SPANISH JUDICIAL DECISIONS IN PUBLIC INTERNATIONAL LAW, 1992

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I. INTERNATIONAL LAW IN GENERAL

II. SOURCES OF INTERNATIONAL LAW

III. RELATIONSHIP BETWEEN INTERNATIONAL LAW AND MUNICIPAL LAW.

1. Application of Treaties under Spanish Law

— STS, 7 October 1992, (Criminal Division), *Ar.Rep.J.*, 1992, n. 7819. Writing the decision: The Honorable D.S.A. Martín Pallín.

This judgment in cassation appeals a decision handed down by the Audiencia Nacional which convicted the appellant of trafficking in contraband elephant tusks in violation of the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora.

This appeal in cassation alleges a material error in the evaluation of the evidence. In this regard, the appellant presented a certificate from the Ministry of Equatorial Guinea which authorized him to export the tusks because they had been acquired before 1986, in other words, before the provisions of the Convention on International Trade in Endangered Species of Wild Fauna and Flora went into effect. The appellant also alleges the incorrect application of the Convention, an incongruency between the facts and the legal classification they were given, and an error in type, and claims that even if the classification were correct, the infraction never actually took place.

The Court rejected all five grounds of the appeal.

"The documents (...) show that the appellant shipped his personal effects in several wooden crates that had false bottoms in which he hid nine elephant tusks. These were not included on the list of items that the appellant gave to the customs agent for processing and release through the Valencian customs department.

(...) Trafficking in and transporting elephant tusks is regulated by the Convention on International Trade in Endangered Species of Wild Fauna and Flora done in Washington on 3.3.1973. Spain's instrument of accession to this Convention is dated 16.5.1986. It was published in the *BOE* on 30.7.1986 and entered into force ninety days after it was deposited.

According to the text of art. IV, in order to import an African elephant one must first obtain and then present an export permit or a certificate for reexportation. Prior to that, an export permit signed by the scientific authorities of the exporting State must be obtained from the country of origin and this document must certify that the export of this specimen does not affect the survival of the species. The administrative authorities of that State must also verify that no currently effective law related to the protection of that State's wildlife is being violated.

The appellant did not comply with any of these requirements nor did he bother to obtain any certificate whatsoever at the time of exportation to prove that the ivory was acquired prior to the date on which the provisions of the Convention went into effect. The document presented after the fact does not prove that the requirements that we have set forth above were met. Furthermore, the provisions of art. 10 of the Convention which allow States that are not parties to the Convention to issue certificates that meet the aforementioned requirements were also not respected.

Therefore we feel that the application of the principles which are allegedly being infringed is completely justified given that we are faced with the importation into Spanish territory of illicit goods which were not declared to customs officials.

(...) The contradiction that the appellant alleges to find in the judgment being challenged does not exist. He claims that the section on proven facts declares that the ivory tusks fall into the category of illicit trade while in the first legal ground they are classified as licit.

This contradiction does not exist because in the section in which the facts are presented, it does not say that the goods were classified as illicit but rather that the formalities required by the frequently cited Washington Convention were not met and that there was no administrative authorization given prior to their entrance into Spain.

The Convention does not classify protected species as prohibited items but rather establishes limits and administrative obstacles to their uncontrolled and indiscriminate exploitation. As is stated in the Preamble and in articles I and II, an attempt is made to protect certain species from excessive exploitation by international trade and regulating the importation, exportation and reexportation of these species is considered necessary for the efficient control of trade in the species found in Appendix II which includes the African elephant.

It is therefore perfectly clear that the Convention allows trade in some of the species found in its text. However, this trade is always subject to controls and prior cautionary measures to ensure the protection of species that may not be in imminent danger of extinction but could run that risk if trade were not subject to strict control which prohibited uses incompatible with their survival.

4. Therefore, even when objects and personal belongings can be imported duty free in cases of a change of residence from a foreign country to Spain, the determination of whether or not elephant tusks can be considered personal corresponds to the customs authorities whose decision can be appealed.

Nevertheless, it is absolutely impossible to import tusks and other specimens subject to the control of the Convention without strictly complying with all of its provisions.

There is no infraction of the accusatory principle in the basic facts and their corresponding legal classification has not been altered at any time. As was already mentioned, the specimens covered by the protection clauses of the Convention should not be considered prohibited items but rather items that are restricted by the established control mechanisms of the international obligations to which Spain subscribes.

For the reasons set out above, this ground must be rejected".

— STS, 24 December 1992, (Criminal Division), *Ar.Rep.J.*, 1992, n. 10320.

This judgment decides in cassation a case brought by the State Attorney against a judgment for acquittal made by the Audiencia Nacional.

Mr. M.C. was accused and acquitted by the Audiencia of a crime against public health which consisted of his giving a box containing nine Buprex pills which he obtained in a pharmacy after presenting the required medical prescription, to Mr. P.M. who did not have a prescription for said medication and who paid Mr. M.C. for the pills.

The Attorney General filed an appeal in cassation against the judgment issued by the Audiencia based on an infraction of the law with only one ground pursuant to art. 849.1 of the LECrim. (Ley de Enjuiciamiento Criminal, Criminal Procedure Law) and requested that art. 344 of the CP (Código Penal,

Criminal Code) be applied to the case because Buprex is a psychotropic drug covered by the aforementioned article.

As is its custom, the Court defined the concept of toxic drugs, narcotics and psychotropic substances by referring to the lists of these substances that have been approved in international agreements ratified by Spain, with the modifications that have been introduced as a result of medical advances which define more accurately the effects of certain chemical and natural products. Therefore, according to the Court, the classification of a psychotropic substance is the one given in art. 1.4) of the United Nations Convention dated 19.12.1988 which was ratified by Spain on 30.7.1990: "any natural or synthetic substance or any natural matter that can be found on lists I, II, III and IV of the 1971 Convention on Psychotropic Substances" which Spain acceded to on 2.2.1973. Thus, the Court declared that Buprex, or Buprenorphine, should be considered a psychotropic substance according to the provisions of art. 344 of the CP since it contains a substance included on list III. Furthermore, the Court found that the defendant knew that the medication contained a psychotropic drug and was aware that trafficking in that drug was prohibited. However, he did not consider this substance to constitute a serious health hazard.

The Court accepted the appeal and issued a second judgment convicting Mr. M.C. of a crime against public health involving a substance that does not present a serious health hazard, and sentenced him to four months and one day of prison and a fine of 500,000 pesetas.

"(...) As regards the first question, everyone is well aware that the doctrine of this Court when faced with the problem of specifying what items should be considered toxic drugs, narcotics and psychotropic substances is to refer to the lists that have been approved in international agreements to which Spain has subscribed with the modifications that are introduced as a result of medical advances which define more accurately the effects of certain chemical and natural products. We consider this means of defining this concept to be the most appropriate according to the principles of legal certainty and legality (art. 9 and 25 of the *CE*) which define Criminal Law.

Therefore, in keeping with the definition offered in art. 1, letter r) of the United Nations Convention of 19.12.1988 (*BOE* 10.11.1990), psychotropic substances must be considered to be 'any natural or synthetic substance or any natural matter that can be found on lists I, II, III and IV of the 1971 Convention on Psychotropic Substances' which Spain acceded to on 2.2.1973 (*BOE* 10.9.1976). These lists were published in the *BOE* of 13.10.1976, and later in a decree dated 6.10.1977 (*BOE* 16.11.1977) which includes the lists in its first annex.

(...) So, the medication in question in this case, Buprex, contains a

substance, Buprenorphine, that is not found on any of the first lists of the previously cited Decree 6.10.1977, nor is it found in Annex 2 ordered by the *Ministerio de Sanidad* 30.5.1986 (*BOE* 6.6.1986); it continued to be excluded from the lists until an Order dated 28.9.1989 (*BOE* 10.10.1989) included it on list III of Annex I (clarified in *BOE* 20.10.1989).

It can be concluded from all of the above that from the date of the last provision cited, Buprex, which contains a substance found on List III of Annex I — Buprenorphine — must be considered a psychotropic drug and therefore the acts specified in art. 344 of the *CP* referring to this kind of medication can be considered criminal and can be sanctioned according to the Penal Code when these acts take place without the required medical prescription.

In conclusion, it is clear that since the events on record occurred after the Ministerial Order dated 10.10.1989, specifically on 20.6.1990, art. 344 of the *CP* should be applied.

(...) If one didn't know that this was a toxic drug or narcotic or psychotropic substance, and one believed, for example, that it was just an ordinary medication, then there would be an error related to an element required for this to be considered a criminal infringement of art. 6 *bis*), paragraphs 1 and 2 (classification error).

If it was known that this was one of the substances included in the lists, but it was thought that selling this substance was permitted, for example, because it was being sold to a foreigner in whose country this behavior was considered legal, this would be a situation of erroneously believing that one was behaving legally. This is contemplated in paragraph 3 of art. 6 *bis* a) (prohibition error).

However, in the case at hand, as the State, here the appellant, correctly shows, the facts of the case do not allow us to conclude that any of these types of errors existed. The defendant was involved in the drug world at that time and knew what Buprex was. He was aware that a special prescription was needed to get it. He also knew that this medication is used to combat withdrawal symptoms in heroin addicts and that these medications are to be used only by the individual named on the prescription.

Therefore it is quite logical to conclude that Mr. M.C. knew the toxic or psychotropic characteristics of Buprex and that giving the pills to someone else was prohibited.

The fact that the defendant did not know that Buprenorphine Chlorhidrate was the main ingredient of Buprex and that this substance is found on the lists of prohibited substances included in international agreements is irrelevant to the commission of the crime in question. Otherwise, only experts in the field could commit this type of crime.

In conclusion, there did exist the deception required to consider this a crime, and the defendant knew that he was acting illegally when he sold the

Buprex pills to his friend. Consequently, we cannot find any error of type or prohibition in his behaviour and therefore, having sold a psychotropic substance, he must be convicted of a crime under art. 344 of the *CP*. This mandates the acceptance of the appeal made by the State Attorney's Office".

— STS, 11 June 1992, (Criminal Division), *Ar.Rep.J.*, 1992, n. 5058.

This judgment decides an appeal in cassation against a prior judgment handed down by the Audiencia Nacional convicting the appellants.

The Court convicted Mr. C.M. and Mr. J.M. of two charges of illegal detention. This was the second offense of this kind for the first party, a fact which was considered an aggravating circumstance.

The two defendants filed an appeal in cassation against this decision and alleged the violation of their right to be presumed innocent until proven guilty and the incorrect application of the articles of the CP which correspond to this concept.

