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EUROPEAN UNIVERSITY INSTITUTE  
DEPARTMENT OF LAW

NATIONAL AND EUROPEAN STANDARDS OF PROTECTION  
OF HUMAN RIGHTS.

- The European Convention on Human Rights as a  
Source of the Constitutional Adjudication on Freedom  
of Expression in Spain -

ANGEL RODRÍGUEZ-VERGARA DÍAZ

This is submitted for assessment with a view to obtaining the Degree of  
Doctor of Laws of the European University Institute.

Florence  
1994

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**NATIONAL AND EUROPEAN STANDARDS OF PROTECTION OF HUMAN RIGHTS.**

- The European Convention on Human Rights as a Source of the Constitutional Adjudication on Freedom of Expression  
In Spain -**

**ANGEL RODRÍGUEZ**

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## INTRODUCTION

**"..above all, it must not be forgotten that the Convention, as is shown especially by its Article 60, never puts the various organs of the contracting states under an obligation to limit the rights and freedoms it guarantees." (The European Court of Human Rights, Handyside judgment of 7 December 1976)**

### **Higher Law. Lower standard.**

In 1993, representatives of the Constitutional Courts of European Countries held in Paris the IXth Conference of European Constitutional Courts. The general discussion panel was dedicated to the relationship between the domestic and the international systems of protection of Human Rights. In the *General Report* to the conference, the impact that both systems have on each other was pointed out<sup>1</sup>.

The *A ver* ("Let me see") case, decided ten years before by the Spanish Constitutional Court (hereinafter the *Tribunal Constitucional*)<sup>2</sup>, may be a good example of the existing interaction between the two systems: A publisher had been previously sentenced by a court for publishing an educational book on sexual matters with this title

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1 "In formal terms, the domestic system of protection of rights through constitutional review and the international system based on compliance with international instruments should operate independently of each other, since their points of departure are different. In practice, however, they are no longer independent, since they proceed from common point of reference which have comparable impact as they are received into each other." [ROBERT, J. (1994) "Constitutional and International Protection of Human Rights: Competing or Complementary systems? General report to the IXth Conference of European Constitutional Courts" in *Human Rights Law Journal* 15 pages 1-23 at 8]. [The cases and literature cited in the text will be quoted in a footnote by the name of the case and the date of the judgment or by the name of the author and the year of publication, apart from the first time each case or bibliographical reference is cited, in which a full quotation will be made in the footnote. A complete reference of the cases and the sources cited in the text can be found at the end of the work. See "sources and bibliography"].

2 *A ver* case, sentencia del Tribunal Constitucional 62/82 of 15 October 1982 in *Boletín de Jurisprudencia Constitucional* 19, pages 919-31. The case is taken now only as an introductory example. For a detailed discussion of this judgment, see *infra*, Chapter VII.

## INTRODUCTION

and had consequently brought the case before the *Tribunal Constitucional*. The *Tribunal* upheld the previous decision and ruled that morals were a constitutional legitimate limit to freedom of expression. The right to freedom of expression is expressly embodied in the Spanish Constitution. In the same provision a number of limits to this right are listed: morals are not mentioned among these. Moreover, the *Tribunal* did not state in its decision that, although not expressly mentioned, it can be deduced from the Constitution as a whole that morals should be regarded as a legitimate restriction to the freedom of speech: the only ground on which the *Tribunal Constitucional* can weigh morals against a fundamental constitutional right is by means of the European Convention on Human Rights, of which Spain is a member state and whose Article 10 expressly contemplates morals as a legitimate restriction to the freedom of expression.

As is well known, the European Convention on Human Rights (hereinafter quoted as "ECHR" or "the Convention") was drafted within the Council of Europe and signed in Rome in 1950. Its aim is to lay down in a binding agreement certain principles, also proclaimed in the Universal Declaration of Human Rights by the United Nations in 1948, and at the same time to provide for supervision of the enforcement of these principles. In order to achieve this, a number of fundamental rights are protected by the Convention provisions, and several bodies (namely, the European Commission of Human Rights, the Committee of Ministers of the Council of Europe and the European Court of Human Rights) were constituted to supervise its respect for the contracting states<sup>3</sup>. Both the European Commission and the European Court of Human Rights have interpreted and applied the Convention enabling a real protection of individual rights under the Convention law in Europe<sup>4</sup>.

In this thesis, Article 10 of the Convention, the Spanish constitutional provision

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<sup>3</sup> A general introduction to the European Convention as a whole, or to its mechanisms, will not be made in this work. With regard to these aspects, see JACOBS, F.G. (1975) *The European Convention on Human Rights*, Oxford:Clarendon Press; DIJK, P. VAN and HOOF, G.J.H. VAN (1984) *Theory and Practice of the European Convention of Human Rights*, Deventer:Kluwer; or FAWCETT, J.E.S. (1987) *The Application of the European Convention on Human Rights*, Oxford:Clarendon Press, among other general books on the Convention.

<sup>4</sup> As is known, both organs will merge in a single Court when the 11 Protocol to the Convention come into force, once it has been ratified by all member states to the Convention. See the text of the Protocol in (1994) *Human Rights Law Journal* 15 pages 68 ff.

## HIGHER LAW, LOWER STANDARD.

on the freedom of speech and also the *A ver* case will be discussed in depth. What is of particular interest here is that, through this decision, the Spanish Constitutional Court has used the European Convention on Human Rights to construe the domestic standard of protection on a fundamental constitutional right. And that, in doing so, it has introduced a new limitation to the freedom of speech which was not previously embodied in the Constitution, and by means of which it was possible for the *Tribunal Constitucional* to *uphold* a previous judicial decision restricting the scope of the right. What is noteworthy of this case is that if there had been no recourse to the Convention, it might be argued that a *higher* standard of protection of a constitutional fundamental right could have been reached.

The general assumption of this study is that, due to the so called *domestic impact* of the Convention, domestic courts frequently apply it in order to interpret domestic law on human rights. Moreover, as will be discussed in Chapter I, Constitutional Courts may equally apply the Convention when construing constitutional provisions on fundamental rights<sup>5</sup>. It is clear, however, that the international protection of human rights has not relieved domestic bodies from their central role in protecting fundamental rights. Accordingly, European institutions can only provide additional protection of the rights of the European individual: the State, and the State's law enforcing authorities, still remain as the essential bodies for the protection of human rights within their jurisdiction<sup>6</sup>.

Domestic courts and other domestic bodies may very frequently play an important

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5 It is remarkable that the application of the Convention as a source to interpret domestic constitutional provisions is usually made by the Constitutional Courts of the member states to the Convention without taking very much into account the formal rank that the Convention holds within each member state domestic hierarchy of laws. On the domestic legal position hold by the Convention in each member state, see *infra*, Chapter I (in general) and Chapter II (as for Italy and Spain).

6 The studies on the human rights protection at an international level all agree that the task for the international instance is only *control*, while the *protection* is for the State. See, for instance, the following paragraph from EVRIGENIS, D.J. (1978) "Le Rôle de la Convention Européenne des Droits de l'Homme" in CAPPELLETTI, M. (ed) *New perspectives for a common law of Europe - Nouvelles perspectives d'un droit commun de l'Europe*, Bruxelles:Brylant, pages 341 ff. at 346: "La sauvegarde des droits de l'homme est, par définition, du domaine de l'ordre qui exerce du pouvoir sur le plan de la vie sociale, donc du domaine de l'ordre étatique (..) L'Etat reste l'instrument de *réalisation* de la protection des droits de l'homme. Les mécanismes internationaux ne sont que des instruments de *contrôle* de la réalisation de ces droits par l'Etat et dans l'Etat". [emphasis added]

## INTRODUCTION

role, not only in the protection of the citizen's rights, but also in the integrative process of Human Rights law in Europe; the interaction between domestic and international instances, it is usually argued, is the source of positive dialectical developments for the protection of the fundamental rights of the individual. However, the domestic application of international standards can also lead to unexpected shortcomings. This work will discuss the general conditions under which domestic application of the ECHR may lead to a lower protection of fundamental rights than the one which might have been achieved by applying only domestic sources.

This possibility comes from the combined action of two features of the Convention which will be discussed in Part I of this study: its domestic application as a *higher law* and its *lower standard* of protection of the rights guaranteed therein. Part II will analyze three different legal systems in which domestic constitutional provisions must be interpreted in the light of a *higher law* on fundamental civil rights: in all these models, both legal literature and courts' practice have claimed that domestic *independent* interpretation of the domestic constitution should be preferred in those cases in which a *higher protection* on a fundamental right is in this way achieved. Chapter II will analyze how this question has been approached, as far as the Convention is concerned, in two member states to the Convention which have received the Convention as domestic applicable law, namely Italy and Spain. Chapter III will discuss how independent interpretation of state constitutions *vis a vis* the Federal Bill of Rights has been recently stressed in the United States. Chapter IV, finally, will turn back to Europe: the problem posed by two different standards on fundamental rights will be there studied as far as the European Union legal order is concerned.

Theoretical assumptions laid down in Part I and hypothesis drawn from the different legal models studied in Part II will allow us to study in Part III how constitutional interpretation is made by a member state's constitutional court in those cases in which both the Convention and the domestic Constitution provide for protection for the same fundamental right. This part of the work will therefore study the following crucial question: when *deference* to the Convention standard should apply and when, on the other hand, an *independent* construction of the domestic constitution should prevail?

An important methodological remark must be put forward at this point. Some

## HIGHER LAW, LOWER STANDARD.

works have appeared whose aim is that of studying the general application of the European Convention on Human Rights by the domestic courts in a single member state<sup>7</sup>. In order to do this, a number of judgments or decisions where the European Convention has been quoted - all of them within a specific period of time or covering a selected judiciary, such as supreme courts or constitutional courts - have been selected and analyzed. The approach, however, seems to be incomplete: in selecting the domestic decisions where the European Convention has been expressly quoted, two important elements may remain beyond the scope of the work: the extent to which the Convention may *not* have been applied when it should, and the extent to which domestic courts may apply the Convention standard *without* quoting it expressly. In other words, there is the danger of working on a self-fulfilling prophecy: decisions where the Convention is applied are the only field of study and conclusions are drawn stating - not surprisingly, it might be said - that domestic courts do in fact apply the Convention.. whenever they do so.

This circular approach must be avoided by making a different selection of the domestic case-law to be studied which should serve as a complement to the selection based on an express quotation of the Convention's provisions. This second group of domestic judgments should be selected not from the domestic decisions where the European Convention is applied, but from the most relevant domestic decisions covering one specific right protected thereby. These domestic decisions can be studied regardless of the fact that the European Convention is applied or not. They form a case study which will eventually support or reverse the conclusions drawn from the general review of the express application of the Convention. Moreover, due attention is in this way paid to the extent to which the outcome of the domestic decision is consistent with the Convention, although the domestic court's reasoning may diverge from the reasoning on the issue developed in Strasbourg. Indeed, it must be put forward that *consistency*, rather than *impact* is the crucial question for reviewing domestic law *vis a vis* the Convention.

Following this approach, Chapter V to IX will review how the Convention has been applied - or not - in the cases on freedom of expression decided by the Spanish

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<sup>7</sup> See for the case of Spain FERNANDEZ DE CASADEVANTE, C. (1988) *La aplicación del Convenio Europeo de Derechos Humanos en España*, Madrid:Tecnos, and BISCOTTINI, G. (ed) (1981) *La Convenzione Europea dei diritti dell'uomo nell'applicazione giurisprudenziale in Italia*, Milano:Giuffrè, for the case of Italy.

## INTRODUCTION

Constitutional Court. The freedom of expression is a fundamental right protected both by the Convention and the Spanish Constitution. Spain, as will be seen in Chapter II, has incorporated the Convention into its domestic legal order and has, moreover, a *sui generis* constitutional provision by means of which the Convention and the case law of the European Court of Human rights has a binding effect as for domestic constitutional construction. These aspects make the Spanish Constitutional Court's case law on freedom of expression a suitable case-study to analyze the interactions between the Convention and domestic constitutional adjudication.

The manner in which the freedom of expression has been embodied both in the Convention and in the Spanish Constitution (Chapter V); the *test* on imposed restrictions of the freedom of expression (Chapter VI), and the legitimate aims under which those restrictions may be imposed (Chapters VII, VIII and IX) will be studied in Part III.

At the end of the study, Part IV will summarize the main conclusions drawn.

**PART I**

**NATIONAL AND EUROPEAN STANDARDS OF PROTECTION OF  
HUMAN RIGHTS. SOME METHODOLOGICAL REMARKS.**

- I. **National and European standards of protection of Human Rights. Some methodological remarks.**



## CHAPTER I

### NATIONAL AND EUROPEAN STANDARDS OF PROTECTION OF HUMAN RIGHTS. SOME METHODOLOGICAL REMARKS.

**1) DOMESTIC COURTS AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS: THE PROBLEM OF STANDARDS.** 1. The different effects of the European Convention on domestic law; 2. Constitutional interpretation and the European Convention. (2) **DOES THE CONVENTION REALLY PROVIDE A MINIMUM COMMON STANDARD?** 1. Judicial activism and judicial self-restraint of the European Court of Human Rights; 2. The *consensus principle* and the "*notions autonomes*"; 3. The restrictions and the "*margin of appreciation*".

The first section of this chapter will discuss how the Convention is frequently applied as a source of constitutional adjudication, in spite of the legal rank it finds in the domestic law of the member states. In section (2) it will be argued that the Convention can only provide for a European *minimum*, in spite of the activism of the European Court of Human Rights during the last thirty years.

#### **(1) DOMESTIC COURTS AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS: THE PROBLEM OF STANDARDS.**

##### **1. The different effects of the European Convention on domestic law.**

The Convention is usually described as a fundamental step in the construction of an efficient system for the protection of human rights in the international field. It has been described, for instance, as "a landmark in the development of human rights protection", and as a "qualified success"<sup>8</sup>. The reasons for this success are to be found, more than in the substantive provisions of the Convention, in two specific characteristics which concern its application. They are both well known: the possibility for individuals under the jurisdiction of a contracting State to apply to the Convention bodies, according

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8 MORRISSON, C. (1967) *The developing European Law of Human Rights*, Leyden: Sijthoff, at 7.

**CHAPTER I**  
**METHODOLOGICAL REMARKS.**

to Article 25(1) ECHR<sup>9</sup>; and the homogeneous political context - Western Europe - in which the Convention is in force<sup>10</sup>. These two facts can be therefore quoted as two real causes for the success of the Convention<sup>11</sup>. However, they are mainly related to one aspect of the Convention: its international dimension, that is, the Convention as an international agreement.

As is well known, the typical effect of the Convention - as applied by the European Court decisions - is to generate an international responsibility for the State which has violated any of the guaranteed rights of the Convention. This so-called *direct effect* is perhaps the Convention's best known, and doubtless its most celebrated, feature. However, it poses a number of questions which have not yet received a definitive answer. The principal problem is that, according to the Convention system, the judgment of the European Court is only declaratory, that is, it is not a review of any domestic court decision. The problem derives from the fact that, due to the rule of exhaustion of domestic remedies before reaching Strasbourg bodies, the domestic court decision very often exists. If the European Court judgment is not a review of the domestic decision, how can the respondent State comply with its obligations under the Convention?

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9 Article 25(1) ECHR reads as follows: "The Commission may receive petitions addressed to the Secretary General of the Council of Europe from any person, non governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention, provided that the High Contracting Party against which the complaint has been lodged has declared that it recognizes the competence of the Commission to receive such petitions. Those of the High contracting Parties who have made such a declaration undertake not to hinder in any way the effective exercise of this right". The role played by the individual applications has been rightly qualified as "the key to the effectiveness of the Convention on the international level" (JACOBS, 1975:274)

10 Comparing the real effectiveness of the Convention with that of the United Nations Covenant on Civil and Political Rights, it has been stated that "It is in this, above all, that the advantage of a regional system is plain. The Convention speaks with a European voice, and governments may be more ready to listen to such a voice, representing a relatively homogeneous and like minded group of states with shared values, than would be the case in a wider or universal system. Much evidence of this has been provided by the various universal systems of protection already in force" (JACOBS, 1975:275-76).

11 Other factors can be quoted to this end, such as the important contribution made by the Convention and its bodies in implementing human rights as a real criterion of foreign policy to be followed by the member states of the Council of Europe; see, in this sense, FAWCETT, J. (1987b) "Algunas luces sobre los derechos humanos", in *Revista General del Derecho* 522, pages 1077-87 at 1078.

## (1) DOMESTIC COURTS AND THE ECHR.

### 1. THE DIFFERENT EFFECTS OF THE ECHR IN DOMESTIC LAW

how can the respondent State comply with its obligations under the Convention? Although it is the responsibility of each State to find a solution to this problem (according to its domestic legal order), the solution provided by the Convention does not go beyond the *friendly settlement* that the Commission is obliged to pursue, by virtue of Article 28(1)(b) ECHR<sup>12</sup> or the *just (economic) compensation* established in Article 50 ECHR<sup>13</sup>.

However, besides this "direct effect", there is an *indirect effect* of the Convention. It regards the application of the Convention by domestic courts (notwithstanding with the possibility of eventually take the case to Strasbourg, which always remains open for the individual). Furthermore, the Convention can be said to have a dual nature, with both an international and a internal or domestic side to it. It should be stated that one other facet of its success is due to the domestic sphere of the contracting states.

This thefore implies that the contracting states have two ways of understanding the Convention: that is to say, as an international agreement it establishes some international obligations for the State, whereas, to the extent to which it has any influence on the domestic juridical order, it can shape the domestic rules on human rights which can thereby be protected in a number of ways. This "ambivalence"<sup>14</sup> of the Convention makes it possible to measure its role both in the international and the domestic field.

The word "*impact*" has been used in a broad way to describe the different manners in which the member states can be influenced by the Convention. Five indicators of this influence were described in what was probably the first use of the word

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<sup>12</sup> Article 28(1)(b) ECHR reads as follows: "In the event of the Commission accepting a petition referred to it (..) it shall (..) place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for human rights as defined in this Convention".

<sup>13</sup> Article 50 ECHR reads that "if the Court finds that a decision or a measure taken by legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the present Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction for the injured party".

<sup>14</sup> The term ("ambivalencia") is used by CARRILLO SALCEDO, J. A. (1982) in *Actes du cinquieme colloque international sur la Convention des Droits de l'homme. Conseil de l'Europe Paris:A. Pedone, p. 218.*

**CHAPTER I**  
**METHODOLOGICAL REMARKS.**

*impact* in this sense<sup>15</sup>. Later, the concept of *indirect effect* was used to describe the influence of the Convention in the draft process, the application, the interpretation and the amendment of the existing law in the contracting states<sup>16</sup>. As well as this, a recent case-study analyzes new sources for describing the *impact* of the Convention in selected countries<sup>17</sup>. From all these studies it is clear that the domestic impact of the Convention is varied and wide. Notwithstanding the usefulness of the broad concept of the impact, only one kind of indirect effect of the Convention will be considered in this paper: the impact the Convention can have on domestic courts in deciding domestic law cases<sup>18</sup>.

According to the first studies on the application of the Convention by domestic courts, this type of impact was only possible once the Convention had been incorporated into domestic law. Incorporation was seen as a prerequisite for domestic application<sup>19</sup>. The incorporation of the Convention is another of the issues which the Convention itself leaves to be decided by each state. In spite of some early studies

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15 The following indicators were suggested: the extent to which the Convention stimulates changes of national legislation within the countries of the Council of Europe because of a decision of the European Commission or of a judgment of the European Court of Human rights; the extent to which these changes occur without any prior decision of the Commission or any judgment of the Court; the extent to which the Convention has been incorporated into the domestic Law within the contracting states; the extent to which it has been applied by domestic Courts; and the extent to which it is known by the peoples of the member states (MORRISSON, 1967:87).

16 JACOBS (1975:277)

17 Five accounts of the impact of the Convention in Scandinavian countries have been proposed: the theoretical point of departure as to the rules governing the relationship between international law and domestic law, the impact of the Convention in the legislative process, the application by domestic courts and other domestic bodies, a comparative perspective with other member states and the official governments' view as has been put forward in the proceedings before the European Court and Commission on Human Rights. See JENSEN, S. (1991) *The impact of the European Convention on Human Rights on Domestic Scandinavian Law. A Case-Law study*, Florence: European University Institute, Ph.D. Thesis, at 6.

18 As to the indicators which will *not* be analyzed here, several cases of changes in national legislation because of the action of the Convention bodies (in Austria, Belgium, Cyprus and Sweden), or without any prior action of any of this bodies (Norway), and conclusions based in statistical material on the extent to which the Convention is known by the peoples of the contracting States can be found in MORRISSON (1967:183 ff. and 194 ff.). See also JENSEN (1991:*passim*).

19 See BEDDARD, R (1967) "The status of the European Convention on Human Rights in domestic law" in *International and Comparative Law Quarterly* 16 p. 206-17

## (1) DOMESTIC COURTS AND THE ECHR.

### 1. THE DIFFERENT EFFECTS OF THE ECHR IN DOMESTIC LAW

which concluded that Article 13 ECHR obliged states to incorporate the Convention into their domestic law<sup>20</sup> and of the fact that the same conclusions can be drawn from the *travaux préparatoires* of the Convention<sup>21</sup>, the European Court clearly stated in a early decision that it is for each member state to decide if the Convention is to be incorporated or not<sup>22</sup>. Moreover, the domestic incorporation of the Convention does not seem to be a matter of great importance for the Council of Europe<sup>23</sup>.

Therefore, each State will decide whether to incorporate the Convention in domestic law, or not: in those states which belong to a monistic tradition on international law, the incorporation is automatically or quasi-automatically made by the official publication of the Convention in the State's Official Gazette; those states which appertain to a dualistic tradition need a formal act of incorporation (generally a statute passed by the Parliament) for the Convention to become domestic applicable law. Following this traditional approach, still another issue must be considered: the status the Convention, once incorporated, acquires within the domestic hierarchy of law, i.e., in the same position as any other domestic statute or prevailing over them, or even at a constitutional

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20 See, for instance, SUSTERHENN, A. (1961) "L'application de la Convention sur le plan du droit interne" in *La protection internationale des droits de l'homme dans le cadre européenne*, Paris:Dalloz, pages 303-35 at 318. Article 13 ECHR entitles everyone whose rights as set forth in the Convention are violated to have "an effective remedy before a national authority".

21 According to MIKKELSEN, N. (1988) "The implementation in national law of the rights and freedoms embodied in the European Convention on Human Rights" in DANISH CENTER FOR HUMAN RIGHTS (1988) *The implementation in National Law of the European Convention on Human Rights*, Copenhagen:DCHR, pages 90-106 at 91, "All the deliberations lead to the conclusion that all States Parties should incorporate the Convention directly into national law at an early date"

22 The Court ruled in its decision in the case of the *Swedish Engine Drivers's Union v. Sweden*, judgment of the European Court of Human Rights of 6 February 1976, in *Publications of the European Court of Human Rights*, series A, n. 20, that neither Article 13, nor the Convention in general, laid down for the contracting states any given manner for ensuring within their internal law the effective implementation of any of the provisions of the Convention. See BERGER, V. (1989) *Case Law of the European Court of Human Rights*, Dublin:The Round Hall Press, at 68.

23 Speaking for the official position of the Council of Europe, it has been pointed out that "... while this is a subject worth discussing by academics, judges and practicing lawyers on the domestic plane, it may not be that important, or even pertinent, in terms of discussions in Strasbourg" [DRZEMCZEWSKI, A. (1988) "The Council of Europe's position" in *The Implementation...*, *cit.*, pages 22-30, at 24]

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or quasi-constitutional rank<sup>24</sup>.

Notwithstanding the formal correctness of the above theory, a number of more recent studies have taken a more realistic approach to the Convention's indirect effect on domestic courts. The most important finding of these studies is that the Convention is frequently applied, in various forms, even in those countries where it has not been incorporated into domestic law<sup>25</sup>. And that, further, in those countries where it has been, the way in which the Convention is applied by domestic courts does not depend very much on the status the Convention holds within the domestic law hierarchy<sup>26</sup>. Domestic courts have applied the Convention taking it principally as a source of law, in the broad sense of the concept, or applying the Convention to interpret the domestic provisions of the case<sup>27</sup>. In sum, the domestic application of the Convention seems to be a matter of judicial policy, rather than a strictly formalistic question. The degree to which each domestic court is open towards international or European arguments seems to play a more important role than the legal issue of incorporation<sup>28</sup>.

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24 See a review of the situation in the different member states of the Convention in DRZEMCZEWSKI, A. (1983) *European Human Rights Convention in Domestic Law. A comparative Study*, Oxford:Clarendon Press, pp. 188-91. See also DOMINICE, C. (1972) "La Convention Européenne des Droits de l'Homme devant le juge national" in *Annuaire Suisse de Droit Comparé* 28 pp. 9-40.

25 For instance, for the case of the United Kingdom, a member state which has *not* incorporated the Convention into its domestic law, it has been put forward that "Although the Convention has not been incorporated into domestic law, it is surprisingly relevant in the domestic courts of the United Kingdom. The question of the relevance of the European Convention on Human Rights for the courts in the United Kingdom arises in a number of different ways (..) The Convention may be relevant (..) as an aid to statutory interpretation, as a part of the common law, as a part of Community law, as a factor to be taken into account by administrative bodies, due to a pending application in Strasbourg, due to the case law of the European Court of Human Rights and due to a friendly settlement under the Convention [CLAPHAM, A. (1991) *The privatization of Human Rights*, Florence:European University Institute, Ph.D. Thesis, at 13].

26 See, for the case of France, the different approach followed by the *Conseil d'Etat* and the *Cour de Cassation* in COHEN JONATHAN, G. (1985) "Rapport de synthèse" in COHEN JONATHAN, G. (ed) *Droits de l'Homme en France. Dix ans d'application de la Convention Européenne des droits de l'Homme devant les juridictions judiciaires françaises*, Strasbourg:Engel, pages 167-87, at 181 ff.

27 See DRZEMCZEWSKI (1983:60)

28 Legal incorporation, however, should not be underestimated, since it has a number of consequences. The principle one seems to be that in the states in which the Convention has not been incorporated a clear cut conflict between the Convention and domestic law is usually avoided, so domestic courts manage to reach a decision by the *interpretation* of domestic law according to the Convention meaning.

**(1) DOMESTIC COURTS AND THE ECHR.**  
**1. THE DIFFERENT EFFECTS OF THE ECHR IN DOMESTIC LAW**

**2. Constitutional Interpretation and the European Convention.**

Constitutional courts are among those domestic courts which frequently apply the Convention in the above mentioned manner. Constitutional courts, by means of constitutional adjudication, have the final word in the interpretation of the domestic constitution provisions. Usually, they give the meaning of a constitutional provision either to overrule a statute or to set up the constitutional interpretation to be given to it. When the case in question is a case in which fundamental rights are involved, constitutional courts may use the European Convention as a source to perform their task of interpretation.

There are a number of reasons which are very likely to make the constitutional courts sensitive to the Convention law: first, constitutional courts normally have the final word in fundamental rights cases; second, their composition usually differs from that of ordinary courts; and third, and perhaps most important, they must interpret constitutional provisions, which are usually ambiguous, and are used to go to a very broad field or sources to reach this interpretation.

The application by domestic constitutional courts of the European Convention on Human Rights in this way leads however to several problems. Leaving aside, for the moment, the formal problems (those that come from the domestic legal status given to the Convention), it may be assumed that the Convention is applied to construe domestic standards of fundamental rights protection. Despite the legal rank of the Convention (or, as has been already said, despite even the fact that the Convention may not have been incorporated into the domestic legal order), constitutional courts can apply it for the interpretation of domestic constitutional provisions on fundamental rights. In so doing, constitutional courts apply the European Convention as a kind of *higher law* as to fundamental rights are involved. It may well be asked if this way of applying the Convention as a source of constitutional adjudication is appropriate or not.

The main problem posed by this application of the Convention is the problem of the standards of protection. In brief, the problem of the standards can be summarized as follows: theoretically, the Convention sets up only a minimum standard on human

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rights protection, that is, only the minimum which the states must fulfil to comply with the Council of Europe requisites<sup>29</sup>. Where the Convention has situated the standard of protection at the minimum, it may be that domestic provisions on human rights provide for a higher level of protection. Clearly, under these circumstances domestic courts will prefer the higher domestic standard and this will prevail over the Convention.

The real problem however, is that this clear conflict between a Convention and a domestic provision very rarely exists. More frequently, there is not domestic standard on the question and it is for the constitutional or supreme domestic court to construe it. The reason for this is very simple: the cases in which there exist a previous clear standard do not reach the constitutional court, since they can be easily decided by lower courts and, besides, they do not pose any "constitutional question". This work, therefore, will concentrate on cases concerning fundamental constitutional rights, taken before the domestic constitutional court, in which the domestic constitutional court must construe the meaning of a constitutional provision.

In such cases, as some studies have revealed<sup>30</sup>, domestic courts may use the European Convention as a means of interpretation in several ways: as the main or only argument to grant the decision (*ratio decidendi*), as an additional (*a fortiori*) argument or even as an *obiter dictum*. In any case, however, there is a possibility for the Convention to be one of the arguments on which to decide on an alleged restriction of a fundamental right. In other words, the Convention will be applied to define the domestic standard of protection of the said right. Is this application of the Convention appropriate?

The *working answer* of this paper is the following: it depends on the consequences of the domestic court's decision: if the judgment reverses the alleged restriction on a fundamental right, then the Convention has been rightly applied. If the decision, on the other hand, confirms the restriction, the application of the Convention raises a number of problems: it may be assumed, as a starting point, that the Convention should never be applied by domestic courts to confirm a restriction on a

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<sup>29</sup> The issue whether the Convention is *really* the minimum common standard is discussed below, see *infra*, section (2) of this chapter.

<sup>30</sup> See JENSEN (1991)

**(1) DOMESTIC COURTS AND THE ECHR.**  
**2. CONSTITUTIONAL INTERPRETATION AND THE EUROPEAN CONVENTION.**

fundamental right. Clearly, it is correct to confront the alleged restriction with the Convention standard, but only if as a result the domestic court decides that a violation of the Convention, or of the domestic law interpreted according to the Convention, has been made. In such a case, provided that the alleged restriction does not comply with the Convention (that is, the minimum), it is clear that no additional argument is needed.

What happens, however, when the result of the review of the alleged restriction before a domestic court is that the Convention (or, the domestic law interpreted according to it) has *not* been violated? In this case, the domestic court must aim to construe the domestic standard applying domestic sources: once the restriction has passed the Strasbourg test, it must now pass the possibly higher domestic standard.

Previous research on the domestic case-law of one member state revealed that the Convention was likely to be quoted by the domestic constitutional court when an alleged restriction on a fundamental right was to be *upheld* by the court<sup>31</sup>. A provisional conclusion on this must point out that if the Convention is applied as the *ratio decidendi* or as an *a fortiori* argument to uphold a domestic restriction on a constitutional right, it is clear that the domestic standards have been construed from the European minimum, in spite of an independent construction of domestic sources by which a higher standard of protection of the alleged violated constitutional right could have been reached.

Two prerequisites are needed in order to make possible this application of the Convention: first, that the standard of protection established by the Convention may be lower than the standard attainable by only domestic means of interpretation<sup>32</sup>; and, second, that domestic courts may in practice go to the Convention, despite its domestic legal rank, to *uphold* a domestic restriction on a fundamental right. The second

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31 See JENSEN, S. and RODRIGUEZ-VERGARA DÍAZ, A. (1993) 'The European Convention on Human Rights in domestic law: A comparative study of the Convention's position in Denmark and Spain' in *The Nordic Journal of International Law*, forthcoming.

32 An important point, much discussed, is whether a concrete standard of protection of one right can really be said to be higher or lower than another, since the real issue would be always a balancing against other rights or social interests, so that a higher standard would simply mean that that one side of the balance has been more carefully weighted than the other. In this work, the question will be discussed when analyzing two of the comparative models proposed, namely the United States of America (see Chapter III) and the European Community (see Chapter IV).

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argument, which has been discussed in general in section (1), will be analyzed in depth in part III of the work, concerning a selected member state of the Council of Europe, namely Spain. The question whether the Convention really provides for a standard of protection lower than that of the domestic law will be discussed in the next section of this Chapter.

**(2) DOES THE CONVENTION REALLY PROVIDE A *MINIMUM COMMON STANDARD*?**

**1. The Convention as a minimum: Article 60 ECHR.**

It seems to be peacefully admitted that the intention of the drafters of the Convention was only to set up a minimum common standard on the protection of human rights for the countries of the Council of Europe. Three reasons can be given as an explanation: first, the international character of the Convention; second, its aim to create harmonization rather than to establish an uniform system; and third, the technical problems which arose from the drafting process.

The international character of the Convention made the drafters follow the traditional international law approach on human rights treaties; that is, the Convention was considered as a subsidiary remedy, needed of restricted interpretation due to the limitation of the state's sovereignty which was involved. Moreover, the decision-making process of public international law forced the member states of the Council of Europe to include only those rights which were accepted by all the member states at that point of time. Therefore, the rights embodied in the Convention were only those considered essential for the task of the Council, i.e. for the integration of European democracies. In the final analysis, only the most important and common fundamental rights were included<sup>33</sup>.

Secondly, given that harmonization was the integrative goal pursued by the

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<sup>33</sup> This does not mean that the Convention was not understood as a transcendental step in the international protection of human rights right from the start. Its more remarkable innovation, however, was not the list of included rights, but the details about the restrictions allowed to them and, above all, the control mechanisms established. Balanced against the protected rights, these two later aspects included in a binding agreement as the Convention was, were seen as being "novel and revolutionary" (Dijk-Hoof, 1984:182)

## (2) A MINIMUM COMMON STANDARD?

### 1. THE CONVENTION AS A MINIMUM: ARTICLE 60 ECHR.

Council of Europe, the principal concern was the final result, i.e. respect for the fundamental rights, and not the way the states would achieve this. However, it should be pointed out that harmonization could equally have been achieved by setting up a *maximum* level of protection and leaving the states to choose the way by which this was to be implemented: that is, the preference for harmonization, rather than for uniformation, does not necessarily imply that the minimum standard should have been chosen. It would, therefore, appear that a precise technique of harmonization (it has been labelled "harmonisation a effect minimum")<sup>34</sup>, was deliberately sought.

The third cause for a minimum standard outset concerns the divergences between the common-law and the continental civil law systems, which may well have posed some problems during the drafting of the Convention. The continental tradition promoted a simple listing of the rights to be protected, whereas on the other hand, the common-law tradition preferred a concrete definition of the rights, including the restrictions permitted. Although the final balance of the Convention can be said to be closer to the common-law technique<sup>35</sup>, the coexistence of two paragraphs referring to the most important rights protected by the Convention, i.e. paragraph one which describes the right and paragraph two which describes the restrictions permitted, would lead us to conclude that in the final analysis a balanced approach was preferred<sup>36</sup>.

In any case, it is clear that, for whatever reasons, the initial intention of the drafters of the Convention was only to define the minimum standard of protection. Let us then turn first to the solution provided for the problem of standards by the Convention system itself.

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<sup>34</sup> "On pourrait, dans ces conditions, qualifier la Convention d'instrument d'harmonisation a effet minimum. Son objectif en tant que facteur d'unification juridique est atteint dans le mesure où les Etats contractants se conforment à ses exigences tout en ayant la faculté de rehausser, dans leur ordre juridique, le niveau de protection fixé par celle-ci." (EVRIGENIS, 1978:351). Nonetheless, the author contrasts harmonization with uniformation, taking as an example of the latter the integrative techniques in private international law (ibid., at 350)

<sup>35</sup> See in this regard VITTA, E. (1962) *L'integrazione europea (studio sulle analogie ed influenze di diritto pubblico interno negli istituti di integrazione europea)*, Milano:Giuffrè, at 24

<sup>36</sup> The two-paragraphs system is present in the rights embodied in Articles 7 (principle of *nulla pena sine lege*), 8 (rights to privacy and family life), 9 (freedom of thought), 10 (freedom of expression) and 11 (freedom of peaceful assembly). In addition, some clauses of Article 5 (right of liberty and security) have the same meaning.

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Since the Convention was from the first moment intended to be the minimum common standard, it contains some provisions aimed at avoiding its application in such a way that could lead to a lower protection than the one provided for in a member state's domestic law. The most important provision as to this respect is Article 60 ECHR, which reads as follows:

"Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party"

The aim of Article 60 is that the European Court not construe any of the Convention provisions so as to limit guaranteed rights under the law of a state before the Court. The Court very rarely has occasion to do so. The scarcity of case-law applying Article 60 clearly illustrates this point: to date, Article 60 has been applied by the European Court only in two cases, and quoted in three separate opinions. In addition, it has been applied once by the European Commission, and it has been quoted once in a separate opinion of one of its members. Moreover, Article 60 has never been the real *ratio decidendi*, either of a case before the Court or of a case before the Commission. Whenever it has been cited, it has been as an additional argument, whereas the *ratio decidendi* was grounded on another provision of the Convention. The case-law, where it has been applied, however, does highlight some of the problems posed by this Article.

First, Article 60 may apply to the Convention itself, in the sense that no provision of any of the Protocols to the Convention can be understood as limiting the rights embodied in the Convention itself or in any other Protocol. Article 60 was applied in this way in the *Ekbatani* case<sup>37</sup>: the respondent government had argued that the right to an appeal before a higher tribunal in case of criminal offences was to be, according to Article 2(1) of Protocol number 7 to the Convention, "governed by law", that is, subject to specifications by domestic law<sup>38</sup>; accordingly, the fact that the applicant's conviction

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<sup>37</sup> *Ekbatani v. Sweden*, Judgment of the European Court of Human Rights of 26 May 1988, *Publications of the European Court of Human Rights*, series A, No 134

<sup>38</sup> Article 2(1) of Protocol number 7 to the Convention reads as follows: "Everyone convicted of a criminal offence by a tribunal shall have the right to have conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall

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had been upheld by cassation without an oral hearing was not a violation of the Convention. The government admitted that the Court had ruled that the right to a fair trial implied an oral hearing under Article 6(1) ECHR, but, in the government's understanding, only the fundamental guarantees embodied in Article 6 were applicable to the appeal proceedings protected by Article 2 of Protocol number 7. The right to an oral hearing was not among these fundamental guarantees. Contrariwise, in the Court's view, Article 2 of the Protocol number 7, as far as Article 6 of the Convention was concerned, was to be read in the light of Article 60. Therefore, a more limited understanding of Article 6 ECHR than the meaning it had before Protocol number 7 entered into force, could not be reached. In the Court understanding of the right to a fair trial, the right to oral hearings in appeal proceedings depended upon the special features of the domestic proceedings viewed as a whole. In the case now before the Court, the applicant's guilt or innocence could not be decided in the appeal proceeding without a full hearing. Thus the court ruled that the Convention had been violated by the respondent state<sup>39</sup>

Secondly, Article 60 has on occasion been applied to argue against the *consensus principle* as an interpretation technique of the Convention's rights. By the application of the *consensus principle*, the scope of a fundamental right as it is embraced in the domestic law of the member states is applied as a source for the interpretation to a right embodied in the Convention<sup>40</sup>. This was the case in the *Golder*

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bé governed by law."

<sup>39</sup> The Court based this opinion on the Explanatory Report of Protocol number 7, which, as to this point, states that "it was understood that participation of member states in the protocol would in no way affect the interpretation or application of provisions containing obligations, among themselves, or between them and other states, under any other international instrument" (paragraph 4). Further, the explanatory report added that "it is clear that this Article [Article 60] will apply in the relation between the present protocol and the Convention itself" (paragraph 43). The Report itself, prepared by the Steering Committee on Human Rights, states that it does not constitute an instrument providing an authority to the interpretation of the text of the Protocol, although "it might be of such a nature as to facilitate the understanding of the provisions contained therein". See the *Explanatory Report on Protocol number 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, Strasbourg, 1985. On the *Ekbatani* case in general, see DUK-HOOF (1985:292).

<sup>40</sup> On the consensus principle, see *infra*, this section

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case<sup>41</sup>, in which the Court construed the right to a fair trial under Article 6(1) ECHR as including a right to a judicial proceeding, that is, a right of access to court<sup>42</sup>. The ground for this interpretation was that the right of access was granted in the legislation of all member states and in civilized countries. Two separate opinions dissented from this way of reasoning: both agreed that under Article 1 ECHR, the obligation of the Convention signatory states was simply to secure to the individuals under their jurisdiction "the rights and freedoms defined in Section I of this Convention". Since Article 60 is in section V, domestic rights which are not expressly embraced in the Convention cannot be incorporated into the Convention mechanism, nor can they serve as a source to interpret the rights in section I<sup>43</sup>. It must be noted that Article 60 has also been applied by the majority of the Court in the same way as the above mentioned separate opinions, that is, as a ground to leave for the respondent state a *margin of appreciation* on how it must fulfil its obligations under the Convention<sup>44</sup>. As will be discussed below, a restriction to some of the Convention's rights is allowed, provided that the restriction is, among other requisites, "necessary in a democratic society". In the *Handyside* case<sup>45</sup>, the Court ruled that a restriction on freedom of speech in one member state could be regarded as "necessary in a democratic society", although the same restriction was not applied in other member states: Article 60 ECHR allowed some states to have a higher standard than others<sup>46</sup>.

On the other hand, in some other cases in which the *consensus principle* has not been applied, Article 60 has been quoted in separate opinions to oppose to this way of

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41 *Golder v. United Kingdom*, Judgment of the European Court of Human Rights of 21 February 1975 in *Publications of the European Court of Human Rights*, series A, n.18.

42 It should be noted that, at that time, the position of the Court and of the Commission were divergent as to this point. Later the right of access to court was peacefully accepted by both. See DIJK-HOOF (1985:296)

43 See separate opinions by Judge Verdross and Judge Zekia.

44 On the margin of appreciation, see *infra*, this section

45 *Handyside v. the United Kingdom*, Judgment of the European Court of Human Rights of 7 December 1976 in *Publications of the European Court of Human Rights*, series A, n.24

46 the literal quotation of the judgment of the Court can be found at the very beginning of this paper.

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reasoning: in the *Wemhoff* case<sup>47</sup>, the court had to decide whether the time during which the applicant had been detained without a trial could be considered "irraisonable" under Article 5(3) ECHR. Although a general reference was made that the meaning of the word "reasonable" was to be understood according to the domestic law and practice, the court did not in fact take into account the domestic standards of other member states<sup>48</sup>. A separate opinion argued that the court should have considered these standards, and cited (certainly as an *obiter dictum*) Article 60<sup>49</sup>. Besides, in a case before the Commission, the *East African Asians* case<sup>50</sup>, the Commission's report said that a right to enter into the State by its nationals was not to be protected by the Convention. A separate opinion argued that, since such a right already existed in domestic legislation, the Convention should have been, by virtue of Article 60, construed as containing it<sup>51</sup>.

Finally, there are two other cases which highlight the problems of regarding a domestic standard as a "higher standard" of protection: in the *De Wilde, Ooms and*

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47 *Wemhoff v. the Federal Republic of Germany*, Judgment of the European Court of Human Rights of 27 June 1968 in *Publications of the European Court of Human Rights*, series A, n. 7

48 For the opposite opinion, see GANSHOF VAN DER MEERSCH, W.J. (1980) "La référence au droit interne des Etats contractants dans la jurisprudence de la Cour Européenne des Droits de l'Homme" in *Revue Internationale de Droit Comparé* 32 pages 318-35 at 323.

49 Judge Zekia, dissenting, considered the fact that, in the United Kingdom, legal practice on the reasonable time to be trial does not allow more than six months, and stated that "Furthermore, Article 60 of the Convention saves rights and liberties enjoyed by individuals in their country if such rights and liberties are over and above those guaranteed by the Convention (..) but in our search for the proper understanding of the scope and effect of the words on 'reasonable time' occurring in Article 5(3) it is permissible, in my view, to examine the meaning attached to such word in judicial practice in a neighboring state country signatory of the Convention."

50 *East African Asians v. United Kingdom*, Report of the European Commission of Human Rights of 14 December 1973 in *European Human Rights Reports* 3

51 Commissioner Fawcett, in a separate opinion stated that "The necessary distinction is not made [in the Commission report] between a right created or accorded by the Convention itself and a right established under domestic law and practice and protected by the Convention. The fact, which is obvious, that the Convention does not in express terms creates or accord a right to entry to nationals, cannot be a ground for saying that the right when established in domestic law and practice, is not protected by the Convention, at least by Article 60 and in my opinion by Articles 5 and 14"

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*Versyp* case<sup>52</sup>, the Court found a violation of Article 5(4) of the Convention, since the legislation of the respondent State did not contemplate the right to challenge the detention of vagrants before a Court. The Court took into account that the detention of the applicants had been ordered by a Magistrate acting as a judicial body, but it pointed out that some guarantees had not been observed. A separate opinion quoted Article 60 to argue that the domestic standard was *higher*, since the detention itself was ordered by a Magistrate, so the review of the measure by a Court was unnecessary<sup>53</sup>.

Further, in the *Glimmerveen* case<sup>54</sup>, the Commission declared an application to be inadmissible on the ground of Article 17 ECHR<sup>55</sup>: a racist candidature concurring to local elections, aimed at encouraging racial discrimination, clearly falls under the scope of this Article, so that it could not seek the protection of the Convention organs. As an *obiter dictum*, however, the Commission took note of the argument of the respondent State that it was obliged under the treaty of Elimination of All Forms of Racial Discrimination to forbid such candidatures<sup>56</sup>; this was regarded as a *higher* standard

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52 *De Wilde, Ooms and Versyp v. Belgium* (vagrancy case), Judgment of the European Court of Human Rights of 18 November 1970, *Publications of the European Court of Human Rights*, series A, n. 12

53 Judges Holmback, Redenburg, Ross, Faure and Bilge stated that "It just finally be pointed out that, under Article 60 of the Convention, the provisions of the Convention may not be construed in a way that limits the rights ensured under national legislation. Hence, as the Belgian legislation goes further than Article 5(4) in that it institutes a compulsory supervision of the lawfulness of the detention - while the Convention provides only the possibility of taking proceedings - it takes precedence over the text of Article 5(4) on this point, and this precisely by virtue of Article 60 of the Convention."

54 *Glimmerveen and Hagenbeek v. The Netherlands*, Report of the European Commission of Human Rights of 11 October 1979 in *European Human Rights Reports* 4

55 Article 17 ECHR reads as follows: "Nothing in this Convention can be interpreted as implying for any State, group or person any right to engage or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention".

56 The International Convention on the Elimination of All forms of Racial Discrimination was adopted and opened for signature and ratification by the resolution 2106 A (XX), of 21 December 1965, of the General Assembly of the United Nations and entered into force the 4th of January of 1965. Its Article 4(b) establishes that the States Parties shall "declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organization or activities as an offence punishable by law.". See *Human Rights in international law. Basic Texts*, Strasbourg: Council of Europe Publications, 1985.

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as to the protection against racial discrimination. Article 60 was therefore also applied to declare the inadmissibility of the application.

This brief review of the application of Article 60 by the European Court and by the European Commission can lead to some first conclusions. It is clear that there is no consistent case law on Article 60. This seems to be because there has not been any necessity to apply it. However, some broad guidelines can be inferred from the above quoted cases:

First, Article 60 has been applied either to support or to oppose the *incorporation*<sup>57</sup> of domestic standards on fundamental rights to the Convention's guaranteed rights. Since Article 60 puts domestic standards over the Convention standard, provided that domestic standards embody a higher protection of a fundamental right, it has sometimes been interpreted in such a way that the domestic standard is binding upon the Convention organs. On the other hand, since Article 60 does not come under Section I, it has sometimes been interpreted as prohibiting the European Court to construe the rights embraced in the Convention following domestic patterns.

The problem of how to determine when a standard is *higher* is clearly shown by the *De Wilde, Ooms and Versyp* and the *Glimmerveen* cases. In *De Wilde*, some members of the Court found that a detention *ordered* by a magistrate provided a higher standard of protection than a detention *reviewed* by a judge. In the first case, the intervention of a judicial body was said to have occurred right from the initial stages and to have been compulsory, while in the second the judicial intervention came later and only as a result of a volunteer right to be exercised by the detained individual. However, the majority of the Court ruled that the fact that the detention was ordered by a Magistrate could not allow the respondent state to omit the right to challenge the detention before a judge, provided that fundamental guarantees had not been observed in the detention.

As well as this, *Glimmerveen* clearly shows the problem of establishing the *higher*

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<sup>57</sup> On the process of *incorporation* in the United States and in the European Community's human rights law, see *infra*, Chapters III and IV.

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standard when a conflict of rights is involved. Since there are several rights to be balanced, a *higher* standard for the right which prevails would mean a *lower* standard for the other right. Certainly, the Treaty of Elimination of All Forms of Racial Discrimination ratified by the respondent state provided a *higher* standard of protection for the right not to be discriminated on the ground of race, but, just as clearly as this, the treaty allowed a *lower* standard of protection for the right to freedom of expression.

Finally, the question may be posed as to what extent Article 60 is applicable when there is *no* previous domestic standard and the Convention has been applied by domestic courts to construe it. It is clear that it is not for the European Court to control the application of domestic standards independently<sup>58</sup>.

It follows that the case-law of the Convention organs on Article 60 ECHR provides very little guidance for the topic at hand; not only is there no relevant case-law on Article 60, but it can be speculated that it is very unlikely that the Court will declare a violation of the Convention solely on the ground of this Article. It would seem that an application of the Convention by domestic courts as the only source for construing a domestic provision on human rights would remain unreviewed by the Strasbourg control mechanisms, even if this application has not taken into account the spirit of Article 60 ECHR: clearly, it is not for the European Court, at least at the present stage of the European integration, to review the application of domestic law in the case of domestic standards.

### 2. Judicial activism and judicial self-restraint of the European Court of Human Rights.

The interpretation given to the Convention provisions by the European Court of

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<sup>58</sup> The only way in which the Court could do so is by construing a convention right following domestic law by mean of the *consensus principle* as is discussed *infra* in this section. However, the Court has never found an independent violation of Article 60, that is, it has never ruled that a member state, having complied with a convention right, has nonetheless violated Article 60 because it has breached a higher domestic standard of protection on the concerned right. Moreover, it would be debatable whether an applicant under these circumstances could be considered to be a "victim" in the sense of the Convention. On this concept, see SPERDUTI, G. (1979) "Sur la garantie par les ordres juridiques internes des droits reconnus dans la Convention européenne des Droits de l'Homme", in *Mélanges Fernand Dehousse*, Paris:Nathan vol. I, pp. 227-30.

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Human Rights is of crucial importance in order to establish to what extent the Convention still provides only for the minimum common standard of protection of human rights in Europe; it has frequently been alleged that, in spite of the initial character of the Convention, which has since then been attributed to it, the judicial interpretation has altered the nature of the Convention into something which diverges fairly substantially from the original minimum standard.

Certainly, the Convention as such is an international agreement and its international features hindered an extensive interpretation by the means of which the initial *minimum* could be abandoned. The member states are able to benefit from this features, by applying to the Convention certain possibilities allowed by public international law. For instance, according to Article 64 ECHR, the states can make reservations or interpretative declarations when signing it<sup>59</sup>. The member states have made very broad use of the capacity the Convention recognizes for them to make such reservations. Although Article 64 does not allow for much of a margin for the granting of such a broad interpretation, the Convention bodies seem to have accepted that such recourse is feasible<sup>60</sup>.

However, despite the Convention's international nature, the methods of interpretation developed by the Court includes certain specific features which can only with difficulty be included in the general techniques of interpretation of international law provided by the Vienna Convention on Treaties. Unlike the common public international

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**59** Article 64 ECHR states as follows: "1. Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this Article.- 2. Any reservation made under this Article shall contain a brief statement of the law concerned."

**60** See DIJK-HOOF (1984:449-52). The trend seems to be an old one, since in 1975 JACOBS (1975:213) had already argued that "the Commission has given a rather extensive interpretation of those reservations which have been made. Thus it has held that a reservation may serve to exclude not only measures expressly covered by the reservation, but also other related measures (..) the Commission appears to have gone too far in accepting that a later law in the same field might be brought within the scope of a reservation." The most evident case, in general, on this matter, could be that of the general reservation made by France as to Article 15 of the Convention, as far as it may concern the powers of the President of the Republic under the French Constitution. According to DIJK-HOOF (1984:452) "it is doubtful whether such a reservation is permissible under the European Convention".

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law approach, the Court's starting point for the interpretation of the Convention implies approaching it as embodying "*objective obligations*" for the contracting states.

The objective character of the obligations under the Convention was first proclaimed by the European Commission of Human Rights in the *Pfunders* case<sup>61</sup>. According to this principle, the Convention does not specify reciprocal rights for the Contracting states but rather the obligation for the contracting states to protect the enjoyment by the individual under its jurisdiction of the rights embodied in the Convention. In this sense, the obligations for the states within the framework of the Convention are *objective*, since they neither constitute a subjective right for a third state, nor do they depend on any rule of reciprocity<sup>62</sup>.

The main consequence of this conception is that two important principles of interpretation of international law do not apply to the Convention. First, the principle that treaty obligations should be interpreted restrictively, since they imply a restriction of the sovereignty of states. In fact, a real improvement in the field of human rights very rarely took place without measures which implied some kind of restriction of sovereignty. As the Court stated in the *Wemhoff* case, it is "necessary to seek the interpretation that is most appropriate in order to realize the aim and achieve the object of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the Parties"<sup>63</sup>. Second, the "travaux preparatoires" are employed by the Court in the task of interpretation in a lower degree than is usual in public international law, in order to escape from an interpretation which does not fit the aim of protection of the

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<sup>61</sup> *Austria v. Italy*, decision of the European Commission of Human Rights as to the admissibility of 11 January 1960, in *Yearbook of the European Convention on Human Rights* (1961) 4, p. 116 ff.

<sup>62</sup> The Commission stated in its report that "The obligations undertaken by the High Contracting Parties in the Convention are eventually of an objective character, being designed rather to protect the fundamental rights of individual human beings from infringement by any of the High Contracting Parties than to create subjective and reciprocal rights for the High Contracting Parties" (p. 140)

<sup>63</sup> *Wemhoff* case, judgment of the ECtHR of 27 June 1968, *cit.*, paragraph 8, as quoted by JACOBS (1975:17)

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individual<sup>64</sup>.

It is interesting to note that the judicial activism by which the Court has reached a progressive interpretation of the Convention makes it resemble a constitutional court more closely than to classic international court. Although the differences between the Court and domestic constitutional courts obviously persist in a number of areas<sup>65</sup>, there are two points in the Court case-law which make its approach to the Convention very similar to that of a typical constitutional court reasoning.

First, the court is usually as equally or even more concerned with the establishment of the law according to the Convention than to the concrete case before it. Therefore, the Court does not apply the functional distinction between international and domestic law to the Convention but, rather, it interprets its provisions taking into account the Conventions's aim of protecting the rights of the individual<sup>66</sup>. Although the Court's decisions have no legal binding force *erga omnes*, the Court is very conscious of the fact that the interpretation given to the Convention will rule in other cases before domestic courts in which a violation of the same Article of the Convention is alleged.

Second, like constitutional courts, the Court feels that its task of applying the Convention includes an interpretation of its provisions which make it possible to update the meaning of the Convention to the present time. As a result of this evolution, the Court's judgments stress the nature of the Convention as a "living instrument", the need for a "dynamic" or "liberal" interpretation of its provisions in the light of new circumstances which were not present when the Convention was passed, the function of the Convention

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64 Freedom of Expression is a good example of the limited scope the preparatory works can provide to an accurate interpretation of the Convention, even as a supplementary means under Art 32 of the Vienna Convention, since they clearly show that the protection of Article 10 was initially intended to cover only the classical political speech; see SAPIENZA, R. (1987) "Pubblicità commerciale e libertà d'espressione nella Convenzione Europea dei diritti dell'uomo: il caso Barthold" in *Rivista Trimestrale di Diritto Pubblico* 37 at 736.

65 See VITTA (1962:33-34), who also discusses the different effects of the Court's decisions and the decisions of the European Court of Justice as a supranational court

66 See DRZEMCZEWSKI (1983:54)

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to serve the basis of "l'ordre public européen", and so forth<sup>67</sup>. It follows that there must be "a broad (..) interpretation of the Convention's substantive provisions"<sup>68</sup>, that the Convention "must be interpreted in the light of developments in social and political attitudes"<sup>69</sup>. Clearly, these methods of interpretation do not turn the Convention into a Constitution, but they render the outcome of the Court's decisions rather similar to what can be expected from the interpretation of a Constitutional Bill of Rights.

Moreover, the Court's behaviour as a constitutional court regards not only its approach to the Convention as a constitution, and the interpretation techniques which have arisen from this approach, but also to the way in which domestic law is considered. Further, a review which is very close to an *in abstracto* control of the relevant domestic law has sometimes been achieved both in inter-states cases and in individual complaints under Article 25 ECHR. Several cases illustrate this last point: in the case of *Klass and others*<sup>70</sup>, the German Constitution was examined with regard to the right to privacy as protected by Article 8 ECHR. Although the Court finally stated that there was no conflict between the two, an *in abstracto* examination of the relevant provision of the German Constitution was carried out<sup>71</sup>; again, in the case of *Luedicke and others*<sup>72</sup>, the Court

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67 The word "dynamic" is applied to this kind of interpretation by JACOBS (1975), while the word "liberal" is used by MORRISON (1967). Besides this, a discussion on the Convention as "ordre public" can be found in GANSHOF VAN DER MEERSCH, W.J. (1968) "Does the Convention have force of 'ordre public' in municipal law?" in ROBERTSON, A.H. (ED) (1968) *Human Rights in national and international law. Precedings to the Second International Conference on the European Convention on Human Rights*, Manchester:Oceana, pages 97-150.

68 MORRISON (1967:205)

69 JACOBS (1975:18)

70 *Klass and others v. Germany*, Judgment of the European Court of Human Rights of 6 September 1978 in *Publications of the European Court of Human Rights*, series A, n. 28,

71 In 1968, an amendment to Article 10(2) of the German Basic Law was passed, and subsequently an act of Parliament restricted the rights to secrecy of the mail, post and telephone, and excluded any remedy before a court in respecting the ordering and implementation of the surveillance measures. Instead of a judicial proceeding, a supervisory parliamentary board was settled. The case before the European Court was indeed more delicate, since the German constitutional court had stated in a judgment of 15 December 1970 that the enacted law was compatible with the German constitution except as far as it excluded subsequent notification to the affected person in cases in which such notification would not jeopardize the purpose of the surveillance. See BERGER (1989:101).

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decided that the implementation of a German law governing liability for costs in criminal proceedings was a violation of Article 6(1) ECHR; in fact the German law did not allow for any another type of implementation<sup>73</sup>.

Moreover, other cases highlight the way in which the Court's behaviour can be said to be similar to other typical outcomes of constitutional court decisions: in the case of *Marckx*<sup>74</sup>, for instance, the Court expressly affirmed that it was entitled to an *in abstracto* control of the Belgian domestic law<sup>75</sup>; and then it limited the possible retroactive effect of the judgment<sup>76</sup>. Again, in the case of *Rees*<sup>77</sup>, the Court gave a recommendation to the respondent Government (United Kingdom) in a very similar way to the recommendations that constitutional courts sometimes give to the legislatures<sup>78</sup>.

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<sup>72</sup> *Luedicke and others v. Germany*, Judgment of the European Court of Human Rights of 28 November 1978 in *Publications of the European Court of Human Rights*, series A, n.29

<sup>73</sup> The existing German domestic law obliged the convicted person who could neither speak or understand German, to pay the cost of interpretation in criminal proceedings. The Court held that this was a breach of Article 6(3) ECHR, which clearly provided for free language interpretation. After the Court's judgment, Germany changed the existing law to avoid other complaints. See BERGER (1989:105).

<sup>74</sup> *Paula and Alexandra Marckx v. Belgium*, Judgment of the European Court of Human Rights of 13 June 1979 in *Publications of the European Court of Human Rights*, series A, n. 31

<sup>75</sup> Answering a preliminary exception from the Belgian government, the Court pointed out that Article 25 ECHR entitled individuals to contend that a law violated their rights in the absence of an individual measure of implementation, if they risk being directly affected by it. See BERGER (1989:115)

<sup>76</sup> This is also typical of a constitutional court's decision. The Court stated that "the principle of legal certainty, which is necessarily inherent in the law of the Convention as in Community law, dispenses the Belgian state from re-opening legal acts or situations that antedate the delivery of the present judgment. Moreover, a similar solution is found in certain Contract States having a constitutional court: their public law limits the retroactive effect to those decision of that court that annul legislation" (paragraph 58). According to GOLSONG, H. (1988) "The European Court of Human Rights and the national law-maker: some general reflections" in *Protecting Human Rights in Europe.. cit.*, pages 239-44 at 242, "What is noteworthy (...) is the manner in which the European Court of Human Rights compares its own position and to a certain extent even its own judicial power with that of the European Court of Justice and most astonishingly also with the Constitutional Courts that exist in some Contracting States.."

<sup>77</sup> *Rees v. United Kingdom*, Judgment of the European Court of Human Rights of 17 October 1986, *Publications of the European Court of Human Rights*, series A, n.106.

<sup>78</sup> The case was originated by the complaint of a transsexual whose certificate of birth had remained unchanged after her change of sex by surgery. The Court did not find in the negative of the respondent government to change the certificate of birth of the applicant a violation of the

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The Court's behaviour as a constitutional court, in this and other cases<sup>79</sup>, has given rise to some criticism<sup>80</sup>. Leaving aside the discussion on this issue, what can clearly be deduced from this case-law is that the Court has to a high degree left the public international law reasoning in construing the meaning of the provisions of the Convention. Although the extent to which the Court sees itself as a constitutional court is open to discussion<sup>81</sup>, the outcome of its decisions are frequently similar.

The objective of the Court has, then, come to be the definition of a "European" standard of protection, rather than the original minimum. As a result, the Court is concerned not only with serious violations of human rights but also with the ordinary measures of member states which can involve the restriction or limitation of fundamental rights of the individual. The "European" standard turns then to come from a precise

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Convention, but added in its judgment that "...it must for the time being be left to the respondent State to determine to what extent it can meet the remaining demands of transsexuals. However, the Court is conscious of the seriousness of the problems affecting these persons and the stress they suffer. The Convention has always to be interpreted and applied in the light of current circumstances (...) The need for appropriate legal measures should therefore be kept under review having regard particularly to scientific and societal developments." (paragrahp 47). According to GOLSONG (1988:243), the European Court in this judgment "came close to a device once used by the German Federal Constitutional Court, when that court in the early sixties, instead of invalidating a given piece of legislation (...) used as a first step a recommendation, or even an appeal, to the legislature to act along the lines indicates by the court". On the case, see also BERGER (1989:331-33).

79 A critical full report of the cases discussed in the text can be found in GOLSONG (1988), who expressly criticizes the behavior of the European Court as a Constitutional Court. In addition, GOLSONG also discusses as to this respect the following cases: *De Becker vs, Belgium*, Judgment of the Court of 27 March 1989, *Publications of the European Court of Human Rights*, series A, n. 4; the *Belgian linguistic case*, Judgment of the Court of 23 July 1968, *Publications of the European Court of Human Rights*, series A, n. 6 and *Kjeldsen and others vs Denmark*, Judgment of the Court of 7 December 1976, *Publications of the European Court of Human Rights*, series A, n. 23.

