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REVIEW BY THE CONSTITUTIONAL COURTS OF PROCEEDINGS BEFORE ORDINARY COURTS APPLYING COMMUNITY LAW

Kosice, Slovak Republic, 1-2 June 2006

REPORT

EU Law before the Spanish Constitutional Court

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1. PRINCIPAL POWERS OF THE SPANISH CONSTITUTIONAL COURT. TYPES OF PROCEEDINGS

First of all, I will consider briefly the principal powers of the Spanish Constitutional Court. An organic law passed in 1979 regulates in detail the functioning and procedures of the constitutional court (Ley Orgánica del Tribunal Constitucional, LOTC). The constitutional court is defined as the supreme interpreter of the constitution (Article 1 LOTC). It is independent from all the other constitutional bodies and is subject only to the Constitution and to its own organic law (Article 1.1 LOTC)[1]. The role of the court is to ensure that laws and governmental actions conform to the Constitution. Therefore, it can be said that the court performs three main functions: 1) to guarantee the supremacy of the constitution, 2) to adjudicate on the distribution of powers between the national government and the Autonomous Communities, or between the Autonomous Communities themselves, and 3) to protect fundamental rights and freedoms of individuals.

The constitutional court exercises jurisdiction in several fields, through a variety of proceedings. The jurisdiction of the Constitutional Court is set out in Article 161 of the Constitution. It consists of three different distinct subject areas:

[1] According to art. 159 (1) of the Constitution, the Constitutional Court is composed of 12 magistrates. As it is known there are two main system of judicial appointment, plus the most common which is a hybrid of the two: The first is the direct appointment system, which does not involve any voting procedure. The common law systems typically involve a rubber stamp appointment by the Head of State or his representative pursuant to a binding executive nomination (Canada, Ireland, all the Scandinavian supreme courts, France) the power of nomination thus being decisive. The second system is the elective system, which tends towards greater democratic legitimacy. This is the case if Germany, Portugal, some Eastern European countries. The most obvious difference among elective systems is the variety of authorities which have the task of proposing candidates for election: the President, the Upper House, a judicial council, political parties in the Parliament… The third system is the hybrid between election and direct appointment, which is the most common. This is the system followed in Spain. As I have said the Constitutional Court is composed of 12 magistrates. Each of the Senate and Congress of Deputies select 4 magistrates (each by a 3/5 majority) – 8; The Chief Executive selects 2, The General Council of Judicial Power selects the final 2. The combination of direct appointment system and the elective system has as an objective to combine the guarantee of the independence of the Court from political influences (2 magistrates been appointed by the Judicial Power) with the desire that the Court ensures a democratic representation. However, this last system – which is predominant in Spain: 8 magistrates being elected by the 2 chambers of the Spanish parliament – is reliant on a political agreement, which may endager the stability of the institution… When the Senate of the Congress of Deputies do have to designate their magistrates is not rare that the legally established periods should not observed. This danger is partially solved by the fact that members of the Constitutional Court are appointed for a period of 9 years. A partial change in memberships occurs every 3 years, when one-third of the Court retires and new appointments are made. Hew we have a mechanism for the stability of the institution. The Constitution also establishes some eligibility requirements: candidates must be lawyers of recognized competence, which means that they are required to have at least 15 years of experience as magistrates or prosecutors, university professors, public officials, or lawyers" (Art. 159.2 CE). In brief, legal qualifications are required, but these qualifications are not limited to a particular legal profession (judges, for instance). That is, in my view, a good point in the composition of the Court. Let me now talk about one of its lacks: any provision is established in order to guarantee the representation of minority groups on the bench. Canada, Belgium, Switzerland are requiring that linguistic differences among their countries should have a reflect in the composition of the Court. That's not the Spanish case, where the representation of catalan or basque minorities is let to de facto observation of a not written rule. This can also be applied to the representation of women on the court. In this sense I can say you that at this moment only one of the magistrates composing the Court is catalan, and that there are only 2 women on the Court, one of them being the President. The President of the Constitutional Court is formally appointed by the King upon the recommendation of the Court sitting in a plenary session. The selection is made from among the members of the Court. Mrs. Emilia Casas, professor of Labour Law, has been elected President of the Court last week. ven though the President retains her prior status as a magistrate of the Court, her power is augmented somewhat by recognition of the vote of quality – remember the Court is composed by 12 magistrates- which she may exercise to break deadlocks of the Court in a plenary session.

A) Abstract review of legislation

Determination of the constitutional validity of laws and regulations constitutes the court's most definitive jurisdiction. The constitutional review power of the court extend to organic laws, statutes setting up Autonomous Communities, ordinary laws of the whole state and of the Autonomous Communities, and other normative acts of the state with the power of law, including legislative decrees and decree laws.