The Court has rejected their appeal. It did find that the facts conclusively showed that the detentions had been illegal, and in Mr. G.T.'s case, it found that a crime of torturing an individual had also been committed. As regards this last crime, the judgment accepted the definition of torture established in the Convention against Torture and other Cruel, Inhuman or Degrading Punishment dated 10.12.1984 and ratified by Spain on 21.10.1987.

The Court partially accepted the appeal filed by Mr. C.M. because it did not find that this being a repeat offense was an aggravating circumstance in the crime of illegal detention. As regards the rest of the appeal, the Court upheld the decisions issued by the Audiencia.

"It is thereby proven that there was an infringement of art. 204 *bis* under which the appellant was convicted, together with the illegal detention contemplated in art. 184 which will be discussed later.

Torture has been defined by the Convention against Torture and other Cruel, Inhuman or Degrading Punishment, dated 10.12.1984, which was ratified by Spain on 21.10.1987 (*RCL* 1987, p. 2405) as any act by which pain or serious suffering is intentionally inflicted upon an individual in order to obtain information or a confession from that individual or from a third party, or in order to punish him for an action that he committed or is suspected of committing, or to intimidate or coerce this individual or others. This definition was conceived by the V Congress of the UN for the Prevention of Crime and the Treatment of Delinquents dated 1.9.1975, recognizing that these acts were carried out by public civil servants, by people carrying out their duties as public civil servants, or at the instigation of these civil servants (see the decision

handed down by the TC dated 27.6.1990) (*RTC* 1990, p. 120).

The crime of torture under art. 204 *bis* of the *CP* is not, in principle, more than a qualified and aggravated type of another infraction.

For this to be considered a crime, there must be a) an authority or public civil servant as the active subject; b) a specific activity produced during an official, judicial or expert investigation; and c) a clear intent to obtain a confession or testimony from the passive subject.

Moreover, art. 204 *bis* contains several types or manifestations. The first three paragraphs (the first three crimes) relate mistreatment to another infraction to which incriminating behavior is closely tied. The last two paragraphs, on the other hand, maintain a certain autonomy as they punish intimidation and torture without relating them to anything other than a generic procedure that is underway, or to the investigation of a crime.

The ground must be rejected".

IV. SUBJECTS OF INTERNATIONAL LAW

1. The Immunity of Foreign States

— STC 107/92, 1 July (Second Division), (*BOE* 24.7.92).
Writing the decision: Magistrate Miguel Rodríguez-Piñero y Bravo-Ferrer.

The plaintiff worked as a secretary in the Embassy of the Republic of South Africa in Madrid. Upon being fired in 1985, she filed a case with the Magistratura de Trabajo, which accepted the allegation of jurisdictional immunity as claimed by the defendant State. This decision was annulled by the Tribunal Supremo in 1986. The records were returned to the Magistratura de Trabajo which declared the firing null and void and ordered the Republic of South Africa to reemploy the worker. As this order was not complied with, Ms. D.G.A. requested enforcement. When South Africa's immunity from enforcement was accepted, the plaintiff filed an appeal for protection with the Tribunal Constitucional and it was accepted.

"Determining the system currently in effect in our legal system as regards matters of immunity of foreign States is a somewhat difficult task. This difficulty derives from the fact that, unlike other countries which have stipulated this issue in specific laws or as part of general procedural law, our lawmakers decided to follow the technique of revising rules and regulations, and deferring the system of State immunities as a whole to Public International

Law. Article 21 of the *LOPJ* states the following:

`1. Spanish courts will hear cases that arise within Spanish territory between Spaniards, between foreigners, and between Spaniards and foreigners in accordance with the provisions of this Law and the international treaties and conventions on this issue to which Spain is a party.

2. Cases of jurisdictional immunity and immunity from enforcement established by the rules of Public International Law are exempt'.

(...) The aforementioned referral to the regulations ... requires that the applicable rule should be determined for each case in accordance with international law; this solution cannot be challenged in strictly legal-constitutional terms, but it is advisable to enact legislation on this issue that would produce greater legal certainty.

Since jurisdictional immunity is not one of the problems presented in this appeal for protection, no more need be said about this issue than that the international law on this matter has evolved throughout this century from the traditional absolute rule of jurisdictional immunity, based on the sovereign equality of all States expressed by the addage *par in parem imperium non habet,* towards the cristalization of a relative rule of immunity which gives national courts the power to exercise jurisdiction over those acts of foreign countries that have not been carried out on behalf of the empire but are instead subject to the ordinary rules of private concerns. Even though it is quite difficult to pinpoint the distinction between *iure imperii* acts and *iure gestionis* acts in certain cases, and although this distinction has been defined in different ways in different States and in different international codes, it has come to serve as a general international rule (...). It is important to point out here that the immunities granted by International Law (especially diplomatic and consular immunities) should not be confused or identified (...).

However, it is possible to see a clear tendency toward gradually relativizing the immunities of foreign countries in national courts. This relativization is more pronounced and clear as regards jurisdictional immunity but it is also evident, although to a lesser degree, in issues related to immunity from enforcement.

(...) In this regards the following data should be mentioned:

A) The proposed articles on State immunity drawn up by the United Nations Commission on International Law establish as a principle a foreign State's absolute immunity from enforcement. The only exceptions to this principle according to the Commission's proposal, apart from a case in which the foreign State consents to enforcement, are cases in which there are State assets specifically destined for commercial and not governmental purposes, and, this includes, among others, `assets, including any type of bank account, that are located in the territory of another State and are used or destined to be

used by the diplomatic mission of the State or its consular offices'. These can never be considered as used or destined for use for commercial purposes. Of course, this attempt to create international guidelines lacks obligatory force, even though their value as a guideline is very high given the organism which sponsored them and the materials used in their preparation.

B) In Europe, the European Convention on State Immunity and its Additional Protocol should be mentioned. (...) Even though Spain is not yet a party to this Convention, it can indeed serve as an indicator (...).

C) As regards the most recent national legislation that has been developed on this issue, especially in Anglo-Saxon countries and in their sphere of influence, we can see that, even when using the principle of immunity from enforcement as a base, exceptions are made based on the concept of assets used for commercial activities in the State in which the case is being heard (...).

D) Finally, we should mention that the national case law of many States has recognized in certain contracts that the Court hearing the case can issue enforcement orders (...).

Therefore, in general, when the sovereignty of a foreign State is not involved in a certain activity or does not affect certain assets, the non-enforcement of a judgment is not authorized by either international or domestic law (by remission), and consequently, a decision not to enforce a judgment constitutes an infringement of art. 24.1 of the *CE*.

International Law prohibits measures to be taken that require the enforcement of judicial decisions that affect those assets belonging to a foreign State that are earmarked or destined for use in carrying out sovereign or imperial activities. Only enforcement related to assets that are destined to be used for economic activities in which the sovereignty of a country is not involved according to a correct compliance with private Law is allowed. (...) The assets belonging to diplomatic and consular missions are absolutely immune from enforcement by virtue of the Vienna Conventions of 1961 and 1963 (...).

Current international practices clearly exclude embassy bank accounts from all enforcement measures. (...) This is true even if the funds deposited in banks can also be used to carry out acts which do not involve the sovereignty of the foreign State.

The Court is well aware of the difficulties that exist due to its inability to attach these bank accounts in cases in which these have not been granted immunity and a forced enforcement of a decision involving a foreign Country is sought.

In response to the above, the TC (...) has decided to partially accept the appeal for protection filed by Ms. D. G.A., and by virtue of this:

1°. To recognize her right to due process as regards her right to the enforcement of final judgments.

(...) 3°. To remand this case to the *Juzgado de lo Social,* courtroom 11 in Madrid, so that that court can proceed to enforce the decision against other possible assets belonging to the State in question which do not enjoy immunity from enforcement".

V. THE INDIVIDUAL IN INTERNATIONAL LAW

1. Aliens

— STS, 1 October 1992, (Contentious Administrative Business Law), (Division 3, section 4), *Ar.Rep.J.,* 1992, n. 7742.
Writing the decision: The Honorable Mariano Baena del Alcázar.

As has been reiterated many times in the case law of the Tribunal Constitucional, this judgment, which interprets art. 13 of the Constitution, also concludes that the recognition of basic rights for foreigners in Spain is not derived from international treaties or from the law, but rather from the Constitution itself, and in order to define the scope of those rights, the Constitution must be interpreted according to art. 10 of its text, in other words, in accordance with the international instruments that protect these basic rights to which Spain is a party.

"(...) The question at hand, which must be considered from the perspective of art. 13 of the current Constitution, has been resolved by the TC in the sense that according to Judgment 107/1984 dated 23 November, the exact wording of the article in question does not assume that there has been a desire to deconstitutionalize the legal situation of foreigners as regards rights and public freedom. The Constitution does not state that foreigners will have the same freedoms in Spain that are granted them by treaties and Law, but rather that they will have those rights in the terms they are established by treaties and the law. Foreigners are then entitled to these rights, but these rights must be legally defined.

Now then, according to the same decision, there exist rights to which both Spaniards and foreigners are entitled, these being those that are inherent to man, and these rights are regulated in the same manner for all individuals. In keeping with this line of thinking, judgment 99/1985, 30 September, issued by the TC, states that among these rights is the right to due process, which

according to the international declarations and treaties referred to in art. 10 of the *CE*, is inherent to all men".

2. Aliens. Refugee Law

— STS, 27 October 1992, (Contentious Administrative Business Law), (Division 3, section 7), *Ar.Rep.J.*, 1992, n. 9106.
Writing the decision: The Honorable Gustavo Lescure Martín.

The judgments that are presented here all deal with the interpretation of indefinite legal concepts related to the situation of refugees in Spain which by their very nature require a broad interpretation, not only in terms of the definition of rights but also in the evaluation of evidence that must be presented for the status of political refugee to be conferred.

Appealed judgment.
"(...) First. Art. 1.2 of the Geneva Convention on the Status of Refugees dated 28.7.1951 and the text of the New York Protocol of 31.1.1967, which Spain acceded to by an instrument dated 22.7.1978, establish that the term 'refugee' will be applied to anyone who 'owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group, or political opinion, is outside the country, or, due to his fear, does not wish to seek protection from that country'. This rule was already a part of domestic law and current legislation is subject to it. It was constituted by Law 5/1984, 26 March, and defines the right to asylum and refugee status as well as the rules for its application which were approved by Royal Decree 511/1985, 20 February. It is comprised of non-specific legal and non-legal concepts which must be integrated into the law keeping in mind the fundamental nature of the right to asylum as defined in art. 14 of the Universal Declaration of Human Rights and art. 13.4 of the *CE* which require an evaluation of the circumstances based on non-restrictive criteria to be carried out so that both the objective and subjective proof of the above does not becomes so difficult as to be almost impossible. It suffices to have a reasonable belief that these circumstances exist to invoke the declaration being sought. This interpretation can be considered correct according to the expression 'sufficient indicators' included in the Law itself and constantly referred to in case law, including, to cite some of the more recent cases, the decisions issued in Division 3 of the TS dated 4 March, 10 April and 18 July 1989.

