SPANISH JUDICIAL DECISIONS IN PUBLIC INTERNATIONAL LAW, 1993 AND 1994

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I. INTERNATIONAL LAW IN GENERAL

II. SOURCES OF INTERNATIONAL LAW

III. RELATIONSHIP BETWEEN INTERNATIONAL LAW AND MUNICIPAL LAW

1. Foreign Matters of the State and of Regional Governments

— STC 26/05/94, *BOE* 25.6.94.
Reporting Judge: The Honourable Luís López Guerra.

Ruling on a conflict of competence brought by the Spanish government against certain precepts of Decree 89/1988, dated April 19, promulgated by the Basque government, which stipulates the organic structure of the Departamento de Presidencia, Justicia y Desarrollo Autonómico.

The Court rules that not all Autonomous Community activity related to foreign affairs, especially as regards the European Community, constitutes an infraction of the State's exclusive right to carry on foreign affairs found in article 149.1.3 CE. The creation of an office for institutional relations with the European Community located in

Spanish Yearbook of International Law, Volume III 1993–1994, 379–426.

Brussels does not surpass the competence of the Basque Autonomous Community.

"*Legal Grounds*:

(...)

Third.– In order to resolve this conflict of competence, a few prior observations must be made on whether or not Autonomous Communities can carry out actions that have effects outside Spain, and more specifically, actions that create some type of link or relationship with institutions of the European Community.

To determine if these actions are possible and if so, what their limits might be, we must begin by stating that the structure itself of the 'Autonomous State', or of the 'State of Autonomies' as it is defined by the *CE*, by the Statutes of Autonomy, and by those rules that regulate the division of powers, implies that the Autonomous Communities have accepted (either exclusively or in a shared approach with the State) a set of public functions — as regards both regulation and enforcement — that assumes the existence of a material scope of action. There are both Constitutional and statutory rules that stipulate that the Autonomous Communities carry out tasks of considerable amplitude, scope and relevance as regards social and economic issues within the confines of their respective territories. Therefore, as a first comment on the question being addressed here, it is clear that in order for an Autonomous Community to correctly carry out the duties incumbent upon it, it must be accepted that the Community will on occasion have to carry out specific activities not only outside of its own territory, but also outside of Spain.

Fourth.– These general considerations become particularly relevant considering that since January 1, 1986, Spain has participated actively in the process of European integration, the latest step of which has been the entry into force of the Treaty of the European Union, signed in Maastricht on February 7, 1992. Thus it is sufficient to refer to the objectives established in the Treaties of the European Communities — which constitute one of the foundations of the European Union, as article A of the aforementioned treaty of 1992 states —, to the broad powers that are given to community institutions, and in particular, to the fact that community rules and the acts carried out by these institutions can produce direct effects in the legal systems of member States to see that Autonomous Communities, whose autonomy is of a political nature for the purpose of 'managing their own interests' (*Ss.TC* 4/1981 and 25/1981), have a direct interest in the activity that

the European Communities carry out.

Therefore, it is reasonable to believe that when Spain acts within the scope of the European Communities, it is doing so within a legal structure that is very different from traditional international relations. The development of the process of European integration has created a legal system, the community system, which for the states that make up the European Communities can be considered, for certain purposes, 'internal'. When the state in question is a very complex state, such as ours, although it is the State that participates directly in the activity of the European Communities and not the Autonomous Communities, there is no doubt that these Autonomous Communities are interested in the development of this dimension of the Community. Therefore, it should not surprise us that, on the one hand, several Autonomous Communities have created, within their administrations, departments responsible for following the evolution of the activity of community institutions, and that on the other, as is true for other member States of the European Communities, territorial entities have attempted to establish a variety of offices or agencies at the headquarters of community institutions which are charged with directly gathering the required information on any of the activities of these institutions which might affect them.

In the case of Spain, the Autonomous Communities have established several formulae to achieve these goals including creating foundations and working through public entities attached to regional governmental offices or corporations created with public capital. As regards the conflict in this case, the formula stipulated by Decree 89/1988 consists of the creation of an office that forms part of the *Departamento de Presidencia, Justicia y Desarrollo Autonómico del Gobierno Vasco* (Department of the Presidency, Justice and Autonomous Development of the Basque Government), an approach which directly attaches this office to the Autonomous Administration.

Fifth.– Notwithstanding the aforementioned, the Autonomous Communities' ability to carry out activities that have effect beyond their territorial limits as part of their competencies, and the scope that these activities can have, are obviously limited by the reservations that the *CE* has established in favor of the State, and especially the reservation stipulated in article 149.1.3 *CE* which confers upon the State exclusive competence in matters of international relations.

Of course, in order to limit the scope of this reservation, it is important to remember that 'international relations' cannot be defined as any type of activity that involves a foreign country. This is clear by

studying the literal wording of the *CE* (which specifically reserves certain areas of action for the State which are not considered to be part of 'international relations'; for example, 'foreign trade' — article 149.1.10 — or 'foreign medical assistance' — article 149.1.16) as well as the interpretations of the Constitution which can be found in the case law of the Constitutional Court which has not accepted that 'any relation, no matter how distant, based on issues that involve other countries or foreign citizens necessarily implies that competence belongs to the area called 'international relations' (*STC* 153/1989, FJ 8). And, more specifically as regards the topic we are addressing here, we have established that 'the foreign dimension of a matter cannot be used to carry out a broad interpretation of article 149.1.3 *CE* , which would subsume any measure that has some external impact, no matter how remote, to the competence of the State, because by doing so, it would bring about a reordering of the constitutional distribution of competencies between the State and the Autonomous Communities' (*STC* 8/1983, FJ 3, which remits to *Ss.TC* 153/1989, 54/1990, 76/1991 and 100/1981).

Now then, even when it is appropriate to define all foreign activity as matters of 'international relations' reserved by the *CE* as competence of the State, it is also true that this reservation absolutely assumes that those actions that are included in this title are indeed outwith the competence of the Autonomous Communities. This Court has already ruled on this issue on several occasions, and although it has not pretended to provide an exhaustive description of this reservation in favor of the State, it has identified some of the essential elements that are found within it (*Ss.TC* 153/1989, FJ 8 and 80/1993, FJ 3). And while this Court does not intend to undertake this task at this time, it does wish to point out in general terms that by interpreting article 149.1.3 *CE* in relation to other constitutional precepts such as as the ones found in articles 63, and 93—97, it is clear that on the one hand, and in a negative sense, the term 'international relations', as regards legal matters, cannot in any way be defined as broadly as it is in a sociological sense, or as any foreign activity, nor, obviously as 'foreign policy' when this refers to government action. On the other hand, in a positive sense, the object of that reservation — in general terms, as was stated above — has to do with the relations that Spain maintains with other independent and sovereign States, which is the more traditional aspect of these relations, and with international governmental organizations. These relations are governed by 'general international law' as it is called in article 96.1 of the *CE* , and by the treaties and

conventions in force for Spain. Therefore, it is the rules of both general and particular international law applicable to Spain that determine on a case–by–case basis both the content and the subject of these relations. Therefore, in relation to article 149.1.3 *CE* , this Court has been able to refer to very characteristic matters of international law such as those related to the signing of treaties (*ius contrahendi*), the representation of the State in foreign countries (*ius legationis*), and the creation of international obligations and the State's international responsibility (*Ss.TC* 137/1987, 153/1989 and 80/1993).

Thus, the 'international relations' that are the object of the reservation found in article 149.1.3 *CE* are those between international subjects which are governed by International Law. This automatically excludes territorial entities that have political autonomy from participating in 'international relations' as they are not international subjects, and therefore, they cannot enter into treaties with sovereign States or international governmental organizations. Of special importance to this case, this article also excludes these entities from establishing permanent representational organs before subjects which have international byelaws, as this implies a prior agreement with the receptor State or the international organization before which they would carry out their functions.

In the case of Spain, this possibility is not contemplated either explicitly or implicitly in the *CE* . This is also corroborated by the stipulations of the different Statutes of Autonomy as regards international treaties and conventions, and specifically by the statute of the Basque Country.

Sixth.– Given the scope of the exclusive competence of the State, the ability of Autonomous Communities to carry out activities that have foreign implications should be understood to be limited to those that, being necessary or at least convenient for the exercise of their competencies, do not imply the exercise of *ius contrahendi* or create immediate and real obligations as regards foreign public authorities, do not involve State foreign policy and do not create responsibilities for the State in relation to foreign States or inter- or supranational organizations.

It is obviously not necessary to include an exhaustive list of what these activities would be. The decisive factor for the inclusion of an activity in Autonomic competence is not only a statutory attribution of competence in this area, but also that the activity not impinge upon the aforementioned state reservation or perturb or condition it in any way. This means that within the concept of exclusive state competence, there

is the possibility of establishing measures to regulate and coordinate activities that have implications outside of the Autonomous Communities in order to avoid or remedy any possible harm to the formulation or enforcement of foreign policy that may occur, which does pertain exclusively to State authorities.

(...)

In the case at hand, it is impossible then to conclude that 'relations between Basque public institutions and community organisms and the Council of Europe' (article 23.d of the Decree) automatically implies in all cases or in one case in particular, that there is an infringement of state competence as defined in article 149.1.3 *CE* simply because these relations have something to do with matters of international relations. Furthermore, as was stated above, the nature and relevance of the activities carried out by community institutions as regards the exercise of Autonomous Community competencies lead us to understand that Autonomous Communities should indeed follow these activities and remain informed of them, and that in this case, the Autonomous Community of the Basque Country should monitor the predictable evolution and possible repercussions of these activities in that region. However, it is not possible to infer from the precept in question, that (as regards community institutions or the Council of Europe) these monitoring activities can have anything to do with matters such as entering into international agreements, the exercise of *ius legationis* or the acceptance of international responsibility.

(...)

This conclusion is based on the fact that the Treaties of the European Communities and of the European Union do not contemplate the participation of any entity other than that of member States. This excludes divisions within a State from entering into pacts or agreements with community institutions and from creating any type of State responsibility. This also means that the objective of the Basque rule could not have been to regulate relations that given the structure of the European Union, simply cannot exist.

In conclusion, given that the Autonomous Communities can carry out activities with foreign implications within the limits marked above and within the scope of their competencies, especially as regards ties with European institutions, nothing stands in the way of an Autonomous Community establishing an organ charged with coordinating the actions of the different departments that make up its administration in these matters. In light of the text of the Basque Decree, the 'general coordination' which is mentioned refers to the

organs of the Autonomous Community and to no others."

2. Foreign Matters of the State

a) *State Responsibility in Domestic Matters*

— STS 23 June, 1994, (Division 3, Section 6), *Ar. Rep. J.*, 1994, n. 4973.
Reporting Judge: The Honourable José María Sánchez–Andrade y Sal.

With this jurisdictional decision, the Supreme Court rejects the appellant's pretensions of obtaining compensation from the Spanish government based on the fact that actions by said government (deportation of Libyan diplomats and citizens from Spain) provoked retaliatory measures by the Government of Libya (deportation of Spanish citizens from its territory), which gave rise to a breach of contract by the firm known as WAT, S.A.

