SPANISH JUDICIAL DECISIONS IN PUBLIC INTERNATIONAL LAW, 1991

This Chronicle of Spanish Jurisprudence in the area of Public International Law is limited to judicial decisions issued in 1991. It is possible that some of the decisions handed down in the last few weeks of the year are not yet included. They will be included in the following volume of this *Spanish Yearbook*. That volume will also include a general introductory note that summarises the most important aspects of Spanish jurisprudence from 1978 to 1991, the period in which the current Constitution has been in effect.

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I. INTERNATIONAL LAW IN GENERAL

II. SOURCES OF INTERNATIONAL LAW

III. RELATIONSHIP BETWEEN INTERNATIONAL LAW AND MUNICIPAL LAW

1. Hierarchy of international rules in domestic law

— STC 28/1991, 14 February (Full Court), Appeal on the grounds of unconstitutionality, u. 825/1987 (*BOE* 15.3.91).
An examination of the constitutionality of treaties.

The Basque Parliament challenges several articles which were introduced by Organic Law 1/1987, issued 2 April, into the June 19 Organic

Law on the Regulation of Elections, regarding the regulation of elections to the European Parliament.

The Constitutional Court rejects the appeal based on the fact that it is not a constitutional issue and therefore does not fall within its jurisdiction.

"Based solely on the indirect information in its possession, the Basque Parliament believes that article 96.1 of the Constitution has also been violated. It is clear that neither the Treaty of Accession to the European Community nor its legal order includes, as part of the aforementioned article 96.1, the canon of constitutionality under which the laws of the Spanish State are to be examined. Under article 96.1 of the Constitution no international treaty is ever anything but a rule — which enjoys the passive force which that status confers on it — that comes to form part of domestic law. Therefore the supposed contradiction between treaties and laws or other subsequent provisions is not a question that affects the constitutionality of said laws or provisions and so should not be resolved by the Constitutional Court (STC 49/1988, legal ground 14, *in fine*). It is rather simply a question of correctly selecting the Law applicable to a specific case, the resolution of which would correspond to the judicial body under whose jurisdiction if falls. In conclusion, then, the occasional infringement of European Community law by state or regional laws or rules does not convert a simple conflict of infraconstitutional rules into constitutional litigation and these conflicts must be resolved through normal jurisdictional processes.

A slightly different problem is presented when the contradiction being referred to seems to question the constitutionality of a law because it is in direct conflict with a fundamental right because the constitutional rules that guarantee the rights and liberties (of the people) must be interpreted 'in accordance with the Universal Declaration of Human Rights and the treaties and international agreements on this matter that have been ratified by Spain' (art. 10.2 of the Constitution). Nevertheless, a treaty in a case of this type would not be used *per se* as a measure of the constitutionality of the law being examined, as constitutionality would have to be based on the constitutional principle that defines that right or freedom, although the description of its contents would be interpreted in a manner consistent with the treaty or international agreement, (...)".

— STC 187/1991, 3 October (Division 1), Appeal for protection n. 1303/1988 (*BOE* 5.1.91).
Examination of the constitutionality of treaties.

An appeal is filed against the Supreme Court ruling which stated that the Autonomous University of Madrid is required to include the course "Catholic Morals and Doctrines and their Teachings" as an elective subject in the curriculum of the College of Education for Elementary School teachers, known as the Escuela Universitaria Santa Maria. The unconstitutionality of the judicial resolution would rest on the decision being based on a rule — the 3 October 1979 Agreement between the State and the Holy See on Teaching and Cultural Affairs — that directly violates the fundamental right to autonomy for universities (article 27.10 CE) as it requires that a certain subject be included in the university curriculum.

"It is possible, on the other hand, that in the appeal a discussion will take place as to how well the legal principles whose application has been the basis for the complaint filed by the appellant are in agreement with the Constitution (STC 209/1988). This statement does not affect the fact that the rules in question are articles 3 and 4 of the Agreement between the Spanish State and the Holy See on education and cultural affairs, given that said agreement is an International Treaty which was approved by the Spanish Parliament and published in the *BOE* (*Boletín Oficial del Estado*, Official Journal of the State) 15 December 1979 which means that under article 96 of the *CE* (*Constitución Española*, Spanish Constitution) it forms part of our domestic legal code and therefore it is the Constitutional Court which must examine any possible contradiction that may exist between the agreement and the Spanish Constitution (art. 27.2.c) of the *LOTC*,[*Ley Orgánica del Tribunal Constitucional*, Organic Law of the Constitutional Court]). If there is the possibility that the treaties might be declared unconstitutional, there is nothing to prevent that said declaration be made through the mechanism described in article 55.2 of the *LOTC*, (...)".

— SAP Madrid, 30 July 1991, *RGD* 1991, p. 9289.
Precedence of treaties over contradicting laws.

The plaintiff alleges in his favour that there exist certain domestic laws that protect specific classical principles related to the succession of titles of nobility. One such principle is the concept that the successor must be male.
The Court rejects the suit based on the principle of sexual equality.

"This Supreme Court proclaims and reiterates as *ratio decidendi* of this appeal and in keeping with the very clear criteria included in the judgments issued on 20 June and 27 July 1987, the repeal of the old principle of masculinity or preference for the male on the grounds of *ex post facto* unconstitutionality as it is discriminatory and contrary to the Constitution (art. 14) and the New York Convention on the Elimination of all Forms of Discrimination against Women which has been binding on our State since it became part of our domestic legal code (art. 96.1 of the Constitution and art. 1.5 of the Civil Code). However, in accordance with the doctrine put forth by the meritorious sentences of 20 June and 27 July, 1987, the repeal of that principle affects and must affect the successions to titles of nobility which take place after the promulgation and entrance into force of the Constitution, even though said repeal due to *ex post facto* unconstitutionality cannot produce relative effects. This is not only because there exists no legal rule that authorizes such a retroactive effect, but also because the constitutional principal of legal certainty (art. 9.3 of the Constitution) requires it to be so as the recognition of retroactivity that the appellant requests would produce an alteration and upheaval in the immense majority or virtual totality of the current status of titles of nobility (...)".

2. Interpretation of domestic rules in accordance with international rules

— STC 10/1991, 17 January (Division 1), Appeal n. 1812/1988 (*BOE* 13.2.91)[1]. The application of the European Court of Human Rights doctrine.

The appellants invoke both their right to effective judicial control and due process (art. 24.1 CE) and their right to a fast and speedy trial (art. 24.2 CE) in response to the failure of the judgment to provide an order concerning the third party claim to ownership brought before the Tribunal de Primera Instancia 18 (Court of First Instance) in Madrid in an action for enforcement.

"Although the appellants claim both the right to due process (article 24.1 of the Constitution) and to a quick and speedy trial (article 24.2 of the Constitution), rights which are different and can therefore be evaluated separately (SSTC 26/1983, legal ground 3, 5/1985, legal ground 3), there is no doubt that only the second, the right to a quick and speedy trial, comes

1. For further information see STC 37/1991, 14 February (Division 1), Appeal for protection n. 1578/1988 (*BOE*, 18.3.91).

into play here, as the repeated mention of the right to due process seems void of any autonomous content in the plaintiff's argumentation, which is based wholly on the delays being denounced and thereby incorrectly confuses the two rights.

The right to a quick and speedy trial — which cannot be defined as simply missing procedural deadline — includes in its wording a vague legal concept whose exact content must be found, as this Court has repeatedly stated, by applying both the objective and subjective factors that can be found in this generic wording to the circumstances of each particular case. In keeping with the case law of the European Court of Human Rights, this Court has stated that these factors can be limited to the following: the complexity of the litigation, the normal duration of litigation in similar cases, the possible consequences of the litigation for the plaintiff seeking protection, the procedural conduct of the trial and finally the conduct of the authorities and the assignment of available means (among others, STC 223/1988, legal ground 3). In accordance with this doctrine, the answer that this Court must give to the appeal here presented will depend on the results we obtain by applying these factors to the concurrent circumstances of the case at hand, (...).

Consequently, only a jurisdictional body can be accused of delay. The appellants' claim in their pleadings that the delay is attributable to the judge or that it is the result of structural or organizational defects lacks relevance in the evaluation of a violation of a fundamental right. This Court has repeatedly declared, once again in keeping with the doctrine of the European Court of Human Rights, that undue delay resulting from structural deficiencies can excuse the judges of these jurisdictional bodies from personal responsibility for the delays in issuing their decisions, but that this does not prohibit citizens from exercising their right to react to these delays nor does it allow these delays to be considered non-existent (SSTC 36/1988, legal ground 3, 233/1988, legal ground 7).

The principle of an interpretation which favors the protection of fundamental rights prohibits any restriction of the scope or content of the fundamental right to a quick and speedy trial based on the distinctions made as to the causes of the delay that article 24.2 of the Constitution itself fails to establish (STC 85/1990, legal ground 3) (...)".

— STC 206/1991, 30 October (Division 1), Appeal n. 2115/1988 (*BOE* 27.11.91).
Application of the European Court of Human Rights doctrine.

The plaintiff seeks protection from what he considers to be a violation of his right to due process by the a quo court that rejected his appeal of a previous decision which prolonged the duration of his pre-trial custody to four years.

"In order to determine if the duration of pre-trial custody exceeds a reasonable length of time, it is necessary to consult the doctrine on the integration of standards that this Court has drawn up consistent with the doctrine of the European Court of Human Rights (Neumeister, S. 27 June 1968; Wemboff, S. 27 June 1969; Stogmuller, S. 10 November 1969; Skoogstrom, S. 2 October 1984; Bezicheri, S. 25 October 1989; and Letellier, S. 26 June 1991). In accordance with this doctrine, an evaluation of duration must be made keeping in mind, on the one hand, the actual length of custody, and on the other, the complexity of the matter, the judicial body's activity in the matter and the appellant's conduct, so that the need to prolong custody in order to assure the presence of the accused at the trial is not due to the mere inactivity of the Magistrate, nor is it provoked by obstructionist measures taken by the defense such as the filing of improper motions or the use of delay tactics which are exclusively aimed at exhausting the pre-trial custody periods.