Second.- The Court has arrived at this conclusion — the acceptance of 'sufficient indicators' — because, on the one hand, the objective situation

which has caused the appellant to fear persecution in his country due to his political beliefs is a well known fact and has been entered in the record through a strict interpretation of the favorable report by the United Nations High Commissioner for Refugees (UNHCR) and the report commissioned by the Spanish Minister of Foreign Affairs from our embassador in Iran, and the fact that that department does not oppose the actor's pretensions. On the other hand, although the task of offering proof is quite difficult, there is ample evidence of the grounds for this appeal if we take into account in a combined fashion the allegations, the guarantees, the documented testimony, and the UNHCR recognition of the case. Finally, the grounds on which the resolutions being challenged are based are mere suppositions derived from rights from which the opposite conclusion could also be legitimately drawn. This was firmly established by the interested party through administrative acts, as has already been stated during the course of this trial in the written suit itself".

Judgment of the Tribunal Supremo.

"First.- The trial court has found sufficient indicators that the fear the appellant, an Iranian citizen, has of being persecuted in his country for his political beliefs is well-founded. In accordance with the provisions of art. 22 of Law 5/1984, 26 March, in relation to art. 1° 2 of the Geneva Convention of 28.7.1951 and the Protocol dated 31.1.1967 which Spain acceded to in an instrument dated 22.7.1978, the Court recognized his status as a political refugee. The State Attorney protests this resolution and alleges that in addition to the Commission's report opposing the recognition of the actor's status as a political refugee in Spain, a political organization opposed to the current regime in power in his country — which he has visited on many occasions legally and with a valid passport and with no type of restrictions placed on him — adds that more than five years passed between the time he first arrived in Spain and the time he filed an application for protection, and during this time he was under the protection of the diplomatic authorities of his country. Finally, the State Attorney alleges that the appeal was not filed in a timely manner.

Second.- The challenge brought by the State Attorney must fail, first because he accepted the ruling issued by the *Audiencia Nacional* on 21.12.1989 which rejected the untimeliness of the appeal. This decision was correct in that the notification of the rejection of the appeal for reversal indicated that the contentious administrative business appeal could be filed within a two month period. The allegations related to the merits of the case must also be rejected because A) even though the report of the Interministerial Commission on Asylum and Refugees was unfavorable, the report issued by the United Nations High Commissioner for Refugees was favorable and did find that the interested party met the conditions required to obtain the status he was

seeking. B) several documents have been entered into the record from Mr. M.A. and Mr. C.C., members of the Central Committee of the Communist Party of Spain, which attest to the fact that the appellant is an Iranian democrat who had to leave his country for reasons of political persecution and therefore requested asylum in Spain. He was the leader of the Tudeh Party in Iran and since January 1988, has been the leader of the Popular Democratic Party of Iran, and C) the principal applied for refugee status in Spain when the embassy of the Islamic Republic of Iran refused to renew his passport. There is no proof that he has returned to his country at any time while there is proof that he traveled from Spain to Turkey, Portugal and the Federal Republic of Germany. All of these circumstances counteract the arguments presented by the State Attorney, and therefore the Court is inclined to confirm the judgment being challenged because it feels that the appellant in this case does find himself, due to his political beliefs, in the situation contemplated by art. 22 of Law 5/1984 in relation to the 1951 Geneva Convention and the 1967 New York Protocol".

3. Human Rights

a) Right to be assumed innocent

— STC 138/1992, 13 October, (First Division), (*BOE* 17.11.92). Writing the decision: Magistrate Rafael de Mendizábal Allende.

The presumption of innocence should be interpreted according to the international texts related to human rights.

"One of the guiding principles of contemporary Criminal Law in both its substantive and formal facets is the principle that says that any person accused of a crime is assumed innocent until proven otherwise. This concept is not an *ex nihilo* creation as it has inspired the entire structure of our *LECrim.* since 1981. However, its inclusion in art. 24 of the *CE* has given it new vigor. According to art. 10 of the *CE,* this article must be interpreted according to the international treaties on this subject that have been ratified by Spain such as the 1950 Treaty of Rome ratified in 1979, and the 1966 Covenant of Civil and Political Rights. These clearly show that the principle mentioned above is systematically more complex if we take into account that the presumption of innocence can only be overridden when an independent, impartial and legally established Court declares an individual guilty and this after a trial and full due process (arts. 6.1 and 2 of the 1950 Convention). The circle is completed with the substantive identity of an administrative infraction and crime which was recognized by the

European Court of Human Rights (Engel case, 8 June 1976) four years after it was ruled upon by our own TS (Judgment 9 February 1972). It was later incorporated into art. 24 of the *CE* ...".

b) Right to a public trial

— STC 65/1992, 29 April, (First Division), (*BOE* 29.5.92).
Writing the decision: Magistrate Fernando García-Món y González-Regueral.

The right to a public trial is not an absolute right. This can be concluded from international texts on human rights.

"The decision to hold a trial behind closed doors is an exception to the right to a public trial which is recognized and guaranteed by art. 24.2 of the *CE*. The purpose of this right is to ... protect individuals against a type of justice that is hidden from the public and to maintain the community's trust in the Courts. Nevertheless, this is not an absolute right, as can be seen in the provisions on this topic in the Universal Declaration of Human Rights and the international treaties on this matter to which Spain is a party. All of these documents serve as a basis for the interpretation of the basic rights recognized in our Constitution according to art. 10.2 of said document. In fact, art. 29, in relation with art. 10, both of the Universal Declaration, and art. 14.1 of the International Covenant on Civil and Political Rights and art. 6.1 of the European Convention of Human Rights and Fundamental Freedoms hold that the right to a public trial, and more specifically, the public's and the press's access to a courtroom during an oral hearing, can be limited or prohibited by law in a democratic society for several reasons including to maintain public order".

c) Union rights

—STC 75/1992, 14 May, (Full Court), (*BOE* 16.6.92).
Writing the decision: Magistrate Miguel Rodríguez-Piñero y Bravo-Ferrer.

The Tribunal Constitucional rules on an appeal based on unconstitutionality brought by the Public Ombudsman against arts. 3 and 5.2 of Law 4/1986, 8 January, regarding the transfer of property accumulated by a labour union.

Under the system for the protection of the right of unions to act freely according to the international rules which bind Spain, union activity includes all legal means afforded by domestic law. National legislation should ullow unions to fight to defend the interests of their members. Public officials cannot interfere in union activities, but they can promote them and help increase their strength.

"Union rights include 'all legal means' that can be found in our legal system and the international treaties on the matter to which Spain is a party. These include 'collective bargaining and strikes, and should be extended to include the initiation of collective conflicts' (STC 37/1983, legal ground 2).

As long as each union has been guaranteed sufficient and specific power to comply with its duty to represent and defend the interests of workers, the concept of union rights 'does not guarantee unions or their members any kind of special treatment by the Government' which would recognize rights or concrete powers that go beyond the true meaning of this concept as defined by the interpretation given by the European Court of Human Rights in its decision dated 27 October 1975 in the case of the Belgian National Police Union (paragraph 38).

The orienting nature of this decision on the interpretation of fundamental rights is clear according to the provisions of art. 10.2 of the *CE*. According to the doctrine set down by the European Court of Human Rights, this principle requires that 'national legislation allow unions to fight to defend the interests of their members' but each State is allowed 'to choose the means to this end'.

Art. 28.1 of the *CE* guarantees unions certain freedoms in relation to public officials. By doing this, it is clear that an attempt is being made to avoid the interference of these officials in union activities such as when they are exercising their right to 'write their bylaws and administrative rules, to freely elect their representatives and to formulate their plan of action' (art. 3.1 of Convention 87 of the International Labour Organization). However, not all types of public intervention in union activities are excluded. International and constitutional doctrines prohibit public 'interference', undue State meddling in union activities, coercion or the conditioning or control of the freedom to form a union or 'to formulate the union's platform' but it does not prohibit those public acts that, without restricting the autonomy of the union, attempt to promote unions and increase the power of those which already exist. It is within this context that the case law of this Court should accept the possibility of the State economically subsidizing unions and even allowing them to use public halls or property (...). So, the legality of this measure derives from the fact that these actions would significantly contribute to the promotion of unions (...)".

d) Prohibition of sexual discrimination

— STC 229/1992, 14 December, (First Division), (*BOE* 19.1.93).
Writing the decision: Magistrate Miguel Rodríguez-Piñero y Bravo-Ferrer.

Mr. C.R.V. applied for a job with Hulleras del Norte (HUNOSA) as a mining assistant. Although she was declared able to fill the position, all of the openings

were filled by males. She alleges sexual discrimination.

The Court accepts the case based on applicable community and international rules.

"That the petitioner for protection was not employed as a mining assistant is due to the fact that she is a woman and the decision was based on a provision that has not been formally annulled which prohibits women from working in the mines. Both the decision of the trial court and that of the appeals court ruled that the principle complies with art. 14 of the *CE* because it is a measure which serves to protect women, and with the domestic application of Covention 45 of the International Labour Organization of 1935... and of art. 8.4.b) of the European Social Charter... which require States to 'prohibit the employment of women in underground mining jobs'.

However, we must take into account that since the time those rules were issued, society has evolved towards an anti-discriminatory stance. Certain types of protective measures have been severely scrutinized, especially those that are based on unfounded prejudices, those that create a sexist division of labour, and those that due to the social and productive evolution that has taken place and the improvement in health and safety conditions in the mines, no longer make any sense. (...) If this biological difference is to be used to justify differential treatment, the safety reasons must be clearly stated, and one of the considerations that must be made is if the protection which these measures are supposed to offer in reality or potentially infringe upon the rights or negatively affect the interests of women.