Abstract review of legislation takes place either:

- by challenge to the validity of laws: upon a direct request by a proper party, the Constitutional Court in a plenary session may declare any law unconstitutional. The parties with standing to bring the appeal of unconstitutionality are the President of the Government, the public defender, 50 deputies, 50 senators. A direct action against the constitutionality validity of a law cannot be brought by an individual citizen. This is the so called "appeal of unconstitutionality" (*recurso de inconstitucionalidad*).
- or by means of preliminary reference form a judicial court. The question is limited to a legislative act (never a regulation) relevant to a case pending before the court certifying it. It may be brought before the court adopts a final decision, after hearing the parties in the judicial proceeding (*cuestión de constitucionalidad*).

In both the direct and indirect proceedings, a decision of the Constitutional Court has the same effect as an ordinary judicial decision. It has also had the effect of invalidating the law. But its retroactive effect is for all practical purposes limited.

B) Conflicts of authority (Resolutions of conflicts between the State and the Autonomous Communities or between the Autonomous Communities themselves).

With the Spanish Constitution of 1978, Europe gained a new politically decentralized constitutional regime. The formula chosen was not the federal one, as is the case in Germany, Switzerland, Austria, Belgium or the US, but rather the regional model already in practice in Italy.

From the onset of the period in which the Constitution was being drafted, the regional issue in Spain presented itself as an extremely complex problem, due to the different degrees of autonomous sentiment and aspirations in the diverse Spanish regions. Many of them, such as Catalonia, Galicia, Valencia, the Balearic Islands or the Basque country had enjoyed a limited experience with self-government during the Second Republic (in the 30s.). In these regions, nationalist parties were soon formed and captured a majority of the electorate. But in the rest of Spain regional sentiment was hardly an issue.

The authors of the Constitution were forced to choose among three formulas: a) Grant autonomous regimes to the 2 or 3 regions were autonomous sentiment was strongest, following the precedent set by the Second Republic; b) The second solution which came to be known as "coffee for everyone", providing for the autonomy of all of the regions in Spain, each having identical competencies and jurisdictions. These two solutions were rejected. C) The solution adopted was defined as a "cheese platter". The Constitution would distinguish between "nationalities" and "regions" and would allow each Autonomous Community to draft its own statute of autonomy "made to order". Each region would assume the powers and competences which it deemed appropriate to each case, with the exception of a package of competencies which were reserved exclusively for the State. The three regions with a history of self-

government (Galicia, Catalonia and Basque country) received more freedom to choose these competences. As a result, between 1979 and 1983, a total of 17 Autonomous Communities were constituted in Spain, each under different Statutes of Autonomy, and each with its own parliament with legislative powers and government with executive powers.

Naturally, a problem which arises from this situation is how to coordinate the diverse parts of this de-centralized regime, avoiding conflicts among its various constituents and guaranteeing a minimum of unified policies in matters such as defence, the monetary system, foreign policy, or economic policy.

As is well known, to achieve this, different federal or regionalist regimes have used through the years and constitute a series of techniques of articulation which may be grouped into three types: a) techniques of subordination (the creation of a certain degree of hierarchical dependence of the territorial entities involved on the Central State), which are only possible in a regime of reduced autonomy, b) techniques of egalitarian coordination (through a Federal chamber which includes representatives from all regional entities elected either by the individual citizens – the US -, or appointed by the governments of the regional entities – Germany), and c) jurisdictional techniques. In Spain there is a total lack of hierarchical and egalitarian vias for distributing powers between central and regional entities.

Thus, the constitutional court becomes the major instrument to resolve conflicts between regions and the central state: a) The appeals of unconstitutionality, which we have already considered; b) The conflict of competences (*conflictos de competencia*) – in this procedure, the organs of government may challenge administrative actions which they believe infringe on their jurisdiction: the central government may challenge administrative actions of the regions, and the regional governments may, likewise, question administrative acts of the State or of other regions.

Both procedures have been used widely by both the Central Government and the Autonomous Communities since the creation of the Constitutional Court. During the last year (2003), 21 conflicts of competence brought before the Court. As a matter of comparison the Constitutional Court of the FR of Germany has ruled in a total of 12 cases involving conflict of competences since its founding in 1953

C) Individual complaints relating to fundamental rights

One of the most important missions of the Constitutional court is the defense of fundamental rights (the appeal of amparo; *recurso de amparo*). It is rather important to remark that according to the law, the Constitutional Court does not protect an individual against an alleged violation of all the fundamental rights recognized by the Spanish Constitution, but only against some of them. These are basically political rights of citizens, such as freedom of expression or religion, the right to dignity, legal representation, etc.

Any person may seek redress of their fundamental rights: national and foreigners, individuals and companies and associations. Individual applicants are granted the right to submit to the court an infringement in a constitutionally guaranteed right. Nevertheless these functions will be exercised by the court only once remedies in the ordinary courts should be exhausted. This appeal for protection procedure (*recurso de amparo*) has proved to be used more frequently than was intended when the constitutional court was established.