80 GOLSONG (1988:243-44) offers at least the following four arguments for criticising the Court's behaviour: first, the Court does not operate in a fully structured legal system but in a multilateral treaty; second, it can hardly make an appeal to one legislature without doing so to the legislatures of all member states; third, the task of the Court is to remedy individual violations and it is for the State to draw conclusions from the Court's judgment; and fourth, the Court's task, unlike the European Court of Justice, is not to promote integration, which comes only as an indirect effect of the protection of the individual's right.

81 The same analysis that WEILER, J. (1986) "Eurocracy and distrust: Some Questions concerning the Role of the European Court of Justice in the Protection of Fundamental Rights", *Washington Law Review*, pages 1103-42 applied to the self-image of the European Court of Justice could also be applied to the Court. See, on this issue, infra chapter IV

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interpretation of the provisions of the Convention, and from the highly technical questions which the application of the Convention involves<sup>82</sup>. Therefore, such a standard should come about as a result of particular interpretation principles and techniques applied by the Court. Thus, particular interpretation principles like the *consensus principle*, the existence of "*notions autonomes*" in the Convention's provisions, or the *margin of appreciation* of the contracting states when applying the Convention's allowed restrictions to the protected rights, have been developed by the Court.

The extent to which such techniques, as a result of a combination of judicial activism and judicial self-restraint of the Court, can increase the standard of protection from the original minimum will be discussed in the following pages.

### 3. The *consensus principle* and the "*notions autonomes*".

The domestic law of member states is frequently referred to by the Convention organs, either the Commission or the Court. Obviously, they have to take into account the law of the concerned State whenever a domestic measure is being confronted with the Convention's provisions. In this case, however, they do not interpret the domestic provisions. On the contrary, this task of interpretation is left to the domestic authorities: in other words, the meaning of domestic law does not lie at the heart of Strasbourg decisions. Compatibility, or not, with the Convention is the only issue addressed. The Convention organs do not scrutinize the domestic law of the concerned state whenever they have to decide a case. Even when the alleged violation comes directly from the application of a domestic provision, the understanding of its meaning is assumed to be in accordance with the domestic interpretation. The Court, then, only reviews the compatibility between the domestic provision and the Convention.

However, the domestic law of *all* member states, regarded as a whole, plays quite a different role. It is taken as one of the sources for the interpretation of the

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<sup>82</sup> "In other words, a human-rights regime that is indeed working-and not a paper idea - will be normally and mainly concerned not so much with the outrageous, but with highly technical questions, e.g. concerning trade unions and their membership, the right to work, police powers, the *minutiae* of due process of law and the same" [JENNINGS, R. (1988) "Human Rights and domestic law and courts" in *Protecting Human Rights*. cit., pages 295 ff at 298].

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Convention itself, by means of the so-called "consensus principle". The technique of the consensus principle is closely related to the "dynamic" interpretation given to the Convention's provisions. In brief, it means that the Convention organs go to the general rules of law which can be found in the common legal culture of European states, whenever they must to apply this kind of interpretation.

The consensus principle, on the one hand, gives a great degree of legitimation to the "dynamic" interpretation: provided that, in a concrete case, the aims of the Convention to protect human rights cannot not be achieved unless an extensive interpretation is given to the Convention, traditional rules of international law remain useless; by applying the consensus principle the extensive interpretation can be addressed to the "common values" of Europe. Therefore, when a "dynamic" interpretation is required, the "consensus principle" has frequently been applied by the Convention bodies to supply the proper meaning of some of the Convention's provisions. Accordingly, the interpretation of the Convention may legitimately be based on a legal or constitutional tradition common to the member states of the Council of Europe.

Theoretically, the consensus principle is therefore an appropriate technique by which to increase the Convention's standard of protection. On the other hand, however, it involves a number of technical problems which can jeopardize this outcome. These will now be briefly discussed: firstly, those problems arising from the fact that the relevant national laws are not always available and applied by the Court; secondly, the degree to which the common principles must really be "common" to all member states; and thirdly, what may be the main question for the purposes of this work, the extent to which this technique can effectively contribute to the enforcement of a high standard of protection of human rights, for, not infrequently, these enforcements could derive from new processes of implementation, rather than from more old-fashioned (although common) principles; this last point is applicable, above all, whenever the "consensus" technique concerns the express restrictions laid down through the "second paragraph" system.

First, how can these "common values" be uncovered? The Convention organs do not scrutinize the law of all member states to infer these values. Indeed, whenever domestic law is quoted as a source for the interpretation of the Convention, usually only

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general expressions are used, without a concrete reference to the applicable domestic law<sup>83</sup>. The concern of the Convention organs seems to lie principally with the "general meaning" or "general rules" that are presumed to exist in - or, perhaps more appropriate, behind - the juridical orders of the member states<sup>84</sup>. For instance, the principle of "mater semper certa est" on which the Court grounded a broad interpretation of the concept of "family life" under Article 8 ECHR in the *Marckx* case<sup>85</sup>, or the accepted "general trend" in the member states concerning corporal punishment as applied in the *Tyler* case<sup>86</sup>.

These "values", secondly, must be *common* to the member states. The extent to which the applicable values must be shared among the contracting states remains unclear: does it refer to all member states? With such a rule, the principle would then become useless, since the respondent state before the Court or the Commission will always contradict this unanimity and, therefore, the mere fact that a state has not contemplated the value in question will mean that it is not present in all the contracting states; as has been said, recourse to the consensus principle contains a paradox, since the domestic law which has allegedly breached the Convention is at the same time a part of the parameter which establishes the compatibility with the Convention<sup>87</sup>. The only way to solve this paradox is by appealing to a "droit commun", although this provides

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<sup>83</sup> According to GANSHOF (1980:324), the general reference is only to "droits des états membres", without more specifications.

<sup>84</sup> In the words of MACDONALD, R.ST.J. (1988) "Politicians and the Press" in *Protecting Human Rights.. cit.*, pages 361-72 at 370, the Court's interest is in "the broad thrust of national laws rather than their intricacies"

<sup>85</sup> Judgment of 13 June 1979, *cit.* The Court stated that it could not but be struck by the fact that the domestic law of the great majority of the member states had evolved and was continuing to evolve towards equality between illegitimate and legitimate children in regard to the respect in issue. See also BERGER (1989:114-19).

<sup>86</sup> *Tyler Vs United Kingdom*, Judgment of the European Court of Human Rights of 25 April 1978, *Publications of the European Court of Human Rights, series A, n.26*. The Court ruled in this case that corporal punishment, as had been inflicted on a fifteen years old applicant (three strokes of the birch because he committed assault with bodily harm results to a another pupil of the school) was a "degrading treatment" under Article 3 ECHR. See also BERGER (1989:92-95).

<sup>87</sup> "A premier vue, être surpris de voir la Cour invoquer, à l'appui de son interprétation, la législation interne dont elle a la charge de contrôler la conformité au droit de la Convention, il puerait paraître y avoir la un paradoxe (..)" GANSHOF (1980:318-20)

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a solution only in part, since at that general level the identification and nature of these values remains unclear<sup>88</sup>.

The question is similar to that of the so-called "general principles of law"; there exists, indeed, a close relation between the concept of "common values" and the concept of "general principles of (European) law". Since the latter has also been used with integrative aims by the other transnational European legal order (the European Community), conclusions taken from the doctrine of the European Court of Justice may help to shape the meaning of the "common values". It must be noted, however, that the European Court of Justice has also found these "common values" in the Convention itself, but has used the Convention to little effect in the interpretation of community law<sup>89</sup>.

Finally, given the general meaning of the common values, the third problem is how to bridge the gap between a "general value" and a precise standard of protection. It is not enough to identify the meaning of the "common values"; it is also necessary to specify from which "level" of these values the common standard is taken. By applying the "consensus principle", the Court defines the European standard from the existing domestic law. However, clearly the existing law, while aimed at the same "common value" will not be precisely identical in all the member states; whether the "common values" really exist might well form a subject for discussion, but surely nobody will argue that a common *principle* of protecting, for example, the right to privacy, means a common *standard* of protection of the right within all the member states. Common value does not mean common standard: for instance, the disciplinary regime of military forces argued in the case of *Engel and others*<sup>90</sup>, while existing in all the contracting states, may diverge from one state to another. In *Engel* the Court only took into account that the disciplinary regime of the Dutch armed forces followed the general trend of similar rules

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<sup>88</sup> Since the appeal can only be addressed to "la somme de droits de caractère national <que> constitue un droit commun exprimé dans la Convention" or to "la généralité du droit des Etats contractants" GANSHOF (1980:319). Notwithstanding this, according to GANSHOF, the paradox is only "apparent".

<sup>89</sup> See Chapter IV

<sup>90</sup> *Engel and others vs the Netherlands*, Judgment of the European Court of Human Rights of 8 June 1976, *Publications of the European Court of Human Rights*, series A, n.22

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in Europe, but it could have found some examples of domestic law on military discipline under which the facts alleged in *Engel* would have been a violation of domestic law. Moreover, it is sometimes difficult to recognize the "common value" even at a high level of abstraction: in the case of *De Wilde and others*<sup>91</sup>, for instance, the Court stated that the compulsory working of imprisoned people did not breach Article 6 because it was not against the "common trend". However, compulsory labour is itself strictly forbidden in some member states<sup>92</sup>.

Thus, when the consensus principle is applied, the Court may infer a common principle from the existing law in the member states, but, in doing this, it is necessarily making a choice on its own as to the precise standard to be applied in the case before it from the different ones ruling in the different states. In theory, the chosen standard must always be in one of these three positions: (1) The "minimum": the Court can decide to take what will be the "European standard" from the minimum level of protection which can be observed in all the member states. (2) The "maximum": on the contrary, the Court can interpret its task of integration like a task of implementation and development of the level of protection. By means of the Court's decisions, the higher degree of protection of one right within all European states would constitute the new general standard. (3) The "average": the Court can fix the new "European standard" at one average level resulting from the balancing of the existing standards within the states. This middle position would lead neither to an integration at the bottom (the minimum common level is the integrative parameter) nor to an integration at the top (the highest discovered level of protection is the integrative parameter).

The new developed European standard, taken either from the minimum, the maximum or the average level of protection existing within the states, should, once incorporated to the Convention, be considered from then onwards a new European minimum common standard. This means: (a) If the new minimum has been taken from

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<sup>91</sup> Judgment of the European Court of Human Rights of 18 November 1970, cit.

<sup>92</sup> The Court grounded its decision as to this point on Article 4(3)(a) ECHR, which expressly excludes from the Convention's concept of "compulsory labour" "any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention"; under Article 5, detention of vagrants is allowed. However, the court also mentioned the "general standard" on the issue present in several member states.

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the minimum level of protection existing within the states, no integrative effect is reached. The lowest level of protection would actually comply with the exigencies of the common standard; (b) If the new minimum has been taken from the maximum, a number of states would have to modify the interpretation given to domestic law in order to comply with it. In any case, no state would have a degree of protection higher than the new common standard; (c) Finally, if the new minimum is taken from somewhere in the middle, states would lie both below and above the Convention exigencies. This seems to be the more usual option. It follows, then, that the consensus principle, as has been applied by the Court to date, does not necessarily indicate that the Convention is no longer the original minimum. It is true that, theoretically at least, the effect of the Convention would only be real in those states with a level of protection lower than the new common standard<sup>93</sup>.

To what extent does the same possibility remain when the so-called "notions autonomes" technique is applied as a method of interpretation? The concept of "*notions autonomes*"<sup>94</sup> concerns some provisions of the Convention which are interpreted by the Court in a original way, regardless of the meaning they have within the contracting states. It does not follow from this autonomy that some kind of middle point among these systems must be reached, but, rather, that an original interpretation is given by the Court to the provisions in question, No attention is paid to the meaning given to the interpreted concept in related legal orders, that is, the legal orders with which the Convention has any kind of linkage<sup>95</sup>. It has been discussed, however, whether these autonomous concepts can be construed without a precise source in which the new

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93 This is the position of GANSHOF, who relies on Article 60 of the Convention. But on Article 60 see *supra* this section

94 On the concept of "notions autonomes", see EVRIGENIS (1978), EVRIGENIS, D. (1983) "L'interaction entre la dimension internationale et la dimension nationale de la Convention européenne des droits de l'homme" in *Völkerrecht als Rechtsordnung. Internationale Gerichtsbarkeit. Menschenrechte, Festschrift für Herman Mosler*, Heidelberg:Verlag, pages 193-202 and GANSHOF VAN DER MEERSCH, W.J. (1988) "Le caractère autonome des termes et la marge d'appréciation des gouvernements dans l'interprétation de la Convention Européenne des Droits de l'Homme" in *Protecting Human Rights.. cit*, pages 201 ff.

95 "Par milieu juridique proche, j'entends l'ensemble des contextes juridiques systématiques avec lesquels l'instrument auxquels appartient la notion autonome a interpréter présente des liens juridiques. Tels sont les systèmes juridiques nationaux des parties contractantes, mais également le droit international général, ainsi que d'autres conventions internationales en vigueur entre les mêmes parties contractantes." EVRIGENIS (1983:194-5)

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"European" standard is based, and thus, whether this interpretation technique can be clearly distinguished from the consensus principle discussed above<sup>96</sup>. Assuming that some provisions in the Convention can be autonomously construed, such provisions would be good examples of the *dynamic* (constitutional) interpretation applied to the Convention<sup>97</sup>; by means of this interpretation, a precise "European" standard is achieved on the right concerned.

The way in which the Court has applied this interpretation technique has generally been viewed favourably<sup>98</sup>. Although with up and downs, one of the most important fields in which the Court has autonomously interpreted the Convention has been the defence rights and other provisions concerning judicial proceedings: for instance, the meaning of the expression "criminal charges" under Article 6(1) ECHR, as established by the Court in the *Engel case*<sup>99</sup>, or the meaning of the expression "civil rights", under

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<sup>96</sup> According to EVRIGENIS (1983:195-97), the autonomous interpretation must necessarily be based on comparative law, the general principles of international law or the domestic law of the contracting states.

<sup>97</sup> Similar to the way in which the Court applies both the "consensus principle" and the "autonomous conceptions" is that of the United States Supreme Court, which follows both approaches when improving a new federal standard: "On a number of occasions the United States Supreme Court has professed to follow involving practices of a majority of American states, or what it has perceived to be a growing movement among the states. In other instances, however, the Court has not hesitated to proclaim new constitutional rights that, in effect, invalidated the laws of thirty or forty states in a single decision." [FROWEIN, A., SCHULHOFER, S., AND SHAPIRO, M. (1986) 'The protection of Fundamental Human Rights as a vehicle of integration: I. Introduction and V. Conclusion' in *Integration Through Law.. cit.*, vol. 1 book 3, at 237]. A discussion on the similarity between the US and the Convention System can be seen *infra* in Chapter III.

<sup>98</sup> According to one author, the Court in certain areas "has succeeded in creating definite European human rights standards of its own, and, more importantly, in setting up a perceptible legal framework that makes future legal developments inevitable" [FROWEIN, A. (1986) 'Fundamental Human Rights as a vehicle of legal integration in Europe' in *Integration Through law.. cit.*, pages 300-40, at 306]

<sup>99</sup> Judgment of the European Court of Human rights of 8 June 1976, *cit*; the court set up two criteria for distinguishing "criminal charges" under Article 6(1) ECHR from mere disciplinary measures imposed on applicants serving in the armed forces. The criteria were the nature of the offence itself, since if there was a contravention of a legal rule governing the operation of the armed forces, the state might in principle employ disciplinary law rather than criminal law; and the severity of the sanction, since deprivation of liberty could only be a consequence of a criminal charge, except in cases in which either the nature, the duration or the manner of execution of the punishment were not appreciably detrimental. See BERGER (1989:75).

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the same Article as interpreted by the Court in the *König* case<sup>100</sup>. Other well-known examples come from related matters, for instance civil proceedings<sup>101</sup> or from other various provisions of the Convention.

It could be said that, through applying the technique of "notions autonomes", the Court can make the Convention's standard of protection much higher than the original "minimum". Nonetheless, a more detailed discussion can render this affirmation questionable: autonomy under the Convention does not necessarily lead to a higher standard. Further, the criterion applied by the Court to decide whether a convention's provision is "autonomous" or not, is not sufficiently clear. Thus, the following arguments must be considered in a discussion on "notions autonomes":

First, it is clear that the autonomous interpretation of a provision of the Convention must be followed by an important integrative effect, one which would come close to indeed direct uniformation. This would come about since it is the Court which establishes the only meaning the concerned provision can have under the Convention, and thus the contracting states are not allowed to allege a "domestic" interpretation on the same provision<sup>102</sup>. The integrative effect of the *notions autonomes* is always a constant. However, on the contrary, this is not true of the elevation of a standard. A differentiation between these two consequences of the *notions autonomes* technique is

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**100** *König vs the Federal Republic of Germany*, Judgment of the European Court of Human Rights of 28 June 1978, *Publications of the European Court of Human Rights*, series A, n.27, paragraph 86 ff. The *Engel* and the *König* cases are cited as examples by GANSHOF (1980:332). According to FROWEIN (1986:306-15), the Court has succeeded in fixing a "limited" transnational standard in criminal justice, which covers pre-trial investigation, the right to a defence, to be present at the trial, the impartiality of the Court, the presumption of innocence and the right to a trial within a reasonable time. Other matters like standards on arrest and detention have been left to a higher state's discretion for the present.

**101** Again, the interpretation given to the term "civil rights and obligations" under Article 6(1)1 ECHR ("droits et obligations de caractère civil") in the case of *Ringeisen vs Austria*, Judgment of the European Court of Human Rights of 16 July 1971, *Publications of the European Court of Human Rights*, series A, n. 13. See EVRIGENIS (1983:197)

**102** This integrative effect of the establishing of a European standard is studied in depth by FROWEIN (1986:322-28), who reviews from this point of view the most interesting decisions concerning new developments on Basic Rights (torture, etc), in civil and administrative procedure, privacy and family life, and protection of property.

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essential for a proper understanding of the problem<sup>103</sup>. On the one hand, the integrative effect comes from the fact that an autonomous interpretation given by the Court will be binding on all contracting states from then onwards, regardless of the meaning the concept in question can be given in the domestic law; in those contracting states where the Convention is also domestic applicable law, the interpretation given by the Court will also, in the domestic cases in which the Convention is applied, have binding force on domestic courts<sup>104</sup>. On the other hand, the cases in which the court has applied the technique of the autonomous notions *may* lead to a higher standard of protection, since the Court is setting a new standard based exclusively on the aims of the Convention; in other words, the Court in these cases feels itself to be freer to set up a new standard, so that likelihood of a "dynamic" interpretation is very high. Nothing, however, in this interpretation technique implies that the European standard *must* diverge from the initial minimum. The standard will certainly be new, but it may or may not be higher<sup>105</sup>.

Second, even assuming that the Court will frequently apply the *notions autonomes* technique in order to improve the standard of protection, it is very difficult to know beforehand which provision of the Convention can be included among them subject to this interpretation technique. Moreover, the Court has not excluded any provision of the Convention: every concept embodied therein, including provisions with

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103 The double role of the autonomous concepts, "uniformité d'application" and "interprétation créatrice" is analyzed by EVRIGENIS (1983)

104 According to EVRIGENIS (1983:196-7) "C'est leur fonction principale. Détaché surtout du contexte juridique national, elles réalisent une uniformité internationale au-dessus de la diversité nationale. Si les notions autonomes puisent dans une certaine mesure leur contenu dans le droit de s Etats contractants, elles y reviennent non seulement comme définitions uniformes des engagements internationaux de ces Etats mais, dans le cas où la Convention s'incorpore dans l'ordre juridique national, également comme définitions uniformes que, emmenant de convention internationale sont elles-mêmes incorporés dans l'ordre juridique national.." The same effect is emphasized by GANSHOF (1988:204)

105 Accordingly, this second effect is described by EVRIGENIS (1983:197) in terms of potentiality: "une autre rôle, également important: elles sont, par excellence, l'outil d'une interprétation créatrice. Affranchies de la servitude d'une dépendance absolue des conceptions juridiques nationales, parfois sclérosées et en tout cas particularistes, mais tout en pouvant mettre en valeur l'évolution et l'épanouissement de ces conceptions, elles peuvent devenir l'instrument d'une jurisprudence adaptée aux transformations constantes des données sociales."

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the same wording as other domestic provisions<sup>106</sup>, can be interpreted autonomously by the Court. The only useful guidance to the question is provided by the clauses "in the sense of the Convention", or "in the context of the Convention", which usually lead to for an autonomous interpretation. In any case, however, any of the Convention's provisions, excluding only those in which an express reference to domestic law is made, may be interpreted by the Court in this way.

It follows, therefore, that the "notions autonomes" technique does not always imply that a higher standard is applied for construing the meaning of the provisions of the Convention. The same can be said of the related "consensus principle" technique.

### 4. The restrictions and the "margin of appreciation".

By the application of the *margin of appreciation* doctrine, the contracting states are granted a degree of autonomy for the interpretation of those concepts of the Convention, other than the ones which are autonomously interpreted by the Court. These concepts are primarily those which embrace a legitimate restriction on a Convention's right. The states' autonomy of interpretation with regard to these latter forms, to some extent, the other side of the coin of the "notions autonomes". It therefore applies to provisions that, according to the Court, may be broadly interpreted in the light of domestic law. Although the domestic interpretation is eventually reviewable by Strasbourg, the states have a wide margin of appreciation to construe the meaning of these provisions at the domestic proceedings. This *margin of appreciation*, and the whole system of restrictions allowed by the Convention, must also be confronted with the alleged "dynamic" interpretation reached by Strasbourg.

Only a few groups of rights can be said to be "absolute" within the framework of the Convention<sup>107</sup>. These *absolute* rights cannot be derogated from, even during war

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<sup>106</sup> The fact that 'homophonie n'est pas forcement synonymie' is put forward by EVRIGENIS (1983:194) and GANSHOF (1988:204)

<sup>107</sup> These rights are those stated in Article 15(2) ECHR, namely, the right to life, the right to not be subjected to torture or to inhuman or degrading treatment, the right to not to be held in slavery or servitude, and the right to not to be found guilty on account of any act which did not constitute a criminal offence under the law at the time it was committed. In addition, according to DIJK-HOOF (1984:420-21), three rights of the fourth protocol can be added to this list: the right to not to be deprived of one's liberty merely on the ground of inability to fulfill a contractual obligation, the right

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time or in public emergencies. They are the most fundamental of human rights the respect of which is binding on nations whatever the situation may be. All the other rights embraced in the Convention can be restricted or, under certain circumstances, even derogated from<sup>108</sup>.

Two kinds of restrictions concern the majority of the rights embodied in the Convention: those which are general, provided by the general clauses of the Convention on restrictions of rights, and those which provide specific restrictions, usually allowed by the "second paragraph", to each concerned right.

A first general clause on restrictions to the rights protected by the Convention is embodied in Article 17 ECHR, which bans the "abuse of rights". This provision prevents anyone from exploiting the rights guaranteed by the Convention for the purpose of destroying human rights<sup>109</sup>. Although it can be said to be general, this provision, however, cannot cover all the rights laid down in the Convention; Article 17 ECHR applies exclusively to those rights whose abuse could lead directly to the said aim of destroying human rights completely. Although "the question of the connection is obviously open to discussion"<sup>110</sup>, it may be said the Articles concerned are Article 9, Article 10 and Article 11, that is, freedom of thought and religion, freedom of expression and the freedoms of peaceful assembly and association<sup>111</sup>. In addition, the restrictive

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not to be expelled from the territory of the State of which one is a national, and the banning of collective expulsion of aliens.

108 Without any doubt, the crucial point when protecting a fundamental right or freedom is the extent to which a derogation or restrictions are allowed. The restrictions, broadly interpreted, can destroy the protected right totally; see, for instance, the comments on the restrictions allowed to freedom of speech under Article 10 ECHR in FAWCETT (1987b:1079)

109 Article 17 ECHR literally states that "Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth or at their limitation to a greater extent than is provided for in the Convention".

110 DIJK-HOOF (1984:413)

111 According to JACOBS (1975:211), however, it is doubtful whether freedom of thought, as it does not engage any exterior activity, can be included in this list. As the Commission quoted from the preparatory works in the German Communist Party Case, where Article 17 ECHR was controversially applied, its objective was "to prevent adherents to totalitarian doctrines from exploiting the rights guaranteed by the Convention for the purpose of destroying Human Rights". The procedural application of Article 17 ECHR is controversial too, since in some cases, as in the

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clause of Article 16 ECHR can be also considered a general clause, although it concerns only a limited number of the Convention's rights. Article 16 ECHR allows restrictions to be imposed on the political activity of aliens<sup>112</sup>. Again, the term "political activity" limits the scope of the restrictions that can be made. In so far as these rights are related to activities other than political ones, aliens are entitled to the same guarantees as the nationals of the State in question. Finally, it has been discussed whether "inherent limitations" can be discerned from the very nature of a right protected under the Convention without the presence of any express clause. According to the Commission case-law, some rights have an "inherent limitation", which comes, for instance, from the legal situation of a person, such as detained or imprisoned people, or every other group of persons in a special legal position, such as psychiatric patients, soldiers and civil servants. The Court has rejected the possibility of finding inherent limitations to the rights, at any rate to those articles where express restrictions are incorporated in a separate paragraph. In these cases, consequently, the enumeration is exhaustive<sup>113</sup>.

Not only general restrictions, but also a general clause of derogation applies to the rights embodied in the Convention (excluding the absolute rights mentioned above). Under Article 15(1) ECHR, the contracting states can derogate from their obligations

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above mentioned KPD case, it is applied to the process of admissibility and in others on the merits (the *Lawless* case, for instance). In any case, even though it usually forms a possible ground of justification for the respondent State to rely on, it should be pointed out that "However, Article 17 not only implies a prohibition for persons and groups, but also for any State" (DIJK-HOOF, 1984:411)

112 Article 16 ECHR reads as follows: "Nothing in Articles 10,11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens."

113 According to the Court, the fact that the person in question belongs to a particular category may still be taken into account. Nevertheless, as DIJK-HOOF (1984) point out, this position "presents the great advantage that the limitations in question (..) are, as restrictions, explicitly subjected to the opinion of the Strasbourg organs, which also have to review its application for its conformity with provisions such as Article 18". With respect to other rights which have not been provided in the Convention with express possibilities of restriction, however, the doctrine of inherent limitations can be also criticized, for "if the drafters had wanted to permit special restrictions in relation to particular categories of persons, they could have stated this in each individual article" DIJK-HOOF (1984: 423).

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under the Convention in war time or in a public emergency<sup>114</sup>. The doctrine of the *margin of appreciation* of the member states was initially applied to the derogations allowed by Article 15(1) ECHR. The *margin* doctrine was first applied in the first case decided by the Court, the above quoted *Lawless* case. The meaning of the emergent doctrine was, according to the Court, to allow a certain margin for the states when extraordinary circumstances were under discussion. Provided that the restriction of fundamental rights was justified under those circumstances, the Court presumed that the State measures taken followed the Convention's prescriptions<sup>115</sup>. Although the Court could eventually review the state's behaviour, according to the *margin* doctrine it was for the state to first address the necessity of the restrictions and the scope of the rights to be restricted.

Although the new doctrine of the *margin of appreciation* raised some criticism, the particular political context involved justified, in the view of the majority of the literature, the emergence of the new doctrine. Arguments which stressed the character of the Convention as an international agreement and the need for the cooperation of the contracting states in order to put its aims into effect were expressed<sup>116</sup>. Indeed, from this point of view, the doctrine of the *margin of appreciation* could be regarded as a

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114 Article 15(1) states that "In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under the Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law."

115 The situation from which the doctrine of the margin was originated has been described like 'situations in which governments were faced with civil disturbances, riots, possibly large-scale acts of violence from sizable segments of the population, perhaps even intervention from outside'. Under that circumstances, 'governments were allowed by the Commission a certain freedom of action, a certain margin of error in dealing with such situations. The Commission would not second-guess these actions unless they exceed that margin'[MORRISSON. C. (1973) 'Margin of appreciation in European human rights law', *Revue des Droits de l'Homme*, vol 6, pages 263-86 at 267]

116 Including those arguing the fact that the Commission should take into account the danger that a member state would derogate from the Convention, or even the actual disappearance of the Commission itself in the case of a decision involving political aspects of so delicate a nature: "for several reasons, the Commission needs the tool margin of appreciation or something like it (..) most importantly, as a creature of governments which are still quite independent and capable of scuttling the entire Convention, the Commission must use the concept at times (..) one element domestic judges need rarely, if ever, consider, is the possible elimination of their courts as a direct result of their decisions.."(MORRISSON, 1973:284)

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functional equivalent of other mechanisms of international law by which the states grant themselves a certain degree of autonomy in defining the binding effect an international treaty has upon them. Following these perspectives, the *margin of appreciation* has been discussed jointly with the possibility for the member states to make reservations, discussed above<sup>117</sup>, or the concept of exclusive domestic jurisdiction<sup>118</sup>.

The next step of the Convention's organs, however, was to extend the doctrine of the *margin of appreciation* to express legitimate restrictions under the Convention, other than the general derogation allowed by Article 15(1) ECHR. On this occasion, the application of the new doctrine to other Articles of the Convention raised an extensive criticism<sup>119</sup>.

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117 See EVRIGENIS (1978:352)

118 According to BERNHARDT, R. (1986) "Domestic Jurisdiction of States and International Human Rights Organs", *Human Rights Law Journal*, pages 205-216 at 205, the notion of exclusive domestic jurisdiction "circumscribes the area where the individual nation-state can act without any outside interference either from third States or from international organizations. The notion is not often used in formal treaties or other international documents; it is more often invoked in unilateral pronouncements in which States assert their exclusive domestic jurisdiction". Accordingly, the doctrine of the margin of appreciation "..means in substance that certain evaluations and judgments in the human rights field must be left to the competent State organs and cannot be substituted by evaluations and judgments of the European Commission or the European Court.." (ibid. at 213). Although finally the author states that the concept of domestic jurisdiction is not applicable to the human rights field, it is clear that the doctrine of the margin leads, to a certain extent, to the same objective. The main difference, certainly, is that "It is not the State but the Convention organ which finally decides, however, whether a national margin of appreciation exists and where the limits are", while the concept of domestic jurisdiction "indicates the sole and unshared responsibility of the State". (ibidem)

119 For instance, although reaffirming the opinion on the margin doctrine stated some years before ("a defensible doctrine if applied cautiously", see MORRISSON, 1967:140), one author now stated that "in roughly a decade since its birth (..) its usage has been expanded far beyond the Article 15 'explosive situations' cases into at least the following Convention provisions: Articles 8, 9, 10, 14 and one subsection of Article 5, as well as Articles 1 and 2 of the first Protocol (..) there is some, although non conclusive, evidence that the concept is being expanded into provisions where it is inappropriate and that the Commission has not yet refined an approach to the concept" (MORRISSON 1973:283 and 286). Another opinion criticized the extension of the doctrine in the following terms: "Il n'est pas admissible que la marge d'appréciation de l'autorité nationale s'étende, en dehors de tout principe et des toute règle qui gouvernent l'interprétation en droit international de toutes les notions et toutes les situations que la Cour peut recentrer (..) Il n'appartient ni à la Commission ni à la Cour de se laisser tenter par d'autres terrains pour étendre la flexibilité des notions contenues dans la Convention et ses Protocoles additionnels. L'avertissement n'est peut-être pas inutile". (GANSHOF, 1988:209)

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As has been stated, together with the general restrictions, the Convention contents expressly allowed restrictions to certain rights, embodied by the "second paragraphs" system. Regarding these restrictions, the approach the Convention bodies have adopted concerns three questions: the meaning of the obligation for the restriction to be "prescribed by law" or "in accordance with the law", the scope of the legitimate aims mentioned, and the extent to which the adopted restriction is "necessary in a democratic society". Whatever it may consist of, a restriction expressly allowed by the Convention for one of the protected rights must be "prescribed by law"<sup>120</sup>. It is not for the Court or the Commission to decide whether a restriction has complied with domestic constitutional requirements, or whether it has fulfilled the domestic legal formalities in order to be enacted as a law. These are clearly domestic matters. However, the Convention bodies can ascertain to what extent the restriction has been embodied in a legal norm which satisfies a number of minimal requirements which should qualify it as "a law". These have been fixed in the accessibility and foreseeability of the norm<sup>121</sup>. Besides, the grounds on which a State may formulate a restriction are listed exhaustively in the Articles which contemplate express restrictions. Among others, the following grounds are listed in Articles 9, 10 and 11: national security, territorial integrity or public safety, the prevention of disorder or crime, the protection of health or morals, the protection of the reputation or rights of others, and the authority and impartiality of the judiciary. The third qualification which with a restriction must comply is that it must be "necessary in a democratic society". This requirement is found, with the same meaning,

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120 Article 5 paragraph one, Article 9 paragraph two, Article 10 paragraph two and Article 11 paragraph two have the same clause. The same meaning has the phrase "in accordance by law" which can be found in Article 8 paragraph two and Article 2, paragraph three and Article 4 of the fourth Protocol.

121 The two requirements were met in the case of *the Sunday Times vs. the United Kingdom*, Judgment of the European Court of Human Rights of 26 April 1979, *Publications of the European Court of Human Rights*, series A, n. 30. Following them, the Court has accepted as "a law" under the meaning of the above cited Articles, royal decrees, emergency decrees and even internal administrative regulations based in the law. In fact, the Court has had to deal with the fact that very different traditions of "law" were present within the Contracting States of the Convention. Under those requirements, unwritten or common law, like "contempt of court" in the case of the United Kingdom, were able to achieve the minimum standard. See a discussion on the topic in FAWCETT (1987:272 ff.) and DIJK-HOOF (1984:425 ff.)

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in several provisions of the Convention<sup>122</sup>. It is this last requisite of the expressly allowed restrictions which has most been affected by the *margin* doctrine.

If the *margin* doctrine had not been applied in the way that will be discussed below, the clause on "necessity in a democratic society" could have played a very different role in the setting of a European standard for the protection of any single one of the rights of the Convention: since a restriction on a right must be *necessary* in a democratic society, the Court could have reviewed the existing rules on that restriction within the contracting states; provided that in one of the member states the alleged restriction is not legitimate, it would then become clear that the restriction was not necessary *for* a democratic society. Following this interpretation, the highest domestic standard would have become in each case the new "European" standard.

The way in which the clause of necessity *in* a democratic society has been approached is quite different, and exactly the opposite position has emerged. In other words, the fact that a member state does not contemplate an alleged restriction in its domestic law does not make the restriction unnecessary in a democratic situation. The restriction, then, need only be justifiable as to its necessity in the precise democratic society where it has been applied<sup>123</sup>. Further, the clause of necessity rarely functions as a separate criterion, since, when the only question raised on a restriction is the extent to which a measure is necessary in a democratic society, the Court usually finds this latter justified provided that it was necessary in a contracting State which is itself a democracy. In other words, the "necessity in a democratic society" is usually given as the necessity of the measure in question to achieve, in a democratic society, the

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**122** Restrictions on the ground that they are *necessary in a democratic society* are in the rights protected by Article 8 (privacy and family life), 9 (manifestation of one's religion) 10 (freedom of expression), 11 (freedom of peaceful assembly) and in Article 2 of the fourth Protocol (right to liberty of movement and freedom to choose the residence and the right to leave any country)

**123** Otherwise the "integration on the top" effect discussed above would be always reached as a result of the application of the "necessity" clause. Clearly that solution would be inconsistent with the Convention's spirit, even without applying the *margin* doctrine. Accordingly FROWEIN and others (1986:240) state that "It is clear for the whole system of the Convention that use of the term 'necessary' does not imply that restrictions of the same sort must exist in all countries of the Convention to justify the restriction in question".

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legitimate alleged aim, although this can obviously reduce the scope of such a condition<sup>124</sup>.

In any case, the extension of the *margin of appreciation* to the "second paragraph" restrictions, viewed as a real "transformation"<sup>125</sup> of the doctrine, has rendered useless the initial explanation of its functioning, based principally on the "international" argument or even on the danger of the withdrawal from the Convention of the state concerned<sup>126</sup>. Another explanation has been put forward, granting the existence of the states' *margin of appreciation* from a "federalist" or a "supranational", rather than an international, argument. Following this approach, the federalist framework is put as the "context" where to understand the *margin* doctrine.

Following the "federalist" approach, the application of the the *margin* doctrine by the Court could be compared with the behaviour of a federal central court. Indeed, a comparison has been made between the technique of the *margin* and other techniques applied by the United States Supreme Court in order to grant to a federate state or to other branches of the federal power (i.e., the executive or the Congress) some kind of autonomy. In this sense, the deference for a state's legitimate interest, the technique of "ad hoc balancing" of certain rights or the doctrine of fairness can be seen as equivalent of the *margin* approach followed by the European Court<sup>127</sup>. However, the attempts

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124 Particularly when the "democratic test" is understood as a sort of self-fulfilling tautology. The process is described by DIJK-HOOF (1984:449) as follows: "If a national authority holds that a restriction in itself was necessary and this necessity is recognized by the Strasbourg organs, the latter are inclined to conclude that the assessment that this necessity existed in a democratic society is implied in the fact that the contracting States are democracies. Thus the issue that has to be tested becomes itself the criterion.."

125 MORRISSON (1973:273)

126 In this sense, this fear, argued in 1973, "seems to be less pressing today" [O'DONNELL (1982) "The Margin of Appreciation doctrine: Standards in the Jurisprudence of the European Court of Human Rights", *Human Rights Quarterly*, pages 474-96 at 478], although this kind of analysis would still be useful if the doctrine of the margin were applied again to situations under Article 15(1)

127 See O'DONNELL (1982) and FROWEIN and others (1986). A comparison between the Convention system and the United States system is made in Chapter III of this work. Another author stresses the position of the Court and the Commission, closer to a double competence system shared with domestic organs rather than to an appeal system: "La Cour associe (..) dans une certaine mesure, la marge d'appréciation qu'elle reconnaît aux autorités nationales au phénomène

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of the new approach to define the doctrine precisely have not been completely successful. Particular, the problem still seems to concern the criteria by which the Commission or the Court will decide whether a broad or a narrow *margin* of appreciation for the states exists or not. Contrariwise to the relatively precise standards developed by the US Supreme Court, the Convention organs have not yet reached a significant level of certainty in the possible outcomes of the application of the *margin* doctrine.

Three possible criteria may arise from the cases in which the *margin* has been applied<sup>128</sup>: first, the above discussed technique of the consensus principle; second, the nature of the right as limited by the state's applied restriction; and third, the "textual analysis" of the provision of the Convention in question.

According to the first criterion, the Convention's organs will be more likely to apply the *margin* doctrine in cases in which a consensus on the issue among the member states does not exist, or cannot be uncovered with precision. The more the consensus principle applies, the less room there is for the *margin* doctrine. This criterion is the clearest, both in its theoretical basis and in the predictability of its effects on the outcomes of the Court decisions; it has in reality been applied in a number of cases<sup>129</sup>. The only drawback, apart from the problems which arise from the consensus principle itself<sup>130</sup>, is that it has been on occasion wrongly applied<sup>131</sup>. The second suggested

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de la double compétence juridictionnelle (...) en dehors de toute hiérarchie d'appel, compétence a deux ordres pour connaître des mêmes contestations" (GANSHOF, 1988:210). As well as this, the relationship between the *margin* doctrine and the "judicial restraint" of the Court had been already pointed out by MORRISON (1973).

128 See O'DONNELL (1982)

129 According to O'DONNELL (1982:479-84) the following cases have been decided applying this criterion: the *Marckx* case, judgment of 13 June 1961, cit.; the *Engel and others* case, judgment of 8 June 1967, cit; the case of the Belgian Police Union vs Belgium, Judgment of the European Court of Human Rights of 27 October 1975, *Publications of the European Court of Human Rights*, series A, n. 20; the case of *Handyside vs the United Kingdom*, Judgment of the European Court of Human Rights of 7 December 1976, *Publications of the European Court of Human Rights*, series A, n.24; and the case of the *Sunday Times vs the United Kingdom*, Judgment of the European Court of Human Rights of 26 April 1979, cit.

130 See *supra* this section of this Chapter.

131 The *Handyside* decision has been quoted as an example of a wrong application to the consensus principle to the margin of appreciation doctrine, since "while there may have been an absence of consensus on morals generally, the complaint's arguments had a merit: as to this book

## (2) A MINIMUM COMMON STANDARD?

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criterion regards the nature of the right to be limited, namely the extent to which such a right may be considered "essential for a democratic society". Again, the principle would be that the more essential the right is for a democracy, the narrower *is margin* allowed to the states. Nonetheless, it may well be that this second criterion conflicts with the first: there may be a consensus on the importance of a right for a democratic society, but not on the illegitimate character of a concrete restriction; therefore, the Convention's organs may grant a wide *margin of appreciation* on that restriction to an *essential right*<sup>132</sup>. Finally, a third, and even less sure, criterion is the textual analysis of the accommodation clauses in the convention to deduce from these a wide or a narrow *margin of appreciation*<sup>133</sup>

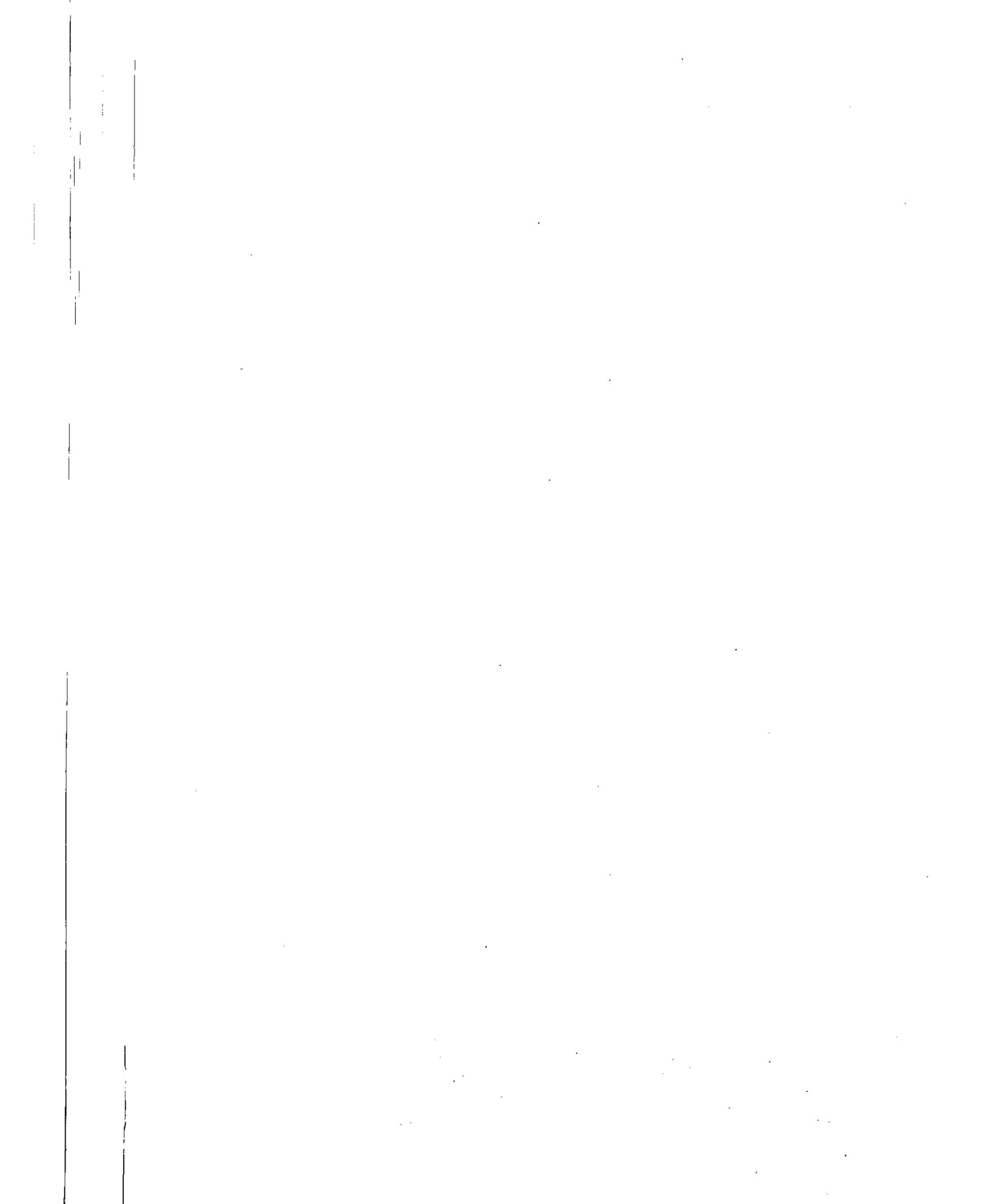
A tentative conclusion on the *margin of appreciation* doctrine, and on the general interpretation made by the Court to the restrictions of the fundamental rights protected by the Convention, should put the emphasis on the uncertainty that the present situation can lead to. The point, then, is not whether the *margin* or other similar doctrine granting a level of autonomy for the member states is justified or not under the Convention system; rather, it is that the doctrine has not yet clearly fixed its standards.

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there was a consensus" (O'DONNELL,1982:482). Nonetheless, the consensus principle, rightly applied, can provide a sure guideline to the margin doctrine: "This should be a method which continues to improve the quality and precision of the rights under the Convention, if it used carefully and objectively, and it should inhibit abuse (..) There is no reason why this approach cannot be extended validly to govern the margin of appreciation doctrine (..)" (O'DONNELL,1982:485).

132 For instance, freedom of expression and morals. Again, the Handyside case and other cases are quoted as examples by O'DONNELL (1982:485-88) with some criticism: "the Court has made some reference to a specific right (..) as fundamental to democracy. The Court, when it does so, proceeds to invoke a narrow margin of appreciation. The results of the cases are mixed, however; despite de tough language used by the Court in its scrutiny of the complained-of practice, the government has not been found in violation frequently".

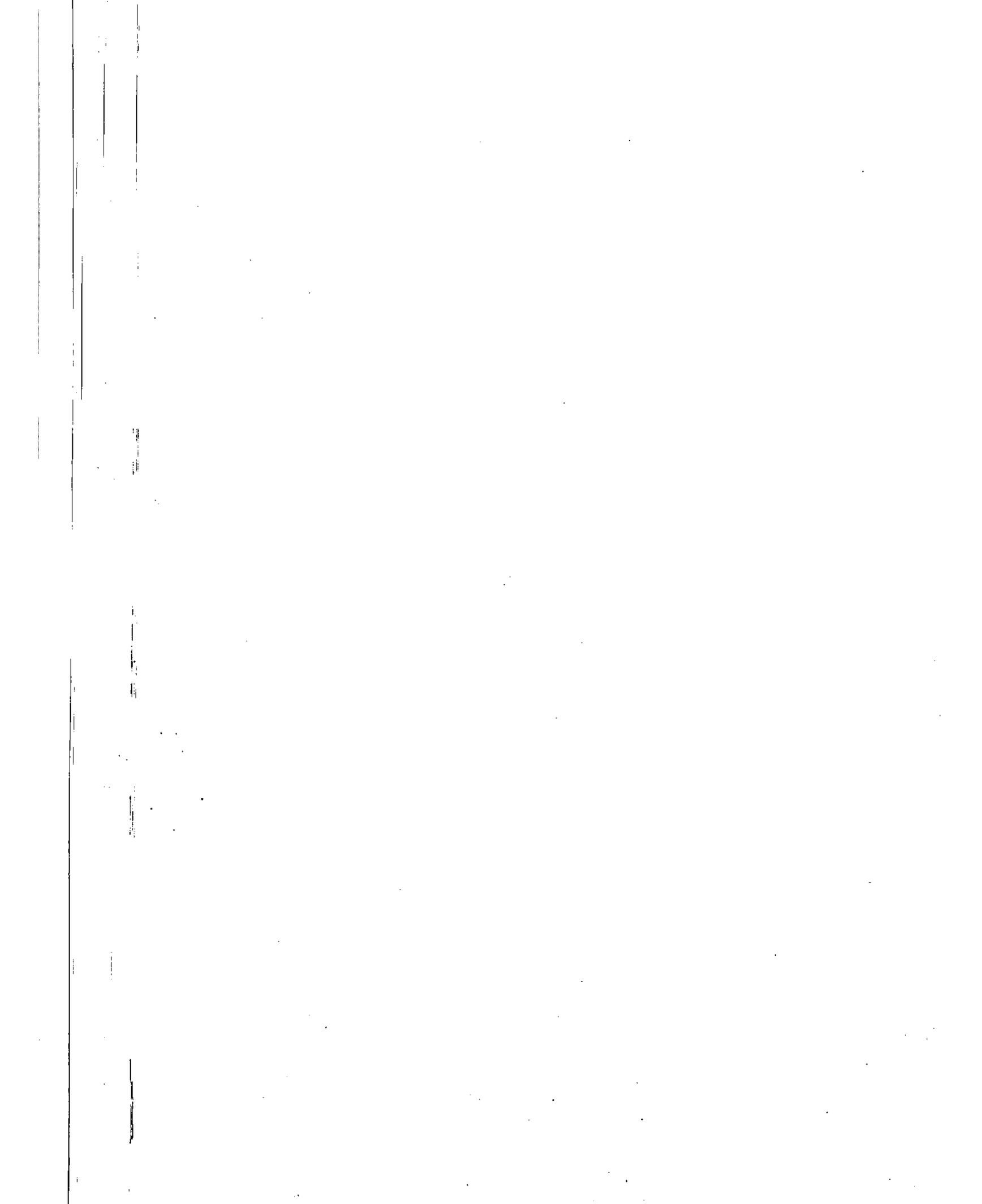
133 Only two cases are cited in which the textual analysis has been applied, the case of *Golder Vs. United Kingdom*, Judgment of the European Court of Human Rights of 21 february 1975, *Publications of the European Court, series A, No 18* (the terms "there shall be no interference" under Article 8(2) ECHR) and again the *Handyside* case, judgment of the European Court of Human Rights of 7 December 1976, *cit.*, (the term "duties and responsibilities" under Article 10(2)ECHR). See O'DONNELL (1982:489).



## **PART II**

### **MODELS FOR A COMPARATIVE RESEARCH.**

- II. National Human Rights Protection in an International Context: The European Convention on Human Rights in the domestic legal order of Italy and Spain.**
- III. Constitutional Rights protection in a Federal Context: the United States of America.**
- IV. Human Rights Protection in a Supranational Context: The European Community.**



## CHAPTER II

### NATIONAL HUMAN RIGHTS PROTECTION IN AN INTERNATIONAL CONTEXT: THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN THE DOMESTIC LEGAL ORDER OF ITALY AND SPAIN.

(1) INTRODUCTION. (2) THE FORMAL DOMESTIC STATUS OF THE CONVENTION IN ITALY AND SPAIN. 1. The Convention as an international treaty in Italy and Spain; 2. The Constitutional value of the Convention in Spain; 3. The Constitutional value of the Convention in Italy. (3) THE APPLICATION OF THE ECHR BY THE SPANISH AND THE ITALIAN COURTS: A GENERAL ASSESSMENT. 1. The Convention before the Italian and the Spanish Supreme Courts; 2. The Convention before the Italian and the Spanish Constitutional Courts; 3. The Convention as the only source for the domestic standard of protection of fundamental rights.

#### (1) INTRODUCTION.

The ECHR was ratified by Italy by virtue of an *ordine di esecuzione* passed by the Italian Parliament in 1955<sup>134</sup>. Accordingly, the obligations derived from the Convention entered into force, as far as Italy is concerned, in that year. However, other prerequisites needed in order to implement other aspects of the *direct effect* of the Convention were not met until eighteen years later: the compulsory jurisdiction of the European Court of Human Rights under Article 46 ECHR and the possibility for individuals under the Italian jurisdiction to raise complaints to the Commission under Article 25 ECHR were not accepted before 1973. Spain ratified the Convention much later than Italy. In 1950, when the Convention was drafted, Spain was under the dictatorship of Franco. Although the francoism tried in several occasions to be admitted as a member

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<sup>134</sup> The Act of 5 August 1955, number 848, embodies the two usual provisions in this kind of acts of reception of international treaties: Article 1 of the Act authorizes the President of the Republic to ratify the Convention. Article 2 embodies the *ordine di esecuzione*, that is, in words of CHIAVARIO, a "clausola specificamente tesa ad attribuire efficacia, sul piano interno, alla parte normativa della Convenzione stessa" [CHIAVARIO, M. (1969) *La Convenzione europea dei diritti dell'uomo nel sistema delle fonti normative in materia penale*, Milano:Giuffr , at 37]. See the parliamentary debates on the ratification in PISANI, Mario (1992) "La ratifica italiana della Convenzione europea dei diritti dell'uomo" in *Rivista Internazionale dei Diritti dell'Uomo* 5 pages 506-26]

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state of the Council of Europe, the lack of democratic conditions made the admission of Spain impossible until the franquist regime came to an end. However, Spain was admitted as a member state shortly after the transition to democracy began, even before the first free elections were celebrated and the new Constitution was passed<sup>135</sup>. The Spanish Parliament ratified the Convention in October 1979, and soon after the compulsory jurisdiction of the Court was also accepted. Individuals complaints under Article 25 ECHR are admitted since 1981. On several occasions both Spain and Italy has been brought before the European Commission and the Court of Human Rights for alleged violations of the Convention.

In Italy, in almost thirty of these cases, a violation of the Convention was found. Once the first individual complaints had reached the Convention organs, Italian legal literature noted that Italy was likely to be condemned by the European Court due to violation of the defense rights embodied in Article 5 and 6 of the Convention<sup>136</sup>. This estimate was confirmed a few years later, when the first decisions condemning Italy were emitted<sup>137</sup>. To date, all the decisions of the European Court condemning Italy have concerned Article 5 and Article 6 of the Convention<sup>138</sup>. These cases have concerned, amongst other aspects of the right to a fair trial, the right to receive free legal

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135 See VIÑAL CASAS A. (1978) "Historia de las negociaciones para el ingreso de España en el Consejo de Europa" in *Revista de Instituciones Europeas* 5 pages 93-113

136 See PALMIERI, G. M. (1980) "L'esperienza italiana in tema di ricorsi individuali alla Commissione europea dei diritti dell'uomo" in *Rivista di Diritto Internazionale* 63 pages 45-74.

137 The first condemning decision, the judgment in the *Artico* case [*Artico v Italy*, judgment of the ECtHR of 13 May 1980, in *Publications of the European Court of Human Rights, series A, n. 39*], was hardly a surprise for Italian legal circles. See a first reaction to this case, criticizing the way in which Italy had approached it, in PIZZORUSSO A. (1980) "Rossi de vergogna, anzi paonazzi" in *Foro Italiano* 103,IV page 150.

138 See the cases of the European Court of Human Rights concerning Italy up to 1989 in GREMENTIERI, V. (ed) (1989) *L'Italia e la Convenzione Europea dei diritti dell'uomo*, Milano. On the most recent cases, see (1991) "Fifteen cases vs. Italy concerning the length of criminal proceedings. A systematic survey" in *Human Rights Law Journal* 12 pages 160-62. An earlier review of the European Court's decisions concerning Italy had also put forward the importance of Article 5 and 6 of the Convention. See PITTARO, (1987) "L'ordinamento italiano e la Convenzione Europea dei diritti dell'uomo" in *Giurisprudenza Costituzionale* IV pp 391 at 396-97.

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assistance<sup>139</sup>, the right to compensation after a wrong conviction, the guarantees when judged in *contumacia*<sup>140</sup>, and the right to a domestic remedy for any encroachment of the rights protected in the Convention<sup>141</sup>. Spain has been condemned by the European Court for a violation of the Convention on four occasions: as in the case of Italy, three of them concerned the right to be judged "within a reasonable period of time" and other guarantees under Article 6 ECHR<sup>142</sup>. In addition, Spain has been condemned for a violation of freedom of expression under Article 10 ECHR<sup>143</sup>

The high number of decisions of the European Court ruling that Italy has violated Article 5 or Article 6 of the Convention have clarified that if a proper domestic application of the Convention were possible in Italy, a domestic remedy would have been provided before reaching Strasbourg. This also clearly shows that the common argument to justify the delay in the ratification of Article 25 ECHR, allowing the presentation of individual complaints (that the Convention would not add anything to the domestic level of protection) was clearly untrue<sup>144</sup>. A view to the polemic nature of the Italian cases

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139 See the *Artico* case, ECtHR of 13 May 1980, *cit.*, and *Goddi v Italy*, judgment of the ECtHR of 9 April 1984 in *Publications of the European Court of Human Rights*, series A n. 76. On the *Goddi* case, see also a comment in CHIAVARIO, M. (1990) "Cultura italiana del processo penale e Convenzione europea dei diritti dell'uomo: frammenti di appunti e spunti per una microstoria", in *Rivista Internazionale dei Diritti dell'Uomo* 3 pages 433-473 at 447.

140 See *Colozza v Italy*, judgment of the ECtHR of 12 February 1985, in *Publications of the European Court of Human Rights*, series A n. 89. On this case, see CRESTI, L. (1989) "La Convenzione europea dei Diritti dell'Uomo e il procedimento contumaciale italiano" in *L'Italia e la Convenzione.. cit.*, pages 99-128 and CHIAVARIO (1990:448)

141 See *Ciulla v. Italy*, judgment of the ECtHR of 22 february 1989, in *Publications of the European Court of Human Rights* series A n. 148. On this case, see RAIMONDI, G. (1990) "La Convenzione Europea dei Diritti Dell'Uomo nella gerarchia delle fonti dell'ordinamento italiano. Nota minima in margine alla Sentenza Ciulla", in *Rivista Internazionale di Diritti Dell'Uomo* 3 pages 36-41 and CHIAVARIO (1990:451)

142 *Barberá, Messegue and Jabardo vs Spain*, judgment of ECtHR of 6 December 1988, in *Publications of the European Court of Human Rights* series A, n. 140; *Unión Alimentaria Sanders vs Spain*, judgment of ECtHR of 7 July 1989 in *Publications of the European Court of Human Rights* series A, n. 157; and *Ruiz Mateos vs Spain*, judgment of ECtHR of 22 June 1993 (not yet reported).

143 *Castells vs Spain*, judgment of ECtHR of 23 April 1992 in *Publications of the European Court of Human Rights* series A, n. 236.

144 See, in this sense, GREMENTIERI, V. (1989) "l'Italia e la Convenzione europea dei Diritti dell'Uomo: bilancio di quindici anni de ricorsi individuali" in *L'Italia e la Convenzione.. cit.* at 196.

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decided by the European Court is also merited: many domestic *casos celebres* have been brought before the Conventions' bodies showing that the public's concern on the Convention is growing in Italy<sup>145</sup>.

Apart from its direct effect, the domestic incorporation of the Convention has also provided, both in Italy and in Spain, some usual *indirect effects*, which have affected the legislative process: for instance, legislation has been modified in both countries after a decision taken by any of the Convention's bodies<sup>146</sup>. Moreover, some kind of *preventive* indirect effect, which has taken place in the absence of any previous Strasbourg decision, has also been noted in Italy<sup>147</sup>.

The main domestic *indirect effect* of the Convention, however, comes from the application of the ECHR by domestic courts as a part of the domestic legal order. This domestic application has been approached from different legal principles in Spain and Italy: international treaties need an internal parliamentary act of incorporation to be received into the Italian legal order; this is the main reason why Italy is considered a dualist system state concerning international law; Spain, on the contrary, can be seen as a monist system, since international treaties, once ratified by the Parliament, become domestic applicable law.

However, in Italy, in spite of the domestic status of the Convention as domestic applicable law, the possibility for Italian Courts to apply the Convention is far from being

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145 "È importante segnalare la qualità dei ricorsi: ai giudici di Strasburgo sono stati infatti diretti ricorsi concernenti alcuni dei più significativi avvenimenti politico giudiziari verificasti in Italia negli ultimi anni (..) questo fenomeno dovrebbe continuare nel prossimo futuro.." (GREMENTIERI, 1989:186)

146 After the *Colozza* case was decided by the European Court, Italian domestic law concerning *contumacia* was modified. Parliamentary debates on the new law shows that the *Colozza* decision was the main argument for the modification of the previous law. See, in general, on the indirect effects of the Convention in Italy, MAROTTA F. (1989) "Gli effetti delle sentenze della Corte Europea dei Diritti dell'uomo nell'ordinamento italiano", in *Rivista Internazionale dei Diritti Dell'Uomo* 2 pages 55-64.

147 The most clear example of a *preventive* indirect effect is Article 2 of the new Code of Criminal Procedure, in which a general clause stating that domestic law must comply with international treaties on the matter has been introduced. The first draft of the Code, moreover, directly mentioned the Convention. See MAROTTA (1989:63-64). On the implications of the new Code of Criminal Procedure for a *constitutional* status for the Convention in Italy, see *infra* this Chapter.

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a well established fact. The problem with such an application originates from the fact that the Italian Constitution, unlike its Spanish counterpart<sup>148</sup>, contains no provision concerning the effect that international treaties have in the domestic order<sup>149</sup>. In Spain, on the contrary, the domestic status of the Convention has allowed domestic courts, including the *Tribunal Constitucional*, to apply the Convention on many occasions.

This Chapter examines briefly how the Convention as domestic applicable law has been approached in Spain and in Italy. Section (3) reviews the application of the Convention as a source for domestic constitutional adjudication on Human Rights. First, section (2) will study the formal domestic status of the Convention in both countries.

## (2) THE FORMAL DOMESTIC STATUS OF THE CONVENTION IN ITALY AND SPAIN.

### 1. The Convention as an international treaty in Italy and Spain.

Two main questions have been posed concerning the domestic status of the Convention as an international treaty, both in Italy and in Spain: first, the position that the Convention holds within the domestic hierarchy of laws, particularly the possibility for a *a posteriori* domestic statute to derogate from any of the Convention's provisions; and, secondly, whether or not the Convention has a "self-executing" character or not.

In Spain, the problem of the hierarchial position of the Convention as an international treaty has been directly solved by the Constitution. In accordance with the Spanish constitutional tradition<sup>150</sup>, the Spanish Constitution of 1978 (hereinafter quoted as CE, "Constitución Española") contains in Article 96(1) a provision concerning

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148 See *infra* this Chapter..

149 The only references in the Italian Constitution to the domestic effects of international treaties are Article 80 and Article 87(8) of the Constitution. Article 80 reads as follows: "The Chambers authorize by law ratification of international treaties of a political nature, or which provide for arbitration or judicial regulation, or imply modifications to the nation's territory or financial burdens, or to laws". Article 87(8) states that "He [The President of the Republic] accredits and receives diplomatic representatives and ratifies international treaties, provided they be authorized by Parliament whenever such authorization is necessary" The Italian Constitution is quoted in English following the translation in BLAUSTEIN, A. and FLANZ, G.H., *Constitutions of the Countries of the World*, New York:Oceana.

150 See Article 65 of the Republican Constitution of 1931.

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the general reception of international treaties into Spanish Law<sup>151</sup>. According to this Article of the Constitution, international treaties are received into domestic law (*..shall form part of the internal legal order..*) with the only requirement being its prior official publication in Spain. This condition cannot, however, be seen as an act of *incorporation* since it does not mean that a statute or other legislative act, stating that the treaty shall be part of domestic law, must be passed; it only indicates that the treaty, like any other act of Parliament, needs to be published in Spain in order to comply with constitutional provisions on the proclamation of legal acts<sup>152</sup>. Since Article 96 CE (Eopa) applies to all kinds of international treaties, human rights treaties - and the Convention among them - fall under its scope. The Convention has, therefore, become applicable law in Spain and it is, therefore, binding upon domestic courts in the same way as domestic law<sup>153</sup>.

