Spanish Judicial Decisions in Public International Law, 1997

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1. The Immunity of Foreigu States

– Judgment delivered by the Madrid Superior Court of Justice on 21 May 1997 (Social Jurisdiction). Appeal 974/1996.
Reporting Judge: Mr. Juan Antonio Linares Polaino.
Source: RJA 1997/4693.

In this sentence, the Madrid Superior Court heard this appeal for reversal filed by the United States Embassy in Madrid against a sentence which declared the dismissal of Pedro B.C. inappropriate and sentenced the party which is the complainant here to readmit the worker or to pay the corresponding financial compensation due to him.

"Legal Grounds:

Second.– ... In order to resolve this issue, we should commence with the understanding that in our legal system the principle of relative or restricted jurisdictional immunity takes precedence, as the petitioner did indeed recognise, with regard to foreign states subjected to national courts. This fact requires a distinction between *acta iure imperii* (absolute jurisdictional immunity) and *acta iure gestione* (theoretically subject to jurisdictional revision). In the case of the dismissal of a Spanish national working in a foreign embassy located in Spain,

the second type of *acta* would apply in accordance with the Supreme Court rulings of 10 February 1986 (*RJ* 1986/727) and 1 December 1986 (*RJ* 1986/7231) and the particularly significant Constitutional Court Judgment 107/1992 of 1 July (*RTC* 1992/107). The petitioner was well aware of this case law but argued that although Spanish jurisdiction prevails with regard to answering to the economic consequences of the termination of the labour contract, agreed to by the accused, it does not have the right to investigate the cause of the dismissal because it is the exclusive right of any sovereign state to determine the number of workers employed in its embassies and the Court is in agreement with this criteria. It is not possible to impose a predetermined staff in a foreign embassy. The decision regarding human and material resources to be assigned to a diplomatic mission is an '*acta iura imperii*', not only in accordance with the immunity principle provided for in the 1961 Vienna Conventions on diplomatic relations and those of 1963 (*RCL* 1970/395 and *NDL* 26104) on consular relations, but also by virtue of its very nature as a political act in the context of diplomatic activity. That is why this decision may not be reviewed (with the corresponding possibility for annulment). The decision to reduce the number of embassy employees was taken within the jurisdictional headquarters of the United States Government. This in no way means, however, that the dismissal is considered appropriate. The termination of a labour contract interpreted as an '*acta iure gestione*' making the management decision of the foreign state subject to national courts in no way means that an '*ad hoc*' amendment of labour legislation is to be applied by a judicial institution".

2. Diplomatic Immunity

– Supreme Court Judgment delivered on 23 January 1997 (Jurisdiction for suits under Administrative Law). Appeal 8452/1992.
Source: RJA 1997/351
Reporting Judge: Mr. Jaime Rouanet Moscardo

On 21 September 1982, the entity known as the "People's Office of the Libyan Diplomatic Mission" acquired a house in Madrid to be used as headquarters for the Al-Fateh Arab School. The Land Value Increments Tax was applied to this acquisition and in a decision handed down on 18 September 1987, the Madrid Town Hall rejected the appeal for reversal filed by the Mission with regard to the tax. The Town Hall's decision was appealed before Madrid's Superior Court for Suits under Administrative Law which pronounced its sentence on 12 February 1992 admitting the appeal.

The Supreme Court rejected the remedy of appeal filed by the Madrid Town Hall thus confirming the appealed sentence.

"Legal Grounds:

Third.– As a result, at the time of the 1982 court decision, the system established in accordance with the following articles was applicable: 517

(defines those taxpayers to whom the tax applies); 518 (defines exactly who is obliged to pay this tax as substitute taxpayers) and 520 (paragraph 1 of which specifies the subjective and objective exemptions with no specific mention being made of diplomatic missions or persons or entities exempt from this tax by virtue of international treaties or conventions. This latter case, however, is clearly covered by the above mentioned Royal Decree 3250/1976 which, according to arguments made, is not applicable in the municipality of Madrid).

Notwithstanding the above and as was reflected in the Verbal Notes and in the Certification from the Spanish Foreign Affairs Ministry attached to the 21 September 1982 document, 'the People's Office of the Libyan Diplomatic Mission (having obtained the mandatory prior authorisation allowing the acquisition of the real estate to be used for the Al-Fateh Arab School) is exempt from all national, regional or municipal taxes and charges in accordance with the Vienna Convention (*RCL* 1968/155, 641 and *NDL* 26103) on diplomatic relations and the principle of diplomatic reciprocity'.

Art. 23 of the Vienna Convention on Diplomatic Relations (18 April 1961) affirms that, once having met Art. 12 requirements on authorisation or permission (granted by the host State, Spain) regarding the establishment of offices forming part of the Diplomatic Mission, the acquiring State (in this case Libya and the Head of the Mission) is exempt from all national, regional or municipal taxes and charges associated with Mission offices regardless of whether these are owned or rented properties. Taxes and charges which, in accordance with the legal precepts of the host State, are payable by an individual (in this case the Mexican couple selling the property) entering into a contract with the acquiring State or with the Head of the Mission, are not exempt.

As a result of the above and in accordance with Civil Code Art. 1.5 which states that 'legal regulations forming part of international treaties will be directly applicable in Spain once they form part of the internal regulations following the publication of the unabridged text in the *Boletín Oficial del Estado*, there can be no doubt that the 1961 Vienna Convention Art. 23, published in the Spanish *Boletín Oficial del Estado*, on 24 January 1968 is implicitly applicable, with respect to the Municipality of Madrid, in the context of Paragraph 1, Art. 520 of the 1955 Locale Regime Law (*RCL* 1956/74, 101 and *NDL* 611).

Therefore, despite the fact that Paragraph 3 of this latter precept states that 'the right to an exemption is to be granted to the person or entity to whom the tax applies', *i.e.* to the selling taxpayer in accordance with Art. 517, completely independent of the person obliged to make payment, *i.e.* the buyer and substitute taxpayer, it is nevertheless self evident that if Art. 23 of the above mentioned Convention provides an exemption that is objective (with regard to taxes affecting Mission offices) as well as subjective (exempting the acquiring State and the head of the Mission, except in the case of individuals who sign a contract with these latter two), the Libyan Diplomatic Mission cannot be considered subject to this controversial tax even if considered a substitute taxpayer because the wording of Art. 23 is so

specific and strict that it is exempt from fiscal obligations both in its potential condition as taxpayer as well as its real one – the one it assumed in the 21 September 1982 public deed – as substitute".

V. THE INDIVIDUAL IN INTERNATIONAL LAW

1. Aliens

– Supreme Court Judgment delivered on 11 November 1997 (Jurisdiction for suits under Administrative Law), Appeal 3660/1993.
Source: RJA 1997/8303.
Reporting Judge: Mr. Juan Antonio Xiol Rios.

In this sentence the TS rules on the Supreme Court appeal filed by the legal representative of Ernesto G.B. against a sentence handed down by the TSJ Administrative Law Court of the Community of Valencia on 21 January 1993 which refused to renew the Community residence card provisionally issued to the petitioner.

The TS admitted the appeal thus repealing and annulling the sentence. The Administrative Law Appeal was admitted therefore annulling the refusal of the request and granting the applicant the right to obtain a Community residence card in accordancc with RD 1099/1986 allowing citizens of European Community states to enter, reside and work in Spain subject to the regime set up in that provision and subsequent applicable regulatory modifications.

"Legal Grounds:

Third.– This Court, however, finds it appropriate to distance itself from the doctrine applied in these sentences with a view to establishing a general criteria that, removed from selective particularities, lends itself to the interpretation of the legal regulations in this area moulding its case law to the doctrine accepted by the Court of Justice of the European Communities given that it is incumbent upon this latter Court to establish definitive and binding doctrine, by virtue of the principle of precedence of Community law over internal law with regard to the application of the freedom of European Community Member State nationals to take up residence in another Member State; a right guaranteed through the European Community Treaty and further developed in several sources of Community law integrated into Spanish internal law.

The Court of Justice of the European Communities, especially subsequent to the 7 July 1992 'Micheletti and others' judgment, Case 369/1990, has established restrictive doctrine within the scope of the European Community Treaty regarding the Member States' right to oppose the nationality of another state in cases like this one. In this sentence, resolving a preliminary issue the legal grounds of which are in fact quite similar to those established

by the First Instance Court, rules that Community law provisions regarding freedom to establish residence are in conflict with a Member State which chooses to deny this freedom to a citizen of another Member State who is also a citizen of a third country alleging that the legislation of the host state considers him a national of the third state. The Court of Justice ruling is in answer to the question of whether in cases of double nationality, one of a Member State and another of a third state, European regulations allow a Member State to deny freedom to take up residence based on the fact that the applicant's last habitual residence was in the third country.

This Court points out that the judgment made by the Court of Justice of the European Communities is not an isolated decision but is rather in line with a consolidated doctrine applicable to diverse issues up to the present time. Proof is found in the recent 2 October 1997 judgment in the 'Stephen Austin Saldanha and MTS Securities Corporation/Hiross Holding AG' judgment C-122/1996 in which the Court states that the anti discrimination principle by virtue of nationality covered in Art. 6 of the EC Treaty (*LCEur* 1986/8) should be interpreted in the sense that it opposes a Member State requiring the constitution of a '*cautio iudicatum solvi*' for a national of another Member State who also happens to be a national of a third country where he has established residence when this person, who did not have either possessions or domicile in the former Member State, filed a suit before a civil court there as a shareholder against a company operating in that State while not imposing this same requirement on nationals in the same situation (lacking possessions or domicile)."

2. Aliens. Refugee Law

– Supreme Court Judgment delivered on 22 December 1997 (Jurisdiction for suits under Administrative Law). Appeal 455/1995.
Source: RJA 1997/8789.
Reporting Judge: Mr. Juan Jose González Rivas.

In this sentence the Supreme Court hears the appeal filed by the legal representative of Raiad T.S. against the decision taken at the 3 March 1995 Ministerial Council meeting that rejected the appeal against the 29 December 1992 Resolution of the Ministry of Justice and the Interior which denied the petitioner the right to asylum.

The Supreme Court declared that the acts object of the appeal completely conformed to legal regulations and their validity is thus confirmed by this sentence.

"Legal Grounds:

Third.– Within the scope of international law, the 28 July 1951 Convention relating to the Status of Refugees and the 31 January 1967 Protocol relating to the Status of Refugees, both to which Spain is party as of 14 August 1977 (the 1951 Convention in force from 12 November 1978 and the 1967 Protocol from 14 August 1978, published in the *BOE*, issue 252, 21 October 1978),

point to the fact that all people with no exceptions have certain fundamental freedoms and liberties as expressed in the preamble of the 28 July 1951 Geneva Convention and in the text of the 31 January 1967 New York Protocol, passed by Resolution 2.198 (XXI United Nations Assembly). These texts form part of our internal legal system in accordance with Art. 96.1 *CE* and Art. 5.1 of the Civil Code Preliminary Title and are further developed, within the framework of our internal legal system, by Act 5/1984 right to asylum regulations, modified by the 19 May Act 9/1994, the texts further developed by the 20 February *RD* 511/1985 which initially regulated the application of the Regulatory Act on the Right to Asylum and Refugee Status and by the currently in force *RD* 203/1995 of 10 February which endorses the Regulations for the application of the 19 May Act 9/1994.

Fourth.– In order to resolve the issue at hand, the following suppositions were made:

a) The definition of political refugee taken from the above mentioned regulations describes a foreigner with well-founded fears of persecution due to race, religion, nationality, opinions or membership of a particular social group who is outside the country of his nationality and who is unable or, owing to such fears, is unwilling to avail himself of the protection of that country. This definition implies a series of undetermined legal concepts that give the Government a certain margin of manoeuvrability given the difficulty of operating among these concepts and the need to take a positive and concrete decision on whether the circumstances warrant the concession or refusal of asylum.

   These circumstances are sometimes difficult to prove and in the case of a political refugee there is a need to prove reasonable probability of persecution due to the motives indicated and these must be proven based on an evaluation indicating whether the circumstances do actually give rise to founded fear and persecution for reasons of race, sex or religion.

b) In accordance with Art. 14 of the Universal Declaration of Human Rights, articles 2 and 3 specify the concurring circumstances required. Art. 3 is particularly explicit in its description of the causes for justifying as well as for denying application, the circumstances required of a person to be considered a refugee or to be suffering persecution or subject to unfair judgment. Asylum can be granted to any foreigner who fulfils the requisites specified in the international documents ratified by Spain especially the 28 July 1951 Refugee Convention drawn up in Geneva and the 31 January 1967 Refugee Protocol drafted in New York. Asylum is not to be granted to those who are in one of the categories described in Arts. 1 F) and 33.2 of the Geneva Convention.

Sixth.– In this specific case and being mindful of the concurring personal and sociological circumstances without establishing overall criteria, it became incumbent upon this Court to identify the necessary elements in determining

the legality of the decision being appealed. To aid in this process, the European Union has established criteria (published in the Official Journal of the European Communities 13 March 1996, issue L 63/2, Brussels) with respect to the common position defined by the Council of Europe and based on Art. K) 3 of the European Union Treaty relative to the equanimous application of the term 'refugee' in accordance with Art. 1 of the 28 July 1951 Geneva Convention relating to the Status of Refugees. The determining criteria are: a) well-founded fear of persecution for reasons of religion, nationality, political persuasion or by virtue of membership of a particular social group; b) these motives must be sufficiently serious by their very nature or repetition, comprising a serious affront to human rights and must originate from one of the aforementioned circumstances: race, religion, nationality, membership of a particular social group or political persuasion; c) in order to be considered persecution, these attacks and prejudices must be sufficiently serious so as to warrant the use of public order measures either prohibiting or repressing a religious practice, even in private.

In the case at hand, not only is the United Nations (UNHCR) report missing, which would be indicative of a decision taken by the International Refugee Organisation, but the petitioner also failed to meet the criteria applicable".

3. Humau Rights

a) Right to be assumed innocent

– Constitutional Court Judgment delivered on 2 February 1997, Number 161/1997. Unconstitutionality Case 4198/1996.
Source: RTC 1997/161.
BOE, 30.10.97, Issue 260 (supplement).
Reporting Judge: Mr. Carles Viver Pi-Sunyer.

