual liberty and institutional guarantee. Free expression and freedom of information are fundamental rights of citizens, even as instruments of a function that guarantees the existence of a public opinion that is also free, which is indispensable to the effective achievement of political pluralism as an essential value of the democratic system (*STC* 74/1995 [*RTC* 1995\74], reiterating the doctrine expressed in previous decisions 6/1981 [*RTC* 1981\6], 104/1986 [*RTC* 1986\104], 165/1987 and 107/1988 [*RTC* 1988\107]). Those

entitled to this right are not only the owners of the medium that disseminates information or professional journalists or others who transmit information through these media; rather, they are primarily the community as a whole and each of its members (*STC* 168/1986 [*RTC* 1986\168]).

The Constitutional Court has stated that it has no objection to taking the right to disseminate ideas and opinions to include, in principle, the right to create the material media that make dissemination possible (Judgments 12/1982 [*RTC* 1982\12] and 206/1990 [*RTC* 1990\206]). This right once again applies to the whole community. However, enjoyment of this right is only possible through the action of the creator of the medium. In the case we are dealing with, the doubt about infringement of the manifestation of the right referred not to the creation of a new communications medium but to the continuation of the activity of two media that already operated.

Our Constitution establishes that the freedoms laid down in paragraph one of article 20 are limited by respect for the rights recognized in Title One, by the legal provisions implementing it, and especially by the right to honour, to privacy, to personal reputation and to the protection of youth and childhood. And paragraph two of article 10 of the European Convention on Human Rights establishes that the exercise of freedom to hold opinions and to receive and impart information and ideas freely carries with it duties and responsibilities, may be subject to certain formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

But freedom of expression is not absolute. Both article 20 of the Constitution and article 10 of the European Convention on Human Rights expressly establish its limits. Freedom and limits shape the content of the right. To cite the Constitutional Court, 'both the rules of freedom and the so-called limiting laws are integrated into a single set of rules inspired by the same principles in which, ultimately, it is fictitious to draw a contrast between the individual interest underlying the former and public interest which, in certain cases, calls for restriction. Rather the opposite is true: both individual rights and their limitations insofar as they are derived from respect for the Law and the rights of others are equally considered by article 10, paragraph one of the Constitution as a basis of legal order and social peace' (Judgment 159/1986).

Limitation may impose a restriction or condition the exercise of freedom and may also require its exclusion on the grounds of non-existence of the right in a specific case. Indeed, our Constitution (article 20, paragraph five) provides for the confiscation of publications provided this is carried out by means of a court order. And it is obvious that confiscation is aimed at

preventing in absolute terms the conveyance and reception by the public of a particular message. A constitutionally legitimate confiscation denies the right of freedom of expression – including freedom to receive or impart ideas – in respect of a specific and set content, because in this case the right does not exist, nor are its prerequisites found, the dissemination or reception of the thoughts or information are not protected by the Constitution as they fall outside the stated framework of the right because they clash with another constitutional right or value in that specific preferential case.

The right is thus denied, as it is non-existent, when attempting to exercise it constitutes a breach of legal order – unless the contrariety to the right were not necessary in a democratic society – and, in particular, if its intended exercise constitutes an offence. Also if the exercise contravenes the foundations of political order and social peace established in article 10, paragraph one, of the Constitution – human dignity, man's inviolable and inherent rights, the free development of his personality and respect for the law and for the rights of others.

The closure, albeit temporary, of a communications media would also entail denial of the right. The problem in this case is establishing whether on any occasion non-existence of the right – legal grounds for denial – could be applied to the future, that is, to thoughts or ideas not yet shaped or information not yet conveyable as they lack a premise – the facts about which to inform – or even unimaginable. It is the difference between confiscating a publication, recording or other means of dissemination of a thought, idea or piece of information – constitutionally allowed by virtue of a court order where the requirements of the limit are met – and the closure, albeit temporary, we should stress, of a communications medium. Confiscation is a reaction to an infringement of the legal order that has already been committed and is assessable as to content and scope. Closure of a communications medium amounts to a judgment of a future violation of the Law that is expected to take place. The question is whether the limits of article 20, paragraph four, of the Constitution could include provisions for the future, in which case the closure of a daily newspaper or a radio station would be legitimate – by closing and suspending the activities of the company that owns them. In principle we should dismiss the idea that such a measure would always be unnecessary owing to the existence of other means of preventing the feared harm of lesser significance, which would be the exercise of effective control of the suspicious medium, as our Constitution expressly prohibits prior censorship of publications (article 20, second paragraph).

The measure which has given rise to this appeal was carried out as part of a criminal proceedings based on evidence of the offence of membership of an armed organization (articles 515, second paragraph, and 516 of the Penal Code [*RCL* 1995\3170 and *RCL* 1996\777]) on the part of the directors of the undertakings affected by the measure and the editor in chief of the daily *Egin*, according to which *Egin* and *Egin Irratia* are allegedly part of *ETA*, serving

the purposes of the terrorist organization. The examining judge states in the decision against which the appeal is made (second legal ground) that 'irrespective of the fact that the product offered by 'Orain', 'Egin', 'Egin Irratia', 'Ardatza', 'Hernani Imprimategia' and 'Erigane' is a communications medium, it is merely an instrument for the development, justification and reinforcement of the criminal activity of the terrorist organization'.

If a terrorist organization maintains a communications medium as part of its illegal organization, the existence of a right of the armed group to sustain the operability of the communications medium should be denied. Associations of this kind, insofar as they use means established as an offence, are declared illegal in article 22, second paragraph of the Constitution, that is, expelled from the constitutional system of political order and social peace, one of the foundations of which is respect for the Law (article 10, paragraph one of the Constitution). A terrorist organization lacks fundamental rights, since it does not exist as a collective entity in the legal system. It could not invoke any right to maintain the activity of communications media integrated into its system and, in these circumstances, resolving only the case in question without wishing to draw more general conclusions, the closure of the communications medium in such a situation would, in our opinion, be constitutionally possible.

(...)

Third: The closure and preventive suspension of the activities of 'Orain' as preventive measures adopted during the hearing, insofar as they imply cessation of the publication of the daily 'Egin' and of the broadcasts of 'Egin Irratia', affect freedom of expression and we must examine whether these measures amount to an infringement of the fundamental right to this freedom, which comprises dissemination and reception of information and ideas.

In a Judgment of 28 March 1990, the European Court of Human Rights ruled that States may establish limits on freedom of expression, but these must be justified and proportionate pursuant to paragraph two of article 10 of the European Convention on Human Rights and must be restrictions provided for by the Law as measures in a democratic society necessary for the purposes indicated by the precept.

We will therefore go on to study the constitutionality of the questioned measures – closure of the media 'Egin' and 'Egin Irratia'. In the first of these legal grounds we have argued that measures of this kind are constitutionally possible. It is now necessary to establish whether those adopted in the case in question are constitutionally legitimate, which will require examining the legality of the measures – whether are authorized by law – whether their aim is legitimate, whether they are proportional to the value or right they are intended to safeguard, and whether they are necessary in a democratic society.

The interference we are concerned with here – closure of an undertaking and suspension of its activities as a precautionary measure – would not be prohibited by the Constitution if it were intended to prevent a terrorist

organization from engaging in the activities of a social communications medium integrated into its system and serving the aims of the terrorist organization. The limit on freedom of expression in respect of the rights enshrined in Title One of the Constitution is expressly stated in paragraph four of article 20 – the right to life and to physical and moral integrity, and the right to freedom and security, all of which are compromised by the action of the terrorist group; and social peace, a constitutional value one of whose foundations is respect for law as stated in article 10, paragraph one of the Constitution. The measures, which comprise closure of an undertaking, premises and establishments and suspension of its activities, are provided for by Law, in order to prevent the continuity of the criminal action and the effects thereof, in the case of offences of unlawful association, as laid down in articles 520 and 129 of the Penal Code. The second of these precepts establishes in paragraph two that the temporary closure and suspension of activities may be agreed by the examining Judge during the proceedings. The measures are in keeping with the purpose, expressly established by the Law, of preventing the continuity of the criminal activity and effects thereof – a question expressly argued in the appeal – as they are intended to prevent the terrorist organization from continuing to employ the two mass media integrated into its system to achieve its aims.