"*Legal Grounds:*

Second.– The Court of First Instance correctly understands that no cause–effect relationship can be found between the harmful consequences experienced by "WAT, S.A." as a result of the cancellation of certain work contracts that it had with various Libyan firms and the deportation from Spanish territory of five Libyan diplomats, three professors and three students as ordered by the Spanish government, which provoked the deportation from Libya of 4 of the 17 Spanish employees of "WAT, S.A." who were responsible for doing the work stipulated in the aforementioned work contracts. It is important to note that 10 employees of "WAT, S.A." abandoned said country after the North American bomb attack that took place on May 15, 1986. These events and circumstances undoubtedly contributed to the paralysation of the work that "WAT, S.A." was carrying out in Libya. Furthermore, as was pointed out in the judgment being appealed, there was no proof that "WAT, S.A." had the intention of completeing said work, but rather it appeared that, given the circumstances alluded to earlier, it hoped to renegotiate its contracts with Libyan firms and block collection of the collateral that had been provided. To achieve this goal, "WAT, S.A." tried taking a friendly approach through the intervention of accredited Spanish diplomatic personnel and alleging causes it claimed were *force majeure*. However,

the contents of the letter dated July 4, 1987, sent by the Deputy Director of Bilateral Economic Relations of the Ministry of Foreign Affairs to Mr. R., the representative of "WAT, S.A.", is quite enlightening as regards the compensation that is the object of this appeal. As regards the situation in which "WAT, S.A." found itself in Libya and the claims it made against the Spanish government, and after referring to the diplomatic efforts that were made to deal with the Libyan authorities in order to assist Spanish firms with their problems in that country, the letter states that "WAT, S.A." "was attempting to enter into contracts in Libya in 1985 when it was a well–known fact that other Spanish firms were encountering all manner of problems in that country, especially in collecting outstanding debts. "WAT" decided to enter into contracts without using any of the gnarantee mechanisms available in Spain such as insuring financial support and equipment with *"CESCE"*. According to the preliminary reports that were entered into the record in response to a court order issued by the a quo court (June 27, 1990), to arrive at a correct decision in the case, four "WAT" workers were expelled from Libya, one technical engineer, one electrician–foreman, and two electricians. There is no proof that "WAT" made any attempt to have the expelled workers readmitted or replaced or even that "WAT" filed an application which was rejected by Libya. There is evidence that the Tripoli City Hall, with whom "WAT" had signed a contract in February, 1985, for the construction of four pumping stations, did, through the Mayor, notify "WAT" that these contracts were considered cancelled. Furthermore, the Libyan Ministry of Foreign Affairs notified the Spanish Embassy in Tripoli of this cancellation. There is no evidence that "WAT, S.A." filed a claim of any kind with the Libyan courts. These facts show that there is no direct, immediate and exclusive cause and effect relationship between the harm that "WAT, S.A." suffered due to the cancellation of certain contracts that it had signed with several Libyan entities, and the deportation from Spain of some Libyan diplomats and citizens. Even if these deportations did bring about the reciprocal deportation by Libyan authorities of four Spanish citizens who were working in Libya for "WAT, S.A." on the contracts between "WAT, S.A." and several Libyan entities, it cannot be concluded that this was the reason for the cancellation of these contracts nor for the non–payment of the sums that "WAT, S.A." claims are owed it by these entities, which brought about the harm for which "WAT, S.A." is seeking compensation from the Spanish government.

Third.– The peculiar contractual relationship that exists between the firm "WAT, S.A." and certain Libyan institutions for the construction of

four potable water pumping stations in the Tripoli City Hall, the construction of six sewage purification plants contracted for with the Murzak Popular Committee on Housing, the supply of replacement parts for air–conditioning units and electric and fireproofing installations in military buildings and on military sites, and the completion of four potable water pumping stations in Tripoli, was conditioned by the incidents that took place during the execution of the contracts referred to above. These incidents can in no way be separated from the enforcement of the conditions of the contracts that brought them about and cannot create any objective responsibility for the Spanish government.

IV. SUBJECTS OF INTERNATIONAL LAW

1. The Immuuity of Foreign States

— STS, 22 February 1994, (Labour Division), *Ar. Rep. J.*, 1994, n. 1222.
Reporting Judge: The Honourable Leonardo Bris Montes.

The Tribunal Supremo rejects the action for judicial error brought by the Embassy of the Republic of France in Spain against the resolutions of Labour Court number 22 in Madrid, dictated as part of enforcement proceedings, and specifically against the attachment order dated March 12, 1991, on the bank account belonging to the diplomatic mission who is the complainant in this matter.

"*Legal Grounds*:
Having clarified the supposed reason for the ambiguity found in the petition presented by the defendant and the strict sense in which it can be accepted, it would do no harm to look to the merits of the question. In order to do this, we must first review the different points of the proceedings in which the resolutions that are being challenged occurred. The judgment was issued on September 19, 1990, and ruled that the French Embassy in Spain was guilty of improperly dismissing the complainant. The judgment was accepted by both parties and the work relation was declared severed as the employer chose not to accept the employee's reinstatement. Enforcement of the ruling was ordered

on March 12, 1991, and the attachment which is now being challenged was accorded. The challenge is based on an infringement of the provisions of article 22.3 of the 1961 Vienna Convention (RCL 1961/155 and Ap/NDL 26103) which was ratified by Spain. As was mentioned above, this judgment was accepted; however, on April 6, 1991, a writ was presented before the Court requesting that the order be declared null and void and that an order for non–enforcement be issued based on the supposed immunity granted by article 23.3 of the Vienna Convention. This request was rejected in a ruling issued on April 16, 1991, which granted the right to a motion for reversal which was not exercised, thereby signalling acceptance. Instead, on July 12 and 15, 1991, new writs were presented by the ambassador and the consul in which annulment of the enforcement of the March 12 order was once again requested and subsequently rejected in a ruling dated September 2, 1991. On September 24, this decision was appealed for reversal as was the court order dated September 3 which put the attached amount at the disposal of the plaintiff. In a ruling dated December 23, 1991, both appeals were rejected and notification that no appeals were admissible was given. In spite of this, a writ was presented on February 7, 1992, requesting a reversal of the last ruling dated December 23, which gave rise to the order of February 10 which did not accept the request made on February 7, and finally, instead of resorting to a complaint, an appeal for reversal was filed on March 4 against the February 10 order, which was rejected in an order issued on that same day.

Fourth.– The recounting of the facts given above shows that the two resolutions that can be considered in error based on lack of knowledge of article 22.3 of the Vienna Convention, are the March 12, 1991, ruling that stipulates the attachment, and the April 16 (of the same year) ruling that does not grant annulment of enforcement. Both resolutions are accepted and the right to appeal that is expressly granted and authorized by article 185 of the *Ley de Procedimiento Laboral* is not exercised [...]

Fifth.– All of the above shows that in spite of the efforts and ambiguity of the suit, it cannot be deemed that it was filed in a timely manner or that all of the recourses granted by the legal system were taken advantage of. It is also true that the resolutions which are being challenged on the grounds of judicial error should not be declared erroneous. To arrive at this conclusion, it is sufficient to first transcribe the rule that is the basis for the interpretation of the error, article 22.3 of the 1961 Vienna Convention: "Mission sites, furniture and other assets

located in the missions as well as the mission's means of transport cannot be the object of any search, requisition, attachment or enforcement measure", and second, to study the content of the resolution: the attachment of a bank account held by the Consulate of the French Republic in Spain. The Court has always understood that bank accounts opened in institutions not connected to diplomatic missions cannot be considered assets located in them. The literal tenor of the article transcribed above grants such an interpretation. In a judgment issued November 16, 1990 (RJ 1990/8578), judicial error is defined as "a clear and evident error in the statement of the facts or in the application or interpretation of the law". As the Council of State declaration of June 20, 1991, included in the ruling states, it is true that this is a complex question, and the declaration itself shows that it would be plausible for a solution to be found that would be the exact opposite of the one adopted by the Court, but in order for a judicial error to be declared, it is not enough that a solution other than the one stipulated in the decision and considered erroneous be plausible, as this only means that the resolution is debatable. It is an error when a real or legal solution other than the one adopted by the resolution is imposed in an absolute fashion, in other words, admitting no contradiction".

V. THE INDIVIDUAL IN INTERNATIONAL LAW

1. The Rights of Aliens

— STS, 16 November 1994, (Division 3, Section 6), *Ar. Rep. J.*, 1994, n. 1789.
Reporting Judge: The Honourable Juan Manuel Sanz Bayón.

The judgment finds that the deportation of the appellant, a European citizen, is inadmissible even though the individual in question is in Spain without his documentation in order.

"*Legal Grounds*:
Second.– The first ground for cassation has to do with the determination of the nationality of the appellant, which is a civil matter. Therefore, the rulings made in the judgment on this question are subject to the limitations stipulated in article 4.2 of our contentious

administrative business jurisdictional law.
The appellant's father is French and his mother is Spanish. He was born in France on March 2, 1968 and so acquired French citizenship from the time of his birth in accordance with the wording of article 17.2 of the *Código Civil* that was in effect at that time which stated that a child acquires the nationality of his father. Subsequent to the reform effected by Law 51/1982 dated July 13, article 17.1 establishes that the children of Spanish fathers or mothers are automatically considered Spanish nationals.

As the *Dirección General de los Registros y del Notariado* has repeatedly stated, there is no sufficiently important reason to consider the law passed in 1982 to be retroactive and therefore applicable to births that occurred before its entry into force, which would give individuals born before that date an *ius sanguinis* right to Spanish nationality. In fact, article 2.3 of the *Cc* establishes that laws are not retroactive unless specifically stipulated, and there is absolutely no precept in Law 13 of July 1982 that alludes to or stipulates this retroactivity.

As there is no specific transitory disposition on the atemporal law of Law 51/1982, the transitory dispositions of the *Código Civil* must be applied. In the first of these, it is categorically stated that the rights derived from events that occured while the previous legislation was in effect are governed by said legislation even if the *Código* regulates them in some other way or does not recognize them. It goes on to say that even although a law declared for the first time in the *Código* is considered to be in force from that point on — even as regards situations caused by events that occurred under the previous legislation — this concept is not applicable to nationality because nationality is not simply a right, but rather a status and as such a set of rights and responsibilities. Furthermore, if this 'right' to nationality which was declared in the *Código* for the first time were to be applied retroactively, this would contradict the stipulations found at the end of the transitory disposition on the requirement that a law, when declared for the first time, should not adversely affect any other acquired right of the same type. There is no doubt that the retroactive attribution of Spanish nationality would indeed adversely affect the prior foreign nationality of the individual in question.

Moreover, in this case there is no doubt at all about the current French nationality of the appellant because he himself recognized in the heading of the appeal for reversal he filed on January 30, 1990, that he was single and 'of French nationality, residing in Eragny sur Oise

(France)'. In the second allegation it states that 'the party has French nationality' and that he did not exercise his right to the options provided in Title I of Book I of the *Código Civil.*

It is obvious that no one can contradict his own acts, and the express and complete recognition by the interested party of his French nationality makes any other consideration in this regard unnecessary. It is precisely because of this nationality and residency that the appellant completed his military service in France, a fact which makes it impossible to apply article 6 of the Strasbourg Convention of May 6, 1963, on military service in cases of multiple nationalities, which was ratified by Spain on June 22, 1987.

As a result, the first ground for cassation presented by the appellant must be rejected.