D) Examination of the constitutionality of international treaties prior to their ratification by the state

Concerning incorporation of international treaties into the Spanish legal order, it can be said that Spain has a so-called monisticy system. Validly concluded treaties, once officially published in Spain, automatically form part of the internal legal order (Article 96.1 CE). The Constitution adds to this that the provisions of such validly conclude treaties might only be repealed, amended or suspended in the manner provided in the treaties themselves or in accordance with the general rules of international law.

In order to prevent a conflict between internally binding treaties and constitutional provisions, Art. 95.1 CE provides that the ratification of treaties that contain provisions contrary to the Constitution requires prior constitutional amendment. This is the context in which the Constitution provides for the government, Congress or the Senate to quest the constitutional Court to declare whether or not such contradiction exists (Article 95.2 CE).

The purpose of this procedure is to ensure certainty and incontestability of treaties within the legal order of the country. This procedure – which has to be seen as a mechanism that prevents the ratification of unconstitutional treaties − has only been used twice.

2. SPANISH CONSTITUTIONAL COURT'S ATTITUDE TOWARDS EU LAW

A) General doctrine: the correct application of EU law by national courts and administrative bodies does not concern the Court

Having studied the principal powers of the Spanish Constitutional Court, it is time to consider how EU law has been considered by the court. In my view, two elements define the court's attitude towards EU law: 1) Article 93 CE – which authorises the conclusion of treaties by which powers derived form the constitution shall be vested in an international organisation or institution – is considered as a procedural rule; 2) the court has considered that the correct application of EU law by national courts and administrative bodies does not concern itself, whose jurisdiction deals only with the defence of the Spanish Constitution. Let us study with detail this general attitude. In order to do so it will be useful to distinguish three points.

a) Initially, the Constitutional Court, with express reference to the Judgement of the European Court of Justice (ECJ) *Costa/ENEL*, of 15 July 1964, characterizes European Law as "a separate legal system", which is autonomous, comprising the original treaties (those creating the European Community), and the acts adopted by the European institutions, the provisions of which are binding on and are applicable in Spain (Judgement of the Constitutional Court 28/91 of 14 February 1991, FJ 4). Subsequently, the Constitutional Court identifies the grounds for the binding nature of European Law as lying in the ratification of the Treaty of Accession of Spain to the European Communities, and of the subsequent amendments to the constitutional Treaties. In effect, by ratifying these treaties, state sovereignty is expressed.

This initial approach has led the Constitutional Court to lay down a first statement which has influenced its caselaw. Given that the procedure for acceding to the said Treaties is set forth at Article 93 of the Constitution, said article becomes the formal source of validity of the said

Treaties; from this point of view, the Constitutional Court has characterized the said article as a merely procedural precept (Judgement of the Constitutional Court 28/1991, FJ 4; Statement 1/1992, FJ 4), specific for accession to a treaty that attributes the exercise of sovereign powers to an international Organization with normative capability, and the application of its laws rests with the Spanish judicial bodies and administration.

b) The Constitution, furthermore, provides for mechanisms to ensure that the treaties that make up primary European Law abide by and conform to its principles and rules. These controls are in the hands of the Constitutional Court, and as in the case of a prior appeal on the grounds of constitutionality (Article 95.2 of the Constitution), they have been duly used, or their use has not been ruled out (appeal for unconstitutionality – case 28/1991; a question of constitutionality).

It is for this reason that an eventual conflict between primary European Law and Spanish Law should not be beyond the control of the Constitutional Court, which is even empowered to conduct a material examination into the content of such a contradiction. But these control mechanisms refer exclusively to primary European Law, to the extent that, as is stated at Article 96.1 of the Constitution, once the treaties that constitute the said primary European Law have been validly subscribed and officially published in Spain, they become part of the Spanish legal system.

This particular approach (which derives from a literal interpretation of the corresponding articles of the Constitution and of the Organic Constitutional Court Act) allows us to understand the difficulties the Constitutional Court faces in dealing with secondary European Law, which given that it is adopted by institutions and sources which do not pertain to Spanish Law, cannot be checked against the Constitution for the purposes of examining its validity, nor can the Constitutional Court declare it to be invalid; this can only be done by the European institutions (ECJ), and in application of European Law.

c) From the foregoing the Constitutional Court has deduced that the task of ensuring the proper application of European Law by the public authorities rests with the ECJ and ordinary jurisdiction in a role which, in so far as Spanish courts are concerned, it has seen as merely a problem of selecting the applicable rule for the case in question. In order to reach this conclusion, the Constitutional Court once again relies on the provisions relating to the control of international treaties. The said Judgement of the Constitutional Court 28/1991 reflects well this approach: “Article 96.1 of the Constitution does not confer on any international treaty consideration beyond that of a norm which, in accordance with the passive status the precept confers on it, forms part of the internal legal system; such that the supposed contradiction of the treaties by laws or by other subsequent normative provisions is not a question which affects the constitutionality of the latter, and that therefore ought to be resolved by the Constitutional Court (Judgement of the Constitutional Court 49/1988, 14th legal ground, *in fine*), but rather, as it is purely a problem of selecting the applicable Law to the specific case, the resolution thereof corresponds to the judicial bodies in the cases they hear. Thus, a possible breach of European Law by subsequent national or regional laws or rules does not convert what is only a conflict of sub-constitutional rules into constitutional litigation, and which ought to be resolved at the level of ordinary jurisdiction” (FJ 5).