The interference is consistent with the achievement of legitimate ends – those laid down in the second paragraph of article 10 of the European Convention on Human Rights, which are crime prevention and public safety.

The appeal expressly denounced the lack of proportionality of the measure. The interference is proportionate to the importance of the purposes it serves, given the indications that an armed organization that pursues specific ends by using violent procedures against persons and property – and has carried out a very considerable number of murders – is in a position to exercise effective control over the publication of a newspaper and programming of a radio station. As the Constitutional Court has stated, the prosecution and punishment of crimes are an essential means of protecting social peace and the safety of citizens, which are recognized in articles 10 and 104 of the Constitution and, therefore, are protected by it (Judgment 196/1987 [*RTC* 1987\196]). It has also stated that the legitimate purpose of repressing terrorism does not authorize alteration of the essence of a democratic state, whose existence and development presuppose the submission of matters that are relevant to public life to the criticism or approval of a freely formed public opinion (Judgment 159/1986C). But there is no such alteration of the essence of a democratic state when a criminal organization is denied the use of a communications medium that is integrated in its system and serves its ends.

Proportionality implies weighing up the damage caused by deprivation of freedom of expression against the possible benefit for public order, that is, how appropriate the interference is to its purpose.

Deprivation, owing to non-existence, of the right to freedom of expression

in the maintaining of two communications media that are part of an illegal association (as regards use of means classified as criminal offences, see article 22, paragraph two of the Constitution), is considered proportionate to the defence of social peace (article 10, paragraph one of the Constitution), which entails the enjoyment and existence of fundamental rights and respect for which constitutes a limit on freedom of expression, particularly bearing in mind the seriousness of the crimes committed by the armed organization to achieve its ends and which could be exalted, promoted, encouraged or fostered through the communications media belonging to the terrorist organization.

It should be considered whether this proportionality is also applicable to a case like the present in which the communications media have not yet been judged to be part of an armed organization in a court decision and the closure and suspension from activity of the media constitutes a precautionary and necessarily temporary measure while the case is heard (article 129, second paragraph, of the Penal Code). The closure and suspension from activity was agreed on the basis of reasonable indications of their forming part of such an organization, which amounted to a likely danger that needed to be neutralized until the criminal liabilities and their consequences had been established and the measures judged appropriate to the seriousness of the risk.

Interference is necessary in a democratic society. For it is not appropriate to consider restriction of a different right than the one agreed on to communicate or freely receive information or opinions that is equally well suited to preserving the legitimate end that justifies the interference. For example, it would be unthinkable to have limited the cessation of activity to certain sections of the newspaper or to certain programmes of the radio station; this could furthermore be considered an ineffective means of achieving the intended aim – to prevent the continuity of the criminal activity and effects thereof. Lastly, state control of the final product of the print and spoken media would not be appropriate, as this would amount to a constitutionally illegal prior censorship.

Now, given the significance of the interference and its interim or provisional nature, a reasonable consideration of the allegedly conflicting interests will determine that the measures should be periodically reconsidered by the court, in view of the state of the enquiry, the strength of the evidence at the time of the review and the need at the time of cessation of activity of the media. Our judgment of proportionality and need has been based on the conclusions of the enquiry as of 31 August 1998 – which is the date of issue of the Order against which the appeal was filed and in which the examining judge maintains the precautionary measures in question. The need to maintain the precautionary measures and their proportionality should be judicially reviewed every six months and accordingly be extended or rendered ineffective".

c) Right to inviolability of correspondence

– *STS* 8 March 2000 (Criminal Division). Appeal in cassation n. 2546/1999

The Supreme Court overturns a judgment of the Provincial Court of Madrid of 30 April 1999 acquitting the accused of an offence against public health. The Provincial Court considered that the opening in London of a parcel sent from Ecuador to the accused's home in Madrid constituted an infringement of the right to inviolability of correspondence. The parcel, which contained narcotic drugs, was sent to Spain to be delivered to the addressee as a controlled delivery as provided in the international agreements signed by Spain.

Reporting judge: Mr. Carlos Granados Pérez

"Legal grounds

First: (...) a parcel addressed to the accused was sent from Ecuador to the accused's domicile in Madrid. This parcel arrived in transit at Heathrow airport, where customs officers detected the existence of cocaine weighing approximately one kilogram and asked the Spanish authorities if they agreed to a controlled delivery. The Chief Superintendent of the Judicial Police Headquarters requested authorization from the Chief Prosecutor of the Superior Court of Justice of Madrid to perform a controlled delivery of this parcel. The Prosecution office authorized the controlled delivery and thenceforward took charge of the enquiries. A police officer, posing as an employee of the courier firm, visited the home of the accused who, after signing for the parcel, was arrested. It was also proved that the parcel was opened in the presence of the judge, court officer, public prosecutor, the accused and his lawyer. The parcel contained three storybooks and inside their covers, wrapped in foil, 810.6 grammes of cocaine with a purity ranging between 24 and 45 percent were found.

It is not Spanish legislation that should be considered when assessing how the existence of cocaine in a parcel was detected in England. Article 3 of the European Convention on Mutual Assistance in Criminal Matters, done at Strasbourg on 20 April 1959 (*RCL* 1982\2423 and *Ap.NDL* 13560), establishes that it is the legislation of the country where the evidence is examined or obtained which should govern the manner of examining or obtaining it 'as established by its legislation', and this has been repeatedly stressed in the case-law of this Court (...)

It is true that our Constitution explicitly recognizes the right to personal privacy in order to protect from external interference the area of a person or family group that constitutes private life and the place where it is enjoyed. The inviolability of the home, of correspondence and secrecy of communications are fundamental manifestations of respect, enshrined in the Constitution, for the environment of personal and family private life.

And the inviolability of correspondence is also laid down in the European Convention on Human Rights (...) And article 17 of the International Covenant on Political and Civil Rights (New York, 19 December 1966,

ratified on 13 April 1977) (*RCL* 1977\893 and *Ap.NDL* 3630), also provides safeguards against arbitrary or illegal interference in private and family life, the home and correspondence.

It is perfectly clear, in the case in hand, that there was no such correspondence whose privacy could have been violated. (...)

This Court has delivered many judgments distinguishing between parcels and correspondence in which it attributes exclusively to correspondence the right to secrecy laid down in the Constitution and the application of the articles of the Criminal Procedure Law regulating the opening of correspondence (as in Judgments of 10 March 1989 [*RJ* 1989\2601], 22 October 1992 [*RJ* 1992\8420], 27 January 1994 and 23 February 1994 [*RJ* 1994\1111]), among others. However, since the agreement reached by a majority of the Court committee held on 4 April 1995, the criterion followed – which is not without controversy – has been that parcels must also be considered correspondence as they may bear personal messages of a confidential nature and are therefore protected by the constitutional safeguard that protects secrecy of communications (art. 18.3 *CE* [*RCL* 1978\2836 and *Ap.NDL* 2875]) and by the rules of procedure that regulate the opening of correspondence. However, the safeguard from judicial action is excluded in the case of 'green label' parcels (article 117 of the rules of the Washington Convention, according to which customs inspections are allowed) where their size or weight evidences the absence of personal messages or where the contents are declared on the outside of the parcel (*cfr.*, among others, Judgments of 5 February 1997 [*RJ* 1997\697], 18 June 1997 [*RJ* 1997\5158] and 7 January 1999 [*RJ* 1999\390]).

What cannot be demanded is that English customs officers, when acting in their own country, should abide by this Courts interpretation of certain parcels as equivalent to correspondence in respect of the guarantees to be adopted; this is not required by the aforementioned international agreements and treaties, and we should bear in mind that the XX Congress of the Postal Union in Washington approved, among other agreements, the Convention on parcel postage of 14 December 1989 and Regulations, which Spain has ratified, which expressly prohibit the inclusion of documents that are personal correspondence in parcels.