The application of the previous doctrine to the case at hand shows that even though the decision being challenged — which prolongs the period of pre-trial custody to 4 years — seems, *prima facie*, to lack legitimacy, it is fully justified if the nature of the object of the action and the judicial bodies' activities are taken into account along with the devious defense actions taken by the appellant (...).

Certainly, the defense, when encountering *ius puniendi* by the State, is constitutionally responsible for guaranteeing a citizen's basic right to freedom if he has not been convicted of a crime and is therefore presumed innocent, and therefore has the legitimate and constitutionally protected right to file as many exceptions, defenses and challenges as the legal process allows. It is also true that the right to due process includes the right to exercise all legally established appeals and that basic rights having to do with a reasonable length of pre-trial custody (art. 17.4) and a quick and speedy trial (art. 24.2) cannot be limited by or justified by the fact that a certain jurisdictional body has too heavy a work load. It is no less true that any body, including any party to the suit, is obliged to collaborate with the

judges and the courts during the course of the trial (art. 118 *CE*). However we must remember that if the delay is circumstantial and the State uses the appropriate organic and procedural reforms to obtain the normal functioning of the body, the Eur. Court HR has declared that an overload can serve as a cause for justification (Bucholz, S., 6 May 1981; Zimmermann and Steiner, S. 13 July 1983).

Therefore, one of the ways in which the parties to a trial must collaborate in order to obtain quick and speedy due process, lies precisely in the procedural obligation to participate in a trial in good faith (art. 11 *LOPJ*, *Ley Orgánica del Poder Judicial*, [Organic Law on Judicial Power]) with probity, and without deception or trickery.

This has not exactly been the conduct of the appellant, who, by filing a useless (in terms of real defense), inopportune (because he could have presented the motion at the beginning of the proceedings) and dilatory appeal, caused the paralyzation of the main criminal trial for more than a year. Such obstructionist conduct not only is not in proportional relation to the legitimate exercise of the right to defend oneself, but is clearly aimed at obtaining the unlawful release of the appellant by simply exhausting the legally acceptable periods of pre-trial custody, which is the reason why such anti-legal conduct, being contrary to the constitutional obligation of collaborating with judges and courts in order to obtain quick and efficient action by the system of Justice, cannot be meritorious of protection under the Constitution".

— STC 197/1991, 17 October (Division 2), Appeal n. 492/1989 (*BOE* 15.11.91). Application of tbe European Convention on Human Rights and tbe United Nations Covenant on Civil and Political Rights.

The appellants petition for protection from what they consider to be a violation of their right to communicate true information, caused by judicial decisions that have convicted them of being responsible for information that was damaging to the honor and violated the right to personal and family privacy of the minor and his adoptive parents. The Court rejects the appeal.

"For an invasion of an individual's or family's privacy to be legitimate it is necessary not only that the information be true — which is necessary but not sufficient — but also that the content of the information given be relevant and of general interest to the matter it refers to. The very important value of the right to information cannot override the basic right to honor and individual privacy of the persons who are affected by the information. These rights can only be set aside to the extent that is necessary to ensure freedom

of information in a democratic society (art. 20.2 of the European Convention on Human Rights), (...).

Therefore, it is evident that whatever the manifestation or declarations of the parents might have been regarding the circumstances of the adoption, the information published related to the circumstances and personal situation of the birth mother of the minor child does not constitute information of general interest which would contribute to the formation of public opinion, nor does it refer to facts related to the public activities of the public personality, nor can it be justified as a result of the public's interest in the topic of the article or report. As the Attorney General points out, 'to try to present a debate in the press as to the true parentage of an individual, who in this case is a minor, constitutes an attack on his private life and an arbitrary or illegal intrusion into his personal and family privacy under article 17.1 of the International Covenant on Civil and Political Rights dated 19 December 1976'.

Therefore, the Court finds, and this without limiting the appellants' right to communicate true information freely, that the information published and in question here has violated the right to personal and family privacy of those individuals who were the plaintiffs in the civil suit. Consequently, this suit is rejected".

— STC, 214/1991, 11 November (Division 1), Appeal n. 101/1990 (*BOE* 17.12.91).

The appellant seeks protection for her right to honor as a member of the Jewish people, which was violated by statements made in July, 1985, by Mr. Leon Degrelle, ex-leader of the Waffen S.S., regarding the actions of the Nazis with the Jews and in concentration camps. The Court grants the protection sought.

"In view of this claim and in order to state the question to be resolved precisely, some initial annotations as to the object of this trial must be made. First of all, it is important to make it clear that it is not within the purview of this Court, when hearing an appeal for protection, to study the observance or non-observance, *per se*, of international texts, but rather to examine whether constitutional principles that recognize guaranteed basic rights and public freedoms are respected (art. 53.2 *CE* and 49.1 *LOTC*) without affecting the fact that, according to article 10.2 *CE*, these principles should be interpreted 'according to the Universal Declaration of Human Rights and the international treaties and agreements on these matters that Spain has ratified'. In the second place, a constitutional trial must be concerned with a

conflict that has arisen between private individuals regarding the freedom of expression guaranteed in article 20.1 a) versus the right to honor guaranteed in article 18.1, both included in the Spanish Constitution, with respect to which the ordinary Courts have not perceived any violation of the second guaranteed constitutional right. Therefore, given that the right to honor and several of the others guaranteed by article 18 *CE* are inherent to all people and are derived from 'the dignity of an individual' as recognized in article 10 of the *CE*, the analysis that must be carried out in this case must take into account, apart from the appellant's right to honor, other constitutional rights and principles that are directly or indirectly linked to the right to honor (art. 18.1 *CE*) as only in this way is it possible to determine whether or not there exists the claimed constitutional violation, (...).

Under our constitutional law, the rule that determines this relationship or, in other words, active legitimation does not come from the aforementioned principle of Law 62/1978, but rather from article 162.1 b) of the Constitution under which 'any individual or corporation that claims legitimate interest has the right to file an appeal for protection'. So, unlike other legal systems, such as the German one or even the individual appeal to the European Commission of Human Rights (art. 25.1a, ECHR), our fundamental Law does not grant active legitimacy exclusively to the 'victim' of the infringed basic right, but to any individual who claims a 'legitimate interest'. Therefore, for purposes of determining if the appellant meets the constitutional requirement of active legitimation, the only thing that must be proven in the current appeal for protection is if the appellant can be said to have the legitimate interest on which to base the request to reestablish the basic right that has allegedly been violated, (...).

That being the case, and taking into account that ethnic, social or even religious groups of this kind generally lack a legal personality, and that as such they lack organs of representation which could be assigned by Law to act in civil and criminal matters in defense of the group's collective honor, if article 162.1 b) did not contemplate the active legitimation of each and every member of the group who resides in our country so that they could react jurisdictionally to the assault on the honor of said groups, not only would the violations of this basic right suffered equally by each and every one of these individuals go unpunished, but the Spanish State would thereby be allowing the emergence of discriminatory, racist or xenophobic campaigns in direct conflict with the concept of equality, which is one of the most important values of the legal system that our Constitution proclaims (art. 1.1 *CE*) and one which article 20.2 of the International Covenant on Civil and Political Rights expressly prohibits: ('any expression of national,

racial or religious hate that incites discrimination, hostility or violence is prohibited by Law')".

— STC 145/1991, 1 July (Division 2), Appeal n. 175/1989 (*BOE* 22.7.91). The application of international treaties.

The appellants seek protection from a prior judgment issued by the Tribunal Central de Trabajo (Central Industrial Tribunal) in which the Court, in a decision on another appeal, stated that the fact that the cleaning women employed at a certain hospital were paid less than the laborers at that same hospital did not constitute discriminatory conduct because the two groups of workers pertained to different professional categories. The Court recognizes the appellants' right to not be discriminated against in their salaries due to sex.

"In order to measure the legitimacy of differential treatment in matters of salary, the only element that can be considered is the actual work being done and the concurrence in that work of objectively established circumstances that are not directly or indirectly linked to the sex of the individual, except in specific cases, which should be limited to those in which sex is a determining factor in the ability to perform certain tasks related to the job. Only the true difference between the jobs being done, evaluated in a non-discriminatory fashion, will allow for a differentiation to be made for remunerative purposes (STC 31/1984). This same differentiation can be found in many international treaties to which Spain is a party and which can be used to interpret our Constitution in areas of fundamental rights (art. 102 *CE*). Among these are Covenants 100 and 111 of the ILO (arts. 2.1 and 1.1 a), respectively), and art. 119 of the Treaty of Rome and Directive 75/117, 10 February (art. 1) — which have a special impact on the legal codes of the countries that make up the European Community — as they have been interpreted in the judicial decisions handed down by the Court of Justice of the Autonomous Communities.

It is true that article 28 *ET* (*Estatuto de los Trabajadores*, (Workers' Charter) only states that 'an employer is required to pay equal wages for equal work, with no discrimination whatsoever based on sex'. From this we could deduce a strict prohibition of discrimination in matters of salary for employees who are carrying out the same tasks. However, we must keep in mind that articles 14 and 35.1 of the Spanish Constitution take precedence over this legal rule and they do not contain this restriction on the prohibition of discrimination and they are principles that, according to article 10.2 *CE*, also have to be interpreted in accordance with the international treaties and

agreements on the same issues that have been ratified by Spain. The concept of sexual equality in international treaties has evolved from the initial formulation of a strict principle of salarial equality for each job to a broader conceptualization of this principle which includes the existence of jobs of equal value (art. 2.1 of Covenant 100 ILO dated 23 March 1953, ratified 23 October 1967, art. 7 a) i) of the International Covenant on Economic, Social and Cultural Rights, ratified 30 April 1977 and article 4.3 of the European Social Charter, ratified 11 August 1980). Within the European Community, even though article 119 of the treaty refers to 'the same job' this has been extensively interpreted by community case law and developed in Directive 75/177, article 1 of which defines the principle of equality and remuneration as meaning 'the elimination in all of the elements and conditions of retribution, of any discrimination based on sex for the same job or for a job considered to be of the same value'".

— STC 119/1991, 3 June (Division 2), Appeal n. 1976/1988 (*BOE* 8 July 1991).