The position which the Convention holds within the domestic hierarchy of law is also clearly deduced from Article 96(1) CE of the Constitution: validly concluded treaties are situated above ordinary legislation and below the Constitution. The problem of the so-called *passive force* of international treaties has also been peacefully resolved in Spain: although the debates on the draft Constitution eliminated an express provision stating that treaties should take precedence over ordinary legislation, the same con-

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151 Article 96(1) of the Spanish Constitution reads as follows: "Validly concluded international treaties, once officially published in Spain, shall form part of the internal legal order. Their provisions may only be repealed, amended or suspended in the manner provided in the treaties themselves or in accordance with the general rules of international law". The Spanish Constitution is quoted in English from the official translation in *Documentacion Administrativa*, n.180, extraordinario, Octubre-Diciembre 1978.

152 The Spanish system, however, has been described, due to this prerequisite of official publication, as a "reasonable and moderate dualism": "El sistema español actual sobre aplicación interna de los tratados puede ser calificado como de dualista moderado y razonable. Dualista porque exige un acto de recepción. Y moderado y razonable porque tal recepción se hace por la simple publicación, no por la orden de ejecución de un tratado mediante una ley" [PASTOR RIDRUEJO, J. A. (1986) *Curso de Derecho Internacional Público*, Madrid:Tecnos at 170].

153 Accordingly, it has been said that "Centrándonos ahora en la consideración del Convenio Europeo de Derechos Humanos, llegamos a la conclusión de que, una vez publicado oficialmente en España conforme a lo que dispone el artículo 96, formara parte del ordenamiento jurídico español, lo que se puede aplicar a la totalidad de los tratados y acuerdos internacionales en materia de derechos fundamentales suscritos por España. Por consiguiente, aquel será de aplicación directa y obligada para las autoridades y tribunales españoles" [LINDE, E. (1983,2a) "Eficacia de la Convención en el Derecho Español", chapter VII in GARCÍA DE ENTERRÍA, E. (and others) *El sistema europeo de protección de los Derechos Humanos*, Madrid:Civitas at 179].

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clusion may be drawn from the statement included in the final wording of Article 96(1) which states that treaties "may only be repealed, amended or suspended in the manner provided in the treaties themselves or in accordance with the general rules of international law". This clearly demonstrates that, according to Spanish legal literature, treaties cannot be derogated from by a posterior statute<sup>154</sup>.

In Italy, on the other hand, international treaties holds the position of the *ordine di esecuzione* which incorporates them into domestic legal order. Accordingly, the Convention holds the position of an ordinary domestic statute, since this was the hierarchical position of the *ordine di esecuzione* by which the Convention was incorporated into Italian law. Once the domestic legal position of the Convention as an ordinary statute is admitted, the discussion has also turned to the inability of the Convention to be derogated by a posterior conflicting statute, that is the *passive force* of the Convention as an international treaty. The Italian Constitution (hereinafter quoted as CI, "Costituzione Italiana") does not embody a clear provision in this respect, as is the case of Article 96(1) of the Spanish Constitution. Italian legal literature, however, has argued on doctrinal reasons in order to make the Convention prevail over a *a posteriori* statute. Two main reasons have been put forward for this: first, the fact that the Convention would be considered as a *lex specialis* in the face of any domestic statute, and therefore, would not be abrogated by it; and, secondly, the so-called *coherence argument*, which should guide the interpretation of any posterior statute which *prima facie* conflicts with the Convention: the presumption that Italy will not pass any legislative Act conflicting with its international obligations. None of these arguments, however, seems to fully deal with the problem of the relationship between the Convention and a posterior domestic statute.

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<sup>154</sup> See a survey of legal literature supporting this position in MANGAS MARTÍN, A. (1980) "Cuestiones de Derecho Internacional Público en la Constitución Española de 1978", in *Revista de la Facultad de Derecho de la Universidad Complutense* 61 pages 143-84. Following this theory, it has been put forward that Article 96(1) of the Spanish Constitution "da a entender de manera inequívoca que la derogación, modificación o suspensión de un tratado no puede realizarse a efectos internos por vía de ley. Se proclama así la supremacía de los tratados sobre las disposiciones internas que tengan rango inferior al constitucional, sean anteriores o posteriores al tratado." (PASTOR, 1986:169). A contrary position on the relationship between treaties and statutes can be read in LINDE (1983:173-79) who defends the application in these cases of the principle of competence and not the principle of hierarchy.

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With regards to the *lex specialis* argument, its main weakness is that the presumption of speciality of the Convention should be confronted case by case in the face of a concerned domestic statute, what makes it useless as a general rule<sup>155</sup>: under certain circumstances, domestic law can be considered as a *lex specialis* on a Convention's fundamental right. The Convention would prevail only in those cases in which a domestic statute could effectively be considered as a *lex generalis* concerning the Convention. As a general rule the presumption of speciality of the Convention applies only to the way in which the Convention was passed as an international treaty; without an express constitutional provision on this matter, however, the nature of Article 96(1) of the Spanish Constitution, this view of the *lex specialis* principle, based on the character of the organ which pass the law, cannot grant the prevalence of the Convention over every conflicting domestic statute<sup>156</sup>. The *lex specialis* principle, therefore, does not seem to solve with certainty which law will prevail in an instant case<sup>157</sup>.

Likewise, this argument can be applied concerning the assumption that Italy would not pass any piece of legislation opposing prior international obligations. Certainly,

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155 At least, it will reduce dramatically its usefulness: "Il richiamo al principio di specialità non è, però, troppo calzante, poiché la natura di *lex specialis* della norma di origine convenzionale andrà verificata caso per caso, con riferimento al suo specifico contenuto, al di fuori, cioè, di ogni apriorismo.." (CHIAVARIO, 1969:49)

156 See CASSESE A. (1969) "L'efficacia delle norme italiane di adattamento alla Convenzione europea dei diritti dell'uomo" in *Rivista di Diritto Internazionale Privato e Processuale* pages 918-38 at 927-31.

157 Nonetheless, the *lex specialis* principle has been accepted as a second best solution which would help to support the prevalence of the Convention until it reaches a constitutional status, what, as will be seen below, is not easy to foresee in the short term in Italy: "..non sembra realistico pensare che il *diritto vivente* italiano possa rapidamente evolvere nel senso di risolvere il problema della *primauté* del diritto di Strasburgo assegnando ad esso un valore pari a quello delle disposizioni costituzionali. L'impasse va quindi superata restando sul terreno dei rapporti tra norme di pari rango, quello della legge ordinaria" (RAIMONDI, 1990:39). According to this author, the *ordine di esecuzione* would play, in the face of the Convention, the same role played by Article 10(1) of the Constitution as on General International Law: "In sostanza, ciascun ordine di esecuzione viene a svolgere, nei riguardi del trattato che ne è l'oggetto, la medesima funzione che, nei confronti del diritto internazionale generale, è svolta dall'art. 10, primo comma, della Costituzione, vero trasformatore permanente del diritto internazionale in diritto interno. Esso quindi, operando con continuità, fa sì che le norme pattizie considerate vadano riguardate come sempre posteriori rispetto a norme interne eventualmente difformi." (RAIMONDI, 1990:40). On article 10(1) of the Italian Constitution and, in general, the problems of a *constitutionalization* of the Convention in Italy, see *infra*, this Chapter.

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this *coherence principle* must guide the interpretation of domestic statutes, but there can be cases in which a disagreement between the Convention and a posterior statute occurs which simply cannot be resolved resulting in a conflicting interpretation of the domestic applicable law. The *coherence principle* is useless in such cases in which the problem is more serious, that is, when a clear-cut conflict between the Convention and posterior domestic law is present<sup>158</sup>.

A third argument, however, has tried to avoid the derogation of the Convention by a posterior conflicting domestic statute: this argument stresses the general outline of the Conventions' provisions, which would make them prevail over any posterior statute. The point stressed here is that statutes would not be able to derogate general clauses such as those embodied in the Convention: because of its legal nature, the Convention would prevail over domestic statutes, whose objective and scope would only be to regulate the details of the rights protected therein. Their different scope - general and particular - would imply that the Convention and domestic statutes would be considered as norms of different legal nature. Provided that the abrogation is possible only between norms of the same nature, it is argued, statutes would not be able to derogate the Convention<sup>159</sup>. This reasoning cannot be accepted, either. The argument that provisions of a general nature cannot be derogated by other provisions which regulate the details, is certainly peacefully accepted by domestic Italian law. But this argument always imply a different hierarchical position between the general norm and the particular norm. Given the same hierarchical position, as is the case of the Convention and domestic statutes, the argument cannot be applied: the ability of abrogation would depend exclusively on the content of the norm, and would not be then a matter of hierarchy. The approach would then clearly be unacceptable<sup>160</sup>.

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<sup>158</sup> In words of CHIAVARIO, the *coherence principle* "lascia scoperto, quantomeno, le ipotesi in cui un contrasto tra la norma di origine convenzionale ed una norma ordinaria posteriore assuma i caratteri dell'evidenza, onde risulti manifestamente acetato dal legislatore interno". (CHIAVARIO, 1969:49). See also, on the same point, CASSESE (1969).

<sup>159</sup> See a development of this point in GRISOTTI A. N. (1981) "Valore ed efficacia della Convenzione Europea dei Diritti dell'Uomo nell'ordinamento italiano" in BISCOTTINI, G. (ed) *La Convenzione Europea dei diritti dell'Uomo nell'applicazione giurisprudenziale in Italia*, Milano:Giuffrè pages 123-32 at 130-31.

<sup>160</sup> See CASSESE (1969:935)

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Let us assume, however, that the general nature of the Convention permits it to prevail over domestic statutes. The alleged advantage of the prevalence of the Convention in the face of posterior domestic law, would be impaired by another direct consequence of its general shape: the Convention would be considered as a *programmatic* treaty. Italian legal literature has accepted the distinction between provisions embodied in international treaties which only have a programmatic character (*norme programmatiche*) and those which have a direct compulsory effect (*norme precettive*)<sup>161</sup>. The emphasis in the Convention's general character would classify the Convention, as a whole or in part, as a programmatic treaty<sup>162</sup>. Moreover, the fact that the reception through such a *laconic*<sup>163</sup> act as the *ordine di esecuzione*, has not been completed by any other legislative act clarifying the domestic understanding of the Convention's provisions, has also been quoted as an obstacle for a direct binding effect of the Convention in Italy.

It should be noted, however, that, once an *ordine di esecuzione* has been passed, although without more specifications, the absence of a domestic *atto di coordinamento* developing the Conventions' provisions would only make it more difficult for Italian law-enforcing authorities to complete the task of interpretation, but it would not necessarily imply a programmatic character for the Convention<sup>164</sup>. Further, it must be noted that the programmatic or compulsory character of international treaties depends on the domestic way in which it has been received into domestic law, regardless of the general character of its provisions<sup>165</sup>. The self-executing character of the Convention,

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161 A distinction between these two kinds of treaties can be seen in CHIAVARIO (1969:52-63)

162 Although some provisions, as those embodied in Article 5 and Article 6 ECHR, would have a self-executing character, even in the case that the Convention would be seen as, in general, a programmatic treaty. On this, MIELE, M. (1968) *Patti internazionali sui diritti dell'uomo e diritto italiano*, Milano:Giuffr  at 75-76.

163 CHIAVARIO (1969:37)

164 However, also from this perspective the *atto di coordinamento* is desired. See MIELE (1968:71-72).

165 "Il problema dell'applicabilit  di una norma convenzionale non   risolvibile in termini semplicistici guardando solo al contenuto della norma stessa", but it depends, on the contrary, "sia del suo contenuto pi  o meno generico, pi  o meno completo, sia da come si presenta l'ordinamento e dalla sua idoneit  a consentirla. Solo se si tiene conto di questo dato si pu  comprendere perch  una stessa norma pu  risultare in un ordinamento di applicazione immediata e in un altro non."

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therefore, would be a matter of the domestic way of reception, but it should have nothing to do with the alleged general character of its provisions.

To sum up, international treaties in both Italy and Spain have a domestic legal status of ordinary statutes. Therefore, they are applicable domestic law and must be applied by the domestic courts. Although the Convention should certainly be regarded as a self-executing treaty before domestic courts, it is very difficult, however, to avoid the conclusion that the passive force of the Convention, as an international treaty, is quite different in Italy than in Spain. Unlike Italy, the Spanish Constitution contains an express provisions which make treaties immune to the possibility of an abrogation by domestic posterior statutes. Italian doctrinal efforts, however, have not succeeded in filling this gap of its Constitution.

In both Italy and Spain, however, the Convention can also be approached from a different perspective: it should not be forgotten that the Convention is not only an international treaty, but an international treaty *on Human Rights*. Does this make any difference? As previously mentioned, the general character of the Convention provisions is precisely the fact that advises it to approach the Convention from a *constitutional* point of view: if the Convention were taken as a criterion for the constitutionality of domestic law, the programmatic nature of the Convention would now be an advantage, since it fulfils the nature of constitutional adjudication<sup>166</sup>. As has been seen<sup>167</sup>, Human Rights treaties, moreover, can have another *indirect effect* in the domestic legal order: they can be a source for the interpretation of the domestic constitution as far as human rights are concerned.

In Italy, for instance, the relationship between the general character of the Conventions' provisions and its alleged programmatic character has been compared with the same debate concerning the direct binding effect of the Italian Constitution which

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[ALBANO, A. (1991) 'Le norme programmatiche delle Convenzione europea dei diritti dell'uomo e l'ordinamento italiano' in *Rivista Internazionale di Diritti dell'Uomo* 4 pages 719-727 at 724].

<sup>166</sup> The appropriateness of the Convention as to his respect is put forward by MIELE (1968:72) and CHIAVARIO (1969:38).

<sup>167</sup> See *supra*, Chapter I

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took place short after the Constitution came into effect<sup>168</sup>: some decisions of the *Corte di Cassazione* had affirmed the programmatic character of the Constitution, due to the general character of its provisions. Later, when the *Corte Costituzionale* was set up, it strongly affirmed in its first decision<sup>169</sup> that the Constitution had a direct binding effect, overruling the *Corte di Cassazione* programmatic character approach<sup>170</sup>. Although the legal positions of the Convention and that of the Constitution are clearly not the same, the constitutional debate can certainly illustrate this point: like the Constitution, the Convention has provisions of a general nature, but, like the Constitution, this should not be an obstacle for a direct binding effect.

A direct consequence of granting a constitutional value for the Convention in the domestic legal order of a member-state would be that the Convention would be applicable as a valid parameter of the constitutionality of any domestic law conflicting with it. As a result, the control of any piece of domestic legislation conflicting with the Convention would go through the channels devoted to the constitutional adjudication before the domestic Constitutional Court. The point of departure for the *constitutionalization* of the Convention in the domestic legal order seems to be independent, to a certain extent, on the domestic way of reception. This point of departure stresses a correct assumption that Human Rights treaties should be, by the

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168 "Questa riscoperta delle etichette *programmatico-preceptive* riecheggia (...) gli atteggiamenti più retrivi dei primi anni '50, allorché la Cassazione, facendosi scudo di tale distinzione, rifiutava di applicare le norme costituzionali (...) Potremmo, così, dire che all'atteggiamento *precostituzionale* di allora corrisponde oggi un atteggiamento marcatamente *pre-europeo*" (PITTARO, 1987:392). This comparison is put forward also by MORI P. (1983) "Convenzione Europea dei diritti dell'uomo, Patto Internazionale delle Nazioni Unite e Costituzione Italiana" in *Rivista di Diritto Internazionale* 66 pages 306-51, and ALBANO (1991).

169 *Sentenza della Corte Costituzionale* n. 1 of 14 June 1956.

170 Also in the case of the Convention the main defense of its programmatic character has been made by the *Corte di Cassazione*: "La tesi prevalente presso la Suprema Corte (...) é che le norme della Convenzione di Roma, per il loro carattere programmatico o, come si dice, non precettivo, richiederebbero atti interni di attuazione per produrre effetti per i singoli individui. Secondo questa interpretazione, l'ordine di esecuzione dato a un trattato, pur comportando la recezione di questo all'interno dell'ordinamento, no avrebbe conseguenze per i singoli se no con riguardo a disposizioni complete nei loro elementi essenziale. Per le altre, cioè, quelle incomplete o no autosufficienti, generiche, ecc, questo effetto si produrrebbe solo in conseguenza d'un ulteriore attività interna di integrazione e di specificazione degli obblighi assunti sul piano internazionale. La tecnica del rinvio realizzata dall'atto normativo interno che contempla l'ordine di esecuzione al trattato non sarebbe, in questi casi, da sola sufficiente a tale scopo." (ALBANO, 1991:720).

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very nature of these kinds of treaties, approached constitutionally in a different way than other international treaties<sup>171</sup>.

This approach stresses the special character of general treaties on human rights, due to the contents of these treaties, and due to the fact that their provisions have been worded in an unavoidable general shape. The main consequence of these special features of Human Rights treaties is that a state party will comply with its international obligations under the treaty only to the extent that its domestic law does not conflict with it. This makes the technical proceedings of constitutional adjudication the best way to control compliance with the treaty obligations<sup>172</sup>.

Following this *constitutional* approach, however, the Convention, and other general instruments on Human Rights, would not lose their value as direct applicable treaties, neither would then change their hierarchical position as direct applicable law<sup>173</sup>. However, their domestic enforcement as directly applicable law would be

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**171** "In realtà, il fatto stesso che il problema dell'adattamento del nostro ordinamento (e non solo del nostro) agli atti internazionali sui diritti dell'uomo abbia finito per ritagliarsi uno spazio autonomo dell'ambito di quello più generale dei rapporti tra diritto internazionale e diritto interno sembra indicare che la sua soluzione debba collocarsi su un piano parzialmente diverso da quello su cui operano le tesi ora citate [supra]" (MORI, 1983:309)

**172** "...nella maggior parte dei casi, l'obbligo internazionale dello Stato sarà pienamente soddisfatto solo nella misura in cui la legislazione nazionale sia conforme al precetto - principio fissato (...) Non diversamente dalle corrispondenti norme costituzionali, le norme internazionali sui diritti dell'uomo tendono insomma a svolgere una funzione di parametro della legittimità, in senso lato, dell'attività legislativa dello Stato parte" (MORI, 1983:311). This would apply not only to the Convention, but also the United Nations Covenant or other international general instruments of *constitutional* nature. However, the Convention is remarkable because the constitutional approach have been introduced also into the international organs settled in the Convention itself. On the constitutional approach followed by the European Court of Human Rights, see *supra* Chapter I. The differences between the usual interpretation techniques of public international law and those applied in constitutional law are, however, put forward by CARBONI (1981:135).

**173** This constitutional value of the Convention, however, has been wrongly used to support the idea that the Convention holds in Italy a hierarchical position, as an international treaty, over domestic statutes. It has been said, in this sense, that the relationship between the Convention and domestic statutes "andrebbe svolto tra norme oggettivamente diverse: da un parte, una specifica norma di legge che disciplina un aspetto particolare dell'esercizio di un diritto altrove sancito, dall'altra una disposizione convenzionale, che, per quanto dettagliata possa essere, sancisce e non vuol far altro che sancire il diritto in questione" (MORI, 1983:311-2). See also GRISOTTI R. (1981) "Convenzione Europea dei diritti dell'uomo e Costituzione Italiana:cenni comparativi" in *La Convenzione Europea dei diritti dell'Uomo.. cit* pages 131-52 at 132.

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completed by a second function, by virtue of which these treaties would also act as a parameter of the constitutionality of domestic statutory law. In spite of their ability to solve concrete cases when directly applied by domestic courts, this second function would allow them to play a different role which will be more likely to become the most important one<sup>174</sup>

The crucial legal problem is to what extent each constitutional system allows to this *constitutionalization* of the Convention or any other instrument in its national legal order. Moreover, without a clear constitutional way to situate the Convention as a criterion of the constitutional adjudication on human rights, the general consensus on this point would be useless<sup>175</sup>.

Again, the way in which this problem has been posed in Italy and in Spain has been conditioned by the constitutional provisions of each state. As seen below, the Spanish Constitution expressly situates the Convention - and other international treaties on Human Rights - as a mean of interpretation of the domestic Constitution itself. On the contrary, in Italy, the Constitution does not expressly situates the Convention as a mean of interpretation of the fundamental Constitutional rights or as a valid parameter of the constitutionality of statutory law; several Articles of the Constitution, however, have been debated in order to give to the Convention a constitutional status.

#### 2. The Constitutional value of the Convention in Spain.

The Spanish case illustrates the double function that Human Rights treaties may play into the domestic legal order: in Spain, the above studied Article 96(1) of the Constitution is not the only constitutional provision concerning the domestic status of Human Rights treaties. Another Article of the Constitution, Article (10)2, directly situates

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174 "Se si tiene conto della loro immediata percettività e della loro formulazione, in nulla diverse dalle norme più propriamente statali, appare chiaro, infatti, che una volta immesse nel sistema giuridico interno esse costituiscono pur sempre norme complete e fornite di funzione loro propria: anche quando no si rivelino direttamente applicabili, esse continueranno a rappresentare canoni di conformità della legge statale" (MORI, 1983:318).

175 This point is stressed by ARBA S. (1991) "La giurisprudenza italiana e la Convenzione Europea dei Diritti dell'Uomo" in *Rivista Internazionale dei Diritti dell'Uomo* 4 pages 120-132 at 129, who puts forward that there exists in Italy a "convincimento diffuso dell'obbligatorietà delle norme internazionali di diritti dell'uomo".

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the Convention as a valid criterion of the constitutionality of laws: according to this Article, Spanish Constitutional provisions on fundamental rights should be construed following international treaties on the matter ratified by Spain<sup>176</sup>. The present situation in Spain is then that Article 96(1) CE concerns international treaties in general, whereas Article 10(2) CE refers only to international treaties and agreements on human rights.

One may ask why the Spanish Constitution embodies two clauses on the reception of international treaties. An in-depth answer to this question can only be given with reference to the period of the Spanish transition to democracy. As is well-known, the Spanish Constitution was the result of a transactional negotiation among a number of political forces. Several of them were in open opposition to the francoism while others, those who won the majority in the first general election after the dictatorship, had a more ambiguous attitude to the regime which had just come to an end. This added to the difficulties of achieving consensus on the draft constitution. One of the draft Articles where this consensus was the most difficult to achieve at the debates in the *Congreso de los Diputados*, the lower House of the Spanish Parliament, was Article 27(1) which regulated the right to education. At this stage of the draft Constitution, it had only one provision - Article 96 quoted above - regulating the reception of international treaties. When the project went to the Senate, the *Union del Centro Democratico*, the centre party then in office, introduced Article 10(2) initially as a clause of *integration* of international treaties on human rights and finally with the above mentioned *interpretation* clause. And, in spite of the support that the Socialist Party and other forces of the left had previously expressed to the international systems of the protection of human rights, they strongly opposed the inclusion of this provision. The reason for this was to be found in Article 27 of the Constitution itself. The centre had forced the socialists to recognize "the right of individuals and legal entities to set up teaching establishments" [Article 27(6)], but the socialist party had succeeded in not including the right to *direct* them. Once negotiation on this point had been concluded, the Government tried to modify it by introducing Article 10(2). According to this Article, all fundamental rights, including the right to

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<sup>176</sup> Article 10(2) of the Spanish Constitution reads as follows: "The standards relative to the fundamental rights and liberties recognized by the Constitution shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements thereon ratified by Spain"

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education, had to be interpreted in conformity with the international treaties in this field ratified by Spain. Amongst them, the International Covenant on Civil and Political Rights of 1966 had then only just been ratified. Article 18(4) of the Covenant stipulates that the States have to respect the liberty of parents or of legal guardians, "to ensure the religious and moral education of their children in conformity with their own convictions". Thanks to the new Article 10(2) this provision would be the criterion for interpreting Article 27 of the new Constitution. This is why the socialist leader in the Senate spoke of the "parallel Constitution" that would thereby be created. However, the Article remained unchanged and was incorporated into the final text<sup>177</sup>.

The question, then, is whether Human Rights treaties are "part of the internal legal order", following Article 96 CE or are they criteria for the interpretation of "the fundamental rights and liberties recognized by the Constitution", as stated in Article 10(2). Initially, the legal literature criticized the apparent overlap between Articles 96 and 10(2) CE. Moreover, Article 10(2) CE was said to be "superfluous"<sup>178</sup>. Conversely, in spite of these earlier studies, there exists an important difference: Article 10 talks about "interpretation" and it concerns "the standards relative to the fundamental rights and liberties recognized by the Constitution". Hence, it places international treaties on human rights *above the Constitution* in the sense that the Convention has to be interpreted in the light of Human Rights treaties ratified by Spain. Certainly, thanks to Article 96, all

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<sup>177</sup> Nevertheless, it can be said that the interpretation both the center and the socialists gave to the Article 18 of the United Nations Covenant was wrong. The drafted texts of Article 10(2) of the Spanish Constitution are to be found in *Boletín Oficial de las Cortes*, January, 5 and April, 17 of 1978. The debates in Parliament on this subject can be found in *Diario de Sesiones de la Comisión Constitucional del Senado* of the 23rd of August of 1978, pages 1738-1761. Others sources are LINDE (1983:167-72) and APARICIO, M. A. (unpublished) "La cláusula de interpretación del artículo 10,2 de la Constitución Española como cláusula de integración constitucional" [lecture given at the University of Granada in 1989], according to whom the final formula was directly inspired by Article 6 of the Portuguese Constitution. There is a long bibliography on the Spanish transition to democracy: on the Constitutional drafting process, see PECES BARBA, G. (1989) *La elaboración de la Constitución de 1978*, Madrid: Centro de Estudios Constitucionales.

<sup>178</sup> It was stated that by virtue of Article 96 of the Constitution "puede convertir en superfluo el artículo 10(2), pues, si alguno de estos tratados ha sido incorporado al Derecho interno español, entonces está claro que su función no será la de suplir por vía interpretativa las dudas que la norma española ofrezca. Sencillamente será invocable para su directa aplicación ante los tribunales" [GARRIDO FALLA, F. (1985/2a) "Comentario al artículo 10(2) de la Constitución Española" in GARRIDO FALLA (and others) *Comentario a la Constitución Española*, Madrid:Civitas at 142].

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treaties have a say in the interpretation of the related legislation too; but they only operate on an infraconstitutional level. On the contrary, thanks to Article 10(2) CE, Human Rights treaties offer a proper interpretation to be given to the rights embraced by the Constitution itself<sup>179</sup>. Therefore, there is no overlap between Article 96(1) and Article 10(2) of the Constitution. The general reception of treaties by virtue of Article 96 allows the authorities, including the judiciary, to apply them directly as domestic law while the "interpretation clause" operates when a Constitutional right has to be interpreted.

Article 10(2) CE, however, can only be used whenever a right previously included in the Constitution must be interpreted. In other words, when a treaty protects a right which is not embodied in the Constitution, the treaty may be used as applicable domestic law, but it cannot be used as a guideline for interpreting the Constitution itself. In this sense, Article 10(2) does not cover all the cases in which Article 96 is applicable<sup>180</sup>. The most important effect in the case of a fundamental right protected by an international treaty ratified by Spain, but not embodied in the Constitution, is that, independently, the treaty is not able to transmit the right it embodies to a number of guarantees foreseen only for the fundamental rights embraced in the Constitution. This means that, in such cases, the violation of a right embraced in a treaty cannot be alleged before the Constitutional Court and will be protected only by ordinary courts<sup>181</sup>. This does not, however, apply to the Convention: all the rights protected by the Convention without exception are embodied in the Constitution. Therefore, Article 10(2) CE is always applicable whenever a violation of the Convention is alleged. Thus there is indeed a double reception. The Convention, which was "ambivalent" because of its international

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**179** *"..todos los tratados sirven de parámetro interpretativo en la aplicación de normas internas (..) los tratados comunes operan en el ordenamiento infraconstitucional mientras que los tratados sobre derechos [humanos] operan directamente en el nivel constitucional"* (APARICIO, 1989:5)

**180** *"Los acuerdos internacionales concluidos por España sobre derechos humanos forman parte de nuestro ordenamiento en virtud del artículo 96 (..) Por el contrario, este artículo 10.2 no apela a los convenios internacionales en cuanto derecho interno, sino que la referencia explícita a la Declaración Universal de Derechos Humanos y a otros convenios internacionales sobre la materia se hace solo a efectos de interpretación de los derechos y libertades incluidos en la Constitución"* (MANGAS, 1980:150)

**181** See APARICIO (1989).

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and, at the same time, domestic effects<sup>182</sup>, acquires, in addition, a double value in the Spanish domestic legal order. By virtue of Article 96 CE it is applicable domestic law in Spain and can be invoked before domestic courts; and by virtue of Article 10(2) CE it is also a guideline for the interpretation of the rights embraced in the Spanish Constitution.

Contemporary Spanish legal literature qualifies the double reception of the Convention into Spanish law as a "singular fact" and points out the Constitutional value the Convention has thereby acquired<sup>183</sup>. Moreover, the *constitutional value* of the judgments of the European Court of Human rights, as a source for the interpretation of the rights embodied in the Spanish Constitution, has been accepted too: the double reception of Article 10(2) of the Spanish Constitution and of Article 45 of the Convention introduces the case-law of the European Court as a compulsory means of interpretation of the Spanish Constitution<sup>184</sup>. It may be disputed, however, to what extent the case-law of the European Court should have the same binding force on domestic courts in cases in which the Court has applied the so-called "dynamic interpretation" of the Convention. The problem arises when an "emerging right" developed by the European Court is not expressly protected by the Spanish Constitution, as the case may be in the future. Under such circumstances, the alleged impossibility to apply Article 10(2) CE in relation to a right not expressly embraced in the Constitution should not prevent a

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182 On how the ambivalence of the Convention has been put forward in Spain, see CARRILLO SALCEDO (1985).

183 The reception of the Convention by virtue of this double was has been described as a "singular legal technique" and as a "guarantee clause" (MANGAS, 1980:150). Further, a former Spanish judge at the European Court of Human Rights has pointed out the Spanish case as a "...un cas a tout fait singulier de valeur constitutionnelle directe de la Convention Europeenne qui resulte de l'article 10,2 de la Constitution de 1978" [GARCIA DE ENTERRIA, E. (1988) "Valeur de la jurisprudence de la Cour Européenne des Droits de l'Homme en Droit Espagnol", in *Protecting Human Rights*..cit, at 222].

184 "par le jeu combine d'un double renvoi (renvoi de l'article 10,2 de la Constitution a la Convention et renvoi de l'article 45 de la Convention aux arrêts de la Cour européenne), la jurisprudence de la Cour européenne est devenue directement pertinente en Espagne pour l'interprétation de la Constitution du pays" (GARCIA DE ENTERRIA, 1988:244).

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domestic court from being bound by the case-law of the European Court<sup>185</sup>.

Finally, it is still open to discussion to what extent the decisions of the other Convention bodies have the same value, since the decisions of either the Commission or of the Committee of Ministers have rarely been referred to by the *Tribunal Constitucional*<sup>186</sup>.

**3. The Constitutional value of the Convention in Italy.**

In Italy, the possibility of a constitutional control by the *Corte Costituzionale* of any domestic statute conflicting with the Convention (or, more properly, with the *ordine di esecuzione* by which the Convention has been introduced into the Italian legal order) was first put forward in the late sixties<sup>187</sup>. This possibility, however, has not been expressly embodied in the Constitution: there is not in the Italian Constitution any

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185 Furthermore, a distinction has been drawn (see APARICIO, 1989) among the different ways the case-law of the Court may have binding effect on domestic courts. On the one hand, both the "new" rules deriving from the "dynamic interpretation" and the main "principles of interpretation" laid down by the European Court have the effect of introducing, respectively, new rights in the bill of rights and judicial precedents binding both on the Constitutional Court and the ordinary courts. On the other hand, the "interpretation techniques" followed by the European Court in each case (i.e. empirical, historical, pursuing the "European standard" or leaving room for the State's "margin of appreciation, etc) should not have binding value on domestic law-enforcing authorities. Since this question has been addressed by the literature only very recently, it cannot yet be said whether or not this question will be generally accepted or discussed. It may be regarded as the proper way to interpret the so-called "expansive function" which the literature mentions about Article 10(2) of the Constitution [see RUIZ GIMENEZ, J. (1983) "Comentario al artículo 10,2" in ALZAGA, O. *Comentarios a las Leyes Políticas*, Madrid:EDERSA]. However, it may be questioned to what extent it from an analytical point of view is possible to distinguish between the "principles of interpretation" and "interpretation techniques".

186 Judgment 114/84 of the *Tribunal Constitucional*, which refers to a resolution of the Committee of Ministers as grounds for its decision, notices, however, that "su sentido no resulta de necesaria consideracion en nuestro Derecho sobre la base del citado art. 10,2 de la Constitucion (...) la interpretacion relevante, de acuerdo con el art. 10,2 de la Constitucion es solo la jurisprudencia del Tribunal Europeo y no la del Comite de Ministros.."

187 The first formulation of this possibility is due to MIELE: "Resta, a nostra opinione, aperta la via all'incidente di costituzionalità anche nell'ipotesi che il legislatore emani leggi ordinarie in contrasto con la Convenzione europea. La Corte costituzionale, ricorrendo il generale presupposto procedurale relativo all c.d. pregiudizialità costituzionale, è competente a dichiarare l'inefficacia della legge emanata in contrasto alle esigenze di adattamento alle Convenzioni europee [sic]. Questo ci sembra l'unico modo per garantire la costituzionalità dell'adeguamento nel tempo dell'ordinamento italiano alle convenzioni in materia di diritti dell'uomo" (MIELE, 1968:85)

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provision resembling the above studied Article 10(2) of the Spanish Constitution<sup>188</sup>.

Under these circumstances, Italian legal commentators have tried to find a way through which the *constitutional value* of the Convention could be affirmed. Three Articles of the Constitution have been quoted to support this: the general clause concerning the acceptance of international law of Article 10(1) Cl; the limitation of sovereignty clause embodied in Article 11 Cl; and the mention of the inviolable rights of man in Article 2 Cl. Neither of them, however, seems to grant a constitutional status for the Convention in Italy.

1) Article 10(1) of the Italian Constitution contains a general clause by which the Italian legal order complies with the generally recognized rules of international law<sup>189</sup>. Some commentators have tried to apply this Article in order to grant a domestic constitutional status to the ECHR: according to their interpretation, any domestic statute conflicting with the Convention would be an infringement of Article 10(1) of the Constitution, and therefore could be declared unconstitutional by the *Corte Costituzionale*. On the other hand, however, it has been noted that Article 10(1) of the Constitution applies only to general international customary law, and therefore treaties are not included under its scope. The only way to include international treaties under the scope of Article 10(1) of the Constitution would be by viewing the rule *pacta sunt servanda* as a part of international customary law. This would make the application of any domestic statute conflicting with an international treaty a breach of this international customary law rule, and, therefore, a breach of Article 10(1) of the Constitution. As a result, the doors will be opened for a declaration of unconstitutionality by the *Corte Costituzionale*.

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188 What has been criticized as follows: "...al fine di garantire una piena efficacia alla Convenzione nell'ordinamento interno, si sarebbe dovuto seguire il procedimento della *costituzionalizzazione* delle relative norme, magari utilizzando il diritto di riserva previsto dell'art. 64 della stessa Convenzione, in rapporto alle clausole ritenute troppo gravose perché se ne potesse ammettere l'efficacia vincolante nei confronti del legislatore ordinario. Non essendo stato adottato quel procedimento, è gioco forza concludere nel senso che, in linea generale, le norme sostanziali della Convenzione di Roma si pongono allo stesso livello delle norme di legge ordinaria." (CHIAVARIO, 1969:50-51).

189 Article 10(1) of the Italian Constitution reads as follows: "Italy's legal system conforms with the generally recognized principles of international law".

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The opinion has prevailed, however, that this argument cannot be accepted: first of all, because *pacta sunt servanda* is not properly an international rule<sup>190</sup>, and secondly, because, if these were the effects of Article 10(1) of the Constitution, Article 10(2) CI would be useless<sup>191</sup>. This argument can therefore be applied in order to deny a constitutional status of the Convention through Article 10(1) of the Constitution<sup>192</sup>.

2) The transference of sovereignty clause of Article 11 of the Constitution has also been quoted in order to give a constitutional status to the Convention<sup>193</sup>. It is extremely difficult, however, to include the Convention under the scope of this Article, expressly embodied in the Constitution due to a foreseeable transference of sovereignty to the European Community. In order to apply Article 11 of the Constitution to the Convention, it should be assumed that the obligations of Italy as a member state of the Convention imply a clear transference of sovereignty to the Convention organs, which is clearly not the case. Even if some kind of transference of sovereignty were deduced from the Convention's provisions (for instance, the exercise of judicial functions by the European Court of Human Rights), it seems clear that the application of this Article to any other case than the one for which it was initially thought, would be extremely complicated<sup>194</sup>. In fact, the possibility to grant a constitutional status to the Convention through this Article has been widely denied<sup>195</sup> by Italian legal literature<sup>196</sup>.

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**190** See CASSESE (1969:920-24) and GRISOTTI (1981:125-27)

**191** See CASSESE (1969:924). On Article 10(2) of the Italian Constitution, see *infra*, this Chapter..

**192** Some interesting remarks, however, have been put forward on the extent to which particular provisions of the Convention can be regarded as a part of general international law, and on the extent to which the Convention as a whole can be seen as a general international law *in Europe*. See MORI (1983:332-346).

**193** Article 11 of the Italian Constitution reads as follows: "Italy condemns war as an instrument of aggression against the liberties of other peoples and as a means for settling international controversies; it agrees, on conditions of equality with other states, so such limitation of sovereignty as may be necessary for a system calculated to ensure peace and justice between Nations; it promotes and encourages international organizations having such ends in view".

**194** See CHIAVARIO (1969:42-47)

**195** The only clear position in favour of Article 11 of the Constitution as a way to grant a constitutional status to the Convention in Italy, can be seen in MORI (1983:322-32)

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3) Finally, the general mention of the "inviolable rights of man" embodied in Article 2 of the Constitution<sup>197</sup> has also been, on occasions, quoted as a valid source to grant a constitutional status to the Convention. Article 2 of the Constitution, however, contains only a general mention to the respect for human rights which does not seem to be enough for the *constitutionalization* of the Convention within the Italian legal order with the same effects that it has in Spain<sup>198</sup>.

Neither the general mention of international law of Article 10(1) CI of the Italian Constitution nor the transference of sovereignty clause of Article 11, nor the mention of the inviolable human rights of Article 2 CI, can be applied in order to grant to the Convention a role as a source of the constitutional adjudication on human rights in Italy. Two other Articles of the Constitution, however, have been quoted in order to do so. Both of them are more likely to succeed, although certainly with a more limited scope: Article 10(2) of the Constitution, which would allow a constitutional control based on the Convention only as far as the rights of foreign people in Italy are concerned, and Article 76 of the Constitution, which would have the same effects only on any Convention's protected right domestically regulated by the Italian Code of Criminal Procedure. The points argued on these two Articles are the following:

1) As mentioned above, the Convention is viewed by the majority of the literature

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196 The argument of a fraudulent constitutional reform have also been argued as to his respect: given a broad interpretation of Article 11 of the Constitution, the great number of treaties which could be included therein would imply that "si verrebbe ammettere che attraverso leggi ordinarie (di esecuzione di quei trattati) vengano derogate norme costituzionali: il che equivarrebbe ad una palese e sistematica elusione dell'art. 138 Cost., il quale richiede, per la modifica della Costituzione, un procedimento aggravato rispetto a quello contemplato per la legge ordinaria" (CASSESE, 1969:926)

197 Article 2 of the Italian Constitution reads as follows: "The Republic recognizes and guarantees the inviolable rights of man, both as an individual and as a member of the social groups in which his personality finds expression, and imposes performance inalterable duties of a political, economic and social nature".

198 It has been said that in order to avoid "l'assurdità di una costituzionalizzazione di massa, nonché il rischio di inutili cristallizzazioni e di contrasti di formulazione, queste convenzioni e dichiarazioni internazionali sui diritti dell'uomo devono sì essere fondamentali parametri da utilizzare dell'individuazione del significato storico e concreto dell'art. 2 ma non possono costituire esse stesse il contenuto" (GRISOTTI, 1981:128) See also MORI (1983:346-49) and CHIAVARIO (1969:47-49).

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as outside of the scope of the general clause concerning international law embodied in Article 10(1) of the Constitution. However, it has been stressed that the second paragraph (*secondo comma*) of this Article embodies a special provision concerning a specific kind of international treaties: those treaties which regulate the legal situation of foreign citizens in Italy. According to this Article of the Constitution, domestic law regarding the legal status of foreigners must comply with international treaties on the matter ratified by Italy<sup>199</sup>. It has been argued, therefore, that Article 10(2) of the Constitution situates international treaties concerning foreigners as a valid parameter of the constitutionality of statutes<sup>200</sup>. By virtue of this Article, moreover, the Convention would be applicable by the *Corte Costituzionale* as a source for the constitutional control of posterior domestic statutes. This possibility provided by Article 10(2) of the Constitution, however, would be an exception to the general status of international treaties within the Italian legal order<sup>201</sup>: Article 10(2) would apply only to the extent to which the Convention, or any other international treaty, concerns the legal situation of foreigners. The Convention would then be applied as a constitutional parameter only to the extent to which it regulates fundamental rights of any non-Italian person under the jurisdiction of Italy<sup>202</sup>. Accordingly, a posterior domestic statute in which fundamental rights of foreign citizens in Italy are defined, could be declared unconstitutional if it conflicts with the Conventions' provisions.

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199 Article 10(2) of the Constitution reads as follows: "The legal status of foreigners is regulated by law in conformity with international rules and treaties".

200 See a development of this point in CASSESE (1969:938 ff). See also CHIAVARIO (1969:52-54)

201 As has been put forward, the main criticism to the inclusion of the Convention under Article 10(1) of the Constitution is that "essa trascura un elemento importante: la Costituzione, pur omettendo di predisporre qualsiasi congegno di adattamento al diritto pattizio, ha inteso prefigurare una garanzia costituzionale di talune categorie di trattati, e precisamente di quelli regolanti la condiziona giuridica de lo straniero" (CASSESE, 1969:920). This is not, however, the only exception to the general rules concerning international treaties in Italy provided by Article 10(2) of the Constitution: according to this Article, international treaties on foreign citizens' rights should be always incorporated by a domestic act with the status of statutory law; that is, the *ordine di esecuzione* of these kind of treaties will holds always the hierarchical position of parliament statutes. See CASSESE (1969:932).

202 As is well known, Article 1 ECHR states that "The High contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention" [emphasis added]

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Although this would not imply a new position for the Convention within the domestic legal hierarchy<sup>203</sup>, it would however introduce a paradoxical situation in the domestic protection of fundamental rights: posterior domestic statutes could be declared unconstitutional whenever a conflict arises with an international treaty on the matter, but only if the fundamental rights of foreign citizens in Italy are concerned. The paradoxical situation would clearly be that, at least at a first glance, that the fundamental rights of Italian citizens would be subjected to a lesser constitutional protection than the rights of foreigners<sup>204</sup>. This has been the reason why the limited possibility of a constitutional status for the Convention concerning foreigners' rights has been criticized<sup>205</sup>.

Admittedly, a constitutional status for the Convention only as far as non-Italians are concerned barely complies with the non discrimination clause embodied in Article 14 ECHR<sup>206</sup>. A proposed solution to this problem has been put forward, however, so that this contradiction could be avoided by the extension of such a guaranty (the international treaty as a valid parameter of constitutional adjudication) to Italian citizens as well: the combined application of Article 10(2) CI, the mention of the inviolable fundamental rights of Article 2 CI and the non-discrimination clause of Article 3 CI <sup>207</sup>

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**203** The implications of Article 10(2) of the Constitution would be that "per assolvere il compito di uniformare l'ordinamento alla categoria dei trattati che essa contempla, invalida ogni legge ordinaria incompatibile con le norme di adattamento in questione. Quella legge ordinaria diviene viziata da illegittimità costituzionale sopravvenuta", but, however, these treaties "conservano però anche in questa ipotesi l'efficacia di legge ordinaria, venendo a distinguersi dagli atti normativi primari soltanto per la circostanza di fruire di un garanzia costituzionale" (CASSESE, 1969:933)

**204** What would be in contradiction with the spirit of the Convention as well: "..può sembrare paradossale che proprio la Convenzione di Roma - significativa espressione della tendenza ad ampliare il raggio di tutela internazionalistico dei diritti dell'uomo oltre l'ambito della tradizionale politica di "garanzie per lo straniero" - finisca per ricevere, nel ambito dell'ordinamento italiano, una particolare posizione costituzionale soltanto in quanto comprensiva di siffatte *garanzie*." (CHIAVARIO, 1969:54).

**205** See a critical position in GRISOTTI (1981:128-29)

**206** Article 14 ECHR reads as follows: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

**207** Article 3 of the Italian Constitution reads as follows: "All citizens are invested with equal social status and are equal before the law, without distinction as to sex, race, language religion, political opinions and personal or social conditions"

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would therefore imply that the Convention would act as a parameter of constitutional adjudication even when applied to Italian citizens. As a result, Article 10(2) CI would also lead to a *constitutional value* for the Convention when the fundamental rights of Italians were involved<sup>208</sup>.

2) Recently, Article 76 of the Constitution has been quoted as another mean to grant a constitutional status to the Convention in Italy. As was the case of Article 10(2) CI, however, it would grant a constitutional status only to a part of the Convention. Article 76 of the Constitution allows the Government to pass legislation provided that the Parliament has authorized that delegation. According to Article 76 CI, the Parliament can set the limitations and criteria which the government must respect when the delegated legislation is passed<sup>209</sup>. By the application of the legal principle of the *ecceso di delega*, further, the *Corte Costituzionale* can rule the unconstitutionality of any piece of legislation passed by the government under Article 76 of the Constitution whenever the limitations and criteria fixed by the Parliament have not been respected.

The Parliament authorized the government to pass a new Criminal Procedure Code in 1987. It contains a general clause of observance of the Convention and other international instruments as one of the restrictions to be respected by the government<sup>210</sup>. Accordingly, it has been stressed, any provision of the Criminal Procedure Code which conflicts with the ECHR would be a breach of the parliamentary limitations to the government delegation, and therefore it would imply an *ecceso di*

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**208** "Una attenta analisi del testo costituzionale porta considerare da un lato l'art 2 che parla di diritti inviolabili di tutti, e l'art 10,2 che individua in concreto questi diritti, fornendo loro, relativamente agli stranieri, la garanzia costituzionali prima menzionata [the Convention as a parameter of the constitutionality of domestic law]; dal altro, l'art 3, che, secondo quanto affermato dalla Corte, sancisce il principio dell'uguaglianza di trattamento tra i cittadini e stranieri, in relazione agli stessi diritti fondamentali. Dalla lettura coordinata di questi tre articoli, sembra allora corretto desumere che, almeno per quanto concerne i diritti fondamentali, lo straniero ed il cittadino debbano godere della stessa tutela e, perciò, anche della medesima garanzia costituzionale di tali diritti." [TANCA, A. (1984) "Costituzione italiana, diritti individuali e carcerazione preventiva", in *Rivista Trimestrale di Diritto Pubblico* 34 pages 921-311 at 927].

**209** Article 76 of the Italian Constitution reads as follows: "The exercise of legislative functions may be delegated to the Government save by the laying down of principles and criteria and only for a limited period of time and for definite objects."

**210** See the directive number 45 of the parliamentary delegation (*legge di delegazione*) n. 81 of 1987.

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*delega* under Article 76 of the Constitution. Therefore, the *Corte Costituzionale* could apply Article 76 of the Constitution in order to rule the unconstitutionality of such a provision<sup>211</sup>. As was the case of fundamental rights of foreign people under Article 10(2) CI, however, Article 76 CI would have a limited effect: it would only apply to domestic law embodied in the penal procedure code and conflicting with the Convention. Nonetheless, it should be noted that the majority of alleged violations of the Convention by Italian authorities were specifically concerned with the procedural rights protected by Article 5 and Article 6 ECHR. The Code of Criminal Procedure may be, moreover, the first step towards a future constitutional status of the Convention in Italy<sup>212</sup>.

### (3) THE APPLICATION OF THE ECHR BY THE SPANISH AND THE ITALIAN COURTS: A GENERAL ASSESSMENT.

#### 1. The Convention before the Italian and the Spanish Supreme Courts.

As demonstrated in the methodological Chapter of this work<sup>213</sup>, the way in which domestic courts have dealt with the possibility of a domestic application of the Convention is the crucial aspect in ascertaining the real role played by the Convention in the domestic legal order of a member state. This possibility, in fact, mostly depends to what extent to which domestic courts are sympathetic to European arguments, and only to a lesser extent on the domestic formal status of the Convention within the domestic hierarchy of laws.

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211 This point has been put forward by CHIAVARIO: "la (.) affermazione generale del preambolo della legge-delega del 1987 - circa il dovere di adeguamento del codice de procedura penale alle norme delle convenzione internazionale ratificate per Italia e relative ai diritti delle persona e al processo penale - appare destinata ad avere una importantissima ripercussione sul piano dei rapporti fra le fonti normative: e di conseguenze (e quel che più conta), sul piano del meccanismo di controllo di costituzionalità delle leggi (.) dev'essere colto anche nella sua attitudine a conferire, sul piano formale, un nuovo ruolo alle norme della Convenzione (..) ruolo che - stando alla logica dei rapporti fra legge-delega e legge delegata- non dovrebbe essere inferiore a quello delle direttive rientranti nell'elenco dei singoli *punti* dell'art. 2 della legge-delega e sicuramente idonee a fornire parametri di valutazione delle norme del codice, in eventuali giudizi di costituzionalità" (CHIAVARIO, 1990:465)

212 As has been said, "...Può essere questo l'anello che consente di ancorare finalmente a qualcosa di solido un'aspirazione indiscutibilmente ragionevole, quale è quella di veder riconosciuto a tali norme, nell'ordinamento interno, il ruolo più adeguato ai loro contenuti" (CHIAVARIO, 1990:465).

213 See *supra*, Chapter I.

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This methodological assumption was already been proposed, as far as Italy is concerned, already in the late sixties: once the first legal debates on the legal status of the Convention had not reached a clear conclusion on the matter, the interest turned to how Italian Courts had actually dealt with the problem<sup>214</sup>. Following this *realistic* approach, it must be said that the balance of the application of the Convention by Italian Courts is, to date, clearly in the negative. Since the late seventies, a general opinion has been widespread in Italian legal circles in the sense that "lo spirito del diritto europeo non penetra nell'ordinamento italiano"<sup>215</sup>. Moreover, the attitude of Italian Courts on the domestic application of the Convention was qualified as "sconcertante"<sup>216</sup>. At the end of the eighties, moreover, this opinion had become common place in Italian legal circles<sup>217</sup>. This negative balance would apply not only to Italian Courts, but, in general, to the Italian authorities, the government, the Parliament, and to the legal profession as well<sup>218</sup>.

In the mid-seventies, however, Italy ratified Article 25 of the Convention allowing individuals complaints to come before the Commission. The domestic application of the Convention seemed to initiate little change: when the first cases against Italy were admitted by the Commission, the opinion was widely held that the Convention could

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<sup>214</sup> The risk of a formalistic approach to this question, and the need to take into account which was the real attitude of Italian authorities was put forward by CHIAVARIO (1969:23).

<sup>215</sup> GREGORI, G. (1979) *La tutela europea dei diritti dell'uomo*, Milano: SugarCo at 217.

<sup>216</sup> "L'applicazione giurisprudenziale della normativa convenzionale fornisce peraltro un panorama a dir poco sconcertante", [TAVORMINA, V. (1981) "Sulla compatibilità dell'ordinamento italiano con la Convenzione Europea dei diritti dell'uomo alla luce di alcune applicazioni giurisprudenziali" in *La Convenzione Europea dei diritti dell'Uomo..cit.*, pages 153-77 at 153]. the "palese sfiducia dei litiganti" and the majoritarian presence of "guidici convinti della perfetta coincidenza tra convenzione e ordinamento italiano" are emphasized. This author concludes that the Convention has been of practically no help for Italian litigants on fundamental rights (id., p. 176).

<sup>217</sup> "Il confronto fra l'ordinamento italiano e la Convenzione europea dei diritti dell'uomo conduce a un bilancio, almeno finora, largamente negativo". This opinion "é divenuto, più che una consuetudine, un vero e proprio luogo comune" (PITTARO, 1987:392).

<sup>218</sup> The general situation was described in the following words: "la magistratura non riconosce l'applicabilità diretta delle norme della Convenzione; alquanto discutibile rimane l'atteggiamento del Governo; la classe forense appare non informata, come del resto la pubblica opinione; i ricorsi italiani agli organi europei sono, di conseguenza, piuttosto limitati; in compenso fioccano le sentenze di "condanna" dell'Italia da parte della Corte di Strasburgo; i reggitori della cosa pubblica e gli stessi mass-media ostentano il massimo disinteresse al riguardo" (PITTARO, 1987:392)

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have some impact on domestic Italian law, above all in the criminal law field. Simultaneously, as shown above<sup>219</sup>, a way to *constitutionalize* the Convention was tentatively formulated by legal literature<sup>220</sup>. However, a more widespread assumption of the role that the Convention could play in the domestic legal order only came into effect with the first Strasbourg decisions condemning Italy for the violation of any of the Conventions' protected rights. The relevance of terrorism in Italy at that time, and the changes made in criminal proceedings in order to fight against it, contributed in putting the rights guaranteed by the Convention, particularly those embodied in Article 5 ECHR and Article 6 ECHR, in the centre of the legal dispute and of the public eye<sup>221</sup>.

It was in this context in which the *Corte di Cassazione*, the Italian Supreme Court, accepted that the Convention was applicable domestic law. Several arguments, however, have drastically reduced the utility of arguing about the Convention before this Court: first, the *Cassazione* has strongly affirmed in some decisions that the Convention is not a "self-executing" treaty, and therefore, it cannot be enforced without a prior domestic parliamentary act giving concrete content to its general provisions<sup>222</sup>; secondly, this Court has frequently declared that the Convention has nothing to add to the guarantees provided by the Italian Constitution or any other piece of domestic law on a fundamental right. Not surprisingly, therefore, a recent review concluded that the balance of the application of the Convention by the *Corte di Cassazione* is still in the negative<sup>223</sup>

Whereas it is rare to find a clear statement that a conflicting domestic statute should prevail over the Convention, reported decisions of the *Cassazione* shows that its usual reasoning is simply to avoid the conflict by directly stating that the concerned domestic law is compatible with the Convention. Many of these decisions, however, have

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219 See *supra*, this Chapter.

220 The influence which the *Pfunders* case had in Italian legal literature is put forward by CHIAVARIO (1990)

221 See CHIAVARIO (1990:455-56)

222 See PITTARO (1987:392)

223 Some developments, however, have been noted during these years. See, for instance, a comment to the decision 1980/15, *sezione uniti penale*, in which the direct domestic application of the Convention is accepted, in ARBIA (1991). A general balance of the ECHR before the *Cassazione* can be seen in CHIAVARIO (1990:457-60)

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concerned defense rights in cases in which, afterwards, the European Court has declared that there has been a violation of the Convention<sup>224</sup>.

The argument lying behind these *Cassazione* decisions is that the Convention is superfluous given the higher level of protection provided by the Italian Constitution. It should be noted, however, that in addition to the literal differences between the Convention and the Constitution<sup>225</sup>, different techniques of interpretation and of protection of the rights embodied apply to each of them<sup>226</sup>. Both texts should therefore be seen as complementary. Above all, the conception of the Convention as a *living instrument* has made the European Court reach a very sophisticated jurisprudence in some cases. If, however, a *a priori* standard could be defined for both the Convention and the Constitution, it is certainly unavoidable to make a distinction between rights of the defendant in criminal proceedings, in which the Italian record seems to be lower, and other civil liberties<sup>227</sup>. In any case, it is difficult to conclude other than that the level of

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**224** A first review of these decisions of the *Cassazione* can be seen in GREGORI (1979:217-9). Specific aspects of the defense rights have also been subject to this treatment before the *Cassazione*, see SCALABRINO SPADEA, M. (1988) "Equo processo e processo amministrativo italiano" in *Rivista Internazionale dei Diritti dell'Uomo* 1,2 pages 41-66.

**225** It is true that, if provisions of both texts are literally compared, it can be concluded that the Italian Constitution (like the domestic constitutions of many other member states) protects more rights, or guarantees in principle a higher level of protection. This is due to the different nature of both documents and to the already studied character of the Convention as a *minimum standard*. In some cases, however, even this literal comparison may imply a higher level for the Convention. See for instance, a comparison between Article 6 ECHR and Article 17 CI on the right to be presumed innocent in MIELE (1968:74).

**226** Compared with the Italian Constitution, the Convention "discende più nella analiticità del linguaggio normativo (influenza common-law) e enuncia diritti soggettivi, in tanto la Cost enuncia fondamentalmente principi ed istituti giuridici (che interessano più dal punto di vista del ordinamento oggettivo che come diritti soggettivi dei singoli cittadini), istituti garantistici". (PITTARO, 1987:394). Moreover, the Convention "consente accertamenti da parte di organi internazionali, i quali operano secondo schemi connaturali all'ordinamento internazionale, vale adire con estrema sensibilità per i dati concreti e per le situazioni effettivamente esistenti. Possono così venire superati i formalismi interpretativi e procedurali, che talvolta si sviluppano presso gli organi nazionali e che si traducono in prassi lesive dei diritti tutelati dalla convenzione di Roma." [SCOVAZZI, T. (1984) "Le prime esperienze dell'Italia davanti alla Corte Europea dei diritti dell'uomo", in *Rivista di Diritto Internazionale Privato e Processuale* 20 pages 37-46 at 45].

**227** "Le norme della Convenzione poste a salvaguardia delle prerogative individuali non immediatamente ricollegabili al diritto penale, appaiono decisamente in minus dal contenuto sfumato e generico, e sono spesso ripetitive di principi già affermati e sviluppati con maggior rigore dall'ordinamento nazionale. Una panoramica della giurisprudenza italiana sul tema è

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protection of the Convention system is impossible to ascertain without paying due attention to the European case-law on the concerned right, something very rare to find in Italian decisions disqualifying the Convention as domestic relevant law.

In Spain, on the other hand, the first time in which an international treaty on Human Rights was applied as domestic law by the *Tribunal Supremo* (the Spanish Supreme Court) seems to have been in 1979, in the *El Grande Oriente Español* case, which involved the question of whether administrative control of the right to association was allowed under Article 22 of the Spanish Constitution<sup>228</sup>. The *Tribunal Supremo* ruled that Article 22, following Article 10(2) of the Constitution, was to be interpreted in the light of Human Rights treaties ratified by Spain. Accordingly, the *Tribunal Supremo* construed the allowed restrictions to the right of association under the requirement of "necessity in a democratic society" of Article 22 of the International Covenant on Civil and Political Rights, ratified by Spain in 1977. Following the *Tribunal Supremo*, such a requirement implied that *El Grande Oriente Español* should be regularly registered as an association by the Ministry of the Interior, unless the government decided to initiate a judicial proceeding in order to declare its illegality<sup>229</sup>.

The first time the *Tribunal Supremo* expressly quoted the Convention was in a judgment of that same year, the *Prensa del Movimiento* case<sup>230</sup>. By a Royal Decree 23/1977, the Spanish government decided to privatise all state-owned newspapers. Previously, those newspapers had been owned by the *Movimiento Nacional*, the only

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indicativa: soprattutto in questo campo richiami alla Convenzione operati dalle parti o dai giudici sono incoerenti e poco convincenti, sempre comunque subordinate ad una serie di riferimenti a norme interne, alle quali la Convenzione, in effetti, aggiunge poco o niente." (TAVORMINA, 1981:157c)

**228** *El Grande Oriente Español* case, *Sentencia del Tribunal Supremo* of 3 July 1979, in *Aranzadi* 3182. The case had been brought before the Supreme Court by a Spanish masonic association prohibited under the francoism, alleging that this was a breach of Article 22 of the Constitution. This Article stipulates that "(1) the right to association is recognized (..) (4) the association may only be dissolved or have their activities suspended by virtue of a considered judicial ruling (..)".

**229** The application of the international standard to his question, however, seems to be somewhat superfluous, since Article 22 of the Constitution itself expressly rules that it is for the judiciary, and not for the public Administration to outlaw an association.

**230** *Prensa del Movimiento* case, *Sentencia del Tribunal Supremo* of 14 August 1979, in *Aranzadi* 4676.

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political party permitted under the francoism. A number of newspapers who had no interested private buyer were closed. Journalists of these newspapers initiated judicial actions, claiming that this was a breach of the right to "receive impartial information" embodied in Article 20 of the Constitution. The *Tribunal Supremo* applied the Convention here to state that the right to receive information does not imply that the state was obliged to run newspapers<sup>231</sup>

**2. The Convention before the Italian and the Spanish Constitutional Courts.**

In Italy, in spite of years of legal debate<sup>232</sup>, the *Corte Costituzionale* has not yet given a specific answer to the question of the extent to which the Convention can be applied, at least in part, as a mean of domestic constitutional adjudication on Human Rights. The *Corte Costituzionale* has denied some specific ways to this *constitutionalization*, although it has not closed completely the door<sup>233</sup>. The reasons for this attitude, however, seem to be very close to those argued by the *Cassazione*<sup>234</sup>. In Spain, it has been reviewed to what extent the Convention has

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**231** The decision was taken "conforme al artículo 20 de la Constitución y al contenido que a la libertad de expresión asignan tanto el artículo 19 del Pacto [the International Covenant on Political and Civil Rights] y el 10 del Convenio [the ECHR], preceptos éstos con arreglo a los que debe ser interpretado el primeramente citado, por exigirlo así el artículo 10(2) de la propia Constitución" (*Prensa del Movimiento case, considerando 1*). This case was brought later before the Constitutional Court by the journalists of two concerned newspapers, *Voz de España* and *Unidad*. On this case, see *infra* this Chapter.

**232** See *supra*

**233** Although with some exceptions, which will be seen *infra*, the following statement is still true today: "..sino ad ora, sono rimasti praticamente infruttuosi i tentativi effettuati per vedere solennemente riconosciuto alla Convenzione europea un rango particolare nella gerarchia formale delle fonti di diritto interno italiano. Infatti, al Palazzo della Consulta si é sempre evitato di ammettere una costituzionalizzazione del catalogo di diritti e di libertà che la Convenzione racchiude.." [CHIAVARIO, M. (1974) "La Convenzione Europea Dei Diritti dell'Uomo ed il suo contributo al rinnovamento del proceso penale italiano" in *Rivista di Diritto Internazionale* 57 pages 454-507 at 463].

**234** "La Corte [costituzionale] sembra (..) decisa ad evitare di formalizzare in qualsiasi modo il rapporto tra la Costituzione e le norme internazionale sui diritti dell'uomo, rimanendo così arbitro dell'opportunità o meno di utilizzare queste ultime. Al fondo, c'è probabilmente una reticenza a valorizzare obblighi internazionali in una metria costituzionalmente regolata, cui si aggiunge, altrettanto, probabilmente, un convincimento (peraltro diffuso) della presenza nel nostro ordinamento di maggiori garanzie al riguardo. Ma sul piano strettamente giuridico sarebbe stata certamente auspicabile una maggiore attenzione alla fondatezza delle diversi ipotesi di costituzionalizzazione prospettate, tanto più che il ricorso talvolta operato dalla Corte alle norme

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been expressly quoted by the *Tribunal Constitucional*. According to these surveys, the Convention has, in one way or another, been referred to on more than seventy occasions in judgments or other decisions from the Court (up to 1988)<sup>235</sup>. Today, the Convention is often applied by the *Tribunal Constitucional*. In general, the function of the Convention in this respect has been described in very positive terms<sup>236</sup>. Each Constitutional Court, therefore, has approached the domestic status of the Convention in a very different way. The following examples highlight the way in which the *Corte Costituzionale* and the *Tribunal Constitucional* have decided some relevant cases in which the *constitutional status* of the Convention was involved.