Therefore, the English customs officers cannot be considered as having violated the agreements protecting the accused's privacy; nor has it been proved that English laws were violated; what has been established, as the Court that handed down the judgment acknowledged this, is the willingness of the English officers involved in the reception, detection and delivery of the parcel containing the narcotic drug to give a statement to that Court on their respective actions, though it was not possible to take statements from them after completing the relevant procedure, because the defence, whom this evidence affected, decided not to hear it.

Irrespective of the fact that there is no evidence, and therefore it is not

stated as proven, that the English customs officers had proceeded to open the parcel, even if this were the case a violation of fundamental rights and guarantees requiring a fair trial would not have occurred; this Court has previously pronounced on this, such as in a Judgment of 14 February 2000 (*RJ* 2000\693) declaring the legitimacy of the evidence even though the parcel containing the narcotic drug had been opened by the German authorities before continuing its controlled transit towards Spain.

It is beyond any doubt, as the first-instance Court acknowledges, that the opening of the parcel was carried out in Spain in accordance with all the guarantees that the case-law of this Court requires, as provided in article 579 of the Law of Criminal Procedure, for the opening of private correspondence, even though in this case the correspondence was not of this nature.

Therefore, as the Court which handed down the judgment maintained, the evidence was not obtained by violating fundamental rights".

d) Right to the secrecy of communications

– *STC* 49/1999, 5 April (Plenary). Appeals for declaration of fundamental rights ns. 195, 254, 255, 256, 257 and 260/1995

The TC in full session hears a series of appeals for legal protection against several judgments of the Second Chamber of the Supreme Court and of the Provincial Court convicting the appellants of offences against public health and smuggling. The appellants considered that in the proceedings that gave rise to the contested judgments, their rights to the secrecy of communications (article 18.2 of the CE) and to a fair trial with full guarantees and to be presumed innocent (article 24.2 CE) were violated. The TC partially allows the appeal.

Reporting Judge: Mr. Tomás S. Vives Antón

"Legal Grounds

Fourth. (...) And, while it is true that requirements of certainty are not the same when imposing restrictions on the legitimacy of individual conduct as when establishing the conditions under which telephone communications can be legitimately intercepted (Eur. Court H.R., Malone case, judgment of 2 August 1984, no. 67), it is equally true that in each case the legislator must make the 'utmost effort' to guarantee legal certainty (...).

5. Having thus established that judicial intervention is necessary and that the legal rule in question must satisfy all the essential requirements as a guarantee of legal certainty, in order to specify them as accurately as possible, even the minimum requirements, as established in art. 10.2 *CE*, in relation to art. 8 of the European Convention on Human Rights, we must bear in mind the doctrine of the Eur. Court H.R., as we have done in previous judgments (particularly *STC* 85/1994, legal ground 3.).

Now, as regards 'accessibility' or 'foreseeability', in the case of interception of communications by public authorities, the Eur. Court H.R. has stated that this 'implies that domestic law must be sufficiently clear in its terms to give

citizens an adequate indication as to the circumstances in and conditions on which public authorities are empowered to take any such secret measures' (Eur. Court H.R.,Valenzuela case, judgment of 30 July 1998, n. 46 III, citing the Malone, Kruslin and Huvig (Eur. Court H.R., judgment of 24 April 1990), Haldford (Eur. Court H.R., judgment of 25 March 1998) and Kopp (Eur. Court H.R., judgment of 25 March 1998) judgments.

And, specifying that criterion, referring the judgments of the Kruslin and Huvig cases, in the Valenzuela case the Eur. Court H.R. establishes the minimum requirements as regards the content or 'quality' of the law as follows: 'a definition of the categories of people liable to have their telephones tapped by judicial order, the nature of the offences which may give rise to such an order, a limit on the duration of telephone tapping, the procedure for drawing up the summary reports containing intercepted conversations, the precautions to be taken in order to communicate the recordings intact and in their entirety for possible inspection by the judge and by the defence and the circumstances in which recordings may or must be erased or the tapes destroyed, in particular where an accused has been discharged by an investigating judge or acquitted by a court' (n. 46, IV). Basically, the aim is that the law should provide 'adequate protection against possible abuses' (Krushin case, n. 35, and Klass case, n. 50).

Given that, as stated previously, this specific doctrine refers to the same foundations as the one we have generally proclaimed, we must now affirm that it must be interpreted as laid down in art. 18.3 *CE*

Therefore, in the case in hand, since the interference with secrecy of communications took place between December 1986 and April 1987, it should be concluded, as the Eur. Court H.R. did in the aforementioned Valenzuela case, that Spanish law neither defined the categories of people liable to have their telephones tapped nor established a limit on the duration of the measures, and established neither the conditions for transcribing intercepted conversations, nor those relating to their use. Consequently, the position of Spanish law, examined in the specific action that is currently under examination and to which the appellants were subjected, must be considered as contrary to art. 18.3 *CE*

(...)

Second, it should be stressed that we are dealing with a violation of art. 18.3 *CE* that is independent of any other: the insufficiency of the law, which only the legislator may remedy and which, in itself, constitutes a violation of the fundamental right. This is because the insufficient adaptation of the law to the requirements of certainty creates, for all those to whom the tapping measures may apply, a danger in which this violation precisely lies (Eur. Court H.R., Klass case, cited earlier, n. 41). When considering this violation we must therefore acknowledge that the appellants have indeed been exposed to this danger; but, as occurred in the case examined in *STC* 67/1998, this does not necessary imply the constitutional illegitimacy of the action of the

courts or tribunals that authorized the interception (Eur. Court H.R. judgments of 12 July 1988, Schenck case, legal ground I, A, and Valenzuela case, legal ground I).

(...)

6. (...) A Judicial guarantee of the secrecy of communications does not simply entail the formality – authorization from a court or tribunal; rather, this order must be issued in a proceedings, the only means whereby the court procedure can be controlled, and accordingly legally effective. The nature of the telephone tapping, its purpose and the very logic of the enquiry require that they be authorized and conducted initially without the knowledge of the person in question, who is not involved in the monitoring either. However, as the court proceedings develop, this absence must be supplemented by the control exercised by the public prosecutor, the guarantor of legality and of the rights of citizens according to art. 124.1 *CE*, and subsequently, when the measure is lifted, the person in question must have the possibility, which is constitutionally necessary to a certain extent that it is not appropriate to specify here (Eur. Court H.R., Klass case, judgment, n. 55), of knowing of and contesting the measure. This safeguard also exists when, as in this case, 'non-specific inquiries', in themselves arguable, are nonetheless joined, without providing for the continuity of the proceedings under way to ascertain the offence, thereby meeting the requirements of monitoring the cessation of the measure which, otherwise, would be kept permanently, and therefore constitutionally unacceptably, secret.

7. (...) From the earliest (*vid. STC* 62/1982) to the most recent (*vid.* specially, *SSTC* 55/1996 and 161/1997), our decisions have enshrined the principle of proportionality as a general principle which can be inferred from various constitutional precepts (especially the constitutional proclamation of the Rule of Law in art. 1.1 *CE* and the reference to art. 10.2 *CE* arts. 10.2 and 18 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and which, in the sphere of fundamental rights, constitutes a rule of interpretation which, owing to its very content, places a limit on any state interference with these rights, incorporating positive and negative requirements, even vis-à-vis the law.

(...)

A similar opinion has been expressed by the European Court of Human Rights. In the aforementioned Huvig and Kruslin cases, citing other previous judgments, the Eur. Court H.R., in the light of the Convention, ruled that in order to be legitimate, telephone tapping in addition to being provided for by law, must meet the following requirements: ... b) be intended to fulfil a legitimate purpose (the Convention cites national security, public safety and the economic well-being of the country, the prevention of disorder and crime, the protection of health or morals and the protection of the rights and freedom of others) and c) be necessary in a democratic society in the above interests.