The appellants request protection from an alleged violation of their rights to freedom of speech and of the press in the form of administrative resolutions and prior judgments in which it was agreed to interrupt "Radio Costa Blanca" broadcasting and seal off the premises because the broadcasts were not authorized. The Court denies the protection requested.

"The scope of a lawmaker's power is substantial as regards the establishment of new companies specializing in mass media, and when regulating such issues, lawmakers are only restricted by the need to take other concurrent rights and values into account so as to not restrict the essence of their content (STC 206/1990, legal ground 6). And so, in terms of radio and television, we pointed out in the last of the judgments we cited, that these 'present a specific set of problems and that according to all legal codes, they are subject to specific regulations ant this requires a certain degree of administrative intervention which would not be acceptable or admissible in other areas. The last section of article 10.1 of the European Convention on Human Rights reflects this peculiarity by stating that the right to freedom of speech, to express an opinion and to receive or communicate information or ideas does not prohibit States from requiring their radio and television broadcasters to obtain prior authorization' (legal ground 6). Along these lines we also stated in our decision that article 20 *CE* does not, in any case, imply 'the recognition of a direct right to broadcast', nor does this principle 'directly create an automatic right to demand the authorization of broadcast frequencies, even if they are only local' nor 'is it

possible constitutionally to demand that legal regulation or administrative action in these matters be based strictly on the maximum number of frequencies that technical capacity allows' (legal ground 6).

The appellants' claim is based on a constitutionally unacceptable premise, to wit: that article 20 *CE*, also interpreted according to article 10 of the European Convention on Human Rights, provides for the direct recognition of the right to broadcast with no need for licensing, authorization or concession, and on the view that only in exceptional cases in which the lawmaker deems it necessary, can this freedom be subject to limitations or restrictions. Nevertheless, as experience shows, this is not accurate because, among other things, the 'technological limitations on the medium and the utilization of limited usage goods' prevent them from claiming 'an initially free action' (STC 79/182, legal ground 3) which is exactly what the appellants attempt to do here.

Included in this assumption are freedom of speech and freedom to freely communicate information through a means or type of broadcasting which requires a certain administrative license which the appellants, while not questioning the requirement, show no attempt at all of obtaining, only notifying the Administration that they would comply with the conditions for broadcasting set by the license once it was issued".

— STC 36/1991, 14 February, (Full Court), Accumulated questions of unconstitutionality n. 1001/1988 and 291,669, 1629 and 2151/1990 (*BOE* 18.3.91).

Several judges in Juvenile Court presented the question of the constitutionality of articles 15 and 16 of the Law on Juvenile Courts which regulates different aspects of the procedures used in the correction of juveniles, particularly the first of the two which allows hearings and trials to be closed sessions and the Court to be exempt from the procedural rules that apply to other jurisdictions.

"It is not possible to think that article 10.2 of the Constitution is automatically infringed by the principle in question as this rule is limited to establishing a link between our own system of fundamental rights and liberties, on the one hand, and the International Covenants and Treaties on the same issues that Spain is a party to on the other. Proclaimed international freedoms and liberties are not ranked as constitutional if they are not also included in our own Constitution; however, the corresponding principles of our Constitution must be interpreted in accordance with the content of these treaties and covenants so that, in practice, the content of these treaties in

some way becomes the constitutionally declared content on rights and liberties that is included in Chapter 2 of Title I of our Constitution. It is clear, however, that when a lawmaker or any other public authority makes a decision related to one of the fundamental rights or liberties that the Constitution guarantees which limits or reduces the content attributed to them by the cited treaties and conventions, the constitutional principle that is directly infringed is the one that states this right or liberty. There can be no additional effect from the indirect or mediate violation of article 19.2 *CE*, which by definition can never be self-contained, but rather is always dependent upon another violation, which is the one this Court will have to study in this case (...).

As a conclusion, we can state that when interpreted in accordance with the International Covenant on Civil and Political Rights, the European Convention for the Protection of Human Rigbts and Fundamental Freedoms and the Convention on the Rights of the Child, the fundamental rights included in article 24 of our Constitution must also be respected in actions against minors in criminal cases, and that, consequently, as these rights are guaranteed by following the procedural rules that define them, article 15 *LTTM* (*Ley de Tribunales Tutelares de Menores*, Juvenile Court Law) should be declared unconstitutional and null and void because it excludes the application of 'procedural rules used in other jurisdictions' (...)".

3. The Application and Interpretation of International Rules by Domestic Authorities

— STS 13 June 1991, *Contencioso administrativo* (Contentious Administrative Business Law), (Division 3, Section 4), *Ar.RepJ*. 1991, n. 5286.
International customs.

The appellant requests that the decision handed down by the Court of First Instance be revoked and his petition for the granting of a residence visa and authorization for his right to work in Spain by a Consulate outside of Spanish territory be admitted. The Court accepts part of the claim.

"SECOND.— There exists a rule in general international law which requires all sovereign States to recognize a foreign subject's right of access to the Courts in their domestic legal codes. This rule is relevant in legal codes such as the one in Spain that are open to internationalism (final paragraph of the Preamble to the Spanish Constitution). Many rules of conventional international law to which the Spanish state is a party also recognize this right. In domestic law, article 13 of the Spanish Constitution

grants foreigners the same public liberties guaranteed in Title 1 of the Fundamental Rules according to the terms that are established by treaties and by the law. Therefore the right to due process, included in article 24 of the Constitution, applies to foreigners and reflects the aforementioned international treaties, and is determined by the contents of Organic Law 7/1985, dated 1 July, on the rights and freedoms of foreigners in Spain within the limits imposed by the international treaties mentioned above. General international law clearly demonstrates the relevancy of this principle by requiring a declaration that states that the right to due process is one of the 'inalienable human right' as has been recognized by the Constitutional Court since decision 99/1985 (R.T. Const. 99), adding that this decision and the rules of conventional international law on this issue show that due process is equally a right of Spaniards and foreigners and therefore its regulation must be the same for both according to the constitutional principal of equality as stated in decision 107/1984 of the Constitutional Court (R.T. Const. 107) and 115/1987 (R.T. Const. 115)".

— STS 26 November 1991, *Contencioso administrativo* (Contentious Administrative Business Law), (Division 3, Section 2), *Ar.Rep.J.* 1991, n. 8772. International Treaties: 1979 Agreement between the Spanish State and the Holy See.

The question presented in this appeal has to do with whether or not the Catholic Church, and more specifically the bishopric of Vic (and finally the Parish of Montserrat in the city of Manresa) can take advantage of an exemption from municipal taxes on the increase in value of land which was sold in 1987.

"In spite of this, it should be remembered that the Jan. 3, 1979 Agreement to which we referred earlier, which as a true international treaty is part of the Spanish legal code under articles 96.1 of the 1978 Constitution, 1.5 of the Civil Code and 13 of the *Ley General Tributaria* (General Tax Law), prevails over the rules of said legal code by virtue of the principles of speciality and competency. It should be correctly interpreted, however, within the limits indicated in articles 18, 23 and 24 of the aforementioned *Ley General Tributaria* under articles 31 of the Vienna Convention, VI of the 3 January 1979 Agreement itself, and Section 2 of its Additional Proposal, in which it is stated that the Holy See and the Spanish Government will proceed 'by mutual agreement' to resolve the doubts and the difficulties that might arise in the interpretation or application of any clause of the Agreement, and points out the current tributary concepts in

which exemptions are described along with cases not subject to taxation according to articles III to V of said agreement. The Order of the *Ministerio de Economía y Hacienda* (Ministry of Economics and Finances) 29 July 1983, which was issued after discussion in the Church-State Commission constituted for that purpose, is a product of that combined interpretive effort.

— STS 14 January 1991, *Contencioso administrativo* (Contentious Administrative Business Law), (Division 3, Section 3), *Ar.Rep.J.* 1991, n. 384. International Treaties. Direct applicability[2].

The Supreme Court rejects the appeal presented by the State Attorney against the Court of First Instance's decision which, in clear contradiction to a decision made at the Ministerio de Educación y Ciencia (Ministry of Education and Science), declared the appellant's right to have the degree of Doctor in Dental Surgery which he obtained in the Dominican Republic validated in Spain.

"The sentence being appealed was carefully examined and resolved according to the legislation that is cited and the case law of the Constitutional Court and of this Division on issues concerning the validation of foreign degrees granted prior to Royal Decree 86/1987, dated 16 January, in the Transitory Provision of which is found an express reference to cases dated prior to the provision, which is the case of the appeal at hand. These cases should be resolved pursuant to Decree 1676/1969, dated 24 July, which was in effect at the time, and which in turn refers us to the international treaties in effect at the time the processing of the petition for recognition was initiated. These treaties specifically state that 'those cases that are clearly equivalent as established by the Courts or international covenants' are exempt from the requirement to undergo a comprehensive exam in order to validate studies and degrees obtained in foreign schools.

FOURTH. - The terms and conditions of the Cultural Convention between Spain and the Dominican Republic dated 27 January 1953, in effect at the time the petition was presented, do not allow any interpretation other than full equivalency for degrees granted in either country and — as is stated in the Constitutional Court decision (Division 2) dated 20 June 1988 — 'introduces a criterion of equality by virtue of which degrees obtained for the exercise of a liberal profession in either of the two countries, and issued

2. Some other decisions of this type include STS *Ar.Rep.J.* 1991 n. 637; 647; 651; 1215; 2649; 2654; 2657; 2668; 3483; 4399; 6458; 5909; 6037; 8866; and 8878.

by the competent authorities, qualify recipients to exercise their profession in the territory of one or the other'. This does not affect the 'formal control' of the requirements for validation 'for the purpose of proving that the petitioners do hold the degree they allege to hold with sufficient authenticity'.

Being satisfied that the degree presented by the appellant is valid, recognition in Spain is granted, and therefore the appeal presented by Counsel for the State is hereby rejected".

4. Agreements and International treaties. Direct applicability

Note: See *infra* V. The Individual in International Law, STS 1 July, 1991.

— STC 245/1991, 16 December (Full Court), Appeal n. 1005/1990 (*BOE* 15.1.92).
The enforcement of the decisions of international courts. The European Court of Human Rights.