Of course, those regulations that provide protection for working women who are pregnant or lactating are not contrary to the Constitution. These are covered by art. 2.3 of Directive 76/207/EEC. These factors are really the only ones that allow for differential treatment in order to protect women. This is the line that has been taken in the case law of the European Communities Court of Justice (Hoffman case, 12 July 1984 and Johnston case, 15 May 1986). This Court has allowed measures in favor of women in these cases in order to ensure, on one hand, protection of the biological condition of women during pregnancy and the post-partum period, and on the other, protection of the bonding relationship between mothers and newborns (...) It is also useful to remember, in this regard, that art. 11.2 of the 1979 Convention on the Elimination of all Forms of Discrimination against Women (...) establishes that protective legislation related to matters of employment 'will be examined periodically and will be revised, annulled or broadened as necessary in light of scientific and technological advances'. Also, art. 3.2.c) of Directive 76/207/EEC orders States to revise their legal and administrative provisions and regulations which are contrary to the principle of equal treatment 'when the desire for

protection that inspired the principle no longer exists'.

Along these lines, it is worthwhile to point out the recent revision of the rule prohibiting women from working at night. The European Court of Justice found no justification for the protection that originally inspired the creation of the prohibition because there is no need which justifies it except in cases of pregnancy or lactancy. Otherwise there seems to be no difference in the inconveniences that working at night causes for men and women. (Stockel case, 25 July 1991). Therefore, in compliance with art. 5 of Directive 76/207/EEC, the member States cannot legally prohibit women from working at night if they do not make the same prohibition for men.

The Government itself seems to have been aware of the lack of current grounds for this prohibition because it brought this suit dated 6 May against art. 8.4.b) of the European Social Charter related to the prohibition of employing women to work in underground mines which lost its effectiveness in Spain on 5 June 1991".

e) Right to due process

— STC/1992, 28 May, (First Division), which rules on the appeal for protection n. 9999/1988 (*BOE* 1.7.1992, rectified in *BOE* 14.10.1992, supplement).

In a judgment that convicted the appellant of robbery with the aggravating circumstance of this being a repeat offense, the appellant alleges that the Tribunal Supremo should not have taken the repeat offense into consideration and alleges an infringement of his right to due process.

The Court grants protection and declares the Tribunal Supremo ruling null and void.

"(...) From all the aforementioned, we must conclude that, in the first place, the limitations of the trial heard by the TS here under appeal in cassation, are partly due to the procedural behaviour of the appellant in this case who did not present the documentation included in the appeal at the trial, nor is there any record of him even trying to present or requesting to enter this documentation. This kept the High Court from correctly using all of the factual elements available to examine the grounds for cassation which are based on a *de facto* error in the evaluation of the evidence. Without lessening the reproach this type of procedural conduct deserves, the rejection of the first ground in cassation which infringed the law (in which one party expressly denounced the incorrect application of the aggravating circumstance of the repeated offense) due to the fact that the requirements for getting rehabilitation were not stated and the prior criminal record of the repeat offender was cancelled, violated the

appellant's basic right to due process (art. 24.1 *CE*). In fact, in response to the appellant's charge that according to the Decree on pardons dated 14 March 1977 on the one hand, and the reduction of sentences based on work on the other, he had completed his sentence on 3 June 1979 and that, because of this, the periods of time indicated by art. 118 of the *CP* for rehabilitation had already expired when the crime was committed, the TS should have checked to see if the defendant's prior criminal record was in effect for the purposes of considering this offense a repeat offense. This should have been done through cassational channels, or, if this type of verification was not considered pertinent, the motion to consider this an aggravating circumstance should have been denied pursuant to the provisions of art. 10.15 of the *CP* (which regulates the admission of criminal records). This is in keeping with a constant and precise doctrine issued by the TS itself in this regard, given that reasonable doubt existed about the current effects of the criminal record of the defendant and this could be inferred from the concrete and specific data accepted by the appellant in his appeal and on which the TS offered no ruling whatsoever in its judgment.

In conclusion, the decision of the Court to reject the first ground of the appeal — in which arts. 10.15 and 118 of the *CP* were said to be infringed — simply because it was not stated in the case that the requirements for the cancellation of his criminal record had been met, or more specifically, the date on which the sentence that had been imposed had been served, must be found contrary to art. 24.1 of the Constitution given that in the case of decisions, the effectiveness of the basic right to due process requires that an in-depth resolution on the so-called prescription of the repeat offense which is grounded in Law be issued as to whether or not all of the requirements set forth by Law were met (STC 64/1983). This, without forgetting that, as this Court has declared on several occasions, a criminal appeal for cassation is not only meant to serve the interests and objectives related to the necessary clarification of the Law in matters of judicial function, but rather it is to play an essential role in the system of jurisdictional guarantees set forth in art. 24 of the *CE* as it allows the individual being tried to submit the ruling which convicted him to the 'higher court' referred to in art. 14.5 of the International Covenant on Civil and Political Rights applicable in this case by virtue of the provisions of art. 10.2 of the Constitution (among others SSTC 60/1985; [*RTC* 1985, p. 60]; 57/1986 [*RTC* 1986, p. 57]; 78/1988 [*RTC* 1988, p. 78]; 20/1990 [*RTC* 1990, p. 20] and 60/1990 [*RTC* 1990, p. 60]) (...)".

f) Right to a speedy trial

— STS, 7 October 1992, (Criminal Division), *Ar.Rep.J.*, 1992, n. 7942.

The appellant, who was convicted of a crime of conversion aggravated by fraud, alleges undue delays in his trial. The Tribunal Supremo admits the appeal and finds an infringement of the right to a quick and speedy trial. The defendant is informed of his right to request compensation for the abnormal functioning of the system of justice.

"(...) The judicial system in a democratic society must provide its citizens with theright to a fair trial with due process. Among these guarantees we find the right to have a trial within a reasonable amount of time without undue delays as is provided for in art. 24.2 of the *CE*.

Art. 6.1 of the European Convention establishes that any one accused of a crime has the right to a quick and speedy trial. Putting this into practice has been the source of much case law in the European Court of Human Rights which has developed a set of requirements and circumstances that must be met in order to evaluate the right to a trial without undue delays. In order to carry out this evaluation, the following factors are needed:

a) A means by which to compute periods of time.

According to the doctrine of the European Court of Human Rights, — Eckle A. case, 15.7.1982 — a reasonable period of time should be calculated starting at the time a person is accused of a crime if the Court has opted for a material and not a formal conceptualization of the accusation. In this case, the period of time could be calculated from the time the defendant was notified of the filing of the action, which was the month of March 1978.

b) The complexity of the matter.

The complexity or simplicity of an action plays an important role in determining what a reasonable period of time for the processing of a case might be.

Normally, matters related to economic issues in which expert accounting witnesses are called are more complicated to process. However, this does not justify excessive delays. Therefore, this action must be studied carefully to see if there has been any judicial passivity — Zimmerman and Steiner case, 13.7.1983 and Powell and Rayner case, 21.2.1990 — and there do seem to be excessive periods of time in which no judicial activity took place.

c) The behaviour of the individual seeking protection.

In many cases, delays are caused by the practices or delaying tactics of the appellant himself who uses and abuses all of the procedural recourses he has not to provide an effective defense of his interests, but rather to delay the

processing of the matter. The only delay that can be considered to be caused by the appellant was during the indictment period when on 26.1.1988, after having received the proceedings on 18.12.1987, he presented a written document prepared by his attorney renouncing his services. The case is given to a new attorney on 4.2.1988 which is returned on 17.2.1988. In other words, the process of indictment, which according to the law is limited to a 5—day period, was extended to 60 days dues to the aforementioned incidences.

This period of time seems irrelevant, however, if we compare it to the twelve years that it has taken to resolve this case.

d) The behaviour of the competent judicial authorities.

The European Court of Human Rights has set forth as doctrine on several occasions that the Convention obligates party States to organize their jurisdictional bodies in a way that allows them to meet the requirements of art. 6.1 including the one that refers to a quick and speedy trial.

The Court has considered the possibility of an excessive workload, which would not implicate the party States' responsibility if the steps necessary to correct an exceptional situation are taken in a timely manner — Milasi case, 25.6.1987.

There is no proof of the existence of an exceptional situation in the jurisdictional bodies that processed this action, the twelve years that it took to process this case due to periods of inactivity by the judicial authorities, as outlined in section 1 of this ground, is appalling.

For all of the above reasons, we must declare that there did exist undue delays — from 1.3.1978 when the case was initiated to 19.5.1990 when a ruling was made by the *Audiencia* — that have extended this case far beyond what can be considered desirable and to these twelve must be added the two years that it has taken to process this appeal.

Therefore, having established the infringement of a fundamental right guaranteed in art. 24.2 of the *CE,* we should face up to the consequences that arise from the merits of the appealed resolution.

Several options are available to determine the effects of the declaration of the existence of undue delays in the processing of an action.

It seems contradictory to accept the existence of an infringement of a basic right and not adopt any decision regarding the validity and enforcement of the resolution affected. This decision must somehow address the fulfillment of the sentence and the State's possible patrimonial responsibility due to the functioning of the administration of justice.

The existence of undue delays makes the punishment late and disproportionate. The sense of guilt no longer has the same urgency as it does when a ruling is issued in a timely manner. Therefore, the appropriate means should be found to avoid the effective fulfillment of the sentence and to adapt

this response to current circumstances.

The means available to us lead us towards absolution in cases in which inactivity extends beyond the period of time given as a sentence for a crime, or towards a reduction in the sentence which can be achieved by means of a pardon. This last solution is the one we will adopt for this case and this will be stated for the record in the second judgment. This will not affect the appellant's right to seek compensation for the abnormal functioning of the administration of justice if he feels it appropriate to do so".

g) Right to honor

— STS, 18 November 1992, (Civil Division), *Ar.Rep.J.*, 1992, n.9233.

This appeal in cassation is brought against a negative ruling made by the Audiencia. The appellant alleges illegal interference in his honor and good reputation based on a conflict between honor and freedom of expression, due to the publication of a book which charges him with collusion in the criminal activities of other persons. The Tribunal Supremo rules the appeal admissible and rules there was an infringement of his right to honor.

"(...) The case in question, and all of its various aspects, must be judged from a global perspective. The first conclusion that should be established is that the charge of support of or complacency or collusion with the criminal activities of other individuals is a serious affront to the honor of the person in question. This is especially true when these acts can be easily confused with other more or less socially plausible excuses for the behaviour of a delinquent. However, such confusion cannot be claimed as regards organized terrorist groups or criminal gangs, who, using political motivation as a pretext, kill and spread panic without any possible justification for their acts and make use of extorsion as a weapon in their struggle against society. In this case, although the charge is camouflaged, it can be considered a type of humiliating insinuation. In fact, after creating a general distaste for the meeting in the readers through the use of unfortunate statements that do not in themselves constitute illegal interference, unnecessary and direct mention is made within the context of the book of the appellant's name, surnames and nationality and a certain 'familiarity' with the guerrilla is attributed to her that has a double meaning. It suggests, on the one hand, that she knows about this subject — which is also not damaging in and of itself to her honor — but on the other hand, it also suggests that she has an open and trusting relationship with the members of the guerrilla group and that she is treated as one of them. Finally the book states that she spoke 'not exactly as an enemy of the guerrillas' would speak. This, together

witb the general line of the book and the atmosphere suggested in it, undoubtedly produces the sensation that the appellant was a friend of the *montoneros* (guerrilla gang), which is a very serious and prejudicial accusation due to the appellant's position and personal prestige, especially given her nationality. She most certainly must have suffered harm and discomfort as a result.