B) The case-law

It is thus understood that the Constitutional Court has concluded that the proper guarantee for the application of European Law by the public authorities is excluded from constitutional processes.

a) Conflicts of authority

In 1986 Spain joined the European Community, an international organization for integration which is attributed with the exercise of powers deriving from the Constitution (Article 93 of the Constitution). This initial assignment of powers has been increased with time by way of either a review of the constitutional treaties of the European Communities, or the very actions of the institutions of the European Union.

The impact of this process has had an effect on the internal distribution of powers between the central State and the Autonomous Regions as established in the Constitution, and inevitably the Constitutional Court has not remained on the sidelines. In general terms the Court has had to address two questions: 1) has the distribution of constitutional and statutory powers been altered as a direct consequence of the transfer of powers to the European institutions? and 2) does the enforcement of European Law, for which the central institutions of the State are responsible at an international level, allow the National Government to set up instruments in order to supervise how the Autonomous Regions enforce European Law in those matters falling within their jurisdiction as defined in the Constitution and in the Acts of Autonomy?

i) The constitutional order of competences and EU law

The case law of the Constitutional Court on the first question is characterized by the repeated statement that "the internal rules on the limitation of powers are those which under all circumstances must form the basis of the response to conflicts of jurisdiction arising between the State and the Autonomous Regions", given that neither the accession of Spain to the European Community, nor the promulgation of European norms, alter the established hierarchy of powers (Judgements of the Constitutional Court 252/1988, 76/1991, 115/1991, FJ 1).

From the foregoing statement the Constitutional Court has deduced that European Law cannot be a criterion for resolving conflicts over jurisdiction that are brought before it as a result of the approval of provisions adopted by State bodies for adapting domestic legislation to European Law.

The foregoing does not mean, however, that the Constitutional Court absolutely ignores European Law; quite the contrary, the Court has emphasized the use of taking it into consideration: only in this way – it has stated – can the internal scheme of distribution of powers be properly applied, which does not occur in a vacuum (Judgements of the Constitutional Court 13/1998, FJ 6, 128/1999, 38/2002). In this manner, European Law acts as an interpretation parameter for the distribution of powers laid down in the Constitution and the Acts of Autonomy. An examination of European Law is even thought to be compulsory in those cases where the institution or the techniques over which the dispute turns do not have a precedent in internal Law, on account of their being newly-contrived instruments, assimilated by us since the advent of European Law (as is the case, for example, in proceedings for the assessment of environmental impact).

FJ 7 of the Judgement of the Constitutional Court 45/2001 of 15 February neatly records the caselaw that may be deduced from this evolution in jurisprudence:

> "Likewise, in what constitutes an uninterrupted line of reasoning which was already present in the Judgements of the Constitutional Court 252/1988 of 20 December, and 132/1989 of 18 July, we have said that in constitutional proceedings European Law is not, *per se*, a canon or direct parameter for comparing or examining the acts and provisions of

the public authorities. And, more specifically, that "in the constitutional processes that arise as a result of positive jurisdictional conflicts, it is not possible to adduce reasons for the unconstitutionality of the acts or provisions other than those relating to the breach of the constitutional and statutory rules on the distribution of powers" (Judgement of the Constitutional Court 122/1989 of 6 July, FJ 5). However, this does not mean that this Court cannot take European Law into consideration, whether in order to conclude that the dispute is a question which "falls within the scope of European Law, and not within the scope of the internal distribution of powers, the subject of the constitutional conflict" (Judgement of the Constitutional Court 236/1991 of 12 December, FJ 10), or "to properly apply ... the internal scheme of distribution of powers" (Judgement of the Constitutional Court 128/1999, FJ 9), by way of a more precise determination of the power in question, which should be carried out bearing in mind the nature of the subject of the dispute over powers (Judgement of the Constitutional Court 13/1998 of 22 January, FJ 4)".

ii) The execution of EU law by the Autnomous Communities

Having established that the jurisdictional bounds of the State and of the Autonomous Regions are not altered as a result of the European Law connection, the question arises as to the enforcement of European Law.

The Constitutional Court has clearly stated that "the enforcement of European Law corresponds to whoever has material jurisdiction, according to the rules of internal law, given that a specific jurisdiction for the enforcement of European Law does not exist" (Judgement of the Constitutional Court 236/1991 of 12 December FJ 9). This statement has been made with the aim of setting a limit on the action of the State which, on the grounds of the principle of the exclusive jurisdiction of the State in international relations, has sought on occasions to extend its powers to all activities involving the development, enforcement, or application of international Conventions and Treaties, and in particular, to secondary European Law.