This doctrine is reiterated – as is only to be excepted, given the literal nature of the Convention – in a Eur. Court H.R., Valenzuela Contreras v. Spain case, judgment of 30 July 1998, (n. 46 et seq).

8. (...) The relationship between the person and the offence under investigation is expressed in the suspicion, but in order to be grounded, suspicions – which, like beliefs, are not merely a question of feeling – need to be based on data that must be objective, and doubly so. First, in that they must be accessible to third parties, as otherwise they could not be controlled. And second, in that they must provide a real basis for inferring that the offence has been committed or is going to be committed, though they cannot constitute judgments about the person. This minimum requirement is essential from the perspective of fundamental law, as if secrecy could be based merely on subjective hypotheses, the right to secrecy of communications, as established in the *CE*, would be meaningless. The Eur. Court H.R. therefore accepts as an adequate safeguard against abuses the guarantee that interference may only take place when 'when there are clear facts on which to suspect someone of having committed or attempted to commit certain serious offences' Klass case, n. 51, or where there is 'good reason' or 'strong indications' that the violations are about to be committed – Eur Court H.R., Ludï case, judgment of 15 June 1992, n. 38.

Partially dissenting opinion of the President, Mr Pedro Cruz Villalón,

2. Art. 10.2 *CE* imposes on national courts, including this Constitutional Court, the delicate duty, in relation to this case, of interpreting art. 18.3 *CE* pursuant to art. 8 of the ECHR. It is delicate insofar as our Constitution establishes that judicial intervention is the guarantee par excellence of the fundamental right to secrecy of communications ('except in the event of a court order'), whereas paragraph 2 of art. 8 ECHR, instead of the aforementioned guarantee enshrined in our art. 18.3 *CE*, provides a broad formula based on the principles of legality and necessity, not specifying the 'public authority' that can adopt the measure of intercepting communications.

This explains why since the Malone case (2 August 1984), the Eur. Court H.R., in a case of phone tapping in the United Kingdom, established as part of the previous requirement of legality ('interference... provided by law') the idea of 'quality of the law' with respect to its 'foreseeability' (grounds 66 to 68), drawing for this purpose on some previous decisions which are not relevant to the case: 'the law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in and the conditions on which public authorities are empowered to resort to this secret and potentially dangerous interference with the right to respect for private life and correspondence' (ground 67). Indeed, 'law', and this is the first principle, has the broadest of senses, encompassing both written and unwritten law.

The doctrine contained in the Malone judgment, regarding a case where domestic law does not require a court order, was applied – in 1990 as is known, and therefore subsequently to the cause of the present appeal – to a domestic

law like ours in which interception is decided on by the judge. Namely the Kruslin and Huvig cases, both dated 24 April 1990, which are literally the same as regards the part that concerns us in this case. In these judgments, the Eur. Court H.R. above all contests that in continental European countries only formal law can be considered a law in the sense of art. 8 ECHR. (Kruslin, ground 29). The most important fact in the case in hand is that the Court, without undervaluing the worth of the safeguard based on the intervention of the Judge (ground 34), reaffirms the idea of quality/foreseeability of the law required by art. 8 ECHR, and on this sole basis, without needing to examine further circumstances, finds a violation of art. 8 ECHR.

The recent Valenzuela case (30 July 1998) saw the reiteration, eight years later and this time applied to Spanish domestic law, of the doctrine of the previous Kruslin and Huvig cases. The Eur. Court H.R. appreciates (ground 58) the subsequent efforts made by the legislature and the judicial authorities to introduce the guarantees required in both legislation and practice in Spain (LO 4/1988 and decision of the Supreme Court of 18 July 1992), but states that in 1985, the year those developments took place, our law did not meet the requirement laid down by the Convention regarding 'interference... laid down by the law' in the terms of quality/foreseeability defined by the aforementioned doctrine.

Third. Therefore, in view of the doctrine of the Valenzuela case regarding the situation of Spanish law at the time of the developments, I find that this Constitutional Court could hardly reach a different conclusion than the judgment on this matter: the appellants right to secrecy of communications was violated. I therefore unreservedly share the statement made overturning the court decisions authorizing the telephone tapping, with the consequent possibilities of redress that this carries with it.

However, I do not share the idea of a type of violation described as 'autonomous and independent of any other' of the fundamental right determined by the shortcomings in the quality of the law which, nonetheless, may be, so to speak, subsequently 'neutralized' by a court practice that is particularly respectful of the fundamental right in question (legal ground 5.). Certainly, this is not how the Eur. Court H.R. acted in the Huvig, Kruslin and Valenzuela cases, where the mere confirmation of these shortcomings leads to the establishment of an infringement of art. 8 ECHR. As regards our constitutional laws, I do not believe we may say that the fundamental right has been violated owing to deficiency of the law and nonetheless affirm that the damage can be counteracted by the judge, since lack of foreseeability cannot be remedied ex post facto. The doctrine governing the Huvig and Kruslin cases is that unless the shortcomings of the law are remedied, the Eur. Court H.R. will continue to detect violations of the fundamental right (it is a different matter – though not irrelevant – that the reparation of this violation, as in the Valenzuela case, should be considered satisfied by merely acknowledging its existence).

4. Irrespective of the foregoing, and moving on to the point that we should continue to describe as 'quality', as regards its sufficiency, of the judges reasoning, with which the majority agree, I agree with a good part of the content of legal grounds 7, 8, 10 and 11, which specify our doctrine on the degree of reasoning that is required of court orders establishing or extending telephone tapping.

We have never doubted that the 'court order' referred to in art. 18.3 *CE* is a reasoned decision. On this basis, whatever 'reasoning' is, it is an activity that is closely related to the 'quality of law' referred to earlier: quality of the formal law facilitates reasoning; shortcomings in the law hinder it and, at the same time, make it more necessary. I agree with the conclusion that those particular decisions, under the circumstances, were insufficiently reasoned. I have some reservations about the prominence that the principle of proportionality is beginning to acquire in our conception of fundamental rights, which these legal grounds illustrate well: it does not seem to me to be indispensable to rely on this principle in order to enforce the constitutional requirements explicitly set out in art. 8.2 of the ECHR. Nor should it be forgotten, once again, that the Eur. Court H.R. bases its reasoning on a model in which the intervention of a judicial authority is not unavoidable; the needs stemming from judicial control following an intervention that may be administrative may not simply be applied to what for us will always be control of judicial intervention. It is necessary to demand 'quality' from a court order as regards its reasoning which, in the case in hand, was lacking, but I do not believe we should go much further in establishing this. Now, with these reservations, I reiterate my agreement with the conclusions reached on the basis of these legal grounds.

(...)

The fact is that, although not a deciding factor, it should be remembered that we have now abandoned the sphere of art. 10.2 *CE* and, in particular, of the ECHR, which regards this as a problem that should be basically solved by domestic law (Schenk case, 12 July 1988, ground 46); therefore, in the Valenzuela case, the European Commission and, later, the Eur. Court H.R. dismissed the claim regarding the repercussions of the violation of secrecy on the verdict of guilty. The implicit reference point is now the United States, that is, that of simple comparative law, and the categories that were established by its Supreme Court at the beginning of this century and are therefore very well defined. For in the Illinois v. Krull case (480 U.S. 340), the Supreme Court declares that the so-called 'rule of suppression' of unlawful evidence does not apply in cases where the police were confident of the legitimacy of a law that authorized searches without a court order and is subsequently declared contrary to the Fourth Amendment. And in the United States v. Leon case (468 U.S. 897), it likewise stated that the same rule of suppression should not be applied to evidence obtained from a seemingly legitimate court authorization that is subsequently declared null and void".

e) Right to a trial with full guarantees

– *STSJ* Granada, Andalusia, Civil and Criminal Division, 30-7-1999, n. 15/1999. Remedy of appeal n. 10/1999

In this judgment the Superior Court of Justice of Granada dismisses the remedy of appeal lodged against the judgment convicting Mr José Manuel B. L. of murder. It dismisses the grounds for appeal claimed by the convicts lawyer regarding violation of the right to a public trial with full guarantees, on the one hand, and of the right to be presumed innocent, on the other.