The Constitutional Court rules on a case of unconstitutionality referred from criminal court 1 in Palma de Mallorca with respect to Penal Code Art. 380 (Organic Law 10/1995, 23 November) for possible violation of CE Arts. 1.1, 9.3, 17.3, 24.2, 25.3 and 53 dealing with the alcohol test. The case was rejected.

"Legal Grounds:

First.– This unconstitutionality issue examines Penal Code Art. 380 from the perspective of *CE* Arts. 1.1, 9.3, 17.3, 24.2, 25.3 and 53. The new penal code states that 'the driver who refuses to submit to legally established tests to check for those circumstances outlined in the above article when so required by a public authority agent, will be punishable for the crime of serious disobedience described in Art. 556 of the Code'. Criminal Court number 1 in Palma de Mallorca is of the opinion that this precept goes against the principle of proportionality in sentencing and is an affront to re-education

and social mainstreaming. It also considers that it violates the right to not testify against oneself and to not declare oneself guilty.

Third.– The broader context of this issue gives rise to two principle problems: the compatibility of Penal Code Art. 380 with the right to not testify and to not declare oneself guilty and, in a more general sense, with the right to defence and presumption of innocence outlined in *CE* Arts. 17 and 24.2. The second problem is the proportionality of the sentence *ex CE* Art. 25.1 with respect to *CE* arts. 1.1, 9.3 and especially to Art. 17 of the constitutional text. The institution calling this issue into question also suggests a different perspective of the constitutional evaluation of this penal norm: the orientation of liberty deprivation sentences towards re-education and social mainstreaming with a reference to *CE* Arts. 25.2 and 53.1. It specifically affirms that the incarceration envisioned in Penal Code Art. 380 'is exclusively oriented towards the objective of general prevention', and thus turns a deaf ear to the mandate contained in the constitutional precepts cited. However, as we will mention further on and as the Treasury Council indicated, the arguments supporting an infraction of *CE* Art. 25.2 and *CE* Art. 53 are unconvincing.

Fourth.– The first main point of this unconstitutionality issue is the harmonisation of the new penal code with the right of the suspect to not testify and with the right of all citizens to not testify against themselves or declare themselves guilty. The Prosecutor's brief adds the element of a right to defence.

This constitutional doubt was essentially already dealt with and resolved by this Court. The *STC* 103/1985 affirmed that the duty to submit to an alcohol test cannot be considered as going against the right to not testify against oneself and to not declare oneself guilty because it does not oblige the subject in question to make a statement expressing a given content or admitting guilt but rather it involves permitting oneself to be made the object of a special type of evaluation which requires a level of cooperation which is not comparable to testifying as this term is understood in the context of the rights described in Arts. 17.3 and 24.2 of the Constitution.

As was already alluded to, the reconsideration of this issue now without broadening the perspectives of the examination to other aspects of Art. 24, could give rise to a change in criteria applied to this case law. The European Court of Human Rights recently reiterated (17 December 1996 sentence, *Saunders v. the United Kingdom* Sentence, paragraph 68; previously in the 25 February 1993 sentence, *Funke v. France*, paragraph 44, and in the 8 February 1996 sentence, *John Murray v. United Kingdom*, paragraph 45), that the right to remain silent and the right to not incriminate oneself, not explicitly mentioned in Art. 6 of the Convention (*RCL* 1979/2421 and *ApNDL* 3627), are at the very core of the right to a fair trial and are closely linked with the right to presumption of innocence. Our Constitution does in fact make specific mention of the right to not testify against oneself and to not declare

oneself guilty, both intimately related with the right to defence and the right to presumption of innocence.

On the one hand, silence is a possible defence strategy for this defendant or any future one or it can be considered a guarantee of a future selection of that strategy. As was explained *in extenso* in the *STC* 197/1995, the old investigative criminal trial was 'governed by a system of weighted evidence in which the accused was considered the object of the criminal trial and the aim was to procure, through his statement or even through the use of torment, a confession to the charges made against him. In the accusatory criminal trial however, the defendant is no longer the object of the trial but rather the subject, *i.e.* a party to the trial and as such a statement, just as a way of procuring evidence or any other investigative act is and must be assumed to essentially be a manifestation or ideal means of defence. Assuming that this is true, the accused must be afforded the necessary freedom by being granted the opportunity to make a statement and with regard to the content of that statement. The right to not testify against oneself or to declare oneself guilty ... are instrumental guarantees or rights corresponding to the general right to defence that are applicable in any passive manifestation or statement, *i.e.* one made with the inactivity of the subject and by virtue of which an accusation is or could be made and who, as a result, may defend himself in court in the manner in which he deems appropriate and under no circumstances may he be forced, induced or compelled to testify against himself or to declare himself guilty' (legal ground 6).

The guarantees with respect to self incrimination in this context refer exclusively to contributions made by the accused and only to those contributions whose content is directly incriminating.

Seventh.– If we apply the two legal grounds developed above to the issue of unconstitutionality, we must first of all reiterate that the tests used to determine whether the driver of a motor vehicle is under the influence of alcohol, toxic drugs, hallucinogens or psychotropic substances, for example an alcohol breath analyser, are not either a statement or testimony in the strict sense of the word and therefore cannot be considered a violation of the right to remain silent, to not testify against oneself and to not declare oneself guilty. Neither are these tests a breach *per se* of the right to presumed innocence by inversion of the material content of the test.

From the point of view of the citizen and the risks that operating a motor vehicle imply, accepting these control measures and collaborating with their application becomes a correlative responsibility, within of course the limits marked by basic legal guarantees. The operation of a motor vehicle is an activity that can put the physical integrity of many people in serious risk to such a degree that today it is the number one cause of death among certain segments of the Spanish population. Having said this, and as is the case with a number of other potentially dangerous activities, it would seem perfectly justifiable that the public authorities, bearing the greatest responsibility to

defend the lives of the citizens, subject those who want to perform this activity to preventive controls carried out by the public administrations and apply sanctions in accordance with the seriousness of their infraction. The objective of obliging citizens to submit to alcohol detection tests or tests for other types of drugs, despite the doubts that could originate from a literal interpretation of Penal Code Art. 380, is to monitor whether drivers are adhering to the rules established by the police in order to guarantee traffic safety. This subjection to the tests not only fails to meet the criteria of self incrimination with respect to a crime against traffic safety by virtue of what has already been expressed, but also, in the context of the new Penal Code in force today, constitutes a specific crime of disobedience. With regard to the crime of disobedience, in contrast to what the district attorney suggests, it does not make sense to consider it a crime *per se* but rather an act of self incrimination. The criteria applied here basically coincide with Resolution (73) 7 of the Committee of Ministers of the Council of Europe, 22 March 1973 that stated that 'no one had the right to refuse to submit to a breath test, to a blood test or to a medical check up. It is the national legislations that have the responsibility to make sure that this principle is properly applied' (point II.2 c). It also coincides with the viewpoint expressed by the European Court of Human Rights (17 December 1996 Sentence, *Saunders v. United Kingdom*, paragraph 69) and by the European Commission of Human Rights (issues 968/1961 and 8239/1978).

With respect to the canon used to determine the proportionality of a precept based on the argument of 'the existence or not of alternative measures which are less intrusive but just as trustworthy as the one analysed', we have already mentioned that the control of this Constitutional Court 'is very limited in both its scope and its intensity' and cannot take on the role of an imaginary legislator and become involved in the corresponding political, economic and opportunistic considerations which are institutionally foreign to it and for which it was not organically conceived. Only if in the light of logical reasoning, of non controversial empirical data and of the set of sanctions that the legislator estimates are necessary to attain analogous protection, would it be necessary to devise an alternative, less restrictive means of achieving equally efficient results desired by the legislator and proceed to reject the rule of the ordinance. (*STC* 55/1996, legal ground 8).

Thirteenth.– Considering the important protected assets and interests that we summarised in the tenth legal ground and despite the clear severity of the sanction which calls for the deprivation of freedom, we did not find an 'inherent, excessive or unreasonable imbalance' between the seriousness of the conduct and the sanction that would suggest to us that an affront to freedom had been committed from the perspective of *CE* Arts. 17.1 and 25.1.

With regard to the rest, what was suggested as excessive relative severity is not relevant in terms of proportionality: the typical specification of this type of disobedience compared to others also produced in the context of a hearing or pre-hearing process. In short, the fact that the penal legislator specified a

specific type of serious disobedience cannot automatically be termed as disproportionate".

– Supreme Court Judgment delivered on 17 December 1997 (Penal Jurisdiction). Appeal 1656/1996-P.
Source: *RJ* 1997/8770.
Reporting Judge: Mr. Ramón Montero Fernández-Cid.

The Supreme Court agreed to hear an appeal for an infraction of the law filed by the defendant José Antonio R.D. against the Sentence delivered by the Huelva Territorial Court on 26 October 1996 for the crime of repeated rape. A second judgment was handed down absolving him of that crime of rape.

"Legal Grounds:

(...)

Second.–

... The Constitutional Court doctrine is thus applied upholding the premise that, except in very specific cases, the only evidence which can call into question the presumption of innocence is that which is given in plenary or in oral proceedings or, in the event of anticipated or pre-constituted evidence, during the investigative stage only when it cannot be reproduced later and the right to defence and the possibility of contradiction is guaranteed (*SSTC* 76/1990 [*RTC* 1990/76], 138/1992 [*RTC* 1992/138], 303/1993 [*RTC* 1993/303], 102/1994 [*RTC* 1994/102] and 34/1996 [*RTC* 1996/34]); and all of the following requirements are met: a) Material: evidence that deals with facts which, by their ephemeral nature, cannot be reproduced on the day of the oral proceedings (*SSTC* 137/1988 [*RTC* 1988/137], 154/1990 [*RTC* 1990/154], 41/1991 [*RTC* 1991/41], 303/1993, 323/1993 [*RTC* 1993/323], 79/1994 [*RTC* 1994/79], 36/1995 [*RTC* 1995/36], 51/1995 [*RTC* 1995/51] and 40/1997 [*RTC* 1997/40]). b) Subjective: The evidence is discovered by the only authority with sufficient independence to generate acts of evidence – the Trial Judge (*STC* 303/1992 [*RTC* 1992/303]). Under extraordinary urgent circumstances, the judicial police are also authorised to make reports and collect and guard elements pertaining to the body of the crime (*SSTC* 107/1993 [*RTC* 1993/107], 201/1989 [*RTC* 1989/201], 138/1992 and 303/1993, among others). c) Objective: The right to contradiction must be guaranteed and therefore, whenever possible, the defence must be given the possibility of appearing before the court at the execution of that summary evidence in order to be able to interrogate the witness or pose questions to the expert (*STC* 303/1993); and d) Formal: it is required, first of all, that the regime of execution of the summary evidence be the same as that of the oral proceedings, *i.e.* the same as the cross examination (thus differentiated from the correlative acts of investigation in which the questions posed by the parties must be formulated through the trial judge), and second of all that the object of the testimony be presented in the public hearing through the 'reading of documents' allowing

the content of which to be compared with the other statements made by those participating in the oral proceedings (*SSTC* 25/1988 [*RTC* 1988/25], 60/1988 [*RTC* 1988/60], 51/1990 [*RTC* 1990/51], 140/1991 [*RTC* 1991/140] and finally *STC* 200/1996 [*RTC* 1996/200]).

It is obvious that this general rule is not strictly adhered to in the event that the claimant-witness exercises his or her right to not provide incriminating evidence against a family member given that that would violate the principle of contradiction if the summary statements are read in the plenary in accordance with Code of Criminal Procedure Art. 730. If in fact, however, throughout those summary statements an opportunity was not given either to the accused nor to his defence lawyer to be present, this would constitute a violation of Arts. 6.3,d) of the Rome Convention on Human Rights (*RCL* 1979/2421 and *ApNDL* 3627) and Art. 14.3 e) of the International Covenant on Civil and Political Rights (*RCL* 1977/893 and *ApNDL* 3630) and thus constitutes a violation of the right to defence and consequently a violation of the presumption of innocence envisioned in Art. 24.2 of the Constitution.

(...)

The general rule alluded to above has received the blessing of the European Court in four different sentences. The sentences delivered in the *Kostovski Case* ECHR judgment 20 November 1989, the *Windisch Case*, ECHR judgment 27 September 1990, the *Delta Case*, ECHR judgment 19 December 1990 and the *Isgró Case*, ECHR judgment 19 February 1991. The above mentioned exception has also received the support of the ECHR. For example in the sentence handed down in the *Unterpertinger Case*, the ECHR (4 November 1986) made reference to the sentence against Mr. U. for injuries inflicted on his wife and step-daughter. The victims had made a statement to the police but not before the Court because they exercised their right not to testify. The statements that they had made to the police were therefore read before the Court and were taken into consideration in the sentencing of Mr. U. The ECHR, mindful of the problems that a face-to-face meeting between the 'accuser' and witness of the same family, wanted to protect the victim and avoid any problems of conscience and was thus of the opinion that a precept that authorises witnesses to not testify under such circumstances does not infringe upon Art. 6.1 and 3, d) of the Convention. Although the reading of the statements made by the witnesses to the police is not contrary to the Convention; its use as evidence should respect the right to defence. Given that the witnesses refused to testify as such before the competent Court, the accused was denied the opportunity to cross examine or insist that they be cross examined with regard to those statements. Also given that the sentence was based on those statements one would have to arrive at the conclusion that Mr. U. was declared guilty based on testimony with respect to which his right to defence was very limited. The accused, therefore, did not receive a fair trial and the Convention's Section 1, Art. 6 was thus violated with respect to the principles inherent in section 3, d) of that same precept.

In a similar situation of litigation among family members (the *Briemont Case*) the ECHR (ECHR judgment 7 July 1989) once again takes up the issue of those who exercise their right to not testify. In this case it was Belgium's Prince Charles. Mr. B., who was in charge of the Prince's business dealings, was dismissed by the Prince who named a new person to the post who took legal action against Mr. and Mrs. B. with relation to their management when they were in charge. In this suit the Prince was a civil party and levelled accusations against Mr. B. The King authorised the Prince to testify which he in fact did two times in writing and not under oath, the written statement being received by the President of the Appeals Court. With royal approval, the Prince submitted to a face-to-face encounter with Mr. B., but at a later date when he was to appear before the hearing Judge he submitted medical certificates in justification of his failure to appear.