In effect, the State Legal Department has alleged on numerous occasions that the international obligations undertaken by Spain in a particular matter postulate an interpretation in favour of the State for the powers to carry out the tasks to which European Law refers. In doing this it has relied on the exclusive jurisdiction of the State in international relations (Article 149.1.3 of the Constitution).

The Court, however, has repeatedly and vehemently rejected this position. And in this regard, it has stated: "with regard to international relations, alleged as a heading alongside health in order to strengthen the State's jurisdiction over enforcement, the guarantee of the performance of the State's obligations does not entail that it ought to be the State Administration that should directly carry out the task of controlling and inspecting the distribution and administration of these products. Compliance with the said obligations is ensured by the rules themselves and the co-ordination of the national health service and legislation on medicines which corresponds exclusively to the State, but this in no way affects the distribution of executive powers between the State and the Autonomous Regions, which naturally could not be taken into account by pre-constitutional legislation". Or that responsibility for ensuring proper enforcement of European Law "does not allow the Government of the Nation to exercise enforcement jurisdiction which, as has been said, ought to correspond to whoever, by reason of the subject-matter, it has been attributed to" (Judgement of the Constitutional Court 45/2001 of 15 February 2001 FJ 7).

The Court, as has been stated, has shown a certain amount of firmness when establishing this limit given that, if it did not exist, "a notable void in the area of the powers that the Constitution

and the Acts of Autonomy attribute to the Autonomous Regions" (Judgements of the Constitutional Court 79/1992, FJ 1; 54/1990, FJ 3) could arise, on account of the progressive expansion of the material scope for the intervention of the European Community. This position, which was already present in the early Judgement of the Constitutional Court 125/1984, constitutes an uninterrupted line of reasoning: "the statement of the exterior dimension of a case cannot be used to carry out an expansive interpretation of Article 149.1.3 of the Spanish Constitution resulting in the State subsuming jurisdiction for all measures featuring a certain exterior dimension, no matter how remote, given that if this were the case it would result in a re-organization of the constitutional order itself for the distribution of powers between the State and the Autonomous Regions (Judgements of the Constitutional Court 153/1989, 54/1990, 76/1991, 80/1993, 100/1991).

Article 93 *in fine* of the Constitution ("The Lower House of Parliament or the Government, as the case may be, shall guarantee enforcement of these treaties and with the resolutions emanating from the international or supra-national organizations to which the assignment has been made") would likewise not justify an expansion of State powers. As has already been stated, the Court considers that "a specific jurisdiction for the enforcement of European Law does not exist".

Consideration of Article 93 of the Constitution, however, has led the Court to acknowledge that it is necessary to provide the Government with the necessary instruments in order to perform the guarantee function attributed to it by this article (Judgements of the Constitutional Court 252/1988, FJ 2; 79/1992, FJ 1), and for this purpose to acknowledge that it is constitutional to establish certain instruments to guarantee enforcement of European norms by the Autonomous Regions (to attribute to a State body or organization the resolution of applications for agricultural and livestock-farming aid as assigned by the EEC to the Kingdom of Spain, following unified selection thereof; the duty on the Autonomous Region to offer the State Administration, with such detail and within the time limit as set by the latter, such information as it may be requested to supply; etc.).

The acknowledgement of this possibility has been accompanied by important caveats. In effect, the Court has taken care to distinguish between an enforcement guarantee and enforcement itself (Judgement of the Constitutional Court 80/1993, FJ 3), has recalled that the provision of Article 93 of the Constitution does not of itself amount to autonomous jurisdictional entitlement in favour of the State, but rather it may only be so by way of a link with the State's jurisdiction in international relations (Judgement of the Constitutional Court 79/1992, FJ 1), and has invoked the general duty to co-operate that must necessarily govern the relations between the State and the Autonomous Regions (Judgement of the Constitutional Court 80/1993, FJ 3); which duty to co-operate takes the form, *inter alia*, of the need to ensure action is co-ordinated and that each one keeps the other informed.

b) Individual complaints relating to fundamental rights

But this exclusion has also been set forth with regard to appeals for mercy, which has given rise to an erratic caselaw and which has resulted in defencelessness for private individuals in the event of incorrect or arbitrary application of European Law on the part of national judges. As is well known, the Constitutional Court has repeatedly stated that the acts of the European institutions may not be appealed through an appeal for mercy.