Reporting judge: Mr Augusto Méndez de Lugo y López de Ayala

"Legal Grounds:

Second: Regarding *ground a) of article 846 bis c) of the Law of Criminal Procedure*, the first of the complaints to be considered relates to the dismissal of a piece of anticipated evidence proposed by the defence, namely examination of one of the witnesses, specifically a minor, Pablo B., the accused's son (...)

Sixth: ...The current article 448 paragraph three of the Law of Criminal Procedure, introduced by Organic Law 14/1999, of 9 June (*RCL* 1999\1555), establishes that 'where the witness is a minor, the Judge, depending on the nature of the offence and the circumstances of the said witness, may agree in a reasoned decision and on the basis of an experts report, that the witness should not be brought face to face with the accused, using for this end any technical or audiovisual means of making the hearing of such evidence possible'...

... Even in a more restrictive case [Judgment 64/1994, of 28 February (*RTC* 1994\64)], the Constitutional Court states: 'There is no doubt that such a manner of giving a statement during a trial constitutes a certain abnormality since, first, it is neither regular nor frequent practice and, furthermore, it would not appear to be consistent with the literal terms of article 229.2 of the *LOPJ*, which establishes textually: '... Statements, confessions at a trial, witness statements, face to face interviews.... shall be carried out before the Judge or Court in the presence or with the intervention, as appropriate, of the parties and at a public hearing, unless otherwise established by Law'. Now, this Court has repeatedly stated that it is not only the confirmation of a certain procedural irregularity which makes an application for a declaration of fundamental rights constitutionally relevant; rather it is the real influence it may have in the particular case on the allegedly violated fundamental rights. Therefore, what we must now examine, in order to ascertain whether the petition should be allowed, is not the irregularity in itself but rather its significance from the perspective of the two allegedly violated fundamental rights.

From the first aforementioned perspective – as the Judgment goes on to state – that is, right to a public trial with full guarantees enshrined in article 24.2 of the Constitution, the disputed witness statement must in turn be

analysed with respect to three requirements, which may be summed up as follows: publicness, contradiction..., in order to ascertain whether or not they were observed in this concrete case. The first requirement, that is, that a trial be public, cannot be considered violated in this case because, aside from the abnormal manner in which the statement was taken, the trial was held in the Court building and documented in the related record, and there is no indication of restrictions of access regarding its holding or the obtaining or disseminating of information thereof. Therefore, the purpose or raison d'être of the right to a public trial, which is none other than the possibility of making the working of the Courts publicly known and subject to the control of individual interests, has in no way been tarnished in this case. Now, from the perspective of the guarantees enshrined in article 24.2 *CE*, the question must be examined, as indicated, in relation to two basic requirements: possibility of contradiction..., that is, real exercise of defence. The procedural contradiction stems directly from article 6.3 d) of the European Convention on Human Rights (*RCL* 1979\2421 and *Ap.NDL* 3627), in the light of which article 24.2 *CE* must be interpreted, as laid down by article 10.2 of the Constitution. Article 6.3 d) of the Convention establishes that anyone charged with a criminal offence is entitled to examine or have examined witnesses against him under the same conditions as witnesses on his behalf. Therefore, the question that arises is whether this requirement may be regarded as fulfilled in cases such as the present, in which witnesses for the prosecution give their statement without being seen by the accused, although they are heard. The Eur. Court H.R. has examined the problem in various judgments, but more in relation to anonymous witness statements, that is, those in which the identity of the witnesses was unknown to the Court or to the defence or to both. Such is the case of the Kostovski judgment of 20 November 1989 (series A, n. 166), and the Windisch judgment of 27 September 1990 (series A, n. 186), and, finally, the Ludi judgment of 15 June 1992 (series A, n. 238). In these judgments the Eur. Court H.R. recognizes the importance of protecting witnesses who may be liable to suffer retaliations and to allow the trial and conviction of criminals belonging to organized groups or members of large-scale criminal organizations (Ciulla and Kostovski judgments), and likewise appreciating the need to guarantee and encourage citizens cooperation with the police in combating crime (Windisch judgment). But, even so, in two of the aforementioned judgments (Kostovski and Windisch cases) it has considered the conviction of a plaintiff on the basis of anonymous witness statements to be contrary to the requirements deriving from the Convention, taking as such statements given by people whose identity is unknown to the Court, to the defence or to both, as this leads to a restriction of the rights of defence because it makes it impossible to contest them before the court in charge of deciding on the innocence or guilt of the accused. In the Ludi case, it stressed the importance of making it possible to contest the witness statement for the prosecution, even though, on this occasion, the identity of the person

in question (a police officer) needed to be protected. The reference to the previous doctrine of the Eur. Court H.R. therefore allows us to conclude that it is the impossibility of contestation and the total anonymity of the witnesses for the prosecution which the aforementioned Court considered contrary to the requirements deriving from article 6 of the Convention; therefore, on the contrary, cases such as the present where the witness statement cannot be described as anonymous but rather 'hidden' (meaning that the witness gives it without being seen by the accused), though the possibility of contradicting and knowing the identity of the witnesses – on the part of the defence and the Judge or Court that is to decide on the guilt or innocence of the accused – is respected, must be considered to fulfil the requirements deriving from article 6.3 d) of the Convention and, therefore, also the guarantees enshrined in article 24.2 of our Constitution".

f) Rights of the child

– STC 141/2000, 29 May (Chamber 2). Application for a declaration of fundamental rights n. 4233/1996

In this judgment the Constitutional Court hears the appeal lodged by P. Carrasco against the judgment issued by the Provincial Court of Valencia in a separation and divorce proceedings. The appellant considers that the aforementioned judgment violates articles 16.1 (freedom of religion) and 27.3 (religious and moral instruction) of the CE, as it restricts his visitation rights on account of his personal beliefs.

The TC decides to allow the appeal.

Reporting Judge: Mr Tomás S. Vives Antón

"Legal Grounds:

4. Freedom of beliefs, whether religious or secular, signifies the recognition of a field of action that is constitutionally immune to state coercion as guaranteed by art. 16 *CE* 'with no other restriction on their expression as may be necessary to maintain public order as protected by law'. It therefore protects an *agere licere* which, in the case we are dealing with, consists of professing whatever beliefs are wished and behaving in accordance with them, as well as maintaining them vis-à-vis third parties and proselytizing them. That constitutional power is particularly manifested in the right not to be discriminated against on the grounds of creed or religion, in such a manner that different beliefs cannot justify different legal treatments (*SSTC* 1/1981, 26 January, *FJ* 5; *AATC* 271/1984, 9 May; 180/1986, 21 February; 480/1989, 2 October; 40/1999, 22 February; Eur. Court H.R., Hoffmann case, judgment, paras. 33 and 36, referring to para. 38), varies in intensity depending on how it governs a persons own conduct and the use each person makes of it or the repercussions that the conduct stemming from ones beliefs has on third parties, whether they be the state itself or individuals, be it by intending they observe the duty to abstain from interfering in our freedom of beliefs or

intending them to be the object and recipient of those same beliefs. When art. 16.1 *CE* is invoked to protect ones own conduct, without directly influencing that of others, freedom of beliefs provides a full protection that is only limited by the coexistence of this freedom with other constitutionally protected rights and legal assets.

However, when that same protection is sought for external manifestations of beliefs, that is, not in order to defend oneself from the interference of third parties in ones freedom to believe or not to believe, but rather to claim the right to have them share in some way or another ones own convictions and influence or condition others behaviour according to them, it is quite a different matter.