Third.– As for the second ground for cassation, it is important to remember that the Treaty of the European Union recognizes the incorporation of the concept of citizenship in the Union. From this it can be deduced that the regulation of the contents of the concept of free movement prohibits the State from setting requirements or establishing impediments or obstacles above and beyond those necessary to guarantee order and public safety.

Article 13.1 of the Constitution stipulates that aliens in Spain are entitled to the public freedoms established in Title I as defined by treaties and law. The principles of free movement and the freedom for nationals of one member State to settle in the territory of another State is based on articles 48 and 52 of the Treaty of the European Economic Community dated March 25, 1957. These principles are restated in Royal Decree 1099/1986 dated May 26 and Royal Decree 766/1992 dated June 26, on the entrance and stay of nationals of other European Community member States in Spain.

In the case at hand, according to police information, the interested party resided and worked in a bar in Calahonda–Motril for fifteen years, while the party himself states that he simply made frequent trips from his home in France to visit his mother who is Spanish and runs said bar. As this Court has already declared in regards to the procedural guarantees that affect the law on aliens, the required presumption of legality in administrative acts does not affect the burden of proof, which falls to the Administration. Furthermore, in order to protect the power of the foreign police and their ability to protect society, there must be an initial presumption of veracity as regards police action, the content of police reports and the data that the police provide. However, this presumption can be weakened by proof to the contrary. It must also

be based on real facts and have a material foundation that can serve as evidence from which, by using a healthy critical approach, a solid administrative and jurisdictional conviction can be drawn that the circumstances required for deportation do exist.

In accordance with the above, there is no evidence in the record or in any of the actions of even minimally solid real facts or material foundations that would lead one to believe with the required level of reliability that the police information on the 60,000 peseta–a–month salary has the necessary factual base to prove the presumption of veracity of these administrative actions.

On the other hand, it was accepted that the appellant was born in Paris on March 2, 1968, and that his father is French and his mother Spanish. These facts were not denied by any of the parties to the action, together with the fact that the mother runs a bar in Calahonda where she habitually resides.

According to article 12 of Chapter III of Royal Decree 1099/1986 dated May 26, the application of the transitory regime stipulated in articles 56 to 59 of the Act of Accession of Spain to the European Communities must be carried out in accordance with the provisions of said Chapter III. According to the third final disposition of this Royal Decree, it has retroactive effects from the date of entry into force of the Treaty of Accession of Spain to the European Economic Community.

According to article 13.d) the provisions found in Chapter III articles 12 to 20, will be applied to those children of self-employed workers who are under 21 years of age or are supported by said worker if they live with him in Spain. According to article 15.2, these children have the right to obtain a work permit valid for a five-year period and a residence permit for the same period of time if they can prove they were legally residing in Spain for a three-year period prior to December 31, 1988, or a period of 18 months between January 1, 1989, and December 31, 1990.

In the case being tried here, we have a French citizen who is the son of a self-employed individual who, in turn, is not only a citizen of a member State of the European Economic Community but also of Spain, and that according to police records, in December of 1989 this individual had been living with his mother for his mother for fifteen years and was clearly supported by her. He was also under 21 years of age until March 2, 1989, which proves that according to the regulations cited by the appellant, he had the right to obtain the permits being sought. Moreover, according to article 23.2 of Royal Decree 1099/1986, the lack of the appropriate applications for these permits

can only be sanctioned by a fine in proportion to the seriousness of the infraction taking into account the degree of willingness, repetition and when appropriate, the economic capacity of the individual, and cannot, in any case, justify deportation from Spanish territory. Therefore, the second ground for cassation is admissible with the logical consequence that the judgment being challenged is revoked based on this ground".

2. Non–discrimination

— STS, 25 January 1993 (Division 3, Section 7), *Ar. Rep. J..*, 1993, n. 316.
Reporting Judge: The Honourable Vicente Conde Martín de Hijas.

Basing its decision on Spanish constitutional case law, the Supreme Court recognizes that the scope of the principle of equality recognized in the Spanish Constitution is subjectively limited to Spanish citizens. It also confirms that there is no violation of the basic rights of aliens who are not nationals of member States given that citizens of the Community do enjoy certain constitutional rights that are recognized for Spanish citizens.

"Legal Grounds:

Seventh.– The possibility that Spaniards are not treated in the same way as aliens as regards the exercise of those rights the Constitution establishes as pertaining to 'Spaniards' is clearly stated in the Constitutional Court judgment of November 23, 1984, which the appellants surprisingly cite in their favor by selecting several unrelated paragraphs from its text. The beginning of the third legal ground, in which these disconnected paragraphs are found, states: 'When art. 14 of the Constitution proclaims the principle of equality, it refers exclusively to 'Spaniards'. It is these individuals who, according to the Constitution, 'are equal under the Law' and there is no prescription whatsoever that extends this equality to aliens.'

Later in the same legal ground, an allusion is made to art. 13 of the *CE*: 'However, this provision does not mean that there is any desire to deconstitutionalize the legal position of aliens as regards public rights and freedoms as the Constitution does not state that aliens in Spain will enjoy the liberties attributed to them in treaties or by law, but rather those 'that this document guarantees them in the terms established in treaties or by law'. Therefore, the rights and freedoms recognized as

pertaining to aliens are constitutional rights and as such are protected by the Constitution — within the specific regulations stipulated. Each and every one of them, however, is a legally configured right as regards content. This configuration can omit the nationality or citizenship of the holder of the right as a relevant element in the control of the exercise of the right, thereby producing complete equality between Spaniards and aliens, as is the case with those rights that pertain to a person as such and not to a citizen; in other words, to those rights that guarantee human dignity, which according to art. 10.1 of our Constitution, is the foundation of the Spanish legal system. Rights such as the right to life, to physical and moral integrity, to privacy, to ideological freedom, etc., pertain to aliens by constitutional mandate, and treatment as regards them different in any way from the treatment afforded to Spaniards is not possible.

However, nationality can be introduced as an element in the definition of the *de facto* case to which established legal consequences must be added. It is clear that the application of the principle of equality must be excluded *a priori* as a parameter which conditions the legal consequences of cases that only differ in terms of nationality, even though this principle must be scrupulously respected in the regulations that govern others who find themselves in similar situations and, as a final point from the judgment, and one that proves the inappropriateness of it being invoked by the plaintiffs in this case, the fourth legal ground states:

'Fourth. The problem of the entitlement to and the exercise of rights, and more specifically, the problem of equality in the exercise of rights which is the topic that concerns us here, depends on the right that is affected. There are rights that correspond equally to Spaniards and to aliens, the regulation of which must be the same for both. There are other rights that can in no way pertain to aliens (those recognized in article 23 of the Constitution, according to article 13.2 and to the exception that it contains). There are others that pertain to aliens only if it is so established in treaties or by law, in which case different treatment for Spaniards in terms of the exercise of these rights is acceptable.'

'Constitutionally, it is not possible to demand equal treatment for aliens — including Latin Americans, as there is no difference that favors them — and Spaniards in matters related to obtaining work, and there is no bilateral or multilateral treaty that so stipulates.(...)'

In the case at hand, the constitutional law that is concerned is the right to work or to choose a profession. Article 35 of the Constitution

explicitly states that these rights pertain to 'all Spaniards' and therefore are not applicable to aliens. Nor can the constitutional validity of a Law that establishes certain requirements for the exercise of a specific profession be questioned. Therefore, aliens who are not nationals of member States of the EEC cannot exercise these professions".

3. Humau Rights

a) The Right to Due Process

— STC 20/07/94, *BOE* 18.8.94.
Reporting Judge: Miguel Rodríguez Piñero y Bravo–Ferrer.

Ruling on an appeal for legal protection against a judgment issued by the Audiencia Provincial of Huesca. The protection is granted and the Court declares that the deportation of an alien who regularly resides in Spain by applying article 21.2 of Organic Law 7/1985 on Aliens, as stated in the ruling for conviction (which is not yet final), without having afforded the convicted party a hearing as is stipulated in that law — which cannot be substituted for by the generic hearing at the end of the trial stipulated in article 739 LE Crim. — is a violation of the right to due process guaranteed by article 19 of the CE.

Legal Grounds:
Third.– (...) The problem presented in this case is based on the application of the provisions of article 21.2 of Organic Law 7/1985, according to which:

'If an alien is convicted of a misdemeanor and the ruling is final, the Judge or the Court can, after holding a hearing with him, dictate his deportation from national territory as an alternative to other possible sentences, provided that all civil responsibilities are satisfied, and with the understanding that the sentence that was imposed on him would be served if he should return to Spain.'

In this regard, the party here involved maintains that he was not granted a hearing as part of the trial process in which the deportation measure as a substitute for serving the sentence imposed was agreed to. He claims it does not suffice — as the *Audiencia Provincial* states in the appeal — for the judge to ask the defendant a generic question such as if he had anything to say after the prosecution and the defense had rested their cases, for the requirements of article 739 *LE Crim.* to be

met. If the question is presented in these terms, it is necessary to examine the purpose and the scope of the requirement of the hearing which article 21.2 of Organic Law 7/1985 refers to, and its constitutional relevance. All of this must be placed within the framework of the trial and its conclusion, which affected an alien's right to remain in national territory.

Fourth.– First of all, it seems clear that, as the State Attorney says, deportation cannot be classified as a sentence. Unlike a sentence, deportation cannot be considered one of the ways in which a State can exercise its *ius puniendi* when faced with an act that is legally classified as a crime. However, it can be used as a measure against the incorrect conduct of an alien in the State in which he legally resides. The State can impose deportation within the framework of criminal policy in relation to the policy on foreign nationals, which is within its purview to design. Therefore deportation is an alternative to fulfilling the true sentence, which must, in any case, be served if the alien returns to Spain, because deportation itself does not satisfy the criminal or civil responsibility that is derived from a crime but rather is a way by which to suspend state authority to enforce judgment which is applied to foreign nationals to safeguard the legitimate ends of the State.

This is not a penalty, but if the affected party chooses not to accept it, it can undoubtedly become a measure by which to restrict the rights of aliens who are legitimately residing in Spain, which in this case is specifically the right to remain in our country, the constitutional relevance of which has been confirmed in the case law of this Court.

This doctrine does recognize that in article 13 of the *CE* , the lawmaker is authorized to establish restrictions and limitations on the basic rights of aliens in Spain, but only under certain conditions. First of all, these restrictions cannot affect those rights 'that pertain to a person as such, and not as a citizen, in other words, ... those that are necessary to guarantee human dignity, which according to article 10.1 *CE* , is the foundation of the Spanish political system' (*STC* 99/1985, FJ2). In addition to the content reserved for the law by the Constitution or by international treaties signed by Spain (*Ss.TC* 115/1987, FJ 3; 107/1984, FJ 3; or 99/1985, FJ 2) one thing is to 'authorize different treatment for Spaniards and aliens, and another is to interpret this authorization as a way to legislate on these matters without taking into account constitutional mandates' (see also *STC* 112/1991, FJ 2).

As specifically regards the right to residency and the freedom of movement of aliens in our country, the term 'Spaniards' as used in article 19 *CE* cannot be understood as a rule by which to exclude aliens

from the subjective scope of this basic right. On the contrary, together with article 19 *CE* 'other precepts that determine the legal status of aliens in Spain' should also be taken into account (*STC* 94/1993, FJ 2), and in the terms established by the ruling of this Court dated July 1, 1992 'section 2 of article 13 only reserves for Spaniards the rights recognized in article 23 *CE*' (FJ 2, *STC* 94/1993, cit.).