Therefore, the legal arguments used in the judgment being appealed are not accepted. In spite of the fact that it is true that the appellant attended the meeting as stated in the record and spoke that meeting — a fact which she has recognized and admitted — it is not true that her words should be interpreted the way they have been simply because she and the author of the book have differing ideologies. This is a clear abuse of the freedom of expression because by giving it the meaning as stated above, an attempt is being made to criticize someone for not sharing the author's beliefs. This constitutes an attack on the freedom of expression of others, and slanders the individual who does not agree with the author. This is not acceptable even if the justification is given that the book is of historical or scientific interest or has some other relevance (art. 81 of the *Ley Orgánica* 1/1982, 5 May) because the classification of historical expert which the author claims (together with his claim of being a journalist which has no relevance in this case) demands scientific rigor in the methods used to check out the sources of information used and prudence in the establishment of data and opinions on individuals which is in direct conflict with the cavalier way in which he makes statements that do constitute illegal interference as defined by art. 7.7 of the applicable law.

(...) By accepting this ground, according to the legal provisions of art. 1715, the judgment being appealed must be annulled, and due to the type of ground, the ruling must be in accordance with the terms of the legal debate as presented. We can infer from the criteria and reasons given in the preceding legal grounds that the appellant's right to honor which is guaranteed to Spanish citizens by art. 18 of the *CE*, has been infringed. This right is extended to foreigners in accordance with art. 13 of the basic Charter and also from the interpretation of art. 10.2 of that text which remits to the Universal Declaration of Human Rights dated 20.12.1948. Article 12 of this Declaration states that no one should be subject to an attack on his honor or good reputation and therefore all people should be protected from such an attack by the law, and when this protection collides with freedom of expression, art. 19 of the New York Covenant states that the former 'entails special duties and responsibilities' and it authorizes the Law to guarantee respect for the rights or reputation of others. This is covered in our legal system by *Ley Orgánica* 1/1982 on civil protection for the right to honor along with other rules that have a criminal nature".

h) Right to freedom of expression

— STSJ País Vasco, 3 November 1992, (Civil and Criminal Division).
Writing the decision: Magistrate Satrústegui Martínez.

This case deals with a motion arising from the abbreviated proceedings 3/1991 on a charge of disrespect or contempt against Mr. A.B.B., a member of the Basque Parliament.

"(...) The Court analyzed the statements made by the defendant from the point of view that the doctrine on freedom of expression and ideological freedom and their limits dictates.

As no *animus injuriandi* could be found, the Court absolved the defendant of the charge of disrespect or contempt.

Even though the reasoning presented up to this point would allow a finding to be made on the existence or non-existence of the criminal elements that make up the charge, it does not seem unreasonable to analyze the facts of the case from the perspective offered by the *CE* because, as the defendant's counsel alleges, the statements that are being judged were made in the exercise of the fundamental right to freedom of expression and ideological freedom which are protected in arts. 20.1.a) and 16 *CE* respectively. The legal right under which the accusation is made, art. 244 *CP*, protects the dignity of the public functions of a Minister — STC 105/1990. In this type of charge, it is not the personal honor of an individual that is at stake, but rather the activities of public institutions whose functioning is interrupted or hindered when an unjust or cavalier attack is made on its honor or when the honesty of its members is questioned. Therefore, it is quite difficult for personal honor to play a decisive role as a constitutional limit — STC 143/1991.

In spite of the fundamental nature of both rights according to our *CE*, arts. 18.1 and 20.1.a), it is true that constitutional case law has repeatedly declared that the freedoms covered by art. 20 are not only fundamental rights of individuals, but also include the recognition and guarantee of free public opinion which is inalterably bound to the concept of political pluralism, an essential value of all democratic States. These freedoms therefore enjoy a kind of effectiveness that transcends that of other fundamental rights, including the right to honor. Because they guarantee free public opinion, which is indispensable for the effective realization of political pluralism, the overriding value of public liberties as stated in art. 20 *CE* can only be protected when these freedoms are exercised in connection with matters that are of general interest due to the topics that they cover and the individuals that intervene and contribute to them as a consequence of the formation of public opinion and this

is when they reach their highest degree of effectiveness in relation to the right to honor which is weakened proportionally as an external limit on the freedoms of expression and information because the individuals involved are public persons, they carry out public functions or they are involved in matters of public relevance, and are therefore obliged to tolerate a certain risk to their subjective personal rights which can be affected by opinions and information which is of general interest. This is a requirement of political pluralism, tolerance and open-mindedness and without these, a democratic society could not exist (SSTC 107/1988, 214/1991, and 85/1992).

Art. 6.1 *CE* guarantees ideological freedom. Without this, there would not exist any of the highest values of our legal system as stated in art. 1.1 of the Constitution which are needed to ensure the social and democratic state of law on which that document is based. In order for liberty, justice, equality and political pluralism to be real and not just a list of ideals, it is essential that when regulating behaviours and therefore when judging those behaviours, those higher values without which democracy could not exist be respected (STC 20/1990, 15 February).

Article 10.2 of the European Convention of Human Rights and Fundamental Freedoms dated 4 November 1950, establishes public safety, the prevention of disorder or crime, the protection of health and morals, and the prevention of the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary as restrictions on the freedom of expression.

In this regard, when a judgment of the European Court of Human Rights on 23 April 1992 stated that freedom of expression is fundamental in a democratic society, it also said that in accordance with art. 10.2 of the Convention mentioned earlier, freedom of information is not only applicable to those ideas considered as favorable or neutral, but also to those that shock, bother or offend, and it added that even though freedom of expression is important to everyone, it is even more important to an elected representative of the people because his role as representative is to draw attention to the things that worry his constituency and to defend their interests.

This same judgment states that the limits placed on permissible criticism are broader in matters related to the Government than they are in matters related to a private citizen or even to a politician and adds that the dominant position occupied by the Government makes it necessary to show a certain moderation when considering recurring to criminal legal proceedings, especially when there are other means available to respond to unjustified attacks or the criticism made by adversaries or in the press.

After analyzing the statements made by the defendant according to the doctrine explained above on the fundamental right to freedom of expression

and ideological freedom and their limits, the conclusion that must be drawn is that these statements where made in the exercise of those constitutional rights and they constituted a type of criticism that while perhaps unfortunate and bothersome, as stated previously, does not pass the limits expressed above. Therefore, according to the aforementioned reasoning, *animus injuriandi* does not exist and A.B.B. should be absolved of the charge of disrespect or contempt of which he has been accused".

i) Right to privacy

— STS, 18 June 1992, (Criminal Division), *Ar.Rep.J.*, 1992, n. 7919.

In summary, this judgment is the result of what before this Court was claimed to be an examination of the practice of illegally obtaining evidence. The Court found that the right to privacy was infringed in two ways: one as regards the privacy of communication in general, and the other as regards the protection of telephone conversations specifically.

Because the Spanish legal system does not adequately address this issue, and taking into account the provisions of the Constitución, it was necessary to recur to the European Convention of Human Rights which guarantees this right in art. 8.

"(...) As the Spanish legal system does not adequately address this issue, and keeping in mind the stipulations of the *CE* whose principles will be cited later on, it is considered desirable in order to define this right more precisely, to recur first to the European Convention of Human Rights (ratified by an Instrument on 26.9.1979 which is also the date on which it took effect), art. 8 of which guarantees the right to privacy and gives it the highest degree of consideration. Under this right one's private life, family, residence and correspondence and their different and varied manifestations are protected. This right being recognized, section 2 of the cited article defends it against all types of attack in the following way: 'There can be no intervention by public authority in the exercise of this right' and then immediately establishes a series of exceptions that must be interpreted in a restrictive manner as they are limitations on a fundamental right.

Two limits are fixed by the Convention in this regard: the intervention must be provided for by law and this intervention must be a necessary measure in a democratic society, — a matter of national security, etc. — or necessary for the prevention of the commission of a crime.

Our entire legal code undoubtedly follows these principles although a few gaps do exist.

(...) The European Court of Human Rights whose case law on the Covenant is especially extensive, in accordance with arts. 10 and 96 of the *CE* has also examined the topic of the right to privacy on several occasions and several cases have dealt with the electronic interception of telephone calls. This is true in the following cases: Golder case, 21.2.1975; Silver case, 25.3.1983; Campbell and Fell case, 28.6.1984; Boyle and Rice case, 27.4.1988; McCallum case, 30.8.1990; Huvig case, 24.4.1990; Kruslin case, 24.4.1990, Klass case, 6.9.1978 and Malone case, 2.8.1984. In all of these cases there is an unmistakable and rigorous defense of the right to privacy.

The judgment of the TC of 15.10.1982 (*RTC* 1982, p. 62), refers to morality as a limit but understands that the declaration can be generalized, and speaks of the need to invoke the corresponding guarantees in order to avoid unjustified limitations on the fundamental rights and public liberties which serve as a central value of our legal system (see art. 10 of the *CE*). Another very recent judgment, dated 14 February of this year (RTC 1992, p. 20) says: 'Personal and family privacy are, in conclusion, considered to be fundamental rights (art. 18.1 of the *CE*) without which the dignified existence that the Constitution wants to guarantee every individual would be impossible and inconceivable (art. 10.1)'.

Returning now to intercepted telephone lines, even though art. 8 of the European Convention does not allude to them directly, their inclusion in this article does not present any special problems for the European Court. In the Klass and Malone cases, telephone conversations were included in the concepts of private life and correspondence. There is no other possible way. In the Huvig and Kruslin cases, bugging telephones and other forms of interception of telephone conversations were considered to be a serious affront against private life and correspondence. They must, therefore, be based on a law that is especially precise. Clear and detailed regulations on this matter seems to be absolutely essential. If these do not exist, there can be no doubt that the system which must be applied in each case will have to be interpreted as best as possible in accordance with the defense of this fundamental right.

(...) The most important rules that make up the general system related to the interception of telephone conversations as related to the guarantee of the fundamental rights of individuals are:

1) Arts. 9.3, 10.1 and 14.2, 18.3, 24.1 and 2, 55.2 and 96.1 of the *CE*.