The suit is based on the following facts:

The Audiencia Nacional (National Court), in a judgment issued 15 January 1982, sentenced the appellant, Mr. B., to thirty years in prison for the crime of murder, to six years and a day on the charge of illegal possession of firearms, and to three months in prison and a fine of 30.000 pesetas for using a false name. It also sentenced Mr. M. to the same first two terms with a change in the charge of illegal possession of firearms to illegal possession of explosives, and sentenced Mr. J. to twelve years and a day for being an accomplice to murder. It also sentenced two other defendants who are not part of this appeal for aiding and abetting an armed gang.

The Supreme Court reconfirmed the sentence — which was the object of an appeal in cassation to repeal the lower court's decision — with their own sentence issued 27 December 1982, with the only exception being Mr. J., who was convicted of aiding and abetting an armed gang, and whose sentence was thereby reduced to six years in prison.

An appeal for constitutional protection was brought against this decision asking for the annulment of the sentences of the National Court and the Supreme Court on the grounds that they were contrary to the right to equal treatment under the law, that they failed to apply the Ley de Amnistía (Amnesty Law), that they failed to guarantee the right to counsel from the time of arrest, the right to due process from judges and the courts, and the right to be presumed innocent. The suit was not admitted for processing

according to ATC 173/1983, because defenselessness was not claimed at the proper time in the proceedings and because there was a lack of constitutional content as regards the violation of the presumption of innocence given the existence of probatory activity in the present case, of the right to equal treatment because there exists no proper point of comparison on which to base discrimination in the application of amnesty in this case, and of lack of due process as the decision issued had solid legal grounds in the Law.

The appellants in this case filed a suit before the European Commission of Human Rights on 22 July 1983, alleging several violations of their basic rights in the criminal case made against them.

The suit was filed with the European Court of Human Rights on 12 December 1986, and the Court, in a judgment dated 6 December 1988, declared that there was a violation of article 6.1 of the European Convention on Human Rights but that there was no violation observed of Section 2 of the same principle. As regards article 50 of the European Convention on Human Rights, the Court stated that the question had not yet been decided and reserved the right to establish the question in a later proceedings if no agreement was reached between the plaintiffs and the Kingdom of Spain.

Of the three appellants, only Mr. J. has fulfilled his obligation by completing his sentence on Sept. 6, 1984.

Once the request to annul the conviction handed down by the Audiencia Nacional was filed, a mandatory proceeding was begun but no immediate agreement was made regarding the enforcement of the sentence. When the Attorney General's office and the attorney for the plaintiff received the request for annulment, both opposed it.

Although the Audiencia Nacional, as stated in the record dated 29 June 1989, did not find the appellant's appeal for protection unfounded according to the constitutional rules that introduce the applicable international Law into the Spanish legal order, and in spite of agreeing to suspend the enforcement of the sentence, it did recognize that the Court with the proper jurisdiction to decide the question was the Supreme Court, given that it reconfirmed the decision being challenged on appeal. Furthermore, the Audiencia Nacional understood that the current petition is analogous to the rules that assign jurisdiction to the Supreme Court in matters of review.

In a new decision issued by the First Criminal Division of the Audiencia Nacional issued after both the counsel for the plaintiff and the Attorney General presented an appeal asking the Court to overturn its own decision, an agreement was reached to modify the prior resolution in the sense that the probation to which the appellants were still subject after completing

their prison sentence included the condition that they would appear the 1st and 15th day of each month in the Courthouse of the city in which they were residing and that they would not leave Spanish territory.

Finally, the Judgment handed down by Division 2 of the Supreme Court on 4 April 1990, exhausted all ordinary channels by declaring that the annulment of the prior conviction by the same Court had not been accepted.

The suit claims that in the present case there was a violation of a basic constitutional right, the right to a fair trial, declared by the European Court of Human Rights, and that the appropriate legal consequences in domestic law should be taken from the Court's decision even though that decision is not directly enforceable. It also states that these consequences should include the annulment of the act that produced the violation if its effects have not yet been extinguished. The Supreme Court allowed individuals convicted in a trial that did not have the required guarantees to be kept in prison, and it denied jurisdictional due process citing that there was no legal provision for it. The Judgment of the Supreme Court itself violates the right to jurisdictional due process and by not annulling the original decisions it confirms and participates in the violation of these rights to a fair trial and the presumption of innocence.

"This Court's examination of the appeal for protection at hand does not have to focus on a discussion of the domestic enforcement of the Eur. Court HR judgment which was the topic of a good part of the debate that took place at the previous judicial level as well as in this appeal, and not only because the issue of domestic enforcement of the Eur. Court HR judgment falls outside of the jurisdiction of this Court, but also because the Supreme Court must be considered correct on this point when it states that the decision issued by the Eur. Court HR is a merely declarative judgment, with no direct domestic annulatory effect, and therefore Spanish courts are not required to enforce it. What the Court has to examine in this appeal for remedy is if the Supreme Court judgment being challenged, as an act taken by a Spanish public authority, has violated the fundamental rights recognized in the Constitution which this Constitutional Court is ultimately required to protect.

Spain's recognition of the European Commission's jurisdictional authority to hear suits on human rights violations under article 25 of the Convention and its acceptance of the compulsory jurisdiction of the Eur. Court HR does not mean, however, that the decisions of this Court must be enforced. The Convention's regulations and the European Court's interpretation of them indicate that the judgments issued by this Court are purely declarative in nature and they do not annul or modify in and of

themselves, actions or, in this case, judgments that are contrary to the Convention. In the Marck case (Judgment dated 13 June 1979), the European Court stated that 'the Court's judgment is essentially declarative and it allows the State to decide which means and methods to use in its domestic legal code to comply with the conditions of article 53' (paragraph 58). In other words, 'the Convention does not confer competency to annul the judgments of a national court nor to order the Government to deauthorize the passages that are the object of the complaint to the Court' (Pakelli, 25 April 1983, paragraph 55).

From the perspective of international law and its power to require compliance (art. 96 *CE*), the Convention neither introduces a supranational superior court — in the technical sense of the word — into the internal legal system of a country to review or directly control internal judicial or administrative decisions, nor does it impose upon the member States any specific procedural measures of an annulatory or abrogatory nature to ensure that the violation of the Convention declared by the Court (or, in some cases, by the Committee of Ministers pursuant to article 32 of the Convention) will be remedied. The Convention does not require the member States to eliminate the consequences of any action that is contrary to the international legal obligations taken on by the State, and thereby virtually reestablishes the situation as it was prior to the act, even though article 50 allows a satisfactory equivalent to be substituted for the reestablishment thereby questioning the definitive and enforceable nature of the domestic legal decision even if this satisfactory substitute only comes into play when national law does not provide a good remedy for the consequences of the decision or state judgment. According to the majority opinion, the Convention does not require that the judgment issued by the European Court be enforced domestically by annulling the authority on an issue that has already been judged and the enforcement of the domestic judicial decision that the Court found to be contrary to the Convention. Nor does article 13 of the Convention grant a domestic right to reopen the legal proceedings for which there is already a firm and enforceable judgment.

The fact that the European Convention, as an international instrument, does not require Spain to recognize the direct enforcement of the decisions issued by the Eur. Court HR in its national legal code, nor to introduce legal reforms that would allow for judicial review of firm judgments that are the result of the Court's declaration of a violation of one of the rights recognized in the Convention, which is the conclusion reached by our Supreme Court and which is defended in this case by the Attorney General, does not mean that public authorities would remain indifferent to such a declaration of the violation of a right recognized by the Convention within

our own constitutional system for the protection of basic rights nor that our constitutional system would allow a situation that could imply the upholding of a violation of the basic rights of the appellants by a denial of nullity or the annulment of the suspension of the sentences carefully issued by the *Audiencia Nacional*.

In fact, Spain's not being required by the European Convention to recognize the direct enforcement of European Court of Human Rights judgments in their domestic legal code does not imply a total lack of national effectiveness of that Court's declaration on the existence of an infraction of a right recognized by the Convention. It must be remembered that the Convention not only forms part of our domestic law under article 96.1 of the *CE*, but also that the rules relative to the basic rights and public liberties included in the *CE* — of interest to us here — should be interpreted in accordance with the international treaties and agreements on these matters that have been ratified by Spain (art. 10.2 *CE*) among which the Convention for the Protection of Human Rights and Fundamental Freedoms is of particular importance. The Eur. Court HR is the qualified body charged with interpreting the Convention, and its decisions are obligatory and binding in our Country when this country is sued. It follows, then, that if that Court declares that there is a violation of a right recognized by the European Convention, that this likewise constitutes a real violation of a basic right guaranteed by our Constitution. It is therefore right to try that case before the Constitutional Court, as Supreme Judge of the Constitution and of basic rights. Therefore, we must determine if there are measures in our domestic Law to satisfactorily correct and remedy a violation of a basic right, especially when there is a violation of the basic right to freedom guaranteed in article 17.1 *CE*, which continues to exist and therefore cannot be remedied through economic compensation.

In the case we are studying, the European Court declared the existence of a violation against article 6.1 of the Convention, a specially qualified violation, in a criminal case that resulted in the conviction of the plaintiffs and which according to the Court, included a series of irregularities - the late transfer of the accused from Barcelona to Madrid, an unexpected change in the judges presiding in the case before the hearing, the brevity of the trial and the fact that many important pieces of evidence were not presented or adequately argued in the oral trial, all of which led them to believe that said legal proceeding, on the whole, did not meet the requirements of a fair and open trial. Certainly the violation of that principle of the Convention, declared by the Court, can only mean that the appellants received prison sentences that were not imposed in an open and just trial with full guarantees, thereby violating article 24.2 *CE*. On the other hand, and equally

as important, the judgment issued by the European Court does not state that there was any violation of the right to be presumed innocent until proven guilty, a right guaranteed by article 6.2 of the Convention.