With this one exception, the conditions under which an alien is entitled to the rights recognized in article 19 *CE*, must be determined by the lawmaker, but once these conditions have been legally set and completed, it can be concluded that aliens 'by the provisions of a law or a treaty or by authorization granted by a competent authority, have the right to reside in Spain and are protected by article 19 *CE*, even though not necessarily in exactly the same way Spaniards are, but rather in the way established by laws and treaties to which article 13.1 *CE* remits.'(*STC* 94/1993, cit.; also see *STC* 116/1993, FJ 2).

Fifth.– Among the treaties signed by Spain that are relevant to this case, we find the International Covenant on Civil and Political Rights, and specifically articles 12 and 13 of said document. This last article establishes that 'any alien lawfully within the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with the law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion, and to have his case reviewed by, and be represented for that purpose before the competent authority or a person or persons especially designated by the competent authority.'

This precept of the ICCPR limits the lawmaker's ability to set the conditions for deportation of an alien who legally resides in a country. The first of these is establishing a rule that sets the conditions for deportation and the second is determining how an alien can defend himself by presenting reasons against his deportation. It is important to remember that the demands made in this treaty as regards protection for the right of aliens to remain in the country, are 'enhanced' by the guarantees found in article 19 *CE* in the terms outlined above.

Upon applying the doctrine to this case in particular, it is clear that the constitutional legitimacy of the measure has not been discussed in abstract given that its potentially negative impact on the right of an alien to remain in our country does not allow it to be classified as intrinsically arbitrary or disproportionate in terms of its own stated purposes (which neither the Constitution nor the Treaties consider illicit).

However, precisely because the measure in question affects the effectiveness of a protected constitutional right in the terms described above, its application cannot be completely left up to the discretional decisions of jurisdictional bodies. In addition to checking to see if the conditions required for its application have been met — a conviction in a final judgment for a crime punishable by a sentence equal to or less than probation – we must ensure that judicial organs have weighed the circumstances of the case and the importance of constitutionally relevant values (sucb as how settled the alien is in Spain, the family unit, article 29.1 *CE* which must be taken into account for a correct adaptation of the alien's right to reside in our country, against the State's interest in applying an deportation measure. In order to weigh these issues correctly and to safeguard the relevant constitutional values that may be in play, a hearing for the alien who is to be expelled is fundamental. This is clearly stipulated in article 21.2 of Organic Law 7/1985. This is the only means by which the set of circumstances in which the deportation is to take place can be presented, discussed and analyzed. Therefore, the hearing must take place under conditions and in a way that allows this goal to be clearly and unequivocally achieved. This is why this case should not be argued solely on the more flexible basis of article 24 *CE* (by evaluating whether or not the affected party had an opportunity to defend himself in this regard). It is also important to ascertain if in addition to this he was given an adequate opportunity to present his reasons in favor of and against deportation which gives the right to a hearing a material extension which surpasses the framework of article 24 *CE* and enters into the sphere of the safeguarding of another constitutionally relevant right pertaining to foreign citizens (the one found in article 19 *CE* in connection with article 13 ICCPR).

Seventh.– It is clear that an irregularity in form was committed in this case from the moment in which the deportation measure was included in a judgment that was not yet final. But this irregularity alone would not be sufficient reason to consider articles 24 and 19 *CE* to be violated if in addition to it there had not been improper handling of the hearing which is obligatory in order to achieve the purposes for which it was created.

Both during the trial and the appeal, the court found that the requirement of a hearing had been satisfied because when the final statements had been made the accused was asked if he had anything to add (article 729 *LECrim.*). However, this posture shows a misunderstanding of both the purpose of this question, which is the

right 'to the final word', and of the hearing specifically provided for in article 21.2 of Organic Law 7/1985. The hearing stipulated in article 789 *LECrim.* is limited to allowing the accused to exercise his right to self–defense against the charge made against him, while the hearing referred to in article 21.2 of Organic Law 7/1985, clearly subsequent to the first, is supposed to formulate allegations on the possibility of replacing a prison sentence with deportation from national territory so that the court can weigh the values in play. As was stated earlier, this is the basis of the legitimacy of deportation from the perspective of constitutional and international precepts as well as from a mere sense of legality. It can be concluded from what has been stated above that these guarantees can only be considered protected if there is a specific consultation made on the deportation measure and on the reasons that the affected party might offer in opposition to this proposal. For these reasons, this ground of the appeal is accepted on the basis that the rights invoked by the petitioner for protection were not recognized by the prior judicial rulings".

b) The Right to Freedom. The Right to Asylum

— STC 17 January 1994, *BOE* 17.2.94.
Reporting Judge: D.J.V. Gimeno Sendra.

Rejects the appeal for protection against a ruling of Court of Instruction n. 27 in Madrid. The Court ruled that the sister of the individual who had been deprived of her liberty did have the authority to file the appeal for protection against the denial of habeas corpus.

The judge hearing this case, which has to do with an alien who was detained and was to be deported for having entered Spain illegally but claims she had petitioned for asylum, is obliged to examine the legal admissibility of the detention without prejudicing in any way the competence of the Administration or of the Contentious–Administrative Courts. If this examination were denied, this individual's right to due process would be violated. However, the protection sought is denied as there has been no harm done to the party's right to freedom as there is no basis for a petition for personal and immediate asylum.

"*Legal grounds:*
(...)
Fourth.– Therefore, the action is limited to examining the charges of

violation of the right to due process (article 24.1 *CE* and the right to freedom (article 17.1 *CE*). However, the content given for both infractions centers on determining if the judge who heard and decided the *habeas corpus* proceeding correctly weighed the fundamental right that was violated against other constitutional interests that were at conflict given that he did not take into account the petition for asylum that the detained party had filed. This fact would have prevented her detention and her return to her country of origin as these measures would have violated the provisions of article 4.1 of the *Ley Reguladora del Derecho de Asilo y de la Condición de Refugiado* (Law 5/1984, March 26). Certainly if the judge did not carry out this judgment of proportionality, the ruling that denied the *habeas corpus* petition would have violated the party's right to due process. Furthermore, as the ruling would have maintained a situation in which the party was deprived of her liberty for reasons not covered by the Law, the right found in article 17.1 *CE* would also have been violated.

The illegality of this detention and the immediate return of this individual to her country of origin is the basis for the *habeas corpus* petition filed with judicial authorities which is now being considered by this court, given that the judicial decision that rejected the petition is being impugned. It falls to this court, then, to analyze if the conditions of the detention are within the Law and if the judicial ruling duly protected the right to liberty (...)

Fifth.– This Court has stated on other occasions (*Ss.TC* 98/1986 and 104/1990) that a *habeas corpus* proceeding is a special proceeding by which a decision must be made solely on the legitimacy of a situation of deprivation of liberty and the attempts being made to terminate or modify this situation without creating any consequences other than its termination or modification (article 8.2 Organic Law 6/1984, May 24) by adopting, as necessary, one of the decisions found in article 9 of Organic Law 6/1984. For this reason, this type of proceeding has been classified as a special process with limited cognizance which is understood to be an instrument of judicial control that does not enter into issues or aspects of the detention itself, but rather only examines the regularity or legality of the detention in the sense provided in articles 17.1 and 4 *CE* and article 5.1 and 4 of the European Convention on Human Rights.

In *STC* 115/1987, we found that the precept that was being challenged as regards its constitutionality — article 26.2 of Organic Law 7/1985, July 1 on the rights and freedoms of aliens in Spain — respected and was required to respect the rules that govern judicial

competence in matters of individual liberty, including the right to *habeas corpus* found in article 17.4 of the Constitution, as regards both the prior admininstrative stage within the 72 hours stipulated and the prolongation of detention which is defined in article 36.2 of the same Law. In other words, we are also concerned here with the detention of aliens who are subject to deportation for having entered the country illegally, a situation in which the principle of jurisdictional exclusivity in matters of freedom must be respected, including the right to habeas corpus found in article 17.4 *CE*

As in the situation contemplated by article 26.2 of the Law on Aliens, in this case the decision on the return of an alien to her country corresponds to the government as it acts in its role as the representative of public interest. But this does not mean that the decision on whether or not to continue a situation of deprivation of liberty, when its legality is questioned by means of a habeas corpus proceeding, as is the case here, corresponds to the Administration. The court must freely adopt a decision taking into account the specific circumstances of a given case including, among others, those that have to do with the reasons for deportation, the legal situation of the alien and any other circumstance the judge deems relevant to his decision (*STC* 144/1990).

Sixth.– Having examined the complaint presented in the action in the light of the above doctrine, it must be concluded that the grounds offered by the Examining Judge in his rejection of the *habeas corpus* petition are inadmissible. In fact, without prejudice to the competence of administrative authorities to make decisions as to the admissibility of the deportation or expulsion of this alien who had been deprived of her freedom, the fact that the administrative decision did or did not fall within one of the situations recognized by the Law as justification for depriving a person of his or her freedom is important as regards the resolution of the habeas corpus proceeding because the respect or violation of the right to freedom and the legality of the detention depended upon to what extent this administrative decision was in keeping with the Constitution and the legal system.

Article 26.2 of the *Ley Reguladora de los Derechos y Libertades de los Extranjeros en España* does indeed authorize the deportation of aliens when, as in this case, they entered the country illegally. However, the same precept includes an exception to this power which is the situation contemplated in article 4.1 of Law 5/1984, March 26 *Ley Reguladora del Derecho de Asilo y de la Condición de Refugiado*: the filing of a petition for asylum with the appropriate governmental authorities.

Other than that, the *habeas corpus* petition was based on a single ground, which was that the petition for asylum that had been filed prohibited the deportation of the detained alien, and the examination carried out by the judge is being challenged because it should include not only reasons for detention but also a ruling on if the legal situation of the alien constituted sufficient grounds for her release according to the provisions of the aforementioned *Ley Reguladora del Derecho de Asilo*. In keeping with this, the decision that the judge could not review this administrative decision in the *habeas corpus* proceeding is an insufficient and unreasonable ground for rejecting the application.
In fact, the justification of the appealed decision cannot be reconciled with the provisions of article 17.1 and 4 *CE* interpreted in the light of article 5.4 *ECHR* given that the decision states that while the Examining Judge does indeed recognize the existence of a petition for asylum, he states that he is not authorized to review the deportation ruling made by the Government delegate. It is true that the final revision of this administrative act corresponds to the Contentious Administrative Business courts, but the recognition of this competence does not totally exonerate the judge in the *habeas corpus* proceeding from monitoring the material legality of this administrative detention. If this were not so, judicial control of administrative detentions would become a simply ritualistic or symbolic act that would violate our Constitution (articles 9.1, 10.1 and 53) because neither the Constitution (*Ss.TC* 47/1987, 197/1987, 176/1988 and 8/1990) nor the convention (European Court of Human Rights judgments dated October 9, 1979, the Airey case, and May 13, 1980, the Artico case) confer merely theoretical or illusory rights, but real and effective ones.