2) The European Convention of Human Rights and Fundamental Freedoms, 4.11.1950, especially art. 8, ratified by Spain in an instrument dated 26.9.1979.

3) The Universal Declaration of Human Rights, 10.12.1948, especially art. 12.

4) The International Covenant on Civil and Political Rights, New York,

16.12.1966.

5) Art. 579 of the *LECrim.* and the concordant principles that are included in the Explanation of Motives and serve as guidelines for its correct interpretation.

6) Arts. 11.1, 238 and 240 and the concordant principles of the *LOPJ.*

7) Art. 6.3 of the *C.c.*

8) The case law of the European Court of Human Rights, the Constitutional Court and the Criminal Division of the Supreme Court.

(...) In summary, the infringements that determine the nullity of evidence obtained through the interception of telephone lines are:

I. Infringements

1) The lack of external evidence. Lack of clear motivation (...).

2) Absence of control mechanisms (...).

3) Regularity of monitoring. Effects (...).

4) Separation of authorization and investigation. As a consequence of everything that was stated in previous legal grounds, there was an infringement of the right to privacy and even more simply, of the privacy of communications in general and of telephone communication specifically in addition to the one which has already been stated. In other words, a new infringement possibly took place when during the interception which was initially authorized there seemed to be another crime committed or other possible crimes whicb were not related to the original investigation — which in this case was about drug trafficking — but were related to another type of crime, bribery, or, in general to certain kinds of corruption. The police should have immediately notified the judge who authorized the first telephonic interception so that he could examine his own authority and the requirement of proportionality. If this is not done, the authorization becomes a type of examination of the general behavior of one or more individuals through their telephone conversations and this is not permissible. Generic authorizations are also not correct and if there is no new and specific judicial authorization, the interception/observation should not be maintained when a new and supposedly criminal act is discovered through telephone intervention which is not related to the object of the original authorization (...).

5) The submittal of copies, not originals.

6) Proof of proportionality. None was offered.

7) The determination of the measure and its limits.

II. Consequences

All of these things require us to declare the nullity of these pieces of evidence and any others directly or indirectly linked to these, and so in the terms already established in other legal reasonings, a detailed explanation of

each of the undoubtedly complex related issues brought before the Court is not necessary. This prevents the Court from making certain general considerations as a compulsory response to the motions made by defense counsel and the corresponding challenges made by the plaintiffs as regards detention, pre-trial custody and solitary confinement".

VII. TERRITORY

— STS, 22 January 92, (Criminal Division), *Ar.Rep.J.*, 1992, n. 293.

In this case, the Court rejects the appeal in cassation based on procedural defects and the infringement of the law which was filed by Mr. J.Z.N. against the judgment issued by the Audiencia Nacional which convicted him of committing a crime against public health and another of attempted smuggling.

Almost all of the arguments presented by the appellant are based on denying that the seizure of the drugs took place in Spanish territory. As regards this, the Court ruled that for all legal and jurisdictional purposes the territory could be considered national. Therefore there was no lack of jurisdiction as was alleged, and the ground for annulment did not exist.

"(...) The second ground seeks protection under arts. 850 and 851 of the *LECrim.* but does not cite any section or paragraph number, and then later cites art. 238.1 of *LOPJ* 6/1985 claiming complete nullity of the judgment due to the lack of jurisdictional authority of the court that issued the ruling. This ground was not announced at the outset, and it mixes cassational channels (art. 884.4), grounds of inadmissibility, and now rejection.

All of the arguments presented by the appellant are based on denying that the drugs were seized in Spanish territory, the basis for claiming an infringement of articles 23.4.f) and 65.1.e) of the previously cited *Ley Orgánica.* The appellant fails to remember that:

1. The combined Spanish-French customs area in which the suitcase was seized is under the juxtaposed control of the Spanish authorities, and under the terms and conditions of international treaties, Spanish law is applicable.

2. That art. 23 itself, which the appellant invokes in n. 4.f), contains exactly the exception to the general territorial jurisdictional rules that exists in cases of drug trafficking. The appellant did not take into account the provisions of the international covenant for the suppression of this type of trafficking.

3. That section d) comes before section e) in art. 65.1 1, and in this section the competence of the *Audiencia Nacional* is limited in cases of drugs or

narcotics to those in which an organized group is involved (which is a more serious sub-type) or those cases that produce effects in places pertaining to several *Audiencias.*

Therefore even if the events had taken place in foreign territory, the alleged lack of jurisdiction would not apply. However, in this case we are dealing with an area that can be considered national for legal and jurisdictional purposes under the terms of the convention and customs law.

Let us recall the judgment issued by this Court on 4.3.1989 (*RJ* 1989,p. 2487) on the application of Spanish criminal law in border customs zones located in French territory given that in this zone both national authorities carry out their functions according to the terms of the international treaties that apply. In this case the treaty is the Covenant with France dated 7.7.1965, ratified on 3.2.1966 (arts. 1 and 4) and the exchange of notes on 26.5.1969.

For these reasons, the motion for nullity as claimed and this ground are rejected".

X. ENVIRONMENT

1. Protection of Endangered Species

Note: See III. Relationship between International Law and Municipal Law. Application of Treaties under Spanish Law.

XIII. EUROPEAN COMMUNITIES

1. The Relationship betwecn Community Law and Spanish Law

— Declaration of the Constitutional Court, 1 July 1992, (Full Court), (*BOE* 24.7.92).
Writing the decision: Magistrate Vicente Gimeno Sendra.

The Treaty of the European Union requires a reform of the Constitución Española. Given that the system of active and passive eligibility of the citizens of the European Union in municipal elections does not imply a transfer of the competencies of the Spanish State but rather an extension of rights, the contradiction that exists between art. 8 B.1 of the Treaty of the European Community, and art. 13.2 of the Constitución Española, can only be rectified by

a revision of the latter.

"In the Agreement of the Council of Ministers of 24 April 1992 it is resolved, in effect, to initiate the stipulated consultative procedures on the following points:

a) The constitutionality of recurring to the channels established in art. 93 of the *CE* and their appropriateness and adequacy for purposes of giving State consent to the Treaty of the European Union signed in Maastricht on 7 February 1992 and its integration into the Spanish legal system.

b) The existence or non-existence of a contradiction between art. 8 B.1 of the Treaty of the European Community (...) and art. 13.2 of the *CE* (...).

This demand which is presented by the Government is the first one to be formulated under the channels established by art. 95.2 of the *CE* (...). Through this channel, the Constitution charges the TC with the double task of preserving the Constitution while at the same time guaranteeing the security and stability of the commitments made by Spain internationally (...). If the question as to constitutionality were to be confirmed, the treaty could not be ratified without first revising the Constitution (art. 95.1) (...).

We must begin by clarifying that what we can be asked to issue is a declaration, not an opinion — a decision, not simply an opinion based on the law. (...) As with all questions of unconstitutionality, what this demand does is present a reasonable doubt. However, we are not being asked to offer reasoning that will clear up this doubt, but rather to issue a binding decision (...).

This resolution has the material effects of a judgment. Even though the form of this declaration cannot be considered a legal 'judgment' (cfr. art. 86.2 of the *LOTC*), it is a jurisdictional decision which is binding (art. 78.2 id.) and, as such it produces *erga omnes* (art. 164.1 *in fine* of the *CE*) all of the effects of a legal judgment, including both the negative and excluding effects (...) and the positive and prejudicial ones that obligate all public authorities to respect and abide by our declaration. Specifically, if its contents were that a certain stipulation is contrary to the Constitution, the immediate and direct executive effect would have to be the reform of the Constitution prior to the approval of the Treaty.

By inverting the order of presentation of the questions presented by the Government, we must first analyze the possible contradiction of the future art. 8 B.1 of the EC Treaty and the Constitution — not only the contradiction with art. 13.2 of that document (...) but, as has already been said, the contradiction with the constitution *in toto* and not only some of its principles. This must be a point of reference for this Court (...).

Art. 8 B.1 of the EC Treaty will recognize that 'all citizens of the Union' will have the right to vote and be elegible to vote in the municipal elections of the

member State in which they reside even if they are not citizens of that State, 'under the same conditions as the nationals of that State'. This provision, together with the others included in the remaining sections of art. 8, define a burgeoning new European citizen which, without abolishing the different nationalities of the citizens of the States that are signators to the Treaty (as is confirmed by the 'Declaration on the Nationality of a Member State' found in the Final Act of the Treaty) attempts to modify the traditional binomial national/foreigner by means of creating a third common status.

It is quite clear, however, that this limited extension of the right to active and passive suffrage to those who are citizens of the Union but are not Spanish nationals, is only partly accepted in the provisions of art. 13.2 of our Constitution which states that only Spaniards are entitled to the rights recognized in art. 23 of this document, 'except for those cases in which, respecting the criterion of reciprocity, are established through treaties or by law for the right to active suffrage in municipal elections'. This constitutional limitation has already been referred to by this Court in STC 112/1991, in which the Court literally states that 'the possible exercise of this right is limited to active suffrage, not passive'. Therefore (...) it is not possible either through treaties or by law to attribute the right of passive suffrage to non-nationals in any of the electoral procedures for the integration of organs of Spanish public authority.

Art. 93 allows for attributions or questions regarding 'the exercise of competencies derived from the Constitution' and its updating will contribute — has already contributed — a specific set of limits for certain purposes, on the attributions and competencies of Spanish public authorities (the limitation of 'sovereign rights' as expressed by the European Communities Court of Justice, the Costa/Enel case, 15 July 1964). In order for this limitation to be effective, however, there must exist a question as to the exercise of competencies (and not simply one of entitlement) of international organizations and institutions, which does not occur in the stipulation which is the object of our resolution. In this stipulation no transfer of competencies takes place. Instead, certain rights are simply extended to individuals who are not nationals, and according to art. 13.2, these individuals are not entitled to these rights.

Therefore, the inevitable conclusion is that there does exist a contradiction which cannot be clarified through interpretation of art. 8 B.1 of the EC Treaty, the wording of which would remain the same for the Treaty of the European Union, and art. 13.2 of our Constitution. This contradiction affects the part of that precept that recognizes the right to passive suffrage in municipal elections for a generic set of people (the nationals of other member States of the Community) who are not Spanish citizens. The only channel available according to law to overcome this contradiction and thereby make it possible to

ratify and sign that treaty, is the one stipulated in art. 95.1 of the *CE* which is the prior revision of the Constitution itself".