The first occasion this occurred was the Judgement of the Constitutional Court 64/1991 of 22 March. The origin of this Judgement is to be found in the appeal for mercy filed by the *Asociación Profesional de Empresarios de Pesca Comunitarios (APESCO)* against the Resolution by the General Fishing Secretariat of 26 August 1986, which approved the project for the periodical listing of vessels authorized to fish in the fishing areas of the North-East Atlantic Fisheries Commission for September 1986, and against the Judgements of the National Chamber of 29 July 1987 and of the Fifth Chamber of the Supreme Court of 11 March 1988, which uphold the said project. In the appeal for mercy the said judicial decisions were accused of infringing the principle of equality (Article 14 of the Constitution) as well as a breach of due process which the appellants are entitled to (Article 24.1 of the Constitution). The accusation of discrimination – which it is now pertinent to focus on – was not formulated in autonomous manner, given that the accusation levelled at the judicial decisions was simply the confirmation of the originating inequality created by the Order of 12 June 1981 and by the act of enforcement that was being challenged. The response of the Constitutional Court consisted in stating that "it is not for the Constitutional Court to monitor the compliance of the activities of the national public authorities with European Law. This monitoring falls within the powers of the bodies of ordinary jurisdiction, in so far as they are responsible for applying European Law, and where pertinent the European Court of Justice through proceedings concerning failure by Member States (Article 170 of the TEEC). The task of ensuring the proper application of European Law by the national public authorities is therefore a question of sub-constitutional nature and thus is excluded from the scope of proceedings for mercy and from the other constitutional proceedings" [FJ 4].

In its reasons for the decision, the Constitutional Court once again made sole reference, as it did in the Judgement of the Constitutional Court 28/1991, to the Treaty of accession and examined it in the light of the constitutional provisions relating to international treaties, in this case Article 10.2 of the Constitution. Furthermore, the Constitutional Court based its decision on the previous Judgement of the Constitutional Court 28/1991, extending that which it had (correctly) held in the case of an appeal for unconstitutionality to all constitutional proceedings.

This generalization of its doctrine of "non-relevance" with regard to secondary European Law was definitively laid down in the Judgement of the Constitutional Court 111/93 of 25 March. The claim for mercy was on this occasion filed by Mr. Angel Gonzalo Gonzalo, a member of the self-styled *Asociación Profesional de Gestores Intermediarios en Promociones de Edificaciones (G.I.P.E.).* The plaintiff had worked as a professional real-estate broker, without holding the official Estate-Agent qualification, when, as a result of a complaint filed by the Official College of Estate Agents of Alicante, he was convicted by the Criminal Court no. 6 of the said city on a charge of impersonation pursuant to Article 321.1 of the Penal Code. Counsel for the appellant argued that the Judgements being appealed infringed his right to due process as enshrined at Article 24.1 of the Spanish Constitution, on the grounds that both the first-instance court and the appeal court had refused to refer to the European Court of Justice, pursuant to the provisions of Article 177 TEEC, a pre-trial question with regard to the compatibility of Royal Decree 1,464/1988 of 2 December, which grants exclusivity in the real-estate sector to Estate Agents and to Real-Estate Administrators, with the provisions of Article 3 of Council Directive 67/43/EEC of 12 January, concerning the attainment of freedom of establishment and freedom to provide services in respect of activities of self-employed persons concerned with matters of real estate.

In its reply the Constitutional Court held that the alleged infringement of Article 24.1 of the Constitution had not taken place in so far as the Judge held, in a reasoned decision, that there was no doubt as to the interpretation that ought to be placed on Directive 67/43 EEC, nor as to its non-applicability with regard to the facts submitted for judicial decision in the case (FJ 2). And in line with the caselaw established in its two previous judgements, it added to this statement, indicating that "Article 177 TEEC, alleged by the appellant, belongs to the realm of European Law and does not of itself constitute a canon of constitutionality" (FJ 2).

Thus, the Constitutional Court has tackled the disputes arising as a result of the application of secondary European Law on the basis of the constitutional provisions relating to constitutional control of treaties; provisions which have led it to consider European Law as the content of an international treaty and to apply the reasoning for the constitutional control of an international treaty to secondary European Law as well. Furthermore, it has extended this interpretation to all constitutional appeals, thereby endowing it with general scope which, when applied to appeals for mercy, has resulted in the Constitutional Court stating that it does not feel bound to intervene, whether mercy is being sought for the infringement of a fundamental right caused by an act of the public authorities which is thought to be contrary to European Law, or where the infringement of fundamental rights is as a result of the Spanish judicial bodies not filing a pre-trial question.

3. CHANGING THE ATTITUDE?

In 2004 the Court has passed two important resolutions dealing with EU Law. These resolutions are Judgement 58/2004, of 19 April 20 and Declaration of 13 December 2004. In both cases the Court has introduced significant changes in the most characteristics issues of its jurisprudential doctrine.

A) Declaration of 13 December 2004

The pronouncement on the Treaty establishing the European Constitution was to become the second declaration of the Tribunal Constitutional under Article 95 of the Constitution[2]. This declaration introduces a significant change, an overruling of the traditional characterisation of 93 of the Constitution as a procedural rule. As stated by the Court in its legal grounds No. 2, this characterisation should be considered within a "within precise co-ordinates", in relation to which it ought to be interpreted, and which under any circumstances are different from the framework within which the Court must now place itself.