The ECHR begins by recognising special regulations for the appearance and interrogation of high State officials in the internal legal ordinances of the majority of the Council of Europe Member States and their existence is based upon objective motives. These ordinances, in and of themselves, are not in conflict with Art. 6 of the Convention. Given that the Prince's accusations gave rise to the suit, the right to defence requires, in principle, that those subpoenaed have the right to discuss all of the facets of the complainant's version in a debate held at a public hearing and, for that reason, the Court ruled that, with respect to all of the issues that Mr. B. was not able to address through a debate, the Convention had been violated.

In order to more clearly define for future reference just what is to be considered case law with regard to this Court, it should be stressed that it is a matter of a simple exception to the general rule that the case law of the Constitutional Court and of this Court allows for in exceptional cases in which the reading of a witness' testimony is allowed in the plenary if he or she is not present at that act; but never under those circumstances – as were indicated above – in which the witness appears at the oral proceeding and refused, based on a legal dispensation, to testify against the accused.

For all of the above, without providing further details which would be a mere reiteration of what has already been expressed, the single motive was allowed and thus the entire appeal".

b) Right to a speedy trial

– Constitutional Court Judgment (Court Number 2) delivered on 17 March 1997, 53/1997. Appeal for legal protection 2016/1993.
Source: RTC 1997/53.
BOE, 17.4.97, Issue 92 (supplement).
Reporting Judge: Mr. Rafael de Mendizabal Allende.

An appeal for legal protection was filed in response to a Court delay in delivering a sentence in the declaratory proceedings held in First Instance Court number 5 in

Madrid. Nine months had transpired since the proceedings had ended and were prepared for sentencing. The Constitutional Court is of the opinion that the fundamental right to a trial without undue delay was violated and therefore ruled in favour of protection.

"Legal Grounds:

At this stage, the details that are usually studied to identify the object of this constitutional protection are not important but their characteristics and repercussions are however. The situation that led to this suit came about as a result of declaratory proceedings the purpose of which was to dissolve a rental contract for unauthorised cession. The procedure followed its normal course until it was ready for sentencing which, despite five formal complaints about the delay, was not delivered until almost a year later, refusing the request made. A simple narration of what happened highlights the delay which was notoriously in excess of the deadline of three days allowed for the drafting of the Court's decision (Art. 59 of the 21 November 1952 Decree [*RCL* 1952/1612 and *NDL* 18642] in the version expressed in Act 34/1984 [*RCL* 1984/2040; *RCL* 1985/39 and *ApNDL* 4257]). This objective piece of data is not sufficient in and of itself, however, to be automatically considered undue delay.

This legal concept is not clearly defined. It is equivalent to 'a reasonable period of time' within which any legal process should be completed according to the perspective provided by our Constitution and the Covenant of New York (*RCL* 1977/893 and *ApNDL* 3630) or the 1950 European Convention (*RCL* 1979/2421 and *ApNDL* 3627) and requires consideration of three factors: the complexity of the issue, the disposition of the parties to the suit and that of the judicial authorities (ECHR, *Sanders Case*, 7 July 1989) and several other precedents. Upon analysis of these elements, the simplicity seems obvious, especially when dealing with the legal issues related to the resolution of a rental contract due to unauthorised cession within declaratory proceedings void of any undue complications and with very clear evidence. The issue was simple with regard to the alleged facts and its legal assessment. Furthermore, the complainant showed avid interest in the case, even to the point of excess, filing inquiries on five different occasions during the 11-month period, *i.e.* an average of once every 70 days. The complainant's attitude can certainly be considered diligent. The delay was attributable, therefore, to simple judicial inactivity. It cannot be justified by work overload within the legal institution nor can the situation be explained by personal problems encountered by court employees (maternity leave, temporary substitution). If that were the case, these circumstances would exonerate the courts and the responsibility would be transferred from the subjective to the objective plane.

In summary, although the concept of undue delay cannot be defined with regard to hearing deadlines, there can be little doubt that converting between one and three days, considered sufficient in the eyes of the Law, into eleven

months is clearly unacceptable, whether the delay is explainable or not. The citizen, whose right to a speedy trial is violated, should not be subjected to this type of delay. This conclusion is not affected by the fact that the sentence was eventually delivered but subsequent to the initiation of this appeal. Handing down the sentence does not erase the delay nor does it cure the injury caused to a fundamental right (*STC* 31/1997 [*RTC* 1997/31]). It is of no consequence either that in the end the case was dismissed leaving things as they were at the outset because the fundamental right in question is completely independent of the content of the case and any expectation of success or failure. In the event that, once proven that a constitutional transgression has taken place, specific measures are not taken for a *restitutio in integrum*, the case will have to be taken up in court once again and the proper sentence will have to be delivered as has already been done. This decision must be a clear statement that is not symbolic but rather practical, indicating a violation of rights and leading to compensation payment for the abnormal functioning of the Justice Administration (*STC* 33/1997 [*RTC* 1997/33]).

Decision:

In accordance with all of the above, the Constitutional Court, *by the authority conferred on it by the Spanish National Constitution* has made the following judgment:

To allow part of this appeal for legal protection and therefore: 1) States that the facts of this case constitute a violation of the complainant's fundamental right to a court process without undue delay given the delay in delivering a sentence in the declaratory proceedings celebrated in this First Instance Court number 5 in Madrid, case number 1434/1991. 2) Dismisses the rest of the appeal proceeding.

(...)".

c) Right to effective judicial protection

– Constitutional Court Judgment, Courtroom 2, delivered on 10 February 1997; Number 18/1997. Appeal for legal protection number 2913/1993.
Source: RTC 1997/18.
BOE 14.3.97, Issue 63 (supplement).
Reporting Judge: Mr. Carles Viver Pi-Sunyer.

An Appeal for Protection was filed against a stay of proceedings order regarding the enforcement of the 22 April 1986 Judgment delivered by Madrid's Social Court number 20 in a suit concerning the nullification of dismissal filed against the Embassy of Equatorial Guinea in Spain. The Constitutional Court granted the appeal after having determined that the fundamental right to effective judicial protection was violated.

"Legal Grounds:

First.– This appeal focuses on the decision taken by the Madrid Social Court number 20 on 30 November 1993 to order a stay of proceedings

regarding the enforcement of a sentence handed down by this same court (then called the Work Magistracy) on 22 April 1986, case number 1257/1984, on the nullification of dismissal. All of the parties represented in this suit as well as the Public Prosecutor's office agree that the act being appealed here is a violation of *CE* Art. 24.1 where it refers to the enforcement of a final judgment.

(...)

Third.– This Court has stated, and it should be reiterated here, that the enforcement of sentences forms part of the right to effective protection provided by Judges and Courts. If this were not the case, judicial decisions and the rights declared or recognised therein, would be nothing more than mere statements of intentions with no practical effectiveness. More specifically, the right to enforcement of a judgment prohibits that the legal institution distances itself, without just cause, from the contents of the sentence to be executed or that it abstains from adopting the measures necessary to provide for its enforcement when this can be legally required (*SSTC* 125/1987 [*RTC* 1987/125], 215/1988 [*RTC* 1988/215], 153/1992 [*RTC* 1992/153]), among others. The main principle behind this right is that judicial action must respect the judgment and be forceful in its application in the event that third parties are opposed to it. It is not incumbent upon this Court to determine exactly what decisions must be taken, in each individual case, to implement the verdict in question but, in the case of retribution for a violation of the right to legal protection, the Court must be watchful. This retribution should not be the result of an arbitrary decision, should not be unreasonable nor should it be the result of passiveness or failure to take action on the part of the judicial institutions to adopt the measures necessary to insure the protection of this right (*STC* 153/1992).

Delving further into these latter two issues on which the Court can and should take a stand, we have observed that a decision taken to not enforce a judgment must be justified by a lawsuit file in accordance with a legal rule, at the same time interpreted in a manner which is most favourable to that enforcement; the lack of enforcement being constitutionally invalid unless it is specifically decided through a resolution which is the application of a legal regulation which is not restrictively interpreted (*SSTC* 155/1985 [*RTC* 1985/155], 151/1993 [*RTC* 1993/151]). Furthermore, and in relation to the obligation of judicial institutions in the enforcement of all judgments, in those cases in which the judgment is to be executed by a public entity, this entity has the obligation to carry it out with the necessary diligence without hampering the implementation of the decision as is stated in *CE* Art. 118. When a decision is hampered in this manner, the Judge must implement the measures necessary to assure enforcement in accordance with the law. If these measures are not adopted with the necessary force allowable under the law to remove the obstacle to enforcement, the judicial institution is in violation of the fundamental right to the enforcement of a sentence which obliges it, as

was said above, to adopt those measures necessary to carry it out (*SSTC* 64/1987 [*RTC* 1987/64], 298/1994 [*RTC* 1994/298]).

(...)

The redress that a judicial resolution to declare a stay of proceedings has is, among others, the appeal for legal protection. Stated in another way: a stay of proceedings declared with respect to the enforcement of a judgment means the Judge 'cancels' so to speak, although it may only be provisionally, his obligation to carry out that sentence. From a constitutional perspective it is important to examine whether this stay of proceedings decision was adopted after having tried each and every one of the possibilities contemplated in procedural law to determine the existence of sufficient assets held by the person or entity to whom the sentence applies. If this is not the case, it could constitute a violation of the Spanish Constitution Art. 24.1.

Sixth.– Before embarking upon an analysis of the specific facts and in order to further define the structure of the fundamental right under scrutiny, it is necessary to refer to the party against whom the claim is made, the Embassy of Equatorial Guinea which, given its special diplomatic condition, brings a number of peculiarities to this Appeal case.

This is not an unusual situation within our case law, however, given that we have already delivered sentences in two previous cases – *SSTC* 107/1992 and 292/1994 – both dealing with labour issues filed against a foreign embassy in Spain. From the point of view of case law, these two cases look at the issue of to what degree the subjective condition of the defendant can affect *CE* Art. 24.1; they attempt to strike a balance between the immunity of foreign States and the right to effective judicial protection as a comprehensive right to be applied to all sentences.

It is not necessary here to reiterate all of the arguments put forth in the two above-mentioned resolutions. We will focus our attention on this particular case by reiterating the following points:

a) It is incumbent upon this Court and through this appeal process, to review whether the decision to not carry out the sentence was based on a legal cause interpreted in the most favourable sense with regard to effective protection.

b) From this perspective, immunity for foreign States with regard to the execution of a judicial decision is not in conflict with, regardless of the nature of that immunity, the right to effective judicial protection provided for in *CE* Art. 24.1 but, an unwarranted extension or broadening by the ordinary Courts of the immunity granted to foreign States with regard to implementing judicial decisions in accordance with current international regulations, would be a violation of the complainant's right to effective judicial protection because it would constitute an unwarranted restriction of the justice system in applying the decision in the absence of any regulation imposing an exception to that application.

c) The specific immunity regime granted to foreign States, by remission of *LOPJ* Art. 21.1, is stipulated in Public International Law regulations obtained by the induction of diverse data including international conventions and State practice. Following an analysis of the two resolutions referred to above, we arrive at the conclusion that absolute immunity from judicial decisions does not exist but is relative. This conclusion is further reinforced by the obligation to effectively protect the rights contained in *CE* Art. 24 and by the *immunity ratio* by which the integrity of a foreign State's sovereignty is safeguarded without granting that State indiscriminate protection. The specific limits applicable to the immunity of foreign States relative to the application of a judicial decision should, therefore, be generally applied when, throughout the course of a certain activity or in dealing with certain assets, the sovereignty of the foreign State is not called into question whether through an international order or by remission, the internal order unauthorises the non-execution of a sentence. A decision to not execute a sentence in these cases therefore constitutes a violation of Art. 24.1 of the Spanish Constitution.

d) In addition to this general limitation, it should not be forgotten that certain assets are granted special immunity by virtue of their owners; this is the case with diplomatic and consular missions. State immunity then must take these two dimensions into consideration: 1) assets pertaining to diplomatic and consular missions are granted complete immunity from executing judicial decisions; 2) the rest of a foreign State's assets which are meant for *iure imperii* activities are also immune but those meant for *iure gestionis* activities are not.

e) It is therefore the responsibility of the ruling judge to determine which of the assets belonging to a foreign State in Spanish territory and which do not specifically belong to consular or diplomatic missions, are unequivocally used to carry out activities in which that State, without calling upon its imperial authority, acts as a private individual.

f) It is not necessary that the assets which are the object of the sentence be meant for the same *iure gestionis* that gave rise to the original lawsuit; some other factor could affect the execution of the sentence.

g) And finally, in *STC* 292/1994, although the defendant to the suit is not the foreign State itself but rather its embassy, that embassy is an institution of that State and its representative in Spain, Vienna Convention [Art. 3.1, a) on diplomatic relations (*RCL* 1968/155, 641 and *NDL* 26103)]. It therefore would not be imprudent to apply the possibilities of sentence execution not to those assets related to embassy activities and which are protected by full immunity, but rather to other State owned assets which are party to this lawsuit and which are related to commercial type activities which, as was mentioned above, are not protected by immunity.

Two more points relating to this case should be added to what has been said so far: when the defendant is an Embassy or a foreign State, it cannot claim insolvency and, especially in these cases involving difficulties in the execution of judicial resolutions which require the collaboration of the State's public authorities, especially its Foreign Affairs Minister. The judicial institution should therefore insist upon this collaboration and in the event that it is unsuccessful this could lead to the pertinent responsibilities.

(...)

It is also true that in this case the Social Court refused to grant the seizure order requested by the Treasury Council of assets kept in the accused's domicile and of several motor vehicles at the accused's disposition. This decision, however, is in accordance with the doctrine contained in the reiterated *SSTC* 107/1992 and 292/1994 according to which these assets are fully protected by immunity.

Independent of this decision and far from being a general declaration of Equatorial Guinea Embassy's immunity from judicial decisions, the Social Court did proceed to seize the only assets – current accounts with insignificant amount of money as was related in the background information – that were opened by the defendant during the sentence execution phase. These assets covered only a very insignificant portion of the embassy's obligations.