For this reason, the *habeas corpus* judge must examine the *fumus boni iuris* that justifies the adoption of any measure that deprives an individual of his freedom. If these measures are dictated by the Administration, it must always be for precautionary purposes because according to the principle of jurisdictional exclusivity as regards sentences that deprive an individual of freedom, the Constitution does not authorize the Administration to impose sanctions that include the deprivation of freedom (articles 25.3 and 117.3). The provision found in article 17.1 *CE* which mandates that the judge should ascertain if the deprivation of freedom falls within "the cases provided in the Law" [or in the "legal cases" referred to in article 1.a) of the *LOHC*] also requires that in this type of detention, the material supposition on which the precautionary measure of deprivation of freedom is based must be at least provisionally reviewed and the decision must be revoked or

declared temporary by means of one of the solutions found in article 8 *LOHC*. This should be done, of course, independently of whether the individual subsequently takes action against the administrative act which rejects the asylum or against the deportation order by making use of the contentious administrative business appeal which gives the Contentious Administrative Business Court full jurisdiction to review the appropriateness of the act according to the legal system and to adopt any precautionary measure that is deemed necessary.

In other words, in matters of judicial review of the material legality of administrative detentions, the *habeas corpus* judge is responsible for the first pronouncement while the Contentious–Administrative Business Courts have the right to the 'last and final word'.

This was not the solution adopted by the decision being appealed. In this decision a clear separation was made between the competence of the *habeas corpus* judge and that of the administrative jurisdictional order, and therefore the legality of the detention was not reviewed. This fact alone is sufficient reason to find that due process was violated: however, a ruling of this kind cannot be accepted for the reasons set out below.

Seventh.– This Court has stated that it is possible for a decision that rejects *habeas corpus* to contradict the right to due process or the right recognized in article 17.1 *CE* based on a lack of reasonable grounds. However, as here we are dealing with the protection of the basic right to personal freedom, it falls to us to ensure its protection without having to return the matter to the judicial organ as would be the case if we were dealing with harm that was strictly limited to the right to due process (*STC* 104/1990).

In the case at hand, however, a ruling that the judge incorrectly evaluated the deprivation of freedom would only be relevant if, due to this, the rejection of the *habeas corpus* petition would have confirmed an illegal deprivation of liberty that had been mistakenly perceived as being in accordance with the law. Therefore, this Court should and can review the constitutional classification of these facts as given by the judge (*STC* 98/1986), taking into account that in the petition it was alleged that the only reason for the illegality of the detention was its adoption while a prior petition for asylum was pending.

Eighth.– The solution to the problem as stated above will ultimately depend on whether or not a valid request for asylum had been filed with the appropriate administrative organs. And it is this fact that this Court simply cannot accept.

The *Ley Reguladora del Derecho de Asilo y de la Condición de*

Refugiado y su Reglamento which was approved by Royal Decree 511/1985 on February 20, requires any alien who enters Spain illegally to file a request for asylum immediately upon his arrival in our country. This can be done at any border crossing or police station. The request can be formulated in writing or verbally by means of an *apud acta* hearing, but in any case, articles 3—5 of this Law require that the request be personally filed by the alien who is seeking asylum (articles 4 and 3, respectively).

Now then, according to the facts as presented by the State Attorney, the request for asylum was neither filed personally by the interested party nor immediately upon her entry into the country. Furthermore, in the declaration the appellant gave at police headquarters in the presence of her attorney, she recognized that her entrance into our country was not only for the purpose of seeking asylum but also in order to work, and she knew she was required to obtain a visa and was aware that she did not have one. Given these conditions, the phone call made by the detained appellant's sister after learning of her sister's detention to make an appointment with the *Oficina de Asilo y Refugio* (Office of Asylum and Refuge) in order to formalize a request can only be interpreted as an attempt to artificially obstruct the deportation hearing. This is understandable given the family ties that bind these two people together, but alone is not sufficient reason to classify the detention as illegal".

c) The Right to Be Educated in One's Own Language

— STSJ Cataluña, 17 December 1993, (Contentious–Administrative Division), *Ar. Rep. J. CA*, 1993/32.

Ms. Felicidad G.B. and others filed a contentious–administrative appeal under Law 62/1978 against the Department of Education of the Generalitat for having denied their children the right to study in their habitual and native language, Castilian Spanish. Before examining the merits of the case, and by applying the doctrine found in STC 238/1992, December 17, the Court adopted positive precautionary measures to ensure the effectiveness of the right to due process which would be impossible to ensure if the interests whose protection is being sought here disappeared or were irremediably lost.

"*Legal Grounds:*

First.– ... in making its decision the Court must evaluate the legal harm done to the basic rights to education and equality, the protection of which is being sought in this case derived from the conflict that exists between resolving the case (*periculum in mora*) and the legal appearance of the plaintiff's demands (*fumus boni iuris*). This requires at least a summary analysis of the constitutional and legal regime of education in Catalonia, and of the harm that could be caused to the general interest if a suspension measure were adopted, according to the Constitutional Court, Judgment 148/1993, April 29 (*RTC* 1993/148), the Court is limited in any case, because these are declaratory proceedings and therefore no ruling can be made on the violation of basic rights. This is a question that must be resolved in the main trial.

Second.– Article 3 of the *Estatuto de Autonomía de Catalunya*, approved by Organic Law 4/1979, December 18 (*RCL* 1979/3029 and *ApNDL* 1910) establishes that the language of Catalonia is Catalan and emphasizes in section two that the Catalan language is the official language of Catalonia along with Castilian Spanish, which is the official language of the Spanish State, thereby recognizing the principle of co–officiality of Castilian Spanish and Catalan within the territory of Catalonia. Article 3 of the Spanish Constitution recognizes the plurilinguistic nature of the Spanish nation and declares Castilian Spanish the official Spanish language of the State which all Spaniards have the obligation to know and the right to use, and recognizes as official the other Spanish languages in the Autonomous Communities where they are spoken in accordance with their statutes. From this derives [1] the assumption of a statute of equality for both languages and of a citizen's obligation to know and use them both as was stated by this Territorial Court of Justice in its judgment of July 23, 1985, [2] the application of this precept to all public authorities located in this Autonomous Community (*STC* 62/1986, June 26 [*RTC* 1986/62]); [3] that neither Castilian Spanish nor Catalan can be consided or treated as minority or foreign languages in Catalonia, thereby preventing the imposition or marginalization of either of them which would be an affront to the right to freely develop one's personality as regards the linguistic communication of the citizens of Catalonia and would violate the cultural and political right of affirmation of the Catalan people which is protected by article 10.1 and 2 of the Constitution.

Third.– The universal right to education that is protected by art. 27 of the Constitution includes the right for students to be educated in a language that they understand and that allows them to effectively

participate in the programs offered by the public education system. It ensures the realization of the principle of equal opportunity within the educational system and incorporates and develops an individual's right to self–determination. However, it does not completely guarantee the right to be educated exclusively in one specific language when there are several languages recognized as official that coexist in a given territory, as was understood by the Swiss Federal Council in its judgment of February 11, 1976, by the Supreme Court of the United States in its rulings of June 4, 1923 and January 21, 1974, and by the Spanish Constitutional Court in judgment 195/1989 (*RTC* 1989/195).

As the Constitutional Court states in judgment 195/1989, November 27, the right to education as regards language does not include as a basic right a parent's right for his children to be educated in the language preferred by the parents in any state school those parents may choose. This is in keeping with the case law of the European Court of Human Rights and is reflected in our legal system through art. 10.2 of the Constitution when it states that the right to education does not guarantee children or their parents the right to instruction in the language of their choice (Eur. Court HR July 23, 1968). No violation of the right to equality for all Spaniards under the law or the prohibition of discrimination based on language which is protected by art. 14 of the Constitution is found when school children are not taught in the language preferred by their parents in the state school of their choice as is stated by the Constitutional Court in the previously cited judgment which is accepted by the *Tribunal Supremo* in its judgment of May 16, 1990 (RJ 1990/4114).

The Constitution provides several methods by which lawmakers can regulate the way educational services are offered in bilingual Autonomous Communities that objectively take into account the specific circumstances involved in order to protect public interest while remaining compatible with and respectful of the basic rights and public freedoms of the people. Therefore, from a constitutional point of view, a totally or partially bilingual approach in which both languages are used equally as languages of instruction in a harmonious and balanced manner is as legitimate as an approach based on linguistic separation in which the language of instruction is one or the other of the languages of the Autonomous Community. This was stated by the Constitutional Court in judgment 137/1986, November 6 (*RTC* 1986/137). Nevertheless, there is greater freedom to choose the language of instruction in the latter system as the former system attempts to provide homogeneity. It falls to public authorities to modify this system — even

though there is no legal base for their authority in this sense — by introducing some of the characteristics of the separate languages model into the combined languages model.

Fourth.– The *Ley del Parlamento de Cataluña* 7/1983, April 18 (*RCL* 1983/970, 1179 and *LCAT* 1983/634) on linguistic regulation in Catalonia states in its Legal Foundations that its purpose is to correct the current linguistic inequality that exists in Catalonia by promoting the use of the Catalan language throughout the region, and goes on to say that the purpose of teaching in Catalan is so that all students learn both languages. To achieve this goal, the system known as total bilingualism was adopted and it is stated in a very clear and precise way in art. 14 that Catalan, as the language of Catalonia, is also the language of instruction at all levels of education thereby making the coexistence of both languages in the educational system possible. It is also stated that Catalan and Castilian Spanish must be taught at all levels of non–university education (section 3), that children have the right to be taught in the early grades in their habitual language whether that be Catalan or Castilian Spanish (section 2), that all children in Catalonia, whatever their habitual language may be upon entering school, must be able to use Catalan and Castilian Spanish comfortably and correctly by the time they finish their basic studies (section 4), and that children cannot be separated in different schools according to language as they should use Catalan more frequently as they become progressively more proficient in that language, as the final section of the cited precept stipulates.

Given the parameters cited above, it is necessary to achieve the effectiveness of the right to be educated in a language one understands, and considering the will of the Catalonian Parliament to ensure the equal usage of both languages as languages of instruction and that the right to choose an educational program based on the language of instruction is a legally created right as can be seen in judgment 195/1989 of the Constitutional Court, this includes both a dimension of freedom which is defined as the absence of coercion or constriction, and a practical dimension which can include measures of positive discrimination.

The appellants' petition that the children's right to be taught exclusively in Castilian Spanish be protected cannot be accepted, nor can the process of immersing these children in the Catalan language be suspended without taking into account the different grade levels of the children involved, the different languages of instruction offered in the schools, and the possibility of finding a state school in a specific

location that offers instruction in the language preferred by the parents, regardless of the legal regulations analyzed above.

Nevertheless, in keeping with the doctrine of the Court of Constitutional Guarantees as expressed in Judgment 87/1983, October 27 (*RTC* 1983/8), the Administration being sued here should be required to provide instruction in the habitual language of choice of the children affected by this appeal who are in the first cycle of primary and early childhood education, in application of the *Ley Orgánica de Ordenación General del Sistema Educativo* 1/1990, October 3 (*RCL* 1990/2045) and to provide the necessary support measures that would ensure adequate teaching in both languages for those students over 7 years of age in those schools in which these measures have not yet been adopted".

d) Human Rights. Principles of Ne bis in idem. Extradition

— STS, 26 February 1993, (Criminal Division), *Ar. Rep. J.*, 1993, n.1516.
Reporting Judge: The Honourable José Hermenegildo Moyna Menguez.