2. Application of International Treaties Incorporated in Community Law

— STSJ Islas Canarias, 30 April 1992, (Contentious Administrative Business Division of Las Palmas).
Writing the decision: Magistrate Fernández Valverde. (*La Ley*, 1992—4, p. 145.)

The appellant seeks the "temporary suspension" of work contracts and a waiver of the payment of the employer's contribution to the Social Security system for the period of time covering the 1st to the 31st of October 1989, both dates included, for 40 employees who worked on the fishing vessels "M.I.", "M.II" and "M.III".

The appellant also claims there was a "force majeure" or "act of God" involved which is prescribed in a rule that forms part of the Spanish legal system through Regulation 2054/1988/EEC 23 June, which in turn forms part of the agreement drawn up between the EEC and the Kingdom of Morocco.

In order to reject this appeal, the Court ratified the argument found in the challenged resolution itself which states that: The aforementioned EEC Regulation is not applicable to those employees whose work contracts are to be suspended because the ships on which they work do not pertain to or sail under the flag of any of the EEC countries.

"(...) As regards the first question, it is absolutely essential to clarify the cause of what the parties claim — or deny — to be an 'act of God'. All of the parties — including the appellant and the intervening officials — make the same error of believing that the Agreement signed by the EEC and the Kingdom of Morocco on 25 February 1988 on matters related to maritime fishing is the legal rule by which an 'act of God' can be defined.

This is not the case as this bilateral Agreement between the EEC and the Kingdom of Morocco has no effect and cannot be applied in the Member States if there is no instrument for internal Community regulation. Therefore, it is quite clear that this Agreement had no legal effect in Spain until the Council of Ministers of the EEC approved the conclusion of the Agreement on matters related to maritime fishing between the EEC and the Kingdom of Morocco on 28 June 1988 which outlined provisions for its application, and that this Agreement did not enter into force in Spain until 15 July 1988, that is until 'the third day after its publication in the *OJEC*' which took place on 12 July 1988.

It should be noted that it is art. 1 of Regulation 2054/1988/EEC of the Council which approved the Agreement on behalf of the EEC, the text of which is attached — as it must be — to the Regulation itself. And we should remember that in accordance with arts. 189 to 191 of the EEC Treaty of Rome 25 March 1957 'the regulation will have a general scope' and 'will be obligatory in its entirety and directly applicable in each member State'.

(...) Having clarified the above, we should then point out that what the appellant is attempting — with no arguments from Autonomic officials — is to claim that an 'act of God' derived from a mandate which is found in a rule which forms part of the Spanish legal system, and one that is considered a law no less. As we have already stated, the Agreement between the EEC and the Kingdom of Morocco forms part of Regulation 2054/1988/EEC dated 23 June, and this agreement is in turn made up of its heading, articles, annexes, appendixes and protocols.

So then, art. 7.4 of the Agreement (approved through the EEC Regulation cited above) establishes that 'the use of some of the fishing options available to the Community can be restricted starting in the second year of application of the Agreement in order to ensure a biological break for certain populations or groups of populations of fish which are particularly sensitive to overfishing, within the limits and according to the rules established in Protocol 1'. Protocol 1 defines 'the fishing options granted by Morocco and the ones granted by the Community for the period which covers 1 March 1988 to 29 February 1992' and includes a chart which shows that all vessels that fish cephalopods (both fresh and to freeze) between parallels 30° and 40° N, must not fish for a period of 1 month (contemplated in art. 7.4 of the Agreement) and this month is clearly stated as being the month of October during the years 1989 to 1991.

To consider a legal rule published in the *OJEC* a full year in advance of the date of the resolution being challenged as an 'act of God' is, in the opinion of the Court, surprising at the very least.

(...) STS, 5 April 1988 considers the concept of an 'act of God' to be related to something extraordinary, catastrophic or unusual, which is also the definition found in art. 1575 *C.c.*, and it is used to refer to something of exceptional gravity or to the inevitability of a normally unexpected event and therefore this event cannot be foreseen. These characteristics do not apply to the case at hand.

Ninth: The second argument offered as grounds for rejection of this appeal is based on the Court ratifying the terms of the challenged resolution itself: the vessels on which the employees in question worked are not vessels that pertain to (or sail under the flag of) an EEC country, and therefore they should not be subject to the aforementioned EEC Regulation which approved the already cited Agreement, art. 1 of which 'establishes the principles, norms and

modalities of cooperation between the EEC and Morocco as regards the conservation and use of natural resources... and it defines the set of conditions that govern fishing by vessels that sail under the flag of a member State of the EEC'. This is not the case of the ships belonging to the appellant which can be clearly seen from the fishing licenses that have been entered into the record in which the ships are shown to be Moroccan.

Therefore, the one month *moratorium* on fishing established for the month of October by Protocol 1 (art. 1) of the aforementioned bilateral Agreement (art. 7.4), approved by Regulation 2054/1988/EEC, not only is not the result of an `act of God´, but it is not binding on the vessels owned by the appellant".

3. The Application of Community Law

— STS, 20 November 1992, (Criminal Division), *Ar.Rep.J.*, 1992, n. 8407.

On November 11, 1987, the Guardia Civil intercepted 165,220 packs of Virginian tobacco "originally from a foreign country" in a vehicle driven by the defendant and in a garage which he rented. The cigarettes had been brought into the country illegally and were to be distributed to several retail outlets.

The Tribunal Supremo rejected the appeal in cassation in which the defendant claimed the judgment of the Audiencia which convicted him of the charge of smuggling constituted an infringement of the law because the alleged Community law was not applicable.

"(...) There appears to be no doubt that, as is stated in scientific doctrine, the general guidelines of Community Law in which all of the provisions related to the public sector must be framed, are determincd by the fundamental contradiction that exists between the Common Market and the diversity of national economic policies. This is the reason why, in the framework of a process of partial economic interpretation which is meant to unify national economic spaces into one Common Market which should in turn become a single domestic market and which should eventually bring about the substitution of individual national economic policies by a single common policy, contradictions, some real and some apparent, are inevitable.

The declaration of the Treaty of the European Union which is cited as an important point of reference for the application of Community Law, can undoubtedly serve as a general framework for the consideration of this topic based on an appeal whose correct and through structuring and content are admirable and should be applauded no matter what the final outcome.

First, we must consider the point of origin of the tobacco. The judgment

says it was foreign. Foreign is a synonym for not national, but nowadays it is possible to speak of a three-fold approach to this term: strictly national, Community national, and foreign, in other words, non-Community national.

(...) We can conclude by saying that the judgment is correct even though the citation of the rule is not: 1) Because the requirements of Community Law as regards the time frame for the process of decriminalization of certain conducts has not been met. 2) Because we are not dealing with a system which unconditionally allows importation but rather one that replaces the previous system and establishes a special tax and imposes the VAT. This new system replaces the old one, which was based on certain prohibitions, and establishes a system which requires compliance with a set of specific requirements that when not met, constitutes a criminal act. 3) Because, even if there existed some uncertainty — which, as has been stated, is not the case here — that the tobacco came from a non-Community country and was therefore contraband, the final consequence was correctly formulated given the circumstances surrounding the seizure of the tobacco and the characteristics of the operation. The facts can be proven with both direct and indirect or indicative evidence established by this Court which can supplant the lack of sufficient motives related to this very important fact, that the tobacco did not come from the Community (cfr. the problem of arms or drugs coming from a foreign country), but rather from non-Community countries.

All of this includes the explicit and unconditional recognition of the importance of Community Law which is understood to include the original law (treaties basically) and derived law (regulations, directives and decisions with their corresponding specifications) and the now classic effect of its being compulsory and having supremacy over the domestic law of the member States. Therefore, Community Law can and does produce decriminalizing effects and can also affect sentences depending upon the terminology which is used in each case. On the other hand, criminalization is an extremely delicate topic and the typification of certain behaviors as criminal based on Community rules probably does not happen as frequently (in spite of arts. 194 of the EURATOM Treaty and 27 of the Statutes of the European Court of Justice)".

— STS, 23 November 1992, (Civil Division), *Ar.Rep.J.*, 1992, n. 9366.

The plaintiff in the first trial — which had to do with a declaration of annulment — sought a ruling to annul the acts of the three companies that were the defendants in the case because their acts constituted a violation of the plaintiff's exclusive right to a certain type of utility. Two of the three defendants not only opposed the suit but filed countersuits as well.

The Court of First Instance rejected the claim and the counterclaims. At the

appeal level, the Audiencia accepted the claim and rejected the counterclaim appeals. The Tribunal Supremo did not accept the appeal in cassation filed by these two claimants.

"(...) The 11th ground, pursuant to art. 1692.5 of the *LECiv.*, alleges an infringement of arts. 38 of the *CE* and 32, 34, and 36 of the EEC Treaty. The ground makes a case out of the question by stating, contrary to what was proven in the record, that utility model number 270.565 has important defects which prohibit the recognition of its validity. It is clear that the recognition of the right to industrial property in any of its forms does not violate the principle of free trade that is granted by art. 38 of the Constitution as the exercise of these rights does not in and of itself constitute an attack on competition which is the principal element of free trade as it is defined in the statement of grounds of law 16/1989 dated 17 July (*RCL* 1989, p. 1591) which provides for the Defense of Competition and is the constitutional pilar of our economic system. We must also address the alleged infringement of arts. 32, 34, and 36 of the EEC Treaty. Community Law and the case law of the Court of Justice recognize the competence of the member State to regulate the rights to industrial property, and so art. 36 establishes that 'the provisions of arts. 30 to 34, both included, will not hamper the prohibition or restriction of importation, exportation or transit justified for reasons of... protection of industrial and commercial property. Nevertheless, these prohibitions should not constitute a means of arbitrary discrimination or a hidden restriction on trade between the member States'. This precept refers to the free circulation of goods, and the Court of Justice, in a judgment dated 8.6.1971, recognized that exceptions to the free circulation of goods derived from the rights to industrial property 'are justified to safeguard the rights that make up the specific objective of this property'. A judgment dated 31.10.1974 ruled that this specific objective, as regards the right to patents is 'essentially to give the holder of the patent the exclusive right to use the invention and the right to manufacture and introduce the industrial product on the market either directly or by issuing permits to third parties and the right to protest any fraudulent imitations. This is meant to be compensation for the creative energy of the inventor'. For this reason, the ground is rejected".

— STS , 5 June 1992, (Contentious Administrative Business Law), (Division 3, Section 2), *Ar.Rep.J.* 1992, n. 5371.
Writing the decision: The Honorable José Luis Martín Herrero.