This is determined by the question posed by the Government, which asked the Court to rule on the sufficiency of Article 93 of the Constitution in order to determine the channel for the integration of the Treaty into national law. From this perspective – the Court held – Article 93 has "a substantive or material dimension which should not be ignored":

> "Article 93 of the Constitution is without a doubt a basic constitutional ground for the integration of other legal systems into our own, by way of the assignment of the exercise of powers deriving from the Constitution, which legal systems must co-

[2] Being the first, declaration 1/1992 concerning the 1992 Maatricht Treaty.

> exist with the national legal system, to the extent that they are autonomous legal systems at source. In metaphorical terms, it could be said that Article 93 of the Constitution operates as a hinge through which the constitution itself allows entry into our constitutional system to other legal systems by way of the assignment of the exercise of powers" (FJ 2).

By making this statement, the Constitutional Court is acknowledging for the first time that "attribution of the exercise of powers creates a genuine material constitutional category, supra-national integration", thereby coming closer to the caselaw view on this subject. More importantly, the Constitutional Court deduces certain consequences from this view of the precept. The first, in line with what was stated in Declaration 1/1992, on the European Union Treaty, consists in stating that Article 93 of the Constitution "does not include a review channel equivalent to the procedures for constitutional reform regulated at Title X of the Constitution"; the second, which brings it closer to the theory drawn up by the Italian and German Constitutional Courts, consists in acknowledging that Article 93 of the Constitution itself imposes on the operation for the assignment of the exercise of powers to the European Union and on the resulting integration of European Law into our own law as allowed thereby has material limits – "inevitable for the sovereign powers of the State, acceptable only to the extent European Law is compatible with the fundamental principles of the social and democratic rule of law as established by the national Constitution" – which are not specifically provided for in this constitutional precept but which are specified by the Court:

> "respect for the sovereignty of the State, for our basic constitutional structures, and for the system of fundamental values and principles enshrined in our Constitution, where the fundamental rights acquire their own substantive nature (Article 10.1 of the Constitution)" (FJ 2).

By way of a third consequence, the Constitutional Court deems itself to have the authority, as a last resort and by way of the relevant constitutional procedures, "to tackle the problems arising (...) in the highly unlikely event that the subsequent course of European Law should lead it to become irreconcilable with the Spanish Constitution" (FJ 4).

B) Judgement 58/2004, of 19 April 2004

The second decision of the Constitutional court to be considered is Judgement 58/2004, of 19 April 2004.

The *recurso de amparo* arose due to a plea lodged before the tax authorities in Barcelona, in which the claimant contested the amount of the tax on gambling established in State Act 5/1990, and the regional surcharge established by Catalan Act 2/1987, as well as the increases estabilshed by the succesive budgetary laws, in particular that referring to the 1995 financial year. This plea was rejected, whereafter the claimant brought an action before the High Court of Justice of Catalonia, which was partly succesful.

With regard to State Act 5/1990, the Constitutional Court had declared the additional tax burden established in Article 38.2.2 for the year 1990 to be unconstitutional, due to a violation of the constitutional principle of legal certainty (Judgement 173/1996). The High Court of Justice of Catalonia held that the tax increases set out by the consecutive budgetary laws should also be deemed additional tax burdens, and, on its own authority and without requesting a ruling on the subject from the Constitutional Court, proceeded to extend the declaration of unconstitutionality

for the additional tax burden stipulated for 1990 to the increases established by successive budgetary laws. Consequently, in relation to the claimant's petitum, the High Court ordered the refund of amounts related to the tax increase, but not the tax itself in totum.

As for the regional surcharge over the national tax (which had been explictly declared constitutional by Judgement 296/1994 of the Constitutional Court), the High Court ordered a total refund of the same on the grounds that the national tax (on which the regional surcharge was based) was contrary to EU law, namely Article 33 of the Sixth Council Directive on the harmonisation of the laws of the Member States relating to turnover taxes.

The regional Government of Catalonia lodged a *recurso de amparo* against this decision on the grounds that "it does not solve the problems *secundum legem*, as it does not observe the system of sources of law. Thus, this is not a decision purely based on the Law, but, on the contrary, is rather based on an inconsistent, erroneous, arbitrary and unreasonable statement, as it fails to apply either Atc State 5/1990 and the Catalan Act 2/1987.

The Court agreed with the regional Government of Catalonia's position and consequently recognised the violation by the High Court of Justice of Catalonia of Article 24.1 of the Constitution, which sets up the guarantees that shape the content of the due process. The Court found that: "the system of sources of law has been disregarded, both due to the fact that the judicial body failed to request a preliminary ruling on constitutionality as laid down in Article 163 of the Constitution, which was the only avenue open to the same to set aside the rule applicable to the case in question, as well as to its total disregard for the effectiveness of a legal rule with force of Law. Such disregard has caused a violation of one of the guarantees that shape the content of due process".