The judgment issued by the Audiencia convicted two individuals of using violence in the perpetration of a bank robbery. It convicted another four individuals as accomplices to the same crime. The State Attorney, some of the defendants and the Banco Hispano Americano SA filed a cassation appeal against the judgment. The Tribunal Supremo accepts the appeal filed by the State Attorney. In the Court's opinion, in the "sub iudice" case, the planning and organization of the robbery was the work of a group of non–resident Italian subjects who had to seek out the collaboration of Spanish citizens. Several subjects agreed to provide this assistance. All of them were aware of the criminal nature of the plan. Some were promised and expected to participate with a share in the financial rewards of the crime and others were merely paid a fee for their services. In accordance with these arguments, the Tribunal Supremo issues a second judgment in which it convicts three of the defendants as authors of the crime that the Audiencia had convicted as accomplices and upholds the rest of the trial court's rulings. Specifically, it rejects the violation of the principle of "ne bis in idem", alleged by two of the defendants who were extradited from Italy when they had already been tried by the Criminal Court of Rome,

whose decision was appealed by the Italian State Attorney.

"*Legal Grounds*:

First.– As regards *ne bis in ídem*. The consensus on *ne bis in ídem* is so great that it is recognized as a principle, even a constitutional principle, in spite of the fact that it is not expressly formulated but rather understood — according to repeated declarations in case law — as part of the principle of classification and legality that defines and governs the entire legal system (art. 25.1 of the Spanish Constitution (*RCL* 1978/2836 and *ApNDL* 2875)]. Originally a procedural principle anchored in the idea of *res judicata*, based on the concept of legal Certainty, it must be related materially or substantially to *ius puniendi* at the state level. Given the growing sense of international solidarity, this is expanding to include other States which have adopted similar criminal and procedural guarantees in their constitutions.

The International Convenant on Civil and Political Rights which was ratified by Spain on 27.4.1977 (*RCL* 1977/893 and *ApNDL* 3630) defines the application and development of this constitutional principle (art. 102. *CE* . Art. 14, paragraph 7 establishes that 'no one can be judged or sanctioned for a crime of which he has already been convicted or absolved by a final ruling in accordance with the law and criminal procedures of each country' and the *Ley Orgánica del Poder Judicial* (*RCL* 1975/1578, 2635 and *ApNDL* 8375) (art. 23.1), as regards the criminal acts committed within Spanish territory, implicitely recognizes the effectiveness of a foreign judgment — provided the subjects, act and legal grounds are identified — 'if it is so stipulated in international treaties to which Spain is a party.' On this point, the judgment and the appeals cite the European Convention on the international validity of criminal *res judicata* agreed to in the heart of the Council of Europe on 28.5.1970, and the Convention between the member States of the European Communities on the principle of *non bis in ídem* dated 25.5.1987, which, not having been ratified by Spain, do not form part of its domestic legislation. However, the European Convention on the transmission of procedures in criminal matters done in Strasbourg on 15.5.1972 and ratified by an instrument dated 24.6.1988 (*RCL* 1988/2255), does form part of domestic law. Title V of this convention, entitled *non bis in ídem* (arts. 35 to 37), establishes that if a 'final and enforceable' criminal judgment rules for absolution, or if the sanction imposed has been fulfilled or was being fulfilled, [an individual] cannot be persecuted, convicted or subjected to the enforcement of a sanction in another member State if the State where

the act was committed 'had requested to initiate legal proceedings'. And finally, in order to complete the current rules that are applicable to this case, the link between this principle and extradition must be mentioned given that the grounds for denying the latter has always been that the State being challenged had issued an enforcement judgment on the same events. Article 27.1 of the Convention for Judicial Assistance and Extradition with Italy, ratified 27.7.1977 (*RCL* 1977/2460 and *ApNDL* 11189), does not allow for extradition if the individual has already been tried and there is a final and enforceable judgment issued by the authorities of the state being challenged, a requirement that derives from art. 9 of the European Convention on Extradition ratified by Italy and Spain in instruments dated 6.8.1963 and 21.4.1982 (*RCL* 1982/1450 and *ApNDL* 5060), respectively (...).

Being subject to these rules, this Court is inclined to reject the first ground of the appeals presented by the defendants B.L.S. and J.E.L. as there is evidence to confirm that the judgment issued by the Criminal Court of Rome on 24.6.1986 was not yet final. This conclusion is based on the pending appeal filed by the State Attorney, as is recorded on page 171, section 12 of the case record. Furthermore, extradition had been granted and it should be added that the Spanish State had failed to request the right to initiate legal proceedings as is clearly stated in the petition for extradition. Therefore, the judgment being appealed did not violate the principle of *ne bis in idem* and did respect international rules for judging and convicting the appellants without violating their individual rights because in accordance with said rules (art. 35 of the European Convention on the Transmission of Proceedings in Criminal Matters) and with art. 23.1.c) of the *Ley Orgánica del Poder Judicial,* the time served in the foreign country was applied to the sentence imposed in this action".

VI. ORGANS OF THE STATE

VII. TERRITORY

1. Territorial Jurisdiction

— STS, 19 January, 1993, (Criminal Division), *Ar. Rep. J.*, 1993, n. 396.
Reporting Judge: The Honourable Enrique Ruiz Vadillo.

The Audiencia convicted the defendants who were in charge of a ship sailing under a Panamanian flag, of the crime of smuggling. The Court also ordered the confiscation of the tobacco that was found when the ship was seized by a Spanish patrol in Spanish territorial waters. The defendants and Naviera Blue Horizon Shipping Lines SA filed an appeal in cassation against the judgment alleging an error in form and an infraction of the law. The Tribunal Supremo rejected the appeal stating that there was no violation of the presumption of innocence or lack of due process or question of constitutionality, nor was there any basis on which to request a preliminary ruling of the EC Court of Justice.

"*Legal Grounds*:
(...)
Second.– By invoking art. 851.1 of the *Ley de Enjuiciamiento Criminal*, a lack of clarity in the proven facts is denounced.

The main question around which this legal challenge revolves is the actual position of the seized ship, and based on this, whether or not it was within the 12 mile limit, in other words, within Spanish jurisdiction.

The merits of the case will be examined in other grounds, including what conclusion the trial judge reached and on what basis. It must be pointed out that in this regard, the judgment is clear and not susceptible to faulty interpretation. According to the judgment being appealed, at 3:00 a.m., the patrol seized the ship which was located at that time at 37 degrees 48.5 minutes north latitude and 0 degrees 32.5 minutes west longitude, that is, five miles from the straight line that links the Hormiga Island with the Cabo de Cervera from which the 12 miles of Spanish jurisdictional waters are measured. As is commonly known, the Hormiga Island is a Spanish island located to the ENE of the province of Murcia and constitutes an underwater prolongation of the Cabo de Palos and a landmark for measurement purposes.

Therefore there is absolutely no question, confusion or error that could lend support to a challenge based on location and this ground must be rejected.

Third.– By invoking art. 849.1 of the *Ley de Enjuiciamiento Criminal* an incorrect application of art. 1, numbers 3 and 8 of the Law dated 13.7.1982 (*RCC* 1982/2029 and *ApNDL* 2977) in relation to arts. 7 and 8 of the Jamaica Convention and 24 and 25 of the Spanish Constitution (*RCL* 1978/2836 and *ApNDL* 2875) are denounced.

Here is where the key question of the appeal lies: the actual location of the ship, which should be determined, as is requested, at this point of the proceeding because if the appeal were rejected because the facts as presented were not respected in the challenge in accordance with art. 884.3 of the *Ley Procesal Penal*, there could be a lack of due process given that the appellant would then have no channels by which to present a challenge. The interpretation of procedural rules must currently be done in accordance with constitutional principles and requirements and in keeping with the case law of the Constitutional Court and with ordinary legality.

In general terms, the system of rules is the following: art. 23.1 of the *Ley Orgánica del Poder Judicial* 6/1985 dated July 1 (*RCL* 1985/1578, 2635 and *ApNDL* 8375) and art. 8.1 of the *Código Civil* determine the competence of Spanish courts as regards criminal matters when the act is carried out within Spanish territory, understood in a broad sense as land (continental or insular), internal or territorial waters, air space, and aboard ships and aircraft that navigate under the Spanish flag.

On the other hand, Law 10/1977, January 4 (*RCL* 1977/47 and *ApNDL* 8633) establishes Spanish sovereignty in these cases, which is exercised in accordance with International Law on waters superjacent to the sea–bed, the sea–bed, the subsoil and ocean resources as well as adjacent air space. In art. 3, territorial seas are established for all purposes as being 12 miles which is equivalent to 22.222 meters which is measured from the low–tide base line and, when appropriate, from the straight base line, both of which are established by the government.

The United Nations Convention on the Law of the Sea dated 10.12.1982, which was signed by Spain on 5.12.1984, establishes in art. 2.2 that the sovereignty of the State extends to air space over the territorial sea and its sea–bed and subsoil.

The above mentioned 1982 United Nations Convention on the Law of the Sea, which dedicates Section Two of Part II to setting the limits of territorial seas, establishes 12 miles as the maximum limit (art. 3), defines what should be understood as the outside limit of the territorial sea (art. 4), the normal base line (art. 5), reefs (art. 6), straight base lines (art. 7), internal waters (art. 8), the mouths of rivers (art. 9), bays (art. 10), ports (art. 11), roadsteads (art. 12), low tide elevations (art

13), and finally, a combination of methods for determining base lines (art. 14).

So, on this point there is no problem. The problem is really the discrepancy in the real location of the ship: 12 miles, which is the point under debate.

Art. 7 of the previously cited Convention defines the criteria for drawing straight base lines and distinguishes between several situations according to the characteristics of a given location. However, by reading the rules, it is immediately clear that the international lawmaker attempts to provide general criteria to be used for measurement purposes, a task which is not always simple.

Having said this, we must once again return to the judgment of the trial court to see how the determination of the 12 miles was done in the case in question.

The crew of the patrol boat "Aguila", who attended the oral hearings on the case, declared that the shore lights could be seen from the spot at which the seizure of the ship took place. Of the members of the crew of the "Celi", except for the two who were being tried, only one said that he could not see them (the time was 3:00 a.m. on April 29th). Both said that they had heard that they were sailing along the coast because the radar didn't work and that the captain had decided to sail so close to the Spanish coastline due to electrical break–downs and to malfunctioning gas pumps. One of the other witnesses stated that they were near the Spanish coastline (10 miles from Cabo de Palos) because the generator had broken down when they passed by Gibraltar.

There is still more: the judgment found that the ship was unloading a shipment of blond tobacco in Spanish jurisdictional waters and that this could be concluded from the fact that the size of the cargo progressively decreased as the ship travelled along its route as it had loaded 4,006 boxes of this merchandise at Antwerp, while only 3,730 were listed on the manifest on board and when the ship was seized only 3, 590 boxes were found. If we add to this the fact that the patrol boat "Aguila" detected a certain radar echo at 2:30, that is to say one–half hour before arriving, and another two faint echoes 23 minutes later which separated quickly from the suspicious echo, the conclusion couldn't be clearer or more unequivocal. The fact that other systems could have been used to determine precisely where the ship was located does not in any way affect the appropriateness or correctness of the trial court's reasoning.

Other reasoning follows, but it is no longer necessary to present it. The inference made as to the location of the ship, an extremely

important piece of information in this case, could probably not be attacked in the cassation case from a criminal technical–procedural point of view because it has nothing to do with discovering an intention, in other words, with finding *animus* (if there had been then the challenge would have prospered), but rather it had to do with a fact, and this can only be challenged by means of art. 849.2 of the *Ley de Enjuiciamiento Criminal.* In any case, as was already stated, this ground is rejected given that the due process being petitioned for was indeed provided".