The violation of art. 6.1 declared by the European Court in this case refers to prison sentences that are still pending. Therefore the continuing effect of the Supreme Court judgment being challenged constitutes an ongoing violation of a right recognized in the Convention, which is considered a specially qualified right and is the consequence of a series of irregularities which allowed the European Court to conclude that the criminal proceedings in question as a whole did not meet the requirements of a fair and open trial. In other words, during the trial legal rules that were meant to ensure the basic procedural guarantees established in article 6.1 of the European Convention were broken. These rules are also protected as basic rights under article 24 of our Constitution, especially the right to an open trial with full guarantees found in article 24.2 *CE*. The right to a trial with full guarantees, as with all other rights, must be interpreted according to the international treaties and agreements on human rights ratified by Spain (art. 10.2 *CE*). Among these the European Convention on Human Rights and Fundamental Freedoms is of special importance. This convention is interpreted by the European Court of Human Rights whose decisions are binding in our country. Therefore, the Court's declaration that there is a violation of article 6.1 of the European Convention implies the existence of a criminal sentence imposed in violation of a right recognized in article 24.2 *CE*. Moreover, as the decision imposes a prison sentence, and was not issued in compliance with the formal requirements established by Law, it also violates the basic right to liberty guaranteed by article 17.1 *CE*.

The Court's declarative judgment, the obligatory nature of which is unquestionable, also indirectly gives rise to an infraction of article 24.2 *CE*. From the point of view of this petition for protection the problem is not one of lack of enforcement of the judgment but rather one of the obligations of public authorities — and as regards the matter at hand, this Constitutional Court's obligation, based on the fact that nothing which affects basic rights can be excluded from its jurisdiction (STC 26/1981) — to protect and satisfactorily remedy a violation of a basic right that continues to exist (...).

By focusing on the unenforceability of the European Court judgment, the Supreme Court judgment has not taken into account that in our constitutional system, in addition to the international obligations assumed by the Spanish state from the European Convention on Human Rights, the declaration of a violation of article 6.1 of the Convention in this case also implies the existence of a violation of the right to a public trial with full

guarantees guaranteed in article 24.2 *CE*, in accordance with article 10.2 *CE* (...).

It is certainly true that our legislature has adopted no provision that allows ordinary judges to review firm criminal sentences resulting from an European Court judgment. As regards the Supreme Court, it understands that current procedural law does not allow this, (...), it produces a result which objectively allows the consolidation, within judicial channels, of the infringement of the right to an open trial with full guarantees, especially if we keep in mind that the denial of a declaration to annul had to be accompanied by the revocation of the *Audiencia Nacional*'s decision which suspended enforcement of the appellant's sentence.

Having proven the existence of a real infringement of article 24.2 *CE* (which also implies a violation of article 17.1 *CE*) and due to the fact that these plaintiffs have not obtained adequate remedy for the violation of that right, it falls to this Court to declare as true the alleged infringement of the right to a trial with full guarantees, and to correct and remedy the violation of this basic right, taking into account the terms of the sentence (...).

By virtue of all of the above, this Court must partially grant the protection sought by the appellants and recognize that the Supreme Court's judgment of 4 April 1990, as it confirms and does not annul the criminal sentences imposed in 1982, has not recognized the appellants' right to an open trial with full guarantees; and in order to reestablish the protection of these rights we must annul not only the 1990 Supreme Court judgment but also and at the same time, the judgments of the *Audiencia Nacional* issued on 5 January 1982 and of the Supreme Court, issued on Dec. 27, 1982 (...).

In an open trial with full guarantees, in order to reestablish this right the declaration of annulment of the 1990 Supreme Court judgment and the 1982 *Audiencia Nacional* and Supreme Court judgments, must be accompanied by the retroaction of the proceedings to the time of the trial, so that a new trial can be held with all of the constitutionally guaranteed rights."

IV. SUBJECTS OF INTERNATIONAL LAW

V. THE INDIVIDUAL IN INTERNATIONAL LAW

1. Legal status of a foreigner

— STS 1 July 1991 (Division 3 of the *Contencioso Administrativo* (Contentious Administrative Business Law), (Division 3, Section 7), *Ar.Rep.J.* 1991, n. 6615.

The appellant, a Peruvian citizen, filed an appeal against a judgment issued by the Audiencia Territorial de Barcelona (Territorial Court of Barcelona) which had rejected another appeal regarding the denial of a work permit. The Supreme Court resolves the appeal by revoking the judgment being challenged and declaring the plaintiff's right to the work permit he sought under article 7 of the Convention on Dual Citizenship that exists between Spain and Peru, dated 16 May 1959.

"According to the doctrine established by this Court, article 3 of Organic Law 7/85 protects the efficacy of the treaties on this issue, according to which art. 7 of the aforementioned Agreement clearly establishes the right of Peruvian citizens in Spain to exercise all types of industries, trades and professions with full protection and Social Security coverage (with Spaniards enjoying reciprocal rights in Peru). Therefore this is not a remand to Spanish legislation, as is the case with other agreements in which a change in rules in Spain or in the country with which the agreement was made alters the contents of the recognized rights of the citizens of each country. On the other hand, the 1959 Agreement between Spain and Peru includes its own rules in addition to generic references to the legislation of the contracting States. It is precisely this specific substantive content that protects art. 3 of Organic Law 7/85 and governs article 7 of the Agreement which grants the right to work to all citizens of the contracting States in the other State, so that a refusal to grant the requested permit is not in compliance with the law and is thereby null and void under article 48.2 of the *Ley de Procedimiento Administrativo* (Law on Administrative Proceedings) as it violates a rule included in the agreement which according to Organic Law 7/85 is part of domestic law.

Article 7 of the Agreement ends with the following phrase: 'The exercise of these rights is subject to the legislation of the country in which said rights are to be exercise'; (...) in reality there is no remission that resolves a conflict in laws but rather a reference to the way in which rights can be exercised, (...).

In accordance with the aforementioned, we conclude that Peruvian citizens should indeed be able to obtain work permits, and that the

authorization of these permits is obligatory according to the provisions of the Agreement; therefore the appeal and revocation of the decision being challenged are accepted, but no reason is found to make any special pronouncement regarding costs".

2. Refuge

— SAN 2 March 1991, *RGD*, 1991, p. 4228.

The appellant, a Tunisian citizen, challenges the administrative act by which his right to asylum was denied and requests that said right, together with his status as a refugee, be recognized.

The Audiencia Nacional accepts the plaintiff's claim and gives a general explanation as to the differences and similarities that exist between the statute on refugees and the one on asylum.

"For a person to be granted legal asylum certain prior conditions must exist and these conditions are quite different from those required for petitions for refuge. Therefore, these two terms cannot simply be used as synonyms except in their purely legal content. For this reason, this division's doctrine states that even when it can be objectively proven that there exist circumstances in a given country that could give rise to a petition for the granting of refugee status in Spain, it is absolutely necessary for the petitioner to sufficiently prove that he/she is in fear of being persecuted because of his/her race, ethnicity, religion, membership in a certain social group, or political activity, all circumstances which form part of the definition or concept of 'refugee'. Both objective and subjective proof of these circumstances is necessary, as the essence of this legal situation, according to the Geneva Convention of 28 July, 1951, and the Protocol on the Status of Refugees (31 January 1967) is precisely a subjective element: fear. This 'fear' must be well-founded, — which is not always easy to prove — and that is why at least a reasonable probability of persecution due to the aforementioned reasons is required from the beginning and not merely suspicions or conjectures. This criteria is also accepted by the Supreme Court (in a judgment dated 29 January 1988, among many others).

As regards the right to asylum, there are some aspects in common with those applicable to refugees. For example, it is enough to present sufficient indications of the circumstances required for its authorization and not full proof (art. 8 of Law 5/84) and as with refugee status, the criteria used in its evaluation should be hospitality, solidarity and tolerance. However, it differs from the notion of refugee in the following ways (art. 2 and 3 of Law 5/84);

the right to asylum can be obtained by those who have refugee status, and the petitioner must have suffered persecution or to been subjected to trial for or convicted of a political or politically related crime, specifically those having to do with the defense of the exercise of the basic rights recognized in Spain or due to an individual's ethnicity, race, religion, membership in social groups, opinions, or political activity even if it includes a common crime or the commission of a crime for the purpose of securing the rights and liberties recognized in Spain; in the struggle against non-democratic regimes; and finally, for purely humanitarian reasons. In other words, recognition of the condition of refugee can be based on more nebulous circumstances while the granting of asylum requires more concrete proof, (...)".

3. Human Rights and Fundamental Freedoms

— STC 10/1991, 17 January.
Right to due process.
Note: See *Supra* III.

— STC 206/1991, 30 October.
Right to due process.
Note: *Supra* III.

— STC 10/1991, 17 January.
Right to a quick and speedy trial.
Note: See *Supra* III.

— STC 245/1991, 16 December.
Right to a public trial with full guarantees.
Note: See *Supra* III.

— STC 119/1991, 3 June.
Right to freedom of information.
Note: See *Supra* III.

— STC 197/1991, 17 October.
Right to freedom of information.
Note: See *Supra* III.

— STC 119/1991, 3 June.
Right to freedom of speech.

Note: ***Supra*** **III.**

— STC 214/1991, 11 November.
Rigbt to bonor.
Note: See ***Supra*** **III.**

VI. ORGANS OF THE STATE

1. Diplomatic Immunity

— STS 21 October 1991. ***Ar.Rep.J.*** **n. 7320.**

The Supreme Court rejects the arguments the appellant presents against a prior decision issued by the Audiencia Provincial (Provincial Court) in which she defends her diplomatic immunity and alleges the violation of several different articles of the 1961 Vienna Convention on Diplomatic Relations.

"As a recent judgment of this Court dated 1-6-1987 points out, diplomatic immunity as defined in articles 21.2 and 23 of the *Ley Orgánica del Poder Judicial* in its reference to international treaties to which Spain is a party previously regulated by art. 334 of the Organic Law of 1870, has a double basis in law (once the fiction of extraterritoriality is overcome): diplomatic representatives accredited before the receiving country are not subject to that foreign law, and diplomatic representatives should enjoy the freedom they need to correctly carry out the duties of their mission, a freedom which they would not have if they could be accused more or less mendaciously and brought before the judicial authorities of the country in which they exercise their functions to be judged and prosecuted by said courts, which would certainly result in the discrediting and damaging of the sovereignty of the accrediting Authority. In reality, it adds, this does not grant impunity in cases in which a common crime is committed in the receiving country, but rather establishes that, as is stated in international scientific doctrine, the nation or State in which the individual has been accredited would declare said individual as *persona non grata* and he would then be tried in his own country after being removed from his diplomatic post as established in the so-called 'principle of representatio' found in Public International Law.