When his convictions and the adaptation of his conduct thereto becomes external and is no longer limited to his private and individual sphere, manifesting itself to third parties to the extent that it affects them, the believer, protected by the freedom of belief enshrined in art. 16.1 *CE*, cannot expect any limit imposed upon this conduct to automatically constitute a restriction of his freedom that violates the aforementioned constitutional precept; nor can he expect, merely by upholding his freedom of belief, to alter private legal transactions or the very compulsory nature of the dictates of law when exercising this freedom, under penalty of relativizing them to a degree that is intolerable for the survival of democracy itself, of which legal certainty is also a fundamental legal principle (*SSTC* 160/1987, 27 October, *FJ* 3, 20/1990, *FFJJ* 3 and 4). The believer's right to believe and behave in accordance with his convictions is subject to no other limits than those imposed by respect for others fundamental rights and other constitutionally protected legal assets; but the right to manifest ones beliefs to third parties by professing them publicly and proselytizing them, adds to the former the indispensable limits for maintaining the public order that is protected by the Law. The public authorities therefore infringe this freedom if they restrict it in ways other than, or by overstepping, the limits established in the Constitution; or, even when they base their acts on these limits, if they in some way disturb or prevent the adoption, maintenance or expression of certain beliefs when there is a causal link between the action of the public authorities and these restrictions and the latter prove indisputably disproportionate (*SSTC* 120/1990; 137/1998; Eur Court H. R. judgments for the Hoffmann case, para. 36; Manoussakis case, paras. 47, 51, 53; Larissis case, para. 54).

Furthermore, the most obvious limit on freedom of belief is found in that same belief itself, in its negative manifestation – that is, the right of the third party concerned not to believe, not to share or not to tolerate others acts of proselytizing (Eur. Court H.R., Kokkinakis case, judgments of 25 May 1993, paras. 42 to 44 and 47; of 24 February 1998, Larissis case, paras. 45 and 47); and the moral integrity (art. 15 *CE*) of whoever suffers the external manifestations of this profession of belief is also an evident limit on this freedom of beliefs, as these beliefs may either entail a certain moral

intimidation or even inhumane or degrading treatment (*SSTC* 2/1982, 29 January, *FJ* 5; 120/1990, *FJ* 8; 215/1994, 14 July, *FJ* 4; 332/1994, 29 December, *FJ* 6; 137/1997, 21 July, *FJ* 3; *AATC* 71/1992, 9 March, *FJ* 3; 333/1997, 13 October, *FJ* 5; Eur. Court H.R. judgments Kokkinakis case, para. 48 and Larissis case, para. 53).

In view of the foregoing, it is appropriate to examine whether the judgment that is contested imposed a justified limit on the appellant's freedom of belief for a constitutionally legitimate aim and, if so, whether it was applied proportionately to the sacrifice of that freedom.

5. From the point of view of art. 16 *CE*, minors are fully entitled to their fundamental rights – in this case, to their rights of freedom of belief and moral integrity; and the exercise thereof and ability to decide on them are fully subject to the decisions of those who are attributed their guardianship and custody (or, as in this case, *patria potestas*), whose influence on the minors enjoyment of his fundamental rights shall be adapted in accordance with the maturity of the child and the different instances in which legislation adjusts its capacity to act (arts. 162.1, 322 and 323 *CC* or art. 30 Law 30/1992, of 26 November, on the Legal System of the Public Administrations and Common Administrative Procedure). Therefore, it is the duty of the public authorities, and very especially of the courts and tribunals, to ensure that the exercise of these powers by their parents or guardians or by those responsible for protecting and defending them is conducted in the interests of the minor and not in the service of other interests which, however legitimate and respectable, should be subordinated to the 'higher' interest of the child (*SSTC* 215/1994, 14 July; 260/1994, of 3 October; 60/1995, of 17 March; 134/1999, of 15 July; Eur. Court H.R., Hoffmann case, judgment of 23 June 1993).

In short, progenitors freedom of beliefs and right to proselytize their children is limited, as well as by the intangibility of the moral integrity of the latter, by that same freedom of belief to which minors are entitled, manifested in their right not to share their parents' convictions and not to tolerate their proselytizing or, more simply, in their right to entertain different beliefs to those of their parents, particularly when such beliefs may negatively influence their own personal development. Should a conflict arise, these freedoms and rights enjoyed by both must be weighed up, always bearing in mind the 'higher interest' of minors (arts. 15 and 16.1 *CE* in relation to art. 39 *CE*).

When, as in this case, we are dealing with the alleged effects on two minors of their father's practices stemming from his beliefs, the international rules on the protection of children that are applicable in Spain should also be taken into consideration. These include, very especially, the United Nations Convention on the Rights of the Child (ratified by Spain by instrument of 30 November 1990) and the European Parliament Resolution on the European Charter of Children's Rights (Resolution A 3-0172/92, 8 July), which, together with Organic Law 1/1996, of 15 January, on Legal Protection of Minors, in force at the time the Judgment contested was passed, constitute

the indispensable legal status of minors on Spanish territory, implementing art. 39 *CE*, and very particularly, paragraph 4. According to the foregoing, the status of the minor is undoubtedly a rule of public policy, which must be compulsorily observed by all public authorities and constitutes a legitimate limit on the freedom to manifest ones own beliefs by expounding them to third parties; this applies even to progenitors.

Art. 14 of the Convention on the Rights of the Child thus establishes that 'States Parties shall respect the right of the child to freedom of thought, conscience and religion'. Paragraphs 2 and 3 go on to state that 'States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child' and 'Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others' (paragraphs 25 and 27 of para. 8 of the Resolution concerning the European Charter).

Therefore, it must be concluded that the sacrifice of freedom of beliefs imposed on the appellant by the contested Judgment of the Provincial Court stemmed from a legitimately constitutional aim. We are dealing with a limitation of the freedom of beliefs of a parent consisting of an additional restriction on the visitation system which, since it is aimed at protecting an interest regarded as of a higher nature in the Constitution, is not, from the point of view of its aim, discriminatory".

– *STSJ* Catalonia, 23 March 1999 (Jurisdiction for suits under administrative law). Appeal n. 1550/1995

The Fifth Division of the Chamber for Contentious Administrative Proceedings of the Superior Court of Justice of Catalonia delivered a Judgment on 23–3–1999, dismissing the appeal lodged by Mr Benjamín C. D. and Mrs Dolores R. V. against the decision of the Conseller D'Ensenyament of 14 April 1995 dismissing the ordinary appeal lodged by the appellants against the statement of the Territorial Delegate in Tarragona, of 31 January 1995 informing them that their children had been provided schooling in accordance with the joint official language system in Catalonia in the field of non-university education.

The TSJ of Catalonia dismisses the petitioner's request, first, that their youngest child receive primary education in Spanish on the grounds that this is his mother tongue, ignoring the system of individualized attention established in the Law on Linguistic Normalization in Catalonia and, second, that the other two children should be taught half the subjects in Spanish in accordance with the bilingual educational model established therein.

Reporting Judge: Mr. Joaquín José Ortiz Blasco

"Legal Grounds:

First: In these proceedings the Decision of 24 April 1995 of the *Conseller*

D'Ensenyament is contested dismissing the ordinary appeal lodged by Mr Benjamín C. D. and Mrs Dolores R. V. against the statement of the *Delegado Territorial* in Tarragona, of 31 January 1995 informing them that their children had been assigned schools in accordance with the regulations governing the joint official language system in Catalonia in the sphere of non-university education.