As can be observed, this is not a judicial decision ruling against the right of the petitioner to see the execution of the judgment made in the labour suit due to the defendant's immunity. The problem is quite different: the object of this appeal is related to the decision to declare a stay of proceedings due to the supposed insolvency of the Embassy. Seen from a different perspective: from the proceedings initiated by the judicial institution, no seizable assets were identified by which the Embassy could meet the obligations imposed by the ruling, the execution of which is the question at hand.

The entire issue therefore focuses on whether the judicial institution, which bears the responsibility of carrying out the sentence, has orchestrated these proceedings to the full extent that *CE* Art. 24.1 imposes on it within the scope of labour issues.

(...)

Eighth.– It is true that an examination of that principle objective showed certain deficiencies with respect to the investigation of the existence of assets from the list of public institutions, entities and private individuals 247 *LPL* of 1990 (current Art. 248 *LPL* of 1995) contemplated by Art. 204 LPL of 1980. According to case background information and almost certainly upon request by the petitioner, the judicial institution decreed the seizure of Embassy funds deposited in current accounts of the financial entities indicated by the defendant with the above described results. The judicial institution's activity, however, was strictly limited to those entities and no further information was requested from other institutions which could presumably be holders of these assets like the Foreign Affairs Ministry or other ministries that, given their

competencies, could provide information about these assets or rights affecting them. The same must be said of the summons issued to the Madrid and Majadahonda Land Registries and to the Madrid Town Hall requesting certification of property assets filed under the name of the Embassy of Equatorial Guinea.

Furthermore, and this is fundamentally important, the content of the different summons and communiqués contained an important lack of precision: they only called for a list or in some cases the seizure of assets belonging to the Embassy of Equatorial Guinea. As was indicated in legal ground 6 however, although strictly speaking the defendant in the suit is not the Republic of Equatorial Guinea but rather its Embassy, the latter is nothing more than an institution of that State and its representative in Spain and therefore the possibilities of executing judicial decisions are also extended to those assets held by the State (and defendant) which are not protected by immunity from judicial decisions. Therefore, the principle potential holder of assets that could be used to execute the sentence in accordance with the protection of this fundamental right was not an object of the investigation.

Furthermore, the judicial institution failed to comply with Art. 246 *LPL* of 1990 (Art. 247 *LPL* of 1995) by not requiring the accused to issue a statement about its assets or rights with the precision necessary to guarantee its responsibilities and without indicating the individuals that exercise rights of any sort over these assets.

Given the circumstances of this case, however, the most relevant weakness shown by the judicial institution in the execution of this sentence is with regard to the monitoring of two proceedings initiated by the court upon request by the Treasury Council, in relation to the Ministry of the Treasury and the Foreign Affairs Ministry.

The fact is, as was described in detail in the background information, the judicial institution, after having summoned the pertinent information, decided to send a communiqué to the above mentioned institutions decreeing the seizure of credits that may have been granted to Equatorial Guinea and the withholding and deposit with the Court of the amounts that that State may have outstanding and summoned the Foreign Affairs Ministry for access to diplomatic channels.

The reply to the seizure order and the withholding of funds from credits and foreign aid was either negative (in the sense that there were no available funds at that point in time) or positive indicating that the funds did indeed exist while at the same time expressing that it was impossible to meet the Court's request because acceptance would, in its view, mean that Spain was taking on international responsibility by bringing aid provided through a Treaty of Friendship with Equatorial Guinea into this lawsuit.

The summons issued to the Foreign Affairs Minister ended with a verbal note sent to the Embassy of the Republic of Equatorial Guinea which met with no response whatsoever. Ordering a stay of proceedings under these

circumstances is equivalent to not exhausting all the possibilities that the regulations offer to the judicial institution executing the sentence. The fact is that the judge, with regard to the aid and subsidies, accepted, without further insistence, the reply that at that moment there were no available funds even though there is information in the file indicating that this type of aid is granted on a periodical basis and this has been the case between 1989 and 1995, period during which Spain has granted substantial sums in the form of aid and subsidies to the State of Equatorial Guinea. Furthermore, given the Government's refusal to heed the call for seizure of aid and subsidies because that would mean that Spain was taking on international responsibility, the judicial institution should have reiterated its request until a response was obtained regardless of this threat because the execution of legal judgments and any other final resolutions delivered by Judges and Courts is mandatory as is collaboration summoned by the Court during the course of a hearing and in the execution of the judgment [arts. 118 *CE*, 17 *LOPJ* and 410 of the Penal Code (*RCL* 1973/2255 and *NDL* 5670)].

(...)

Ninth.– For all of the above, the appeal for legal protection should be allowed. The right to effective judicial protection with regard to the right to the execution of final decisions has been violated by the judicial institution by virtue of the 30 November 1993 stay of proceedings issued before having exhausted all of the legal possibilities provided for by legal regulations in the terms indicated in the above legal grounds.

(...)".

d) Right to physical and moral integrity

– Constitutional Court Auto (Court 1, Section 1) delivered on 13 October 1997, Number 333/1997. Appeal for legal protection number 627/1996-A.
Source: RTC 1997/333 Record of Proceeding.
Reporting Judge: Messrs. Rodríguez, Cruz y Ruiz.

An appeal for legal protection was filed against the 11 January 1996 ruling delivered by the Barcelona Provincial Court which dismissed the remedy of appeal in a ruling involving a small sum of money in a claim made against disciplinary measures taken in a school. Violation of the fundamental right to physical and moral integrity and to the effective protection of judges and courts: non-existent: clear lack of constitutional content. The Constitutional Court rejected the appeal for legal protection.

"Legal Grounds:

Third.– (...)

We have once again before us an alleged violation of fundamental rights in the midst of relations among individuals which, as is often the case, was heard by ordinary jurisdiction by virtue of the mediation of a general clause of Private Law. This circumstance quite logically does not impede an analysis of

the complainant's pretension regardless of the fact that the Constitution, with regard to the guarantees it offers, does not specifically provide for a direct link between citizens and rights and freedoms (Art. 53.1 *CE*) and that, as a result, the only alternative is the filing of an appeal for legal protection in response to a deed committed by the public authorities (Art. 41.2 *LOTC*). It should be remembered as it was recently in the *ATC* 382/1996 (*RTC* 1996/382 Record of Proceeding) – which we should follow closely given the similarity to this case – that fundamental rights, even when they continue to be conceived principally as subjective rights to defence against the State, also have an objective dimension in accordance with which they operate like the basic structural components that provide structure to the whole of the legal system. Based on this dual character of fundamental rights (*STC* 25/1981 [*RTC* 1981/25], F. 51), we argue in legal ground 3 of the *ATC* 382/1996 that, together with the traditional negative relationship that public authorities have with these rights, there is the additional general requirement that 'within the scope of their respective functions, collaborate with a view to firmly establishing fundamental rights and making them real and effective independent of the specific legal system sector that they deal with (*SSTC* 53/1985 [*RTC* 1985/53], F.4.1 and 129/1989 [*RTC* 1989/129], F 3.1)'. This additional understanding of fundamental rights as a protection implicating the State – and not only as a mere obligation to not interfere in the freedoms that they imply – which eventually takes root in the Social State clause (Art. 1.1 *CE*), is first and foremost projected upon the legislator who, upon receiving 'impulses and guidelines' from the fundamental rights (*STC* 53/1985, F 4.1), has the responsibility of making all sectors of the legal system conform to them. This obligation is logically imposed on the judicial institutions however in the exercise of their exclusive jurisdictional function (Art. 117.3 *CE*). The fact is that the constitutional text itself takes care to highlight its relevance in this domain when it explains in its Art. 53.2 the specific role to be played by Judges and Courts in the protection of fundamental rights. Therefore, with regard to relations among individual citizens and with respect to constitutional protection, the fundamental right in question can only be considered as being violated when it is felt that the judicial institutions have failed to act or have acted incorrectly in meeting their obligation to offer protection. It is only under these circumstances that one can gain access to constitutional protection, given that the *LOTC* requires that the violation of a right is 'immediately and directly rooted in an act or an omission committed by a legal institution' (Art. 44.1). In summary, as was explained in *ATC* 382/1996, more than the conduct itself of individuals *per se*, 'the object of an appeal for legal protection – and therefore what should be under scrutiny – is the lack of protection of fundamental rights provided by judicial resolutions which are challenged (for all, *SSTC* 47/1985 [*RTC* 1985/47], F 5.1; 88/1985 [*RTC* 1985/88], F 4.1; 6/1988 [*RTC* 1988/6], F 1.1 and 231/1988 [*RTC* 1988/231], F 1.1)'.

Given these procedural peculiarities which condition the way in which this Court is able to deal with the resolution of fundamental rights cases rooted in relations *inter privatos*, it would be useful to define exactly what this obligation to protect consists of with a view to setting the limits and possibilities of constitutional protection in these cases. When first dealing with this issue we held in *ATC* 382/1996 that 'this obligation placed on the judicial institutions means that they must interpret and apply ordinary legality in accordance with the fundamental rights which therefore must necessarily be taken into account when resolving a controversy between individuals.' As a result, 'when interpreting any aspect of Law, one must keep in mind that, over and above the literal interpretation of the rules comprising the law, the law itself is comprised of fundamental rights' (legal ground 3). When dealing with legal protection, however (further explanation forthcoming), it is not a matter of 'taking account of all the errors that the judicial institutions may have committed in the application of ordinary legality because constitutional protection is not set up as a last instance nor is it a Supreme Court appeal but its purpose is rather to judge whether the scope and efficiency of the rights involved in the case have been properly evaluated' (*ibidem*). It is important to recognise that ordinary Judges and Courts should, in principle, be given a certain margin with which to evaluate each individual case (*SSTC* 120/1983 [*RTC* 1983/120], FF. 3.1 y 4.1, y 41/1984 [*RTC* 1984/41], F 2.1), given that, as is clear and is highlighted in legal ground 3 reiterated so many times *ATC* 382/1996, 'the obligation to protect which is inherent in the objective content of fundamental rights, is not always so clearly defined as to think that this obligation can be satisfied in each case by one correct formula applied to resolve specific controversies.' It is actually just the opposite. It is often 'possible to fulfil this obligation in a number of ways' all of which are in accordance with the Constitution. In these cases, this Court cannot replace a decision taken by a judicial institution with one of its own based on the simple fact that it considers its decision a more adequate assessment of the concurring circumstances of the case in question. (*ibidem*).

(...)

Fourth.– Starting with the first of the alleged rights violations dealing with the right to an education, it must be said that an analysis of the contested resolutions unequivocally reveals that the judicial institutions, in their rejection of the complainant's request, in no way failed to recognise the scope and sense of the right protected by Art. 27.1 *CE*.

This fundamental right, as we stated in *ATC* 382/1996, includes *prima facie* 'the ability to choose from among existing public or private centres although naturally effective access to the centre chosen depends on whether requisites established for the admission of students (private schools are free to set the criteria they see fit) are met (Art. 25 *LODE*)' (legal ground 4). And as a logical consequence of this ability to gain access to the school chosen, the scope of Art. 27.1 *CE* must be considered; specifically the right to 'continue instruction

in the same institution which means that, at least in principle, expulsion from a school under certain circumstances could constitute a violation of the right to an education.' This conclusion is reached in *ATC* 382/1996 following the European Human Rights Court doctrine as well as our own case law which early on admitted the following with respect to the fundamental right which all citizens have to an education: 'It would be of no use to recognise this right in the text of the Constitution if it were later possible to arbitrarily sanction students in the schools for supposed lack of discipline, the ultimate consequence of which could be expulsion from school; that would make it impossible or at least very difficult to really exercise this fundamental right' (*STC* 5/1981 [*RTC* 1981/5], legal ground 28).

Having established the above, mention must also be made of *ATC* 382/1996: 'Nothing stands in the way, however, as is generally the case with fundamental rights, to limiting this facet of the right to education with a view to safeguarding other constitutional rights or assets'. In this case the organic legislator, with the goal of overseeing the peaceful exercise of the entire student body's right to classroom instruction, must have established a basic rule to be followed by all pupils: 'respect for the rules and regulations within the school' (art. 6.2 *LODE*); rules which are independently established by private schools (art. 25 *LODE*). Failing to live by these rules could therefore constitute sufficient justification for expulsion from school without in any way violating a fundamental right. Only in the event that the sanction were issued arbitrarily could the issue of the violation of the fundamental right in question be considered (legal ground 4).

Having conceived in this way the possibility of a valid limitation to the right in question, an analysis of the resolutions under scrutiny in this process conclusively shows that the judicial institutions fulfilled their obligation to protect the fundamental right given that, as will be further explained below, they in no way failed to recognise or erroneously conceived its constitutional dimension. The truth is that both the judgment delivered by First Instance Court 38 in Barcelona (legal ground 4) as well the one handed down by the Provincial Court (legal ground 2) did not fail to study the basic issue from the perspective a fundamental rights, arriving at the conclusion that the sanction was not arbitrarily issued. Both resolutions clearly considered the fact that the pupil's conduct offered good reason to adopt the sanction and emphasised that the punishment was meant to guarantee the education and training of the entire group of students, thus conforming to the goals established by the school centre.

It could also be mentioned that more than the arbitrary nature of the punishment, the alleged rights violation in the suit is linked to the expressed complaint that the mother of the pupil was not notified of the punishment. This fact, however, was not verified before the judicial institutions but rather just the opposite; and it is not incumbent upon this Court to establish the facts of the case *a quo* [art. 44.1.b) *LOTC*]. Even if it were, however, this simple fact

would not constitute of the right which is the object of this treatise. As we had the opportunity to point out in *ATC* 382/1996, although the fundamental right to an education 'may, in principle, provide a certain level of protection against arbitrary expulsion, it in no way requires the scrupulous respect of each and every one the procedural guarantees that could apply'. That is why it is not incumbent upon this Court but is rather the exclusive domain of ordinary jurisdiction to determine whether the law imposes this requisite or not and, if need be, see that it is enforced (legal ground 4). In summary, it is sufficient to note that the First Instance Court as well as the Provincial Court based their decision on the fact that the student's educational trajectory was at no time interrupted (he received individualised tutoring in the kindergarten) and it was thus concluded that the fundamental right guaranteed by Art. 27.1 *CE* was never violated.