As far as the debate on Article 10(1) of the Italian Constitution is concerned in order to grant to the Convention a constitutional status in Italy, the *Corte Costituzionale* has always maintained that the Convention, like any other international treaty, does not fall under the scope of this Article of the Constitution, and, therefore, that an alleged violation of the Convention cannot be considered, for this reason, a violation of the Constitution. The first decision of the *Corte Costituzionale* on this matter was emitted in

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della Convenzione per trarne elementi utili ad avvalorare una certa operazione interpretativa, fornisce di per sé una sicura conferma della loro natura intrinsecamente costituzionale" (MORI, 1983:350)

**235** The most updated, comprehensive review, covers up to 1988. Among the Constitutional rights which has been interpreted according the Convention are the right to education (STC 5/81), the religious freedom (ATC 181/86), the right to life (STC 53/85), the right not to be discriminated (STC 22/81), the right to object to military service (STC 15/82), the right to adhere to trade-unions (STC 53/82), and, in a very important way, the right to due process of law embodied in Article 6 of the Convention (which has been used to interpret the right to be brought before an ordinary judge (STC 10/84 and STC 44/85), the right to be defended by a lawyer (STC 44/87, 74/85, 7/86 and 2/87), to be informed about the accusation (STC 5/84), to a public process in a reasonable time (STC 24/81, 18/83 and 5/85), etc). See FERNÁNDEZ DE CASADEVANTE, C. (1988) *La aplicación del Convenio Europeo de Derechos Humanos en España*, Madrid:Tecnos.

**236** Up to 1981, in reviewing the instances when the Tribunal Constitucional had, effectively, used the Convention to interpret the Spanish Constitution, the situation was defined as a 'hopeful balance' (LINDE,1983:203). Further, nineteen judgments from 1981 to 1985 have been examined reaching a positive conclusion as to the way in which the Convention is applied by the *Tribunal Constitucional* (see GARCIA DE ENTERRIA, 1984). Another study, which, which prolongs the survey until September 1988 recapitulates sixty one judgments and another fifteen decisions. This author points out that the Convention 'es profusamente utilizado por los Tribunales españoles, con valor jurídico, e invocado en numerosas ocasiones por los particulares, como fuente directa (..) el Tribunal que con mayor profusion utiliza la jurisprudencia europea, posiblemente sea el Tribunal Constitucional.'(FERNANDEZ DE CASADEVANTE, 1988:20).

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1960, and it has since then maintained a unvarying reasoning. However, the *ordinanze* of lower courts asking the *Corte Costituzionale* for a declaration of unconstitutionality of a domestic statute on the basis of an encroachment of Article 10(1) of the Constitution has not ceased during the past years<sup>237</sup>.

In 1967, the *Corte Costituzionale* decided a case in which a domestic statute posterior to the Convention, was claimed to be unconstitutional due to a breach of Article 10(2) of the Constitution<sup>238</sup>. This was the first time in which the *Corte Costituzionale* had a clear opportunity to deal with the constitutional status of the Convention through Article 10(2) of the Constitution: according to Article 139 of the *legge doganale*, foreigners convicted of a crime of *contrabando* had to pay a deposit in order to be provisionally released. This Article did not apply to Italians, and a Italian court referred to the *Corte Costituzionale* the question of whether this was a violation of the principle of equality under Article 3(1) of the Constitution. As to the substantive issue, the *Corte Costituzionale* ruled that the principle of equality of Article 3(1) CI of the Constitution was applicable also to aliens under Italian jurisdiction. This was a consequence of the rule of equality on the enjoyments of rights embodied in Article 14 ECHR, which was taken, due to the clause of Article 10(2) CI, as a source for the construction of Article 3(1) CI<sup>239</sup>. As to the *constitutional status* of the Convention, the *Corte Costituzionale* seemed to accept, therefore, that any domestic statute conflicting with the Convention would be, as far as the rights of foreign people in Italy were concerned, a violation of Article 10(2) of

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237 The last reported decision may be the *Ordinanza della Corte Costituzionale* 496 of 18-27 december 1991, in *Gazzetta Ufficiale Serie Speciale* 3 (15 January 1992), in which an alleged violation of Article 6(3) ECHR was claimed to be a breach of Article 10(1) of the Constitution. The *Corte Costituzionale*, relying on previous decisions, ruled the *manifesta infondatezza* of this claim.

238 *Sentenza della Corte Costituzionale* n. 120 of 23 November 1967 in *Giurisprudenza Costituzionale* pages 1577 ff,

239 'Anche in Italia le norme materiali della Convenzione, ed in prima linea l'articolo 14 vengono in tal modo a confermare l'interpretazione estensiva delle garanzie costituzionale d'uguaglianza nelle libertà. Per mezzo del richiamo dell'art. 10 cpv, l'imperativo di non discriminazione avvalorava cioè l'opinione che il legislatore debba assicurare - al di là della lettera dell'articolo. 3, 1 comma Cost - la parità giuridica di tutti i soggetti del nostro ordinamento' [PALADIN, L. (1974) 'Il divieto di discriminazione e la Convenzione Europea dei Diritti dell'Uomo' in *Rivista di Diritto Internazionale* 57 pages 446-53 at 452]. Nonetheless, Article 139 of the *legge doganale* was not declared unconstitutional, since the *Corte Costituzionale* found the establishment of a separate regime for aliens justified either under the Italian Constitution and under the Convention.

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the Constitution. This decision renewed the debate on the constitutional role of the Convention, which has been focusing still then exclusively in Article 10(1)<sup>240</sup>. Some comments to this decision concluded, indeed, that the *Corte Costituzionale* had reached something very close to a real *constitutionalization* of the Convention in Italy<sup>241</sup>.

Three years later, however, the *Corte Costituzionale* seemed to change its mind<sup>242</sup>. A lower court has brought before the *Corte Costituzionale* the question of the possible unconstitutionality of a domestic statute by which some securities measures exclusively concerning foreigners were established<sup>243</sup>. These measures were allegedly a violation of Article 8 ECHR<sup>244</sup>, and, therefore, the statute was alleged to be a breach of Article 10(2) of the Constitution. Arguments on Article 3 and Article 2 of the Constitution, which had granted the previous decisions of 1967, were also provided by the referring court. The *Corte Costituzionale*, however, declared that the alleged unconstitutionality of the domestic statute was manifestly ill-founded: the measures were compatible with Article 3 and Article 2 of the Constitution. Moreover, the *Corte Costituzionale* did not feel it necessary to review the constitutionality of the contested statute in the face of the Convention via Article 10(2). Although its prior decision of 1967 was not expressly overruled, the *Corte Costituzionale* did not address the issue: it only

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240 This decision, it was stressed, "rinnova i termini della questione, non affrontando più sulla base dell'art 10,1 comma, o dell'art 11 Cost, ma lasciando intendere che nelle fattispecie interessate gli stranieri l'inosservanza delle disposizioni convenzionali si risolve in un vizio d'incostituzionalità indiretta per violazione dell'art. 10 cpv." (PALADIN, 1974:453).

241 According to PALADIN (1974:453), the Convention was approached in this decisions as a "fonte atipica *intermedia* fra la Costituzione e le leggi ordinarie".

242 *Security measures on Aliens, Sentenza della Corte Costituzionale n.104 of 26 June 1969 in Raccolta Ufficiale 30 page 173 ff.*

243 Hotels managers and landlords were already obliged to inform the police of the identity of tenants and guests. Articles 1 and 2 of the *decreto legislativo* of 11 February 1948 imposed more serious fines to those who breach this obligation when tenants or guests were aliens, and extended the obligation to inform the police to cases in which nationals were not subject to police control, such as employers with foreign workers and foreign people in Italy as guests of Italians relatives.

244 Article 8, paragraph 1, ECHR grants to everyone the "right for respect for his private and family life, his home and correspondence". Paragraph 2 lists the usual legitimate aims under which an interference in this right is allowed.

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analyzed the question as far as Article 10(1) CI was concerned<sup>245</sup>. The Corte however, mentioned the Convention, in an *obiter dictum*, to state that the concerned measures did not breach the right to privacy under Article 8 ECHR<sup>246</sup>.

A recent decision of the *Corte Costituzionale* has opened the possibility for the unconstitutionality of domestic statutes conflicting with the Convention due to the *ecceso di delega* under Article 76 of the Constitution<sup>247</sup>. The case involved a special procedure regulated by the *Codice di Procedura Penale* under which judicial decisions are not subject to publicity<sup>248</sup>. The question was posed to the *Corte Costituzionale* as to the extent to which this could be a breach of Article 6(1) ECHR and, therefore, an *ecceso di delega* following the criteria established in the parliamentary delegation<sup>249</sup>. The *Corte Costituzionale* finally ruled that the above mentioned special procedure was compatible with Article 6(1) ECHR, apparently confirming that the ECHR can be applied as a criterion for the unconstitutionality of domestic law under Article 76 of the Constitution<sup>250</sup>.

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**245** The *Corte Costituzionale* only pointed previous case-law in which the issue of Article 10(1) CI had been decided. The fact that the *Corte* did not even mention the argument on Article 10(2) as construed in its previous decision of 1967 is criticized by CASSESE A. (1969b) "Sulla Costituzionalità dell'obbligo di segnalare lo straniero all'autorità di pubblica sicurezza" in *Rivista di Diritto Internazionale* 52 pages 576-83.

**246** The ruling on the Convention, however, should have taken into account Article 14 ECHR also: the crucial point was not only whether the application of security measures were a breach of the right to privacy under Article 8 ECHR, but, rather, whether the application of such measures only to aliens was a breach of the principle of non discrimination under Article 14 ECHR. See CASSESE (1969b), who, however, concludes that justification under the Convention could have been argued on other reasons than those given by the *Corte*.

**247** *Sentenza della Corte Costituzionale* n. 251 of 22 May- 6 June 1991, in *Gacetta Ufficiale serie speciale* 23 of 12 June 1991.

**248** See Article 447, 448 and 563 of the Criminal Procedure Code.

**249** As has been seen *supra*, compliance with international treaties on the matter constitutes the directive number 45 of the parliamentary delegation (*legge di delegazione*) n. 81 of 1987.

**250** According to the *Corte Costituzionale*, this provisions of the Criminal Procedure Code concern a negotiate procedure between the defendant and the public prosecutor in which, moreover, not all the features of a proper judicial sentence on criminal aspects are involved. This allows to miss the requisite of a public hearing under Article 6(1) ECHR. (*Sent. Corte Cost.* 251/1991, *cit.* para. 2)

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A Spanish case<sup>251</sup>, in which the Convention was applied by the *Tribunal Constitucional* to construe constitutional provisions on the right to a fair trial, is remarkable on two points. The domestic provision concerned was embodied in a "Ley Orgánica", that is, a statute which directly implements the Constitution and which takes precedence on ordinary legislation. Moreover, in this case, the Convention was the only ground for overruling the domestic rule. The case concerned the right to due process of law and the problem of impartiality of judges. The Spanish Constitution embraces in Article 24(2) the right to a process "with all the guarantees"<sup>252</sup>; although this Article does not expressly mention the right to an impartial judge, Spanish legislation had considered for a long time<sup>253</sup> that a judge could be challenged on the ground that he had been in charge of pre-trial proceedings. A statute of 1967, however, made exceptions to this principle in a special urgent process and, in 1980, two years after the Constitution came into force, the Organic Law 10/80 maintained the exception under certain circumstances: Article 2 of the Organic Law 10/80 concerned minor offenses; it stated that "Instruction judges belonging to the judicial demarcation where the offence was committed would be competent to know and to sentence on such offenses. In no case the cause of challenge foreseen in Article 54(12) of the Criminal Procedure Law will be applied"<sup>254</sup>.

In 1987, two judges from different parts of the country who had to conduct both the preliminary proceedings and then the trial under Article 2 of the Organic Law 10/80, asked the *Tribunal Constitucional* for a preliminary ruling on the constitutionality of such a provision. According to the wording of the question submitted by both courts, the rights to a process "with all the guarantees" embraced in the Constitution had to be

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251 The case of the *Cuestión de inconstitucionalidad sobre la Ley Orgánica 10/1980*, Sentencia del Tribunal Constitucional 145/88 of 12 July 1988 in *Boletín de Jurisprudencia Constitucional* 88-89 pages 1168-76

252 Article 24(2) of the Spanish Constitution grants, *inter alia*, the right "to a public trial without undue delays and with full guarantees".

253 See the Criminal Procedure Law of 1892, Article 54(12)

254 Literally, "Serán competentes para el conocimiento y fallo de estas causas los jueces de instrucción del partido en que el delito se haya cometido. En ningún caso les será de aplicación la causa de recusación prevista en el apartado 12 del artículo 54 de la Ley de Enjuiciamiento Criminal."

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interpreted, by virtue of the interpretation clause of Article 10(2) of the Constitution<sup>255</sup>, in accordance with the ECHR. The result of this interpretation was that the right to be judged by "an independent and impartial tribunal" embodied in Article 6(1) of the Convention was to be included within the "guarantees" foreseen, in general terms, by Article 24(2) of the Spanish Constitution. Moreover, regarding the proper interpretation to be given to Article 6(1) of the Convention as to this point, both asking courts addressed the question to the rule established by the European Court in the *De Cubber* Case<sup>256</sup>.

Both the Advocate of the State and the Public Prosecutor, who are parties in the proceedings before the *Tribunal Constitucional*, stated that the judge, under the challenged provision, was not entitled to, strictly speaking, carry out any "instruction", only minor preliminary proceedings which could not arise any suspicion on his impartiality when the same judge eventually acted in trial. On the contrary, the *Tribunal Constitucional* ruled that, according to the case-law of the European Court, the same judge could not act both in the instruction and the hearings of a case<sup>257</sup>. Remarkably, the *Tribunal Constitucional* solely grounded its decisions on the rule established in *De Cubber*, jointly with a brief and vague mention about the inclusion of the right to be

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255 See *supra* this Chapter.

256 The question submitted by Instruction Court n. 9 of Madrid stated that "Los derechos fundamentales al juez ordinario predeterminado por la Ley y a un proceso con todas las garantías que reconoce el artículo 24.2 CE deben interpretarse, conforme a la remisión que hace el artículo 10.2 CE a los tratados y acuerdos internacionales sobre la misma materia suscritos por España, teniendo en cuenta la doctrina sentada por el Tribunal Europeo de Derechos Humanos al aplicar la norma contenida en el artículo 6.1 del Convenio Europeo de Derechos Humanos; y de acuerdo con ella (en especial sentencia de 26 de octubre de 1984, caso *De Cubber*) y con el contenido de reiteradas resoluciones de este Tribunal, forma parte de los indicados derechos la idoneidad e imparcialidad del órgano en relación con el asunto concreto, que puede verse comprometida por la asunción por el órgano sentenciador del criterio formado en la fase preliminar de investigación cuando ésta y la de conocimiento y fallo corresponde al mismo Tribunal, como ocurre en el procedimiento de la Ley Orgánica 10/80.." (STC 145/88, Antecedent 3)

257 The *Tribunal Constitucional* ruled that "del caso *De Cubber* lo que nos interesa es el principio de que no puedan acumularse las funciones instructoras y juzgadoras. La aplicación de ese principio habrá de hacerse teniendo en cuenta las peculiaridades de nuestro derecho contemplado en su conjunto y no en algún aspecto aislado" (para. 6).

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judged by an impartial judge within the meaning of the "Estado de Derecho"<sup>258</sup>. It should be noted, moreover, that the *Tribunal Constitucional* could only have found unconstitutional the second part of Article 2 of the Organic Law 19/80 *only*. Under the final statement of this Article "In no case will the cause of challenge foreseen in Article 54(12) of the Criminal Process Law be applied". In other words, the *Tribunal Constitucional* could have only overruled the impossibility of challenging the impartiality of the judge, but not the settled procedure involving the same judge both in the instruction and the hearings, finding therefore a halfway solution which would comply both with the ECHR and the established organization of the judiciary in Spain. However, the Court decided to fully apply the doctrine of the "objective" impartiality of judicial proceedings laid down in *De Cubber*, and thus giving full domestic effect to the Convention's standard. Moreover, the *Tribunal* was fully aware that its decision was leading to a rather complicated situation for the Spanish judiciary, which had to completely change its established procedures after this decision<sup>259</sup>.

#### 3. The Convention as the only source for the domestic standard of protection of fundamental rights.

In general terms, it cannot be assumed that neither the Spanish nor the Italian Constitution embody a higher standard of protection of fundamental rights than the standard provided by the Convention. As previously shown<sup>260</sup>, the Convention's *minimum common standard* must not be misinterpreted: the fact that the standard set by the Conventions' organs only meet the European minimum does not mean that this

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<sup>258</sup> Article 1(1) of the Spanish Constitution states that "Spain constitutes a social and democratic state of law, advocating as higher values of the legal order, liberty, justice, equality and political pluralism".

<sup>259</sup> The *Tribunal Constitucional* stated that "No se oculta a este Tribunal que la obligada separación entre la función instructora y la juzgadora afecta a un principio organizativo del procedimiento regulado por la Ley Orgánica 10/80 y que en consecuencia los efectos de la aplicación de la causa de abstención o recusación aquí examinados son más amplios y más complejos que los que se provocan por la aplicación de otras causas que sólo actúan muy esporádicamente. Ello conduce a que sea sin duda el legislador quien deba asumir la tarea de reformar ese procedimiento o sustituirlo por otro.." (para. 8)

<sup>260</sup> see *supra* Chapter I.

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minimum imply a low level of protection. Moreover, due to the *dynamic interpretation* ascertained in Strasbourg, it can be said that the level of protection is considerably high, at least as far as certain rights are concerned<sup>261</sup>. This does not mean, however, that the question of a lower level of protection provided by the Convention cannot arise in a case regarding one specific right<sup>262</sup>.

Both in Spain and in Italy, there is a general consensus that, under such circumstances, the Convention should not be used to lower the domestic level of protection: Spanish scholars unanimously admits that Article 10(2) of the Constitution prohibits this kind of application. Italian legal literature has also peacefully admitted that the impact of the Convention in domestic cases should only be *in bonus*, that is, that the domestic standard of protection of fundamental rights should prevail provided that it is higher than the Convention's standard: the prevalence of domestic higher standard has been put forward concerning particular constitutional rights in Italy<sup>263</sup>; it has also been seen as a general rule of prevalence of higher domestic law prior to the Convention's *ordine di*

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261 It has been rightly stated that "En pratique, tous les Etats européens qui on signe tranquillement la Convention parce qu'ils étaient convaincus que les droits garantis par leur législation surpassaient largement les normes minimales de protection imposées par la Convention ont constaté parfois avec étonnement qu'ils pouvaient faire l'objet de condamnations..En d'autres termes, la jurisprudence de la Cour [européenne] a notoirement élevé le niveau de protection des droits de l'homme effectivement reconnus en Europe." (GARCIA DE ENTERRIA, 1988:224).

262 The higher domestic level of protection has been, however, extended to a general rule, pointing out that "Si se pudieran contrastar, libertad por libertad, las resoluciones de la Comisión y el Tribunal Europeo de Derechos Humanos con las jurisprudencias de los Estados miembros, y especialmente con las jurisprudencias constitucionales, se vería cuantas veces, en los Estados exigentes con las garantías de la libertad, la protección dispensada por el ordenamiento interno aventaja al estandar europeo" [MUÑOZ MACHADO, S. (1988) "Prólogo" in *La aplicación de la Convención..cit*, pages 13-19 at 18].

263 For instance, the principle of legality laid down in Article 7 ECHR has been compared with the same principle under the Italian Constitution, reaching the conclusion that "la Corte [europea] ha ritenuto inapplicabile l'art 7 ad infrazioni di carattere amministrativo, mentre nell'ordinamento italiano il principio di legalità incide anche sulle violazioni delle leggi finanziarie. Ciò non giustifica un atteggiamento di critica nei confronti dell'articolo, altrimenti si perde di vista lo scopo della Convenzione che è quello di garantire il rispetto di determinati "minimi" di tutela" [PAJARDI, G. (1981) "Osservazioni generali sulla Convenzione europea dei diritti dell'uomo, con considerazioni finali relative alla sua applicazione giurisprudenziale in Italia" in *La Convenzione Europea dei diritti dell'Uomo..cit* pages 179-20 at 187]. The higher domestic standard in Italy concerning the death penalty has been put forward by SCOVAZZI (1984:37).

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*esecuzione*<sup>264</sup>. Even in cases in which the Convention would have a constitutional status, further, domestic higher protection would not be impaired by the Convention standard<sup>265</sup>.

The question may be posed, however, whether there are reasons to criticize the application of the Convention in domestic Spanish or Italian law as to this point. It seems though that, regardless of the theoretical point of view adopted by the literature, an application of the Convention as the only ground to define the domestic level of protection of a fundamental right is possible - and that the Convention has actually been applied in this way both in Italy and in Spain. It is, certainly, very hard to imagine such an application in a direct way, that is, clearly lowering the standard of protection provided by Spanish or Italian domestic law on a fundamental right, on the argument that the Convention obliges to overrule statutory law passed by the domestic Parliament. A similar result, however, may be reached when the domestic standard of protection is defined on the only ground provided by the Convention, regardless therefore of a possible higher standard of protection which could be achieved by interpreting the domestic Constitution on its own<sup>266</sup>. Several decisions of the *Corte Costituzionale* and

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264 "Il coordinamento deve farsi al fine di regolare l'eventuale discordanza o antinomia che può esserci fra norme processuali penali e norme interne prodotte attraverso l'ordine di esecuzione della Convenzione. Se la norma italiana preesistente fosse in ipotesi più favorevole della Convenzione, *nulla quaestio*: in tal caso, l'ordine di esecuzione si intenderebbe non avere immenso alcuna norma." (MIELE, 1968:73)

265 As on the *constitutionalization* of the Convention by virtue of Article 10(2) of the Italian Constitution, it has been emphasized that "si potrebbe tutt'al più ammettere che le norme di adattamento in questione risultino sostrate alla abrogazione da parte di leggi successive che regolino la condizione dello straniero in modo meno vantaggioso per lo straniero stesso (..) Se invece viene emanata una legge più favorevole allo straniero, questa indubbiamente abroga - in tutto o in parte, e nei limiti in cui sia a ciò idonea in virtù dei generali principi sul coordinamento tra norme prodotte dalla stessa fonte - le norme di adattamento anzidette (..) L'articolo 10, secondo comma, della Costituzione non mira (..) ad impedire che nel nostro ordinamento vengano emanate leggi che accordino allo straniero un trattamento più favorevole di quello prescritto dal diritto internazionale" (CASSESE, 1969:935). As has been seen, however, the argument that domestic law provide a higher level of protection has been usually applied by domestic Italian Courts as a way to avoid a strict scrutiny of the Convention's provisions.

266 Can Article 10(2) of the Spanish Constitution be applied when a constitutional right not needs be "interpreted"? The classic theory of legal interpretation liked to state that *in claro non fit interpretario*. This is the position of most Spanish legal writers on Article 10(2) of the Constitution [see MANGAS (1980:150), FERNANDEZ DE CASADEVANTE (1988:51-54), and GARRIDO (1985:192), who alludes at this principle as "one of the intrinsic limits of the interpretation"]. Article 10(2) should then

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of the *Tribunal Constitucional* can highlight the issue.

In the *Asociacion Salhakea* case<sup>267</sup>, the *Tribunal Constitucional* upheld a decision of preventing a prisoner from vis-à-vis visits with his wife on the ground that the European Commission had ruled that the deprivation of sexual relations under those circumstances was not "inhuman or degrading treatment" under Article 3 of the Convention<sup>268</sup>. It may be argued that the same conclusion could have been reached arguing on provisions of the Spanish Constitution, the Convention not being taken into account. The point is, however, that the *Tribunal Constitucional* based its decision on the sole argument that such a practice was not banned by the Convention. In doing so it construed Article 15 and 18 of the Constitution, which had been invoked by the applicant<sup>269</sup>, on the sole ground of the Convention standard.

A similar result, moreover, can be achieved in a less direct way. Sometimes the *Tribunal Constitucional* has quoted either the Convention or the case-law of the Strasbourg bodies, not as the main ground to grant a decision, but as an *a fortiori* argument or even as an *obiter dictum*. The *Tribunal Constitucional* seems to be more likely to do so when it has to uphold a lower court decision which, in one way or another, reduces the scope of a fundamental right. The point here is that the Convention could be used in order to add some kind of European legitimacy to a Constitutional judgment which reduces the scope of a fundamental right.

Two decisions may illustrate the case. In Providence ("Auto") 147/83, the *Tribunal Constitucional* ruled that the right to due process of law embraced in Article 24 of the Constitution did not include the right to be judged by a jury. Certainly, the *Tribunal*

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only be applied when a constitutional provision on human rights was itself not sufficiently clear. However, this principle can hardly be supported: since the provisions to be applied are embodied in a Constitution, it is very hard to imagine a way of doing it without a previous work of interpretation.

<sup>267</sup> *Asociacion de Salhateka* case, *Sentencia del Tribunal Constitucional* 89/87 of 3 June 1987, in *Boletin de Jurisprudencia Constitucional* 74 pages 874 ff.

<sup>268</sup> According to Article 3 ECHR, "No one shall be subjected to torture or to inhuman or degrading treatment".

<sup>269</sup> Article 15 establishes that every person "may under no circumstance be subject to torture or to inhuman or degrading punishment or treatment" while Article 18 protects the right "to honour, to personal and family privacy and to personal reputation".

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argued that the jury as an institution was recognized by Article 125 of the Constitution, but this provision had no self-executing character<sup>270</sup>: provided that Parliament had not yet decided to pass a statute concerning the issue, the jury could not be included within the scope of the right to due process of law. The *Tribunal* deduced this from the Constitution itself, but expressly noted that the "right to be judged by a jury" was not included either in the Convention or in other international agreements concerning the matter. In the *Abortion Law* case<sup>271</sup>, further, the *Tribunal Constitucional* ruled that the legislation on abortion which had been recently passed was in accordance with the Constitution, although the judgment compelled the Parliament to pass another statute including new requirements imposed by the *Tribunal*. Again, the Convention did not play a decisive role in the judgment but it had been expressly quoted by the applicants, and the *Tribunal* also expressly quoted Strasbourg case-law: it noted that there was not any judgment of the European Court on the issue, but that the Commission had ruled that the term *everybody* or *toute persone*, as the one entitled to the right to life under Article 2 ECHR<sup>272</sup>, did not include the *nasciturus*. It followed that the expression *todos* which was used by Article 15 of the Constitution within the same meaning, did not necessarily include the *nasciturus* either. It should be stressed that this case came before the *Tribunal Constitucional* because the opposition in Parliament had challenged the constitutionality of the statute on abortion. The political and social debate had been widely discussed throughout the country. It is logical to think that the *Tribunal* tried to unite all the possible arguments to support its decision.

What is noteworthy about these two decisions of the *Tribunal Constitucional*, is that, on the one hand, the Convention was not the principal ground for granting a restriction, but, on the other hand, it was actually quoted in a situation where it should not be related to the case, since the decision finally reached was to uphold an alleged reduction

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<sup>270</sup> Article 125 of the Spanish Constitution reads as follows: "Citizens may engage in popular action and participate in the administration of justice through the establishment of the jury, in the manner and with respect to those criminal actions as may be determined by law, as well as in consuetudinary and traditional courts."

<sup>271</sup> *Abortion Law* case, *Sentencia del Tribunal Constitucional* 53/85 of 11 April 1985, in *Boletín de Jurisprudencia Constitucional* 49 pages 515 ff.

<sup>272</sup> According to Article 2 ECHR, "Everyone's right to life shall be protected by law". The French version states that "Le droit de toute personne à la vie est protégé par la loi".

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of the scope of a fundamental right.

In Italy, the Convention has also been on occasion applied in the controversial way described above, that is, either implicitly considering the Convention as the only applicable law, leaving the domestic argument without a full development, or arguing the Convention standard as *a fortiori* arguments to justify a domestic restriction. The application of the Convention by the *Cassazione* comes often as a *ad abundatiam* argument for upholding alleged restrictions of constitutional rights<sup>273</sup>. Some judgements of the *Corte Costituzionale*, indeed, can also fall under this genre of decisions: when, for instance, the question whether the state monopoly on broadcasting was constitutionally legitimate was brought before the *Corte Costituzionale*<sup>274</sup>, the *Corte* pointed out that a state monopoly on television was not banned by the Convention<sup>275</sup>. Certainly, the *Corte Costituzionale* should be compelled to rule whether a domestic statute is below the Convention's standard: but if, as was the case, the result of this interpretation is that a restriction to a constitutional right is not below the European standard, the Convention should not be used to furnish the judgment. This does not mean that the Convention at any rate should not be quoted in the wording of the judgment but, if so, it should be stated that, once the restriction is allowed by the Convention, nothing can be said yet as to the extent to which the restriction complies with the domestic standard.

Unlike what seems to happen in Spain, however, this kind of application of the

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**273** "...nelle pur numerose sentenze della *Corte di Cassazione* in cui si richiama la Convenzione di Roma, il più delle volte quello della Convenzione non costituisce l'argomento principale delle parti. Il riferimento a tale Convenzione appare fatto *ad abundatiam* unicamente per rafforzare tesi che traggono già dal diritto interno sufficienti motivi giustificativi. E ciò corrisponde all'atteggiamento largamente seguito da parte degli operatori della giustizia e, in particolare, dagli avvocati." (ALBANO, 1991:719, in footnote).

**274** Sentenza della Corte Costituzionale n. 202 of 28 July 1976 in *Giurisprudenza Costituzionale* pages 1267 ff

**275** It has been said on this decision that "Si ha però l'impressione che il riferimento alle norme di origine internazionale, e in particolare a quelle della convenzione, sia talvolta considerato da giudici ed avvocati una specie di asso nella manica, un argomento di sicura presa psicologica, idoneo, se non a legittimare da solo una tesi, a conferirle maggiore solennità con il monito dell'impegno internazionale." (TAVORMINA, 1981:173). On broadcasting under the Convention, see *infra* Chapter V.

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Convention has been on occasion criticized by Italian legal literature. Criticism has come, principally, in those cases in which special domestic measures against terrorism were considered compatible with the Convention by Italian authorities during the so called *anni di piombo*: the so-called *fermo di polizia*, for instance, was expressly said to be allowed by the ECHR during the debates at Parliament<sup>276</sup>, as a way to justify the enforcement of domestic measures against terrorism<sup>277</sup>.

Given the circumstances, a better compliance with the Convention spirit would have been, it has been stressed, to apply Article 15 of the Convention in order to temporarily derogate from any of their provisions<sup>278</sup>. Article 15 ECHR probably was not applied for the same reasons for which Article 5 ECHR was argued as a legitimate ground for domestic measures: the Convention would support the legitimacy of domestic measures of restriction of fundamental rights<sup>279</sup>.

The possibility, therefore, exists of an application of the Convention by Spanish and Italian authorities as the only ground to define domestic rights in decisions in which an *independent* construction of constitutional provisions has not been experienced as a possible method for overruling restrictions to fundamental rights. This, however, should not lead to a disproportionate conclusions on the general effect of the Convention within the Spanish or Italian legal system. Nevertheless, the risk of such an application of the

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**276** *Disegno di legge* 760 of January 1973

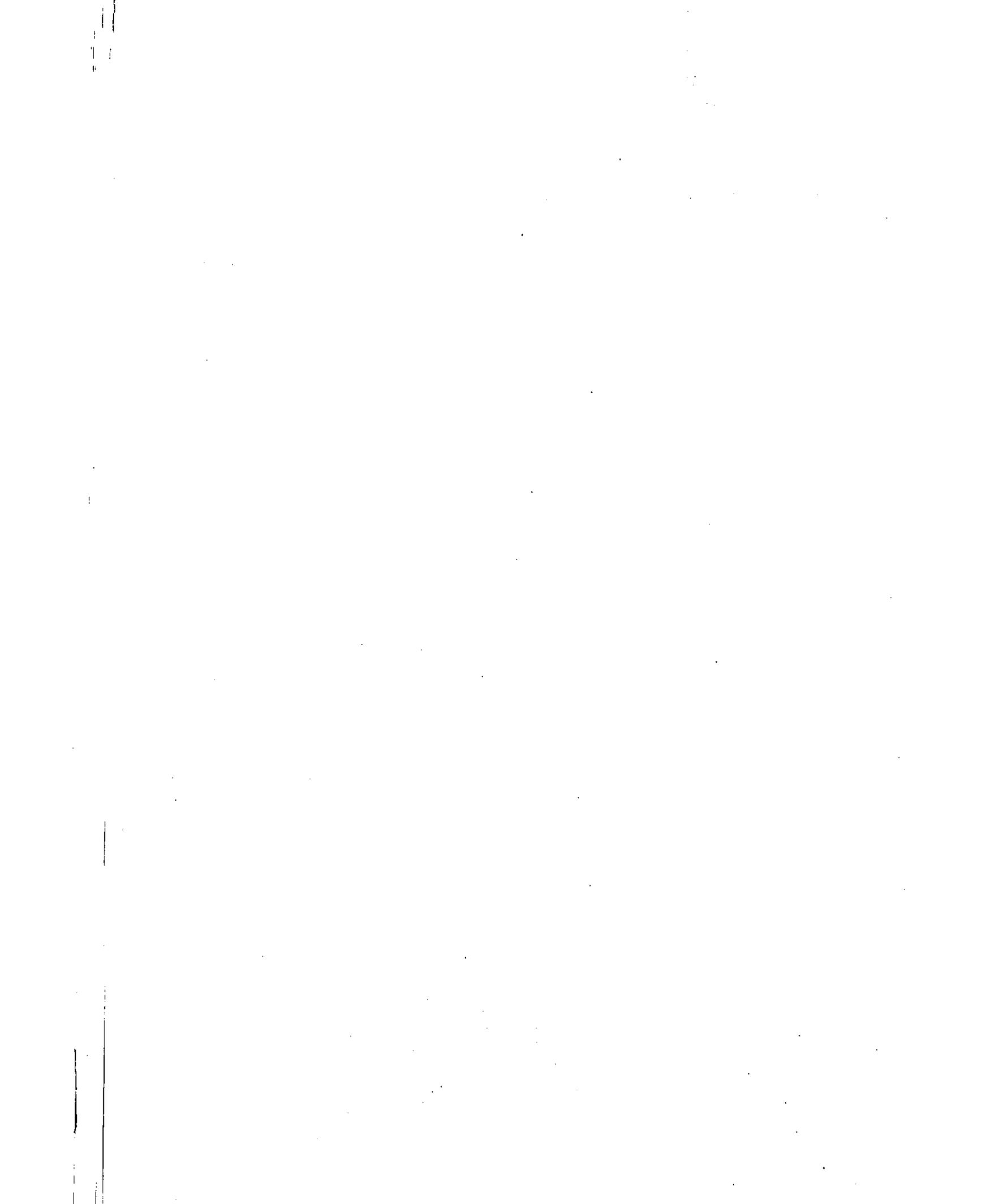
**277** "La cosa che più meraviglia é certamente questa: forse per la prima volta in assoluto (e comunque per la prima volta in materia tanto scottante) la Convenzione europea é stata qui invocata, non già quale simbolo per l'introduzione od il rafforzamento di garanzie, bensì quale pezza di appoggio per un'operazione destinata a ridurre l'area delle libertà individuali." (CHIAVARIO, 1974:501). The same author, sixteen years later described this as an ".episodio che no si sa se qualificare in termini di dubbioso fraintendimento o di mistificazione maldestra: tipico, il paradossale tentativo di trarre argomento proprio da una tra le previsioni di garanzia(art 5.1) della Convenzione europea nonostante l'interpretazione data dalla Corte di Strasburgo sin dalla sua prima sentenza- per sostenere la credibilità del progetto con cui si vorrebbe introdurre nel sistema, sotto il segno di un'amplissima genericità di presupposti, il fermo di polizia" (CHIAVARIO, 1990:442)

**278** Article 15 ECHR reads as follows: "In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law". On derogations under this Article, see *supra* Chapter I.

**279** See, in this sense, CHIAVARIO (1974:502) and PITTARO (1987:395)

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Convention is in our view greater than that considered by literature.



**CHAPTER III**  
**CONSTITUTIONAL RIGHTS PROTECTION IN A  
FEDERAL CONTEXT: THE UNITED STATES OF  
AMERICA.**

**(1) INTRODUCTION. (2) FEDERAL AND STATE STANDARDS OF PROTECTION OF FUNDAMENTAL RIGHTS: 1. The *incorporation* of the Federal Bill of Rights; 2. The *new federalism* and its critics; 3. Areas covered by state courts' right-extending decisions. (3) A ROLE FOR STATE CONSTITUTIONS IN THE PROTECTION OF FEDERALLY PROTECTED RIGHTS: 1. The California Supreme Court decisions; 2. State Bill of Rights and the Supremacy Clause; 3. Equivalent and Not Equivalent state analysis.**

**(1)INTRODUCTION:**

In Chapter II, the problems derived from the existence of two levels of protection of human rights, domestic and international, concerning the European Convention on Human Rights, were analyzed in two member states to the Convention, namely Italy and Spain, which have incorporated the Convention into their domestic law. Chapter III will be devoted to build another comparative framework in which the topic of this research can be studied, this time a federal system, namely the United States of America.

The comparison among federal systems and some aspects of the integration trends in Europe has achieved important scientific goals<sup>280</sup>. As far as protection of fundamental rights is concerned, these studies have been, however, mainly concerned with one aspect of the federal system in the United States: the so called *incorporation* process, by which the federal Constitution has provided a homogeneous standard of protection of the most important civil rights in all the states of the Union. Although the process of *incorporation* involved historical, political and legal aspects peculiar to the United States system, its analysis has provided, nonetheless, useful comparative insights for the study of legal integration in the field of fundamental rights in Europe<sup>281</sup>.

The process of *incorporation*, however, will be taken in this Chapter only as a starting point for studying a further development of the American federal system, closer

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280 The main studies are those recopilated under the series edited by CAPPELLETTI, M. SECOMBE, M. and WEILER, J (1986) *Integration through law: Europe and the American federal experience*, Berlin: De Gruyter

281 See CAPPELLETTI-GOLAY, (1986) and FROWEIN e.a. (1986)

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to the main topic of concern of this research: once the federal Constitution has consolidated its role in protecting civil rights all along the Union, the possibility of a higher standard of protection in a single state has arose. In this way, a similar problem that the one posed by the possible higher standard reached by the domestic constitutions of the contracting states in the face of the European Convention on Human Rights, has been discussed in American courts and legal literature.

This latter feature of the American legal system has not been unnoticed by studies of legal integration in Europe. Quite the contrary, it has been put forward that the higher level of protection of civil rights which can be grounded on state law should be taken into account as far as human rights integration in Europe is concerned<sup>282</sup>. Two facts, however, have obscured the importance of state constitutionalism in the United States for the European context: first, studies on integration has been mainly concerned with the European Community. In the EC, as has been shown in Chapter II, the process of *incorporation* of protection of fundamental rights under community law has not been completed yet. It was therefore logic that emphasis was put in the way in which *incorporation* was reached in the USA and how it could be reached in Europe in the future. Secondly, state constitutionalism in the United States has been neglected for a long period, and even today is clearly underdeveloped compared with the federal Constitution. This made it difficult to compare its achievements in protection of fundamental rights with the protection provided by domestic constitutions in Europe. Nonetheless, it should be noted as well that state constitutionalism originates a discourse of state differences within the federal system, a point that is not very welcome in European legal literature. This may has been, too, a further obstacle for the study of American state constitutionalism in the European transnational context.

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<sup>282</sup> The fact that the federal Constitution of the United States provides only for the minimum common standard has been put forward, as far as European legal integration in the human rights field is concerned, by FROWEN, J. A. (1986) "Human Rights as a vehicle of legal integration in Europe" in *Integration through law.. cit*, pages 300-400 at 342. It has been also stressed that the standard of protection provided by the Supreme Court in the American process of *incorporation* has been on occasion wrongly taken as a full applicable standard, warning on the same danger in the European context. This question is also mentioned regarding *incorporation* in the specific field of freedom of speech in SHAPIRO, M. (1986) "Freedom of expression - Transnational and states interactions in the American Experience" in *Integration through Law.. cit*, pages 249-75 at 257.

## INTRODUCTION.

This Chapter assumes, however, that American state constitutionalism may be useful for the study of the relationship between the European Convention on Human Rights and the domestic constitutions of the contracting states of the Convention. Two reasons can be argued in this way: first, in the ECHR system, *incorporation* has been reached, at least in the sense that the Convention applies to any violation by a contracting state of the rights guaranteed thereby, regardless its legal origin. Secondly, although domestic constitutionalism in Europe is clearly rather more developed than state constitutionalism in the United States, the American debate on different standards of protection, state and federal, is, to date, richer than the European doctrine and legal practice on the matter.

As will be seen below, important political factors were also at the origin of the movement in favor of granting in the United States a higher protection of civil rights on state law. Reliance in state, rather than in the federal, Constitution, came principally as a respond to the new civil rights policy of the United States Supreme Court from some state courts which, in the seventies, began to grant decisions extending the protection of fundamental rights on the solely grounds of a state constitution. As many other legal issues in the United States, the question then seems to depend more on judicial policy than on strict legal terms. Still in 1988, a commentator put forward the curious situation that state constitutions held in the legal system of the United States<sup>283</sup>.

However, a proper understanding of post-*incorporation* problems concerning state and federal standards of protection of civil rights cannot be concerned only by judicial policy matters. Quite on the contrary, present time-meaning of the double protection system in the United States needs to be studied regarding historical, political and juridical matters, since all of them are implied in the born in the seventies of what the literature called the "new federalism". The historical aspect must therefore be the first point discussed in this Chapter. Part (1) will analyze the historical and legal background of the birth of the *new federalism* movement. Part (2) will be devoted to the study of some leading state courts right-extending cases, and of the main legal problems which a higher protection of civil rights, granted solely on state constitutional law, poses to the

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<sup>283</sup> "State constitutions occupy a curious position in American life. They are important, but then again, they seem to be not so important" [KINCAID, J. (1988) "State Constitutions in the federal system" in KINCAID, J. (ed), *State Constitutions in a Federal System*, Newbury Park, Cal:SAGE, pages 12-22 at 14].

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federal legal system<sup>284</sup>.

**(2) FEDERAL AND STATE STANDARDS OF PROTECTION OF FUNDAMENTAL RIGHTS.**

**1. The incorporation of the Federal Bill of Rights.**

As is well known, the first American Bill of Rights were those included in the Declaration of Rights or in the Constitutions of the ex-colonies which later became the constituent states of the Union<sup>285</sup>. Moreover, neither the *Articles of the Confederation*, the first constitutional document which politically organized the ex-colonies<sup>286</sup>, nor the Constitution of the United States as it was originally passed in 1787, embodied a declaration of individual rights among their provisions. In order to include a Bill of Rights, the Federal Constitution had to be amended, raising an ample political debate on the convenience to include a declaration of rights. As a result of this debate, ten amendments, the first amendments to the United States Constitution, were passed in 1789 and ratified in 1791, embodying what was known from then onwards as the federal Bill of Rights. The reasons argued against the necessity of a Bill of Rights in the federal Constitution were various<sup>287</sup>. One of them clearly highlights a crucial point later argued

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**284** See a brief description of the legal questions analyzed in this Chapter in "State Declarations of Rights", Chapter 3 of MARKS, T.C. and COOPER, J. (1988) *State Constitutional Law*, Nutshell Series, St. Paul, Minn:West Pub. Co.

**285** Between 1776 and 1780, all the states except Rhode Island and Connecticut adopted new written constitutions. Seven of them contained separated Bill of Rights, while the remainder incorporated certain provisions regarding fundamental rights to the Constitution itself. These provisions regulated writs of assistance, taxation, and procedural rights, which were familiar to Americans through the English *Magna Charta* and the *Bill of Rights* of 1689. See KELLY, A. and HARBISON, W.A. (1963) *The American Constitution. Its origins and developments*, New York:WW Norton at 94

**286** The *Articles of the Confederation*, drafted in 1777, were aimed at a Confederation-type organization, closer to a mere "league of friendship" (KELLY-HARBISON, 1963:113). They contained no direct provision for executive authority which rested largely in *ad hoc* committees erected by Congress. The failure of this first political scheme was the reason by which representatives of the states met in the Philadelphia Convention in order to draft a new Constitution which would try a Federation-type political organization. See, in general, McLAUGHLIN, A.C. (1969) "The Articles of Confederation" in LEVY, L.W. (ed) *Essays on the making of the Constitution*, New York: Oxford University Press, pages 44-60.

**287** The debate can be seen in LEVY, L.W. (1988) "The Bill of Rights" in BARLOW, J. e.a. (eds) *Essays on the formation of the Constitution*, New York:Greenwood Press, pages 297-27.

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1. THE INCORPORATION OF THE FEDERAL BILL OF RIGHTS.**

by the new federalists: the previous existence of a Bill of Rights in the Constitution of every state made it useless for the Federal Constitution to embody a federal Bill<sup>288</sup>. In fact, when the federal Bill of Rights was finally passed, the Bills of the states influenced its content to a great extent<sup>289</sup>.

The approved federal Bill of Rights, however, did not affect the existing state bills embodied in each state Constitution. The original relation between the federal Bill of Rights and the Bills of Rights included in the constitution of each state was a direct aftermath of the idea of federalism which was at the core of the political organization of the United States. In order to clarify this point, it must be remarked that, as a reaction to the failure of the Confederation scheme attempted in the *Articles of the Confederation*, the new Constitution of 1787 established a suitable national government, the powers of which were, however, carefully listed in the Constitution. As a result, the federal government was one of "few and defined" powers<sup>290</sup>. On the other hand, since the great bulk of the political power was constitutionally attributed to the states, the states were thought to be the real risk for the liberties of the individual; the best place for a document protecting individual rights was therefore the constitution of every single state. As a logic result of this territorial distribution of powers, the federal Bill of Rights, as finally passed, was not binding on the states, each of which had to respect its own Bill

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**288** The fact that rights of the people were adequately protected by state constitutions was the most important argument for the opposition of federalists to George Mason's motion in favor of a Bill of Rights, which was unanimously defeated by the delegates. See CORTNER, R. C. (1981) *The Supreme Court and the Second Bill of Rights. The Fourteenth Amendment and the Nationalization of Civil Liberties*, Madison:University of Wisconsin Press at 3

**289** Later, however, the opinion that the influence had been just in the opposite way broadly circulated, and a wrong conclusion was reached as if state constitutional provisions were adopted to mirror the federal Bill of Rights. Against this extended opinion, it has been rightly put forward that "The lesson of history is otherwise: indeed the drafters of the federal Bill of Rights drew upon corresponding provisions in the various states constitutions. Prior to the adoption of the federal constitution, each of the rights eventually recognized in the federal Bill of Rights had previously been protected in one or more state constitutions" [BRENNAN, W. J. (1977) "State Constitutions and the protection of individual rights" in *Harvard Law Review* 90 pages 489-504 at 501].

**290** For the political debate at the continental convention among adherents to a strong and of a weak executive power in the new constitution, see KELLY-HARBISON (1969:132-47).

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of Rights; the federal bill only bounded on the federal government<sup>291</sup>.

This situation changed dramatically along the 19th and 20th centuries: the movement of the history tended to strengthen the federal government, shifting the original balance of powers between the center and the states. Three periods of the history of the United States particularly contributed to the progressive reinforcement of the federal power, jointly with the reinforcement of the federal Constitution and, therefore, of the federal Bill of Rights: first, the reconstruction period which came after the civil war of 1860-66; second, the social and economic policy of the *new deal* following the depression of the 1920s, which dramatically increased the number of federal regulations affecting matters initially under the autonomy of the states; and, thirdly, the civil rights movement of the sixties which forced states to accept the binding effect of the standard of protection of civil rights as they were embodied in the federal Constitution. The so-called *incorporation* of the federal Bill of Rights was the final result of this over one hundred-long process which changed completely the view and the legal function of the federal Bill of Rights within the United States legal system<sup>292</sup>.

After the civil war the Constitution was amended in order to enforce the abolition of slavery which had been the cause of the war. Among these Reconstruction Amendments, the 14th amendment to the Constitution was directly intended to grant a new status of free citizens to the former slaves in all the states of the Union, particularly in those southern states in which slavery had not been outlawed until the war came to an end. In order to achieve this, the 14th Amendment was bound on the states as well as on the federal government. Its section 1 recognizes to all the citizens of the Union the "privileges and immunities" of the citizens of the United States, the "equal protection of the laws" and the right to not to be deprived of life, liberty or property without the "due process of law". These three clauses were considered essential rights of every citizen

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291 As has been said, "There are essentially two ways of viewing a federal Bill of Rights. One way sees the Bill of Rights as imposing limits only on the federal government - the government, that is, established by the Constitution of which the Bill of Rights forms a part. The other way sees the Constitution, and the Bill of Rights with it, forming the supreme law of the land and thus limiting state as well as federal governments" [CAPPELLETTI-GOLAY (1986:298)]. The first view was the one initially adopted in the United States.

292 On the process of *incorporation*, see, in general, CORTNER (1981) and CAPPELLETTI-GOLAY (1986).

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of the Union, whose deprivation, either by the federal government or by the states, was therefore forbidden<sup>293</sup>.

Practically since it was passed, the courts embarked in a legal debate about to which extent the 14th amendment intended to outlaw anything else than slavery, and soon the debate focussed on the different meaning which could be given to the different clauses included therein. The main question was whether the concepts of "privileges and immunities", "equal protection" or "due process of law" included under its scope any of the rights guaranteed in the federal Bill of Rights; if so, the direct implication of the *incorporation* of any provision of the Bill of Rights under the 14th amendment would be that the incorporated rights would therefore be, as doubtless the 14th Amendment was, bound also on the states.

It was for the United States Supreme Court to give an answer to this. The first findings of the Court, however, seemed to dissuade any further attempt of incorporating any fundamental right of the federal Bill into the 14th Amendment: according to several cases decided during the 19th century, neither the "privileges and immunities" clause, first, nor the "due process" clause, later, were construed as incorporating any right of the federal Bill with binding force on the states<sup>294</sup>. The main argument to reach this conclusion concerned the due process clause: the Bill of Rights contained already another provision guaranteeing the due process of law, embodied in the fifth Amendment<sup>295</sup>. Since all other rights of the Bill were separately listed in the other remaining nine first amendments, the unavoidable consequence was that the right protected by the due process of law clause did not include any other rights expressly protected elsewhere.

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**293** The 14th Amendment, section I, reads as follows: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty and property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

**294** The main cases of this period are analyzed in CORTNER (1981:12-38).

**295** The Fifth Amendment reads as follows: "No person shall (..) be deprived of life, liberty, or property, without due process of law (..)".

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In the same case in which this "doctrine of non superfluosness"<sup>296</sup> was stated, however, the due process clause was defined in a manner which later opened the door to the incorporation: the due process of law, the Court held, protected against state encroachment of those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions"<sup>297</sup>. The remaining question, despite the Court's apparent acceptance of the doctrine of non superfluosness, was whether or not at least some of these "fundamental principles of liberty and justice" were listed in the Bill of Rights. It would seem difficult indeed for the Court to maintain that the Bill of Rights listed no rights that could be defined in this manner.

The way in which civil rights were finally included as "fundamental principles" protected by due process was also somewhat complicated: in 1886, the Court held that corporations were persons within the meaning of the *due process* Clause, and thus converted the clause into a protector of corporate property rights against interferences by the states. And by the 1890s the Court had jettisoned the idea that the due process clause was essentially a procedural guarantee and had accepted the concept of *substantive due process* - that is that due process protected certain substantive rights against governmental impairment regardless of the procedure involved<sup>298</sup>. Up to 1937, the Court applied substantive due process against the increasing federal regulations passed during the depression as a result of President Roosevelt's *New Deal*. The resulting political tension between the Court and the Executive concluded, after a period of political struggle, which a victory of the Court, which, although later changed its own policy as to the *new deal* measures, managed to keep its decisions accepted and to consolidate its institutional position.

This consolidated institutional position after the struggle of the *new deal* doubtless helped when the Court started to apply the 14th Amendment to review decisions grounded on state law on the ground that they violated the rights guaranteed by the federal Bill. The great bulk of these decisions came in the sixties, under the leadership

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296 The case was *Hurtado v California* [110 US 516 (1884)]. On the doctrine of non superfluosness, see CORTNER (1981:21 ff).

297 *Hurtado case, cit.*, 110 US 535

298 See CORTNER (1981:23 ff).

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of Chief Justice Earl Warren, when the Court liberally construed the *equal protection* and the *due process* clauses of the 14th Amendment to fight against state-originated violations of civil rights. All the Warren Court had to do was to apply "liberty" were the Court had put before "property", and as the sixties were going on, the majority of the rights guaranteed by the federal constitution become incorporated into the 14th Amendment and thus binding on the states as well as on the federal government<sup>299</sup>. Along this last period of the incorporation process, the Court had to deal with prior state legislation which did not protect fundamental rights to the same extent that they were protected by the Federal Constitution and which had to be overruled.

At the present time, the result of the whole process of *incorporation* is twofold: first, federal law-guaranteed rights prevail over state law, and this regardless of the fact that the right in question is protected in a federal statute or in the Federal Constitution; second, federal and state law are situated in an inter-relational system in which the up to then existing two separated spheres does not apply any longer, at least as far as civil rights are concerned<sup>300</sup>.

Moreover, as far as the role of the state constitutions in protecting fundamental rights is concerned, the incorporation process placed state constitutions in a paradoxical situation: they embody Bill of Rights which were in practice not applied since the standard of protection of those rights was nation-wide: the main goal of the incorporation process was to protect essential fundamental rights by virtue of the federal constitution,

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<sup>299</sup> In this way, the Supreme Court incorporated the following categories of the Bill of Rights in the equal protection and the due process clause of the 14th Amendment: the cruel and unusual punishment clause, the right to assistance of counsel, the privilege against compulsory self-incrimination, the *Miranda* warnings, the right to be confronted with witnesses, the right to a speedy and public trial and to an impartial jury, the double jeopardy clause and several first amendment rights, as the banning of state-required prayers at public schools, the limitation of libel to public officials, etc. See a list of decisions of the Supreme Court on this matters in BRENNAN (1977:491-95). See also CORTNER (1981:passim).

<sup>300</sup> After incorporation, there are no entirely independent models of state judicial review. Before incorporation, state and federal spheres had remained artificially separated: "The beauty of the model was its theoretical purity. Each of the two parallel charters had a neatly defined role. They could not overlap or interfere with one another. The weakness of the model was the artificiality of the separation. If a coerced confession was repugnant to human dignity why should it matter which government happened to be enacting it?" [FINE, D. J. (1973) "Finding a modern role for the other Bills of Rights" in "Project Report: Towards an activist role for state Bill of Rights", *Harvard Civil Rights and Liberties Law Review* 8 pages 275-312 at 277].

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regardless of the fact that the violation of the rights came from a state or from the federal government. Therefore, an unavoidable consequence was that state Bill of Rights remained applicable just for those rights which, according to the Supreme Court, were not deemed to be "essential". At the end of the process, then, states' Bills were unanimously seen as bills of unessential rights<sup>301</sup>.

The prevail of the federal Bill of Rights became a clear established fact at the end of the sixties, and by that time civil rights litigation had practically nothing to do with state law: the claim that a civil right had been violated was brought before a federal court, or, in the case of the defendant's right in criminal proceedings, before a state court, but the federal constitution or federal civil rights statutory law was practically the only law to be applied. Then, a new conservative oriented policy in the United States Supreme Court, represented by the nomination by President Nixon of Warren Burger as a new Chief Justice in 1969<sup>302</sup>, brought a new political context to the juridical scene.

**2. The new federalism and its critics.**

The Burger Court did not initiate the "counterrevolution" feared by the liberal

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**301** "For the first time the responsibility for protecting a right was not to be determined by the accident of which government was seeking to abridge the right, or by whether the Constitution specifically assigned the care of the right to federal government, or by whether the right had its origin in the federal government's national character. It was to be determined instead by the inherent nature of the right (..) as more and more rights were absorbed, state bills of rights were relegated to a decidedly secondary role. Indeed, the absorption theory transmuted state bills of rights from charters of basic liberties to documents that were controlling only those rights which were deemed unessential" (FINE, 1973:283)

**302** Chief Justices of the Supreme Court, as well as the associated justices, are nominated by the President of the United States for a life tenured office. The nomination, however, has to pass the Senate's veto. In 1968, short before President Johnson concluded his term, it was already clear that the next President would have the opportunity to name a new Chief Justice. Earl Warren announced that he will retired, and President Johnson named A. Fortas. A strong opposition in the Senate, however, forced to the withdrawal of Fortas nomination and in the mean while Richard Nixon won the presidential election. Nixon requested Warren to serve until the end of the 1968-69 term and then nominated Warren Burger as a new Chief Justice. On the Political struggle inside the Supreme Court after Burger's nomination see WOODWARD, B. and ARMSTRONG, S. (1979) *The Brethren: inside the Supreme Court*, New York: Simon and Schuster.

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public opinion sympathetic with the Warren Court's decisions<sup>303</sup>. Under the new Chief Justice, however, a period of strict-constructionism started, narrowing or at least not expanding the scope of federally protected civil rights<sup>304</sup>. Leaving apart the political and juridical debate on the appropriateness of the Supreme Court's new approach to interpret the constitution, the new federal civil rights policy revived the idea that state constitutions were valid grounds for granting human rights protection: litigants, who feared an unsympathetic ruling from the United States Supreme Court<sup>305</sup>, and state Supreme Courts themselves, started to turn to state constitutions as a valid ground to grant a higher standard of protection to the rights of the individual than the one which would probably be decided by a Supreme Court's ruling<sup>306</sup>.

This movement was soon called "*new federalism*" or "*new judicial federalism*", in order to differentiate it from the simultaneous political revival of the role played by the

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**303** Although it was initially thought so, the Burger Court can hardly be described as "a body intent on undoing the work of its predecessor (...)", however, "by the same token, the 1971 term demonstrated that the Warren era was definitively over" (FINE, 1973:270).

**304** According to Justice Brennan, one of the liberal Justices still in the Burger Court and a usual dissenter of the majority, the Court's decisions in which civil rights protection was narrowly construed covered issues as pregnancy, illegitimate birth, free access to justice, due process clause, first amendment, arrest warrants, police searches, privilege against self-incrimination, right to counsel and legal assistance, etc. See BRENNAN (1977:495-99).

**305** "Throughout the Warren Court era, there was no question about which forum a litigant would choose to bring his civil rights action. He would instinctively go into federal court. Now the decision is not so simple. If the litigant wants a federal forum, he will have to sacrifice the opportunity to win his case on an expansive interpretation of his state's Bill of Rights (...). In the Warren era, the sacrifice of a state Bill of Rights argument was of little account. Under the Burger Court, however, the sacrifice may be considerable" (FINE, 1973:272). The action of interest groups, such as the American Civil Liberties Union and the National Rifle Association, in raising state constitutional rights claims is also emphasized by COLLINS, R., GALLIE, P. and KINCAID, J. (1986) "State High Courts, State Constitutions and individual rights litigation since 1980: a survey", *Publius* 16,3 pages 141-161 at 154. However, the federal forum still has its advantages, among them that it is easier to amend a state constitution than the federal one, so a state grounded decision can be easier overruled by a constitutional revision. On state constitutions amendment, see *infra* this Chapter.

**306** Some of the right-extending state court decisions expressly suggested a connection between a recent decision of the United States Supreme Court and the state court's reliance on the state Bill of Rights. See BRENNAN (1977:498).

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states in the United States politics<sup>307</sup>: *federalism*, since the movement claimed to derive directly from the original spirit of the American revolution; *new*, since it clearly departed from the traditional federalist claim to criticize the civil rights *incorporation* process under the Warren era. The federalist argument had certainly been used during the incorporation period opposing the nationalization of civil rights standards by the Supreme Court. Still in the seventies, "federalism" and "state's rights" were seen as synonymous of obstructionism to the incorporation process. However, it was also stressed, the same logic could be employed to encourage the adoption of progressive standards by state courts<sup>308</sup>. At the end of the eighties, the new character of the federalism claims as far as civil rights are concerned seemed to be extensively acknowledged<sup>309</sup>.

Notwithstanding with its claim to be the heritage of the framers' thinking, the *new federalism* was, however, seen by its critics since the beginning as a mere political

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**307** The "political" new federalism had a completely different meaning; it was a part of the economic program of President Reagan in 1980, which included a substantial decrease of federal funding and aids to state-run programs and a greater state control on shared funds. A general assessment on the effects of this new federalism in the intergovernmental relations in United States politics during the eighties can be seen in COLE, R. and TAEGER, D. (1986) "The new federalism: promises, programs and performances" in *Publius* 16,1 pages 3-10, and, in general, in all the contributions to vol 16,1 of *Publius* [special issue: *Assessing the New Federalism*]. Contrariwise to its judicial counterpart, the political new federalism had a conservative character, as a part of the *Reaganomics* program, as has been said, "It is a sign of the times that the expression "new federalism" has quite a different meaning in contemporary political circles than it does in constitutional ones" [COLLINS, R. and GALLIE, P. (1986) "Models of post-incorporation judicial review: 1985 survey of State Constitutional individual rights decisions", *Publius* 16,3 pages 111-139 at 112].

**308** "Federalism need not be a mean-spirited doctrine that serves only to limit the scope of human liberty. Rather, it must necessarily be furthered significantly when state courts thrust themselves into a position of prominence in the struggle to protect the people of our nation from governmental intrusion on their freedoms." (BRENNAN, 1977:503). The new approach by the Burger Court to the civil rights issue helped to shift the view of federalism by state courts, giving a new meaning to the old argument: "Too often in the past the banner of states' rights has been raised in opposition to civil liberties. Too often the attempts of the Supreme Court to stimulate state responsibility by invoking the concept of federalism have been in vain. The Burger Court makes life difficult for state judges because it challenges them to make federalism more than a cliché for judicial conservatism, and states' rights more than a slogan for obstructionism" (FINE, 1973:275).

**309** "No doubt there is growing interest in true federalism today. There was a time when state's rights were associated with Orval Faubus and George Wallace barring the entrance of blacks to public schools. We are long past that confrontational period. Today, state's rights are associated with increased, not lessened, individual guarantees" [MOSK, S. (1988) "The emerging agenda in state constitutional rights law" in *State Constitutions in a Federal System.. cit*, pages 54-65 at 63].

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reaction against the conservatism of the Burger Court; as will be seen below, this original political feature has remained as one of the most important legal arguments against it<sup>310</sup>. In any case, supporters of the *new federalism* waived it as the recuperation of the right idea of federalism lying in the American revolution<sup>311</sup>: according to them, the Constitution of every state should retrieve the role in the protection of the civil liberties and individual rights which they once had.