Second: To find an appropriate solution to the questions raised in these proceedings it is necessary, first and foremost, following a logical order, to establish the inappropriateness of raising the question of the unconstitutionality of articles 2.2, 9, 10, 20.2, 21.1 and 21.5 of Law 1/1998, of 7 January, on Linguistic Policy (*RCL* 1998\363 and *LCAT* 1998\13) on the grounds that they infringe articles 3, 9.2, 14, 27 and 39.4 of the Constitution (*RCL* 1978\2836 and *Ap.NDL* 2875), bearing in mind the untimely nature of this petition, since the decision that is contested was delivered before Law 1/1998, of 7 January was published and entered into force, and the law in force at the time was Law 7/1983, of 18 April (*RCL* 1983\970, 1179 and *LCAT* 1983\634), whose constitutionality was examined by the Constitutional Court in Judgment 337/1994, of 23 December (*RTC* 1994\337); and in any event it should be borne in mind that article 35 of the Organic Law on the Constitutional Court (*RCL* 1979\2383 and *Ap.NDL* 13575) establishes in paragraph 1 that the Judge or Court shall raise the point with the Constitutional Court, ex officio or ex parte, when it is considered that a rule with the force of law applicable to the case and on whose validity the decision depends may be contrary to the Constitution.

Third: Second, we should stress the procedural irregularity committed by the appellants, as can be confirmed by a careful reading of the court documents. Indeed they filed a request with the administration for their children Sandra, Borja and Yago, aged ten, eight and three, and in 5th, 3rd and primary 3 years respectively, to be taught in Spanish, since 'Spanish is their own mother tongue and habitual language' (24 January 1995), though this request is subsequently qualified by the petition that to teaching in Spanish be added 'the learning of Catalan as the language of the autonomous region' (27 February 1995). In the written petition the intention to overturn the decision is accompanied by a request that 'the linguistic policy of the CP Mestral de L'Hospitalet de l'Infant be rendered ineffective as it is contrary to law and derives from rules that violate the domestic and international regulations ratified by Spain', recognizing 'the right of the pupil Yago C. R. to receive a primary education totally in Spanish, without individualized attention and with suitable classrooms, teachers and texts' and that of 'the pupils Borja and Sandra C. R. to be taught half their areas and subjects in Spanish, according to the model of totally bilingual education recognized by regulations and case law'.

Fourth: After citing article 39.4 of the Constitution with respect to the different international agreements, the Universal Declaration of Human

Rights (*LEG* 1948\1) and the United Nations Convention on the Rights of the Child (*RCL* 1990\2712), from which it is inferred that the public authorities are obliged to guarantee teaching in the minors language, respect for his identity, the requirement not to adopt measures discriminating him from other citizens, and the recognition of the essential task of the parents in raising the child, the petition reaches the conclusion that the educational authorities of the regional government of Catalonia do not respect such principles.

What is more, it considers that individualized attention amounts to 'papering over the cracks' and that 'pupils with individualized attention will be children who are marginalized in class, who will never sing songs in their mother tongue (they are children aged up to seven) and who will certainly suffer the consequences of the fact that their parents have chosen on their behalf to defend the family language'.

And in this connection it considers that Decrees 75/1992, of 9 March (*LCAT* 1992\187) (article 3), 94/1992, of 28 April (*LCAT* 1994\236) (article 6), and 95/1992, of 28 April (*LCAT* 1995\237), (article 5), infringe articles 14.2 and 4 of the Law on Linguistic Normalization in Catalonia, as they neither guarantee the right to receive primary education in the minor's customary language nor provide the necessary means, and 'the method of 'individualized attention' does not amount to effective and full observation of pupils right to express themselves in Spanish in a classroom in which teachers and other pupils express themselves and relate to each other in Catalan'.

Fifth: The contested decision provides an adequate response to the appellants' petition as it states that the pupil Yago C. R., since joining the CP Mestral, was taught in Spanish by means of individualized attention – an organizational and educational option that guarantees children's right, recognized in article 14.2 of Law 7/1983, of 18 April, to receive primary education in their habitual language and enables the fulfilment of the objective, established by the Law itself, not to separate pupils on the grounds of language; although it is legitimate to disagree with the educational policy of an authority, this does not mean that, aside from sharing or disagreeing with this criticism, it should be considered that the course of action followed is contrary to law when it merely puts into practice the legal postulates that have been considered consonant with the constitutional model both by the Constitutional Court and the Supreme Court and Superior Court of Justice of Catalonia, without prejudice to correction of the excesses which may occur in specific cases. It is inappropriate to reproduce literally the reasoning contained in the *STC* of 23 December 1994 (*RTC* 1994\337), *STS* of 13 July 1995 (*RJ* 1995\6107) and 17 April 1996 (*RJ* 1996\4627) and *STSJ* Catalonia of 24 February 1994, the most significant points of which are transcribed in the written petition and response, but it should be stressed that it is not appropriate to raise again issues that have already been examined and settled by the courts of justice, particularly issues relating to the conformity with the Law of the provisions contained in Decree 362/1983, of 30 August (*LCAT*

1983\1334), amended by Decree 576/1983, of 6 December (*LCAT* 1984\682), which develops in the sphere of non-university education the principles of the basic rule on linguistic normalization in Catalonia. The Supreme Court, in a Judgment of 13 July 1995, when analyzing article 9 of the aforementioned Law, which in the opinion of the appellant is contrary to the principle of equality laid down in article 14 of the Constitution, states that it is not contrary to Law 7/1983 'if it is interpreted in the sense that the progressive extension it proclaims [and which was already provided in article 14.5 b) of the Law and is also used by the Constitutional Court] cannot be such that it excludes Spanish as a language of teaching from levels subsequent to primary education; since article 9 refers to other rules, determination of the areas or subjects that should be taught in Catalan at different non-university levels, it shall be these other rules that must make the determination without excluding either of the official languages'.

Sixth: Therefore, considering that articles 7 and 9 of Decree 362/1983, of 30 August, are in accordance with the aims of Law 7/1983, and bearing in mind the interpretation of them established by the Constitutional Court in its Judgment of 23 December 1994, and the one made of the Decree by the Supreme Court in its Judgment of 13 July 1995, we must examine whether in the specific cases in question they have been correctly applied. And on this matter it should be said that the existence of some isolated data that could imply an inappropriate application does not alter the basic assumption that in the education of the minors Yago, Sandra and Borja C. R. the basic principles contained in article 14 of Law 7/1983, which develops Decree 362/1983 in the field of non-university education, were respected. The Court does not agree, as this has not been duly proved, that the education received has caused psychological disorders or has led the minors to become isolated in the school environment; indeed, in view of the reports included in the administrative enquiry it can be said that their conduct is adequate and progress with their studies satisfactory. And while it is reprehensible that the regional education authority does not facilitate the task of the parents in choosing the language in which they wish their children to begin their studies owing to the confusing wording of the related forms, or that certain documents contain unfortunate expressions (for example, the so-called 'strategies for facilitating individualized attention for pupils who request primary teaching in Spanish'), this does not affect the idea that in the case in hand there is nothing to prove unequivocally that the relevant regulations have not been fulfilled, since the fact that a few pages of a mathematics exercise book were written in Catalan is not sufficient to be able to state categorically that this subject, which should be taught in Spanish, is mainly or largely taught in Catalan. We should nonetheless remind the CP Mestral that it must fully abide by the regulations on education as regards use of Spanish, as established in number 2 article 9 of Decree 362/1983. And as for the 'individualized attention' given to the minor Yago C. R. we have nothing to reproach the educational authorities for its

application to the case in hand as it respects the spirit of the legislation as inferred from the report by the chief inspector of education of the territorial delegation of Tarragona on 26 January 1995, which has not been distorted, and the extrajudicial observations contained in the governing document of the proceedings about the consequences of the Catalan educational system, which are worthy of respect, should not be considered by the Court".

XIII. EUROPEAN COMMUNITIES

3. Application of Community Law

– *STSJ* Valencia (Chamber for Contentious Administrative Proceedings, Division 1) 23 July 1999. Appeal n. 1832/1996

In this judgment the TSJ of Valencia dismisses the appeal lodged by Mr C.F. against a Resolution of 29 March 1996 of the Conselleria de Agricultura y Medio Ambiente penalizing him for infringing, on a plot of land owned by him, the obligations laid down in Spanish and European Community regulations on environmental protection.

Reporting judge: Mr Luis Manglano Sada.