The articles of the 1961 Convention cited as being infringed, have not been. Articles 29 and 31 of the Convention refer to the general rules of immunity and therefore are general in nature. The principles that really should be applied here are those included in arts. 27.5.6 and 40, because the condition used to justify the supposed immunity is none other than that of 'diplomatic courier', a status quite different from that of an agent accredited in a country that is no longer a receiving country, but rather one through which the courier is travelling. Not only have the aforementioned articles not been infringed, but there has also been absolutely no justification given for why they should be applied. As regards the precise 'accreditation' for the right to exercise in a receiving state, in the case of a third country in which an individual is simply 'in transit,' article 40 of the Convention is the article which should grant 'inviolability and all other immunities needed when in transit through or returning to' a country, (art. 40) and none of this has been proven, as was pointed out (...). On the other hand, even if the appellant's theory were to be accepted, the mere application of article 27.6, which establishes that 'the immunities mentioned in it will not be applied once said courier has delivered the diplomatic pouch entrusted to him' would suffice to reject this appeal. This can be achieved by means of a simple declarative challenge".

VII. TERRITORY

VIII. SEAS, WATERWAYS, SHIPS

IX. INTERNATIONAL SPACES

X. ENVIRONMENT

XI. LEGAL ASPECTS OF INTERNATIONAL COOPERATION

XII. INTERNATIONAL ORGANIZATIONS

XIII. EUROPEAN COMMUNITIES

1. Problems of constitutionality in European Community Law

— STC 22 March 1991 (*BOE* 24.4.91)[3].

In a written document entered into the record of the Constitutional Court on 11 May 1988, the Professional Association of Community Fishermen (APESCO) filed an appeal for protection against an agreement entered into by the Secretary General for Fishing on 27 August 1986, in which approval was given to a project to periodically list the vessels authorized to fish in the fishing grounds belonging to the Northeast Atlantic Fishing Commission (NEAFC) for the month of September of this year. The appellants maintain that "the listing project" was discriminatory under the rules of Community Law.

The following points taken from the declarations made by the Constitutional Court in this case regarding the relationship between Community Law and Spanish Law are worthy of mention:

a) The Constitutional Court is not responsible for controlling the correct adaptation of the activities of national public authorities to Community Law, as this control is the responsibility of ordinary jurisdiction, or, in some cases, of the European Community Court of Justice.

b) The validity of the provisions and actions being challenged should be determined in light of the constitutional principles that recognize the rights and liberties subject to said protection, and the international texts and agreements referred to in article 10.2 of the Constitution should be a source of interpretation for a more correct identification of the content of these laws. In any case, the rules of community law are one more way to verify the consistency or inconsistency of the infringement, even though these rules

"The State Attorney is right when he says that it is not the responsibility of the Constitutional Court to control the adaptation of the activities of national public authorities to European Community Law. This control belongs to the organs of ordinary jurisdiction in their role as 'appliers' of the Community legal code, and in certain cases, to the European Community

3. For more on this see the previous STS of 26 October 1991. *Ar.Rep.J.* 1991 n. 7430. Note by C. Escobar Hernández in *REDI* 1991, 1, vol. XLIII, p. 176.

Court of Justice as judges of non-compliance when a suit is brought before it (art. 170 EEC Treaty). The task of organizing the correct application of European Community Law by national public authorities is not a constitutional question and it therefore can not be the subject of a constitutional appeal or of other types of constitutional proceedings. This court recently stated this when it affirmed that the integration of Spain into the European Economic Community 'does not mean that under article 93 the rules of Community Law have been given constitutional rank and effect, nor does it state in any way that any infringement of those rules by a Spanish provision necessarily implies a conscious violation of article 93 of the Constitution' (STC 28/1991, legal ground 4).

The 'appeal for protection' was established by the drafters of the Constitution and designed by lawmakers as a procedural means of obtaining protection for the liberties and rights proclaimed in articles 14 to 30 of the Constitution (art. 53.2 and 161.1b) of the Constitution and article 41 of the *LOTC*), and only for the purpose of reestablishing or preserving them (art 41.3 *LOTC*). Therefore, the only applicable type of procedure in both this constitutional appeal for protection and the preferred and summary proceeding heard by the ordinary Courts *ex articulo* 53.2 of the Constitution is the one that included the principles of the Constitution that recognize fundamental rights and public freedoms whose content and scope, however, must be interpreted according to the international treaties and agreements referred to in article 10.2 of the Constitution.

The interpretation of the constitutional text that article 10.2 alludes to does not convert those international treaties and agreements into autonomous criteria with which to measure the validity of rules established by or actions carried out by public authorities from the perspective of basic rights. If that were the case, the Constitutional proclamation of such rights would be superfluous, and the drafters would only have to refer us to the International Declaration of Human Rights, or, in general, to the treaties on basic rights and public freedoms to which Spain is a contracting State. On the other hand, the aforementioned proclamation being made, there can be no doubt that the validity of the provisions and acts being challenged in this case should be measured strictly according to the constitutional principles that recognize the rights and liberties which are guaranteed protection in this type of litigation, with the international texts and agreements of article 10.2 serving as a source of interpretation that contributes to a better definition of the content of the laws whose protection is sought in this Constitutional Court.

Spain's accession to the European Community has not altered the standards of validity for appeals nor shifted the Constitutional Court's

responsibility as 'the supreme interpreter of the Constitution' (art. 1 *LOTC*) in these cases and the issues on which they are based, to community bodies or attributed to them the 'exercise of jurisdictional authority derived from the Constitution' (art. 93 of the Constitution). In fact, the application of Community Law under art. 93 of the Constitution and the Treaty of Accession and its supremacy over domestic Law in the aforementioned matters cannot condition or alter the provisions of articles 53.2 and 161.1 b) of the Constitution. Therefore it is quite clear that an appeal cannot be formulated against the rules or actions of Community institutions, but rather only against provisions, legal actions or simple *de facto* channels of domestic public authority as is stipulated in article 41.1 of the *LOTC*. And it is equally clear that grounds for protection can only be violations of the basic rights and public freedoms found in articles 14 to 30 of the Constitution (art. 53.2 and 161.1 b) of the Constitution and Title II of *LOTC*), and therefore, any violation of Community Law — whose rules, in addition to having specific means of protection, can only have the interpretative value that article 10.2 of the Constitution confers on international treaties — is excluded.

Consequently, the only admissible criteria for resolving appeals for protection is the constitutional principle that proclaims the right or liberty that has been violated, and community rules on the issues on which the appealed action or provision is based only serve as one more element by which to verify the consistency or inconsistency of that infringement. The same is true as regards domestic legislation in matters that fall outside of the Community's jurisdiction.

From this perspective, and in relation to the *thema decidendi*, it is important to remember that the basic right invoked - equality - is completely guaranteed in the European Community Treaties, and more concretely, as regards the nature of acts challenged, under article 40.3 paragraph 2, of the EEC Treaty which excludes 'all discrimination between producers and consumers in the Community'. This principle — which is repeatedly the subject of legal suits — is currently similar in content and therefore protection to the one that exists at the national level in all of the Community member states, just as both the European Community Court of Justice and the Constitutional Courts of other member states have repeatedly pointed out. Based on this fact, it is significant that neither the Community Commission nor the Court of Justice itself in its decision of 28 April 1988, (APESCO matter) rejecting the suit filed by the same fishermen's association that now seeks protection before this Constitutional Court, have found any evidence of discrimination based on Community standards in the Spanish system of access to NEAFC fishing grounds or 'the domestic rules

that Spanish authorities use in the formulation of project lists' (paragraph 28) and they specifically cite the judicial decision which states that the judgment of equality in each specific case is the responsibility of national authorities and jurisdictions.

In conclusion, it is also clear that if an action taken by a public authority, having been dictated as a function of European Community Law, violates a basic right, the appeal for protection should be heard by a constitutional court, whether or not that act is regular from the strict perspective of the European Community's legal system and with no prejudice as to the value it has as regards the provisions of art. 102 of the Constitution.

Therefore, based on all that has been hereto said, this Court is not responsible for resolving the matter at hand related to whether the activities of public authorities here challenged do or do not comply with European Community Law. The only problem we must decide on is if the state rules and the acts of enforcement applied in this case do or do not meet the requirement of equality and non-discriminatory action guaranteed in art. 14 of the Constitution.

b) Secondly, the State Attorney claims that in these cases national authorities have not acted as such, but rather as community bodies as their only task was to enforce the provisions of European Community Law. Thus they want to make it clear that, strictly speaking, there are no constitutional grounds on which to try the administrative action being challenged here, which means that said action would be exclusively subject to European Community Law and thereby excluded from the purview of this Constitutional Court.

Nevertheless, this statement of the problem cannot be accepted. It is true that the actions taken by the Spanish administration in regards to the access of Spanish vessels to fishing grounds is expressly included in the Act of Accession and complementary rules as a residual action within one of the sectors - fishing - in which the transfer of competencies to the European Economic Community is the broadest. But this should not lead to the impression that the Administration is no longer a national administration but rather simply an agent of the Community and therefore not subject to national law. The interpretation given by the European Community Court of Justice itself in the aforementioned decision dated 26 April 1988, (APESCO matter) excludes this hypothesis by stating that 'neither the Act of Accession nor the ... Rules indicate to the Spanish authorities which criteria should be used to select the ships'; and therefore 'Spanish authorities should carry out this selection (of the ships proposed on the lists) according to rules of domestic law' (paragraphs 22 and 23). There can be no other solution as the transference of competencies to supranational organisms does not imply that

national authorities are no longer subject to the domestic legal code when they act in accordance with obligations derived from such organisms, because in these cases they also continue to be public authorities subject to the Spanish Constitution and Spanish Laws (art. 9.1 of the Constitution), (...)".

— **STC 12 December 1991 (*BOE* 15.1.92).**

Since 1986, the Comunidades Autónomas de Cataluña, Pais Vasco y Andalucía (Autonomous Communities of Catalonia, the Basque Country and Andalucía) have presented various written documents which have been entered into the record of the Constitutional Court related to specific conflicts over jurisdictional authority challenging certain principles in matters of Metrology; that is, questions have been presented as to the distribution of competencies between the State and the Comunidades Autónomas (Autonomous Communities) in matters of weights and measures.