Thanks to federalism, it was now argued, individuals were entitled to enjoy a double-security system<sup>312</sup>, by virtue of which state law should protect them in the effective exercise of their civil rights, whilst the task of the federal constitution, and therefore of the Supreme Court, was only to establish the minimum standard of protection below which the states could not go; below that federal standard of protection the Supreme Court's interpretation of the Federal Constitution was a full standard to be applied; above this standard, however, a state constitution could be construed by state

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**310** *New federalism* is seen by its critics as the result of the marriage of two schools, "the liberal reaction in the mid-1970s to the jurisprudence of the Burger Court" and "a much older and separated tradition of criticizing state courts for ignoring state constitutions as a source of law"; both schools shared the ultimate goal of "creating in every state a vigorous independent body of state constitutional law capable of standing by itself as a basis for constitutional ruling by state courts" [GARDNER, J.A. (1992) "The failed discourse of state constitutionalism" in *Michigan Law Review* 90 pages 761-837 at 772].

**311** According to Justice Brennan, one of the earlier follower of the new movement, new federalism was "surely an important and highly significant development for our constitutional jurisprudence and for our concept of federalism" (BRENNAN, 1977:495). Further, "Every believer in our concept of federalism, and I am a devout believer, must salute this development in our state courts" (IBIDEM: 502). The link between the new federalist reaction and the conservatism of the Burger Court, however, was also admitted by new federalism advocates. A 1973 report on the issue was purposed to "explore the potential for the development of state bill rights opened by the advent of the Burger Court" (FINE, 1973:275; Justice Brennan himself acknowledged that "It may not be wide of the mark (...) to suppose that these state courts discern, and disagree with, a trend in recent opinions of the United States Supreme Court to pull back from, or at least suspend for the time being, the enforcement of the *Boyd* principle [that is, a liberal construction] with respect to the application of the federal Bill of Rights and the restraints of the due process and equal protection clauses of the fourteenth amendment" (BRENNAN, 1977:495).

**312** "one of the strengths of our federal system is that it provides a double source of protection for the rights of our citizens" (BRENNAN, 1977:503); "The ability of state courts to develop their bills of rights independently of the Federal Constitution derives directly from the fundamental nature of our dual judicial system" [MATSAKIS, E. N. and SPECTOR, L. (1973) "Litigating State Bill of Rights in state court" in *Project Report: Towards an activist role.. cit*, pages 312 ff at 312].

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courts as giving a more generous protection to a civil right embodied therein<sup>313</sup>.

In the decade of the seventies, the new activism of several state courts was therefore claimed to inaugurate a new "post-incorporation era"<sup>314</sup>. It was clear, however, that the strengthen in the future of the *new federalism* depended upon a number of features: first, the attitude of the Supreme Court concerning civil rights construction: the more the Supreme Court continued its strict-constructionism approach, the more room there was for a new federalist development; secondly, new federalism had to deal with long years of neglected state law construction concerning civil rights; thirdly, the possibility of a state higher standard was to be discussed taken into account the specific characteristics of the right concerned in each case. State courts' activism, however, seemed to successfully develop along the eighties and trough the nineties<sup>315</sup>.

Leaving aside the political reaction which labelled the new movement as a "liberal" reaction against the new Supreme Court, juridical arguments were also posed disputing the alleged federal and constitutional legal roots of the new movement. A recent and in depth review of this question has critically concluded that, despite twenty

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**313** "The point I want to stress here is that state courts cannot rest when they have afforded their citizens the full protection of the federal Constitution. State constitutions, too, are a font of individual liberties, their protection often extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which was brought federal law to the force must not be allowed to inhibit the independent protective force of state law - for without it, the full realization of our liberties cannot be guaranteed" (BRENNAN, 1977:491)

**314** The term *post-incorporation* was used to refer to "the state of federal constitutional law after most of the provisions on the United States Bill of Rights were held to be binding on the states" (COLLINS-GALLIE, 1986:112).

**315** Two balanced opinions on this question: "Considering the near absence of state constitutional rights litigation during the 1950s and the 1960s, the rise of such litigation since 1970 might be seen as a "revolution" (..) However, considering the low level of state constitutional rights litigation in most states, one cannot yet speak of a "revolution" (..) With additional changes in the composition of the United States Supreme Court, coupled with a greater dissemination of information about state constitutional law, the trend may accelerate upward during the late 1980s and into the 1990s.." (COLLINS e.a., 1986:160); "There are, of course, policy arguments of both side of this question, Probably it makes sense to argue the issue point by point and area by area; what works for leaflets in a shopping mall may not work for the rights of people arrested for burglary. For our purposes, it is worth noting that the doctrine of independent state grounds fosters a revival of interest in state constitutional law and underscores the importance of the subject. The years of scholarly neglect may come to an end" [FRIEDMAN, L. M. (1988) "State Constitutions in historical perspective" in *State Constitutions in the Federal System.. cit*, pages 33-42 at 42].

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years of development, state constitutionalism still lacked, in 1992, the fundamental attributes of a consistent juridical discourse<sup>316</sup>.

According to its radical critics, the crucial point is that this deficiency reflects an essential inability of state constitutions to develop a coherent constitutional discourse<sup>317</sup>. The lack of a coherent discourse in state constitutionalism was, however, already admitted in the seventies by advocates of the *new federalism*: state courts should be encouraged to recover a prominent role in civil rights litigation precisely to fulfill this lacuna; it was made clear, however, that this was an avoidable consequence of a number of features of the American legal system which the *new federalism* should precisely change; this change should affect the whole legal situation after the process of *incorporation* and the federal-minded behavior of civil rights lawyers in the United States. According to this explanation, *incorporation* had have as a result a nation-accepted image of the United States Supreme Court as the only advocate of human rights, jointly with the perception that the only ground for a civil rights claim was the federal Constitution<sup>318</sup>; all that the *new federalism* had to do was, then, to recover state constitutions as a valid source of individual liberties, in the way they had been before *incorporation*. Critics of new federalism, however, rightly argue that if state courts had really protected civil rights at that time, incorporation itself probably had not been necessary<sup>319</sup>. A second reason argued in the seventies to explain the weakness of the

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**316** The point is discussed in depth in GARDNER (1992), who describes the present situation of state constitutionalism as "a vast wasteland of confusing, conflicting and essentially unintelligible pronouncements" (at 763).

**317** The failure of state courts to develop a coherent discourse of state constitutional law, it is argued, "reflects a much deeper failure, a failure of state constitutionalism itself" (GARDNER, 1992:764).

**318** This image was the first obstacle to state constitutionalism: "Because the nation is accustomed to looking to the Supreme Court as protector and interpreter of individual liberties, some critics feel it is disruptive and damaging for state courts to interpret their state constitutions independently" [JOHANSEN, R.B. (1977) "The new federalism: toward a principled interpretation of the State Constitution" in *Stanford Law Review* 29 pages 297-321 at 298].

**319** The argument has been posed, for instance, as follows: "state courts could have utilized their state constitutions before the Supreme Court began its string of incorporation decisions, thereby preventing the Court from gaining the impression that state would not protect fundamental rights of United States citizens unless forced to do so by the imposition of federal constitutional standards" (GARDNER, 1992:807). On the other hand, it should not be forgotten, however, that incorporation was not only a extension of federal standards to the states, but, inasmuch as this,

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*new federalism* was the federal-oriented legal training in the United States and the actual monopoly of the Federal Bill of Rights in civil liberties argumentation which this situation lead to<sup>320</sup>: as a result, both lawyers and judges tended to ground human rights arguments in the federal Constitution; in fact, one of the measure proposed by new federalists was to increase the presence of state constitutions and, in general, state law, in the syllabus of law schools all along the country<sup>321</sup>. This argument has been, however, rightly answered from the critical side too<sup>322</sup>.

The crucial, point, therefore, is to which extent the lack of a coherent discourse in state constitutionalism is due to circumstantial causes, whatever these circumstances may be, or comes, on the contrary, from an unavoidable consequence of the new federalist approach itself. The latter argument has been recently posed, comparing the legal discourse originated by the Federal Constitution with that of state constitutions: state constitutionalism discourse, it is concluded, clearly does not match its federal counterpart<sup>323</sup>.

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an original construction of these new standards by the Supreme Court. In fact, the standard of protection of fundamental rights was very often defined at the same time in which they were declared binding on states. The federal record was therefore not higher than the standard of many states, and in some respects, it was even worse, for instance the federal treatment of indians of federal reverse of state courts protection against corporate powers. See KINCAID (1988:017).

**320** On the prominent position of the Federal Constitution in legal education in the United States, see in general FRIEDMAN, L. and TEUBNER, G. (1986) "Legal education and legal integration: European Hopes and american Experience, in *Integration through law.. cit*, vol 1 book 3 pp 345 ff.

**321** In a 1986 survey to state courts justices, a general trend was revealed in favor to teach state constitutional law in law schools as a way to increase state constitutional rights litigation. See COLLINS e.a. (1986:156 ff).

**322** "Lawyers will make the arguments they need to make to win cases. If lawyers are not making state constitutional arguments is because doing so does not help them to win (..) As far as law schools, it is undoubtedly always popular to blame them for ills of the legal system, and sometimes such blame may be justified -but not in this case (..) (GARDNER, 1992:810). A further argument to justify the weakness of state constitutionalism, the lack of historical data on which arguments on state constitutional provisions can be grounded, has been also replied, see GARDNER (1992:812).

**323** The best formulation of this argument has been very recently stated: "If a robust, independent state constitutional law exists, it must be manifested by equally robust and independent state constitutional discourse", either under an approach, in which "such a discourse would in all likelihood closely resemble federal constitutional discourse", or in a interstitial approach, in which it "would take a slightly different form (..) would focus on the ways in which the state and

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It is undebatable, however, that state and federal constitutionalism in the United States are two things completely different and, therefore, to say that each play a different role is only a truism. State constitutions, for instance, are easily amended, and in fact they are so very often, on occasion as a response from the state legislature or the state electorate to some supreme state courts decisions "extending" state protection beyond the federal Bill of Rights<sup>324</sup>. Paradoxically, often amended constitutions encourage activism in state Supreme Courts when deciding hard civil rights cases, since these courts, unlike the Supreme Court of the United States, are conscientious of the fact that their ruling may relatively easily be changed in the future by an amendment to the state constitution<sup>325</sup>.

In addition, and mainly as another effect of this "amendomania", state constitutions are usually long documents with issues not usually found in other constitutional documents, not even mentioned in the Federal Constitution. This concerns precisely state Bill of Rights, which usually lists rights other than the classical civil liberties which are more likely found in other constitutions. These issues include capital punishment, victim's rights, privacy and gender discrimination, but also environmental

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federal constitutions differ from each other", that is, it would be "a discourse of distinctness". Studying 1990 state Supreme Courts decisions, the conclusion is reached that the state constitutionalism discourse is coherent in none of both cases. See GARDNER (1992:passim).

**324** For instance, the Supreme Court of Massachusetts declared capital punishment unconstitutional relying on a state constitutional provision identically worded than the Eight Amendment of the Federal Bill of Rights [in *District Attorney of Suffolk v Watson*, 381 Mass 648 (1980)]; after this case was decided, the state constitution was amended in order to overrule the judgment, so the constitution could not be read as prohibiting death penalty. However, the Massachusetts Supreme Court later stroke down the next attempt of a capital punishment statute on the ground that it was still unconstitutional [in *Commonwealth v Colon-Cruz*, 393 Mass 150 (1984)], see FRIEDMAN (1988:041). The Supreme Court of California also provides examples in both directions: when the Supreme Court of California decided that capital punishment was prohibited under a different reading of the California Constitution than the federal provision, [In the *Anderson*, case, see *infra*], the Constitution was again amendment to overrule the Court's decision. Later, however, a new amendment was introduced in the California Constitution stating that "rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution" [new Article 1 section 24; see the text of the amendment in JOHANSEN (1977:312-13)]. A balanced opinion of the amendment process of state constitutions regarding civil rights has acknowledge that "although some observers argue that *amendomania* has led voters in recent years to restrict rights, on balance, state declarations of rights remain, as a group, broader and more liberal than the federal Bill of Rights" (KINCAID, 1988:018).

**325** See FINE (1973:296).

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protection, alcoholic beverage control and so on; these "new rights" can be seen as an evidence of the concern on quality of life which is properly expected of a modern constitution<sup>326</sup>, or simply as banalities which do not deserve to be in a constitution, and, therefore, which make the document in which they are embodied hardly deserve to be called a constitution<sup>327</sup>.

Further, although the "amendomania" may be seen as a sign of a strong federalism or a strong constitutionalism<sup>328</sup>, it is difficult to stand against the argument that this constitutional flexibility contrasts with the idea of a Constitution in which only a few and untemporary principles should be embodied, precisely the idea that Americans like to apply to the federal Constitution. According to its radical critics, state constitutionalism, to be really so, should only embody the "fundamental values" of the society of each state, in the same way as the federal Constitution embodies the "fundamental values" of the Union. State constitutions, however, clearly cannot claim to reflect, in the present time America, the "fundamental values" of the society in the way the Federal Constitution does<sup>329</sup>. Moreover, they cannot even claim to reflect the fundamental values of a specific state: first, because it is doubtful that a particular

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**326** In this sense, KINCAID (1988:016-17). The embodiment in states constitutions of these and other related issues, leaving the classical protection of civil and political rights for the federal Constitution, can also be observed in other federal systems. See DUCHACEK, I. D. (1988) "State Constitutional Law in comparative perspective" in *State Constitutions in the Federal System.. cit*, pages 128-139 at 131, who mentions the case of issues included in cantonal constitutions in Switzerland.

**327** The word "banalities" is used in GARDNER (1992), who takes the example of the maximum permitted length of skies in the Constitution of the state of New York. According to him, these kind of constitutional provisions reflect "merely political compromises": "(..) a constitution is not supposed to be the outcome of pluralistic political bargaining on matters of everyday concern (..) [rather,] it is viewed as the outcome of a process of deliberation meant to identify matter of fundamental importance to the people and to place those matters in a constitution specifically to protect them from the quotidian predations of pluralistic power struggles" (GARDNER, 1992:821).

**328** According to DUCHACEK (1988:130), "The high number of redrafted or amendment constitutions indicates a healthy assertion of state responsibility for responding to new challenges and opportunities. In this sense, constitutional change represents a good measure of the vitality of the American federal political culture".

**329** "The central premise of state constitutionalism is that a state constitutions reflects the fundamental values, and ultimately the character, of the people of the state that adopted it. This premise, however, cannot serve as the foundation for a workable state constitutional discourse because it is not a good description of actual state constitutions" (GARDNER, 1992:764)

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specific state can have any fundamental value unshared with the rest of the Union; and, second, because, even in that case, the structure of state constitutions would hardly reflect such fundamental values: fundamental values means few and settled values, just the contrary to long and easy amended states constitutions, as they are in the average, as has been just shown.

Nonetheless, the failure of state constitutions to reproduce at a state level the idea of constitutionalism lying in the Federal Constitution would only undermine the importance of state constitutions if their proposed role were precisely this, that is, to play at a state level the role played by the federal constitution at a national level. Although the extent to which this is the desired role for a state constitution is certainly something the new federalism's theorists will have to clarify in the future, it is not adventurous to state that this would be a very difficult goal to achieve. Further, that state constitutions cannot play the same role that the federal one is something little more than obvious for any observer of the United States legal system. This does not imply, however, that state constitutions cannot play *another constitutional role* in the federal system.

The extent to which state constitutions should reflect any fundamental value in order to perform a constitutional function, and the extent to which there can be any value which, despite its fundamental nature, is not shared by the whole nation is, moreover, a problem of minor concern for the purposes of this Chapter. Independently of the answer - if any - that will arise for the American academic debate, state Supreme Courts have as matter of fact increasingly relied on state constitutions to grant a greater protection of some fundamental rights than the level of protection given by the federal Bill. The insights that they can provide for the double-standard problem in Europe does not depend on the idea of constitutionalism lying behind. Further, the question whether different fundamental values are necessarily behind different standards of protection of fundamental rights concerns this work as to Europe, not as to the United States<sup>330</sup>.

**3. Areas Covered by state courts' right-extending decisions.**

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**330** The debate on the existence of values in constitutional adjudication in the United States can be followed in ELY, J. H. (1980) *Democracy and distrust. A Theory of judicial review*, Cambridge, Mass: Harvard University Press

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Reported decisions of state Supreme Courts granting a higher protection of individual rights than that released by the United States Supreme Court include a meaningful number of state courts and various types of concerned rights: California, Hawaii, Pennsylvania, Michigan, South Dakota and Alaska are among the reported state Supreme Courts whose decisions granted along the seventies a greater protection of civil rights grounded solely on the correspondent state constitution<sup>331</sup>. More recently, nearly 400 decisions in which state courts extended state protection under their state constitution beyond the standard of their federal counterpart were reported covering the period 1970-1988<sup>332</sup>. These decisions covered several civil rights areas, namely, criminal law, freedom of speech, privacy, the application of the equal protection clause, and the extension by state courts of the conditions for a "state action" under which a violation of a fundamental right can be claimed.

There are several reasons which make it the defendant's rights under criminal law a distinctive area in which state constitutions may grant a higher protection than the federal one: first, each state of the union has its own criminal substantive and procedural law and a great number of criminal charges are taken before state courts; moreover, unlike other civil rights litigation, in which the defendant may choose a federal forum, criminal law actions under state law must be heard before state courts: since civil rights arguments must be presented in the court where the prosecution is taking place, they therefore are more likely to be expanded on state grounds<sup>333</sup>. Accordingly, the rights of the defendant have been the usual area in which state courts have settled a higher standard of protection: the right to counsel, the legitimacy of police searches, the right to be tried by a jury, etc, are among the reported decisions as to this respect<sup>334</sup>.

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**331** According to the survey in COLLINS, e.a (1986), state courts' right-extending decisions are more usual in Northeast and West states, states with a moralistic political culture and courts whose members are appointed by the governor or the legislature, rather than in those appointed by popular election.

**332** See KINCAID (1988:22).

**333** Accordingly, criminal law area "is the one in which the states should be expected to make the largest contribution". Thus, "where the pressure for expansion of civil rights tends to be borne by the federal courts, the pressure for expansion of criminal rights remains to a large extent focussed on state courts" (FINE, 1973:303).

**334** See a list of decisions concerning these issues in BRENNAN (1977)

**(2) FEDERAL AND STATE STANDARDS ON FUNDAMENTAL RIGHTS.  
3. AREAS COVERED BY STATE COURTS' RIGHT-EXTENDING DECISIONS.**

Moreover, criminal law is the area in which a feed-back process between a state court and the Supreme Court has succeeded the most: the Supreme Court has been prepared to rule that a state law grounded standard of one right has become incorporated in the Federal Bill as a national minimum once several state courts had reached this standard under the state constitution<sup>335</sup>.

The extension of this trend to areas, other than criminal law, in which civil liberties were also involved, was therefore seen as a further step in the new federalist *revolution*. A significant year as to this respect seems to be 1985, in which, although the great majority of the reported state right-extending decisions were still on criminal law issues, a significant tendency to extend such protection outside the defendant rights area was noted. This trend concerned mainly the equal protection clause, privacy and freedom of speech<sup>336</sup>.

Another interesting state law development as to this respect, although it does not regard one substantive right, deserves however to be expressly mentioned: it concerns the *state action* doctrine. As is well known, one of the requirements that the United States Supreme Court have established in order to rule that a violation of a federal constitutional right has been prepetated is that the action allegedly violating the right must be attributed to the state, here understood not as the opposite to the federal government, but, in general, as any public authority or public official acting in its official capacity.

The requirement of a *state action* in a civil rights violation claim is, moreover, a direct consequence of the distribution of power in United States Constitution: since the Federal government is a government of *few and defined* powers, it is not empowered to restrict individual action which otherwise would be understood as a violation of a civil right embodied in the Constitution. The respect for federal constitutional civil rights is therefore binding only on the federal government (before incorporation) and on the

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335 The rights to legal assistance and counsel, which must be economically afforded by the state, can be quoted as examples of this *dialectical development*: such rights are "exactly the kind of question that the Supreme Court cannot decide in a vacuum. The state courts must break the ground and provide the Supreme Court with a foundation on which it can decide when and how to extend the right nationwide" (FINE, 1973:305).

336 See COLLINS-GALLIE (1986:137-39).

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states (after incorporation), but not directly on individuals. On the other hand, the nature of state power is different: unlike the federal government, the Constitution conceive states as entities of *retained* powers, what means, as to this concern, that the Bill of Rights included in a state constitution is more likely to be interpreted as binding on individuals directly. In this respect, state courts can act closer to common law courts than the federal ones<sup>337</sup>. A broad conception of the state action doctrine has already been applied by state courts in order to grant a higher protection of the right to freedom of speech than the federal standard of the *public forum* doctrine<sup>338</sup>.

Only a minority criticizes today the point of departure of state courts decisions in which a higher standard of protection of a civil right is grounded on the state Bill of Rights, whilst the federal standard is applied only as the minimum floor of protection. The contemporary debate has turn, at least in part, to discuss the manner in which state courts reach right-extending decisions, since the right they have to rely on the state Bill of Rights seem to be peacefully admitted<sup>339</sup>. As to this respect, different models of states courts reasoning have been proposed, studied and criticized. The following section of this Chapter will introduce them by studying some leading cases of the most activist, right-extending, state court: the Supreme Court of California.

**(3) A ROLE FOR STATE CONSTITUTIONS IN THE PROTECTION OF FEDERALLY GUARANTEED RIGHTS.**

**1. California Supreme Court decisions.**

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<sup>337</sup> As least, this makes states not feel themselves bound by the state action doctrine as far as the federal government is. State courts can interpret the state action clause in a broader way, see FINE (1973:307-08). More directly, it has been stated also that "State courts (...) not restricted by the federal state action rule in construing state constitutions, and thus can protect their political processes from this private interference" [(1980) "The Supreme Court 1979 term" in *Harvard Law Review* 94 at 173]. On *state action* in general, see TRIBE, L.H. (1988) *American Constitutional Law*, Mineola, N.Y., pages 350-53 and GUNTHER, G. (1991) *Constitutional Law*, Westbury, N.Y.: The Foundation Press, pages 883-926.

<sup>338</sup> See the Californian *Pruneyard* case, *infra*, and a somewhat prophetic comment on the issue before the case was decided in FINE (1973:300).

<sup>339</sup> See JOHANSEN (1977:297). Of course, there is still who thinks that the problems of the manner in which state constitutions are applied area unavoidable direct consequences of the failure of the idea of state constitutionalism itself, see GARDNER (1992).

**(3) A ROLE FOR STATE CONSTITUTIONS.  
1. CALIFORNIA SUPREME COURT DECISIONS.**

The California Supreme Court has possibly been the state Supreme Court which most has extended protection on civil rights on the solely ground of the state Constitution, well over other state courts also embarked in the *new federalism* movement<sup>340</sup>. The California Supreme Court has, however, decided state constitutional cases in various and different ways, some of them deserving more criticism than others: its early cases of the seventies or even of the sixties, for instance, were labelled as typical *reactive* cases in which the court failed to expressly state which state law ground had been applied, its ruling being seen as a pure dissent with a United States Supreme Court's already decided case on a *federal issue*<sup>341</sup>; there has also been cases in which the Court, although initially found an independent state ground backing its decision, decided later to follow a narrower federal standard<sup>342</sup>; and cases in which, on the other hand, the court affirmed on remand and independent state law construction, either

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<sup>340</sup> The behavior of the California Supreme Court, had been stated, "has not been widely emulated by its counterparts in other states (..) California's commitment to the continuing development of a significant body of state constitutional law is uncommon."

FALK, J. B. (1973) "The State Constitution: A More Than "Adequate" Nonfederal Ground" in *California Law Review* 61 pages 271-86 at 280). In addition to the cases discussed *infra*, leading cases of the Californian Supreme Court in which the California Constitution has been interpreted in this way concern the double jeopardy clause [in *Cardenas v Superior Court* 56 Cal 2d 273], the *reformatio in peius* clause [in *People v. Henderson* 60 Cal 2d 482], the right to counsel [in *In re Johnson* 62 Cal 2d 325] and other fundamental federally protected rights. See FALK (1973:279-80).

<sup>341</sup> In *Department of Mental Hygiene v Kirchner* [62 Cal 2d 586 (1965)], the California Supreme Court invalidated a state law requiring relatives of mentally ill patients to contribute to the patients' support in state mental institutions relying in the equal protection clause, but the Court failed to state which equal protection clause, state or federal, had applied; Still in the early seventies, in *Rios v Cozens* [9 Cal 3d 454 (1973)], the Court invalidated state law allowing to revoke insured motorist's drive license under certain circumstances without a hearing, relying on the due process clause; on remand by the United States Supreme Court, the California Supreme Court simply stated that the California Constitution furnished an independent ground to decide the case, without more explanations. Both cases are cited and criticized by JOHANSEN (1977:304-05).

<sup>342</sup> This was the case in the *Diamond II* case [Diamond v Bland 11 Cal 3d 335 (1974)]; four years earlier, the Court had decided *Diamond I* in favor of an antiwar group seeking to collect signatures and distribute leaflets at a shopping center. In a separate case in 1972, the United States Supreme Court held that the owner of a shopping center was not required to permit such leafleting on his property [in the *Lloyd*, case, see *infra*]. Since *Diamond I* had been based only on the California Court's construction of the Federal Constitution, on rehearing, the Court declared that the federal decision controlled and reversed its previous decision. The case is reported in JOHANSEN (1977:310-11). *Diamond II*, was, however, later overruled in the *Pruneyard* case, see *infra*.

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breaching a Supreme Court<sup>343</sup> or even its own precedent<sup>344</sup>. Two leading right-extending cases of the California Supreme Court, the *Anderson* case and the *Pruneyard* case will be now discussed.

The *Anderson* case<sup>345</sup>, in which the Supreme Court of California ruled that the capital punishment was unconstitutional under the California Constitution, originated in legal circles and also in the public opinion at large a polemic on the application of state constitutions diverging from the federal one. The case involved a highly politically debated issue, which in fact crucially affected more than one hundred persons which at that time were sentenced to dead in California and waiting for execution<sup>346</sup>. In addition, the case included several features which made it very likely to reach the attention of the public controversy. The most remarkable circumstances of this case were a slightly different wording between the Federal and the Californian applicable Constitutional provisions, which had to be carefully studied by the Court; the existence of a long line of cases previously decided by the California Supreme Court itself upholding as constitutional in California the capital punishment, which had to be overruled; a pending case on the same issue before the Supreme Court of the United States which, following a federal deference approach, would have advice the Californian court to wait for the federal ruling before deciding the case; and a final political outcome by which a popular initiative expressly amended the California Constitution after the case was decided, in

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**343** In *People v Brisendine* [13 Cal 3d 528 (1975)], the Court decided not to follow a narrower federal precedent: in the earlier decided *Simon* case [7 Cal 3d 186 (1972)], the California Court had construed police searching standards following the Supreme Court existing case law [*Terry* case, 392 US 1 (1968)]. Later, the Supreme Court retreated from its previous standard to a narrower construction in *Robinson* [414 US 218 (1973)], and *Terry* was overruled. When the same issue came now before the California Court, the fact that *Simon* was grounded not in the state but in the federal constitution, coupled with the pronouncements that state and federal provisions on the issue were substantially the same, implied that the California court would follow now the *Robinson* narrower standard. However, it affirmed independent interpretation of the state constitution and interpreted the state provision as had been previously construed in *Simon*. On this case, see JOHANSEN (1977:311-14).

**344** In the *People v Disbrow* case [16 Cal 3d 101 (1976)], concerning the *Miranda* warnings, the California Court faced the embarrassing position of having to explain disagreement with the United States Supreme Court and with its own precedent in order to hold a ruling more protective than the federal standard. See JOHANSEN (1977:314-16).

**345** *People v Anderson*, 6 Cal 3d 628 (1972)

**346** The California Court declared its judgment fully retroactive.

**(3) A ROLE FOR STATE CONSTITUTIONS.  
1. CALIFORNIA SUPREME COURT DECISIONS.**

order to assure that the death punishment would be subsequently applied in that State. It is not surprising, therefore, that the *Anderson* case was contemplated as one of the leading cases in the *new* federalism movement in the early seventies.

The facts of the case were as follows: the appellant, Robert P. Anderson, had been previously sentenced to death by a jury, and the sentence had been confirmed by another jury after retrial<sup>347</sup>. A motion for a new trial was denied, and then the case came in an automatic appeal under the relevant provision of the California Penal Code before the Supreme Court of California. The defendant's claim was typically grounded on a parallel reading of the federal and the state provisions concerning the capital punishment, which was claimed to be unconstitutional under the federal and the state constitutions<sup>348</sup>. The Court, however, analyzed first the question under the California Constitution reaching the conclusion that the death penalty was unconstitutional. This allowed the Court, once the case had been decided on state grounds, to leave the federal constitutional issue unaddressed<sup>349</sup>.

The point of departure of the court's reasoning was the different wording of the provisions of the Federal and the Californian Constitution governing the capital punishment. On the one hand, the Eight Amendment to the United States Constitution

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**347** Anderson had been found guilty of first degree murder, the attempted murder of three men and first degree robbery. The penalty at death had been fixed for the murder charge. The judgment was affirmed [*People v. Anderson* (1966) 64 Cal 2d 633], but the remittitur was recalled and the judgment was reversed insofar as it related to the death penalty under the compulsion of the federal rule in *Witherspoon v. Illinois* [391 US 510 (1968)]. In *in re Anderson* 69 Cal 2d 613 (1968), a second trial was had on the issue of the penalty for the murder, and the jury again imposed the death penalty.

**348** The full contentions of the defendant were that an error had been committed in selecting the jury, that certain evidence had been improperly admitted, that the prosecutor was guilty of prejudicial misconduct, and that the death penalty constituted both a cruel and an unusual punishment and, as such, contravened the Eighth Amendment to the United States Constitution and Article I, section 6, of the Constitution of California. (*Anderson case cit.*, 6 Cal 3d 633)

**349** "Because we have determined that the California Constitution does not permit the continued application of capital punishment, we need not consider whether capital punishment may also be proscribed by the Eighth Amendment to the United States Constitution". (*Anderson case, cit.*, 6 Cal 3d 633-34) [footnotes and references omitted]

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prohibited "cruel *and* unusual punishments"<sup>350</sup>; on the other hand, Article I, section 6 of the California Constitution prohibited the infringement of "cruel *or* unusual punishments"<sup>351</sup>. If the choice of the word "or" in the Californian provision, instead of the federally applicable "and", was to be deemed purposeful, the logical consequence was that certain punishments could be held unconstitutional in California if they were either cruel or unusual, while the federal prohibition was only applicable to those punishments which were both. This was the approach followed by the Court<sup>352</sup>.

The first step was therefore to analyze to which extent the meaning of the word "or" in Article I, section 6 of the California Constitution could be understood in this fashion, and in order to do this the Court first engaged in a careful and exhaustive analysis<sup>353</sup> of the history of that provision as it was passed in the California Constitutional Convention of 1849 and the following constitutional revisions of 1879 and 1966. The conclusion reached rejected the idea that this Article was to be read in the light of the federal Eight Amendment, and, further, remarked the fact that the framers of the California Constitution were perfectly aware of the way in which this provision would diverge from its federal counterpart if the disjunctive "or", rather than the copulative "and", was to be included therein<sup>354</sup>. The conclusion of the Court was,

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**350** The Eight Amendment to the United States Constitution reads as follows: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted".

**351** Article I, section 6 of the California Constitution read as follows: "(.) Excessive bail shall not be required, nor excessive fines imposed; nor shall cruel or unusual punishments be inflicted (.)".

**352** The Court held that "Article I, section 6, of the California Constitution, unlike the Eighth Amendment to the United States Constitution, prohibits the infliction of cruel or unusual punishments. Thus, the California Constitution prohibits imposition of the death penalty if, judged by contemporary standards, it is either cruel or has become an unusual punishment. (*Anderson case, cit.*, 6 Cal 3d 634) [footnotes and references omitted]

**353** A review of the analysis of the Court can be seen in JOHANSEN (1977:306-09).

**354** "Some commentators have suggested that the reach of the Eighth Amendment and that of Article I, section 6, are coextensive, and that the use of the disjunctive form in the latter is insignificant. Our review of the history of the California provision persuades us, however, that the delegates to the Constitutional Convention of 1849, who first adopted the section which was later incorporated into the Constitution of 1879, were aware of the significance of the disjunctive form and that its use was purposeful". The Court further noted that "the delegates modified the California provision before adoption to substitute the disjunctive "or" for the conjunctive "and" in order to establish their intent that both cruel punishments and unusual punishments be outlawed in this state" (*ANDERSON CASE, CIT.*, 6 CAL 3D 634, 636) [footnotes and references omitted].

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therefore, that a broader prohibition than the one provided in the federal constitution had been conscientiously embodied in the Constitution of California<sup>355</sup>.

Before addressing the point whether the capital punishment was either cruel or unusual under the California Constitution, however, the Court had to answer in the negative two preliminary questions: first, whether it was enough for the purposes of the judgment to notice that the death penalty was not considered either cruel or unusual at the time in which the Constitution was enacted or amended; the negative answer to this problem was also the key to construct *others* provisions of the California Constitution in which the death penalty was mentioned and which otherwise would have straightly implied that it was allowed by the Constitution<sup>356</sup>. The second question was whether, once the Constitution had forbidden cruel or unusual punishments, it was for the state legislature to establish in a statute which punishments were covered under its scope: here the Court opposed to deference the issue to the state legislature, and strongly vindicated that it was exclusively for the Court to judicially adjudicate the meaning of any constitutional provision, Article I section 6 included<sup>357</sup>.

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**355** The Court also found the reasons why this broader prohibition had been embodied in the Constitution: according to the Court, the social situation in 1849 in California advice the Californian framers to outlaw unusual punishments which, although unduly not cruel according to that time standards, were applied in certain territories: "The absence of any effective government at the time of the discovery of gold and consequent proliferation of mining camps, had resulted in the administration of justice, such as it was, in the camps by vigilante committees (...) Lacking means other than direct administration of physical punishment by which to enforce their judgments, the miners developed a variety of punishments which can only be described as "unusual" even in that day. (*Anderson case, cit., 6 Cal 3d 637*) [footnotes and references omitted].

**356** "rules of construction require that wherever possible we construe constitutional provisions in such a way as to reconcile potential conflict among provisions and give effect to each (...) It has been suggested that we are therefore restrained from considering whether capital punishment is proscribed by Article I, section 6, since the death penalty is expressly or impliedly recognized in several other provisions of the California Constitution. We perceive no possible conflict or repugnance between those provisions and the cruel or unusual punishment clause of Article I, section 6, however, for none of the incidental references to the death penalty purport to give its existence constitutional stature. They do no more than recognize its existence at the time of their adoption (*Anderson case, cit., 6 Cal 3d 637-38*) [footnotes and references omitted].

**357** "Our duty to confront and resolve constitutional questions, regardless of their difficulty or magnitude, is at the very core of our judicial responsibility (...) we would abdicate our responsibility to examine independently the question were our inquiry to begin and end with the fact that statutory provisions authorizing imposition of the death penalty have been recently enacted or continue to exist". (*Anderson case, cit., 6 Cal 3d 640-41*)[footnotes and references omitted]

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The only remaining obstacle for the application of the cruel or unusual rule in the way it had been construed by the Court was the Court's existing previous decisions in which the death penalty had been held not unconstitutional under the California Constitution; this obstacle was skipped by stating that those decisions had not considered the issue under the above mentioned construction but, rather, they had approached the relevant California constitutional provisions paralleling the Eighth Amendment federal guarantee<sup>358</sup>. In this way, the case was ready for the application of the cruel or unusual rule.

The conclusion that capital punishment falls under the scope of Article I section 6 of the Californian Constitution was reached by a three step reasoning: first, the Court made it clear that the question was to be answered according to contemporary standards of decency<sup>359</sup>. Second, capital punishment was held to be cruel according to contemporary world-wide trends in criminal and constitutional law<sup>360</sup>. Having reached the conclusion that the death penalty was cruel, the court could (and should) have refrained from any other argument, since cruelty was enough, according to its own prior construction, to decide the case. Interesting enough, however, the Court went further,

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**358** *Anderson case, cit.*, 6 Cal 3d 641, 645

**359** "When justifications offered in support of continuance of the death penalty were more recently challenged, we continued to uphold it on the ground that it had long been practiced and its application upheld, without, however, independently reexamining the question of the cruelty of the punishment in the reality of present day conditions (..) We are mindful, too, that article I, section 6, like the Eighth Amendment, is not a static document. Judgments of the nineteenth century as to what constitutes cruelty cannot bind us in considering this question any more than eighteenth century concepts limit application of the Eighth Amendment" (*Anderson case, cit.*, 6 Cal 3d 641,647) [footnotes and references omitted]

**360** "Well over a century has now passed since the day when vigilante justice and public hangings made executions an accepted practice of California life. We cannot today assume, as it was assumed in early opinions of this court, that capital punishment is not so cruel as to offend contemporary standards of decency (..) [we] have concluded that capital punishment is "cruel" as that term is understood in its constitutional sense". The Court held that the cruelty of the death penalty, in the constitutional sense, derived not only from the execution itself, but also from "the dehumanizing effects of the lengthy imprisonment prior to execution (..) The brutalizing psychological effects of impending execution are a relevant consideration in our assessment of the cruelty of capital punishment" (*Anderson case, cit.*, 6 Cal 3d 645, 649).

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in a third step, to conclude that the death penalty was *also* unusual<sup>361</sup>.

The Court's decision, at the end, was to hold capital punishment unconstitutional under the Constitution of California because it was both cruel *and* unusual<sup>362</sup>. Why did the Court furthered to address the issue of the unusual character of the death penalty after a careful and long construction of the relevant Californian provision which allowed it to decide only on the ground of its cruelty? A suggestive answer is that the Californian Court in fact tried to establish a nation-wide standard, either encouraging other state courts to overrule death penalty punishment under state constitutions with the same wording than the Eight Amendment or trying to influence the decision on the matter still pending before the United States Supreme Court<sup>363 364</sup>.

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361 "Although death penalty statutes do remain on the books of many jurisdictions, and public opinion polls show opinion to be divided as to capital punishment as an abstract proposition, the infrequency of its actual application suggests that among those persons called upon to actually impose or carry out the death penalty it is being repudiated with ever increasing frequency". The Court went on to conclude, after a world-wide review, that the death penalty "it is now, literally, an unusual punishment among civilized nations" (*Anderson case, cit.*, 6 Cal 3d 648, 656) [footnotes and references omitted]

362 The judgment was decided by an unanimous court except judge McComb, who dissented arguing that capital punishment was constitutional under the California Constitution and that, as far as the federal issue was concerned, the Californian Court should have waited for the pending Supreme Court' decision on the same question. (See *Anderson case, cit.*, 6 Cal 3d 658)

363 According to JOHANSEN (1977:308), the finding that capital punishment was also unusual was "unnecessary under the court's reading of the California Constitution, but essential in persuading other courts to consider overturning the death penalty under the eight amendment of the Federal Constitution". The same can be said of the Californian *Brisendine* case [13 Cal 3d 528, *cit.*], in which the Court relied on state law provision identical than the federal one instead of in other applicable state law provision unique to California Constitution, (i.e. privacy). JOHANSEN (1977:313) also suggests that this was done in order to intent a nationwide effect of its decision.

364 The subsequent political outcome of the case deserves also be mentioned: the case was appealed for *certiorari* before the United States Supreme Court, which denied [406 US 958 (1972)]. Already in the arguments of the Californian Attorney general before the Supreme Court, political reasons were strongly posed against the Californian Court's decision [see FALK (1973:274-78)] and soon a warm political debate involving capital punishment and state constitutional interpretation flowed all along the State. Judge Wright, the author of the opinion in the Supreme Court of California judgement, publicly defended the appropriateness of the judgment in the following terms: "Just as the Court has struck down legislation which unconstitutionally penalized people for their political beliefs, race, national origin, and sex, so the court struck down legislation which unconstitutionally discriminated on the basis of wealth. It was in this tradition that we heard Robert Anderson's automatic appeal from a judgment sentencing him to die in the gas chamber". He went on to appeal: "You may, if you wish, disagree with us on the merits, but you

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Seven years later, the Supreme Court of California decided another leading right-extending case under the state Constitution, the *Pruneyard* case<sup>365</sup>. The facts were as follows: a group of high school students peacefully tried to solicit support for their opposition to a United Nations resolution on sionism by setting up a table in a corner of the central courtyard of a private-owned shopping center. The Pruneyard shopping center was a large commercial complex, open to the public at large, containing over seventy-five commercial establishments. The policy of the shopping center was not to permit any publicly expressive activity, including circulation of petitions. Therefore, short after the students began their petition, a security guard told them they had to move from there and suggested they could continue their activity in the sidewalk outside Pruneyard property. The students left the place and sued the shopping center alleging a breach of fundamental rights under the California Constitution and under the first amendment to the Constitution of the United States. After being decided by the Superior Court of Santa Clara County, which held that the students were not entitled to exercise their asserted rights on the shopping center property, and by the California Court of Appeals, which affirmed, the case reached the Supreme Court of California.

This court then reversed, construing provisions of the California Constitution delineating the right to free expression and the right to petition the government for redress of grievances as entitling the appellants to conduct their activity on shopping center property. The construction of the relevant provisions of the California

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should not challenge our right and our duty to make determinations on the constitutional problem with which we were confronted" [WRIGHT, D. R. (1972) "The role of the judiciary: from Marbury to Anderson" in *California Law Review* 60 pages 1262-74 at 1271, 1274). Finally, a new amendment was introduced by referendum in the Constitution of California overruling the Court's decision and assuring the constitutionality of capital punishment. According to the amendment, "All statutes of this state in effect on February, 17, 1972, requiring, authorizing, imposing or relating to the death penalty are in full force and effect, subject to legislative amendment or repeal by statute, initiative or referendum. The death penalty provided under those statutes shall not be deemed to be, or to constitute, the infliction of cruel or unusual punishment under the meaning of Article I, section 6, nor shall such punishment for such offenses be deemed to contravene any other provision of this constitution" [as quoted by JOHANSEN (1977:309)].

365 *Pruneyard Shopping Center v Robins*, 23 Cal 3rd 999 (1979)

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Constitution<sup>366</sup> diverged from the *public forum* doctrine as has been developed by the United States Supreme Court. By virtue of the *public forum* doctrine, freedom of speech is allowed to be exercised in several places which are considered to be convenient for dissemination of free expression to the public. The doctrine is grounded on the fact that these places perform a public function which entails individuals to exercise the right to freedom of expression therein. Consequently, any restriction of free speech exercised in this places fits the requirements for a *state action*. The public forum doctrine, indeed, was one of the aspects of freedom of speech which most hardly was imposed by the Supreme Court to the states in the process of incorporation of the first amendment<sup>367</sup>.

The extent to which the *public forum* doctrine could be applied to private property had been decided by the Supreme Court in a series of cases in which the doctrine had been slowly deperated<sup>368</sup>: In the *Marsh* case<sup>369</sup>, the Supreme Court ruled that private property performing essentially public functions were bound by the same limitations that the government as to *public forum* doctrine: the case involved jehova witnesses who distributed religious literature in a company-owned town. Concerning large shopping centers, the *Marsh* rule was first extended to private shopping centers in which the expression was concerned with the use for which private property was intended in the *Logan Valley* case<sup>370</sup>, which involved union workers picketing in the shopping center premises. *Logan Valley*, however, was later narrower understood as not covering unrelated speech in the *Lloyd* case<sup>371</sup> which involved anti-war activists circulating

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**366** Article I section 2 and section 3 were of the California Constitution were applied. Article I section 2 provides that "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press". Article I section 3 provides that "People have the right to (..) petition government for redress of grievances".

**367** According to SHAPIRO (1986:265), the *public forum* doctrine constituted the greatest point of friction between federal courts and local governments during the incorporation process of first amendments rights.

**368** See the evolution of the Supreme Court as to this respect in SYPHER, R. B. (1980) "Comment" to *Pruneyard Shopping Center v. Robins*, in *Hofstra Law Review*, 9 pp. 289-313 at 290-97.

**369** *Marsh v Alabama*, 326 US 501 (1946)

**370** *Food Employees Local 590 v Logan Valley Plaza Inc.* 391 US 308 (1968)

**371** *Lloyd Corp. v. Tanner*, 407 US 551 (1972)

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leaflets, and finally, expressly overruled in the *Hudgens* case<sup>372</sup>, in which picketing in shopping centers was not any longer considered under the *public forum* doctrine. Current Supreme Court case-law when the *Pruneyard* case reached the California Supreme Court implied, therefore, a very narrow construction of the federal *public forum doctrine* in private property premises<sup>373</sup>.

The California Supreme Court, however, decided *Pruneyard* holding that freedom of speech and of petition under the California Constitution covered the exercise of these rights in large commercial centers. The Court ground its decision in the increasing rise of shopping-centers in America, which made their quasi public-nature more evident, and allowed to apply the *public forum* doctrine on state constitutional law grounds<sup>374</sup>.

Nonetheless, before reaching this conclusion, the Supreme Court of California had to deal with the alleged breach of *federal* rights claimed by the shopping center: as far as federal case law was concerned, the court noted that *Lloyd* did not purport to define the nature or scope of federally protected property rights of shopping center owners generally: by extending free speech protection to the appellants on *state* grounds, the Court stressed, the *federally* protected rights of the shopping center owners were not affected<sup>375</sup>. Moreover, the Court also found a federally acknowledged ground to extent state law standard: *Lloyd-Hudgens* line of cases, while denying first amendment protection on shopping center premises, admitted that statutory law may extend such

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**372** *Hudgens v NLRB*, 424 US 507 (1976)

**373** In fact, with *Hudgens*, only company-owned towns the type of *Marsh* were covered by the federal *public forum* rule: "The *Hudgens* Court (...) rejected *Logan's Valley* functional equivalent analysis that a shopping center was the same as a company town. Declaring *Logan Valley* overruled by *Lloyd*, the Court, quoting *Lloyd*, held that free-speech rights could not be upheld at a privately owned shopping center unless the property contained *all* of the attributes of a state-created municipality" (SYPHER, 1980:297).

**374** See SYPHER (1980:300).

**375** "It bears repeated emphasis that we do not have under consideration the property or privacy rights of an individual homeowner or the proprietor of a modest retail establishment. As a result of advertising and the lure of a congenial environment, 25.000 persons are induced to congregate daily to take advantage of the numerous amenities offered by the [Pruneyard shopping center] (...) A handful of additional orderly persons soliciting signatures and distributing handbills in connection therewith, under reasonable regulations adopted by defendant to assure that these activities do no interfere with normal business operations (...) would not markedly dilute defendant's property rights" (*Pruneyard case, cit*, 23 Cal 3d 910, 911).

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protection; Therefore, the same extension could be grounded on state constitutional law.

**2. State Bills of Rights and the Supremacy Clause.**

Different models of application of state Bills of Rights have been described, all of them as proposed solutions to the problem of when and how a state constitutional provision should be applied as giving a more generous protection than the Federal Bill of Rights. Above discussed California case law highlights some points of the discussion: the background idea is to avoid a misuse of state constitutions which would impair essential characteristics of the federal system. Two main shortcomings of the application of a state bill will be discussed in this and the following section.

First, the preservation of the Supremacy Clause of the Constitution in a right-extending state court decision: the standard of protection on a state guaranteed right may on occasion lower the standard of protection of another federally protected right; in this case, however, the supremacy clause will make federal law prevail.

Secondly, the application of a state bill provision may be really covering a state court rule on a *federal* provision: state courts' decisions often have an unprincipled, oriented-result reasoning, in which the real argument seems to be a dissent with a Supreme Court' ruling on the interpretation of the *federal* Bill of Rights, rather than an independent *state* law ground. Frequently, moreover, early right-extending decisions of state courts did not seem even to think it was worth it to expressly argue on which grounds - state or federal - a higher standard of protection was reached<sup>376</sup>. A dissenting rule on a federal standard, nevertheless facilitated by the fact that a similar wording is often present in both state and federal provisions, would be however repugnant to the constitutionally guaranteed role of the Supreme Court as the final interpreter of federal law.

As far as supremacy of federal law is concerned, it must be noted that the *new federalism* does not demand to break the existing agreement on the *incorporation* achievements. The binding effect of the standards of federally protected rights on the

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<sup>376</sup> The argument suggested by FALK (1973:280) that a state Court may think the principle that state constitutions are independent documents too obvious for explanation is not convincing, given the debate on the limits of right-extending state decisions.

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states is a well established fact nobody will deny: any construction of a state constitutional right below the standard provided by the federal Bill of Rights would conflict with the supremacy clause of the Constitution and therefore would not apply. Quite on the contrary, the legal target of the new federalists is to champion only a possible higher protection, on a state ground, to a federally protected right. It may on occasion happen, however, that a higher standard of protection on a specific right may imply a lower standard of protection of another right or another legitimate federal interest balanced against it.

According to the supremacy clause, when such a conflict arise, federal law prevails over state law. Supremacy, however, does not necessarily imply that state law must be interpreted in order to not to conflict with federal law: a conflicting interpretation may be unavoidable given a clearly conflicting provision of a state Constitution. In this case, the federal standard will not be considered as a precedent as to state law. Federal law will simply directly prevail as a consequence of the supremacy clause, although state law will remain on the book<sup>377</sup>.

The *Pruneyard* case illustrates how supremacy may affect state's right-extending decisions: the crucial point when the case was appealed before the United States Supreme Court was that the higher standard of protection of freedom of expression decided by the Supreme Court of California implied lowering some aspects of other federally protected rights, namely the compensation clause on the right to property embodied in the Fifth Amendment and the right to exclude the speech of others allegedly embodied in the right to freedom of speech as guaranteed by the First Amendment. This had been also argued in the California Supreme Court ruling, which disposed of any notion of federal binding property rights before proceeding to construe the California Constitution as guaranteeing the right to gather signatures at shopping centers<sup>378</sup>.

The United States Supreme Court ruled than none of the federally protected rights argued by the appellants had been abridged by the California Court's decision: the property rights of the owners of the shopping center, the Supreme Court held, had not

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<sup>377</sup> See COLLINS-GALLIE (1986:116).

<sup>378</sup> See SYPHER (1980:300).

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been violated, since the state had a legitimate interest in its restriction. Further, federal guarantee on the compensation clause had not been violated either, since the restriction imposed by the state did not fulfill the necessary requirements in order to be considered a taking of property, and therefore, appellants were not entitled to a compensation<sup>379</sup>. Moreover, other alleged federally protected rights were also held by the Court as not violated<sup>380</sup>.

The question remains, however, to which extend a state court decision extending state guaranteed rights beyond the federal standard by lowering the protection of another federally preserved right will necessarily breach the supremacy clause of the Constitution. An interesting proposed way to manage with these possible conflicts

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**379** The binding effect of the just compensation clause of the Fifth Amendment on states was not under discussion; however, appellants failed to demonstrate that the "right to exclude others" from one's property was in this case so essential to the use or economic value of their property that the state-authorized limitation of it amounted a "taking" under the Fifth Amendment compensation clause. According to the Supreme Court, "not every destruction or injury to property by governmental action has been held to be a "taking" in the constitutional sense (..) Rather, the determination whether a state law unlawfully infringes a landowner's property in violation of the Taking Clause requires an examination of whether the restriction on private property forces some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole (..) There is nothing to suggest that preventing appellants from prohibiting this sort of activity will unreasonably impair the value or use of their property as a shopping center (..) The California Supreme Court decision made it clear that the PruneYard center may restrict expressive activity by adopting time, place and manner regulations that will minimize any interference with its commercial functions (..) Appellees were orderly, and they limited their activity to the common areas of the shopping center. In these circumstances, the fact that they have "physically invaded" appellants' property cannot be viewed as determinative" [*Pruneyard Shopping Center v. Robins*, 447 US 74 (1980) [footnotes and references omitted].

**380** This concerned both the alleged violated first amendment right to not to put one's property to disposition of the speech of others and the due process of law clause. On the first point, the Supreme Court held (*Pruneyard case, cit.* 447 US 87) that appellees had not infringed the first Amendment right of the owners not to be forced by the state to use his property as a forum for the speech of others, on the ground that the shopping center was by choice of the owner open to the public and that views expressed by the public were not likely to be identified with those of the owner. See a development of this argument in SYPHER (1980:404-05). Besides, the argument that property was denied without due process of law implied, the Court held, the application of the test that the law should not be "unreasonable, arbitrary or capricious" and that the means selected "have a real and substantive relation to the objective sought to be attained". In the Court's view, "appellants have failed to provide sufficient justification for concluding that this test is not satisfied by the State's asserted interest in promoting more expansive rights of free speech and petition that conferred by the Federal Constitution" (*Pruneyard case, cit.*, 447 US 85) [footnotes and references omitted].

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between state and federal guaranteed rights is to consider the rights embodied in a state Bill of Rights as *federally* protected rights also. This argument is based on the 9Th Amendment to the Federal Constitution<sup>381</sup>.

According to this approach, through the 9Th Amendment those rights guaranteed to individuals by state Bills of Rights are *federalized*, that is, entitled to the same protection than federally protected rights<sup>382</sup>. Clearly, this conception does not *per se* avoid the possibility of conflicts between fundamental rights as guaranteed by a state Constitution and other fundamental rights as guaranteed by the federal Constitution. These conflicts, however, would not be usual conflicts between federal and state law, in which the supremacy clause would automatically apply. Rather, they would be seen as conflicts between *enumerated* and *not enumerated* federal rights<sup>383</sup>.

In order to see how this approach would change the functioning of the Supremacy clause as far as state right-extending decisions are concerned, it must be taken into account that supremacy of federal law is nowadays absolute, that is, federal law prevails over any kind of state law, states constitutions included. In the United States legal system, there is not a place in the hierarchy of law for state constitutions between the federal constitution and federal statutory law; otherwise, the legal system would guarantee that state constitutional law would prevail over federal infra-constitutional legislation. Contrariwise, as is contemporarily understood, the principle of autonomy of

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**381** The ninth Amendment to the Constitution of the United States reads as follows: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people". The argument based on this amendment comes from MASSEY, C. R. (1990) "The anti-federalist ninth amendment and its implications for state constitutional law", *Wisconsin Law Review* pages 1229-66.

**382** This conclusion is reached from the mandate of the 9th Amendment to "not disparage" rights protected thereby with respect to federal protected rights: "if both enumerated and unenumerated rights are entitled to the full panoply of constitutional protection accorded individual liberties, and if the ninth amendment was intended to preserve individual liberties secured by state constitutions, the necessary conclusion is that individual liberties secured by state constitutions against governmental invasion were federalized by the ninth amendment" (MASSEY, 1990:1232).

**383** As his author admits, this approach simply incorporates into the federal Constitution state constitutional rights and secures them against federal invasion in the same way that the Constitution protects other federal constitutional rights; at the same time, however, it would transform possible conflicts as if they were "between two federal constitutional rights, one based in state law and the other in federal law" (MASSEY, 1990:1254).

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states does not protect interpretations of state constitutional law which conflict with any federal piece of law. Therefore, any level of federal law, even an administrative regulation, overrides a state constitution<sup>384</sup>. This implies that state courts decisions extending protection of the civil rights embodied in a state Bill of Rights are allowed only to the extent that they do not situate any other right below the standard provided by Federal law<sup>385</sup>.

Following the 9th Amendment approach, however, this traditional conception of the supremacy clause is changed by introducing a distinction depending upon which kind of federal law conflicts with state constitutional law: on the one hand, if the conflict of rights is between a state constitutional right and federal constitutional law, federal law should prevail<sup>386</sup>: this is also the outcome of the traditional application of the supremacy clause. On the other hand, however, when the conflict is between a "federalized" right through the 9th Amendment and federal Congressional legislation, or any other kind of federal infra-constitutional law, a test should be necessary in order to establish which right should prevail. According to the proposed test, the state-guaranteed standard would prevail, provided that the following three conditions are fulfilled: first, the state-guaranteed constitutional right must be of a fundamental character; secondly, it should not *significantly* impair other existing fundamental rights<sup>387</sup>; thirdly, the state

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**384** As far as state right-extending decisions are concerned, this point has been put forward in (1982) "Developments in the law: The interpretation of State Constitutional Rights" in *Harvard Law Review* 95 pages 1324-1502 at 1333.

**385** As far as supremacy is concerned, this is certainly the only limit: "Although a state court cannot expand a state provision to the point where it conflicts with a countervailing federal right, short of such collision the states have the power to enlarge individual liberties as much as they deem appropriate" (FINE, 1973:285); but see *infra* the discussion on the *not equivalent* state decisions, in which, however, supremacy is not involved.

**386** When the conflict is between state and federal constitutional law, "if one right must yield, the supremacy clause appears to dictate that the rights with its substantive source in federal law should prevail" (MASSEY, 1990:1255).

**387** The problem is obviously to which extend an infringement of federal law would be deemed no to be "significant". The only provided guide as to this problem states that "Only if the infringement were substantial, should the putative ninth amendment right be denied recognition, since it will be recalled that this test operates only when the source of the right in collision with the ninth amendment right is also located outside of the Federal Constitution. If the source of the right were Congressional legislation, there would be no particular reason to prefer Congress' judgment to that of the states, especially since the ninth amendment can be read to express an original

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guaranteed right should not cover an attempt by a state to capture some benefits for its citizens leaving the cost for out-of-staters<sup>388</sup>.

The recourse to the 9th Amendment to provide a solution to possible conflicts between state courts' right-extending decisions and federal infra-constitutional legislation may be seen as a somewhat weak argument, taking into account the low appreciation that arguments grounded in the 9th Amendment have in American legal circles<sup>389</sup>. Further, its application would change deeply rooted aspects of the legal federalism in the United States<sup>390</sup>. Nonetheless, this approach has at least one advantage: it points out that state right-extending decisions can conflict with federal legislation under circumstances in which the automatic application of the supremacy clause will not furnish an appropriate solution<sup>391</sup>.

Interesting enough, the United States Supreme Court only scrutinized the California decision in *Pruneyard* as far as other federal rights were concerned, but it did not address the question of the federal legitimacy of the Californian court's construction of freedom of speech under the California Constitution. The only mention made by the Court was to recognize the possibility of a state higher standard of protection as a well

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preference for the state decision" (MASSEY, 1990:1263).

**388** Borrowing from the commerce clause jurisprudence, it is suggested to address this issue by a series of inquiries: First, "is the right at issue one that is facially designed to capture benefits for local residents at the expense of outsiders? If so, it must fail". Second, "does the right, though facially neutral, impose a disproportionate share of costs on outsiders and vest a disproportional share of benefits with insiders? This right, too, must fail" (MASSEY, 1990:1264).

**389** "In sophisticated legal circles mentioning the Ninth Amendment is a surefire to get a laugh ('What are you planning to rely on to support that argument, Lester, the Ninth Amendment?')" (ELY, 1980:34). Criticism to Ninth Amendment's arguments, however, derives mainly from the way in which natural law arguments may be grounded on the Amendment's text. See ELY (1980: 34-41 and 48-54)

**390** The extent to which, for instance, a possible hierarchical position of state constitutions below the federal Constitution and above federal statutory law would be strange to the American legal system is put forward by GARDNER (1992:832-36).

**391** On the other hand, it is acknowledged that, at the end, 9th Amendment's rights are *disparaged* when placed in a serious conflict with enumerated rights or important values of federal union. This outcome, is seen as "necessitated by the delicate balance of interests demanded of a truly dual, co-equal partnership in a federal system" and is deemed to be, however, "preferable to the alternative: the total disavowal of enumerated rights" (MASSEY, 1990:1265).

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established fact<sup>392</sup>. This introduces the problem to be discussed in the next section.

**3. Equivalent and Not Equivalent state analysis.**

A second problem concerning grounded on state law, new federalism's postulated, state courts' right-extending decisions, derives from those decisions in which the state law provision applied is substantially or identically worded than a federal law provision protecting the same right. It should be remarked that this situation does not *per se* involve supremacy, since there is not necessarily another federally protected right or interest which preservation is allegedly impaired by a state court. This may be the case, for instance, of the defendant's rights, which are not balanced against another fundamental interest, as *Anderson* illustrates as far as capital punishment is concerned; or of other cases in which a state court has managed to extend a state-guaranteed right without lowering the standard of protection of another federally protected right, as was the case in *Pruneyard*.

State courts' decisions grounded on state provisions resembling federal clauses, however, concerns another well established legal principle: the final voice the Supreme Court of the United States has in the interpretation of the federal Constitution. The problem can be summarized as follows: the interpretation given by a state court to state law is immune to federal review by the United States Supreme Court<sup>393</sup>, provided that federal-guaranteed rights or interests are not affected. Even in this latter case, the Supreme Court will not, properly speaking, review the interpretation given to state law, but, rather, it will directly apply the supremacy clause by virtue of which federal law will

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**392** Responding appellants' argument based on *Logan-Lloyd-Hudgens* line, the Supreme Court held: "Our reasoning in *Lloyd*, however, does not *ex proprio vigore* limit the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution" (PRUNEYARD, 1980:081) The point is rightly stressed by SYPHER (1980:302): "At issue [when *Pruneyard* reached the Supreme Court] was not the property of the California Supreme Court's construction of its own state constitutional provisions, but whether those provisions, as construed, interfered with conflicting federally protected rights". The concurring opinion of Justice Marshall went further to state that "I applaud the court's decision which is a part of a very healthy trend of affording state constitutional provisions a more expansive interpretation than this Court has given to the Federal Constitution" (PRUNEYARD, 1980:91).

**393** Not to lower federal courts, which are empowered to interpret and apply state constitutional law. See COLLINS-GALLIE (1986:30).

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prevail, as have been discussed above<sup>394</sup>. The existence of an *adequate an independent state ground* has been thus peacefully applicable to state courts decisions extending the protection of civil rights on state law grounds: provided that no federally guaranteed interest was affected, the Supreme Court was prepared to admit that the interpretation of provisions in a state Bill of Rights was exclusively for the state Supreme Court, and therefore not subject to federal review<sup>395</sup>. Moreover, independent state law interpretation was even encouraged by the Supreme Court<sup>396</sup>

The raise of the *new federalism*, however, poses the issue of decisions extending the protection of civil rights which, according to its critics, are only dissents on a federal standard: state courts would be in fact extending civil rights protection by virtue of a dissenting interpretation of the federal Bill, a similar provision of the state Bill of Rights being taken only to cover the divergence from the federal standard.

According to the traditional *Adequate an Independent state ground* doctrine, the United States Supreme Court was prepared to review only the federal grounds which might lie behind a right-extending interpretation of a state provision: as far as state law was the alleged ground for a state court's decision, a state court rule would remain

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394 See *supra* this Chapter.

395 "We are utterly without jurisdiction to review such state decisions", Justice Brennan said concerning right-extending, not conflicting with supremacy, state courts' decisions [BRENNAN (1977:501)]. A recent commentator, moreover, stress that the *Adequate and Independent state ground* doctrine has received a tremendous burst of energy in the las decades and points out, illustrating the question to be discussed in the text, that it "permits something close to outright defiance of federal doctrine" (FRIEDMAN, 1988:041). The germen of the *Adequate and Independent state ground* doctrine in the United States Supreme Court can be traced back to the language in a case of 1874, *Murdock v Memphis* [87 US 590], and has been often confirmed [87 US (20 Wall) 590 (1875); 296; US 207 (1935); 324 US 117 (1945); 386 US 58 (1967), etc]. Even in cases in which a state court interpretation has been deeply discussed, this doctrine has not been put under discussion. On the political debate on the *Anderson* case, for instance, it has been said that "The principle that the United States Supreme Court will not review state courts decisions based on adequate non federal grounds is a familiar and fundamental one (..) The controversy over *Anderson* reflected dissatisfaction, not so much with these well-established principles, as with the California Supreme Court's practice, exemplified by *Anderson*, of resting important public law determinations on the California Constitution" (FALK, 1973:275).