— STS, 2 March, 1993, (Division 3, Section 2), *Ar. Rep. J.*, 1993, n. 1726.
Reporting Judge: The Honourable Ángel Alfonso Llorente Calama.

In this ruling, the Spanish Tribunal Supremo should look to certain aspects of the Law of the Sea to determine in which maritime spaces fuels subject to the Special Tax of the Canary Island Autonomous Community on Fuels Derived from Petroleum can be consumed. The perhaps prudent allusion to the indications of the III Conference on the Law of the Sea and not the 1982 Convention which had not yet entered into force at that time and had not been ratified by Spain should be noted.

"*Legal Grounds*:

Fifth.– Confirming the accuracy of this criteria, which is a key element in deciding the admissibility of the quota and therefore of its consequences, requires the conciliation of a series of diverse concepts found in both domestic and international rules which do not always coincide. We must begin with the fact that according to art. 132.2 of the Spanish Constitution, the land– based maritime zone, beaches, territorial sea and natural resources of the economic zone and the continental shelf are all public property belonging to the State.

The *Ley de Costas* 22/1988, July 28, defines the land–based maritime zone as the space between the lowest low tide base line and highest high tide line or, if it is greater, the line where the waves of the strongest storms are known to have reached. This is an obligatory reference for determining the internal limits of territorial sea, which externally are drawn by tracing a line so that the points which make it up are 12 nautical miles from the points closest to the base lines (arts. 2 and 3 of the *Ley del Mar Territorial* of 10/1977, January 4) which must

be straight lines established by the government.

These straight base lines were marked as the limits of Spanish jurisdictional waters along with one part of the eastern islands of the Canary archipelago as one zone by Decree 2510/1977, August 5 and Law 15/1978, February 20, when the new concept of Exclusive Economic Zone was established. This zone was defined as extending from the outer limit of the 12–mile Spanish territorial seas to a distance of 200 nautical miles, counting from the base lines used to measure the breadth of the former. However, as regards the archipelagos, art. 1.2 of this law stipulates that the external limit of the economic zone should be measured from the straight base lines that link the outer points of the islands that make up the archipelago so that the resulting perimeter follows the general configuration of each of the archipelagos. However, the straight base lines for the Canary archipelago are not yet drawn, and in International Law, using archipelagos to measure the Exclusive Economic Zones is not accepted. Only archipelagos that are considered a State, not those that are considered part of a State, are recognized.

Sixth.– From the perspective of domestic law, measuring the 200 mile Exclusive Economic Zone from the archipelago is acceptable given that Law 10/1977 can be considered to be tacitly abolished and replaced by a law dated 10.2.1978. Furthermore, art. 2 of the *Estatuto de Autonomía de Canarias* (Organic Law 10/1982, August 10) can be interpreted to say that a whole is made up of its component parts within a space that includes the land, subsoil, air space and territorial waters that surround the perimeter of the archipelago and also includes landlocked waters between the islands.

As the judgment being challenged correctly states, the public nature of this property — which is contemplated in article 132.2 of the Spanish Constitution —, and therefore, the sovereignty of the State over this property, cannot justify the exclusion of the Autonomous Community's competence over these areas, especially its competence as regards taxation. This distinction is found, along with others, in *STC* 58/1982, July 27, which states that art. 132.2 of the Spanish Constitution does not attribute competence of any kind to the State, but rather only establishes a legal reservation since as regards competence, Title VIII of the Spanish Constitution and the Statutes of Autonomy must be consulted.

Seventh.– Having established the above, art. 46, Part IV of the text of the III Conference on the Law of the Sea, addresses the concept of archipelago and defines it as a group of islands, including parts of islands, interconnecting waters and other natural features that form an

intrinsic economic, political and geographic entity, or which historically have been regarded as such. The archipelago which makes up the Autonomous Community of the Canary Islands meets those criteria".

VIII. SEAS, WATERWAYS, SHIPS

IX. INTERNATIONAL SPACES

X. ENVIRONMENT

XI. LEGAL ASPECTS OF INTERNATIONAL COOPERATION

XII. INTERNATIONAL ORGANIZATIONS

XIII. EUROPEAN COMMUNITIES

1. The Relationship between Community and Spanish Law.

— STS, 17 September 1993, (Criminal Court), *Ar. Rep. J.*, 1993, n. 7146. Reporting Judge: The Honourable José Martín Pallín.

The defendants filed an appeal in cassation against a judgment issued by the Audiencia Nacional that convicted them of the crime of attempted flight of capital in an amount greater than 50,000,000 pesetas. At a later date, and in an extemporaneous fashion, the defendants request that the question be brought before the European Communities Court of Justice under the provisions of article 177.3 of

the Treaty of the Community (LECur 1986/8) and at the same time before the Constitutional Court alleging unconstitutionality. The question under examination is whether the retroactive effect of the favorable provisions of RD 672/1992, July 2 (RCL 1992/1967) on Spanish investments in foreign countries, whose articles 3, 7 and 8 generally deregulate all of these investments, can be interpreted to mean that all of the remaining obstacles to the uncontrolled taking of certain quantities of money out of the country should be removed. In other words, what must be determined is if RD 1816/1991, December 20 (RCL 1991/3013) on economic transactions in foreign countries and RD 42/1993, January 15 (RCL 1993/318) are compatible with community rules in instances in which these rules require a declaration to be filed in order to export money in cash, bank notes or bearer's cheques whether these be in pesetas or foreign currency, as well as bars of gold when the value of these exports is greater than 1,000,000 pesetas per person and per trip, and to prior administrative authorization when the value of the money being exported is greater than 5,000,000 millon pesetas per person and trip.

The Tribunal Supremo accepts the appeal and issues a second ruling in which it absolves Luis R.G. of this monetary crime while upholding the rulings of the trial court as regards the other two defendants. However, the Court rules that there is no justification for bringing the prejudicial question before the European Union Court of Justice nor the question of unconstitutionality before the Constitutional Court.

"*Legal Grounds*:

Fifth.– (...)

2.– Frankly, the primitive structuring of this ground excuses us from analyzing the questions of legality related to the progressive implementation in Spain of the Directives of the European Economic Community and more specifically the directive on the deadline — 31.12.1992 — set for our country to liberalize the free movement of capital in accordance with the provisions of EEC Directive 88/361 dated 24.6.1988 (LECur 1988\818).

(...)

4.– Therefore we find ourselves faced with integrating dispositions of a criminal type and we must determine to what extent they constitute an obstacle to the specific provisions of the Treaty of the European Economic Community that proposes the progressive suppression over a transitory period and to the extent necessary, of the restrictions on the movement of capital pertaining to residents of member States.

As part of the development of this community spirit, we are faced with the Directive mentioned above dated 24.6.1988, which establishes as a cardinal principle the complete liberalization or deregulation of the movement of capital within the Community, while at the same time, art. 7 recommends extending this deregulation to relations with third countries.

We must determine if the terms of the directive are so broad and concrete that they have cancelled out the content of the administrative dispositions that we cited above and therefore have emptied the criminal dispositions that are based on the force of a specific administrative regime for the control of the movement of capital of their content.

5.– The persistence of administrative controls such as the requirement to file a declaration or to request prior authorization is a regulatory measure on the flow of money the purpose of which is to provide monetary authorities with an accurate idea of the volume of money that is taken out of the country in order to ensure a healthy financial system.

The fact that there is a general interest in maintaining the system of filing a declaration is perfectly compatible with the community provisions on the deregulation of the movement of capital as contemplated in a general sense in arts. 30 to 34 of the Treaty of the Community. These provisions fit well within the spirit and letter of art. 36 of that treaty.

Along these lines we can also cite the case law of the European Communities Court of Justice which has established in some of its resolutions — S. 20.2.1979 — that the dispositions of the Treaty are indeed compatible with those regulations that attempt to protect consumers, public health, public safety, the efficacy of fiscal controls and the loyalty of commercial transactions although they create certain obstacles to deregulation. At the same time, an attempt is made to ensure that deregulation does not become a source of dubious business transactions that lack the clarity and transparency required of all types of transactions, especially financial ones.

6.– The stated purpose of RD 1816/1991, December 20, on economic transactions abroad is to defend the general interest while at the same time attempting to anticipate the full deregulation of transactions and transfers with foreign countries before the provisions of the Community Directive dated 24.6.1988 that are applicable as of 31.12.1992 come into effect.

Maintaining the requirement to obtain prior authorization for the

physical exportation of bank notes in excess of 5,000,000 pesetas is justified by the need to fight criminal activity, especially drug trafficking. Furthermore, this restriction does not create any type of obstacle to economic transactions abroad given that collections, payments and transfers through bank channels are completely deregulated.

We must not forget that the disposition that we are examining states that the full and complete deregulation of foreign transactions should not be considered to mean that there can be no mechanisms for the gathering and communication of information on these transactions that would permit statistics to be kept on collections, payments and transfers abroad which would ensure that the Spanish legal system is being respected, especially as regards art. 111 of the *Ley General Tributaria* (*RCL* 1977\48 and *ApNDL* 122), all of which falls under the protection of the provisions of art. 4 of Directive 88/361 of the European Community.

(...)

7.–This network of community and domestic dispositions highlights the fact that the effects of the deregulation of the movement of capital on member States of the Community and on other non–Community member States is not incompatible with the establishment of rules designed to provide stability and transparency for the system so that the member State does not find itself totally impotent when faced with the savage and tumultuous flight of capital carried out in suitcases or bags or hidden under the false floorboards of automobiles.

The monetary policy supported by community rules does not contemplate the possibility that citizens evade a State's statistical control of the amounts of money that are phsyically taken out of the country thereby creating financial instability which can in some ways be encouraged by overly ambitious deregnlatory proposals.

Deregulation is not incompatible with the structuring of a sector, and asking citizens to declare the quantities of money that they take abroad when this can affect fiscal stability is a reasonable and ideal measure, and it is in the best interest of the public that these measures be respected. This does not contradict the full effectiveness and force of Community Directive 88/361 of 24.6.1988 in any way. This directive is totally safeguarded and unaffected by the dispositions that establish the requirement for prior authorization of the physical exportation of bank notes in amounts greater than 5,000,000 pesetas.

(...)".

2. Procedure for the Elaboration of Spanish law within Community law.

— STS, 14 September, 1994, (Division 3, Section 4), *Ar. Rep. J.*, n. 6969.
Reporting Judge: The Honourable Mariano Baeza del Alcázar.

The object of this judgment refers to the adoption of a Royal Decree issued by the Spanish government that enforces certain Community regulations without having obtained a pronouncement of the Council of State which the Court considers obligatory in this case.

"*Legal Grounds*:

First.– A direct challenge is made in this Contentious–Administrative appeal against Royal Decree 1435/1988, November 25, issued by the government at the request of the *Ministerio de Agricultura, Pesca y Alimentación* (Minister of Agriculture, Fishing and Foods) and published in the *Boletín Oficial del Estado* on December 3 of the same year. It is important to point out that, according to its statement of purpose, this Royal Decree was issued to enforce European Economic Community Regulations 797/1985 and 1760/1987, modified by Regulation 1094/1988 of the Council of Ministers of the European Community on April 25. These regulations refer to the withdrawal of land from agricultural exploitation and the extension and reconversion of those lands, which is also regulated in Community law by Regulations 1272 and 1273 dated 1988.