(...)

With regard to the fundamental right to physical and moral integrity, this Court in the past has had the opportunity to indicate that its constitutional scope guaranteed *prima facie* 'protects the inviolability of the individual, not only against attacks intended to injure the body or spirit, but also against any type of intervention in one's assets without the permission of the owner' (*SSTC* 120/1990 [*RTC* 1990/120], legal ground 8; 117/1990 [*RTC* 1990/117], legal ground 6; 215/1994 [*RTC* 1994/215], legal ground 4 and 207/1996 [*RTC* 1996/207], legal ground 2). Extending our analysis beyond this generic content protected *ab initio* – and therefore susceptible to limitation – the Courts wanted to more precisely limit the bounds of the right by incorporating the same guarantee as that contained in Art. 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (*RCL* 1979/2421 and *ApNDL* 3627); *i.e.*: no one may be subjected to 'torture or inhumane or degrading treatment.' It is self evident that these are limiting prohibitions within a constitutionally protected area and are absolute in nature ('in no case'), which means that the mere fact that these prohibitions have been transgressed results in the immediate and unequivocal violation of the fundamental right to physical and moral integrity. It should therefore come as no surprise that when a possible violation of this right is alleged, the analysis should commence with whether the punitive measure which is the object of analysis may be counted among any of the three cited categories: torture, inhumane treatment or degrading treatment. Neither should it come as a surprise that case law from European control institutions should be considered as extremely relevant; the general hermeneutic mandate embodied in Art. 10.2 *CE* is added on this occasion to the important influence that Art. 3 of the Convention has had on the drafting of Art. 15 *CE*.

Following in the wake made by ECHR in the *Ireland v. United Kingdom* Sentence of 18 January 1978, 167, according to which the distinction made between the three categories is principally derived from the different intensities of suffering caused, this Court has also highlighted the fact that

these same categories form part of a scaled continuum the highest level of which would be constituted by degrading treatment. 'Torture' and 'inhumane or degrading treatment' – as we noted in legal ground 9 of *STC* 120/1990 – are, from a legal standpoint, graded levels on the same scale which, at all levels and independent of the objectives they were meant to achieve, denote illicit physical or psychological injury inflicted in an abusive manner (from the perspective of the injured party) and with the intention of abusing and subjugating the will of the subject (doctrine reiterated in *SSTC* 137/1990 [*RTC* 1990/137], legal ground 7; 57/1994 [*RTC* 1994/57], legal ground 4 and 215/1994, legal ground 5 A). In this context, the ECHR, going one step further, has made an attempt to more clearly define the concept of 'degrading treatment' by considering it that which causes in the victim feelings of fear, anguish and inferiority which may humiliate, degrade and possibly break the victim either physically or morally (Judgments: *Ireland v. United Kingdom*, 18 January 1978; *Soering*, 7 July 1989 and *Tomasi v. France*, 27 August 1992, 112). Independent of these considerations, case law from the ECHR emphasises the fact that for an abuse to be considered under the scope of Art. 3 of the Convention, it must surpass a minimum severity threshold. The definition of this minimum is by its very nature relative and therefore is dependent upon the concurring circumstances surrounding the individual case (*Ireland v. United Kingdom*, 162; *Tyrer*, 25 April 1978, 30; *Soering*, 100; *Cruz Varas and others v. Sweden*, 29 August 1990, 83; *Vilvarajah and others v. United Kingdom*, 30 October 1991, 107, among others). Expressed in the same terms used by the ECHR in a suit similar to the one analysed here, the *Campbell and Cosans Case*, in which a disciplinary measure employed in a school was brought to court, 'for the treatment in question to be considered *degrading* it should also provoke within the injured party – in front of others or alone – a sense of humiliation or degradation that reaches a minimum level of severity.' (Judgment of 25 February 1982, 28; reiterated in the *Castello-Roberts v. United Kingdom* Judgment of 25 March 1993, 30, also relative to corporal punishment in schools).

The determination of exactly where to draw the line between abuse which is a violation of a fundamental right and one which is constitutionally irrelevant is, as was stated above, dependant upon the specific circumstances of the case in question. Despite these difficulties, it is possible to identify a few criteria that can be used in this determination. First of all, and mindful of the absolute nature of the prohibitions being dealt with here, it should not be forgotten that in making this judgment, the degree of legitimacy or good intentions of the end supposedly accomplished through the punitive measure in no way should be a determining factor. Our basic affirmation that 'although a specific punitive measure cannot be considered as inhuman or degrading treatment based on the objective being pursued, this does not mean that the punitive measure in itself cannot be considered as such' is built upon this base. (*STC* 215/1994, legal ground 5 A reiterating the doctrine already expressed in *SSTC*

120/1990, legal ground 9; 137/1990, legal ground 7 and 57/1994, legal ground 4 A). Second of all, when the alleged abuse is in the form of a punishment, the suffering that it causes can only be considered as 'degrading treatment' if it goes beyond what is considered a usual and often inevitable element of humiliation inherent in the punishment itself (*Tyrer, 30; Soering, 100 and Castello-Roberts 30 Cases*). Consequently, this Court only considers a punishment degrading if it 'provokes humiliation or a sensation of degradation that reaches a certain level which is different from or greater than that which is normally associated with the simple conferring of the punishment' (*STC* 65/1986 [*RTC* 1986/65], legal ground 4; since then fixed doctrine: *SSTC* 89/1987 [*RTC* 1987/89], legal ground 2; 120/1990, legal ground 9; 137/1990, legal ground 7; 150/1991 [*RTC* 1991/150], legal ground 7 and 57/1994, legal ground 4).

(...)".

e) Right not to be tortured

– Delivered by the Supreme Court on 6 June 1997 (Penal Jurisdiction). Appeal 835/1996.
Source: RJ 1997/4594.
Reporting Judge: Jose Augusto de Vega Ruiz.

The TS recognises this sentence being challenged in this Supreme Court appeal procedure for infraction of a constitutional precept, infraction of a law and procedural defects filed by the legal representative of Alexis A. C., René Miguel V. B. and Gonzalo B. T. against the sentence delivered by Section one of the National Court on 13 July 1996 which sentenced them as the authors of the crime of illegal arrest.

The TS rejects this Supreme Court appeal.

"Legal Grounds:

First.– The sentence under appeal affects only three of those allegedly responsible for the abduction of the business executive Emiliano R.S. a few years ago. That resolution declared the defendants C., V. and B. guilty of the crime of illegal detention in accordance with Arts. 480 and 481.1 of the old Code (*RCL* 1973/2255 and *NDL* 5670), and the laws describing the crime of collaboration with an armed group, Art. 174 bis, a). The Court sentenced the accused in accordance with Art. 68 with regard to the first of the infractions indicated to a term of fourteen years, eight months and one day imprisonment for each one and with the aggravating circumstance outlined in Art. 57 bis, a) which obliges the Court to apply the maximum sentence for crimes related to armed groups, terrorist elements or rebels.

(...)

Third.– The first motive basically denounces the supposed violation of the right to effective legal protection because the protests made by the defendant in court with regard to abusive treatment during his arrest did not follow due

legal course and consequently disallowed him access to jurisdiction (*sic*).

The Sentence delivered on 22 September 1995 (*RJ* 1995/6743) made a generic study on torture and abusive treatment. As described in the Sentence, torture has been defined by the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment of 10 December 1984, ratified by Spain on 21 October 1987 (*RCL* 1987/2405), as any act by which pain or serious suffering is intentionally inflicted upon a person in order to procure from that person or a third person information or a confession or as a punishment for an act allegedly committed or suspected and also to intimidate or coerce that person or others. This definition corresponds with the idea put forth at the V Congress of the UN for Crime Prevention and Treatment of Delinquents held on 1 September 1975. Ideas were also drawn from old Art. 204 *bis* of the Penal Code that must be analysed in light of Art. 5 of the Universal Declaration of Human Rights (*ApNDL* 3626), 7 of the International Covenant of New York (*RCL* 1977/893 and *ApNDL* 3630), 3 of the Rome Convention (*RCL* 1979/2421 and *ApNDL* 3627) and 6 of the General Penitentiary Law (*RCL* 1979/2382 and *ApNDL* 1177). An analysis must be made in light of the fact that Paragraph 2 of the precept was established through Organic Law 3/1989 of 21 June (*RCL* 1989/1352), in response to the need expressed by the Spanish Constitution and the Courts to reform and develop legislation that was completely incompatible with the democratic spirit.

One of the values derived from Art. 15 of the Spanish Constitution (*RCL* 1978/2836 and *ApNDL* 2875) is the definitive and absolute rejection of all that represents or supposes contempt for human dignity in all cases and under all circumstances expressed in the 25 April 1978 European Human Rights Court Judgment, the first that differentiated between torture or inhumane treatment and what could be considered as degrading treatment. It was clearly shown here that degrading treatment is not necessarily considered as torture.

Abusive treatment is characterised by a general and pervasive attitude with an 'added measure' of perversity and evil that covers a range of different behavioural patterns which vary in their degree of severity. Within this category of abusive treatment, however, what could be considered as degrading treatment is clearly different from torture. Degrading treatment is characterised by a more customary pattern (European Human Rights Court Sentences of 25 February 1982 and 28 January 1979 sic.); repeated behaviour provoking less serious situations although they always are an affront to personal dignity because both contempt and humiliation are always present. Torture, on the other hand, is characterised by more drastic and intense behaviour than is described in Spanish legislation and normally overlaps with other crimes as well although the most significant exception, interrogation accompanied by intimidation or physical violence, is also punishable.

Fourth.–

(...)

As clearly appears on record, the investigating Judge, faced with the

complaint regarding abusive treatment, ordered the accused to submit to an examination by a forensic physician who did not objectively note any type of injury and consequently no measure was adopted as part of the investigation. If the opposite had been true, investigation would have been mandatory.

The defence motive was rejected for the following reasons: 1) The accused's legal representative was able, at any time, to file an independent charge or complaint regarding these alleged criminal actions providing they were filed within established legal time constraints. 2) In light of the political objectives that are often pursued by making allusions or statements of this nature, the only thing that is now clear is the lack of objective evidence with regard to the reality of this abusive treatment which would constitute a crime in accordance with Art. 204 *bis* (see Sentences corresponding to 19 December and 23 March 1996 [*RJ* 1996/9010 and *RJ* 1996/1925], 30 November 1995 [*RJ* 1995/8879], 13 December and 15 October 1993 [*RJ* 1993/9421 and *RJ* 1993/7531]). 3. It is also quite clear that this Supreme Court appeal is simply not practical because it would not affect the prison sentence handed down and thus it would not make sense for the Court to admit a complaint that in no way could change the judgment delivered by the Court. 4. As a result, the relationship between these facts and the right to effective legal protection is not at all clear given that at no time was the accused denied access to jurisdiction.

Seventh.– The third motive presented by the defence is in relation to the presumption of innocence and the arguments put forward all refer to basic evidence which they had hoped to nullify for supposed procedural defects. It should initially be mentioned that the dense arguments presented through a '*totum revolutum*' of sorts gives rise to a series of very diverse issues.

As was highlighted in the Judgment delivered on 6 March 1995 (*RJ* 1995/1812), violation of Art. 520.2 of the Code of Criminal Procedure become particularly relevant if this violation has given rise to effective material lack of proper defence which is not the case in this hearing since the accused received proper attorney defence and was never left defenceless. And if it is in fact true that in the 'record showing the accused was informed of his rights' (page 340) it only shows that he was arrested and isolated for his alleged membership in the group known as *MIR*, it is no less true that afterwards, after having received a statement from him, he was informed of the link between the above-mentioned organisation and *ETA* and with the abduction of the commercial executive R., which is why the accused, as the District Attorney rightfully indicated, was provided with a full, immediate and comprehensible explanation of his arrest.

Eighth.– Furthermore, a rebuttal must be made to allegations made in the motive. The statements made by the accused in general and by this individual in particular, were considered in the filing of the suit only when made in court and in the presence of his lawyer and therefore nullity based on alleged torture that wonld negatively condition the free will of the accused is out of the question as is the defence's claim that tape recording did not follow proper

legal procedure. As the Court has already mentioned, allegations regarding torture do not seem to be supported by evidence 'that would allow us to conclude that torture was used to manipulate their statements and this conclusion is supported by the medical reports'.

Tape recording of the statements made by the accused was done in strict accordance with correct procedure. Neither the lawyer nor the accused raised any objections and this can only be explained by the scrupulously correct manner in which it was carried out. The proceeding indicating that all those present agreed to the taping, later to be transcribed by the judicial secretary, was signed. The judicial secretary certified both the transcription as well as the tape recording which was recorded on a blank tape and kept in the possession of that civil servant.

Tape recordings have been the object of debate in this Court number two specifically related to conversations taking place in penitentiaries (Sentence of 6 March 1995 [*RJ* 1995/1808]), and in a wider sense (Sentence of 30 November 1992 [*RJ* 1992/9560]). It should be noted that in the majority of these cases the controversy focuses on recordings made from phone taps (Sentence of 14 December 1994 [*RJ* 1994/9757]).

Whenever a document is used as evidence, the credibility of its content must be assured and with regard to public documents this is achieved through a Notary. With regard to private documents, authenticity is established by the recognition of those involved and subsidiarily by an expert analysis. In the case of a mechanical voice reproduction, the expert will be called upon to affirm that the taped voice corresponds to a specific person or that the written transcription corresponds to the information on tape.

In this particular case, disquisitions would be superfluous because the recorded statement and its subsequent transcription were agreed to by the interested party and his lawyer. The right to legitimate defence, therefore, was in no conceivable way violated. It should be added that with regard to the request made at the conclusions of the accused to listen to the tape in the plenary which, ordered by the resolution that Art. 659 authorises, no objection was raised by the defence. The position which is held here was already reflected in the Sentence of 6 November 1996 (*RJ* 1996/8051) which proclaimed the legitimacy of these recordings if they are made without protest from the interested parties given that they are a 'novel way through superior technology to provide a greater level of guarantee to the defendant"'.

f) Right to defence

– Judgment delivered by the Supreme Court on 29 December 1997 (Penal Jurisdiction). Appeal 283/1997.
Source: RJ 1997/9221.
Reporting Judge: Mr. José Antonio Martín Pallín.