396 "Although the move to independent interpretation may be a reaction against the Burger Court, it is a mistake to assume that the Supreme Court disapproves of the trend. Rather, the Court repeteadly has encouraged independent interpretation of state constitutions" (JOHANSEN, 1977:298).

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isolated from federal review, the possibility of which, therefore, was claimed to be merely mechanical<sup>397</sup>.

A new approach to this problem came when the United States Supreme Court decided the *Long* case<sup>398</sup>. The facts of the case were as follows: according to previous Supreme Court case-law, police search without a warrant of an automobile is allowed by the 14th Amendment only as a "protective search", that is, the police may legitimately search in the car of a detained person in order to check whether there is a weapon inside. When David Long was detained in Michigan for driving drunk, this kind of search allowed a police officer to uncover in Long's car a knife, placed close to the driver's seat. The police officer went further and uncovered also a bag of marijuana which was hidden in the baggage compartment of the car. Long was subsequently prosecuted for driving drunk and for possession of narcotics, and when the Michigan Supreme Court heard the case in appeal, it ruled that the unwarranted search of Long's car had been unconstitutional under the Michigan Constitution as far as the discovering of the bag of marijuana was concerned, and that, therefore, Long could not be prosecuted for the possession of Marijuana<sup>399</sup>.

The case was subsequently appealed by the state before the United States Supreme Court on the ground that it was a breach of federal case law on the "protective search" clause included under the 14th Amendment. The Supreme Court noted that the

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<sup>397</sup> "When a state court appends an unelaborated -and hence unentangled - state ground to a decision that rests predominantly on federal constitutional interpretation, the Supreme Court finds review precluded. But if the state court acknowledges the relevance of federal constitutional concerns to the evolution of the state ground, the insulation from federal review evaporates. The result is an autonomy principle focused on the formal independence, not the substantive legitimacy, of asserted state law grounds." [*Developments in the law.. cit.*, at 1340-1] The rather formalistic result of such an approach is put forward in the following way: "the source a state court cites for a right it enforces determines whether or not the Supreme Court has the power to hear the appeal. The state court's effective power over the Supreme Court jurisdiction in these instances is intriguing: it can "overprotect" a defendant, and by simply citing the words as they appear in the state constitution instead of citing the same words in the federal Constitution, disempower the Supreme Court. It can create a separate sphere for itself by saying so. Its word makes its word the last word" [ALTHOUSE, A. (1987) "How to build a separate sphere: federal courts and state power" in *Harvard Law Review* 100 pages 1485-1538 at 1490].

<sup>398</sup> *Michigan v Long*, 463 US 1032 (1983)

<sup>399</sup> *People v Long*, 413 Mich. 461 (1982).

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ruling of the Michigan Supreme Court was grounded on two brief citations of the Michigan Constitution only, and it faced the problem of to which extend such a brief citation of a state Constitution along with the federal 14th Amendment may constitute a legitimate state ground for diverging from a federal ruling on the same issue<sup>400</sup>

The *Long* United States Supreme Court ruled that state independent interpretation was not allowed whenever either the state court decision fairly appeared to rest primarily on federal law, or whenever the adequacy and independence of the state law ground was not clear from the face of the opinion. Under these circumstances, a state court decision was presumed to be grounded on its own understanding of federal law, and therefore subject to the Supreme Court review. In fact, *Long* only requires state courts to clearly state which independent state ground had been applied if they want to remain isolated from federal review, the traditional approach remaining unchanged in any other aspect<sup>401</sup>.

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400 The state court had cited the state constitution and the federal constitution in a footnote, and concluded: "We hold, therefore, that the deputies' search of the vehicle was proscribed by the fourth Amendment to the United States Constitution and Article 1 section 11 of the Michigan Constitution" (Michigan *Long* case, *cit.*, 413 Mich. 473).

401 According to the *Long* rule, state courts are only required "to say explicitly when their decision rest on state grounds if state courts want to insulate their decision from Supreme Court review." (GARDNER, 1992:775). See also ALTHOUSE 1987:1501). Admittedly, the Supreme Court could have tried the other way, that is, to rule that unless a federal right or interest was affected, state decisions were presumed to be validly grounded on state law basis. This was the point stressed in the dissenting opinion of Justice Stevens: the Supreme Court, he held, "should have no interest in what the state has done, even if the state has done it with federal law, unless it has deprived an individual of a federal right" [*Long* case *cit.*, 463 US 1068 (Stevens, J., dissenting)] The main argument of the dissent was that this was the only way to avoid the Supreme Court to give constitutionally unforeseen preliminary rulings to state courts, since the state court could on remand reargue the case on state law grounds. However, Justice Steven's view, taken to its extreme, would equally distort the Supreme Court's jurisdiction, since, following this argument, the Court should not review any appeals brought by the state rather than the defendant, even when the federal ground stands alone. See a discussion on this point in ALTHOUSE (1987:1506-7). The presumption which *Long* established in favor of federal review, moreover, did not escape from the political debate on new federalism issues and was criticized for its alleged conservatism. Remembering the conservative federalists claims of the times of the Warren Court, it has been pointed out that a conservative Supreme Court turned against state-generated diversity, as it was the case in *Long*, "understably tends to stir up the common suspicion that procedural doctrine masks substantive goals" (ALTHOUSE, 1987:1494). On the other hand, this criticism has been qualified as "greatly overblown": "Not only can the *Long* requirement of clarity be satisfied simply by adding a caption or explanatory sentence to a court's opinion, but it requires state courts to do exactly what New Federalism proponents have been urging them to do: think explicitly about the

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With Long, then, the problem of which state grounds are understood as *independent* and *adequate* remains unsolved, the only clear point being that, unless the question is expressly argued by a state court, federal review is possible. Particularly, the question of the extent to which adequate state grounds need to be grounded on sufficiently *independent* state law construction with respect to federal law, remains unanswered. As to his point, state court's right-extending decisions have been classified into two general groups, *pure independent* and *Supreme court's oriented decisions*<sup>402</sup>. In order to avoid charges of "constitution shopping"<sup>403</sup>, several reasons have been quoted as valid grounds on which a state court may legitimately rely to independently interpret a state provision diverging from the federal rule. Namely, the existence of precedents in sister states courts, the interpretation of open-ended federal provisions, or of unique state provisions without a federal counterpart<sup>404</sup>. Further, a different wording between a state and a federal provision seems to be the most appropriate ground for such divergences, as the *Anderson* case partially demonstrates<sup>405</sup>.

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grounds of their decisions, and make those grounds clear in their opinions" (GARDNER, 1992:776).

402 Pure "occurs when the state court, either because local conditions, the distinctive wording of the state constitution or both, arrives at its own construction of the state constitution (..) Supreme Court-oriented or reactive interpretation, on the other hand, occurs when the state court faces a narrow interpretation of a particular provision by the Supreme Court and must decide whether to acquiesce in that interpretation." (JOHANSEN, 1977:305-06). These two models correspond with "the reactive approach, which merely responds to, criticize and amends the relevant federal doctrine, and the self-reliant approach, with constructs an original state doctrine without a reference to federal analysis" (*Developments in the law.. cit*, at 1363).

403 JOHANSEN (1977:321).

404 It has been stated, for instance, that "one of the most natural ways" of diverging from a federal standard would be to allow a state court "to explore a category the Supreme Court has left open-ended and to give it content as the state court thinks best". [MATAKIS, E. and SPECTOR, P.L. (1973) "Litigating state Bill of Rights in state courts" in *Project Report: Towards an activist role.. cit.*, pages 312 ff at 314]. Unique state constitutional law provisions in which state court may rely for an independent ruling cover, among other issues, healthful environment, privacy and equality for women, which do not find a counter provision in the Federal Bill of Rights. On the extent to which state constitutions are likely to embody different issues than the federal one, See *supra* this Chapter..

405 MATAKIS-SPECTOR (1973:315-16) rightly quote an Alaska Supreme Court decision [*Ellison v State* 383 P 2d 716 (Alas.1963)] as a *different wording* case. He, however, wrongly quotes *Anderson*, which only initially was grounded on the different wording between the relevant Californian and Federal provisions. See *supra* this Chapter.

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According to a further classification<sup>406</sup>, *pure independent* decisions belong to a *not equivalent* model with respect to federal law: these cases are decided on completely independent grounds, without taken into account federal case law concerned; their main assumption is either that there is not any federal ruling on the issue or that the existing federal case law is not applicable at any rate. Two kinds of *not equivalent* state decisions are included in this model: different wording grounded cases fit the first type, although these *not equivalent text* cases are not very frequent in practice<sup>407</sup>. The second group is formed by *not equivalent analysis* cases, which do not depend on textual differences as the sole basis for deviations from federal case law, and differ from any other state right-extending decision in one significant sense: their systematic reliance on state law grounds<sup>408</sup>.

The majority of state right-extending decisions, however, are based on an *equivalent* model with respect to the federal Bill: while *not equivalent* decisions develop a pure independent state law argumentation of the case, grounded either in a different worded provision or in a systematic independent approach to a state law provision, *equivalent-type* decisions are based on a deference to the United States Supreme Court. Two *equivalent-type* models can be distinguished: first, the most usual new federalist state court's reasoning, the *equivalent plus* model, in which a state court follows the United States Supreme Court reasoning until the point in which the state court extend a higher standard of protection to the concerned right than the one provided by federal law<sup>409</sup>. Secondly, state court's decisions which completely follow the federal ruling without going further, which constitute the *pure equivalent* reasoning. These latter decisions certainly do not departure from the federal standard; until this point is reached,

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406 See COLLINS-GALLIE (1986)

407 Only five cases were reported under this model in 1985 in the COLLINS-GALIE (1986) survey.

408 See COLLINS-GALIE (1986:125)

409 The bulk of 1985 state right-extending reported decisions are included in this model. It "operates in such a way that state and federal standards, as well as the reasons for those standards, will typically be the same. When explicitly using this model, a court announces its general inclination to align state and federal law protection while reserving for itself the power to interpret state law beyond the federal minimums" (COLLINS-GALIE, 1986:117)

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however, they are identically reasoned than the *equivalent plus* model<sup>410</sup>.

The crucial question is whether an *adequate and independent state ground* exists in *equivalent plus* state courts' decisions, when none of the circumstances which justify a *pure* independent state decision, particularly the linguistic variation, is present. The proposed solutions to this dilemma broadly diverge: some commentators would restrict independent interpretation of state Constitutional rights to cases in which a decision could be justified by reference to the specific language of a state constitution or to any other authority peculiar to a state as those quoted above; otherwise, a *lockstep* analysis should apply<sup>411</sup>. Others, however, seems willing to concede state courts the opportunity for an independent determination whenever federal doctrine seems restrictive, whether or not legal authority peculiar to a state suggests that a state right may have a more expanded scope than its federal twin<sup>412</sup>.

*Supreme Court-oriented case-law, as doubtless equivalent plus decisions (but*

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**410** Although they represent respectively the most usual *new federalist* and *federal deference* kind of decisions, the difference between *pure equivalent* and *equivalent-plus* types is only a matter of degree. An extreme form of the *pure equivalent* model is exemplified by Article 1 section 2 of the Constitution of Florida, which mandate interpret the state search and seizures constitutional clause in the same way that the 4th Amendment to the Federal Constitution, as reported by COLLINS-GALIE (1986:116-17). It should be noted that, in theory at least, an *equivalent minus* model is also possible, although Supremacy will make federal law prevail. These cases merely imply that, as a matter of state constitutional law, state judges need not accept federal standards. Of course, "having once denied a claim based on state law, state judges must accord to a right's claimant any or all rights guaranteed under federal law" (COLLINS-GALIE, 1986:120).

**411** By *lockstep analysis* is meant that state constitutional provisions should be interpreted to provide exactly the same protection as their federal counterparts in case of identical wording. This kind of analysis have been defended against *new federalism* claims: "Commentators have consistently contended that adoption of the lockstep approach is inconsistent with basic principles of state autonomy. This article will challenge that assertion (..) to demonstrate that lockstep analysis is entirely consistent with the basic concept of American federalism" [MALTZ, E. M. (1988) "Lockstep analysis and the concept of federalism" in *State Constitutions in the Federal System.. cit*, pages 98-106 at 99].

**412** One of the most extreme defence: "there is not the slightest improperly when the highest court of a state invalidates state legislation or state administrative action as violative of the state constitution. That remains true even where the state constitutional provision is similar or identical to the Federal Constitution, where the Federal Constitution's meaning is uncertain, or where the state court suspects or knows to certainty that the United States Supreme Court would reject an analogous federal constitutional claim (..) Moreover, state courts ought to regard decisions of the United States Supreme Court interpreting like provisions of the Federal Constitution as binding only to the extent the Court's reasoning is intellectually persuasive" (FALK, 1973:281).

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also *pure equivalent*) are, may deserve the accusation of being an *ad hoc*, reactive jurisprudence, based exclusively on a state court's reaction against a federal rule. However, this is an unavoidable risk once one obvious fact is accepted: that states constitutions would never have again the prominent role they once had in the definition of the standards of protection of civil rights; the national model is certainly seen by the new federalism as no longer applicable, but the goal of the nationalization of protection of civil rights provided by the incorporation process should nevertheless be applauded as a minimum standard background.

The prominent role of the Federal Bill of Rights, and consequently of the United States Supreme Court should not then be under discussion. This makes it unavoidable, however, an *interstitial* approach in state constitutionalism development, by virtue of which state constitutions will be situated under a relational scheme in which federal constitutional law remains as the central point of reference. Therefore, state right-extending decisions will usually be more concerned with the federal ruling on the issue than with an isolated, not influenced, construction of state law. As a result, state constitutional case-law is unavoidably more institutionally-focussed and relationally-based than analytically premise-oriented<sup>413</sup>.

At the present time, only a minority of *new federalism* supporters advocates a primacy model for states bills, according to which they should always be pure independently construed<sup>414</sup>. This will be the only case, however, in which an interstitial, reactive approach, would not apply. The generalized trend, on the contrary, is to concentrate the role of states constitutions in a filling gaps function, by which state constitutions will be approached in a more realistic fashion which, however, will at the

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413 COLLINS-GALIE (1986:116)

414 According to \*GARDNER (1992:774-75), on the contrary, the primacy approach is preferred by "a sizable majority", while the interstitial model would be in the minority. The primacy of states constitution, however, has been also grounded on technical reasons, arguing that the economy of the process and the "case and controversy rule" advice to address the issue first at a state level, and if a solution can be given at that step, the federal question should be unaddressed. According to this approach, "the practice of looking first to the state constitutions as a basis for disposing of a claim of right or privilege accords with our traditions of federalism (..) only if the state constitution does not offer the protection sought it become appropriate to consider the case in federal constitutional terms". This approach would be "consistent with the familiar principle that controversies ought to be resolved at the lowest possible level" (FALK, 1973:286).

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same time encourage their capacity of granting a higher standard of protection than the federal Bill<sup>415</sup>. The prevailing *interstitial* model for state constitutionalism fully acknowledges that the general background of the protection of civil rights is provided by the Federal Bill<sup>416</sup>.

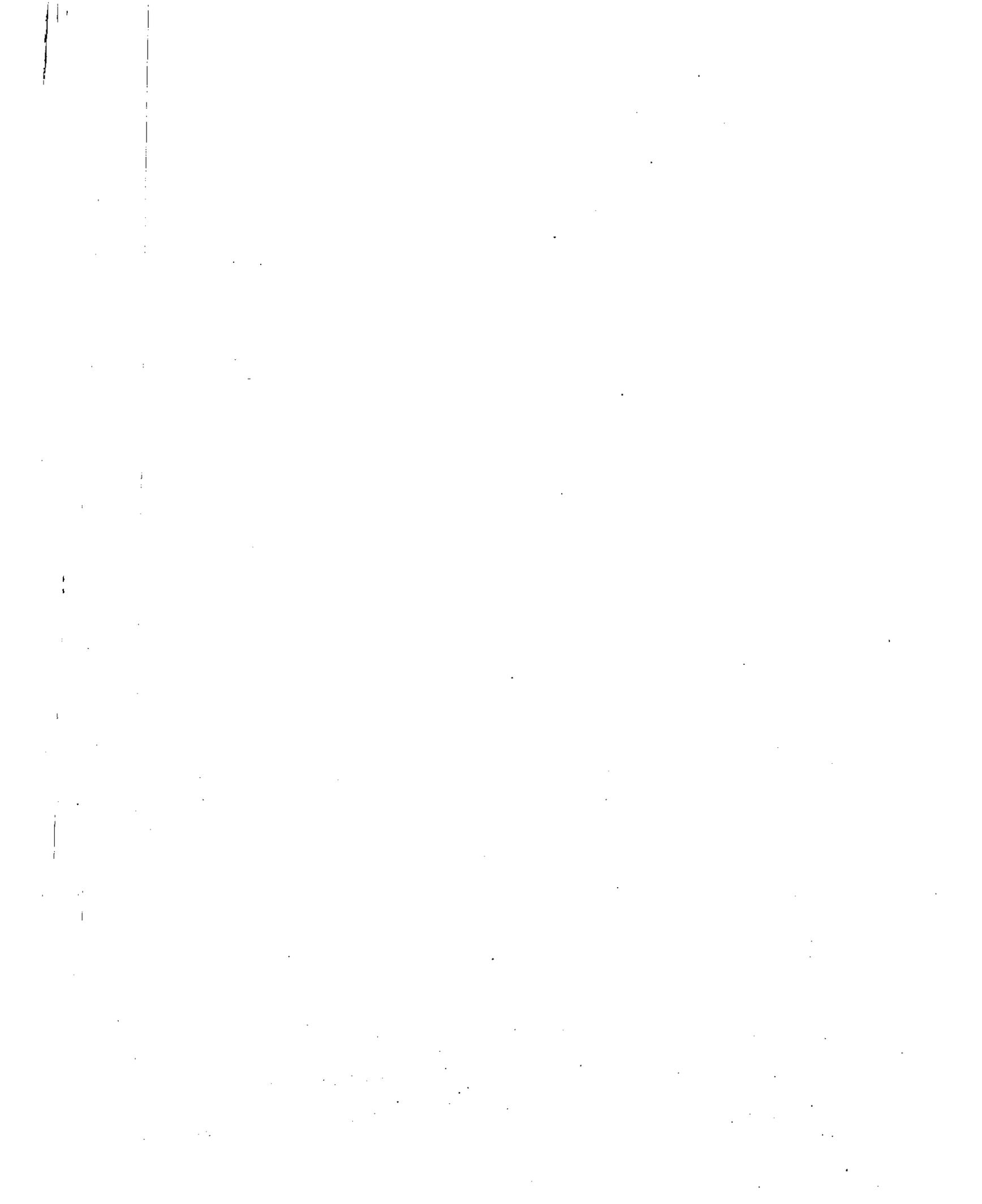
After the review made in this Chapter, it is clear that state constitutionalism which is at the base of *new federalism*, cannot be criticized for being both *reactive* and *primacy*, for one of the two alternatives must be applied. It is also clear that the only applicable is the *interstitial* one. The extent to which a state decision may be *reactive*, moreover, should not concern legal analysis, which should be restricted to reasoning. At the end, provided that an *adequate state ground* exists, it is for the state court to adhere or not to the federal ruling<sup>417</sup>.

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415 Now that the basic federal guarantees are applied, it is argued, "Conservative interpretation of state bills of rights is indeed precisely the thing that will make them worthless. It is only by venturing beyond the established patterns that the states will be able to make a genuine contribution" (FINE, 1973:284).

416 The interstitial model, further, "recognizes federal doctrine as a settled floor of rights and asks whether and how to criticize, amplify, or supplement this doctrine to yield more extensive constitutional protection. The state court's role is not to construct a complete system of fundamental rights from the ground up" (*Developments in the law.. cit.*, at 1357).

417 "State courts judges and also practitioners, do well to scrutinize constitutional decisions by federal courts, for only if they are found to be logically persuasive and well-reasoned, paying due regard to precedent and the policies underlying specific, constitutional guarantees, may they properly claim persuasive weight as guideposts when interpreting counterpart state guarantees.." (BRENNAN, 1977:502)



## CHAPTER IV

### HUMAN RIGHTS PROTECTION IN A SUPRANATIONAL CONTEXT: THE EUROPEAN COMMUNITY.

**(1) INTRODUCTION. (2) HUMAN RIGHTS IN COMMUNITY LAW. 1. The rebellion of domestic courts and the reaction of the European Court; 2. The sources for the protection of human rights in the case-law of the European Court of Justice; 3. The method of construction of the community standard; (3) THE INCORPORATION OF THE ACTION OF THE MEMBER STATES UNDER THE STANDARD OF PROTECTION OF HUMAN RIGHTS OF COMMUNITY LAW. 1. The first incorporation: the application by the European Court of community standards of human rights to state action; 2. Prospects for a second incorporation: the application of community standards of human rights by domestic courts.**

#### **(1) INTRODUCTION.**

Despite of the impression that European community law may at a first glance give, it will in this Chapter be argued that the European community is *not* a satisfactory system for a comparative approach in as far as the research pursued in this work is concerned. As will be shown, several legal and political factors make it very improbable that domestic constitutional courts will construe the domestic standard of protection of a fundamental right embodied in the national constitution on the ground of a community standard as developed by the European Court of Justice, and regardless of domestic sources of constitutional interpretation. Nevertheless, some of the questions concerning the protection of human rights within the community legal order can be helpful to the research, although posed by the literature only in a speculative way.

The problem of the protection of fundamental human rights in a supranational context certainly has been posed in the community system. Indeed, the discussion has mainly addressed the problem of standards, one of its central points being the possible difference between the standards of protection at the community and at the national level. However, the problem has never been seen as coming from the application of European community human rights law by domestic courts as the only or the main source for the definition of the domestic standard, in the way in which this was discussed on the European Convention on Human Rights in Chapters I and II. Moreover, the approach has been quite the opposite: domestic courts have feared that the application of European community law by the *European Court of Justice*, regardless of

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the domestic standards of protection of fundamental rights, would in reality lower the standard or protection of human rights. As is well known, and as will be briefly discussed below, this was the cause of the so-called *rebellion* of the Italian and the German constitutional courts.

The dispute would now seem to be over, or at least to be mitigated. This is certainly due to further developments on human rights protection by the European Court of Justice, but another factor must also be taken into account: the fact that the *incorporation* of domestic law into community standards of human rights is not yet completed. At present, community law and domestic law still remain as separate legal orders as far as human rights are concerned. Thus, in theory, there is not much room for the application of community standards to the domestic action of member states, either by the European Court of Justice or by domestic courts. In practice, however, this last possibility - the application of community standards of protection of fundamental rights by domestic courts to domestic action of member states - cannot be said to be completely closed: not only may further developments on the process of *incorporation* change the situation in the future, but it is also debatable whether the application of community standards to member states action by the European Court of Justice (in this chapter known as *first incorporation*) is a necessary prerequisite for the application to domestic cases of the community standard of protection of human rights by domestic courts (to be called *second incorporation* here).

In addition, there are a number of factors which make the discussion of the human rights issue in community law helpful for the purposes of this research. Firstly, every member state of the Community is a signatory of the Convention<sup>418</sup>. Secondly, some of the legal techniques employed by the European Court of Human Rights in the interpretation of the Convention have also been applied by the European Court of Justice in human rights cases; and thirdly, the Convention has itself sometimes been applied by the European Court to these cases.

It is therefore appropriate at this point to review the extent to which the Community system can provide any useful insight for the proposed topic of research

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**418** Although not all the members of the Council of Europe are members of the Community at the present time.

## (1) INTRODUCTION.

pursued in this thesis.

## (2) HUMAN RIGHTS IN COMMUNITY LAW.

### 1. The rebellion of domestic courts and the reaction of the European Court.

In their special task of protecting fundamental rights, some constitutional courts of the member states of the European community feared that the community legal order would breach some of the rights constitutionally protected by the domestic law of the member states. Accordingly, they expressly announced that they felt themselves competent to review this kind of community action. The history of this is very well known, and only a brief review will be presented in order to clarify how the present situation affects the purposes of this research.

The European Court of Justice rejected reviewing community action in the face of alleged violation of domestic constitutional rights on the ground that community law was a separate legal order from the law of the member states. This was first ruled in the *Storck* case<sup>419</sup> and, one year later, in the *Geitling* case<sup>420</sup>. The argument that community law should, however, comply with domestic fundamental rights still was frequently put before German courts and the European Court seemed finally to be sympathetic to this complaint. The Court then began a new human rights oriented policy, the first decided case of which was *Stauder*<sup>421</sup>. The European Court, having been requested to interpret a provision of community law, interpreted it in such a way that the provision at issue did not violate human rights. The Court then launched a series of cases in which community law was reviewed in the light of human rights<sup>422</sup>.

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419 *Stork vs High Authority*, case 1/58, judgment of the European Court of Justice of 4 February 1959, in *Recueil de la Cour de Justice des Communautés Européennes*, V p.63. The Court held that "it is not competent to apply the municipal law of the Member States" and that "it cannot examine the contention that the High Authority in taking its decision, violated the principles of German Constitutional Law" [in English as quoted by BRINKHORST, L.J. and SCHERMES, H.G. (1977) *Judicial remedies in the European Communities. A Case Book*, Deventer:Kluwer, at 299)].

420 *Geitling Ruhrkohlen-Verkaufsgesellschaft vs High Authority*, case 13/60 judgment of 18 May 1962, in *Common Market Law Reports* [1962] p. 113.

421 *Erich Stauder vs city of Ulm*, case 26/69, preliminary ruling of 12 November 1969, in *Common Market Law Reports* [1970] p. 118

422 In all these early cases, however, the Court ruled that community law had not violated human rights. See *infra*, this Chapter.

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The new human rights oriented policy of the Court seemed, however, not to satisfy domestic courts completely. Moreover, in the middle seventies, the constitutional courts of two member states, the Italian *Corte Costituzionale* and the German *Bundesverfassungsgericht*, stated in several decisions that the "supremacy" of European Community law could not be accepted if, as a result, constitutionally guaranteed fundamental rights were going to be affected<sup>423</sup>. Both domestic decisions had, at that time, one common effect: a strong reaction on the part the Community Institutions<sup>424</sup>,

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<sup>423</sup> In *Frontini vs Ministero delle Finanze*, sentenza della Corte Costituzionale n. 183 of 27 December 1973, in *Common Market Law Reports* [1974] p. 383, the *Corte Costituzionale* held that the limitations of sovereignty allowed by Article 11 of the Italian Constitution "are allowed solely for the purpose of the ends indicated therein, and it should therefore be excluded that such limitations of sovereignty (...) can nevertheless give the organs of the EEC an unacceptable power to violate the fundamental principles of our constitutional order of the inalienable rights of man." (paragraph 21). As well as this, the *Bundesverfassungsgericht* took the same position in the *Solange* case of 29 May 1974, in *Common Market Law Reports* [1974] p. 548. In this case the *Bundesverfassungsgericht* was asked to give a preliminary ruling on the compatibility with the German Constitution on the already decided ruling of the European Court in the *Handelsgesellschaft* case. The *Bundesverfassungsgericht* pointed out that the Community lacked a democratically elected parliament to which community organs could be fully politically responsible, and particularly, it lacked "a codified catalogue of fundamental rights" which could provide legal certainty on protection of human rights in community law. Accordingly, and "as long as [*solange*] this legal certainty, which is not guaranteed merely by decisions of the European Court of Justice, favourably though these have been to fundamental rights, is not achieved in the course of the further integration of the community, the reservation derived from Article 24 of the [German] Constitution applies" (paragraph 23). According to the construction of Article 24 of the *Grundgesetz* in this judgment, the Article limited the possibility of transferring sovereignty to the community to the preservation of essential features of the constitution, among them constitutional fundamental rights.

<sup>424</sup> And, it may be said, the equally unanimous reaction of Community legal scholars. Generally speaking, the domestic decisions were seen as a dangerous '*constitutionalistic*' approach which could seriously jeopardize the supremacy of Community Law and the Community itself. Criticism of the Italian *Frontini* and the German *Solange* cases can be seen, for instance, in CHUECA SANCHO, A. (1989) *Los derechos fundamentales en la Comunidad Europea*, Barcelona: Bosch. A more balanced opinion has acknowledged that "this attitude [from the Italian and the German courts] (...) is contrary to the doctrine of the supremacy of Community law. From the standpoint of the Community such a conclusion is inescapable. But, on the other hand, the attitude of a constitutional court by definition pledged to uphold the constitution is equally understandable." [AMERICAN SOCIETY OF INTERNATIONAL LAW (1978) "The Emerging European Constitution" in *Proceedings of the American Society of International Law*, pp. 170 ff at 180]. A recent review of the problem from a constitutional law perspective can be seen in DIEZ-PICAZO GIMENEZ, L. (1991) "¿Una constitución sin declaración de derechos? Reflexiones constitucionales sobre los derechos fundamentales en la Comunidad Europea", in *Revista Española de Derecho Constitucional*, 32 pp. 135-55, who rightly points out that such an approach is necessary although certainly unusual in the literature.

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among them a new judgment of the Court of Justice, that is, the decision in the *Hauer* case<sup>425</sup>, in which a community law provision which allegedly violated human rights, was strictly scrutinized<sup>426</sup>. Both the German and the Italian Constitutional Courts eventually changed their position in this respect<sup>427</sup>.

Two important points of the process by which the European Court found a legal ground for the protection of human rights in Community law will be now briefly analyzed: *why* the Court moved from its original position, and *how* the Court achieved this; that is, the reasons for this change of policy and how it was grounded on a legal basis in Community Law.

As already stated, the construction of the European Court's own standards of protection, which implicitly overruled previous decisions, started as a new human rights oriented policy arising as a reaction to the Italian and the German constitutional courts' decisions. The reasons for the reaction of the European Court went further, however, than the mere will to respond to the anxiety<sup>428</sup> expressed by the German and the Italian Courts: in addressing the human rights issue, the European Court managed to avoid the risks to which the decisions by the German and Italian courts could have led.

The risk did not consist, however, in an actual review of community law by domestic courts on the grounds that human rights had been touched. Indeed, both the Italian *Frontini* and the German *Solange* decisions contemplated this possibility only as an extreme case, and from the wording of both decisions it can be clearly deduced that only under very extreme circumstances would those courts felt themselves entitled to

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425 *Hauer v Land Rheiland-Pfalz*, case 44/79, preliminary ruling of the European Court of Justice of 13 December 1979 in *Common Market Law Reports* [1980] 3, p. 42

426 see *infra* this Chapter.

427 See the so-called *Solange II* decision of the *Bundesverfassungsgericht* of 22 October 1986, in *Common Market Law Reports* [1987] p. 225.

428 According to CLAPHAM, A. (1991b) *Human Rights and the European Community: a critical overview (European Union - The Human Rights Challenge, vol I)*, Baden-Baden: Nomos Verlags, at 30. it was "a response to anxiety expressed by the Constitutional Courts of Italy and Germany that if the European Court could not review these provisions they would either go unchecked or would have to be reviewable in the various Member States."

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review community law<sup>429</sup>. The real risk came instead from the announcement made by both courts that they had jurisdiction to review compliance of community law with human rights. Even assuming that it was very unlikely that a control would be followed by a declaration of the unconstitutionality of community law, the very fact that a domestic constitutional court declared itself competent to carry out such a review was felt to be unacceptable from the community point of view.

In effect, in the view of the community organs, the attitude of the German and the Italian constitutional courts threatened the authority, the uniform application, and the very concept of supremacy of community law: first, Italian and German ordinary judges would be able to legitimately refer the question of an alleged unconstitutionality of community law (and not only on the ground of human rights) to the domestic Constitutional Court; the reference was in itself a violation of the procedure on preliminary ruling under Article 177 EEC, and would jeopardize the authority of community law<sup>430</sup>. Second, the Italian and German decisions were also a risk for the uniform application of Community law<sup>431</sup>. Thirdly, the very concept of supremacy of community law was at stake.

The European Court of Justice therefore had several good reasons for developing a human rights doctrine. The main obstacle to this consisted, however, in precisely the argument which the Italian and the German courts has used as the fundamental reason

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429 The *Bundesverfassungsgericht* held in the *Solange* case, of 29 May 1974, *cit*, paragraph 24 that "(..) in the hypothetical case of a conflict between Community law and a part of a national constitutional law (..) the guarantees of fundamental rights in the Constitution prevails (..)"[emphasis added]. More precisely, the *Corte Costituzionale* held in the *Frontini* case, n. 183 of 27 December 1973, *cit* that an "aberrant interpretation" of Article 189 EEC could be the only ground on which "the guarantee would always be assured that this Court would control the continuing compatibility of the Treaty with the above mentioned fundamental principles [i.e., fundamental human rights]".

430 Accordingly, in reference to the German *Solange* case, it has been said that it "did not create any great actual risk of German authorities not applying Community law. Of greater practical significance was the possibility that parties could challenge the constitutionality of Community law before German courts. These courts would then discuss the question in order to decide whether or not they should bring the matter before the Constitutional Court. This would delay the full application of Community Law in Germany and it would detract from its authority" [SCHERMES, H.G. (1987) *Judicial protection in the European Communities*, Deventer:Kluwer, at 122]

431 "If Courts in the Member States started to review Community provisions this would hardly lead to a uniform and harmonious development of Community law (..)" (CLAPHAM, 1991:30)

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for the *rebellion*: the Community Treaties, for whatever reason<sup>432</sup>, lacked a Bill of Rights, and thus the European Court could not ground the protection of human rights on a positive rule of community law. To solve this problem, the Court applied a *constitutional approach* to the interpretation of the Treaty.

It is worth stressing at this stage of the work that it is certainly only an approximation to state that the EEC Treaty, and the other treaties formally in force within the European legal order, forms the *Constitution* of the Community. Nonetheless, the Treaty has occasionally been mentioned in this way in the European Court case-law<sup>433</sup> and perhaps to speak of the Treaties as a constitution is even becoming a commonplace in the literature<sup>434</sup>. However, to qualify the Treaty as a constitution can only be an approximation from the orthodox constitutional law perspective, since the Treaty lacks a number of characteristics which have been so far considered essential features of a constitution. This applies not only to the content of the Treaty, in which the lack of a Bill of Rights is certainly an important deficiency<sup>435</sup>, but also in its process of drafting and approbation<sup>436</sup>, and in its legal rank with respect to the member states of the

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432 It is usually argued that the feeling for such a Bill of Rights was not present at the moment of the drafting process of the EEC Treaty. J. WEILER, however, explains the lack of a Bill, among other reasons, because paradoxically the Bill could have been interpreted as if the Community organs could then legitimately restrict all other rights not embodied in the Bill. In any case, these and other explanations can only be surmised, since there is no available source material on the *travaux préparatoires* of the Treaty, which remain secret. See WEILER (1986:1110).

433 For instance, in the *Partie Ecologiste Les Verts v. European Parliament*, case 294/83, in *Common Market Law Reports* [1987] 2, p. 340.

434 The subtitle of one of the most extended handbooks of community law [HARTLEY, T.C. (1988) *The Foundations of European Community Law*, Oxford: Clarendon Press] is "An introduction to the Constitutional and Administrative Law of the European Community". See, recently, CASSESE, S. (1991) "La Costituzione Europea", in *Quaderni Costituzionali*, 3, pp. 487-508.

435 A Bill of Rights is what makes the difference between a Constitution and a mere "frame of government". The doctrine is already bicentennial: see the famous Article 16 of the *Declaration Universal des Droits de l'Homme et du Citoyen*.

436 In pure legal terms, the Treaties establishing the Communities were passed as International Agreements. The fact that a number of states had a referendum in order to accede to the Community does not fulfil the classic requisites for a "pouvoir constituant".

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community<sup>437</sup>.

Nevertheless, it would surely be appropriate to state that, although it is not a Constitution, the Treaty *has been interpreted constitutionally*. That is, notwithstanding the fact that the Treaty does not embody the essential features of a constitution, the way in which it has been approached by the European Court of Justice has led to a *constitutionalization* of the Treaty as a result. The Court's approach has affected the methods developed for the interpretation of some provisions of the Treaty as well as the position that the Treaty holds in respect to secondary community law<sup>438</sup>.

The European Court of Justice, like any other court, has applied several methods of interpretation to Community law, chiefly literal, historical, systematic, and teleological: the literal method attends mainly to the wording of the provision at hand, the historical method to that of the *travaux préparatoires*, whilst the systematic method attempts to find the correct interpretation of a provision taking into account the system of the community law as a whole. To some extent, the teleological interpretation can be considered as separate from the other three methods. As the word "teleological" rightly suggests, this method of interpretation seeks the most appropriate interpretation to be given to a provision in order to achieve some definite aims: first, to promote the objective of the rule, second to prevent an unacceptable consequence of the literal interpretation, and third, to fill the gaps that would otherwise exist within the community legal order<sup>439</sup>.

In theory, the teleological interpretation remains subsidiary when the wording of

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437 It should not be a minor obstacle against the consideration of the Treaty as a *Constitution* that, as far as member states are concerned, primary and secondary community law hold the same position in the domestic hierarchical order, what then should lead to the conclusion that *all community law* holds a *constitutional* position. This last assumption is hardly compatible with the very concept of a Constitution.

438 "The Court of Justice plays a significant role in the development of the European Communities, to some extent comparable with the role of the Supreme Court in the early years of the United States. *Both are constitutional courts charged with the preservation and the development of the law in a new society* (...) The community treaties are the primary sources of Community Law. *They play the same role as is played by the Constitution* in the national legal orders. Their legality cannot be challenged and they take priority over all other rules of Community law."(SCHERMES, 1987:1) [emphasis added].

439 The methods of interpretation of community law as have been applied by the European Court of Justice are presented in SCHERMES (1987:11 ff).

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The European Court of Justice, like any other court, has applied several methods of interpretation to Community law, chiefly literal, historical, systematic, and teleological: the literal method attends mainly to the wording of the provision at hand, the historical method to that of the *travaux preparatoires*, whilst the systematic method attempts to find the correct interpretation of a provision taking into account the system of the community law as a whole. To some extent, the teleological interpretation can be considered as separate from the other three methods. As the word "teleological" rightly suggests, this method of interpretation seeks the most appropriate interpretation to be given to a provision in order to achieve some definite aims: first, to promote the objective of the rule, second to prevent an unacceptable consequence of the literal interpretation, and third, to fill the gaps that would otherwise exist within the community legal order<sup>439</sup>.

In theory, the teleological interpretation remains subsidiary when the wording of

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**437** It should not be a minor obstacle against the consideration of the Treaty as a *Constitution* that, as far as member states are concerned, primary and secondary community law hold the same position in the domestic hierarchical order, what then should lead to the conclusion that *all community law* holds a *constitutional* position. This last assumption is hardly compatible with the very concept of a Constitution.

**438** "The Court of Justice plays a significant role in the development of the European Communities, to some extent comparable with the role of the Supreme Court in the early years of the United States. *Both are constitutional courts charged with the preservation and the development of the law in a new society* (..) The community treaties are the primary sources of Community Law. They *play the same role as is played by the Constitution* in the national legal orders. Their legality cannot be challenged and they take priority over all other rules of Community law."(SCHERMES, 1987:1) [emphasis added].

**439** The methods of interpretation of community law as have been applied by the European Court of Justice are presented in SCHERMES (1987:11 ff).

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a provision is completely clear. In practice, it is for the European Court to state in which circumstances this is so, and, in fact, this method of interpretation has been increasingly applied by the European Court when it has felt the need to achieve one of the above mentioned objectives. As with the European Court of Human Rights, the European Court has applied the teleological method in order to provide a "dynamic interpretation" of the Treaty, updating its meaning to new circumstances and challenges. This is what renders the European Court of Justice a constitutional court<sup>440</sup>. The justification for a teleological method of interpretation of community law also approximates very closely to the general approach taken to constitutional law: the necessity of interpreting the law according to current circumstances, or even the application of a flexible method of revision through judicial decisions, without making it necessary to apply the complex amendment process of the Treaty<sup>441</sup>.

**2. The sources for the protection of human rights in the case-law of the European Court of Justice.**

The procedure by means of which the European Court of Justice has applied this approach to the human rights issue has also been studied in depth. The process has been rightly described as an *extension* of the community competencies<sup>442</sup>: in the absence of a community Bill of Rights on which human rights protection could be grounded, the European Court of Justice stated that human rights were among the

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<sup>440</sup> H.G. SCHERMES, however, prefers to speak of *teleological* interpretation when this method is applied to the treaty provisions and of *constitutional* interpretation only when it is applied to secondary community law. According to him, in the latter case "the expression *constitutional* interpretation may be used in order to stress that the Treaties, the constitution of the community, are the basis for this interpretation. A legal order is developing out of the constitution and in its constitutional interpretation the Court interprets that the legal order as it has evolved in such a way it may fulfil its function more efficiently. The spirit and the purpose of the constitution form the core of this interpretation (..)" (SCHERMES, 1987:18). In domestic constitutional law, however, the expression *constitutional interpretation* applies equally to the interpretation of statutory law according to the Constitution and to the interpretation of the Constitution itself.

<sup>441</sup> "one gets the impression that the Court was stricter as to the letter of the text in its early days than it is at present. This may be a necessary development as the factual situation gradually evolves in such a manner that a text written in 1957 cannot be interpreted in exactly the same way in 1987 (..) The Communities Treaties have far more in common with a constitution. It is extremely difficult to amend them, and their development largely depends on the changing interpretation accorded to them by the judiciary (..) " (SCHERMES, 1987:14).

<sup>442</sup> See WEILER, J. (1985) *Il sistema comunitario europeo*, Bologna:Il Mulino at 135 ff.

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"general principles" of community law, and that, therefore, their protection came under the duties of the Court. Certainly, there was, and still is, a general principle backing the idea of judicial human rights protection within the community; the protection of human rights can be said to be one of the essential principles of the community, since in all member states respect for human rights is a binding constitutional rule. Moreover, respect for human rights constitutes an unwritten condition for accession to the community<sup>443</sup>.

The translation of this principle into positive norms in the Treaty was, however, more difficult. As has already been stated, the first time the European Court was asked to rule on a community law provision which was allegedly incompatible with human rights, the Court rejected this revision on the grounds that community law was a separate legal order from the legal orders of the member states, and this made domestic standards of protection of human rights inapplicable. It is worth discussing two specific points of the first human rights cases brought before the European Court in order to gain a proper understanding of further developments. First, it should be clarified that the doctrine of the supremacy of community law was not clearly established at that moment<sup>444</sup>. Second, in both cases the plea was to review community law against the domestic standards on fundamental rights, but without asking the court to construe such

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**443** The democratic configuration of the state and in general the principle of rule of law has been described as the "essential basis" on which the Court of Justice should ground its human rights case-law: "The European Community is nothing other than a form of corporate life of States whose constitutional orders are based on the principles of free democracy. That was the unwritten precondition for European integration and the same criterion remains the condition *sine qua non* for the accession of other European States to the Community. If then the Community is nothing other than a *modus existendi* common to the member States and their peoples on the basis of solidarity and interdependence, there is no escaping the conclusion that the Community's institutions too and especially the Court of Justice, are bound by the principles of freedom, democracy and the rule of law which are unanimously expressed in the constitutional and social orders of those states." [PESCATORE, P. (1981) "The Context and significance of fundamental rights in the law of the European Communities" in *Human Rights Law Journal* 2 pp. 295-308 at 300].

**444** Both in the *Storck* and in the *Geitling* decisions, the ground for rejecting the pledged review of community action against domestic standards of protection of human rights was the view of community law as a separate legal order, rather than supremacy. See WEILER (1986:1113), according to whom the self perception of the European Court was at that time more that of an international than a Constitutional Court.

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principles in community law<sup>445</sup>.

It was at this point that the Italian and German *rebellion* took place, endowing the question with a new political tone. The European Court therefore had to look for a new legal basis for developing a human rights policy. Summarizing the developments in the European Court case-law, the building of new sources for community-based legal protection of human rights can be summarized in three stages<sup>446</sup>:

1) First, the court was forced to develop a new position with regard to a community fundamental rights protection. Theoretically, its new approach did not overrule either *Stork* or *Geitling*, since the Court still maintained that community law was not reviewable against domestic standards on human rights. The real movement was to find a human rights standards in community law also.

Certainly, several standards on human rights protection could be induced directly from some of the provisions of the Treaty of Rome, mainly in some of the community liberties, i.e., freedom of movement of workers (Article 45 ff EEC), and the right to establishment (Article 52 ff EEC), and from other principles embodied in the Treaty, such as the principle of non-discrimination on the grounds of nationality (Article 7 EEC), or the principle of equal pay for equal work (Article 119 EEC)<sup>447</sup>. Nevertheless, these provisions are not very helpful, first, because they do not cover all the possible field of fundamental rights which could be touched upon by a community policy; and second because a policy based on these principles may itself encroach on human rights under some circumstances. The Court then found itself in the position of having to search for a previously established legal basis for human rights protection. It found this in the

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445 For the *Stork* case, see the quotation of the decision *supra*, this Chapter. The plea probably conditioned the decision of the Court (see the remarks by J. BRIGDES, in *The Emerging..cit*, page 178) although the Court could have construed a community standard without an express plea in this way, as it did, for instance, in the *Hauer* case (see paragraph 16 of the *Hauer* case, case 44/79, *cit*).

446 The analysis in three stages first appeared in DAUSES, A. (1985) "The protection of fundamental rights in the Community legal order" in *European Law Review* 10 p. 398-419. See a further application in ALONSO GARCIA, R (1989) *Derecho Comunitario, Derechos Nacionales y Derecho Común Europeo*, Madrid:Civitas, .

447 The provisions of EEC Treaty where fundamental rights are expressly recognized are listed in DAUSES (1985:399).

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general principles of law.

The general principles of law are not unfamiliar within the law of Europe. They were used by the European Court even before the Court used them in human rights cases<sup>448</sup>. However, an accurate legal basis for a judicial decision grounded on general principles of law also needs a positive rule, allowing the Court to apply these general principles. The EEC Treaty contains in some of its provisions a general mention of the concept of "law" which serves to this purpose. Thus, in describing the task of the European Court, Article 164 EEC establishes that the Court will ensure that "the law is observed"<sup>449</sup>. As well as this, Article 173 EEC entails the European Court to "review the legality" of acts of the Council or of the Commission. Broadly interpreted, both articles allow the Court to appeal to the general principles of law to make decisions about human rights cases<sup>450</sup>.

The first time that the European Court applied the general principles of law as a source for the protection of human rights was in the *Stauder* case<sup>451</sup>. The case concerned a community provision which authorized member states to make butter available at reduced prices to low income consumers receiving social assistance. In order to receive the butter, however, recipients had to be fully identified and their names were therefore required. A German citizen entitled to this aid challenged the requirement of being fully identified before a German court, alleging that this was a breach of his human dignity and therefore of his fundamental rights. A question was raised on the

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448 Among the general principles of law other than fundamental rights recognized in community law, the following can be quoted: legal certainty, proportionality, the right to a hearing, equality and the privilege of legal profession. See HARTLEY (1988:139 ff)

449 Article 164 EEC reads as follows: "The Court of Justice shall ensure that in the interpretation and application of this treaty the law is observed"

450 "By means of those provisions all the activities of the Community and its institutions are made subject to the principles of law and legality in the widest sense of those terms. It would not be an exaggeration to describe these provisions as an expression of respect for the rule of law which seems to be nearest English equivalent for the French *légalité* and the German *Rechtstaatsprinzip*. Once that principle is recognized, the foundation is laid on which the protection of fundamental rights may be developed (PESCATORE, 1981:298). An express remission to the general principles of law, however, is to be found in Article 215 EEC, but regarding only non contractual liability, a field of little concern for fundamental rights. See ALONSO (1989:231).

451 *Stauder* case, case 26/69, *cit.*

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language in which an authentic interpretation of the community provision at hand should be grounded, and the German court referred the question to the European Court. The European Court interpreted the community provision in its more liberal way, and ruled that it did not require the identification of the beneficiaries of the aid by name. The Court added: "Interpreted in this way, the provision at issue contains nothing capable of prejudicing the fundamental human rights *enshrined in the general principles of community law* and protected by the Court"<sup>452</sup>. With *Stauder*, then, the door was opened towards an application of the general principles of law to the human rights question. The problem which remained was the identification of which legal principles could claim to be "general principles of law. This was the second step the Court had to take.

2) By their very nature, general principles of law are not expected to be listed in a positive norm. In practice, the European Court of Justice placed them, as far as human rights are concerned, in the same place as the European Court of Human Rights; that is, in the "common principles of law" of the member states. This step was taken in the *Handelsgesellschaft* case<sup>453</sup>, in which a previous deposit lodged by a German society, the *Internationale Handelsgesellschaft*, in order to obtain an export licence of maize metal was forfeited, following a community regulation, due to the fact that the exportation was not completely effected. A German court considered that the community provision was in fact a penalty contrary to the principle of proportionality, and therefore a breach of the fundamental rights protected by the German Constitution. The court referred the question to the European Court which reaffirmed the rule that community law could not be reviewed in the face of national constitutional law and reached a negative conclusion as to the question raised. Before reaching this conclusion, the following reasons, which deserve a full quotation, were put forward:

\*However, an examination should be made as to whether or not any analogous guarantee inherent in community law has been disregarded. In fact, respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst *inspired by the*

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<sup>452</sup> *Stauder* case, *cit*, paragraph 7 [emphasis added]. The same paragraph is fully quoted by HARTLEY (1988:133)

<sup>453</sup> *Handelsgesellschaft* case, case 11/70, preliminary ruling of 17 December 1970 in *Common Market Law Reports* [1974] p. 283.

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*constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the community.* It must therefore be ascertained in the light of the doubts expressed by the *Verwaltungsgericht* [the German referring court], whether the system of deposits has infringed rights of a fundamental nature, respect for which must be ensured in the community legal system.<sup>454</sup>

It follows then from *Handelssgesellschaft* that the European Court of Justice also applied the "common principles" rule to develop the theory of general principles of community law, taking them from the common constitutional traditions of the member states of the community<sup>455</sup>. In a similar way to the manner in which the question was posed in the European Convention system, it can be questioned now how common must the common principles of law be to serve as a basis for a community general principle of law<sup>456</sup>. In community law the answer comes, in practice, from the application of a rule of *no rejection* according to which a principle of constitutional law embraced by one member state is considered to be a general principle of community law, unless it is expressly rejected by the domestic law of another member state<sup>457</sup>.

It should be noted, however, that the so-called common principles serve only as a first source, but that they are never directly applied by the European Court. In fact, the process by which a common principle is to be applied is somewhat complex: first, it has to be deduced from the existing law in the member states ("*..inspired by the constitutional traditions common to the Member States..*"); and, second, it has to be transformed into a *community* general principle of law ("*..ensured within the framework*

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454 *Handelsgesellschaft* case, *cit*, paragraph 4 of the judgment [emphasis added].

455 SCHERMES (1987:25 ff) classifies the general principles of law into community law in three groups: compelling legal principles stemming from the common legal heritage of western Europe (in which fundamental rights are grounded), regulatory rules common to the laws of the member states and general rules native to the community legal order.

456 See *supra*, Chapter I.

457 According to the rule of *no rejection*, "if any Member State considers a principle to be of such importance that it has incorporated it in its constitution, it should be accepted as a principle of community law unless it can be demonstrated that the rule is contrary to the legal order of any of the other Members." (SCHERMES, 1987:30).

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*of the structure and objectives of the community.*")<sup>458</sup>. However, once a community general principle of law has been construed, there is still a further step before it reaches the community standard of protection: the process is thus threefold: firstly a principle of law "common" to the member states must be found, secondly, from a national principle of law a community principle is deduced, and thirdly, a precise standard of protection is deduced from the community principle. The way in which this third step is taken will be discussed in the next section.

3) Finally, the last development of the European Court in its seeking a source for human rights protection in community law was also to apply in this way the European Convention on Human Rights. The Convention is taken as a positive international agreement to which all the member states of the community are signatory parties, and which embodies the "common principles" of the member states as far as human rights are concerned. The first time the ECHR was applied in this way by the European Court of Justice was in the second *Nold* case<sup>459</sup>. Although from that case onwards the ECHR has been frequently quoted by the European Court, it has only been to say that either

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458 From this transformation onwards, the principle will be considered as a "community" principle, and will no longer be seen as a distillation of the common principles of the member states, which means that the common principles have been increasingly substituted in the case-law of the Court by new community general principles of law of which the former were once the original source. Once a common principle has been incorporated as such to community law, "las posteriores invocaciones que se hagan del principio o categoría ya incorporado se harán en cuanto elemento integrante del derecho comunitario (...) A medida que vaya creciendo ese cuerpo de derecho público comunitario formado por vía jurisprudencial, menor será, lógicamente, el número de problemas que no puedan resolverse a partir del mismo, sin necesidad de recurrir a soluciones contempladas en los derechos nacionales al contar el derecho comunitario con las propias" (ALONSO, 1989:251).

459 *J. Nold vs the Commission of the EC, case 4/73, judgment of the European Court of Justice, of 14 May 1974, in Common Market Law Reports [1974] page 354.* The case was decided only eleven days after the ratification of the European Convention on Human Rights by France. The judgment, however, referred only implicitly to the Convention among the "international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories", which "can supply guidelines which should be followed within the framework of Community Law". According to PESCATORE (1981:301), the Court could only "draw guidelines" from the ECHR because it has not been ratified to the same extent by all member states, since a number of them have made reservations to the Convention.

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it did not apply to the case or that it had not been violated<sup>460</sup>.

Although the political context in which the Court developed its human rights doctrine has obviously not been introduced into the legal reasoning, the necessary point of departure for a proper analysis of the Court's developments is still its reaction against the *rebellion*. The fact that the human rights doctrine of the European Court came as a response to previous domestic decisions has affected the Court's position in a number of ways. The most important consequence of this context is that to a certain degree it can be said that the European Court used human rights protection as a new approach to achieve the same goal which had been pursued in the first cases in which protection for human rights was rejected. Both before and after the domestic *rebellion*, what was at stake and what the Court tried to preserve was the same thing: the supremacy of community law<sup>461</sup>.

This point is worth emphasizing, since it highlights at least three important features<sup>462</sup>: first, it is an example of the two sides of the human rights question as to the integration issue, which will be discussed later in this chapter<sup>463</sup>. Second, it helps to understand the way in which the "mighty problem" of judicial review or the "distrust"

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460 See a survey of the cases in which the Convention has been quoted by the European Court in SCHERMES (1987:036-37). According to CLAPHAM (1991:50), the *Kent Kirk* case, case 63/83 in *Common Market Law Reports* [1984] p. 522, a case regarding the banning of a retroactive penal measure, has been to date the only case before the European Court in which an individual has benefited from the ECHR.

461 "the prime motivation for judicial extension was not, I believe, simply a benevolent interest in human rights, nor even in the democratic structure of the Community. At the source of the mutation one finds, in what must be one of the most curious paradoxes of a system explicable only by paradoxes, the *same* protective sentiment which induced the Court to *reject* the fundamental rights initiative ten years earlier." (WEILER, 1986:1118).

462 The three points are stressed by WEILER (1986)

463 "on the one hand, human rights (..) represents and integrational value and instrument (..) On the other hand, protection of human rights is typically designed to protect the individual against public authority (..) to be meaningful, protection will have to extend on occasion even against policies adopted in good faith to further the goals of European integration (..)" (WEILER, 1986:1108).

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issue has been posed - or not - in community law<sup>464</sup>. And third, and most important for the discussion in this section, it is the grounds on which the Court's behaviour can be discussed in the face of a hard human rights case which may seriously affect a community policy. In the absence of such a case, it may be said that, to date, the commitment of the European Court has been devoted more towards the supremacy of community law than to human rights<sup>465</sup>. Therefore, as a starting point on the question of standards, it may be said that the context in which the European Court's first decisions on human rights arose would support to a certain degree the idea that the Court will not proceed to a high level of protection if supremacy or implementation of community policies are involved.

As a result of the described process, the European Court of Justice construed its own sources for the protection of human rights. According to the proposed conditions for a comparative model<sup>466</sup>, two points will now have to be studied in order to draw a conclusion on the extent to which an *equivalent*<sup>467</sup> construction by domestic courts (applying the human rights *community* standard to define the human rights *domestic* standard) is possible or not: the first point is whether the *community* standard may grant a lower protection to fundamental rights than the domestic standards, or, to put it in the other way, whether domestic law provide a higher standard than that provided by community law in human rights protection. There is also a second point, namely whether domestic courts will apply *that* community standard to domestic cases<sup>468</sup>. A brief review

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464 A "heretical rather than critical" approach, according to his author. To put it in his words, "what is at stake, then, is not the fear of excessive zeal in asserting individual rights but fear of the opposite: a reluctance of the Court to exercise a sufficiently robust individual protection policy, If there is distrust it is not a distrust of a Court overreaching far enough. This is what I mean by the credibility issue." (WEILER, 1986:1109).

465 Again, WEILER (1986:1119) says this in a clear statement. although this time he puts it in the interrogative: "If it is true that the Court developed its human rights doctrine to protect the integrity of the Community legal order rather than the individual, will it, in a case pitting human rights on the one had against an *important* Community policy of integrational value on the other hand, be ready to prefer the individual to the Community?"

466 See *supra*, Chapter I

467 On the *equivalent* constitutional analysis in the United States, see *supra* Chapter III.

468 Which may imply that the European Court of Justice should first apply the community standard to member states' action. The extent to which the *first incorporation* is a prerequisite to the *second incorporation* will be also discussed below.

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of the first of these two problems in community law will be made now, while the second point will be discussed in the next section of this Chapter.

#### 3. The method of construction of the community standard.

A first answer to the question of standards could be that, since the community standard derives from the common principles of law existing within the member states, the community standard and the member states' standards of protection of fundamental rights are both at the same level. The weakness of this position, however, comes from two false assumptions: first, the community standards cannot come from a common standard within the member states simply because it is doubtful whether such a thing exist; and second, even in the case that common standards existed, the Court takes them only as a first step to construe a new "community standard" of its own.

Not surprisingly, the discussion on whether common principles of law within the member states of the community imply a common standard of protection of human rights has been rooted on similar arguments as in the European Convention System: in both cases the same member states and the same common principles of law are involved. And, as was seen in the case of the Convention<sup>469</sup>, the discussion in community law has also concluded that common *principles* cannot be understood as common *standards* of protection. The first point, then, is that the community standard cannot claim to be at the same level as that of the domestic laws, because such uniformity of protection does not exist at the domestic level<sup>470</sup>. Let us assume, however, that, at least in an concrete

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469 See *supra*, Chapter I.

470 The conclusion seems to be unanimous, either through the claims that the common principles have an overly abstract meaning for judicial adjudication, as a result of the different degree of protection of the same principle in various member states, or that the *political* consensus within the member states on protection of human rights does not elude a *juridical* diversity of methods and concrete techniques of protection. See for instance the following comments: "However attractive that conclusion [community standard coming directly from the common general principles] may appear as a first sight, in reality it entails many problems since it implies that all Member States are in agreement at least of essence, in acknowledging a given number of unassailable fundamental and human rights. It is not absolutely clear that that is the case. Although all the Member States are conscious of certain intellectual and political traditions going back at least to the French Revolution (...) nevertheless regardless of that common historical heritage, they go their own way as regards method, structure, normative rank and definition of the scope of individual guarantees" (DAUSES, 1985:407); "unless it [the European Court] is construing the common tradition as such a general level as to become almost meaningless, it is operating

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case, a common standard of protection of one specific fundamental right can be found in domestic law of the member states. As has been said, even in this case the European Court would not apply such a standard without its previous transformation into a community standard. This transformation implies the definition of the limits of the legitimate restriction of the concerned right on a completely new basis.

This is clearly shown by the reasoning of the Court in the *Hauer* case<sup>471</sup>. A land owner challenged before a German court a community law provision which imposed a temporary ban on all new planting of vines and the question was referred to the European Court. Relying on the previous human rights cases, the Court applied the doctrine of the general principles of law and took into account the member states' common legal principles and the European Convention on Human Rights (this time with a detailed analysis of the relevant Convention's provisions). Once the Court had "compulsory taken inspiration"<sup>472</sup> from member states traditions, however, it interpreted the distilled common principle on human rights in the light of the community context. It is during this second phase of the Court's reasoning that the common principle of law becomes a precise standard of protection<sup>473</sup>; in the same way as the domestic courts

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on a heuristic assumption of constitutional commonality in Europe which is simple unfounded" (WEILER, 1986:1127). "(..) toda la discusión acerca de los standards máximos o mínimos muestra bien a las claras que, en puridad, no existen tradiciones constitucionales comunes en materia de derechos fundamentales, al menos desde un punto de vista jurídico (..) lo unico que tienen en común los Estados miembros es una concepción política de los derechos fundamentales, es decir, el disfrute efectivo, independientemente de sus mecanismos jurídicos, de un mínimo de libertades sin las cuales no puede afirmarse siquiera la existencia de un ordenamiento liberal-democrático." (DÍEZ-PICAZO, 1991:150); "It is possible that in searching for a common standard, the Court may reduced to finding a bare minimum of protection which falls below what would be accepted in most of the Member State. Furthermore, even if it seeks a maximum standard, Constitutions will reflect different political cultures in very different countries, so rights cannot be simply selected, extracted and accumulated." (CLAPHAM, 1991:051). All these statements can be even more reasonably applied to social and economic rights, the rights on which the consensus within the Member States is smaller, but those which are more related to the Community matters (see DAUSES, *ibid.*). See also ALONSO (1989:271).

471 *Hauer* case, case 44/79, *cit.*

472 The mixed use of imperative plus facultative language is rightly emphasized by WEILER (1986:1124)

473 The division into two phases also comes from WEILER: "A correct statement of the method adopted by the European Court of Justice is a two-phased procedure of establishing first, a constitutional principle derived from comparative analysis and then the Court's application of the

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balance the fundamental right against another state's legitimate interest (for instance, the right to property against nationalization procedures), the European Court will counterbalance the legitimate interests of the community taken as a whole against the alleged fundamental right.

This has two main consequences. First, the European Court may rightly claim its monopoly in reviewing community law on an alleged violation of fundamental rights, since domestic courts could awkwardly put the interest of the whole community in the balance<sup>474</sup>. Second, the outcome of the community balancing may be completely different from that of its domestic application.

Nevertheless, it should be noted that the applied test itself also comes from the constitutional practice within the member states<sup>475</sup>, mainly from the practice of the German *Bundesverfassungsgericht*, from where it has expanded to other domestic constitutional courts<sup>476</sup>. As it was applied in *Hauer*, the community test lists the three usual conditions for a legitimate restriction of a fundamental right. First, the community interference must be justified by the objectives of the community; second, the interference must be proportional to that objective; and thirdly, the very substance of the

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principle to the Community context. The fundamental human rights recognized by the Constitution of the Member States are only principles, general rules and guidance. They are not predictions of adjudicatory outcomes in each Member State or in the transnational legal order." (WEILER, 1986:1133). To the extent to which the previous comparative analysis can be distinguished from the process of establishing a community general principle, the process can be understood as in three stages, as is evident in the text.

**474** In this way the most dangerous threat of the domestic *rebellion* was avoided.

**475** The functionalistic approach to fundamental rights (that is, balancing the right against a legitimate state interest and allowing on this ground the application of legitimate restrictions) is not an exclusive of Community Law. Indeed, this is the most extended way to interpret constitutional provisions on human rights, at least within the continental systems. Other approach would consider human rights from a natural law perspective; only from this last point of view it can be said that, since " (...) human rights values will have to be interpreted in the light of the demands of European Integration (...) they are not considered to be the highest law." (CLAPHAM, 1991:48)

**476** See, in general, STARCK, C. (1987) "Constitutional definition and protection of rights and freedoms", in STARCK (ed), *Rights, Institutions and impact of international law according to the German Basic Law*, Baden-Baden:Nomos.