Therefore we are faced with a disposition that is issued by the Spanish government for the development and enforcement of a community rule. This disposition is challenged by the Federation of Associations of Farmers and Ranchers of Andalusia, who file an appeal against the entire Royal Decree, but specifically challenge the annex to the decree which lists the areas excluded from the regime by which pasture lands are withdrawn and refers again specifically to the affected areas located in Andalusia.

There are several points that must be resolved in order to make a judicial ruling that is in keeping with the legal system. Among these are the inadmissibility of the appeal filed by the procedural representative of the Administration, the alleged omission of the opinion of the Council of State, the lack of a hearing for affected organizations, and the merits of the case, which the appellants stress violate article 9.2 of the Spanish Constitution which safeguards the right to legal certainty.

In the opinion of the appellants, this legal certainty was severely threatened by the fact that the Royal Decree is materially different from the *Ley de Reforma Agraria de Andalucía*, which was passed by the Autonomous Community and which pursues objectives opposed to those pursued by the Royal Decree which is here being challenged.

(...)

Third.– Among these, priority must be given to the examination of whether it was necessary to obtain a pronouncement from the Council of State to be able to pass the Royal Decree which is challenged here. The omission of this step, if the pronouncement is understood to be obligatory, constitutes a procedural error that should be examined as a priority issue once the procedural exceptions are resolved.

In this regard, an agreement must be reached with the State Attorney that this requirement of an opinion from the Council of State is not grounded in the literal wording of the Organic Law of the Council, 3/1980, April 22. The part of that law that most directly addresses this topic is article 22.2 which establishes that the Standing Committee of the Council of State must be consulted on many issues including the approval of dispositions that are issued to enforce, comply with or develop international treaties, conventions or agreements. Given that under our law, for a report to be obligatory there must be an express legislative mandate to that effect in force, it must be concluded that the opinion or pronouncement in question was not obligatory and therefore, its ommision does not affect the validity of the Regulations.

This is the position that has been consistently supported by counsel for the Administration who emphasizes that international treaties, conventions and agreements form the original law of the Economic Community, in other words, they are the Treaties of the European Community and now of the European Union. In this case, a challenge has been made against a Royal Decree that was issued to develop several community regulations, which must be considered law derived from the European Community and not an international treaty, convention or agreement.

Now then, in spite of the coherence of the argument and of the brilliance with which it was presented before this Court, in cases of conflict, a European Community regulation has direct effect on the domestic legal system of Spain and must be given priority in its application over Spanish laws. This is the decisive question as regards the resolution of the appellant's case, because on the other hand, we cannot accept reasoning that is based on the claim that the Royal Decree contradicts the *Ley de Reforma Agraria de Andalucía* on

matters of exclusive competence of the Autonomous Community. This is because given the wording of the Statute of Autonomy of this community, the regulation of issues related to agriculture and ranching falls under the exclusive competence of the Andalusian Autonomous Community, but only in the sense that it develops and enforces the legislation of the State. Therefore, from this point of view, it cannot be claimed that the Royal Decree should have been issued only after obtaining a pronouncement of the Council of State because it affects the mandates of a law.

Returning, then, to the main issue, we should point out that if indeed the question at hand is not explicitly found in the *Ley Orgánica del Consejo de Estado*, we do have a rule issued by the Government that develops a Regulation or a set of Regulations of the European Community that is binding on Spanish authorities and has primacy over our own laws.

Given these conditions, it is impossible to claim that a pronouncement by the Council of State is obligatory if the Royal Decree is limited to simply transcribing the mandates of a community rule to domestic law. If such a pronouncement were obligatory, it would mean that obtaining an opinion from the Council of State would be required for the direct application of a law. But the case is that in order to issue the Royal Decree that is being challenged here, it can be concluded from the record that the Spanish government consulted the Administration of the European Community, which authorized the Spanish government to make use of the exception clause found in article 32 bis, paragraph 1, of Regulation 797/1985. As a result, the Spanish government made use of this authorization and developed the precepts of the community regulations specifying exactly what their application should be.

Therefore, the Royal Decree issued by the Spanish government which is now being challenged has certain characteristics that make it rigorously equivalent to Regulations issued to enforce laws. For this reason, this case should be resolved in accordance with the spirit of the *Ley Orgánica del Consejo de Estado* of April 22, 1980, prior to Spain's accession to the European Community, and it should therefore be understood that the proposal for the Royal Decree should have been sent to the Standing Committee of the Council of State for the required report.

In accordance with this finding, we rule that all actions related to this case should be returned to the time at which the pronouncement of the Council should have been requested. As a result, there is no need to

study whether or not the Royal Decree is in keeping with the legal sytem nor, therefore, the merits of the case".

3. Community Law. The Free Movement of Persons

— STS, 26 February 1993, (Division 3, Section 6), *Ar. Rep. J.*, 1993, n. 853.
Reporting Judge: The Honourable Pedro Antonio Mateos García.

In these two judgments, the Tribunal Supremo develops the application in Spanish law of the community principle of free movement of persons.

"*Legal Grounds*:

Second.– The free movement of workers and of their indirect beneficiaries (among whom are found the spouse of a subject of a member State) within the European Economic Community, as the challenged judgment correctly states, is a basic right, and we would add the core of a right common to all Europeans who belong to the Community. However, by claiming that art. 11 of Community Regulation 1612/1968 is applicable in spite of the fact that it deals with a limitation stipulated in the Accession Act as being valid only until 31.12.1990, the trial court states that the spouse of a community worker is recognized as only being entitled to equal treatment as regards working and receiving benefits and then only when the worker is employed in a salaried position. Therefore, individuals who are self–employed are not covered. This is the case of the individual here in question. It is also important to mention in this first treatment of the subject, that, as the trial court states, Royal Decree 1099/1986, May 26, on the entry, presence and employment in Spain of citizens of member States of the European Economic Community (currently replaced by Royal Decree 766/1992, June 26) was developed to cover the need to adapt our domestic legal system to the obligations that emerged from accession, and that in any case the treaties, the Act of Accession and other community rules that are directly applicable should be used as guides for interpreting the decrees (...).

Fifth.– The conclusion drawn from the previous paragraph, as a means for the interpretation of the disposition elaborated and published in Spain to control the free movement of community citizens and other individuals who benefit from that right to free movement, is reinforced

by community rules themselves which are represented by the accession treaties, regulations and directives that, as we said before, are directly applicable to all of the dispositions of the member States and also to all administrative practices. This community rule establishes the free movement of persons — community citizens — as an exception to the general regime on aliens, and it guarantees all nationals of member States and their spouses the right to exercise their profession throughout the EEC. Furthermore, the mandate of community law intensifies its mandate to be equal to domestic law whenever necessary to ensure the free movement of persons between the member States. Furthermore, Community law warns that the rights family members derive from the free movement of people include not only the right to move with and reside with the worker, but also the right to develop one's life in the chosen country. The rights to entry, residence and exit are exactly the same, no matter what type of work will be done whether it be salaried or independent, even though there is separate regulation of each, with Regulation 1612/1968 controlling the free movement of salaried workers and another regulation controlling self–employed individuals and services, which are included in the freedom of establishments through general programs on establishments and services. There are also Directives on this issue. However, in reality all are governed by identical principles and are seen as groups of rights whose content and development are identical, given that both the right to move and the right to remain or reside in the country in which one chooses to exercise a community freedom are contemplated (...)".

— STS, 23 April, 1993, (Division 3, Section 7), *Ar. Rep. J.*, n. 2855. Reporting Judge: The Honourable Melitino García Carrero.

"*Legal Grounds*:

Second.– Royal Decree 1099/1986, May 26 (currently revoked and replaced by RD 766/1992, June 26) responds, as stated in its preamble, to the need to complete the already cited article 3 of the Organic Law 7/1985, which promulgates the specific rules required by obligations derived from Spain's Treaty of Accession to the EEC and the corresponding community directives, the purpose of which is to abolish all discrimination based on the nationality of workers in the member States, and also those relative to the free movement of persons who wish to come to Spain to reside as regards the issue of work, whether it be as an employee or as a self– employed individual.

In this appeal, an Italian national's (and therefore a citizen of a member State) right to reside and work in Spain is addressed. This issue should be analyzed by giving preference to the consideration of the rules of said Royal Decree which regulates the administrative formalities related to a Community member's right to enter and remain in Spain in order to carry out both salaried or unsalaried activities or to provide or receive services, which is protection by the articles corresponding to the Treaty (art. 1.1) in whose exegesis should be contemplated the clear goals of the treaty which is to totally eliminate any restriction or obstacle.

Third.– Royal Decree 1099/1986 (hereafter referred to as the Royal Decree) structures the legal regime on the entry and stay in Spain of citizens from other community member States, using two criteria in addition to the transitory rules of Chapter 33, together with the general rules found in Chapter II and specific ones found in Chapter IV, which stipulate the measures related to entrance into Spain, to the issue and renewal of residency cards and permits or their denial, and to sanctions and deportation from Spanish territory of EEC member State citizens for reasons of law and order, public safety or public health (art. 21). In this last case, the regulation gives government authorities the extraordinary right to adopt any of the following measures provided that the required guarantees that an individual can contest the measure and defend himself are met: impede entrance into Spain even if an individual presents all required documentation; deny the issue or renewal of residency cards or of the work and residency permits regulated by Chapter III; order deportation from Spanish territory. Unlike these rules, under the common regime, measures which can be used are much more detailed, as is the case with art. 23, which we will subsequently examine.

An examination of the case file shows that there is no question that this case has been processed according to common rules in spite of the fact that the police report attached to the request for the initiation of deportation proceeding contains sufficient material to warrant the use of the law and order option based on the investigation of the case. For example: a) the extradition request filed by Italian courts based on association with delinquents and conspiracy in fraudulent bankruptcy although the extradition was denied by the Criminal Division of the Audiencia Nacional; b) the investigation carried out by the Central Drug Brigade for suspicion of being involved in drug trafficking; c) a supposed tie to the Italian Mafia through the "Santa Pola Clan"; d) alleged commercial activity for the purpose of laundering money ...

Fourth.– The record shows that from the time of his arrival in Spain in 1987 in possession of a valid passport, until the month of January 1990, when he was arrested as a result of the extradiction request mentioned above, the appellant did not file any request for residency in Spain or for a work permit, nor did he declare any professional or economic activities, even though he has continually worked as a joint administrator of the mercantile firm "La Marbellita SA" (ff. 5 to 32 of the file).

Now then, by applying the common rules from Chapter II of the Royal Decree, the circumstances found in art. 26.1 of LO 7/1985 as justification for deportation must be applied in accordance with the provisions of art. 23 of the Royal Decree as this is a case that deals with a national of a member State of the European Community. To comply with this criteria, we must remember that section 2 of said article states that deportation from Spanish territory cannot be based on "the omission of an application for a residency card or of a work and residency permit in cases in which an individual is entitled to obtain them". In these cases, the only possible sanction is a fine, which should be in proportion to the severity of the infraction, taking into account the willingness, recurrence and, when appropriate the economic capacity of the individual committing the infraction".

XIV. RESPONSIBILITY