This judgment raises two points of interest. First, the possible direct effect of directives which, in this judgment, while not denied, is considered inadmissible

due to the fact that, in the Court's opinion, Spanish law does not contradict the directives that govern this matter. Second, even though the national judge should verify the adaptation of the provisions of domestic law to those of Community Law, according to the Spanish legal system, judges do not have the authority to monitor adaptation for rules that have the status of laws.

"(...) Fourth.- On the other hand, this litigation seeks the waiver of art. 8, 1.23 in this case due to the effects of the provisions of the Sixth Directive of the Council of the European Community dated 17.5.1977 on the harmonization of the legislation of the member States in matters of taxes on business turnover.

Above all, it is wise to remember that except for in exceptional cases, art. 189 of the EEC Treaty and art. 161 of the EURATOM Treaty provide that 'the directive will bind the member State in terms of the outcome that should be achieved but national authorities will be responsible for choosing the form and the means'. This is not the case for regulations, which are also addressed by the Court of Justice of the European Communities (case 39/1972): 'According to arts. 189 and 191 of the Treaty, regulations are, as such, directly applicable in all of the member States and enter into force simply by means of their publication in the Official Journal of the European Communities from the date fixed in the regulation itself, or if none is fixed, from the date provided for in the Treaty.

Well then, as can be seen in the majority of the points of the extensive and significant Statement of Purpose of Law 30/1985, which regulates the VAT, the Sixth Directive and other Community rules were precisely the basis and inspiration for that law. Therefore, in no case can it be said that the Spanish State has turned its back on these rules — directives — whose terms the State (and only the State) was obliged to respect. This being so, the first definition that is presented is the one related to whether, in spite of the definition of art. 189 in the Treaty, one direct effect of the directive can be recognized as the appellant requests. Even though it is true that since the Van Duyn decision (case 41/1974) the Court of Justice of the European Communities has admitted some situations of direct effect, this is in cases in which the member State has not introduced the desired outcome of the directive into their national legislation. The Ratti decision (case 148/1978) says, 'Therefore, a member State that has not adopted the measures of application required by the directive in the time allotted to do so, cannot deny to individuals that they have not complied with the obligations that the directive sets forth. From this we can deduce that if an individual files an appeal with a domestic court based on the provisions of a directive seeking a declaration that a domestic provision should not be applied because it is incompatible with that directive which has not been introduced into the domestic legal system of a State, which is therefore in non-compliance with the directive, the Court should accept the appeal if the

obligation in question is unconditional and sufficiently precise'. However, this is not the case here since, as we have shown, Spain has introduced the Sixth Directive into the law which regulates the VAT.

There is, then, another underlying pretension in the appellant's claim which has to do with the control of the application of directives, that is, the verification of their correct introduction into domestic law. It is well known, on the one hand, that certain community institutions (the Commission and the European Communities Court of Justice) are charged with this control, but what is being questioned here is the control a national judge has over the adaptation of domestic rules which are adopted in application of the directive to the text of the directive itself. The Court of Justice has repeatedly recognized (case 51/1976, Verbond van Nederlandse Ondernemingen; case 21/1978, Delkvist) that individuals are entitled to force a national judge to monitor the domestic rules passed by the Government in order to develop the directives. Additionally, this control or monitoring is limited in the Spanish legal system by the provisions found in art. 1 of the law that regulates the Contentious Business Administration jurisdiction. In other words, the domestic rules that are issued for the development of the directive do not have the status of law. If this were not true (but it is in the case we are concerned with here) Spanish courts could not exercise control over the adaptation of the laws to the directives that are developed or introduced".

— STS, 21 September 1992,(Contentious Administrative Business Law), (Division 3, section 3), *Ar.Rep.J.*, 1992, n. 7056.
Writing the decision: The Honorable Pedro José Yagüe Gil.

Based on the repeated case law of the European Communities Court of Justice on the direct effect of directives, this judgment denies the direct effect of Directives 75/362/EEC, dated 16 June and 75/363/EEC, of the same date, based on the minimum content of the norms that States are obligated to respect when developing directives in their domestic law, which is a consequence of the limited attempts to coordinate and not to harmonize these norms in matters of training for the recognition of degrees.

"(...) Seventh.- Finally, we must address the argument that the plaintiff presents in connection with Community Law when she claims that the denial of the degree sought violates the principles of direct effect, primacy and non-discrimination among the nationals of the different member States. But we also do not accept this argument. The case law of the ECCJ has declared that if directives can indeed become directly applicable and produce direct effects in the same way regulations do (judgment 7.10.1970), it would only be in cases in

which a directive, from the point of view of its content, is considered to be unconditional and sufficiently precise, and then only as long as the member State does not adapt its domestic law in the period of time established for this purpose or when it carries out an incorrect adaptation (Marshall case, 26.2.1986, expressly cited in the Becker case, and similarly in a later case dated 17.10.1989). So then, in this case, the period of time established for adaptation of Directives 75/362/EEC, 16 June (18 months after notification, according to act. 25) and 75/363/EEC, also dated 16 June (18 months after notification, according to art. 9) would have been surpassed significantly by the time the plaintiff requested his degree from the Administration (since according to art. 392 of the Act of Accession, these periods should be counted from the date of accession which was 1.1.1986). Therefore, there is nothing, from this point of view, to obstruct the direct effectiveness of these Directives. But there is when looked at from another perspective: these rules are limited to imposing the obligation to mutually recognize diplomas, certificates and other medical degrees and to coordinate the provisions regarding the applications of physicians. This last category does not require the physicians of all of the member States to have identical preparation but rather establishes some minimum requirements to which each State can then add some others. This can be concluded from the following precepts: 1) From the Statement of Purpose of Directive 75/362/EEC, 16 June (modified by Directive 81/1057/EEC, 14 of December, and by Directive 82/1976/EEC, 26 January) according to which 'a directive that regulates the mutual recognition of diplomas does not necessarily imply a real equivalence in the training which is required for each of these diplomas', 2) From the Statement of Purpose of Directive 75/363/EEC, 16 June, according to which 'the similarity in the training given in the member States allows the coordination in these matters to be limited to the requirement that minimum rules be respected thereby allowing the member States to freely organize their educational system' and also 'it is useful to set certain minimum criteria in relation to the access to specialized training and the duration of that training'. 3) In the articles of Directive 75/363/EEC, which speak of 'at least six years of study' (for physicians), which 'should correspond to the following conditions' (art. 2.1) among which are found minimum periods of training for the different areas of specialization (arts. 4 and 5 for specialists).

Eighth.- In summary, these Directives are based on different guidelines which they respect, and they only set a few obligatory minimum standards. Therefore we can see that it is not appropriate to invoke their direct effect or primacy, nor the right to equality guaranteed in art. 14 of the *CE* in a situation in which Community Law only requires the minimum standards set to be respected. (See on this same topic the decision of the TS [Division 3, section 3] of 10 September 1992 [*Ar.Rep.J.*, 1992, n. 7270], 11 September 1992

[*Ar.Rep.J.*, 1992, n. 7271] and 28 September 1992 [*Ar.Rep.J.*, 1992, n. 7459]).

4. The System by which a Spanish Judge can Request a Preliminary Ruling

— STS, 15 February 1992 (Corporate Division), *Ar.Rep.J.*, 1992, n. 1376.
Writing the decision: The Honorable Luis Gil Suárez.

This decision, by means of a decentralized application of Community law, rejects the petition of the party who challenged the presentation of a preliminary ruling. The national judge, who has ample freedom to raise questions of interpretation before the ECCJ and who is more knowledgeable about the interpretive problems that might arise on a given matter, is able to evaluate the application of Community Law, and according to the decision, only if the court has "serious and profound" doubts about the interpretation should it appeal to the Community judicial system.

"(...) Eighth.- The appellant asks the Court to bring the preliminary ruling related to the issues of this appeal before the European Community Court of Justice. However, considering the provisions of the last two paragraphs of art. 177 of the EEC Treaty signed in Rome on 25.3.1957, it is quite clear that the national courts of the different countries are not obliged nor should they bring preliminary rulings before the Court of Justice in cases where there is simply a situation which demands the application of a Community rule. Rather, this should be done only in cases in which there is a serious or profound doubt about the interpretation of the Community provision which is applicable and when, due to the obscurity, vagueness or imprecision of the terms of the rule, it is difficult to adopt a clear solution. And this is not at all the case in the appeal that is before us now because, as has already been stated, a simple reading of art. 47.1.e) clearly shows the inviability of the appellant's request. Therefore, this request is rejected".

5. Competencies of the Autonomous Communities in the Enforcement of Community Law

— STC 79/1992, 28 May, (Full Court), (*BOE* 16.6.92).
Writing the decision: Magistrate Alvaro Rodríguez Bereijo.

The Court examines a matter related to 15 disputes regarding competence

related to the enforcement of the Law of the European Community in matters of the European Agricultural Guidance and Guarantee Fund (Guarantee Section). The decision recognizes that the Ministerio de Agricultura, Pesca y Alimentación has invaded several competencies of the Autonomous Communities.

"The connection with the European Community should not alter the scope of competence of either the State or the Autonomous Communities. The enforcement of international covenants and treaties in matters that fall under the competence of the Autonomous Communities obviously does not provoke the assignment of a new competence which is different from those that the Autonomous Community already has by virtue of other precepts (STC 252/1988, legal ground 2). On the other hand, the State cannot use its exclusive right to international relations (art. 149.1.3 of the *CE*) to extend the scope of its competence to all activities that are considered to be the development, enforcement or application of international covenants and treaties and specifically those derived from European Law. If this were the case, given the progressive broadening of the real sphere of intervention of the European Community, it would produce a significant drainage of the area of competencies that the Constitution and the *Estatutos* give to the Autonomous Communities.

As regards the European Agricultural Guidance and Guarantee Fund (Guarantee section), the institutions of the EEC, when necessary, distribute available resources among the different States and not among territorial entities which form part of the State itself but cannot be ranked at the same level.

The regulation of the conditions for authorizing these grants, their amounts, the possible beneficiaries of the grants, and even certain aspects of the processing of applications beginning with deadlines and other types of verification and control mechanisms, are included in Community Regulations which the provisions that are the object of dispute attempt to develop and apply. In fact, many of the precepts of these rules of domestic law are limited to transcribing other rules from the European Community regulations, which, whether correctly done or not from the perspective of the elaboration of legal texts, does not in this case present any problem related to constitutionality based on the concept that these precepts of European Law are 'directly applicable'. In other words, no act of prior formal incorporation of these precepts into domestic law is needed for them to be effective within the national territory of the member States. The margin for a complementary development or enforcement rule is very narrow, and generally speaking, is limited to setting organizational and procedural guidelines ...".