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protected right must be guaranteed whatever the restriction may be<sup>477</sup>

As a result, the construed standard of protection is a genuinely new community standard. *Hauer* and other cases<sup>478</sup> have made it clear that the community parameters of the legitimate restriction of a fundamental right (that is, community test of proportionality) does not come from an approximate average of the allowed restrictions in the member states. The different method for ascertaining a common principle and for construing from that principle a community standard must be put forward: the Court may review the existing common principles within the member states in order to incorporate one of them into the general principles of community law. At a general level, the fact that such a principle exists in the majority of the member states should be carefully weighed by the Court. The greater the majority rule applies, the less margin the Court should have to decide whether or not to incorporate it<sup>479</sup>. However, at the level of *concrete techniques of protection*<sup>480</sup>, the Court must adapt them to the community context; and here the majority rule cannot be taken into account, since the community interests balanced by the Court have nothing to do with a sum or an average of the member states' interest. It is something completely different, and only can be asserted by taking into account the community interests as a whole. That is the reason why the majority rule can be applied to the principles, and not to the standards<sup>481</sup>. The final result, then, is a combination of the consensus rule (in ascertaining what a general principle of

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477 *Hauer* case, case 44/79, *cit*, paragraphs 17-33; the application of the test of legitimate interest and of proportionality in terms of Community policy is described in depth in WEILER (1986:1124 ff); see also DAUSES (1985:400-5).

478 ALONSO (1989:253) lists the following cases in which a clear statement of the Advocate General can be found as regards the community test: *Hoogovens*, case 14/61; *Duraffour*, case 18/70; *Aktien*, case 5/71 and *Werhahn*, cases 63-69/72.

479 "un principio que existe en los derechos de un amplio número de estados miembros (...) merece ser reconocido como un principio general del derecho [comunitario] sin que haya necesidad de discutir si es mejor o más progresista que los principios en conflicto existentes entre los derechos de los estados miembros" (ALONSO, 1989:256)

480 the term is used in this way by ALONSO: "En lo que se refiere a los principios, en mi opinión, sí que debería intentarse una aproximación tendiente a obtener el mayor grado de comunidad posible (...) por otro lado, las diferencias no suelen venir marcadas por los principios o categorías generales, sino por sus técnicas jurídicas de concreción (...)" (ALONSO, 1989:257)

481 This is the greatest difference with the ECHR system, since there is not a "separate" interest to restrict fundamental rights under the Convention law.

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community law is) and of the application of the restriction test in a specific community context<sup>482</sup>. This is the community optimal<sup>483</sup>.

Criticism of the Court's approach comes not from the functionalistic method itself, but for its application in the absence of a Bill of Rights<sup>484</sup>. The functionalistic approach to the restriction of fundamental rights clearly provides a high degree of judicial discretion; at the domestic level, however, judicial discretion is counterbalanced by the provisions of the domestic Bill of Rights which appear as a clear limit to the legitimate restrictions which may be applied to the right. This applies also to the essential substance of the concerned right, taken by the Court as the last limit of the functionalistic approach. The doctrine of the essential substance has some important consequences on how the problem of standards should be approached, as will be seen below. For the present, all that need be said is that it loses a great deal of its usefulness if there is no positive provision to which it can be applied<sup>485</sup>.

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482 However, the application of the consensus rule to standards could be discussed in cases in which a great consensus exists also at this level within the member states, although, as has been already seen, this quite improbable: "El Tribunal de Justicia de la Comunidad debería intentar, en la medida de lo posible, y teniendo siempre presente que tales principios, categorías y técnicas jurídicas de concreción están llamados a integrarse en los ordenamientos nacionales, el mayor consenso posible en la selección de los mismos, pudiendo actuar con mayor libertad cuando tal consenso no fuere posible, o cuando, siéndolo a nivel general, no sucediera lo mismo al descender a nivel particular o de detalle" (ALONSO, 1989:260)

483 In the words of DAUSES, "The optimal solution will therefore be the one which, on the basis of a qualitative comparison of the national legal systems, is best able to take account of the actual economic social and political facts and which is also the most capable of being integrated into the specific aims and the structure of the Community" (DAUSES, 1985:409)

484 "Las cuestiones problemáticas [on protection of human rights in European Community law] no tienen raíz procesal sino que son más bien de naturaleza substantiva y proceden de haber tenido que configurar los derechos fundamentales como principios generales, habida cuenta de la falta de una declaración de derechos en los tratados institutivos. Es precisamente de aquí de donde nacen las más graves carencias de tutela objetiva y subjetiva." (DÍEZ-PICAZO, 1991:147)

485 Although the *Bundesverfassungsgericht* has developed a way of ascertaining the essential substance of the right whilst remaining relatively independent from the provision at hand, the wording of the provision in which the right is protected is able to establish some limits. For instance, Article 20 of the Spanish Constitution bans any kind of prior censorship to freedom of expression, while, according to Article 21 of the Italian Constitution the banning of prior censorship covers only the freedom of the press, and not any other manifestation of freedom of expression. Prohibition of prior censorship, then, has been introduced to a different extent in the essential substance of the right in Spain and in Italy.

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Obviously, it is not for the European Court to enact such a Bill<sup>486</sup> or to engage in other proposed solutions, such as, for instance, the accession of the community to the ECHR<sup>487</sup>. Further, some authors have pointed out that the Bill would create at least an equivalent amount of problems to those which it could help to solve<sup>488</sup>. However, all

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**486** As is well known, there has been some not completely successful attempts by different Community organs to cover the absence of the Bill. The most recent one is the *Declaration of the European Parliament on Human Rights* adopted on 12 April 1989 (cf. OJ C 120/52 16 May). It seems that the Parliament is the most appropriate organ for enacting the Bill, but the legislative system of the Community is an obstacle to this: *stricto sensu*, the recent *Declaration* is a resolution of Parliament, although the Parliament tried to give it a *sui generis* character by separating the Declaration from the resolution adopting it and by stressing in the Preamble the unique legitimacy that the Parliament enjoys in front of the other institutions of the Community. In this way, the Declaration starts with the formula "In the name of the Peoples of Europe..". See a general assessment on the *Declaration* in WEILER, J. (1991) "Towards a second and a third generation of methods of protection" in *Human Rights and the European Community: Methods of Protection (European Union - The Human Rights challenge, vol II)*, Baden-Baden:Nomos, pp. 556-640 at 611-29).

**487** The literature on the possible accession of the Community to the ECHR is vast. A general assessment on the relationship between the ECHR and the EEC law can be found in FROWEIN (1986:329-40). Generally speaking, the advantages of the accession points to the symbolic effect it will have, and the disadvantages points to the inability of the Community to fulfil some obligations under the Convention (i.e. running free elections) and to the institutional division of two bodies of jurisdiction (European Court of Justice/ European Court of Human Rights) [see, for instance, DAUSES (1985:417)] or to some procedural matters [see DIEZ-PICAZO (1991:144-52)]. Nevertheless, it should be pointed out that, as it may deduced for the discussion in Chapter I, accession would not solve the problem of standards completely, since the same problem can be perceived also in the ECHR system.

**488** The discussion can be considered from various points of view: first of all, it has been pointed out that, although desirable, the Bill is not necessary as such for a Federation of States of the type which Europe will be in the future. The essential point as to this regard is a supreme law which can override any law of the states of the federation, but in that law "there may, or may not, be provision for the constitutional protection of fundamental rights." [HARTLEY, T. C. (1986) "Federalism, Courts and legal systems: the Emerging Constitution of the European Community" in *American Journal of Comparative Law*, 34, 1 pp. 229-47, at 231]. Similarly, it has been stressed that "In practice, the acceptance of human rights as a general principle of law may be as good a solution as any, leaving it to the Court of Justice to develop the fundamental rights of the European Community." (SCHERMES, 1987:037). Further, the Bill could even "enable the standards which have been set by the European Court in its decided cases to be watered down and the existing system to be robbed of its efficacy." (DAUSES, 1985:416). This last fear seems to be the cause of Article 27 of the Parliament Declaration of 12 April 89, allowing the Court to recur to its classical sources in addition to the provisions embodied therein (see WEILER, 1991:625). Moreover, the consensus for such a Bill would surely be very difficult to reach, the consequence of which would then be the probable outcome of a minimum standard Bill, more harmful than beneficial. This would apply overall to economic and social rights (DAUSES), not to mention the "third generation rights" about which the Community should take some normative action in the

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these arguments cannot hide the flawless nature of the "general principle" solution, which has remained unchanged since its was first applied in the seventies<sup>489</sup>. To sum up, although the Bill would not be the solution to all the present problems, it would be a substantive base for the Court on which to validly ground the construction of the community standard<sup>490</sup>.

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future. It seems that if social and economic rights, rights of consumers, environmental rights, educational and cultural rights, and the new challenges posed by the new technologies (bio-medical ethics, reproduction technology, freedom of information and privacy, etc) are hardly present in domestic Bill of Rights, the extent to which these rights would be embodied in a yet to come community Bill of Rights would be at least debatable (see a general review of all these new problems in CASSESE, A. CLAPHAM, A. WEILER. J. (1991) "1992 - What are our rights? Agenda for a Human Rights Action Plan" in Cassese, A. Clapham, A. Weiler, J. (eds) *Human Rights and the European Community: Methods of Protection (European Union - The Human Rights challenge, vol II)*, Baden-Baden: Nomos, pp 1-77, at 24-55). The correspondent "third generation" methods of protection, moreover, seem to be concentrated in new institutional devices for effective vindication of the new rights (see WEILER, 1991:556-62). Finally, it is stressed that the Bill will not solve the problem of the standard of protection: " (..) even if such catalogue of basic rights were produced and enforced by the Community Court, it would not remove the possibility of conflict (..) What is needed is not an artificial once-and-for-all catalogue of Community rights but some means of establishing a continuing relationship between the protection of rights in the Community context and the protection of rights in a wider international context to produce a degree of harmony between the two." (*The Emerging.. cit*, page 181). A conclusion shared by a number of authors may thus be that neither the Bill nor the accession to the ECHR are a good solution, and that, on the contrary, "In the middle term the problem of human rights in the European Economic Community would still be a matter of judicial interpretation" (DAUSES, 1985:418)

489 It is true that the "general principles of law" method has allowed the Court to develop an increasingly numerous catalogue of community fundamental rights (see a list of community rights in CAPPELLETTI, M. and GOLAY, D. (1986) "The judicial branch in the federal and Transnational Union: its impact on integration" in *Integration through law.. cit*, vol. 1 book 2 pages 261-351 at 339-42). But, on the other hand, the lengthening of the list of the protected rights has not been accompanied by a new method, which has remained unchanged. See DÍEZ-PICAZO (1991:139)

490 The following paragraph is a good summary of the present problems of the method for protecting human rights as developed by the European Court of Justice: "el problema más intrincado que suscita la falta de una declaración de derechos no es el de la identificación de éstos sino, paradójicamente, el de la determinación de su contenido. En efecto, al haber tenido que proteger los derechos fundamentales como principios generales procedentes de las tradiciones constitucionales comunes de los Estados miembros, la cuestión verdaderamente espinosa no es tanto si un determinado derecho existe en todas esas tradiciones - ya que es indudable que hay un conjunto mínimo de libertades, propio de cualquier ordenamiento constitucional-democrático-, sino más bien que el alcance de ese derecho no es el mismo en todos los Estados miembros (..) la pregunta es si el Tribunal de Justicia de la Comunidad Europea, al analizar las tradiciones constitucionales debe dar preferencia a los standards más altos y exigentes de este tipo de países o si, por el contrario, puede conformarse con la llamada opción minimalista o mínimo común a todos los Estados miembros (..) con independencia de que el TJCE haya cortado este nudo gordiano afirmando una jurisprudencia específicamente

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Having described the way in which the community standard of protection of human rights is construed by the European Court, the question may now be posed as to the position of this standard in the face of domestic levels. A preliminary question, however, is to what extent the community standard would be applicable to state action, other than that of implementing a community policy, either by the community court or by domestic courts. For, if such a possibility does not exist, the community standard would only be applicable to community action without any possibility of an domestic application to domestic cases. This last point, the so-called *incorporation* of community law, deserves a further discussion.

### (3) THE *INCORPORATION* OF THE ACTION OF THE MEMBER STATES UNDER THE STANDARD OF PROTECTION OF HUMAN RIGHTS IN COMMUNITY LAW.

#### 1. The first incorporation: the application by the European Court of community standards of human rights to state action.

All the discussion on the right way to approach the relation between community law and domestic law in a specific field will obviously remain useless if such a relation does not exist at all. This might be true of the human rights issue, since, to date, the community law and domestic law of the member states remain separate legal orders as far as human rights are concerned. From this point of view, the discussion on standards would make no sense: the community and the domestic standard would run in parallel lines, without meeting at any point<sup>491</sup>.

At the beginning of the European community, it was community law as a whole which was seen as a legal order separate from the law of the member states. The doctrine of separate legal orders had been applied by the European Court of Justice to the community law in its first decisions, as a ground to justify that domestic law should

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comunitaria en la materia - las tradiciones constitucionales comunes son sólo fuente de inspiración para el TJCE, el cual puede reconocer incluso un derecho que no exista en algunos Estado miembros - el problema continúa siendo sumamente relevante (..)" (DÍEZ-PICAZO, 1991:150)

<sup>491</sup> This point is emphasized by WEILER (1986:1107): "the discussion on standards has been at least in part misconceived (..) the [European] Court is not concerned, despite some explicit language, with *matching* Member State standards: indeed, such matching is impossible. Instead, the Court has staked a jurisdictional claim to human rights-based judicial review and asserts the rights to impose autonomous Community standards which Member State courts do *not* apply."

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not encroach on community law. Afterwards, the notion of supremacy of community law was construed by the European Court, and the separate legal orders doctrine was virtually abandoned: the new concept of supremacy substituted the old doctrine in ruling the relations between the community law and the member states law. As a result, community law was to be considered a *higher* law with respect to member states law<sup>492</sup>. The supreme position of community law has since that moment been stressed as an essential feature of the community system, even more important than the position of the Treaty as a higher law with respect to secondary community legislation<sup>493</sup>.

As is well known, the supremacy of community law, as construed by the European Court, has two consequences, called by the European Court the *direct effect*, and the uniform application of community law. Supremacy, however, also has one limit:

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492 The German *Solange* decision is a good example of the shortcomings of the doctrine of separate legal orders. The *Bundesverfassungsgericht* applied in this decision the same as that the European Court of Justice in *Van Gend and Loos*, that is, the European community law as an "autonomous" legal system, which was, at the same time, the concept in which the dissenters in the *Bundesverfassungsgericht* grounded the supremacy of community law. Moreover, if supremacy means that the community law should be regarded as higher law in respect to domestic law of the member states, it should be noted that the German court called the Treaty the *Community Constitution*.. just to miss in the Treaty a Bill of Rights. In fact, the doctrine of separate legal orders could support either supremacy of community law or the opposite. Comparing the present situation with that of the first years of the United States, prof. STEIN has pointed out that "it seems clear that the [European] Court of Justice has treated the question of supremacy as one to be decided exclusively in terms of the treaty of Rome. If speaking of the Community legal system as independent and autonomous made that task easier, so be it. [Justice] Marshall had used a similar approach. What seems not merely misleading, but false, is to assert "separateness" as legal commentators continue to do" (In *The Emerging Constitution..cit*, page 174). A general analysis of the process of construction of community law as a higher law with respect to the law of the member states can be found in STEIN, P. (1981) "Lawyers, judges and the making of a transnational constitution" in *American Journal of International Law*, 75, pp. 1-27, where the role played by member states, judges of the European Court and Advocates General is studied in seven leading cases concerning supremacy.

493 The famous statement of Justice Holmes, of the United States supreme Court, is usually cited in this context [for instance, it is cited by G. CASPER in *The Emerging Constitution..cit*, page 166 or by HARTLEY (1986:237)]. The priority of community law over the domestic law of the member states is not, however, enforced by judicial review as in the United States. As has been rightly pointed out, "The power [to review member states law] is indirect because the European Court cannot declare Member State legislation invalid: all it can do is declare that in enacting or maintaining in force the measure, the Member States has *failed to fulfil an obligation* under the treaty". This is not quite the same thing as a direct power of judicial review, although it comes very close to it since the offending Member State is obliged by the Treaty to take the necessary measures to comply with the judgment of the Court of Justice. See HARTLEY (1986:238).

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the distribution of competencies between the community and the member states, since community law is supreme only in the field of competencies which the Treaty assigns to the community. This last point implies important consequences for the issue of human rights in community law. For a proper understanding of these consequences it is necessary to briefly comment some points of the general relation between community law and member states law.

First, supremacy of community law will apply in all the fields in which community law is competent. In those fields, community law will hold the position of a higher law, even beyond domestic constitutions. The supremacy of community law does not imply, however, that member states, in one way or another, cannot be involved in a field about which the community is competent. On the contrary, the community system is based on cooperation between the community organs and the member states. In addition, the community lacks a public administration which would be in charge of the implementation of community policies alongside the member states of the community. Therefore, the public administration of the member states is also called upon to implement community policies. In all these situations, supremacy means that either a member state piece of law or a member state administrative act which is declared incompatible with community law by a domestic court<sup>494</sup> cannot be enforced. In the fields lying outside the competencies of the community, however, supremacy will not apply and, as a consequence, the law of the member state cannot be reviewed by the European Court of Justice.

In which areas is community law supreme? The answer is that supremacy applies in all those areas covered by the Treaty, but this answer does not have clear and foreseeable consequences. Community competencies are continually expanding, thanks to a broad interpretation of the Treaty and, in the final analysis, it is for the European

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<sup>494</sup> There is no Community judicial order separate from the judiciary of the member states. Therefore the cooperation of the member states courts is equally essential for the application of community law: "The European Court is the only Community Court: there is no equivalent to the United States federal district courts or the Canadian federal Court. The original jurisdiction of the European Court is almost entirely concerned with actions of the Commission against a member State. There is nothing analogous to American diversity jurisdiction. Generally speaking, actions brought under Community Law, even if between citizens in different Member States, must be brought in the Member States courts." (HARTLEY, 1986:241). The situation has remain unchanged with the establishment of a Community Court of First Instance.

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Court to decide on the nature of a community competence under the treaty<sup>495</sup>. In practice, whenever a member state law or member state action is alleged to be incompatible with community law, the issue of competence of the community is rarely addressed. The very existence of a community law provision under which incompatibility with the state measure can be claimed, implies in practice a community competence.

Theoretical as they may be, however, the boundaries of community law competencies must be taken into account for a proper understanding of the relationship between community law and the law of the member states as far as human rights are concerned. Moreover, human rights are not easily located in a precise place under this description. This is due to the *sui generis* position that human rights protection holds in community law: since there is no Bill of Rights in the Treaty, the right conclusion as to this point is that protection of fundamental rights is not a field of competence of the community. Nevertheless, and as a result of the process studied in section (2), the European Court has declared human rights to be covered by the general principles of community law. The question is, then, to what extent this doctrine allows the Court to consider human rights protection a competence of the community, and therefore, to review member state action against it. To date, the European Court has applied community human rights standard to community action, but, until now, the test has not been applied to state action<sup>496</sup>.

However, it must be pointed out that the question of the application of community standards of human rights to state action is in no way posed when the state action concerned is considered by the European Court to fall directly under its jurisdiction. This happens in the two following cases: first, when the state action allegedly violates a community provision which itself embodies a human right. In this case, the issue at hand would be the violation of a positive provision of community law and supremacy doctrine will apply. Obviously, an express provision of the treaty or of secondary community law

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**495** In addition, the doctrine of implied powers, grounded on Article 235 EEC, has been applied to a certain extent by the ECJ. See WEILER (1985:125 ff)

**496** Another important difference from the federal point of view: " (...) in contrast to the position in the United States and Canada, however, the Community doctrine of fundamental rights applies only to Community institutions. So far, the European Court has made no attempt to apply it to the Member States." (HARTLEY, 1986:244)

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is needed for this<sup>497</sup>. As has been discussed above, positive community law provides very few possibilities as to this regard. Second, when the state is acting in its capacity of a community element, it is implementing a community policy. In this case, the state would be considered as a community agent, and therefore the human rights test would not be, properly speaking, applied to state action but to community action implemented by a member state<sup>498</sup>.

The application of community standards of human rights to state action other than those included in the two above mentioned cases, has been called *incorporation*. As has been seen, the term *incorporation* comes from a similar process in the United States, by which the Federal Bill of Rights was also applied to the states and not only to the Federal Administration<sup>499</sup>. As far as Community law is concerned, *incorporation* can therefore be defined as the process by which the European Court would review state action other than that implementing a community policy on the sole grounds of a violation of human rights as a general principle of community law, without any other express provision of the treaty being taken into account.

In the case-law of the European Court, a first step towards incorporation seemed to be taken in the *Rutili* case<sup>500</sup>: an Italian citizen, Roland Rutili, had received from France a residence permit subject, due to his trade union activity, to a prohibition of residence in certain French departments. He took the case before a French Court

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**497** Therefore, it can be said that human rights impose restrictions not only on the Community institutions, but on member states too, but only " (...) inasmuch as infringement of them would constitute interference with rights protected by Community Law" (PESCATORE, 1981:305). The clearest statement as to this point from a community organ is a written reply to a question on the issue put by M Vie (cf. OJ No C268 of 8 October 1984) reported by SCHERMES (1987:38): "The respect of fundamental rights by authorities other than the European institutions is not in general a matter of Community Law. Should a fundamental right be violated by a Member State, the Community Institutions would be able to intervene only if the violation were at the same time a specific violation of Community law (...)".

**498** In other words, "The Court of Justice can review only those acts of the member States which they perform in their capacity as elements of the Communities, that is, the acts which stem from their obligations under Community law and which therefore for part of Community law to some degree." (SCHERMES, 1987:250).

**499** On *incorporation* in the United States, see *supra* chapter III.

**500** Roland Rutili vs French Minister of the interior, case 36/75, preliminary ruling of 28 October 1975, in *Common Market Law Reports* [1976] p. 156.

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alleging a violation of the freedom of movement of workers guaranteed by Article 48 EEC and the question was referred to the European Court. The French government had grounded the restrictions to the freedom of movement imposed on Rutili in Article 48(3) EEC, which allows the member states to limit freedom of movement of workers on the ground of, *inter alia*, public policy and public security. The Court then had to rule on the extent to which it was for the member states to interpret a derogation allowed by the Treaty to a community provision; the Court held that the limitations imposed by the Treaty to the power of the member states to interpret Article 48(3) were "a specific manifestation" of the more general principle embodied in the ECHR according to which restriction of fundamental human rights were allowed only inasmuch as they were "necessary in a democratic society"<sup>501</sup>. Since the French action did not fulfil this requirement, it was declared contrary to community law. It must be noted that the French government was not here acting in its capacity as a community agent, but, rather, implementing its own policy on public security; therefore, *Rutili* seemed then to imply that the Court would be able to review state action, even if did not violate any express provision of community law, in the face on of the general principles of law by which human rights protection was granted in the community, in just the same way as the general principles of law had been already applied as a higher law to community action<sup>502</sup>.

However, other decisions of the Court eventually made the otherwise clear statement of *Rutili* seem to be overruled. This seemed to happen in the *Cinetheque* case<sup>503</sup>. The Court had to rule whether French legislation establishing a mandatory

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501 Paragraph 32 of the judgment. The Court expressly quoted the clause of "necessary in a democratic society" as a requirement to restrict some of the rights guaranteed by the ECHR, namely the right to privacy and family life, the freedom of thought and of religion, the freedom of expression, the freedom of peaceful assembly and the freedom to choose a residence. On the clause of "necessary in a democratic society" in the Convention system, see *supra* Chapter I.

502 Although stressing that the key recital of *Rutili* as to this point was in an *obiter dictum*, WEILER (1986:1139) accordingly states: "(..) could this higher law also become a source for adjudicating a national concept which did not violate the specific provisions of Community law? This would be the effect of incorporation (..) the Court seemed to be ending towards such a step."

503 *Cinetheque S.A. and others v. Federation Nationale des Cinemas Français*, cases 60-61/84, preliminary ruling of the European Court of Justice of 11 July 1985, in *Common Market Law Reports* [1986] p.365

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period of time between the release of a motion picture for showing in cinemas and its subsequent release in video cassettes was a violation of the free movement of goods protected by Article 30 EEC<sup>504</sup>. What is now of interest is that a violation of Article 10 ECHR, which embodies freedom of speech, had also been alleged and the Court ruled on this point that it had no competence for reviewing such compatibility<sup>505</sup>. Nonetheless, the door for community review of state action seemed to be opened again one year later in the *Kipgen* case<sup>506</sup>. The facts of the case are now of secondary importance: all that needs to be said is that the Court had to rule on the prohibition of discrimination embodied in Article 40(3) EEC. Again, as in *Rutili*, the Court ruled that the principle was "a merely specification of the general principle of equality which is one of the fundamental principles of community law"<sup>507</sup>.

Although at a first glance, the extent to which the Court is likely to review state action against human rights can be seen as a mere matter of judicial activism, the key legal distinction in these recent cases is still whether the state is acting as in its capacity as a community element or not<sup>508</sup>. Therefore, it has been emphasized that *Cinetheque* and *Kipgen* involved different situations: according to the European Court, the facts in

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**504** The Court answered this question in the negative and construed Article 30 EEC as not applicable to this kind of legislation.

**505** "Although it is true that it is the duty of this court to ensure observance of fundamental rights in the field of Community law, it has no power to examine the compatibility with the European Convention of national legislation which concerns, as in this case, an area which falls within the jurisdiction of the national legislator", *Cinetheque* case, *cit*, paragraph 26. According to CLAPHAM (1991:037), *Cinetheque* in practice reduced the scope of *Rutili*, and as a result the review which was possible in the former case under Article 48(3) EEC could not be applied in the latter to Article 30 EEC.

**506** *Marthe Kipgen and others vs Secetaire d'Etat a l'Agriculture et a la Viticulture*, cases 201-202/85, preliminary ruling of the European Court of Justice, of 25 November 1986, in *Common Market Law Reports* [1988] p. 151.

**507** *Kipgen* case, *cit*, paragraph 9

**508** "To what extent does a breach of the general principles of law, such as a violation of human rights, constitute a breach of an obligation under Community law? In this case it is essential to distinguish in what capacity the Member states has committed the breach, If it is its capacity as an individual and independent state, then the Community institutions cannot be involved. The fact that the Community accept certain principles of law as binding in the performance of Community functions, does not legally oblige the Member states to accept the same principles in the exercise of other functions. Nor does it entitle the Community institutions to interfere with their tasks of their Member states." (SCHERMES, 1987:261)

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*Cinetheque* concerned a state measure which falls "within the jurisdiction of the national legislation"<sup>509</sup>, while in *Kipgen* the state measure reviewed was a implementation of a community policy<sup>510</sup>. It clearly follows that each decision concerned a different type of state action. However, in the same paragraph of the *Cinetheque* judgment in which the Court rejected reviewing compatibility with the ECHR of the French law, the Court admitted that it was its duty to "ensure observance of fundamental rights *in the field* of community law"<sup>511</sup>. In so doing, the Court seemed to delimit a third type of state action, neither the *Kipgen*-type nor the *Cinetheque*-type, which would eventually be subject to review against community human rights standards<sup>512</sup>.

There is no a precise way in which to interpret what "in the field of community law" exactly means. Broadly interpreted, it may mean that all kinds of state action except those in which the state has exclusive jurisdiction should be reviewed against community standards on human rights. This would include state measures such as those in *Cinetheque*, precisely the case in which the Court stated this rule, and in which review against human rights was rejected. On the other hand, a narrow interpretation, would interpret the phrase "in the field of community law" as meaning "in the field of *exclusive competence* of community law", which would leave outside the Court control state measures already reviewed against human rights in the Court case-law, for instance that of the *Kipgen* case<sup>513</sup>. It is clear that neither of these two interpretations lead to

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<sup>509</sup> *Cinetheque* case, cit, paragraph 26.

<sup>510</sup> The European Court held in *Kipgen* that Article 40(3) EEC "covers all measures relating to the common organisation of agricultural markets, irrespective of the authority which lays them down" (paragraph 8).

<sup>511</sup> *Cinetheque* case, cit, paragraph 26 [emphasis added]

<sup>512</sup> "(..) What the Court seems to be saying is that there is a difference between, on the one hand, a member State pursuing social or even economic policies which in themselves are not within an area of Community policy although they may be reviewed for any adverse effect they may have on Community rights, and on the other hand, a member State, as in this case, really administering what is a part of the Community on Agricultural Policy" WEILER, J. (1989) "The European Court at a Crossroads: Community Human Rights and member State Action" in CAPOTORTI, F. e.a. (eds) *Du droit international au droit de l'integration*, Baden-Baden:NomosVerlag pp. 821-42, at 826]

<sup>513</sup> See WEILER, Joseph (1989) "The European Court at a Crossroads: Community Human Rights and member State Action" in CAPOTORTI, Francesco, e.a. (eds) *Du droit international au droit de l'integration*, Baden-Baden:NomosVerlag pages 821-42 at 27. Besides, it is true that an

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consistent consequences.

A more reliable interpretation of the "*Cinetheque* formula"<sup>514</sup>, however, still makes the key distinction between the distribution of competencies between the member states and the community but, rather than the strict concept of competence, a wider concept of *areas of competence* is here applied. Accordingly, the cases between *Cinetheque* and *Kipgen* would cover every state action in which, although a community policy is not implemented, an area of predominant interest for the community is affected. These would be those areas in which the relationship between community law and national law is established with a pre-emption, rather than a supremacy, clause<sup>515</sup>. However, to the extent to which there may not exist any positive community provision covering these areas, state action in this *field* of community law may not be effectively pre-empted, but, rather, only *pre-emptible*, in the future, by community law. It is proposed, then, that these *pre-emptible areas*, be covered by human rights review also<sup>516</sup>. By this reasoning, a huge number of state measures which may lie in such a *field* of community law would be subject to review against community human rights standards<sup>517</sup>. This seems to be the most extensive interpretation which can to date be

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area of exclusive competence of the community allows state action, so, under this point of view, the narrow interpretation of the clause "in the field" would not raise any problem.

514 WEILER (1989:824).

515 The difference between supremacy and pre-emption means that "In supremacy type situations, there is no question about the competence of the Member State to operate in a field - the only question being whether the national measure violates a Community provision. In pre-emption type situations, even in the absence of a positive Community measure which is violated, the Member State action is prohibited (..) Supremacy and pre-emption fulfil different functions. The former preserves the integrity and uniformity of positive Community law. The latter is in effect an inducement to Community policy making." (WEILER, 1989:828-29)

516 "There are subject-matters which are *predominantly* within an area which comes under Community jurisdiction, even if incidental member State action is not always barred. In these cases, it is submitted, the Court will have the power to review State action for violation of Community human rights. There are, by contrast, areas which are predominantly within the jurisdiction of the Member States, even though incidental Community action, or control, is not precluded. These situations will be outside the Klensch [i.e. *Kipgen*] class." (WEILER, 1989:827).

517 In the words of CLAPHAM (1991:040), "This is the real crux of the matter - when the action complained of does not depend on a community provision yet may be covered by the general field of Community Law". This kind of state action is considered under a five groups classification scheme: human rights at the national level affected by state action operating outside the scope of application of community law; human rights at the national level in the field of application of

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given to the existing case-law of the European Court on the issue<sup>518</sup>.

On the other hand, the review against community human rights standards of state action in *pre-emptible* areas would still leave outside areas of exclusive jurisdiction of the member states in which, nonetheless, community fundamental rights may yet be touched. This is the case of national measures which, on the grounds of an allowed restriction to a community freedom (for instance, public policy) may derogate from one of the community liberties (for instance, freedom of movement of workers). It has also been proposed that these state measures should be subject to review against community human rights standards<sup>519</sup>. This would mean that the line started in *Rutili* is expanded to those cases in which the state measure can only with difficulty be seen as acting "in the field of community law". The reasons for this further incorporation of state action, however, seem to be sound: not only would community freedoms otherwise be endangered<sup>520</sup>, but, since these measures are already taken before the European Court to be reviewed under a legitimate community derogation, the European Court, in also rejecting to review the measure under human rights standard, would in practice be sanctioning a violation of human rights<sup>521</sup>. In any case, this last group of state action

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community law; human rights to be protected against action by community institutions or agents; human rights which might be granted or instigated by the Community and human rights of persons in third countries. See CLAPHAM (1991:031).

**518** The ground is that "Neither the Community, nor its Court of Justice, should ever accept that within an area of positive Community policy, through Member State action, even if otherwise tolerated, the individual should be the subject of conduct which violates general principles of law and standards of human rights which are considered unacceptable within the EC legal order (..) (WEILER, 1989:830).

**519** This is the *but/for condition* of WEILER: "only in those cases where but for a recognised Community exception to a fundamental Community prohibition, a Member State measure would be in violation of Community law, should the Court also examine the compatibility of the national measure with Community human rights." (WEILER, 1989:830)

**520** Although it could be equally argued that any state measure or any state violation of human rights could also endanger community liberties. As WEILER himself admits, freedom of movement of workers can be threatened by any state measure which can simply affect freedom of persons: workers would not like to live in a member state where human rights are not protected. Broadening this argument, moreover, every state action, even those under the state exclusive jurisdiction, should be reviewed under community human rights standard. See WEILER (1989:839-40)

**521** "By refusing to scrutinize the derogations in the *but/for* situation for violation of human rights, while insisting on scrutinizing them for, say, proportionality, is not the Court signalling that all the interests is in the economic integrity of the Common Market and not the individuals that make it

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being *incorporated* or not, any remaining state action which does not operate in the field of community law, nor derogate from any community provision, will be situated outside the scope of community standards of human rights<sup>522</sup>.

**2. Prospects for a second incorporation: the application of community standards of human rights by domestic courts.**

Briefly summarizing the above section, it can be said that, first, the European Court of Justice has *incorporated* state action under the review of community standards of human rights only to the extent to which the concerned state action is an implementation of a community policy; second, that, nonetheless, the existing case-law of the European Court can be extensively interpreted in order to also include as state action subject to community review all national measures *in the field* of community law; third, that, moreover, it might be argued that the community review should also be applied to whatever state action derogating from a community liberty, regardless of the fact that it operates or not *in the field* of community law (although this seems not to be the trend of the existing case-law, even if interpreted extensively); and, finally, that, in any case, there would be always a huge number of national measures not covered in any sense by the community standard of protection of human rights.

In the above section, the role played by the European Court of Justice in each of these cases was described. The purpose of this section is to analyze what would be the behaviour of domestic courts if they were to decide similar cases to the above-mentioned ones, and whether domestic standards of protection of human rights should be construed relying on community law or not.

In the introduction to this chapter, the application to domestic cases of community standards of human rights by domestic courts was called "second incorporation". In order to pose some hypotheses about the prospects for this *second incorporation*, as far as domestic law governed cases are concerned, it is useful to make a distinction

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up? Are not, in this fashion, individuals really turned into factors of production?" (WEILER, 1989:841).

<sup>522</sup> This would cover national law *outside the field* of Community law. Clearly, human rights violated by this state action would always be reviewable under domestic remedies and under the ECHR.

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between, on the one hand, the types of state action to which the community standard of human rights would be applicable by the European Court (either *implementing-type* or *in the field-type* cases) and, on the other hand, state action which will not be under any circumstances reviewable by the European Court against human rights standards (at present, this includes includes *but/for-type* cases and state action *outside the field* of community law). In each of these two groups of cases, some hypothesis about the standard that domestic courts should apply will now be briefly posed.

The first group of cases would include all the cases in which the state action would be reviewable by the European Court against the community standard on human rights. This would include, for instance, *Stauder-type*, *Rutili-type* or *Hauer-type* cases. In all these cases, however, it could very well be that domestic law also provides a legal basis for the protection of the fundamental rights involved. In this way, the right to human dignity (as in *Stauder*), the right to circulate and to live along the country (as in *Rutili*), or the right to private property or to professional liberty (as in *Hauer*) are usually covered by domestic constitutional provisions. According to the way in which the European standard is construed by the European Court, it may equally be that the domestic and the European standard of protection of that right were at different levels. Under these circumstances, then, the question would be which standard should be applied by domestic courts.

Arguing about the European Convention on Human Rights and the United States systems, it was proposed in Chapters I to III that domestic courts should apply the *higher* standard of protection, it being either the domestic or the transnational (or federal) one<sup>523</sup>. In the European Community system, however, the situation seems to be different: since a community policy is involved, in all these cases domestic courts should in principle, according to the supremacy of community law, apply the community standard as a part of the community law, the community standard being either higher or lower than the domestic one<sup>524</sup>.

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**523** Strictly speaking, this applies only to domestic courts in member states in which the Convention has been incorporated into domestic law. See *supra*, Chapter I.

**524** Even if the application of the community standard implies the inapplication of a positive community provision? The question is slightly different from that answered first in the affirmative and later in the negative during the domestic *rebellion*: now it is not a question of supremacy, but

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It must be noted, however, that, in such a situation, there will be two different standards of protection *on the same right*, the application of each depending upon the fact that the right is exercised in a community-related or in a domestic-related field. Would the application of the community standard to community-related state actions, regardless of the domestic standard, be consistent with European integration process? If European integration is to be of a federal type, comparative research suggests that the coexistence of two different standards is compatible with the federal organization, provided that the related field is a federal competence, or, as this concept was construed in section (2), is *in the field of federal competence*<sup>525</sup>.

This would apply either to a community lower-than-domestic standard or to a community higher-than-domestic standard. Although from the strictly legal point of view, both situations deserve the same legal treatment<sup>526</sup>, certainly a domestic application of a community *lower* standard would be politically more debatable. Let us imagine a domestic construction of the right to not to be subject to a non proportional punishment as if the forfeit of a previous deposit regardless of the behaviour of the plaintiff, were a violation of the right (the European Court having ruled in the *Handelsgesellschaft* case that this is not a violation) or a domestic construction of the right to private property or to professional liberty as if the banning of planting vines were a violation to the right (the European Court having ruled that this is not a violation in the *Hauer* case). It would be hard for a domestic court to apply a community lower standard only due to the fact that the field is a competence of the community.

However, the only possible escape from the application of the community standard (and the domestic court would very likely use it) would be to refer the question

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a matter of the model of judicial review established by the treaty. In practice, such a question would probably be referred to the European Court, but the domestic court could equally apply the community standard, and, therefore, leave the community positive provision in question unapplied, if the domestic court considers that, relying on a previous rule given by the European Court, the meaning to be given to the provision has been clearly established. On the problem of the doctrine of *acte clair* and its relationship with the obligation for some domestic courts to refer a question to the European Court, see HARTLEY (1988).

525 On how the problem is solved in the United States system, see, *supra*, Chapter III.

526 It has been rightly pointed out that a community standard above national ones should not be seen as less disturbing as far as uniformity of community law is concerned, than a community standard below the national standard. See WEILER (1986:1124).

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to the European Court. Certainly, it is also very probable that the European Court will manage to construe a new community standard in such a way that it would not be seen as incompatible with the domestic one; it may equally be, however, that the solution reached by the European Court implies the restriction of the right in a way in which domestic standards would not allow<sup>527</sup>. This is not to say that equivalence in human rights protection should not be seen as a "requirement of structural homogeneity in the community", as has been put forward<sup>528</sup>. However, under these circumstances, a domestic application of a lower community standard to a community-related case implies that, since the related field falls under the community competence, restoring the "structural homogeneity" would be a task for the European Court.

A second category of state action will include all national measures outside the scope of community law, that is, state action which, to date, is not reviewable by the European Court of Justice against community standards on human rights. According to the present situation, domestic courts in these strictly domestic cases would not have to apply the community standard: since the field is not now a community competence, supremacy of community law does not apply.

Let us imagine, however, a domestic court having to rule whether public identification by name in order to receive a state social aid not covered by community law violates a constitutional right to human dignity, or having to decide whether deportation of a trade union activist on the grounds of public security violates a domestic right to circulate over the territory of the state. Would this court have not be tempted to take into account the community standards as established in *Stauder* or in *Rutili*, to decide the domestic case? The community standard, as a result, could provide in these cases an indirect integrative effect: as has been said, domestic courts, compelled to apply a community lower standard of protection in a community-related case, would very likely refer the question to the European Court. In the same way, compelled to apply a domestic lower standard, domestic courts might well try to apply the community higher

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527 On how the community standard is construed, see *supra* section (1)

528 "The requirement of equivalence in the area of fundamental rights is therefore but a specific application of the general requirement of structural homogeneity or at least structural concurrence as between the Community legal order and the liberal-democratic legal orders of the Member States" (DAUSES, 1985:400).

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standard to the domestic case.

The idea of a *dialectical development*<sup>529</sup> as a method for the *second* incorporation of community standards into domestic cases, however, seems to be more a question of judicial policy than of strictly legal problems. From the formal point of view, the application of the domestic standards, even lower than those of the community, to domestic cases, would simply be the logical consequence of the federal argument posed below: in the same way that a community standard, lower or higher than the domestic one, would fully apply to community field matters, the domestic standard, higher or lower than the community one, would fully apply to domestic matters.

Further, the tendency of domestic courts to apply community higher standard to domestic cases cannot be claimed to be an entirely established fact<sup>530</sup>. Moreover, some existing case-law would support the opposite idea<sup>531</sup>. In any case, comparative research suggests that this would depend on a number of factors, among them, time, place, rights<sup>532</sup>, and, above all, judges involved<sup>533</sup>.

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529 "the Community legal order, as an autonomous order, is influenced by common standards of fundamental rights, as are the municipal legal orders of its member states. On the other hand, it is possible to foresee a dialectic development by which the legal order of a Member State will be influenced by the jurisprudence of the Court of the Community." (FROWEIN, 1986:302). It has been rightly pointed out that this would be in reality a feed-back process: "Since the Luxembourg Court often develops its standards by comparing Member State rules, member state courts may in turn be influenced in their jurisprudence on Community matters by this common standard" [FROWEIN, J. A., SCHULHOFER, S., SHAPIRO, M. (1986) "The protection of Fundamental Human Rights as a vehicle of integration, 'I) Introduction' and 'V) Conclusion'" in *Integration through law.. cit*, vol 1 book 3 at 235].

530 "It remains to be analyzed in detail to what extent the relevant case-law has led to increased awareness of fundamental rights not only within the Community institutions but also - as a result of feed back - in those Member States where less importance is attached to such rights" (DAUSES, 1985:419)

531 See a review in CLAPHAM, 1991:037-45).

532 "(..) throughout of the integrative process, the level of applicable minimum human rights standards may vary considerably from time to time, from place to place and from one class of rights to another", (FROWEIN e.a., 1986:232). Rights in which a positive action of the state is involved seems to have a more integrative potential (see FROWEIN e.a., 1986:243-44) .

533 Learning from the United States experience, it has been said that "in short, it depends on the commitment to human rights and to integration of judges in high courts. (FROWEIN e.a., 1986:341). A specific study on the European Community system has measured one of these variables, commitment with integration, analyzing the reference of questions by the domestic

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Paradoxically, however, the *dialectical development* could also be desired in the opposite way, that is through the application of the community standard to domestic cases *when the community standard is lower*. As has been said, the application of a community lower standard to a community-related case would be justified on the grounds of the supremacy of community law; on the other hand, the application of a community higher standard to a domestic case, although not compulsory from the strictly legal point of view, can without difficulty be seen as a positive effect of European legal integration: it being an *in bonus* construction of a domestic standard, domestic courts could probably argue on the *favor libertatis* principle or any other domestic source of interpretation by which domestic standard could be increased. Unlike these cases, the application of a *lower* community standard to a case in which a community policy is *not* involved can be described as a clear *equivalent* analysis leading to a lower protection of a constitutional right.

Does this last possibility of an application of community law to domestic cases lowering the standard of protection really exist? It is a question for a case-law study, whereas the purpose of this chapter is only to provide some comparative insights to the topic of the thesis. However, it seems that there effectively exists one kind of case in which this possibility clearly appears: the already reported *Cinetheque* case<sup>534</sup> illustrates the point. As has been said below, in *Cinetheque*, a French court had referred to the European Court the question on the compatibility of a state policy with Article 30 EEC and with Article 10 ECHR, and the European Court ruled that the national measure did not violate community rights. The Court added, however, that it had no competence

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courts to the European Court through the procedure of preliminary rulings as established in Article 177 EEC. In deciding whether to refer a question or not to the European Court, "the dilemma for the national judge is compounded by the legal tradition of the member state in which the judge operates (...) each time a judge is confronted with the issue of Community law, the decision to refer is a statement affirming the authority of the European Community, whereas a refusal to refer may be a rejection of that authority" VOLCANSEK, M.L. (1986) *Judicial politics in Europe*, N.Y.:Peter Lang, at 11]. To the extent to which these argument could be applied to the problem studied here, the relevant factors in the behaviour of national judges (which run from communications processes (language, clarity..) to socio-political or cultural matters, the judicial role as viewed by judges themselves or follow-up mechanisms) should also be taken into account. A somewhat optimistic statement concerning the willingness of the Spanish Tribunal Constitucional to contribute to this dialectical development can be seen in ALONSO (1989:281)

534 *Cinetheque* case, cases 60-61/84, *cit.*

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to rule on the alleged incompatibility of the state measure with the ECHR due to the fact that the measure in question failed "within the jurisdiction of the national legislator". It followed that the French Court, when definitively deciding the case, had to rule on its own understanding of Article 10 ECHR.

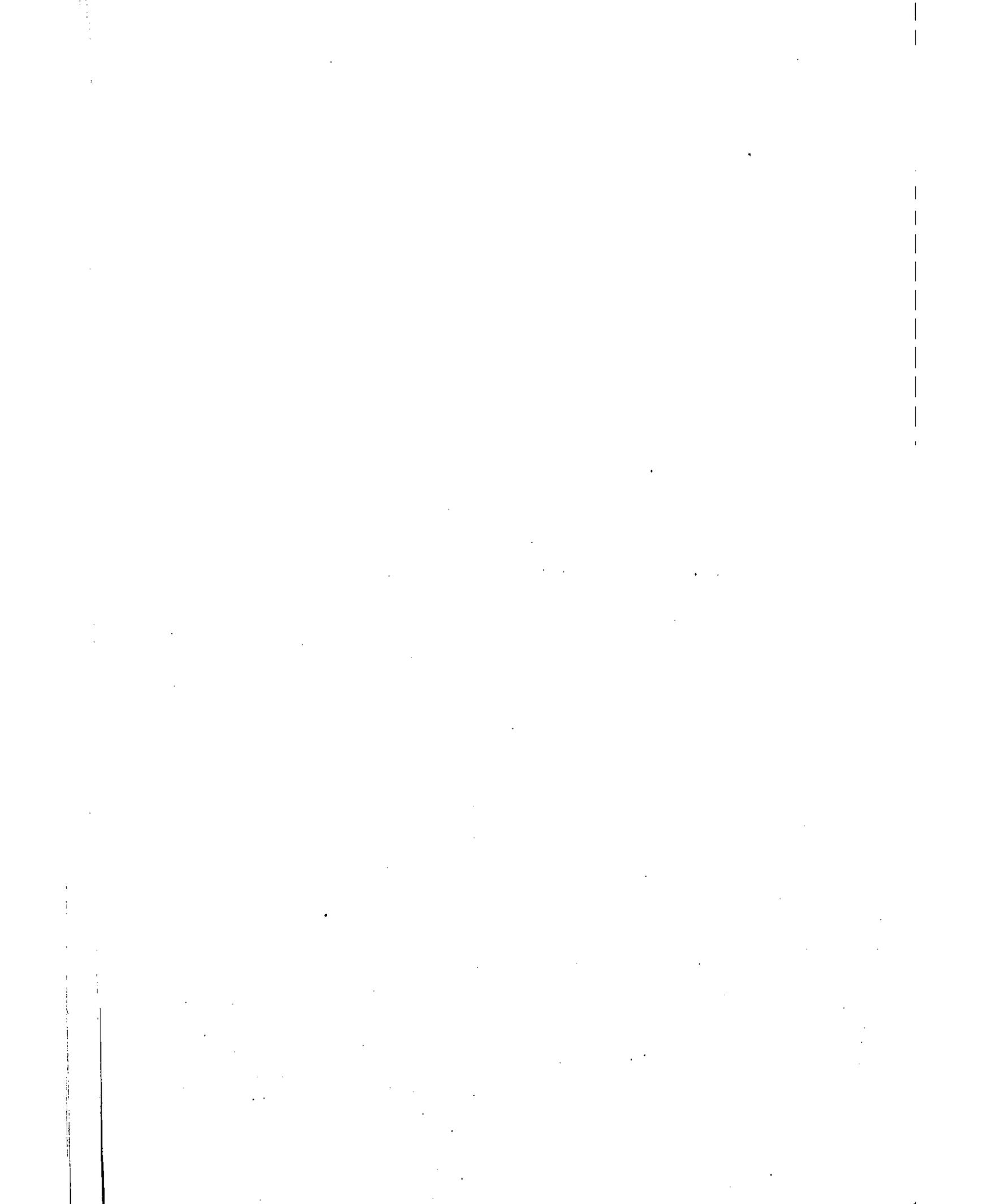
Let us imagine, however, that the European Court had not rejected reviewing the compliance with ECHR and, moreover, that it had ruled that the French measure did not violate the Convention. In this case, the European Court's ruling, as far as the European Convention is concerned, could not be seen as a fully applicable standard by the domestic court<sup>535</sup>: since *Cinetheque* was not a case of a state implementation of a community policy, but, rather, a measure covered by state competencies, it should still be for the national court to further elaborate the construction of Article 10 of the Convention, according to its own sources of interpretation<sup>536</sup>.

Learning from the domestic application of some decisions of the European Court of Human Rights, this could be a danger for a possible *equivalent* construction of domestic law based on decisions of the European Court of Justice, in the case that the *first incorporation* process is completed: if *Cinetheque*-type cases are to be reviewed by the European Court in the future, state action not implementing a community policy should also pass the domestic test on human rights.

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**535** Clearly, it would be a fully applicable standard if the Court had stated that the Convention had been violated.

**536** This was the opinion of the Advocate-general, sir Gordon SLYNN, in this case. After stating that, for the purposes of the case, freedom of speech could be seen as a part of Community law, and that, in his opinion, this freedom was not violated by the French measure, he added that "it is for the national court to decide whether the national measure in this particular case violates the Convention" (*Cinetheque* case, *cit.*, p. 379), what is, according to WEILER, a "perfect federal logic". His words: "Even on the assumption that the Advocate-General and the Commission are right in claiming the extension of Community standards to national legislation, if a national measure is to be found violative of the Community standard this would be dispositive and the national court should follow the ruling and hold it inapplicable. If a national measure 'passes' the Community test of human rights, it may still be possible for the national court, either applying the Convention or its own standard, to strike it down. It would of course be different if we were dealing with a question of validity of a Community measure. In these circumstances both 'passing' or 'failing' the Comm test would be dispositive for the referring national court" (WEILER, 1989:823).

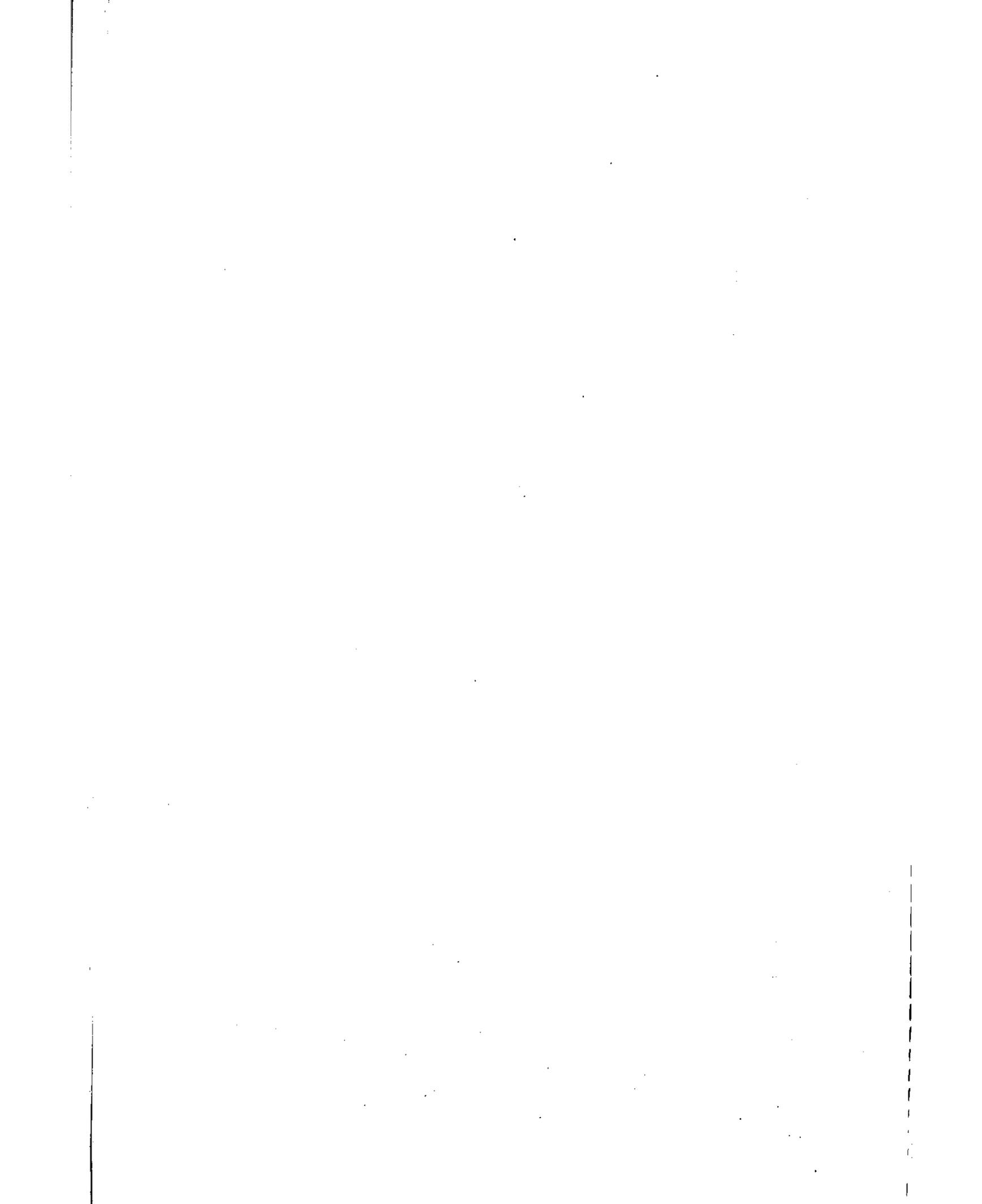


## **PART III**

### **CASE-STUDY:**

#### **THE CASE-LAW OF THE SPANISH CONSTITUTIONAL COURT ON THE RIGHT TO FREEDOM OF EXPRESSION.**

- V. Freedom of expression under the European Convention on Human Rights and under the Spanish Constitution.**
  
- VI. Legitimate Restrictions to the Freedom of Expression under the Stasbourg Test and under the Spanish Constitution.**
  
- VII. Restrictions to the Freedom of Expression for the protection of Morals and for maintaining the Authority and the Impartiality of the Judiciary.**
  
- VIII. Restrictions to the Freedom of Expression on the ground of the National Security and the Prevention of Disorder.**
  
- IX. Restrictions to the Freedom of Expression on the ground of the Reputation or Rights of Others.**



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**FREEDOM OF EXPRESSION UNDER THE EUROPEAN**  
**CONVENTION ON HUMAN RIGHTS AND UNDER THE**  
**SPANISH CONSTITUTION.**

**(1) THE SCOPE OF FREEDOM OF EXPRESSION. 1. Article 10 of the European Convention on Human Rights and Article 20 of the Spanish Constitution; 2. The Scope of Freedom of Expression under Article 10 ECHR and under Article 20 CE. (2) THE APPLICABILITY OF ARTICLE 10 ECHR AND ARTICLE 20 CE: SELECTED CASES. 1. The Right to professional secrecy of journalists and the Right to Rectification; 2. Broadcasting; 3. Commercial expression.**

**(1) THE SCOPE OF FREEDOM OF EXPRESSION.**

**1. Article 10 of the European Convention on Human Rights and Article 20 of the Spanish Constitution.**

The right to freedom of expression is recognised by Article 10 of the Convention in a very broad sense<sup>537</sup>. As is the case of other Convention provisions where substantive rights are laid down (i.e. Articles 7,8,9 and 11), Article 10 ECHR is divided into two sections, so that paragraph 1 embraces the right, while paragraph two contains the restrictions which can be placed on the exercise of the right without breaching paragraph 1. Article 10(1) ECHR states as follows:

"Every one has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises."

According to paragraph 2, however, not every "interference by public authority" can be said to constitute a violation of the right to freedom of expression. This paragraph lists the "interferences" which public authorities may impose in order to restrict freedom

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<sup>537</sup> On the freedom of expression, in general, and as a right protected by international law, see KORTHALS, W. F. (ed) (1992) *Information Law towards the 21st Century*, Deventer: Kluwer; ARTICLE 19 (1988) *Information Freedom and Censorship. The Article 19 world report*, Essex: Longmann, 1988; BARENDT, E. (1985) *Freedom of Speech*, Oxford: Clarendon Press; PINTO, R. (1984) *La liberté d'information et d'opinion en droit international*, Paris: Economica; PALADIN, L. (ED) (1979) *La libertà d'informazione*, Torino: UTET.

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of expression without violating the right protected thereby. This paragraph states as follows:

"The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interest of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary."

The meaning of both the paragraphs of Article 10 has been interpreted by the case-law of the Commission and the Court<sup>538</sup>. Indeed, a number of the most famous *causes celebres* of the Strasbourg bodies have had to deal with this matter. The main remarks of interpretation thereby developed will be studied below, confronted with the case-law of the Spanish *Tribunal Constitucional* on freedom of expression as a *constitutional* fundamental right in Spain as provided by the Spanish Constitution.

Like Article 10 ECHR, Article 20 CE embodies the right to freedom of expression and of information. This Article states as follows:

"1. The following rights are recognised and protected: a) The right to freely express and disseminate thoughts, ideas and opinions by word, in writing or by any other means of divulgation. b) The right to literary, artistic, scientific and technical production and creation. c) The right to professorial freedom. d) The right to freely communicate or receive truthful information by any means of dissemination whatsoever. The law shall regulate the right to invoke the clause of conscience and that of professional secrecy in the exercise of these freedoms"

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538 A general study of the freedom of expression under the Convention will not be made in this work. Article 10 ECHR will be studied only as far as its application by the European Court of Human Rights may be compared with the Spanish *Tribunal Constitucional* case-law. However, the most important questions posed by this Article of the Convention will be analyzed in the following Chapters. A general and up to date view on Article 10 ECHR may be seen in the paper presented by M.A. Essen to the Colloquium on "Freedom of Expression and the audio-visual revolution" held at the EUI, Florence, in 1989. See ESSEN, M.A. (1990) "La liberté d'expression dans la jurisprudence de la Cour Européenne des Droits de l'Homme" in CASSESE, A. AND CLAPHAM, A. (eds) (1990) *The transfrontier television as a Human Right*, Baden-Baden: NomosVerlag, pages 113-36. See also the (1988) *Proceedings to the Sixth International Colloquy about the European Convention on Human Rights*, Dordrecht: M. Nijhoof. The Colloquy, held in Seville in 1985, was dedicated to the freedoms of expression and information under the ECHR.

**(1) THE SCOPE OF THE FREEDOM OF EXPRESSION**  
**1. ARTICLE 10 ECHR AND ARTICLE 20 CE.**

This article has been characterised as a complex, intricate, even labyrinthine one<sup>539</sup>. Not only can paragraphs a) and b) be said to be an unnecessary duplicate. Paragraphs b) and c), too, add complexity since they embrace two other rights closely related to the rights to freedom of expression and information, one might even say rights included in its very essence; but they are recognised without the specifications that have been set forth in the latter cases<sup>540</sup>.

The rest of the article contains the guarantees for the protection of the said rights (paragraphs 2-5) and the restrictions that may apply to them (paragraph 4): constitutional guarantees applicable to freedom of expression and related rights protected by Article 20 CE are, in addition to the clause of conscience and that of professional secrecy comprised in paragraph 1, the following: any kind of prior censorship is banned [Article 20(2) CE]; media dependent upon the State or upon any public agency are to be controlled by Parliament, according to the law. This law shall guarantee access to such media "by significant social and political groups, respecting the pluralism of society and of the various languages of Spain" [Article 20(3) CE]; according to Article 20(5)CE, "the confiscation of publications and recordings and other media information may only be granted by virtue of a judicial order". Legitimate limits to freedom of expression are regulated in Article 20(4) CE, which provides "respect for the rights recognised in this

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**539** As with Article 10 ECHR, Article 20 CE will be studied in the following Chapters only to the extent to which its construction by the *Tribunal Constitucional* may be compared with the European Court's on Article 10 ECHR. The bibliography on Article 20 CE is lengthy. See, among the most recent works, JAEN M. (1992) *Libertad de expresión y delitos contra el honor*, Madrid, Colex; O'CALLAGHAN, X. (1991) *Libertad de expresión y sus límites honor, intimidad e imagen*, Madrid: EDERSA; MOLINERO, C. (1990) *Teoría y fuentes del derecho a la información*, Madrid: Civitas; HERRERO TEJEDOR, F. (1990) *Honor, intimidad y propia imagen*, Madrid: COLEX; MUÑOZ MACHADO, S. (1988) *Libertad de Prensa y procesos por difamación*, Barcelona: Ariel; SALVADOR, P. E.A. (1987) *Qué es difamar? Libelo contra la ley del libelo*, Madrid: Civitas; SAAVEDRA M. (1987) *La libertad de Expresión en el Estado de Derecho. Entre la utopía y la realidad*, Barcelona: Ariel; CARRILLO, M. (1987) *Los límites a la libertad de prensa en la Constitución española de 1978*, Barcelona: PPU; and ROYO J. (1987) *La protección del derecho a la propia imagen*, Madrid: Colex;

**540** Article 20 has been criticized because of its complexity and its lack of rigor, which, as has been said, may be due to the obsessions which can be found in the Spanish Constitutional process [See FERNANDEZ-MIRANDA CAMPOAMOR, A. (1984): "Comentario al artículo 20 apartados 1-3 y 5" in ALZAGA, O. (ed) *Comentarios a Las Leyes Políticas*, tomo 2 489-53 at 499; a summary of the parliamentary debates on this Article is to be found in pages 497-99].

## CHAPTER V

### FREEDOM OF EXPRESSION UNDER THE ECHR AND UNDER THE CE.

Title<sup>541</sup>, by the precepts of the laws implementing it, and especially by the right to honour, to privacy, to personal reputation and to the protection of youth and childhood".

At a first glance, Article 10 ECHR and Article 20 CE resemble each other in general: whereas Article 20 CE seems to cover more specific kinds of rights than Article 10 ECHR, which, however, may be included in a broad conception of freedom of expression. Moreover, as will be seen below, the TC, because it considers freedom of expression as an essential element of democracies, has given a "preferred position" to freedom of expression whenever public issues are involved, following the case-law of the European Court regarding this point. As well as this, restrictions allowed by the Spanish Constitution on freedom of expression are, as a general rule, covered by the different legitimate aims defined in paragraph 2 of article 10 of the Convention. Furthermore, the *Tribunal Constitucional* has sometimes directly quoted the Convention, and on other occasions it has applied it to interpret an express restriction on the right allowed by the Spanish Constitution itself.