It is worth pointing out that the Generalitat de Catalunya (Catalonian Regional Government) presented a specific conflict of competence against several principles of Royal Decree 597/1988 dated 10 June, which regulates EEC metrologic control and was issued in order to adapt Spanish domestic legislation to Community Directive 71/316 of 26 June on the approximation of member State legislation in matters related to instruments of measurement and methods of metrologic control.

As regards the claims formulated by Catalonia, the Constitutional Court stated:

a) that transfer of derived community rules to Spanish law should follow the criteria for the division and assignment of competencies between the State and the Comunidades Autónomas fixed in the Spanish Constitution and in the Statutes of Autonomy as Spain's membership in the European Community does not mean that national authorities are no longer subject to the Spanish Constitution or Spanish laws. Therefore, and in the absence of a specific competency related to the enforcement of Community law, the enforcement of this right is the responsibility of the party who can prove that he has a right to the competency being disputed according to Spanish domestic Law.

b) that, as regards the Catalonian pretension to have certain principles of the Royal Decree (in which it is established that only the Castilian language will be used) declared unconstitutional, the Court finds this question to be accessory to the previous one. In any case, given that it is assumed that copies of the communications required by the Royal Decree must be sent to all of the European Community member states, it cannot be

claimed that this is an issue of the relationship between a citizen and an Comunidad Autónoma, but rather of acts of communication of public authorities among themselves and therefore should be regulated by the rules of Community Law. To that effect, the Directive refers to official languages as established by community Law, and Catalan is not among these.

"Well then, having thus outlined this constitutional controversy, it should be pointed out that the transference of community rules to domestic Law must follow the constitutional and statutory criteria for the division and assignment of competencies between the State and the *Comunidad Autónoma*, criteria which are not altered by either Spain's entrance into the EEC or by the promulgation of community rules unless their review is carried out through normal channels (art. 95.1 of the Constitution); the assignment of competencies to community organisms does not imply that national authorities are no longer subject to the Constitution and other laws. This is clearly established in article 9.1 of the fundamental rules (SSTC 252/1988, legal ground 2, 64/1991, legal ground 4 b), 76/1991, legal ground 3, 115/1991, legal ground 1).

As for the rest, neither the State nor the *Comunidad Autónoma de Catalunya* questions the State's competency to transfer community directives in this matter as part of its authority to make rules, but rather they dispute who should maintain the power to enforce them because while the rules being challenged clearly confer EEC metrologic control on the Spanish Center for Metrology, the Catalonian Administration claims that control should belong to regional authorities.

The limits to the litigation being thus defined, in order to resolve this conflict it should suffice to analyze the disputed regulations. Such an analysis would confirm the approval of the EEC model (title II) and primitive EEC verification (title III) as regards phases of metrologic control, and the domestic regulation of competencies according to the same unjustifiable philosophy that inspires the current regulation of state metrologic control that was summarized earlier, that is, the exclusion of regional government from said phases and executionary powers, or, in other words, its centralization in only one body which would report to the national government. For these reasons, it is firmly stated that in general terms 'the Spanish Center for Metrology is responsible for carrying out the EEC Metrologic control in Spain" (art. 2.2) , a statement based on the right of approval of the EEC model (art. 7) and its possible revocation (art. 16.1), and on the placement or stamping of the corresponding EEC marks and signs which testify to the fact that the controls were carried out (art 21 and several sections of Annexes I and II). These principles overlap with the

competency of the *Comunidad Autónoma* presenting the appeal - the Catalonians - because, once again, the authority to enforce rules pertains to the regional governments that can prove competency in the matter by virtue of their Statutes (...).

The consolidated constitutional doctrine previously mentioned, according to which Spain's entrance into the EEC and the subsequent transference of the rules of derived Community law does not change the constitutional rules on the distribution of competencies, would end up void of content if a broad application of the term 'foreign trade' as proposed by the State's Attorney were to be accepted as that application would always exclude the *Comunidad Autónoma* from any matter related to Community Law because it would be quite difficult to find community rules related to foreign trade if this is defined simply as infra-community trade.

Consequently, when faced with the allegation that foreign trade prevails over the specific rights of competence of a *Comunidad Autónoma* - in this case, the carrying out of metrological measurements - it is necessary to study the goals of the Community directives under which are dictated the domestic rules that the *Comunidades Autónomas* considered to be in violation of their authority in order to determine what link they have with foreign trade. On this point it is perfectly clear that the Community directive — which after being adapted to our domestic law by Royal Legislative Decree 1296/1986 on 28 June, and further developed in Royal Decree 597/1988 of 10 June — has the goal of unifying the legislation of member States, and that only a very indirect and remote relationship with foreign trade can be found. By any measure this relationship would not be sufficient to justify the prevalent intervention of said rules, which, in the situation contemplated here, cannot exclude the lawful exercise of regional competencies nor the principle of territoriality, given that according to repeated constitutional doctrine, regional competency exercised according to the Constitution and the Statutes of Autonomy, by its very nature, would produce some effects beyond the boundaries of the *Comunidad Autónoma* that adopted it.

In summary, the enforcement of Community Law pertains to whoever can actually prove competency according to the rules of domestic law as there exists no specific competency for the enforcement of Community Law. Therefore in matters of weights and measures, the enforcement of Community Law would be carried out by the governments that are competent to carry out analogous or similar actions according to domestic law. And in matters of metrologic control, this responsibility corresponds to the *Comunidad Autónoma de Catalunya* and the *País Vasco* within the boundaries of their own respective territories.

Once it has been accepted that the *Generalitat de Catalunya* has the authority to carry out EEC metrologic control activities, under article 11.5 of the Statutes of Autonomy related to article 149.1.12 of the Supreme Rule, it is necessary to resolve a secondary claim presented by the Catalonian administration, which, in its pleadings requests that article 23 of Royal Decree 597/1988 and Section 1.1 of Annex I be declared unconstitutional on the grounds of lack of competency. These principles state that 'any inscriptions that must be made to comply with the provisions of this Royal Decree will be written in the Castilian language' (art. 23) and 'the application and all accompanying documentation will be written in the Castilian language. The applicant will simultaneously send a copy of the application to all member States' (the section mentioned in Annex I). In the plaintiff's opinion, this Court should recognize that the actions described could be written either in Castilian or in Catalan according to the principle of co-officiality.

However, this claim cannot be accepted on jurisdictional grounds if a careful and detailed reading of the provision being challenged is carried out. The provisions established in section 5.1 are undeniably relevant to a correct understanding of the problem. In this section it states that the different approvals of the EEC model will be published in a special annex to the 'Official Journal of the European Communities' and it seems clear that this formal publication should be written in one of the nine official languages of the European Community according to the rules of Community Law itself (art. 217 of the EEC Treaty and article 5 of Rule 1 of the Council of 15 April 1958, at which time the linguistic system of the EEC was fixed, although it has been modified on various occasions after each successive accession) and not in any of the official languages belonging to the Autonomous Communities according to the rules of domestic Constitutional Law (art. 3.2 of the Catalonian Statute of Autonomy). In the same way, paragraph 2 of the aforementioned Section 1.1 of Annex 1 establishes that it is the direct responsibility of the petitioner for approval of an EEC model to 'simultaneously direct a copy of the application to all member States'. We are not, therefore, dealing with a relationship between a citizen and a regional government but rather with true acts of communication between public authorities themselves which should be regulated by the rules of Community law and specifically by those that have to do with the official status of the languages of the member States. Said another way: the problem of which language should be used when filling out an application for EEC metrological contrast and recognition, the documentation the application generates, and the inscriptions that will be made in conjunction with it, is a

problem for Community Law and not for the domestic assignment of competencies, which is the object of this constitutional dispute.

And in this sense, the statement 'official language in accordance with the legislation of the State in which the application is submitted' used in art. 1.1 of Annex 1 of the Directive should be understood to refer to languages that have been declared official languages in the European Community by Community Law, among which Catalonian is not found. Nevertheless we should state that the obligatory use of the Castilian language does not prohibit the autonomous administrations from adopting measures needed to ensure citizens the right to address them in and indistinctly use both languages. However, this right of the citizens and the corresponding duty of the autonomous administration cannot lead to the belief that the principles being challenged here are tainted by incompetency".

2. Supremacy of Community Law

— STC 28/1991, 14 February (Full Court), Claim of unconstitutionality n. 1987 (*BOE* 15.3.91).
Note: See above III.[4]

"Briefly, the Kingdom of Spain has been bound to both original and derived European Community Law ever since the date of its accession to the Community. This — in the words of the ECCJ (European Communities Court of Justice) — constitutes a legal system in and of itself which is integrated into the legal system of the member states and imposed upon jurisdictional bodies (Costa/ENEL Decisions, 15 July, 1964).

However, this does not mean that article 93 has given Constitutional rank and force to the rules of Community Law, nor does it in any way say that an infringement of those rules by a Spanish provision means that there has been a violation of article 93 of the Constitution. This principle is certainly the true foundation of this bond, given that its acceptance — orchestrated in the Treaty of Accession, its immediate basis — expresses state sovereignty. We should not forget however, that this constitutional principle, which is organic-procedural in nature, is limited to regulating the way in which certain kinds of international treaties are drawn up and this means that only

4. Article by A. Mangas Martín: "Comment on *TC* decision 28/1991, 14 February, on the *Ley orgánica del Régimen electoral general* (Organic Law on the General Election Regime) and the *Acta relativa a las elecciones al Parlamento Europeo* (Act on the Elections to the European Parliament)", *RIE* 1991, 2, p. 587 et seq. Note by C. Escobar Hernández in *REDI* 1991, 1, vol. XLII, pp. 172 *et seq.*

these kinds of treaties can be judged for constitutionality under article 93 due to the fact that the Constitution is the source of their formal validity.