Moreover the Constitutional Court considered:

> "when the Administrative Chamber of the High Court of Justice of Catalonia, independently to all other judicial doctrine on the matter, observes a contradiction between national and European law, it is, in the first place, giving rise to doubts as to the implementation of Community law, doubts that until that moment did not exist. Consequently, the judicial body – even having expressed no doubts as to the incompatibility between the domestic and the European provisions -, given that it precisely came to assume a contradiction which no other judicial body had observed, should have requested, in accordance with the doctrine of the European Court of Justice, the preliminary ruling laid down in Article 234 of the Treaty of the European Community, submitting to the consideration of the Court of Luxembourg the reasons or motives according to which it believed that national law might be incompatible with Community law, living aside any established interpretative criteria.
>
> It should be taken into account, for these reasons, that the existence or inexistence of doubt – in the context at hand – cannot be understood in terms of the judge's subjective opinion on a given interpretation of Community law, but in terms of an objective, clear and conclusive inexistence of any doubt in its application. Thus, what is relevant here is not the inexistence of reasonable doubt, but the inexistence of any doubt at all. Thus, the criteria applied by the Supreme Court, as well as by the other judicial bodies that concurred in finding that the incompatibility did not exist, should have raised sufficient doubts (in whoever might have understood otherwise) to request the preliminary ruling laid down in Article 234 EC before disapplying the domestic law due to its supossed contradiction with EU law. It should be highlighted, in this respect, that the existence of a

> prior ruling by the Court of Justice does not release a judicial body from the need to request a new EC preliminary ruling when it uses interpretative criteria in a manner that leads to a conclusion different from that expressed by the other judicial bodies".

As a result, the Court pointed out that:

> The decision not to apply domestic law on the grounds that is supposedly incompatible with Community law without previously requesting the preliminary ruling laid down in Article 234 of the Treaty establishing the European Community, adopted by a judicial body whose ruling is not subject to ordinary appeal and regarding an issue in which the judicial body itself differs from all applicable national judicial doctrine – constructed on the grounds of criteria held by the European Court of Justice in several rulings -, implies a violation of the guarantees that constitue the due process (legal ground No. 10).

The judgement contains four outstanding elements:

1) it grants mercy against a judicial infringement the immediate cause of which is a breach of Article 234 TEU. "It is true – it adds – that mercy is not granted on the grounds that Article 234 TEU is not complied with (this would be equivalent to granting European Law "constitutional status"), but likewise it should not be denied that to grant it on the grounds that it is said breach that gives rise to the infringement of the fundamental right protected by appeals for mercy, is tantamount to acknowledging, at least in practice, that European Law (in this case the duty to file the pre-trial question ex 234 TEU) may be of constitutional relevance;
2) it has added the duty to refer the pre-trial question to the ECJ to the content of the constitutionally-declared right to due process (24.2 of the Constitution), which therefore makes it capable of being protected by an appeal for mercy;
3) it has chosen in a clear and unequivocal way to carry out an overall examination of judicial reasoning, examining whether or not the decision not to refer the pre-trial question is in accordance with the law or if it has legal grounds;
4) this examination of the requirement for reasoning has been based on objective criteria to the extent that in order to assess whether or not the judge was in a situation of having a reasonable doubt which required him to refer the pre-trial question to the ECJ, this has been carried out in acceptance of the caselaw of the ECJ in the matter of pre-trial questions.

4. FINAL REMARKS

The importance of the two decisions of the Constitutional Court examined for the purposes of allowing judicial policy to be structured such that it allows an examination of the process of European legal integration is important: by way of Decision 1/2004 the Constitutional Court states that certain provisions of the Spanish Constitution lay down limits on the attribution of powers to the European Union and that such limits, even when implicit, make up the content of Article 93, and it has authority, as a last resort and by way of the relevant constitutional procedures, "to tackle the problems arising (...) in the highly unlikely event that in the subsequent course of European Law, this should become irreconcilable with the Spanish Constitution" (FJ 4); by way of the Judgement of the Constitutional Court 58/2004, it states that its traditional caselaw pursuant to which European Law does not have constitutional status does

not preclude it from "reviewing the judicial assessment of the possible contradiction between European Law and domestic law where this has resulted in an infringement of fundamental rights and public liberties set forth at Articles 14 to 30 of the Constitution [Articles 53.2 and 161.1 b) of the Constitution and title III of the Organic Constitutional Court Act] [Judgement of the Constitutional Court 64/1991 of 22 March, FJ 4 a)].

In this manner the conditions allowing the Constitutional Court to abandon its traditional view that European Law does not have constitutional status and relevance, and to draw closer to the view of legal judge held by the GFCC, which could without doubt lead to an increase in the number of pre-trial questions referred by Spanish courts. The difficulties and the workload involved in their preparation have been adequately recognized by the General Council of the Judiciary, which by way of a Plenary Resolution dated 3 December 2003, has given a high score (10 points, identical to the points awarded to writs raising the question of constitutionality and questions of illegality) to the dedication module corresponding to writs filing pre-trial questions before the ECJ.