"Legal Grounds:

First: This appeal was lodged by Mr Vicente C. F. against a Resolution of 29 March 1996 of the *Conselleria de Agricultura y Medio Ambiente*, which fined him Ptas. 10,000,001 and granted him one month in which to restore the plot affected by the illegal action.

Second: As may be inferred from the proceedings, on 15 December 1994 a complaint was lodged by the technical department of the *Conselleria de Medio Ambiente*, informing the Conselleria that plot 563 Industrial Estate 9-2a covering an area of 1,320 sq m of the Parque de la Albufera in Algemesí had been filled in with earth and planted with a different crops, resulting in the transformation of an area of wetland where rice was grown into an orange orchard.

(...)

On 15–12–1994 proceedings were instituted against the appellant and after the court proceedings in which charges were made, sanctions were proposed on 23–11–1995, and on 29–3–1996 the case was determined by imposing a fine of Ptas 10,000,001 on the accused and ordering him to restore the land to its previous state, since the regional authority considered that the facts constituted a very serious infringement of art. 38.7 and 9 of Law 4/1989, of 27 March (*RCL* 1989\660), on the Conservation of Nature Areas and of Wild Flora and Fauna.

Third: The appellant contests the administrative proceedings as he considers that: there is no prior regulatory designation of the plot owned by him as a protected natural area; it violates the principle that offences must

be specified as such; the offence has lapsed; and there is insufficient evidence for the prosecution.

Fourth: (...)

The next level of law is Community law. Until 1986 there was only a remote reference to community environmental policy in art. 36 of the EEC Treaty (*LCEur* 1986\8), and until then the legal basis for community action in environmental matters was arts. 100 and 235 of the Treaty of Rome.

The Single European Act of 1986 (*RCL* 1987\1562 and *LCEur* 1987\2040) established protection of the environment as one of the community policies, shaping its characteristics in arts. 130 R), S) and T). The Act incorporated a new Title, VII, entirely devoted to the Environment, to the third part of the EEC Treaty.

The signature of the Treaty of Maastricht (*LCEur* 1992\2465) in February 1992 marked the introduction of certain new elements in environmental matters through arts. 3-k), 100 A), 129, 171, 130 D), 130 R), 130 S) and 130 T).

Mention should be made of the impact on the matter in question of the different Action Programmes (five) approved by the Council since 1973 with a main objective: protection of nature, combating contamination of water and air, noise pollution, the problem of waste and protection against hazardous substances and chemical products; recently these rules have even affected the regulation of certain matters such as biotechnology.

The relationship between community law and the domestic law of the countries which make up the European Union is based on a series of principles which are likewise applicable to the existing relationship between Community environmental law and national administrative law. Two of these principles are relevant to the case in hand:

a) Principle of direct effect of community regulations. Direct effect is a significant characteristic of community rules, as if it did not exist, relations between member states would be different. It was the case-law of the Court of Justice of the European Communities which made this principle effective following the 'Van Gend-Loos' Judgment of 5–2–1963, the consequences of direct effect being:

- From the moment they are enacted in the Official Journal of the European Communities, community rules are directly applicable and do not need to be transposed to domestic law.
- Community rules immediately generate rights and obligations for their recipients, who may be not only the member states but also individuals, when they are involved in legal relationships governed by Community law.
- Community rules can be invoked by individuals directly before the courts and tribunals of the member States, since citizens, like those States, are also subjects of Community law.

Nonetheless it should be stressed that the direct applicability of a rule depends on its content, so that, as the ECJ has repeatedly stated, direct effect

will be given, first and foremost, both to rules imposing an obligation to abstain and to those creating obligations to act, extending the direct effect to relations between individuals, and, second, the direct effect of rules is acknowledged without any problems, but directives are a different matter and should be treated separately.

b) Principle of primacy of Community Law, which states that Community rules endowed with direct effect prevail over internal ones, whether the former precede or are subsequent to the latter and whatever their status, on the basis not only of direct effect but also of the principle of the autonomy of community law. This is a primacy conceived in very broad terms, in accordance with the case-law of the ECJ (Internationale Handelsgesselschaft Judgment, 17–12–1970, Nold Judgment, 14–5–1974 and Simmenthal Judgment 9–3–1978). Legal ground 21 of the latter states that 'every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule'.

(...)

Lastly, it should be stressed that with respect to Protected Nature Areas it is appropriate to invoke as applicable sectoral rules: the Convention of 23 November 1972 (*RCL* 1982\1739 and *Ap.NDL* 10479), the Ramsar Convention, 2 February 1971 (*RCL* 1982\2203 and *Ap.NDL* 4858), the Berne Convention, 19 September 1979 (*RCL* 1986\3023), Law 4/1989, of 27 March, on the conservation of nature areas and wild flora and fauna, the Laws establishing the different National Parks, the regulations of the autonomous region, EEC Directives 79/409, of 2–4–1979 (*LCEur* 1979\135), 86/122, of 8-4-1986 (*LCEur* 1986\1209) (on wetlands), 92/43, of 21-5-1992 (*LCEur* 1992\2415), on the Conservation of Natural Habitats and of Wild Fauna and Flora and 94/24, of 8–6–1994 (*LCEur* 1994\2004).

Sixth: Having established the jurisdictional and regulatory aspects of the disputed issue, we should now conclude that in the case in hand the controversy over the existence of regional regulations of the *Parque de L'Albufera* and the wetlands that make it up is irrelevant, bearing in mind the direct application of the basic state and European Community rule, without prejudice to the consideration that if the complaint was lodged in December 1994 and the developments occurred less than two years before that date, we should not rule out the applicability of Decree 71/1993, of 31 May of the *Consell de la Generalitat Valenciana.*

Law 4/1989, of 27 March is directly applicably to the case under debate. In the stated purpose art. I expressly and clearly mentions its purpose of enforcing art. 45.2 *CE*, implementing its guidelines, particularly those affecting the rational use of natural resources in order to protect and improve quality of life and defend and restore the environment.

Infringements are described as minor, less serious, serious and very serious

depending on their repercussions and significance for people and properties and the circumstances of the person responsible, degree of malice, involvement and benefit obtained, and the irreversibility of the damage or deterioration in the quality of the resource or protected asset.

(...)

The conducts described must be considered very serious in view of the area affected, its proximity to wetlands, the lack of authorizations or permits to fill it with earth and the vital importance of the ecosystem; this category is also applicable pursuant to art. 39.2 of the aforementioned legal text. The facts examined in this proceedings fall into the category of administrative offences described in view of the destruction of an area of wetland which constituted a habitat for aquatic birds, vulnerable species in danger of extinction.

The foregoing observation leads us to the Community regulations defining their territorial framework, their scope of protection as an ecosystem of international importance, particularly as an area of wetland and habitat for aquatic birds. Indeed, the Ramsar Convention of 2 February 1971, ratified by Spain on 18-3-1982 (*BOE* 199, of 20–8–1982), on wetlands of international importance, which entered into force for Spain on 4–9–1982, defines as wetland site n. 13 La Albufera in Valencia, with an area of 21,000 hectares. This Convention establishes (art. 2) that the designated wetland sites of each Contracting State shall be included on the list, defining the bounds of each wetland to be described by means of maps. This was performed with La Albufera in Valencia which, by means of an agreement of the Council of Ministers on 19 April 1990 was added to the list of wetlands protected by the international community.

Furthermore, Council Directive n. 79/409/EEC, of 2 April 1979, on the conservation of wild birds, which includes L'Albufera with an area of 21,120 hectares is applicable; art. 3.2 b) of this directive regulates the maintenance of the habitats of protected areas in order to ensure the survival and reproduction of protected species (art. 4.1). This Council directive was subsequently amended by 86/122/EEC, of 8 April 1986, and 92/43/EEC, of 21 May 1992, both of which are equally applicable.

Finally, this Court considers that the minimum fine of Ptas.10,000,001 imposed pursuant to art. 39.1 of Law 4/1989 by the authority against which the appeal was lodged to be balanced, on the understanding that the principle of proportionality has been respected."