Therefore, in the case at hand, once accession to the EC had taken place through a treaty of this kind which was authorized by Organic Law 10/1985, and once the mechanism established in art. 93 was used, that constitutional rule can not be affected by any possible conflict that might arise between national, state and autonomous legislation and Community Law because it is a question that falls outside the objectives and content of the rule. Not even the final section of this constitutional principle supports such affectation, as the appellant seems to claim in his very succinct reasoning, because it is one thing for the Parliament or the Government to guarantee compliance with the Treaty of Accession and European Community Law (even though this law does not apply to areas such as distribution or enforcement) and another very different thing that an infringement of European Community Law by laws or rules that postdate the Treaty of Accession implies *eo ipso* a violation of the final section of article 93 of the Constitution, because, as has already been pointed out, this principle simply determines which State organ will be responsible for guaranteeing compliance with European Community legislation based on the type of activity needed to put Community decisions into practice.

Therefore this definition of the limits of the exact scope of article 93 of the Constitution clearly shows that it could not be even indirectly affected by article 211.2 d) of the *Ley Orgánica del Régimen Electoral General* (Organic Law on the General Election Regime) and therefore the grounds of unconstitutionality that the appellant charges based on its non-conformity with article 5 of the European Electoral Act simply do not exist".

— STC 22 March 1991 (*BOE* 24.4.91).
Note: See above XIII.1.

3. Supremacy. Direct Effect

— STS 13 July 1991, *Social, Ar.Rep.J.* 1991, n. 5985.

The Supreme Court accepts the appeal in cassation to block the unification of doctrine (n. 266/1991) filed against the decision of the Tribunal Superior de Justicia (Superior Court of Justice) of La Rioja.

Litigation here has to do with Directive 80/987/EEC relating to the doctrine established by the European Community Court of Justice regarding the direct effect of Directives.

The Supreme Court maintains that the recognition of the direct effect of this kind of community actions by the Court of Justice has been gradual and always related to the relationship between individuals and the State (vertical effect).

On the other hand, a Directive's provisions must be unconditional and sufficiently precise to allow an invocation of direct effect to succeed when confronted with domestic law. This unconditionality and precision do not exist in the case in question and therefore the aforementioned Directive 80/987 is not applicable to it.

"In order to study the alleged infringement we must have some prior knowledge of the legal grounds used to evaluate the plaintiff's claim in the original decision. These grounds were based on the recognition of the direct effect of the Directive of the Council of the European Communities dated 20 October 1980, (80/987/EEC) on the harmonization of member state's legislation in matters related to the protection of salaried workers in cases of company bankruptcy. There is simply no doubt (and no question regarding this issue is brought up in the litis or in the appeal) that according to the domestic rules of law the Fund for Wage Protection is not applicable to executive level personnel given the terms of art. 33 (1 and 5) under articles 3.2 and 15.1 of Royal Decree 1382/1985 and 11.2 of Royal Decree 505/1985. For this reason, the litigation is brought against the aforementioned Directive, and in direct relation to the doctrine established by the European Community Court of Justice on the direct effect of Directives.

Recognition of the direct effect of this type of community action by the Court of Justice has been gradual and always related to the relationship between individuals and the States (vertical effect), (...).

A synthesis of the case law included here clearly indicates that the provisions of the Directive must be unconditional and sufficiently precise to allow a successful invocation of their direct effect on domestic law, with the subsequent recognition of the rights of individuals expressed in the community action as opposed to those recognized by the State in non-compliance. This unconditionality and precision do not exist in the case at hand, (...)".

— STS 29 October 1991, *Contencioso Administrativo*, (Contentious Administrative Business Law), (Division 3, Section 2), *Ar.Rep.J.* 1991, n. 8541.

This litigation concerns the contradiction that exists between the Law on Mixed Death and Survivor's Insurance 50/1980 dated 8 October, and

directive 79/267 which contemplates mixed insurance. The appellant claims the contradiction should be resolved in favor of the directive based on the principle of supremacy and because of the direct effect that can be attributed to it.

"There is no doubt that Community Directive 79/267 dated 5 March, which determines the result that the member State should obtain but leaves it to the national authorities to choose the means (art. 189 of the EEC Treaty) by which to reach that end result, contemplates mixed insurance. However, in accordance with Art. 8.3, it does not prohibit said authorities from formulating complementary regulations regarding the general or special conditions and terms of a contract. Therefore even given the Directive's unifying purpose, there is nothing to stop member States from establishing certain conditions in order to facilitate access to life insurance and to eliminate some discrepancies that exist between national legislation in regulatory matters and precisely to exclude certain types of operations which, due to their special characteristics, lack the principle purpose of insurance and therefore should not be covered by the protection offered by community rules.

The fact that domestic provisions cannot foresee if the application for authorization will be evaluated according to the economic necessities of the market does not mean that factors related to the operation itself cannot be considered. These factors were taken into account when Royal Decree 1203/1989 was issued to adopt financial and fiscal measures with which to modify art. 2 of Law 3/1984 dated 2 August, on the Regulation of Private Insurance.

The regulation of capitalization operations is not questioned and it is accepted that community rules give national legislatures the power to authorize those that are based on actuarial techniques that suppose certain obligations in terms of length of time and cost in exchange for lump sum or fixed fractioned payments.

Based on this, there is no evidence that a conflict between community and domestic rules exists, and therefore, due to the compatibility of the two, the principles of supremacy and direct effect do not apply, nor does art. 177 of the EEC Treaty on the filing of the judicial question with the E.C. Court of Justice, meant to be consulted when there are doubts about the interpretation of a community rule, which in this case is not evident from an examination of the directive, as it is really based on domestic legislation (...)".

4. Prejudicial question

— STS 28 November 1990, *Contencioso Administrativo*, (Contentious Administrative Business Law), (Division 3, Section 2), *Ar.Rep.J.* 1991, n. 3440[5].

The owner of a building rented to the Generalitat de Catalunya challenged the amount of value added tax he paid. After appealing to the lower courts, the Generalitat appeals to the Supreme Court alleging inter alia provisions in Directive 77/388, 1977, on fiscal harmonization.

The Court, observing no such contradiction, rejects the appeal. It also states that even if such a contradiction were observed, the matter would not fall within its jurisdiction as the only viable remedy for the matter would be to file it with the ECCJ.

"To the best of our understanding, there exists no contradiction whatsoever between the Directives and the Law, but even if there did, a response would fall outside of our jurisdictional authority. Even when the ECCJ has admitted that there is an exceptional possibility that this type of rule causes a direct effect (Van Duyn Decision, case 41/74), it has allowed it only when the State in question had not introduced the required regulations into its own legal code. Thus it has stated very clearly that 'therefore, a member state that has not adopted the measures of application required by the Directive by the deadline set, cannot object to an individual's non-compliance with the obligations established in the Directive'. In such a case 'when a national court is faced with an individual who has complied with the provisions of a directive and brings suit against a declaration of failure to apply a domestic provision which is incompatible with that directive — which has not been introduced into domestic law — and which is in direct non-compliance with the Directive, the Court must hear the suit if the obligation it is concerned with is unconditional and sufficiently precise' (Ratti Decision, case 148/78.) It seems clear that this is not the case here, as the Kingdom of Spain has more or less complied with its common responsibility to legislatively regulate the value added tax as our Constitution requires.

In such a situation, the only remedy possible is to file the case with the ECCJ. This Court has recognized, of course, that individuals can ask a national judge to regulate the domestic rules approved by the government for the development of Directives (Verbond Nederlandese decision, case

5. Also see STS dated 23 November 1990, 29 November 1990 and 30 November 1990, *Ar.Rep.J.* 1991 n. 3439, 3441 and 3442.

51/76 and Ondernemingen, 21/78). Now then, this regulation, which in our country, in principle, is the responsibility of the contentious administrative business law jurisdiction, has an absolute limit marked by the Constitution, article 106 of which alludes to the reglementary authority that art. 97 attributes to the government of the Nation as well as to the *Comunidades Autónomas* themselves (art. 153.c), which coincides with the limits set a third of a century ago by art. 1 of the Law which regulated this jurisdictional system and charged it with trying all general provisions whose category or rank is less than a constitutional law. For this reason, this can only be heard by the Constitutional Court".

XIV. RESPONSIBILITY

1. Diplomatic Protection

— SAN 25 March 1991, *RGD* 1991, p. 5172
The Spanish Government's responsibility for failure to exercise or for incorrectly exercising.

The judgment rejects the company's claim that the State has vicarious responsibility for a debt incurred by a foreign country (Libya). The judgment is based on the fact that the harm was the result of a breach of contract which is not attributable to the Spanish State, which only tried to assist in the collection of the debt by using a protocol which it later had to abandon due to the unforeseen and unacceptable conditions set by the debtor nation.

"Well, in the case at hand it should be emphasized that contrary to what the plaintiff maintains, this charge is not based on the normal or abnormal functioning of public services, no matter how broadly you choose to define the term 'public service'; rather we have in this litigation a case of *tertius genus* as established in article 2.b) of the *Ley de la Jurisdicción Contencioso-Administrativa* ([Contentious Administrative Business Law] and related to article 40.3 of the *Ley de Régimen Jurídico de la Administración del Estado* [Law on the Legal System of State Administration]) as it has been determined that even if the contentious administrative business law jurisdiction is not responsible for hearing questions that arise concerning international relations, it is responsible for hearing '... cases concerning compensation that were duly established, the

determination of which falls to the contentious administrative business law jurisdiction (...)'.

By making it clear on the record that what the Spanish government was trying to do was to help collect the debt, it cannot be deduced nor accepted as principle that the government is vicariously responsible for the another State's breach of contract with a Spanish company nor is it obliged to enter into agreements whose terms and conditions are clearly disadvantageous, if not totally ruinous.

After eliminating this element of 'anti-legality', it is also impossible to observe any cause-effect relationship between the Spanish separation from the negotiations and the non-payment of the debt. This is true, because, as was stated earlier, the harm had been caused at least a year earlier by Libya's non-payment of its debt, (...).

We could definitely speak of a contractual responsibility as the basis for this charge if a measure had been adopted whose consequences were direct and prejudicial to a subject and were the result strictly and exclusively of the Spanish initiative (...) or if the protocol had been drawn up with clearly disadvantageous conditions for the Spanish companies, or, if drawn up in an acceptable way, it had been breached in an unreasonable or groundless way by the Spanish party or followed satisfactorily by both parties and then breached by the Spanish government".