The TS recognises this sentence being challenged in this appeal procedure for

procedural defects and infraction of a constitutional precept law filed by the legal representative of the accused Martin E. And Beveren Pieter L. against the sentence delivered on 28 October 1996 by the Territorial Court of Granada in the case filed against them and one other for a crime against public health.

The TS rejects this Supreme Court appeal.

"Legal Grounds:

First.– The appeal filed by the accused Martin E. does not follow a standard structure and must be put in order so as to deal adequately with the issues contained therein. At the outset it alleges lack of effective legal defence by virtue of the fact that he was not provided with an interpreter who spoke his native language.

1. It is quite true that the accused is a citizen of Holland, a fact that is accredited throughout this entire process. The file indicates that Dutch is a minority language within the European Community and that it is very difficult to find professional translators, especially in small cities. It was considered acceptable to employ the services of English language translators for the taking of the accused's biographical data and to take a general statement. The defendant criticised the work of those that acted as professional English language interpreters and therefore considers that a violation of Art. 520 of the Code of Criminal Procedure has been committed and, more importantly from a constitutional point of view, the defendant claims to have suffered from lack of effective defence.

(...)

3. Our court system requires that any person arrested or deprived of liberty, and by extension subjected to an oral hearing, be provided with an interpreter in the event that he does not speak or understand Castilian Spanish. This service is also offered to Spanish citizens who are from Autonomous Communities that have a different co-official language. Our internal regulations should be interpreted not only in accordance with the Constitution (*RCL* 1978/2836 and *ApNDL* 2875), but also in accordance with the provisions of the international texts to which Spain subscribes and fundamentally the International Covenant signed in New York on Civil and Political Rights (*RCL* 1977/893 and *ApNDL* 3630) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (*RCL* 1979/2421 and *ApNDL* 3627). In accordance with this legislation, all persons have the right to be aided by an interpreter free of charge if they do not understand or are not able to speak the language used in the courtroom. The effectiveness of the right to defence implies that the accused understands the meaning of the accusation and the content of the questions directed at him as well as all the procedures which, in a certain sense, contribute to establishing the terms of the accusation. In this case, the petitioner voluntarily made his statement in English with the aid of an interpreter and when questioned by the investigating judge about whether he understood this language he answered affirmatively. There is no evidence, therefore, that a

fundamental right has been violated and no objection was raised at the time of the public and solemn oral hearing.

For these reasons the appeal should be rejected".

XII. EUROPEAN COMMUNITIES

1. The Relationship between Community Law and Spanish Law

– Judgment delivered by the Superior Court of Justice of the Community of Valencia on 14 October 1997. Appeal 1061/1995.
Source: RJA 1997/3196.
Reporting Judge: Mr. Manuel José Pons Gil.

The Superior Court of Justice of Valencia heard the appeal for reversal filed by the legal representative of Juan L.L., Emilia Maria M. S., D. Agustín B., Amparo G. M and Angelina S. I. against a lower court ruling in favour of the accused, the Wages Guarantee Fund.

"Legal Grounds:

First (and only).– Having received a sentence calling for dismissal, the complainants' legal representative filed an appeal formulating a single argument, void of legal citations but focusing on an examination of the law applied in that resolution and objecting to the fact that the 20 October 1980 Community Directive was not applied 80/987 (*LCEur* 1980/432), published in the Official Journal of the European Communities on 28 October 1980 in relation with Art. 33 *ET*. The appeal cannot be upheld because, based on the non-contested facts in which the appeal is rooted and which were anticipated above, there can be no question that the compensation payments received by the complainants through Art. 41 *ET* are not protected by the Wages Guarantee Fund given that they are not specifically included in Art. 33.1 and 2 of the cited legal text. Focusing on the allegation verified by the petitioner that the Spanish State failed to apply the Community Directive cited above, by virtue of the fact that it provides for a broader spectrum in workers' protection than that which is called for in Art. 33 *ET* mentioned above, this must mean that this issue has already been dealt with many times over by the Supreme Court based on the Sentence of 30 December 1992 (*RJ* 1992/10382) and fundamentally on the Court of Justice of the European Communities' Judgment of 26 December 1993 which, although referring to a case involving the right of high-ranking officials to wage guarantee protection, establishes doctrine which is perfectly applicable to this case, based on the allegation made in the appeal, and which can be summarised in the following paragraphs:

a) The Directive's provisions must be unconditional and precise enough that they can be cited directly with respect to the internal law of a

country with the consequential recognition of the rights of individuals when the State is at fault.

b) The Wage Guarantee Fund is an institution with a specific legal regime. Its content and the limitations defined therein should be respected so that the Spanish Labour Courts are not able to bestow added responsibilities on it over and above those provided for in the applicable legislation.

c) In the event that the complainants feel that their rights were violated by virtue of the fact that the Spanish legislation failed to consider the regulations of the Community Directive, they have the right to request eompensation from the Spanish State for damages suffered as the result of this failure to apply the Directive.

This implies that the above mentioned Community regulation is not directly applicable. Priority should be given to the internal norm cited above which excludes the wage guarantee protection in the case at hand. Neither can an argument cannot be made in favour of the application of the revoked Art. 31 of the Labour Relations Law (*RCL* 1976/766) which offers broader wage protection because the applicable regulation is the one in force at the time that the incident giving rise to the appeal took place. All of this leads, as was stated above, to the rejection of this appeal and the confirmation of the lower court ruling."

3. The Application of Community Law

– Judgment delivered by the Superior Court of Justice of Madrid on 17 April 1997 (Social Jurisdiction). Appeal 1901/1996.
Source: RJA 1997/1245.
Reporting Judge: Mr. José Luis Gilolmo López.

The Superior Court of Justice of Madrid heard the appeal for reversal case filed by the complainants against the sentence handed down by Social Court 4 in Madrid on 27 October 1995. The High Court dismissed the appeals filed by TGSS and INSS thus confirming the contested sentence.

"Legal Grounds:

Seventh: The issue at hand here is the determination of whether the cited Council Regulation can be applied given that it is a regulation meant for direct application in Member States in accordance with Art. 189.2 of the EEC Treaty or whether its possible applicability should be attenuated today given the lack of development with regard to application in accordance with Art. 5 of the EEC Treaty and corresponding Arts. 192 EAEC Treaty and 86 of the ECSC Treaty.' In the opinion of the *TGSS* and the *INSS*, 'the regulations as they stand in what is today the European Union, regardless of whether they are meant for direct applicability, occasionally require intervention from the State prior to their application which can be of two types: administrative

enforcement or regulatory enforcement depending upon whether the state's obligation is reduced to individual application or whether it implies the promulgation of general norms complementary to Regulation provisions.' Following up on this premise, the petitioning entities conclude by essentially affirming that 'in this particular case we have the need for regulatory enforcement of Regulation 571/1992' and that, despite the fact that neither of the petitioners intended to ignore the Community law mandate, for *TGSS* the Regulation 'is impossible to apply at this point in time' and for *INSS* 'with reference to its capacity ... it is incompetent in this sense.'

Eighth.– The overall scope, the compulsory nature of all of its elements and its direct applicability in each Community Member State, are the three basic characteristics of the Regulations which, as sources of derived European law, differentiate them from the rest of the Organisation's own regulatory instruments as is very clearly laid out in Paragraph 2 of Art. 189, EEC Treaty of 25 March, 1957 (*BOE* 1, 1.1.86). The Regulations under scrutiny here, *i.e.* 259/1968 modified by 571/1992 leave absolutely no doubt in their respective last paragraphs that 'all of the elements of this Regulation are compulsory and directly applicable in each Member State.'

Direct applicability means that the Community norms should have a full and equal effect in all of the Member States from the moment that they come into force and throughout the entire period that they remain applicable. By virtue of this characteristic, Community provisions create both rights and obligations – that should be safeguarded by national courts – both for the State and its different institutions as well as for individual persons. Problems encountered in the integration of Community norms, with the exception of a specific provision contained therein stating otherwise, do not grant the affected State the authority to employ its own discretionary measures to the application of the Regulation, nor do they permit non-conformity with the uniformity objectives pursued by the Community. In short, 'it is not admissible that a Member State selectively or incompletely applies the provisions of the Regulation in such a way as to constrain the enforcement of certain elements of Community legislation. Along these same lines, difficulties encountered in enforcing a Community act can in no way be taken as justification for allowing a Member State to consider itself unilaterally free from having to fulfil its obligations' (Case 39/72 'Commission/Italy', *Rec. 1973*, p. 101).

When alluding to Community Regulations then, the scientific doctrine unanimously highlights the fact that they are truly a direct source within the internal order which, in addition to taking precedence over national regulations, do not require development norms from each State or from Community institutions unless the Regulation itself made explicit provisions for this. Even in these exceptions, the risk of non-uniform application has given rise to interpretations delivered from the Court of Justice of the European Communities which are very restrictive with regard to powers

which are occasionally explicitly conferred upon national authorities (ECJ Judgment 17 December 1970, Case 34/70 'Synacomex', *Rec.* 242), or to the Community authorities themselves (ECJ Judgment same date, Case 30/70 'Scheer', *Rec.* 1197). Even in cases where a specific Regulation may have a void regarding possible application difficulties that could give rise to a significant regulatory vacuum, the Court did allow the national government authorities to make exceptions or to not apply the regulation under certain conditions (ECJ Judgment 30 December 1972, Case 18/7 'Granaria', Rec. 1172).

(...)

The first draft Decree, the purpose of which was to reflect the Regulation's technical application mechanism in our internal regulations, was drawn up in March of 1989. A second draft Decree was also put together in May of 1994 but to date neither of the two have been published in the *Boletín Oficial de Estado* despite the fact that in October of 1992 the European Commission subpoenaed the Spanish Government (case file pages 1631 to 1633, Volume IV) giving it a period of two months to make an official comment with regard to its non-compliance with the Regulation in question. Furthermore, on 13 October 1993, the Commission issued a 'reasoned opinion' attached to pages 1635 to 1639 of Volume IV by virtue of which in no uncertain terms it credits the Spanish Government with 'having failed to fulfil the obligations inherent to paragraph 2 of Art. 11, Annex VIII of the European Communities Civil Servant Statutes and of Art. 5 of the EC Treaty'.

Ninth.– It is the opinion of this Court that the Regulation in question is not unclear or vague and therefore does not justify regulatory intervention on the part of the Spanish authorities whether through the State Government itself or the Social Security Administration given that, based upon the compulsory nature, the general scope and direct applicability analysed above (and without prejudice to being able to eventually achieve greater uniformity within our internal regulations system with respect to the Community provision, to which end, according to the petitioners, consensus is being sought with the European authorities through enforcement regulations applied to the second of the draft Decrees referred to above), it is possible to appeal to mechanisms or parameters inherent in the internal Spanish social welfare system itself in order to comply through administrative action or, as a last resort and in absence of the former, judicial action.

(...)

It is therefore self evident that the indicated procedure, or any other arising from our own internal Social Security system, allows for adherence to the Community Regulation in question. What should not be accepted under any circumstances is the dismissal of claims filed by the Social Security Administration alleging that direct applicability is supposedly impossible

(...)".

– Judgment delivered by the Superior Court of Justice of Andalusia, Granada, on 31 January 1997 (Social Jurisdiction). Appeal 1655/1996.
Source: RJA 1997/233.
Reporting Judge: Mr. Emilio León Sole.

The Superior Court of Justice, in proceedings stemming from a dismissal filed before Social Court number 4 in Granada, partly allows the appeals filed by the complainants and the company which is a co-defendant in the case against the lower court sentence delivered on 22 January 1996. The Superior Court rules on the direct application of the Directive on the transfer of companies.

"Legal Grounds:

(...)

Tenth.– ... It is well known in the '*acquis communitaire*' that Directives are characterised by the fact that they cannot be directly applied because they do not apply to private individuals but rather to Member States to which the Council affords a period of time to allow them to adapt their legislation to Directive guidelines. It is also well known that a Directive may be occasionally waived when the difficulty encountered in direct application results in the Member State failing to meet its obligations within the period of time conferred and when its terms are unequivocal, precise and not subject to conditions, opinions or discretionality.

It is also true, as the complainant quite rightly alleges in his appeal brief that the sentences delivered by the Court of Justice of the European Communities on 16 December 1993 (ECJ 1993/206) and on 13 November 1990, indicate that the jurisdictional institutions should interpret national law in light of Community directives when the content coincides, attempting to obtain the result referred to in the Directive in accordance with Art. 189.3 of the Treaty (*LCEur* 1986/8). It is also true that the principle of 'similar interpretation' is especially relevant when a Member State has considered that the pre-existing provisions of its own national law answered to the requirements of the Directive in question.

(...)

What the ECJ sentences cited above do is provide interpretation criteria aimed at the Courts of Justice, *i.e.* a hermeneutic guideline. When the national regulation is clear, however, there is no room for interpretation of any sort *in claris non fit interpretatio* (as was mentioned above), because in this case the task would not be one of interpretation but rather of application (*sic*) of the National Law to in turn apply the Directive, *i.e.* with regard to National Law, this is only possible when the Community norm to be applied is not a Directive but rather a directly applicable Community Regulation. If this were not the case it would lead to the violation of the entire system of national and Community sources. Therefore when the national norm is – in the case of decrees, for example – clear and transparent, it would only be possible to displace a national norm and replace it with a Community one if it were a

directly applicable Community norm. In this case Royal Decree 1382/1985 very clearly indicates that the only applicable Worker's Statute precepts are the ones cited and Art. 44 is not among them thus eliminating any possible interpretation.

D) Furthermore, even if we situate ourselves in the context of the sentence being appealed and admit the complete and direct applicability of the terms of the Directive cited, it so happens that Paragraph 2 of the precept is explicit with regard to the generic mandate of Paragraph 1 transcribed above, limiting the effects of this 'transfer' to the rights derived from the Collective Agreement without making any mention of those derived through individual agreements.

That Paragraph therefore indicates that, following the transfer (in the sense expressed in section 1, Art. 1), the transferee will respect the working conditions agreed through the Collective Agreement to the same degree that they were to be applied by the transferor until which time that Collective Agreement has expired or a new Collective Agreement comes into force. The *status quo* of the agreement only applies to conditions agreed upon through the Collective Agreement and not by virtue of individual contracts.

In short, the Court is of the opinion that, in response to the criteria applied by the petitioner, the invocation of Directive 77/187/EEC (14 February) does not alter his criteria regarding the transfer of the company with respect to the compensation agreed to with the high-ranking executives."

– Judgment delivered by the Supreme Court on 28 December 1997 (Civil Jurisdiction) on an issue of competence. 1829/1997.
Source: RJA 1997/8435.
Reporting Judge: Mr. Xavier O'Callaghan Muñoz.

The contracting party "Home English" filed a complaint in an action for payment of the outstanding balance owed by Mateo G. in the Barcelona Court that corresponded to the case by virtue of the rotation system employed in that district. The accused in this complaint raised a competence issue by filing a restraining order in the First Instance Court of Villena while the complainant maintained his complaint based upon expressed submission while the accused based his order on the general competence regulation; both parties received a favourable report from the Public Prosecutor's office. According to general regulations, Art. 62, rule one of the Code of Civil Procedure, the First Instance Court of Villena is the competent court. According to the submission clause included in the contract signed between "Home English" and D. Mateo, the competent court is the Barcelona Court. The Supreme Court ruled that the First Instance Court in Villena is the competent court.

"Legal Grounds:

(...)

Third.– ... In addition to this regulation, one has to bear in mind Directive 93/13/EEC, 5 April 1993 (*LCEur* 1993/1071), on abusive clauses in consumer

contracts. Abusive clauses are defined as follows in Art. 3: The clauses of a contract which have not been negotiated individually will be considered abusive if they, despite the good faith requirement, give rise to, in detriment of the consumer, a significant imbalance between the parties' rights and obligations that are implicit in the contract. A contract is considered as not having been negotiated individually when it is drafted prior to signing and the consumer is not able to exert any influence over it, especially in the case of standard form contracts. The professional who claims that a standard clause was negotiated on an individual basis will assume full responsibility for proving that this was actually the case. The Annex to this Directive contains a list which, although not exhaustive, is indicative of clauses that can be considered abusive... 'Q) Which eliminate or impede the exercise of judicial actions or appeals filed by the consumer, especially making it compulsory to appeal exclusively to a particular jurisdiction or arbitration not provided for in the legal provisions, unlawfully limiting available means of evidence... Art. 6: The Member States affirm that they will not bind the consumer, in accordance with the conditions stipulated by national rights, by abusive clauses found in a contract signed between the consumer and a professional... etc'. This Directive should have been transferred to Spanish Act by 31 December 1994 at the latest as is stipulated in Art. 10, but this was not the case. Case law, as was stated in the Sentence of 18 March 1995 (*RJ* 1995/1964), highlights the problems arising directly from Directives that are not transferred within the ordered time frame: The incorporation of legal norms into the systems of European Union Member States is not an automatic process but, in line with the doctrine of the Court of Justice of the European Communities, they exert a vertical influence on the States when individual persons file complaints based on the fact that the Directive was not transferred to the country's internal law within the original time frame. This lack of punctuality can also have a horizontal effect in the case of conflicts between individuals when the national law has clear and precise norms providing the possibility for immediate implementation: resulting in the declaration of the submission clause, ...".

– Judgment delivered by the Territorial Court of Madrid on 28 May 1997 (Civil Jurisdiction). Appeal 327/1995.
Source: RJA 1997/2492.
Reporting Judge: Mr. Pedro Pozuelo Pérez.

The commercial company "Explotación Agrícola Gorquez de Abajo, SA" filed a complaint related to a social agreement conflict against "Banco Español de Crédito" before First Instance Court 60 in Madrid. On 24 February 1995, that Court handed down a sentence dismissing the complaint. Section 18 of the Territorial Court of Madrid ruled that the complainant had no appeal case.

"Legal Grounds:

Fourth.– And finally, the petitioner, in passing, seems to have alluded to an alleged conflict between the Spanish regulation and the Community Directives. The motive of the appeal, introduced at the wrong moment (not until the second instance after having said nothing during the first instance), cannot be admitted. The Court was well aware that the Court of Justice of the European Communities has been insisting upon the direct applicability principle for community law both for constitutive law (the classic Van Gen and Loos sentence of 5 February 1963) as well as for derived law, mostly Directives, ('Marshall' and 'Faccini Dori' sentences). This has been the case in the so ealled vertical relations, *i.e.* in cases in which an individual citizen requests the application of Community law against a State during the course of lawsuit heard within national jurisdiction or, to put it in the words of the Court in the above cited 'Marshall' sentence '... in all cases involving Directive provisions, from the point of view of their content as unconditional or adequately precise, individual citizens may invoke them in a suit filed against a State, regardless of whether it is because the State has not adapted its national legislation to the Directive within the stipulated time frame or because it has effectuated an erroneous adaptation'. On the other hand, the Court of Justice of the European Communities itself has excluded the direct applicability principle in suits involving individuals (horizontal) and in legal ground 48 of the 'Marshall' sentence it affirms that a Directive can not, in and of itself, create an obligation on an individual citizen and that a Directive provision cannot be invoked in that spirit (against that individual). This indicates the unenforceability of direct application as regards Community law and is further confirmed by legal ground 20 of the 'Faccini Dori' sentence. Therefore, the fact that this lawsuit is between two legal persons in strictly private law without State intervention of any sort renders irrelevant a request for the enforcement of direct applicability of the Directives in question. For this reason the appeal, which was surprisingly formulated to begin with, was dismissed thus upholding the original sentence".

– Judgment delivered by the Supreme Court on 3 November 1997 (Jurisdiction for suits under Administrative Law). Appeal 544/1995.
Source: RJA 1997/8252.
Reporting Judge: Mr. Pascual Sala Sánchez.

The TS partially allows the administrative law appeal filed by the "Confederación Española de Organizaciones Empresariales" (Spanish Confederation of Business Organisations) against several precepts of the General Tax Regulation on Capital Transfer Tax and Documented Legal Acts ratified by Royal Decree 828/1995 on 29 May. It also expresses its conformity with Arts. 21.1 and 76.3, a) and c), paragraph 2, of the Royal Decree cited and its disagreement with Arts. 54.3; 64.5, paragraph 2; 74, sections 2 and 3 and 75, sections 3, 5 and 6. The sentence partially overrules the latter provisions.

"Legal Grounds:

(...)

Sixth.– ... The above mentioned regulatory precepts seem to go beyond the limits of the Codifying Legislation of which they form part and, above all, they constitute a violation of Art. 11, section b), of Directive 69/335/EEC of 17 July, gradually being incorporated in our tax system through the above-mentioned norms of Act 32/1980 of the Codifying Legislation of the Tax Regulation under scrutiny here from 1980 and 1981 and of Act 30/1985.

On the other hand it is needless to say that, although Art. 189 Paragraph 3 of the Founding Treaty of the European Economic Community seems to indicate that the Directives only mandate adaptation of Member State legislation and therefore do not create directly applicable law that individual citizens may force States to apply through the courts, Justice Court case law of what is now the European Union has stated on a number of occasions that, in those cases in which the deadline date for the enforcement of a Directive has passed and the Directive in question has not been properly enforced, individual citizen may invoke the precepts of that Community Directive in a dispute with the State (direct vertical applicability) that are clear, precise and leave no margin for discretional appraisal either because the useful effect of the norms in question would be diminished if citizens were not allowed to invoke the Directives in their own courts and if the courts were not bound to apply them (Sentences 1 February and 23 November 1977, 'VNO' and 'Enka' Cases respectively) or because the States cannot oppose individual citizen with regard to their own failure to comply with the obligations imposed on them by the Directives (Sentences 5 April 1979, 'Ratti' case and 19 January 1982, 'Becker' case). In conclusion: when the provisions of a Directive, with respect to their content, are unconditional and adequately precise, they may be invoked before the State which is guilty of not having incorporated the Directive into national legislation within the stipulated time constraints and national judges are obliged to give precedence to the Directive provisions in the event of a conflict with national legislation (Luxembourg Court Sentences of 26 February 1986, 'Marshall Case', and 20 September 1988, 'Moormann Case').

In this particular case, the text of the above mentioned Art. 11, b) of Directive 69/335/EEC goes beyond the simple eradication of the entitlement tax – it eliminates the entire fiscal burden levied on loans in the form of debentures or other analogous entitlements. As the above mentioned Justice Court has already stated (2 February 1988 'Dansk Sparinvest' Case, and the 25 May 1989, 'SPA Maxi Di' Case) Art. 11 should be interpreted in the sense that 'a Member State is not authorised to subject capital companies, defined as such in Directive Art. 3, for having issued a loan, to a tax burden that is different from the one mentioned in Art. 12 of the same Directive. The scaled Tax on Documented Legal Acts does not appear among the exhaustive list of exceptions cited in Community case law'.

As a result, if the 1995 Regulation calls for a tax on the emission and cancellation of loans in the form of debentures or other analogous entitlements, it is in violation of the 1993 Codifying Legislation and, more importantly, is in direct conflict with Community regulations. It should, therefore, be overruled in that case".

4. The System hy which a Spanish Jndge can Request a Preliminary Ruling

– Judgment delivered by the Supreme Court on 10 February 1997. (Jurisdiction For Suits Under Administrative Law). Appeal 4806/1991.
Source: RJA 1997/351.
Reporting Judge: Mr. Rafael Fernández Montalvo.

In this sentence, the Supreme Court rules on the remedy of appeal filed against the sentence handed down by the Madrid Superior Court for Suits under Administrative Law on 7 November 1990 and which dismissed the appeal filed by the company "Colgate-Palmolive, SAE" against the 15 December 1989 Resolution taken by the regional Economic Minister for the Community of Madrid. This Resolution confirmed a former Resolution taken by the Director of the Consumer Protection Service on 3 February 1989 with regard to a fine imposed for a labelling infraction.

The Supreme Court allows the appeal thus reversing the appealed sentence and nullifying the contested resolutions by virtue of their illegality.

"Legal Grounds:

Third.– With regard to the preliminary issue, one must bear in mind that Art. 177 EEC Treaty (*LCEur* 1986/8) includes a preliminary procedure of remittal to the Court of Justice of the European Community (ECJ) which coincides to a certain degree with incidental processes dealing with the unconstitutionality of legal norms in 'concentrated' constitutional judicial systems (Art. 163 *CE* [*RCL* 1978/2836 and *ApNDL* 2875]), concerning this particular case) and, in general, with the issue of the remittal of preliminary issues the objectives of which are to: guarantee the uniformity of Community law, favour its development and assure the stability of derived law by providing, even to individual persons, effective protection of their rights and interests provided for in the European Community's legal system. Community law that was not interpreted in a uniform manner would give rise to conflicting judgments. To avoid this type of situation, the above-mentioned Art. 177 EEC Treaty was conceived: to assure and maintain the uniformity and coherence of the European Community's legal system. In this respect the ECJ, as of the Sentence delivered on 16 January 1974, 'Rheinmühlen', 166/73, and in doctrine later reiterated in other Sentences like the 29 May 1977 'Hoffmann-La Roche' Case 107/66, has stated that 'it is essential to safeguard the community nature of the law established by Treaty Art. 177 the purpose of which is to insure that this law, under all circumstances, exerts the same

effect on all of the Community Countries. This precept intends to prevent divergent interpretations of the Community law that national legal institutions must apply by giving national judges a vehicle by which to eliminate the difficulties that could arise from the requirement to fully implement Community law within the framework of the legal systems of Member States.

This Treaty precept includes two cases covering different types of preliminary issues: remittal for interpretation applicable to the Treaty itself, original law and derived law [Art. 177, a) and b)] and remittal for validity assessment which is reserved exclusively to acts of derived law [Art. 177, b)]. This theoretical distinction, however, does not remedy the fact that in practice there is sometimes a close connection depending upon the degree to which the incapacity issue also gives rise to an interpretation of the norms that condition the legal validity of the controversial derived law in question.

The preliminary remittal procedure is rooted in a level of cooperation that implies a sharing of functions between the national judge who is competent to apply Community law in a specific case and the European Court of Justice whose role it is to guarantee the uniform interpretation of Community law throughout all of the Member States (ECJ Judgment 16 December 1981, 'Foglia/Novello', 244/80). It is exclusively incumbent upon the national judge to assess the need for a preliminary decision and the appropriateness of the issues presented by the parties, watching out for the possible existence of a problem of interpretation of applicable Community law that he is not able to resolve on his own. It should not be forgotten that he is also responsible for applying this Community law and that the ECJ's jurisdictional monopoly only affects non-validity issues corresponding to Community institutional acts (ECJ Judgment, 22 October 1987, 'Foto Frost', 341/85). Thus, Art. 177 EEC Treaty is not an appeal route open to the parties of a lawsuit being heard in a national court and it therefore does not suffice that the parties claim that the suit implies Community law issues to initiate a preliminary issue. It is incumbent upon the national judge to determine the necessity of preliminary remittal through consideration of the following elements: a) applicability of the Community law provisions to the lawsuit; b) existence of a doubt regarding the meaning or validity of an applicable Community law norm that would have an effect on the ruling in the suit; and c) inability to resolve the problem himself without risking the uniformity with regard to interpretation and application of Community law.

In summary, having substituted in ECJ doctrine itself, the criteria of 'separation' with that of 'cooperation' in the design of jurisdictional function sharing between the Community judge and the national judge (ECJ Judgment 11 December 1965, 'Schwarze', 16/65), it is the national judge who must take the initiative for remittal (ECJ Judgments 16 June 1981, 'Salonia', 126/80, and 6 October 1982, 'CILFIT', 283/81) and for deciding whether it is necessary for the ECJ to make a preliminary decision on some aspect of Community law ('pertaining to the issue at hand') in order to make a ruling (STS 3 November

1993 [*RJ* 1993/8847]). In accordance with the system resulting from the application of Art. 177 EEC Treaty, 'the national judge, the only person who has knowledge of the facts of the case as well as the arguments forwarded by the parties and who should assume responsibility for the judicial ruling, is the person who is best situated to evaluate, with full knowledge of the case, the appropriateness of the legal issues that arise throughout the hearing and the need for preliminary decision in order to deliver a resolution' (ECJ Judgment 29 November 1978, 'Pigs Marketing Board', 83/78).

Paragraphs 2 and 3 of Art. 177 EEC Treaty make a distinction between the option of remitting issues to the Court of Justice, an alternative available to any jurisdictional institution of one of the Member States, and the obligation to remit a question to the Court of Justice when it is the case of a 'national legal institution whose decisions are not susceptible to national judicial appeal'. In this case, with a view to guaranteeing the unity and applicability of Community law and also mindful of the fact that resolutions delivered by that supreme legal institution have the status of national case law, the preliminary issue must be dealt with before making a judgment. This does not mean, however, that the last resort judge or national Supreme Court judge does not have a say in the determination of the appropriateness or is not able to carry out a relevance hearing to raise preliminary issues in the terms outlined below.

The assessment of the appropriateness of the preliminary issue which is the responsibility of the national judge even, as has already been mentioned, when the internal judicial hearing has come to a close in accordance with the formulation of Treaty Art. 177 which uses the words 'if a decision is deemed necessary in order to make a judgment,' has been paradigmatically displaced by the 'clear act' criteria. This doctrine which is so frequently employed by the French State Council (Art. 11604 *Ministre de l'Interieur c/ Cohn-Bendit*, Resolution of 22 December 1987) as well as by the German Federal Finance Court (*Bundesfinanzhof*, Resolutions of 16 July 1981 and 24 April 1985), was questioned while insisting that all issues brought before a national legal institution of last resort should be remitted to the ECJ because the national court is not competent by virtue of Art. 177, Section 3, EEC Treaty to retain the Community court because the ruling regarding the clarity of the issue is the fruit of interpretation and since the notion of 'clear act' does not conform to the complexity of the Community legal system. Nevertheless, if at the outset the ECJ seemed to consider that the obligation contained in Art. 177, section 3 EEC Treaty was absolute, at least since the 'CILFIT' Sentence (ECJ, 6 October 1982), it has made clear that there are two situations in which the last instance judge is not obliged to remit to the Community Court: the first is when there is case law established in the Community Court that resolves the controversial point, independent of the nature of the proceedings that gave rise to that case law; the second is when the proper application of Community law is so clear that it leaves no reasonable doubt about how to resolve the issue or, using its own words 'the correct application of Community law is so

clearly self evident that it leaves no reasonable doubt as to how to resolve the issue at hand.' If this is the case, the national legal institution must also be convinced that 'this same self evidence will be equally recognisable by the legal institutions of the other Member States as well as by the Court of Justice' and may proceed to not submit the issue to the Court of Justice. This same 'clear act' doctrine has inspired some High Court decisions such as the 14 April 1989 Sentence. Also, in *STS* 27 January 1990 an analysis was made of the need to submit the preliminary issue to the ECJ mindful of the doctrine and, although its application was excluded because the response to the issue did not appear obvious, the proposal was considered inappropriate because the ECJ doctrine offered a solution to the problem. The conclusion can thus be made that the exclusion of an issue from a preliminary judgment is justified: when it does not condition the ruling (irrelevant issue) so that, regardless of the ECJ response, it will have no influence on the final ruling (ECJ Judgment of 22 November 1978, Mattheus 16 December 1981, 'Foglia/Novello', among others); when the answer is self evident because there is no reasonable doubt relative to the interpretation and/or validity of the applicable Community provision while remaining mindful of, as the ECJ highlighted, both the context as well as the set of norms to which the norm being interpreted belongs (clear sense); and when the doubt is 'clarified' by virtue of the similarity of the issue with a case resolved by the ECJ which would allow the doctrine of the precedent to be invoked or even the community case law as was indicated by the ECJ Judgment 27 March 1963, 'Da Costa', 28 to 30/1962 and is referred to in Art. 104.3 of the Procedural Regulations of the Court itself of 19 June 1991.

In accordance with the doctrine expressed, the Court in this case does not harbour any interpretative doubts relative to the meaning of the Directive invoked in the terms expressed below and therefore does not consider remittal of the preliminary to the ECJ pertinent or in the interests of the petitioning party.

Fourth.– Within the system of Community Law sources, in principle the Directives impose upon the State an obligation with respect to the result, leaving it free to choose the form and means to achieve that end. Just the opposite of what occurs with the Regulations, they therefore require the regulatory intervention of the Member States for their 'transfer' or application. As the First Instance Court reminds us, the Court of Justice of the European Communities indicated, some time ago now, 'the direct vertical applicability' of the Directives under certain circumstances. There were a few precedents but it was as of the 5 April 1979, 'Ratti', 148/1978, and the 19 January 1982, 'Becker', 8/1981 Sentences that the conditions were determined for the invocability of a Directive and its direct application: if upon expiration of the deadline imposed on the States to adapt their internal legislation there remain deficiencies, a Community provision, the content of which is adequately precise and unconditional, may be invoked.

The compulsory nature of the Directive for the States is deduced from Arts. 5 and 189.3 EEC Treaty that establish the right of an individual to invoke, in his favour, a non-enforced Directive and thus disallow the Member State to ignore the obligations that the Directive imposes upon it. In the same sense, there are also a number of uniform application and non-discrimination principles (Art. 7 EEC Treaty, Art. 6 subsequent to the Maastricht reform).

Furthermore, we have recognition of the 'direct vertical application,' *i.e.* the possibility for private citizens to call on the State or the courts to judicially impose certain Directive provisions in the above mentioned cases. This does not, however, exonerate the State from its obligation to enforce these Directives through the adoption of the necessary internal provisions. The compulsory nature of this duty is thus exacerbated even when the Directive does not meet the requirements that make it directly applicable in these vertical relations as was determined by the ECJ in the important 'Francovich' Sentence which pointed to the responsibility and redress that the State had to assume to guarantee the full efficiency of the Community norm."

– Judgment delivered by the Superior Court of Justice of Navarra on 13 January 1997 (Social Jurisdiction). Appeal 82/1995.
Source: RJA 1997/749.
Reporting Judge: Mr. Victor Cubero Romeo.

In this ruling, the Superior Court of Navarra dismisses the appeals filed by the complainant and the co-defendants against the Sentence delivered by Social Court 3 of Navarra in a case stemming from a claim to nullify the stationing of workers. In its ruling, the Navarra court analyses the conditions determining admissibility of preliminary issues before the Court of Justice of the European Communities and studies the difficulties arising from direct applicability of Directives.

"Legal Grounds:

First.– The proponent of this preliminary issue argues in favour of the need for clarification as to the correct interpretation of Directive 84/466/ *EURATOM* (*LCEur* 1984/561) with regard to its application in Spain, given the frequency with which the object of this material has been remitted to the Court of Justice. It is the view of the petitioner that clarification is necessary and would condition the final ruling to be delivered by the court because it is essential for the interpretation and application pending with regard to internal Spanish norms.

The widely decentralised application of Community law as well as a harmonic and homogeneous interpretation of the norms of which it is comprised, constitute the fundamental principle of the preliminary remittal to the European Court as is described in Art. 177 EEC.

The development of Community law with directly applicable norms and others, like the Directives which are therefore decisively important for the application of each of the Member States' internal law, has determined that

the national judge is more and more frequently called upon to make a correct interpretation (for their proper application) of those norms which, forming part of his country's legal system, must make a choice in the exercise of his jurisdictional function. In the end, the objective is no different than that of internal preliminary issues and is a matter of providing assistance to the legal institution acting as a legal operator.

Article 177 EEC (*LCEur* 1986/8) makes a distinction between compulsory and facultative issues, depending upon whether the ruling can or cannot be appealed. Given that a supreme court appeal can be filed for the unification of case law in response to a judgment delivered by this High Court of Justice, the possibility of remitting the issue to the European Court is completely at the discretion of this High Court which is responsible for determining whether, from its point of view, this is necessary or not in order to properly carry out its jurisdictional function. This necessity is a function, therefore, of the assessment made by the institution that is responsible for delivering the judicial resolution, which constitutes what is called the 'appropriateness' of the issue (ECJ 19 December 1968, Salgoil). This is the prerogative of the judicial institution and neither the parties to the lawsuit nor governments of the Member States may meddle in that process. The same level of freedom ought to be afforded the Court of Justice in determining the moment in which it does the revision as well as establishing the text of the issue (ECJ Judgment 'Kledingsverkoopbedrifj/Bosch').

It is true that Directive 84/466, the interpretation of which is the object of the request, is not a directly applicable law but should serve for the proper interpretation of Spanish legislation dealing with the same material.

It is also true that another factor which could favour the requested remittal is a number of lawsuits which have given rise to the separation or division of functions within radiology units comprised of health care professionals with different academic credentials.

Notwithstanding the above, this motive is not sufficient to justify this Court's formulation of a remittal request which should be limited to the need for interpretation from the European Court.

Focusing upon the terms of the Directive themselves, it can be easily observed that they are not very clearly defined and are general in nature which is actually quite reasonable given that their purpose is to set the general guidelines that national legislations should follow and, that being as it is, one could not expect from the European Court an interpretation that did not remain very general. Furthermore, it is felt that the Spanish legislation, as will be seen below, is sufficient to properly resolve the *thema litigandi* which is the object of this appeal, to which the existing Supreme Court case law related to this subject should be added.

As a supplement to the above (and not a new argument) it should be mentioned that the right to a speedy trial – *ex* Art. 24 *CE* (*RCL* 1978/2836 and *ApNDL* 2875) – requires that circumstances which could delay the

outcome of the hearing and which are not absolutely indispensable in providing a reasoned and reasonable response, should be avoided.

For all of the reasons given above, the request for preliminary remittance should be denied".

6. State Liability in Community Law

– Judgment delivered by the Supreme Court on 5 June 1997 (Jurisdiction for suits under Administrative Law).
Source: RJA 1997/5954.
Reporting Judge: Mr. Juan Antonio Xiol Rios.

In this Sentence, the Supreme Court rejects the administrative law appeal filed by the legal representative of Ana Maria G.P. against the Council of Ministers' Agreement of 3 March 1995 by virtue of which the petitioner was denied compensation for possible damages with regard to her post as a customs agent resulting from the coming into force of the Single European Act.

"Legal Grounds:

(...)

Second.– The proper resolution of the petition filed requires a prior qualification, from the perspective of the State's patrimonial responsibility invoked, of the series of measures that led to Spain's entering the European single market and the consequential elimination of customs barriers which resulted from Government initiatives adopted in application of legislative provisions implemented through the ratification of organic laws given that they affected the exercise of State competencies recognised in the Constitution.

Following the negotiation process Spain, along with Portugal, became a member of the European Communities with the signing of the Act of Accession on 12 June 1985 (*RCL* 1986/2 and *ApNDL* 2643; *LCEur* 1986/6), through the Organic Law 10/1985, of 2 August (*RCL* 1986/1979 and *ApNDL* 2644), authorisation was granted by the Spanish Parliament – in accordance with Art. 93 of the Constitution (*RCL* 1978/2836 and *ApNDL* 2875), by virtue of which 'through the organic law it possessed the authority to authorise the signing of treaties which attribute to an international organisation or institution the exercise of certain constitutionally based rights' – for Spain's accession to the European Communities which implied the application of the 1957 Treaty of Rome (*LCEur* 1986/8), which envisions customs union. Art. 31 of the Act of Accession refers to the transitory measures and indicates that the last 10% reduction would take place on 1 January 1993.

The 14 February 1986 Council of Ministers Agreement authorised the signing of the Single European Act and a new Organic Law, 4/1986 of 26 November (*RCL* 1986/3639), authorised its ratification; its Art. 8 providing for the progressive adoption of measures to establish the internal market to be completed by 31 December 1992.

By virtue of Organic Law 10/1992 of 29 December (*RCL*/2784), final authorisation was finally received for the ratification of the European Union Treaty drafted in Maastricht on 7 February 1992 (*RCL* 1994/81 and *LCEur* 1992/2465), which, in its Art. B, sets the objective of a market free of internal frontiers.

In summary, despite the series of government acts carried out in the arena of international relations and administrative acts for the application of legal provisions legitimising the European Union integration process, the incorporation of Spain into the Single Market was basically produced through decision taken at the legislative level through organic laws ratified by Parliament. For that reason, it is appropriate for the parties to this suit to accept that the issue of whether the State has patrimonial responsibility as a result of the application of legislative acts is valid.

Seventh.– . . . The negotiation process leading up to Spain's accession to the European Communities culminates with the signing of the Act of Accession of Spain and Portugal on 12 June 1985. On 8 August 1985, Organic Law 10/85 of 2 August was published authorising Spain's accession to the European Communities which implied the enforcement of the 1957 Treaty of Rome which in turn implied the elimination of internal customs barriers. Art. 31 of the Act of Accession makes specific reference to transitory measures and specifies that the last 10% reduction was to take place on 1 January 1993. Independent of possible announcements made by the Government with regard to this measure, it was formally and unquestionably adopted through the 14 February 1986 Council of Ministers' Agreement authorising the signing of the Single European Act. This took place almost seven years prior to the definitive elimination of customs barriers and therefore could not have gone unnoticed by the petitioner who must have been aware of the effects it would have on her professional activity.

The fact that on 27 April 1987 the Union of Customs Agents and Commissioners sent the first of a series of letters expressing concern over these matters to the Finance Ministry with regard to the effects that the coming into force of the Treaty would have on their agents, indicates that it indeed did not go unnoticed.

(. . .)

As stated in the Council of Ministers' Resolution being challenged in this case, the EEC Regulation 3904/1992 (*LCEur* 1992/4112), of the 17 February Council meeting called for 'adaptation measures for customs agents and commissioners with regard to the internal market'. In support of this collective, on 23 July 1992 a Tripartite Agreement was signed between the Government, the General Council Customs Agents and Commissioners and the trade unions. On 9 July 1993 the order from the Parliamentary Relations Ministry and the Government Secretary was published in the *Boletín Oficial del Estado*, 8 July (*RCL* 1993/2115), which regulated the granting of aid to Customs Agency workers affected by the coming into force of the Single European Market".