#### 2. The Scope of Freedom of Expression under Article 10 ECHR and under Article 20 CE.

The first controversial aspect of a right to freedom of expression comes from the enormous variety of "expressions" which can in principle be included under the protection of a legal provision embodying freedom of expression. Moreover, Article 10 ECHR has on occasions been alleged before the Court to have been violated jointly with *other* rights recognised by the Convention and closely allied to freedom of speech<sup>542</sup>. Not all of these "expressions", however, are covered by Article 10 ECHR: The Court has

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541 Article 20 CE is included in Title One of the Constitution, "Concerning fundamental Rights and Duties", which covers from Article 10 to Article 55.

542 The following Articles of the Convention are usually alleged jointly with Article 10: Article 8 and Article 9, closely related since they embody respectively the right to privacy and the right to freedom of thought; Article 16, which allows restrictions on the political activities of aliens; and Article 14, which protects against discrimination; [See JACOBS (1975:151-57)]. It has been also pointed out that the Commission tends to bring together the freedom to hold opinions of Article 10 and the freedom of thought of Article 9 [see FAWCETT (1987:262)], two issues which, however, "can hardly be distinguished" [DIJK-HOOF (1984:310)]. The different approaches of Article 8 and Article 10, comes from the different aim which each Article has: "the aim of Article 8 is to protect privacy, and in this sense, to protect the private character of the means collected in Article 10 under the leading of expression information" (DIJK-HOOF, 1984:309).

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**2. THE SCOPE OF FREEDOM OF EXPRESSION UNDER THE ECHR AND THE CE**

already ruled, for instance, that expressions emitted under circumstances specifically covered by other rights guaranteed by the Convention are protected according to those provisions and not under Article 10 ECHR. This has been the case, for instance, of expressions emitted in the course of a public demonstration, in which Article 11 ECHR<sup>543</sup> applies as a result of the *lex specialis* principle<sup>544</sup>. The application to these kinds of expressions of another Article of the Convention, however, does not imply that freedom of expression will not be taken into account: the *special* provision is to be interpreted in the light of Article 10 ECHR, since its function, in this aspect, is to protect freedom of speech too<sup>545</sup>. In other cases, however, the protected right under which the case is approached does not allow freedom of expression to be considered at any extent, since the protection granted under the concerned Article of the Convention fully satisfies the complaint which the Court is dealing with. Therefore, the Court does not find it necessary to decide on the alleged breach of Article 10 ECHR. This has been the case, for instance, of a violation of the right to privacy by the interception of a prisoner's correspondence: given the separate breach of Article 8 ECHR, a separate consideration

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**543** Article 11 ECHR embodies the right to public demonstration. It states as follows: "(1) Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests. (2) No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interest of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the state."

**544** As established by the Court in the *Ezelin* case, ECtHR of 26 April 1991, *cft.* On the alleged violation of Article 10 ECHR, the Court ruled in *Ezelin*, in agreement with the Commission report, that "In the circumstances of the case, this provision [Article 10 ECHR] is to be regarded as a *lex generalis* in relation to Article 11, a *lex specialis*, so that it is unnecessary to take it in consideration separately" (*Ezelin* case. ECtHR of 26 April 1991, *cft.*, paragraph 35)

**545** According to the Court, "Notwithstanding its autonomous role and particular sphere of application, Article 11 must, in the present case, also be considered in the light of Article 10", since "the protection of personal opinions, secured by Article 10, is one of the objectives of freedom of peaceful assembly as enshrined in Article 11" (*Ezelin* case, ECtHR of 26 April 1991, *cft.*, paragraph 37). The Court relied in the previously decided case of *Young, James and Webster* [*Young, James and Webster v. the United Kingdom*, Judgment of the ECtHR of 13 August 1981 in *Publications of the European Court of Human Rights* series A, n. 98].

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of Article 10 ECHR was not seen as necessary<sup>546</sup>.

As far as their applicability is concerned, Article 10 ECHR and Article 20 CE have not got exactly the same scope. Each of them may be applied to slightly different cases, with consequences on both<sup>547</sup> sides: on the one hand, Article 20 CE is applicable to cases which would not be covered by Article 10 ECHR; on the other hand, cases covered by Article 10 ECHR may remain outside Article 20 CE, since these cases may be covered by *other* Articles of the Spanish Constitution.

This double-edged difference between the Convention and the Spanish Constitution as to the scope of provisions covering freedom of speech comes from the fact that Article 20 CE embodies a high number of fundamental rights which the Spanish Constitution attaches to freedom of speech and which are not in the wording of Article 10 ECHR. Some of them, however, such as the freedom of academic speech or the right to scientific production and creation<sup>548</sup>, have been construed, or may be easily construed, by the Court's case-law. Others, on the contrary, would hardly be found in Article 10 ECHR. This is the case, for instance, of the right to professional secrecy of journalists or the right to rectification<sup>549</sup>. Cases covering these rights, therefore, would be approached by the *Tribunal Constitucional* under Article 20 CE, although they may remain outside the protection of Article 10 ECHR in a Court's ruling.

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<sup>546</sup> As decided in *Mccallum v. the United Kingdom*, Judgment of the EctHR of 30 August 1990 in *Publications of the European Court of Human Rights* series A, n. 183. Article 8(1) ECHR protects everyone's "right to respect for his private and family life, his home and his correspondence".

<sup>547</sup> Although, on occasions, the *Tribunal Constitucional* has stated in *obiter dicta* that both Articles, that of the Convention and that of the Constitution, have exactly the same meaning, pointing out that "el contenido de los dos textos que encabezan este grupo normativo [Article 10 ECHR and Article 20 CE] coinciden sustancialmente, sin que pueda apreciarse la menor contradicción entre ellos" (*Punt Diari*, case, STC 232/91, *clt.*, fundamento jurídico 1).

<sup>548</sup> Each of them embodied in Article 20(1)(c) and Article 20(1)(b) CE respectively. As to the freedom of scientific creation and production, see the *Ley de la Ciencia* case, [*Sentencia del Tribunal Constitucional* 90/92 of 15 March 1992, in *Boletín de Jurisprudencia Constitucional* 135, pages 20-30, fundamento jurídico 5], in which the *Tribunal Constitucional* stated that the right to scientific freedom must be respected when the attribution of competencies on the scientific field to the Autonomous Communities.

<sup>549</sup> Both of them have been construed by the *Tribunal Constitucional* as additional fundamental rights also protected by Article 20 CE. See *infra* this Chapter.

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As has already been said, on the other hand, cases approached by the Court under Article 10 ECHR may be construed by the *Tribunal Constitucional* as an exercise of another constitutional right: picketing, for instance, would be analyzed by the *Tribunal Constitucional* under Article 28(2) CE which embodies the right to strike. Since such a right is not embodied in the Convention, cases of freedom of speech while picketing will be approached by the Court as Article 10 ECHR cases, and not, as is the case of the *Tribunal Constitucional*, as a freedom to strike case taken in the light of freedom of speech provisions<sup>550</sup>.

Other cases in which the applicability of Article 10 ECHR has been at the heart of the case, however, have been much more controversial. This may happen in cases in which the alleged violation of freedom of expression has been construed by the Court as concerning a right which is *not* protected by the Convention system, or when the case is brought under a Convention's Article which has *not*, according to the Court, been violated.

The right to access to public service illustrates the different scope that the Convention and the Spanish Constitution may have regarding this respect. The right to access to public service is specially protected by Article 23(2) CE. Although the *Tribunal Constitucional* has stated that it is for the Parliament to broadly define the requirements to access<sup>551</sup>, restriction to access of public service due to the exercise of freedom of expression would surely be taken by the *Tribunal Constitucional* as an Article 23 case, taken in the light of Article 20. The same may not be said for the Court: In both the

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**550** As in the *Piquete de Jodar* case, [Sentencia del *Tribunal Constitucional* 254/88 of 21 december of 1988, in *Boletín de Jurisprudencia Constitucional* 93, pages 82-86, fundamento jurídico 3]. Freedom of speech while exercising another fundamental right has allowed the *Tribunal Constitucional* to reinforce the protection of the latter. The *Tribunal Constitucional* has defined trade unions representatives, for instance, as qualified speakers, since freedom of speech is taken in these cases in the light of the right to freely join a trade union.

**551** According to a constant line of cases, the *Tribunal Constitucional* has construed the right to access to public service as "un derecho de configuración legal", that is, a right whose regulation in detail is for statutory law, which has only to respect the principle of equal treatment embodied in Article 14 CE. See this definition, in a freedom of speech related case in the *Gastos reservados* case, [Sentencia del *Tribunal Constitucional* 220/91 of 25 November of 1991, in *Boletín de Jurisprudencia Constitucional* 128, pages 68 ff, fundamento jurídico 5].

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highly polemical *Glaserap*<sup>552</sup> and *Kosiek*<sup>553</sup> cases, decided simultaneously by the Court and with literally the same arguments, it was ruled that applicants' separation from the civil service due to the exercise of freedom of expression was not a case under Article 10 ECHR, but a case in which the right to become a civil servant was the only question involved: since this right had been expressly omitted by the framers of the Convention, separation of a civil servant on the grounds of freedom of expression was not a case for Article 10 ECHR<sup>554</sup>.

It should be pointed out, however, that, according to the Court, this does not situate civil servants outside the Convention's system of protection: except in the case of access to public service, public servants' fundamental rights are covered by the Convention<sup>555</sup>. The crucial aspect of a case in which public servants are involved is therefore whether access to public service lies at the heart of the case or not<sup>556</sup>.

The *Glaserap* and *Kosiek* cases illustrate the problems which may arise when

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552 *Glaserap v. Germany*, Judgment of the ECtHR of 28 August 1986 in *Publications of the European Court of Human Rights* series A, n. 104

553 *Kosiek v. Germany*, Judgment of the ECtHR of 28 August 1986 in *Publications of the European Court of Human Rights* series A, n. 105

554 The Court stated that "The Universal Declaration of Human Rights (..) and the International Covenant of Civil and Political rights of 1966 provide, respectively, that 'every one has the right of equal access to public service in his country' (..) and that 'every citizen shall have the right and the opportunity (..) to have access, on general terms of equality, to public service in his country' (..) In contrast, neither the European Convention nor any of its Protocols sets forth any such right. Moreover (..) the signatory States deliberately did not include [it] (..) " (*Kosiek*, case, ECtHR of 28 August 1986, *cft.*, paragraphs 33-36 and *Glaserap* case, ECtHR of 28 August 1986, *cft.*, paragraphs 47-50).

555 "While this background makes it clear that the Contracting States did not want to commit themselves to the recognition in the Convention or its Protocols of a right of recruitment to the civil service, it does not follow that in other respects civil servants fall outside the scope of the Convention (..) " (*Kosiek* case, ECtHR of 28 August 1986, *cft.*, paragraph 35 and *Glaserap* case, ECtHR of 28 August 1986, *cft.*, paragraph 44).

556 In *Kosiek* and in *Glaserap*, the Court answered this question in the negative: " (..) In refusing Mr Kosiek such access- belated though the decision was -, the responsible Ministry of the Land took account of his opinions and activities merely in order to determine whether he had provided himself during his probationary period and whether he possessed one of the necessary personal qualifications for the post in question. That being so, there has been no interference with the exercise of the right [to freedom of expression]" (*Kosiek* case, ECtHR of 28 August 1986, *cft.*, paragraph 39; the same statement as to the applicant in *Glaserap* in the *Glaserap* case, ECtHR of 28 August 1986, *cft.*, paragraph 53)

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the issue of the applicability of Article 10 ECHR is followed by a decision in which the Court rules that freedom of expression has *not* been violated: furthermore, in these kinds of cases to argue that freedom of expression is in principle applicable and then that a legitimate restriction has been applied, would surely lead to the same decision (no breach of Article 10 ECHR) but probably in a less controversial way. Public servants are also entitled to freedom of speech under the Spanish Constitution. Their right to freedom of speech, however, may be restricted on the grounds of the functioning of the public administration. The degree of the restriction depends upon a number of factors, such as the nature of the public service concerned. Likewise, in some cases greater restrictions than to citizens not serving at the Public Administration may be imposed even to *qualified speakers*, as trade unions representatives<sup>557</sup>.

Dissenting opinions concerning applicability in the above mentioned cases illustrate that, for a Court minority, applicability of Article 10 ECHR should be understood in a broad manner, provided that legitimate restrictions to freedom of expression are equally broad<sup>558</sup>: Furthermore, applicability of Article 10 ECHR has been peacefully

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<sup>557</sup> This is, for instance, the case of policemen: the *Tribunal Constitucional* ruled in the *Unión Sindical de Policía (USP)* case que "Las libertades de expresión y sindical tienen sus límites derivados de la condición de funcionario (...) de suerte que el funcionario que rebasa tales límites puede ser legítimamente sancionado en vía disciplinaria, sin que ello constituya violación de las libertades referidas (...) un funcionario (...) que ostente representación sindical está obligado al igual que los restantes funcionarios que carezcan de esa representación, al cumplimiento de sus deberes funcionariales, sin (...) exenciones o inmunidades" (USP case, Sentencia del Tribunal Constitucional 141/85 of 22 October 1985, in *Jurisprudencia Constitucional XIII* pages 207-17, fundamento jurídico 3). On who are *qualified speakers* under the ECHR and under the CE, see infra Chapter IX.

<sup>558</sup> Although both *Kosiek* and *Glaser* were decided by sixteen votes to one, a number of concurring opinions reasonably argued in this way: "In this case (...) civil service status provides no more than the general background, whereas the dominant feature in the forego is a prejudice suffered because of the expressions of opinions. This to my mind brings the case squarely under Article 10-1 of the Convention. Having said that, I would add briefly that in my view the interference in question was justified" (*Kosiek* case, ECtHR of 28 August 1986, *cft*, concurring opinion of Judge CREMONA). It was similarly stated that "The present judgment could, however, have brought out more clearly the principle that even in the case of access to the civil service Article 10 of the Convention 'obviously' may apply. In this way, The Court would have made its interpretation clearer (...) While the Contracting States did not wish to commit themselves to recognizing a right of access to the civil service in the Convention or its protocols, The High Contracting Parties nonetheless undertook in Article 1 of the Convention to secure 'to every one within their jurisdiction' the rights and freedoms guaranteed in the Convention. It follows that access to the civil service must not be impeded on grounds protected by the Convention (for

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extended in other cases to obscene paintings, ruling that freedom of Art and obscenity come under the scope of the Convention's meaning of freedom of expression<sup>559</sup>, or to the right to *receive* information, which from the beginning has been viewed by the Court as a separate right under Article 10 ECHR<sup>560</sup>.

As well as the Convention<sup>561</sup>, the Spanish Constitution embodies a passive right to receive information<sup>562</sup>. Moreover, the *Tribunal Constitucional* has applied the passive side of freedom of information in order to reinforce guarantees on freedom to *impart* information, in a very similar way to the Court's interpretation of the passive side of Article 10 ECHR. Following the *Tribunal Constitucional* approach, the right to receive information to which the public is entitled applies whenever information at hand concerns a matter of public interest. The public's passive right is therefore an additional argument to especially protect dissemination of information on public matters.

Under the Spanish Constitution, the right to receive information has also been approached in the light of the fundamental right to privacy. Access to administrative files concerning personal data is generally embodied in Article 105 CE which, however, regulates the general functioning of the Public Administration and, therefore, does not

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example freedom of opinion, freedom of expression)" (*Kosiek* case, ECtHR of 28 August 1986, *cft.*, and *Glase nap* case, ECtHR of 28 August 1986, *cft.*, partly dissenting opinion of judge SPIELMANN).

**559** In *Muller v. Austria*, Judgment of the ECtHR of 24 April 1988 in *Publications of the European Court of Human Rights* series A, n. 133, paragraph 27. On the facts of this case, see *infra* Chapter VII.

**560** Although no violation on the exclusive ground of the right to receive information has been decided to date, a clear statement on the right to *receive* information as a part of Article 10 ECHR may be found in the *Sunday Times* case, in which the Court ruled that "Not only do the media have the task of imparting such information and ideas: the public also has a right to receive them", pointing out that the public "had a vital interest in knowing all the underlying facts and the various possible solutions. They could be deprived of this information, which was crucially important for them, only if it appeared to be absolutely certain that its diffusion would have presented a threat to the 'authority of the judiciary'" (*Sunday Times*, case, ECtHR of 26 April 1979, *cft.*, paragraph 65-66).

**561** According to Article 10 ECHR, the right to freedom of expression shall include "freedom to hold opinions and to *receive* and impart information and ideas (..)" [emphasis added]

**562** Article 20(1)(d) CE embodies "the right freely to communicate or *receive* accurate information (..)" [emphasis added].

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enshrine a subjective right of citizens actionable before a Court<sup>563</sup>: following a well established principle on the interpretation of these kinds of constitutional provisions, Article 105 CE should only ground the unconstitutionality of any statutory law abridging personal access to such files.

The *Tribunal Constitucional*, however, has recently taken this Article in the light of Article 18(1) CE<sup>564</sup> and Article 18(4)CE<sup>565</sup> and has, as a result, held that citizens are entitled to access to such information, even in the lack of a statutory law regulating access proceedings. Remarkably, moreover, the only ground for the ruling was an international treaty on the matter<sup>566</sup>.

As far as freedom of expression is concerned, however, the passive right to receive information has not yet been declared by the *Tribunal Constitucional* as the only ground for a violation of Article 20 CE. It was alleged with this purpose in an early case in which the *Tribunal Constitucional* maintained that the passive side of freedom of information did not amount to a transformation of freedom of speech in a second generation right. That is, according to the *Tribunal Constitucional*, the right to receive information does not imply that the State must provide, in general, sources of information to the public<sup>567</sup>. Remarkably, the Public Attorney relied on the Convention to argue that

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**563** According to Article 105(b) CE, the law shall make provision for "The access of citizens to administrative files and records, except to the extent that they may concern the security and defence of the State, the investigation of crimes and the privacy of individuals".

**564** Article 18(1) CE reads as follows: "The right (..) to personal and familiar privacy (..) is guaranteed".

**565** Article 18(4) CE reads as follows: "The law shall restrict the use of data processing in order to guarantee the honor and personal and familiar privacy of citizens and the full exercise of their rights".

**566** in the case of *Acceso a datos de carácter personal*, Sentencia del Tribunal Constitucional 254/93 of 20 July of 1993, in *Boletín de Jurisprudencia Constitucional 1993*, pages 200-17. See a discussion on the legal effects of international treaties on human rights in Spain, *supra*

**567** According to the *Tribunal Constitucional*, freedom of expression and of information are "derechos de libertad frente al poder y comunes a todos los ciudadanos (..)". Journalists, therefore, are not entitled to "transformar en su favor, lo que para el común de los ciudadanos es un derecho de libertad, en un derecho de prestación" (*Voz de España* case, STC 6/81, *cít*, fundamento jurídico 4). The case decided the claim raised before the *Tribunal Constitucional* by a number of journalists which have been dismissed when some state-owned newspapers were closed.

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the right to receive information did not stand for a compulsory economic activity of the Administration to provide media enterprises<sup>568</sup>. Although the *Tribunal Constitucional* did not quote the ECHR in the judgment, it seems as if it followed the Public Attorney's<sup>569</sup>. Furthermore, a restrictive construction of the right to receive information has later been confirmed by the *Tribunal Constitucional* in other cases<sup>570</sup>.

#### (2) THE APPLICABILITY OF ARTICLE 10 ECHR AND ARTICLE 20 CE: SELECTED CASES.

Clearly, a prior decision on the applicability of Article 10 ECHR in an instant case is crucial for the analysis of the legitimacy of the imposed restrictions: as has been seen, an alleged violation of freedom of expression may be seen by the Court as falling outside Article 10 ECHR, because the facts are construed as a breach of *another* protected right, or as the non exercise of a protected right. In such cases, the techniques developed by the Court by which a restriction to freedom of expression are analyzed are not applicable. This point will be studied further in this section concerning those cases in which the problem of the applicability may pose crucial questions for a freedom of expression based ruling: these cases cover problems which have been construed by the

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568 "La libertad de expresión que garantiza el artículo 20(1)(a) de la Constitución y que aparece también declarada en los artículos 19 de la Declaración Universal de Derechos Humanos, el artículo 19(2) del Pacto Internacional de Derechos Civiles y Políticos y el artículo 10 de la Convención Europea de Derechos Humanos (...)", the Public Attorney stated, "no comporta, en modo alguno, el derecho a exigir el mantenimiento a ultranza de un determinado órgano de comunicación, público o privado (...)" (*Voz de España* case, STC 6/81, *cit.*, antecedente 2). However, no case-law of the Court of or any other Strasbourg organs was quoted in order to support this statement.

569 The only dissenting opinion to the judgement stressed the objective aspect of freedom of speech, which "tiende a realizar, en el plano de la información, el pluralismo político que el artículo primero [of the Spanish Constitution] proclama como uno de los valores superiores del ordenamiento jurídico y que requiere (...) la adopción de medidas correctoras de la desigualdad (...)" (*Voz de España* case, STC 6/81, *cit.*, dissenting opinion of judge FERNÁNDEZ-VIAGAS).

570 In the case of the *Gastos Reservados*, [Sentencia del Tribunal Constitucional 220/91 of 25 November 1991, in *Boletín de Jurisprudencia Constitucional* 128, pages 68 ff., fundamento jurídico 4], a full tribunal again ruled that "el derecho a recibir información veraz que garantiza ese precepto constitucional [i.e., Article 20(1)(d)] es un derecho de libertad, que no consiente ser convertido en un derecho de prestación, como implícitamente pretenden los demandantes". In this case, however, the applicants' claim under the right to receive information could hardly be seen as a "derecho prestacional", since it only concerned classified information which the government did not put at the disposal of the Parliament.

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*Tribunal Constitucional* to a higher degree of protection than the Convention, as is the case of the right to professional secrecy and the right to rectification; cases, such as broadcasting, whose standard of protection in Spain has been developed following the Convention standard; and, finally, cases, such as commercial speech, whose standard of protection under the Convention seems to be at present higher than the standard foreseeable in the *Tribunal Constitucional* case-law.

**1. The Right to professional secrecy of journalists and the Right to Rectification.**

Article 20 CE enshrines as a fundamental right closely associated to freedom of expression, the right to the professional secrecy of journalists<sup>571</sup>. The *Tribunal Constitucional* has not given a full ruling on this fundamental right yet, although it has made it clear that this right entitles journalists not to reveal their sources even in judicial proceedings<sup>572</sup>. According to another recent judgment, however, the right to professional secrecy does not cover journalists who do not check the identity of their sources, although they are not obliged to reveal that identity during a trial<sup>573</sup>.

The Court, on the other hand, has not construed a right to professional secrecy under Article 10 ECHR, which as a matter of fact does not mention it, although a compulsory obligation to reveal the sources of a journalist at trial might be seen as an "interference" by public authorities in the exercise of the freedom of information<sup>574</sup>. However, it is unlikely that the *Tribunal Constitucional* would followed a *dependent* interpretation of the Spanish Constitution regarding the right to professional secrecy, since, as has been seen, this right is expressly embodied in Article 20 CE: in such cases of a clear cut conflict between the Constitution and the Convention, the *higher protection*

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571 According to Article 20(1)(d) CE, "(..) The law shall regulate the right to invoke (..) professional secrecy in the exercise of these freedoms [freedom of expression and information]". On the right to journalistic secrecy in Spain, see FERNÁNDEZ-MIRANDA A. (1990) *El secreto profesional de los informadores*, Madrid: Tecnos, and CARRILLO, M. (1993) *La cláusula de conciencia y el secreto profesional de los periodistas*, Madrid: Civitas.

572 In the *Carta al Director* case, Sentencia del Tribunal Constitucional 15/93 of 18 January 1993, in *Boletín de Jurisprudencia Constitucional* 142, pages 97-102.

573 In the *Tellado* case, case, Sentencia del Tribunal Constitucional 123/93 of 19 April 1993, in *Boletín de Jurisprudencia Constitucional* 145 pages 148-154.

574 On the Concept of *interference*, see *infra* Chapter VI.

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established by the Constitution clearly prevails.

Furthermore, a clearer *independent construction* has been made by the *Tribunal Constitucional* in the case of the Right to rectification. Here, unlike in the case of the right to professional secrecy, the *Tribunal Constitucional* may not justify its departure from the Convention's standard on a *different wording* argument: this right is neither expressly embodied in the Convention nor in the Constitution. The *Tribunal Constitucional*, however, has also construed it as a fundamental constitutional right directly linked to the freedom of information.

The *Tribunal Constitucional* first admitted a *recurso de amparo* on the right to rectification in 1983<sup>575</sup>. This is remarkable, because the right to rectification is not expressly embodied in Article 20 CE, so its fundamental character, and, therefore, the possibility for anybody to initiate *amparo* proceedings, does not come directly from the wording of the Constitution. The construction of the right to rectification by the *Tribunal Constitucional*, however, assumed the fundamental character of this right and that it may, therefore, be protected by the *recurso de amparo*. Notably, the *Tribunal Constitucional* did not rely on the Convention in order to decide that the right to rectification should *not* be included under Article 20 CE on the grounds that it is not included under Article 10 ECHR either<sup>576</sup>. This would have been a good example of a low standard construction of a constitutional standard relying on the Convention, which has been in this case rightly avoided by the *Tribunal Constitucional*. The *Tribunal*

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**575** In the case of *Información sobre el Proceso del Aceite de Colza*, Sentencia del Tribunal Constitucional 35/1983 of 11 May 1993, in *Jurisprudencia Constitucional VI* pages 16-27. The *Tribunal Constitucional* dismissed the *amparo*, but, noteworthy, the recourse was not declared inadmissible, what implied that the right to rectification was approached by the *Tribunal Constitucional* as a fundamental right, since only these rights are protected by the *amparo* proceedings. On the procedural aspects of the right to rectification, see TOME PAULE, J. (1984) "La rectificación de informaciones inexactas en el novísimo derecho español" in *Poder Judicial* 712 pages 71-84.

**576** It has been pointed out that "opinions still greatly differ" on the extent to which such a right may be construed under Article 10 ECHR, and that the question must be further seen under the problems which a *dritwirkung* approach pose to the interpretation of the Convention (see DIJK-HOOF, 1984:310). Moreover, it has been also said that "it is very doubtful whether a contracting state could be held to be in breach of Article 10 if it gave no such statutory right to reply, being content to leave the conflict to be resolved in proceedings for defamation" (FAWCETT, 1987:258-59).

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*Constitucional*, however, did not expressly state that independent domestic means of interpretation should lead to this conclusion regardless of the interpretation given to the Convention. Its arguments, however, were based on its own independent construction of Article 20 CE regarding this question: first of all, for the *Tribunal Constitucional*, the right to rectification is an additional guarantee to the free public opinion as guaranteed by Article 20 CE. Its function is not to ensure the veracity of published information, but only to make available to the public different versions on the same issue in those cases in which anyone concerned in what has been published disagrees with the description of facts which have been published<sup>577</sup>. Different versions on the same matter are *per se*, according to the *Tribunal Constitucional*, a guarantee for pluralism<sup>578</sup>. Since veracity is not a prior condition<sup>579</sup>, the media may be compelled to publish "untrue" statements submitted to a court by anybody who feels himself entitled to exercise this right. It must also be noted that, for the *Tribunal Constitucional*, rectification of news is not seen as a restriction on the right of publishers to disseminate information. On the contrary, rectification is approached as a guarantee to freedom of speech, as has been seen. Moreover, rectification of news is directly linked in *Tribunal Constitucional* case-law with the *passive* right to receive information which Article 20 CE allows to the public. Certainly, the right to freedom of information would be illegitimately restricted if false information were compulsorily published in newspapers or other media by a judicial order

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<sup>577</sup> According to the *Tribunal Constitucional*, and following the regulation embodied in the *Ley Orgánica 2/84, del Derecho de Rectificación*, this right does not cover the obligation for the media to publish replies to opinions, but only to information. See also CARRILLO, MARC (1986): "El derecho de rectificación en la Constitución Española. Comentario a la Ley Orgánica 2/84 de 26 de marzo" in *Revista de Derecho Político* 23 pages 41-66.

<sup>578</sup> The *Tribunal Constitucional* stated in the *Tiempo* case [Sentencia del Tribunal Constitucional 168/86 of 22 December in *Boletín de Jurisprudencia Constitucional* 69 pages 35-40 fundamento jurídico 5] that "la difusión de informaciones contrapuestas, que no hayan sido formalmente acreditadas como exactas o desacreditadas como falsas, con efectos de cosa juzgada, no puede lesionar (...) el derecho, reconocido en el artículo 20(1)(d) de la Constitución, en su doble faceta de comunicar y recibir libremente información veraz. Antes bien (...) supone (...) un complemento a la garantía de la opinión pública libre (...)"

<sup>579</sup> As ruled by the *Tribunal Constitucional* in the *Tiempo* case, STC 168/86, *clt.* The extent to which veracity should be taken into account as a ground for granting the right to rectification has raised, however, a debate in Spanish legal literature which is still in force. See two different opinions as to this respect in CHINCHILLA, M. C. (1987) "Sobre el derecho de rectificación" in *Poder Judicial* 6 pages 71-82 and in CARRILLO, M. (1988) "Derecho a la información y veracidad informativa" in *Revista Española de Derecho Constitucional* 23 pages 187-206.

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as the final version of a matter of public concern<sup>580</sup>; but this is not the case of the right to rectification: publication of rectification ordered by a court does not compel the publisher to retract the previously published version nor does it make it a crime to provide further evidence supporting the publisher's view<sup>581</sup>.

Following this approach, the *Tribunal Constitucional* has construed the right to rectification as a right whose claim before a court does not preclude other legal actions pursued to restrict published information or to compensate damages<sup>582</sup>. Since judges in rectification proceedings do not decide on the truth of statements, the procedure is only aimed at the analysis of formal requirements and to check that a real connection between the rectification statement and the published information really exists<sup>583</sup>.

The fundamental character of the right to rectification may therefore be seen as a construction that the *Tribunal Constitucional* has made on its own, without taken into account the probable lower standard of the Convention regarding this respect. Admittedly, however, the *Tribunal Constitucional* could have approached compulsory

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580 The *Tribunal Constitucional* has admitted that the right to freedom of information would be breached "tanto si se impide comunicar o recibir una información veraz como si se difunde, se impone o se ampara la transmisión de noticias que no responden a la verdad, siempre que ello suponga cercenar el derecho de la colectividad a recibir sin restricciones o deformaciones, aquellas que sean veraces" (*Tiempo* case, STC 1668/86 *ctf.*, fundamento jurídico 2).

581 According to the *Tribunal Constitucional*, compulsory publication of rectifications "(...) no menoscaba el derecho fundamental proclamado por el artículo 20(1)(d) de la Constitución, ni siquiera en el caso de que la información que haya sido objeto de rectificación pudiera relevarse como cierta y ajustada a la realidad de los hechos (...) el simple disentiendo por el rectificante (...) no impide al medio de comunicación social afectado difundir libremente la información veraz, ni le obliga a declarar que la información aparecida es incierta o a modificar su contenido (...)". (*Tiempo* case, STC 168/86 *ctf.*, fundamento jurídico 5). This statement from the *Tribunal Constitucional* gives a direct answer to the claim of a journal which neglected to publish the requested rectification on the ground that previously published information was accurate, while the rectification which the applicant wished to publish was, according to the journal, clearly false. See *Tiempo* case, STC 168/86 *ctf.*, antecedentes).

582 See *Tiempo* case, STC 168/86 *ctf.*, fundamento jurídico 4.

583 The *a quo* judge, however, carries out an important task, since it must check at least the following aspects: "que la inserción de la réplica sólo procede en la medida en que se pretender rectificar hechos y no opiniones y cuando los hechos publicados afectan perjudicialmente a los intereses del demandante aludido por la información" (*Tiempo* case, STC 168/86 *ctf.*, fundamento jurídico 6). Procedural aspects of the right of rectification proceedings have been further defined by the *Tribunal Constitucional* in the *Esteve* case, Sentencia del Tribunal Constitucional 164/88 of 22 December 1988 in *Boletín de Jurisprudencia Constitucional* 93 pages 118-24.

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publication of rectifications as an interference under Article 10 ECHR, which would have probably passed the Strasbourg test on legitimate restrictions on freedom of speech. However, this constitutional right has been construed as an additional guarantee for freedom of information from a *pure independent* interpretation of Article 20 CE by the *Tribunal Constitucional*. The constitutional construction of the right to professional secrecy of journalists may be included in a different group of *independent* interpretation: that group in which domestic constitutional constructions are based on a clearly different wording between the national Constitution and the corresponding provision of the Convention.

**2. Broadcasting.**

The applicability of Article 10 ECHR to cases in which broadcasting is involved had been maintained by the European Commission of Human Rights since its early cases on the matter. The Court finally reached the same conclusion in 1990 in the *Groppera Radio* case<sup>584</sup>. Furthermore, the full inclusion of broadcasting under Article 10 ECHR was broadly ruled in this case<sup>585</sup>.

One year later, in the *Autronic* case<sup>586</sup>, the Court confirmed its previous decision<sup>587</sup>. It was in this second case that a number of questions concerning broadcasting as a case for freedom of expression were settled by the Court: firstly, the Court did not see any obstacle in the fact that the applicant was a corporate person, ruling that freedom of expression equally applies to corporations and physical persons: the principle that corporations are also entitled to the right of freedom of speech, already a peaceful statement in the Court case-law, was therefore also applicable when

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584 *Groppera Radio v. Switzerland*, Judgment of the ECtHR of 28 March 1990, in *Publications of the European Court of Human Rights* series A, n. 173.

585 According to the Court's ruling in this case, "both broadcasting of programmes over the air and cable retransmissions of such programmes are covered by the right enshrined in the first two sentences of Article 10(1)" (*Groppera* case, ECtHR of 28 March 1990, *cft*, paragraph 55).

586 *Autronic AG v Switzerland*, Judgment of the ECtHR of 22 May 1990, in *Publications of the European Court of Human Rights* series A, n. 178.

587 The defendant Government submitted that Article 20 ECHR was not applicable, since, in its view, the case was covered by provisions concerning freedom of enterprise and not freedom of expression. The Court, contrariwise, held that freedom of expression was applicable. See *Autronic* case, ECtHR of 22 May 1990, *cft*, paragraphs 44-48.

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broadcasting was concerned<sup>588</sup>. Secondly, the Court held that the right embodied in Article 10 ECHR also includes a right to choose the means by which the expression is made<sup>589</sup>: this clearly situates the right to broadcast information or expressions under the scope of Article 10 ECHR. And thirdly, and strongly related to the facts of the case, broadcasting may equally be approached, the Court stated, from the passive right to receive information<sup>590</sup>.

However, the main problems concerning the inclusion of broadcasting under Article 10 ECHR come not directly from the issue of applicability of this Article, but from the extent to which Article 10 ECHR should be in such cases interpreted in a given way. A first question regarding this respect arises from the wording of the Article: an exception of a license system for broadcasting is embodied in the first paragraph of Article 10 ECHR<sup>591</sup>. The question has then been posed as to the extent to which such a license system may not be subject to the conditions listed in Article 10 ECHR paragraph 2.

In *Autronic*, the Court answered this question in the negative<sup>592</sup>. In order to reach this conclusion, the Court first embarked in a comparative analysis of an exception with *another* right enshrined in the Convention whose wording is similar to that contained in Article 10(1) ECHR: the exception that excludes members of the armed forces from

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588 Legal persons had been entitled by the Court to the right to freedom of expression since the *Sunday Times case*, ECtHR of 26 April 1979, *cft*, paragraph 35. Now, concerning broadcasting, the Court ruled that "(..) neither *Autronic AG's* legal status as a company, nor the fact that its activities were commercial, nor the nature of freedom of expression can deprive *Autronic AG* of the *§* of Article 10. The Article applies to "everyone, whether *§* legal persons" (*Autronic case*, ECtHR of 22 May 1990, *cft*, paragraph 48)

589 " (..) Article 10 applies not only to the content of information but also to the means of transmission # since any restriction imposed on the means necessarily # with the right to receive and impart information" (*Autronic case*, ECtHR of 22 May 1990, *cft*, paragraph 48)

590 "Like the Commission, the Court is of the view that the *reception* of television programmes by means of a dish or other aerial comes within the right # in the first two sentences of Article 10(1) (..) " (*Autronic case*, ECtHR of 22 May 1990, *cft*, paragraph 48) [emphasis added].

591 Article 10(1) ECHR *in fine* states as follows: " (..) This Article shall not prevent States from requiring the licensing of broadcasting, television, or cinema enterprises".

592 See *Groppera case*, ECtHR of 28 March 1990, *cft*, paragraph 061-73.

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the right to association embodied in Article 11 ECHR<sup>593</sup>. This exception, the Court noted, is, unlike the exception concerning broadcasting, embodied in *paragraph 2* of Article 11(1) ECHR. The conclusion is reached, therefore, that Article 11(2) ECHR contemplates for the armed forces an exception which falls outside the requirements, listed in the same paragraph, which any other restriction of the right to association must fulfill<sup>594</sup>. A license system for broadcasting is, on the other hand, embodied in *paragraph 1* of Article 10 ECHR. According to the Court, this simple fact makes it impossible for it to be applied in order to escape from the general requirements of paragraph 2 of this Article<sup>595</sup>: requirements listed in paragraph 2 of Article 10 therefore apply to any interference in freedom of expression, a license system for broadcasting included.

This interpretation of the exception clause, reached in the *Groppera Radio* case, was later confirmed in the *Autronic* case<sup>596</sup>. After *Autronic*, therefore, it is clear that any license system issued by a state must comply with the requirements of lawfulness, the pursuing of a legitimate aim under the Convention and, remarkably, it must be *necessary in a democratic society*. In other words, license systems for broadcasting fully fall inside

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593 Article 11(2) ECHR, after listing the restrictions which may be imposed to the freedom of peaceful assembly and to the freedom of association, states that "(...) This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the state".

594 According to the Court, Article 11 ECHR "(...) provides only in paragraph 2 for the possibility of special restrictions on the exercise of freedom of association by members of the armed forces, the police and the administration of the state and it could be inferred from this that those restrictions are not covered by the requirements in the first sentence of paragraph 2 except for that of lawfulness (...)" (*Groppera case*, ECtHR of 28 March 1990, *cft*, paragraph 61).

595 "(...) A comparison of the two Articles [Article 10 and Article 11 ECHR] thus indicates that the third sentence of Article 10(1), in so far as it amounts to an exception to the principle set forth in the first and second sentence, is of limited scope (...) This supports the conclusion that the purpose of the third sentence of Article 10(1) of the Convention is to make it clear that States are permitted to control by a licensing system the way in which broadcasting is organized in their territories, particularly in its technical aspects. It does not, however, provide that licensing measures shall not otherwise be subject to the requirements of paragraph 2, for that would lead to a result contrary to the object and purpose if Article 10 taken as a whole" (*Groppera case*, ECtHR of 28 March 1990, *cft*, paragraph 61).

596 See *Autronic case*, ECtHR of 22 May 1990, *cft*, paragraph 1990:52.

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the so called "Strasbourg test"<sup>597</sup>.

Once the applicability of the test of paragraph 2 of Article 10 ECHR on the license system in broadcasting embodied in paragraph 1 has been established, it still remains to be seen whether the test has any particular feature when broadcasting is involved. According to the available case-law, the extent to which the test on legitimate restrictions of freedom of expression will be interpreted by the Court on such cases is not clear<sup>598</sup>. In any event, the Court, learning from other European courts' decisions, has not tied its forthcoming judgments on the matter to established general principles, pointing out that technical developments will in the future play a crucial role in deciding cases concerning broadcasting under the right to freedom of expression<sup>599</sup>. At any rate, any licensing regulation, will have to comply with two requirements: it should respect political pluralism and should not grant the licenses on discriminatory or arbitrary grounds<sup>600</sup>.

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**597** A concurring opinion went a step further, claiming that, as the Commission had stated in its report, the license system foreseen in paragraph 1 of Article 10 ECHR could apply to emitting, but not to the right to receive broadcasted information: "(...) the licensing power of states (...) does not extend to the reception of broadcast (...) The freedom to see and watch and to hear and listen is not, as such, subject to States' authority." (*Autronic case*, ECtHR of 22 May 1990, *cft*, paragraph dissenting opinion of judge DE MEYER)

**598** The *Groppera* case, in which the Court finally decided that no violation of Article 10 ECHR had been made, may suggest, however, that the Court is prepared to give a broad margin of appreciation to the member states in cases concerning licenses for broadcasting. See the reasoning followed by the Court in the *Groppera* case, ECtHR of 28 March 1990, *cft*, paragraph 71-73).

**599** The Court took into account in *Autronic* the evolution of the transfrontier television and the practice of reception of uncoded programmes without requiring permission from the broadcasting country in order to reject the government's submission in which the restriction on Article 10 ECHR was allegedly justified because of the special characteristic of telecommunications satellites. In so doing, the Court stated that "later developments can be taken into account in so far as they contribute to a proper understanding and interpretation of relevant rules (...)" (*Autronic case*, ECtHR of 22 May 1990, *cft*, paragraph 62-3).

**600** See JACOBS (1975:156) and FAWCETT (1987:259). In any case, Article 10, read together with Article 14 which prevents discrimination, provides that "no discrimination is permitted in the case of licenses being granted and, if there is question of a State monopoly, the broadcasting time granted to a political party, trade union, or other institution of a specific political, religious, philosophical or ethical character may not be disproportionate" (DIJK-HOOF, 1984:314). On the extent to which a state monopoly is *per se* compatible with Article 10 ECHR, see *infra*, this Chapter.

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As for Spain, the *Tribunal Constitucional* has peacefully included the broadcasting of television programmes under Article 20 CE since its early cases on the matter. The fact that Article 20(1)(d) CE expressly mentions the right to freely communicate or receive information "by any means of dissemination whatsoever" was duly taken into account regarding this respect. Therefore, in Spain, the right to broadcast comes, in principle, under Article 20 CE. The *Tribunal Constitucional*, however, has pointed out that the right to establish broadcasting companies is subject to special limitations under the Constitution<sup>601</sup>. In several cases, moreover, the *Tribunal Constitucional* shaped the right to establish a broadcasting company in a very light manner: it stated that this right, although covered by Article 20 CE, had a "less intensive" protection than that given to other *substantive* rights embodied under the same Article of the Constitution. The right to engage in a broadcasting activity is then approached by the *Tribunal Constitucional* as a mere "instrumental" right<sup>602</sup>. Moreover, according to the *Tribunal Constitucional*, there is not under the Constitution a right to broadcast as such, since broadcasting may or may not be a legitimate activity depending upon the fulfillment of administrative regulations<sup>603</sup>. Legitimacy of administrative regulations setting out a license system is, in the *Tribunal Constitucional* rulings, equally founded both on the sole interpretation of

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601 After ruling that "No hay inconveniente en entender que el derecho de difundir las ideas y opiniones comprende en principio el derecho de crear los medios materiales a través de los cuales la difusión se hace posible", the *Tribunal Constitucional* listed legitimate grounds on which this right could be restricted: namely, the avoiding oligopolistic trends, international agreements on distribution of waves frequencies and the fact that the mean by which information is disseminated by broadcasting has been defined as a public domain. As will be seen, this last point was crucial for the case then before the *Tribunal Constitucional*. See *Antena 3 case*, case, case, Sentencia del Tribunal Constitucional 12/82 of 31 March 1982, in *Boletín de Jurisprudencia Constitucional* 12, pages 272-81, fundamento jurídico 3.

602 "no se puede equiparar la intensidad de protección de los derechos primarios, directamente garantizados por el artículo 20 CE y los que son en realidad *meramente instrumentales* a aquéllos. Respecto al derecho de creación de medios de comunicación, el legislador dispone, en efecto, de mucha mayor capacidad de configuración, debiendo contemplar al regular dicha materia otros derechos y valores concurrentes, siempre que no restrinja su contenido esencial." (*Maldonado case*, Sentencia del Tribunal Constitucional 206/90 of 17 December 1990, in *Boletín de Jurisprudencia Constitucional* 117, pages 96 ff., fundamento jurídico 6). [emphasis added].

603 See *Radio X case*, Sentencia del Tribunal Constitucional 119/91 of 3 June 1991, in *Boletín de Jurisprudencia Constitucional* 123 pages 104 ff. fundamento jurídico 5).

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the Constitution and on the exception allowed by Article 10(1) ECHR<sup>604</sup>.

The construction by the *Tribunal Constitucional* of the legitimacy of a system of administrative concessions to broadcast relies on the public relevance that freedom of expression enjoys in a democratic society: in all their broadcasting cases, the *Tribunal Constitucional* has stressed this side of freedom of speech as an "institutional guarantee" provision<sup>605</sup>. This institutional side of the right to freedom of expression allows a greater restriction on broadcasting in order to assure respect for pluralism than that which might be based on a provision exclusively embodying a subjective individual right<sup>606</sup>.

With regards to this point, the *Tribunal Constitucional* was prepared to rule that the right to broadcast lacked the legal exercisable conditions to be exercised until an Act of Parliament had been passed. In a 1982 case, the banning of private television companies was declared to be compatible with the Constitution on this basis. The *Tribunal Constitucional's* reasoning was drawn from two familiar arguments on the question<sup>607</sup>, based on two familiar arguments on the issue: existing international rules

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604 The *Tribunal Constitucional*, for instance, relied a fortiori on the Convention in the *Radio x case*, STC 119/9 *cft*, fundamento jurídico 5.

605 For instance, in the *Antena 3 case*, it reminded that Article 20 was a subjective right and, at the same time, "el reconocimiento y la garantía de una institución política fundamental, que es la opinión pública libre, indisolublemente ligada con el pluralismo político, que es un valor fundamental y un requisito de funcionamiento del Estado democrático. El artículo 20 defiende la libertad en la formación y en el desarrollo de la opinión pública, pues la libertad en la expresión de las ideas y los pensamientos es <su> necesaria premisa" (*Antena 3 case*, case, STC 12/82, *cft*, fundamento jurídico 3).

606 "La comunicación pública libre no solo exige la garantía del derecho de todos los ciudadanos a la expresión del pensamiento y a la información, sino también la preservación de un determinado modo de producirse de los medios de comunicación social, porque tanto se viola la comunicación libre al ponerle obstáculos desde el poder, como al ponerle obstáculos desde los propios medios de difusión" (*Maldonado case*, STC 206/90, *cft*, fundamento jurídico 6).

607 "La configuración de la televisión como servicio público, aunque no sea una afirmación necesaria en nuestro orden jurídico-político, se encuentra dentro de los poderes del legislador (...) la atribución de la gestión directa del servicio público a un ente público (...) es, sin duda, el punto neurálgico de este asunto [the establishment of an license system] (...) requiere una decisión del legislador y un desarrollo legislativo que este *Tribunal Constitucional* no puede suplir" (*Antena 3 case*, STC 12/82, *cft*, fundamentos jurídicos 4-5)

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for distribution of frequency waves<sup>608</sup>

and the avoidance of oligopolystic trends<sup>609</sup>; both of them demand for a state license system for broadcasting. These reasons, jointly argued by the *Tribunal Constitucional* and the fact that broadcasting by air needs to use the public domain<sup>610</sup> justifies consideration of broadcasting as a public service<sup>611</sup>.

Taking broadcasting of television and radio programmes as an exercise of the fundamental right to freedom of speech, however, makes it a crucial problem, rather than the justification of a public service in this field, which was not even contested before the *Tribunal Constitucional* by applicants claiming their right to establish broadcasting companies<sup>612</sup>, the extent to which such a public service may be legitimately run by a state-owned station only. The legitimacy of a state monopoly on television is, in other words, the crucial question to be answered, either under Article 10 ECHR or under

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**608** "la actividad de emisión de ondas para radiotelevisión se encuentra sometida a una normativa de Derecho Internacional, dado que los intereses nacionales pueden entrar en conflicto con los intereses de otros países (..)dentro de ella <hay> una serie de acuerdos que regulan las utilización de las frecuencias, de suerte que es necesario que los Organismos internacionales atribuyan a cada país las frecuencias y que los Estados se obliguen en atención al interés público internacional a respetarlas (..)" (*Antena 3 case*, STC 12/82 *cit*, fundamento jurídico 3).

**609** "la necesidad de no impedir un igual ejercicio de los mismos derechos por los demás ciudadanos, de manera que la creación de un medio o soporte de difusión no debe impedir la creación de otros iguales o similares (..)cuando el medio de reproducción que se crea tiene que servirse de bienes que ofrecen posibilidades limitadas de utilización (..)su grado de escasez natural o tecnológica determina una tendencia ologopolística que condiciona el carácter de los servicios que se pueden prestar (..)" (*Antena 3 case*, STC 12/82, *cit*, fundamento jurídico 3).

**610** "la emisión mediante ondas radioeléctricas que se expanden a través del espacio entraña la utilización de un bien que ha de ser calificado como de dominio público con una calificación por nadie contradicha" (*Antena 3 case*, STC 12/82, *cit*, fundamento jurídico 3)

**611** Reasons other than those of a technical character were also argued by the Tribunal Constitucional in a later case, in which when the applicants claimed before the Tribunal that technical reasons do not apply to local television, the Tribunal replied that "La legitimidad constitucional de la calificación de la televisión como servicio público responde a una serie de razones, entre las que se cuentan las de carácter técnico, que no son, sin embargo, las únicas que pueden configurar este tipo de configuración del medio" (*Maldonado case*, STC 206/90, *cit*, fundamento jurídico 6).

**612** "entiende que no hay que atacar la consideración de la televisión como servicio público esencial - que acepta - sino el monopolio o gestión directa de dicho servicio por el ente público denominado RTVE (..) pretende (..) que la gestión del servicio público sea indirecta (..)" (*Antena 3 case*, STC 12/82, *cit*, fundamento jurídico 2).

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Article 20 CE.

As for the Spanish Constitution, the *Tribunal Constitucional* has clearly stated that, once a public service on broadcasting has been declared compatible with the Constitution, the way in which the public service is organised is a *political decision*. Both possibilities, either running the public service in the form of a state monopoly or the establishment of administrative concessions by which private companies may be allowed to broadcast, are equally possible under the Constitution: due to its political nature, this decision is not subject to constitutional review. Provided that the Parliament decides on the latter possibility, it is nevertheless for the *Tribunal Constitucional* to assure that the principle of equal treatment and other fundamental rights are respected in the concessions process<sup>613</sup>. Although this approach may be subject to changes, due to technical developments to which the *Tribunal Constitucional* might in the future feel bound<sup>614</sup>, at present the situation in Spain is that, from a constitutional point of view, the *Strasbourg test* on interferences in freedom of expression only applies once the Parliament has decided to organise the public service of broadcasting by means of concessions to private companies rather than a state-owned monopoly. In other words, a situation of state monopoly would not be subject to a constitutional review by the *Tribunal Constitucional*.

The problem is then what the *Tribunal Constitucional* may do in the absence of a Parliamentary bill on how the right to broadcast should be organised. In the *Tribunal Constitucional* view, the *interpositio legislatoris* is necessary. Moreover, in the absence of such a parliamentary bill, an applicant could hardly appeal by means of the *recurso de amparo* since he would in practise be attempting an *in abstracto* control of legislation which individuals are not allowed to do<sup>615</sup>. This position, however, has been strongly dissented inside the *Tribunal Constitucional* since the first decision on broadcasting<sup>616</sup>.

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<sup>613</sup> "la *publicatio* limita y sacrifica en favor de otros derechos, pero que no puede en modo alguno eliminar" (*Maldonado case*, STC 206/90, *cít*, fundamento jurídico 6).

<sup>614</sup> See the *Maldonado case*, STC 206/90, *cít*, fundamento jurídico 6.

<sup>615</sup> See the *Maldonado case*, STC 206/90, *cít*, fundamento jurídico 5.

<sup>616</sup> The *Tribunal Constitucional*'s decision was also criticized by a sector of legal literature. See BASTIDA F.J. (1990) *La libertad de Antena: el derecho a crear televisión*, Barcelona:Ariel

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According to dissenting opinions, a license system is compatible with the Constitution, but it cannot be organised as a state monopoly. Whatever the system, it should allow citizens to apply for an administrative concession: the Parliament cannot act as if Article 20 CE were not in force<sup>617</sup>. The decision on whether to establish a system by which private companies may engage in broadcasting activities is *not*, therefore, a political decision<sup>618</sup>. In other words, the existing state monopoly when the 1982 case was decided was, for a minority of the *Tribunal Constitucional*, a breach of the fundamental right to freedom of expression<sup>619</sup>.

Is the decision adopted by the majority of the *Tribunal Constitucional* on television state monopoly consistent with the Strasbourg case-law on the matter? It should be noted that the Convention itself was also applied by the *Tribunal Constitucional* in order to support, *a fortiori*, that the state monopoly then in force in Spain is compatible with the Constitution<sup>620</sup>; dissenting opinions, on the other hand, relied on domestic constitutional sources only in order to reach the opposite conclusion.

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617 "El legislador (...) puede (...) resolver acerca de cual sea el momento oportuno para establecer las normas organizativas necesarias para el ejercicio de algunos derechos fundamentales que, sin ser derechos de prestación, no son simplemente derechos reaccionales y no pueden ser ejercidos en ausencia de organización. Lo que no puede hacer (...) es negarlos (...) o ignorarlos, dictando normas reguladoras (...) como si tal derecho no existiera y, anular, en consecuencia, su contenido esencial" (*Antena 3 case*, STC 12/82, *cft.*, dissenting opinion of judge RUBIO LLORENTE).

618 "La naturaleza específica de la televisión (...) [makes it imprescindible] una previas normas de organización. Pero el legislador está constitucionalmente obligado a establecerlas; no es competencia suya resolver sobre si debe hacerlo o no. Las decisión es acerca de la existencia o inexistencia de una libertad no pueden ser consideradas nunca como cuestiones políticas (...)" (*Antena 3 case*, STC 12/82 *cft.*, dissenting opinion of judge RUBIO LLORENTE).

619 La Constitución (...) consagra también el derecho a crear los medios de comunicación indispensables para el ejercicio de estas libertades (...) la gestión de un servicio público que, como sucede con la televisión, implica el ejercicio de derechos fundamentales de los ciudadanos, no puede organizarse en forma de monopolio estatal que impida absolutamente el ejercicio del derecho (...) el monopolio estatal de la televisión no es constitucionalmente legítimo (...)" (*Antena 3 case*, STC 12/82, *cft.*, dissenting opinion of judge RUBIO LLORENTE).

620 See the *Maldonado case*, STC 206/90, *cft.*, fundamento jurídico 6. The Tribunal, however, had not relied on the Convention as to this point in the previously decided case of *Antena 3*. (see *Antena 3 case*, STC 12/82, *cft.*)

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Only in the recent *Informationsverein Lentia* case<sup>621</sup> has the Court provided a clear statement on this question. Until this case, moreover, legal commentary on the Convention seemed not to agree on what the Convention's position would be regarding state television monopolies<sup>622</sup>. Until the *Informationsverein Lentia* case, then, upholding a state television monopoly relying on the Convention (as the *Tribunal Constitucional* partially did) may be seen as a case of *parallel interpretation*: the Constitution is interpreted paralleling the Convention regarding this point. This being so, independent domestic sources of interpretation providing a higher protection of the freedom to broadcast could have been disregarded. Whatever the case, the Court ruled in *Informationsverein Lentia* that the exception of a license system for broadcasting under Article 10(1) ECHR does *not* cover a state monopoly on television.

Local cable television remains the most important problem since, according to the *Tribunal Constitucional*, it is only a legal activity when under an administrative license which, on the other hand, cannot yet be obtained, since the Parliament has not issued the correspondent procedure. The situation of local cable television today is, therefore, very similar to that of standard television before the *Ley de Television Privada*. The *Tribunal Constitucional*, however, has not yet directly ruled on the question of licenses for local cable television, although an *amparo* on local television stations was denied in the *Video de Callosa* case, decided in 1990, due to procedural reasons: applicants wishing to establish a local television station went directly to the *Tribunal Constitucional* arguing that there was not a settlement procedure for asking for an administrative concession on local television; therefore, no prior administrative act was required before taking the case to court. The *Tribunal Constitucional*, however, ruled that the

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621 *Informationsverein Lentia* e.a. v. Austria, Judgment of the EctHR of 24 October 1993 in *Publications of the European Court of Human Rights* series A, n. 276

622 JACOBS (1975:156), quoting the early case-law of the Commission was of the opinion that the Convention effectively permits the banning of private broadcasting and the settlement of a State Monopoly. DIJK-HOOF, on the other hand, point out later developments in the Commission case-law and wonder whether "such an 'interference by public authority' by which the receipt of information from an independent source is cut off completely with respect to a given medium, although it does not seem to conflict with the text of Article 10 (..) does not after all greatly conflict with the spirit of this article" (1984:314). FAWCETT (1987:259), however, affirms that "the term 'enterprises', being expressed in the plural, does not mean that the fact that many convention countries to establish monopoly enterprises for radio and TV is contrary to Article 10".

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impossibility for such concessions does not come directly from the law governing private broadcasting, and that applicants should not have dismissed administrative proceedings on those grounds. The amparo was therefore denied.

In that decision, however, the *Tribunal Constitucional* admitted that it could have reviewed the banning of local private televisions under the test of reasonability if this had been relevant to the case<sup>623</sup>. A year later, a new case, the *Ley Orgánica de Telecomunicaciones* case, gave the *Tribunal Constitucional* a new opportunity to do so<sup>624</sup>. Here again, however, the *Tribunal Constitucional*, after stressing that local private television stations had not yet been subject to constitutional scrutiny in any previous case<sup>625</sup>, decided not to go on the merits due to procedural reasons. This time, however, a number of judges, including the President of the *Tribunal Constitucional*, disagreed with the majority: in their view, a license system for local cable television which makes it impossible to obtain administrative concessions is, in one way or another, incompatible with the Constitution. According to these dissenting opinions, the traditional public domain argument is not arguable in such a case<sup>626</sup>. It was pointed out, that the *Tribunal Constitucional* should at least have skipped formal reasons and decided on the

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**623** The tribunal Constitucional wondered, however, whether it should be decided in its ruling the extent to which "la exclusión del cualquier tipo de televisión que no sea la de cobertura nacional por medio de ondas hertzianas está justificada y tiene fundamento razonable y, por ello, es constitucionalmente legítima", to rule that it only should answer that question "si dicho examen fuese necesario para la atribución directa de frecuencias y potencias a efectos del otorgamiento de los recursos de amparo, lo que no resulta posible obtener en una sentencia de amparo" (*Maldonado case*, STC 206/90 *cít.*, fundamento jurídico 8).

**624** *Ley Orgánica de las Telecomunicaciones case*, Sentencia del Tribunal Constitucional 189/91 of 3 October 1991, in *Boletín de Jurisprudencia Constitucional* 127 pages 127 ff fundamento jurídico 3].

**625** Neither in *Antena 3*, nor in *Maldonado*, the *Tribunal Constitucional* stated, the constitutionality of the banning of local television had been analyzed by the Tribunal (*Ley Orgánica de las Telecomunicaciones case*, STC 189/91 *cít.*, fundamento jurídico 3).

**626** " (...) el dominio público (...) en el supuesto que ha dado lugar a la cuestión, es la vía pública, difícilmente estimable, en este supuesto, como un bien escaso (...) y no encuentro razón suficiente alguna para considerar que el ejercicio de un derecho fundamental como el recogido en el artículo 20(1)(a) CE en su manifestación de emisión de programas de video comunitario, deba quedar impedido, o en suspenso, hasta que el legislador estime oportuno regularlo" (*Ley Orgánica de las Telecomunicaciones case*, STC 189/91 *cít.*, dissenting opinion of judge LÓPEZ GUERRA).

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merits<sup>627</sup>. The strongest *voto particular* found, moreover, that the *Ley Orgánica de Telecomunicaciones* violated not only freedom of expression as embodied in Article 20 CE, but also freedom of economic activity and the principle of equal treatment under the law<sup>628</sup>.

According to the above discussed case-law, therefore, there are still broadcasting activities in Spain subject to a license system which may not be pursued by private citizens or companies: the license procedure does not contemplate the possibility of broadcasting stations on a local basis. Is the Spanish standard regarding this point lower than the standard established by recent developments of the European Court? If the above discussed license systems are covered by the exception embodied in Article 10(1), it is. It should be taken into account that the *Tribunal Constitucional's* approach to the local television issue was based *a fortiori* on the Convention, as has usually been the case with other broadcasting cases decided by the *Tribunal Constitucional*<sup>629</sup>. Now that the Court has interpreted the Convention stating that a license system whatsoever must give applicants a possibility for having a license to engage in broadcasting activities, it is foreseeable that at least the *Tribunal Constitucional* will not argue on formal reasons in the future to avoid a full ruling on the matter.

#### 3. Commercial expression.

The overriding problem arising from the question whether the protection of Article 10 ECHR may be extended to expressions other than those traditionally seen as an exercise of freedom of speech comes from the so called "commercial speech". Whatever consequences it may bring in the future, the principle that broadcasting falls under the right to freedom of expression as enshrined in the Convention is now easily admitted by the Court. On the contrary, the extent to which commercial expression or advertising should be included under the protection of Article 10 ECHR of the Convention has not yet been completely clarified. On two occasions, however, the Court has ruled that,

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627 This was the position of the President of the *Tribunal Constitucional*, see the *Ley Orgánica de las Telecomunicaciones* case, STC 189/91 *cft*, dissenting opinion of judge RODRÍGUEZ-PIÑERO).

628 See *Ley Orgánica de las Telecomunicaciones* case, STC 189/91 *cft*, dissenting opinion of judge RUBIO LLORENTE)

629 See *Ley Orgánica de las Telecomunicaciones* case, STC 189/91 *cft*, fundamento jurídico 4).

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under certain circumstances, commercial expression deserves to be protected as a case of freedom of expression: this was the case of the *Barthold* case<sup>630</sup> and of the *Markt Inter Verlag* case<sup>631</sup>. In these two cases, however, the circumstances have allowed the Court not to give a full ruling on this matter<sup>632</sup>.

In the *Barthold* case, the Government's submissions claimed for the non applicability of Article 10 ECHR to a case in which commercial expression was involved. According to the government, advertising should be kept outside the scope of Article 10 ECHR<sup>633</sup>. The question of the applicability of Article 10 ECHR had already been decided by the Commission, ruling that it was applicable to the case<sup>634</sup>. The Court, however, managed to reach a judgment without deciding on the applicability of Article 10 ECHR to commercial expressions: other kinds of opinions and information, directly covered by Article 10 ECHR, were found in the *commercial* message, allowing the Court to hold a violation of the Convention without taking into account the pure commercial

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630 *Barthold v Germany*, Judgment of the ECHR of 25 March 1985, in *Publications of the European Court of Human Rights series A*, n. 90

631 *Markt intern Verlag GmbH and Klaus Beermann v. Germany*, Judgment of the ECHR of 20 November 1989 in *Publications of the European Court of Human Rights series A*, n. 165

632 On this case, see SAPIENZA, 1987 (735-36). The view was expressed that in *Markt*, the Court will probably answer the questions which had been remained opened in *Barthold* [EISSEN (1989)]. As will be seen, this has been the case only partially.

633 The applicant - a German national - had been punished for breaching the norms of fair competition by indirectly giving publicity to his veterinary clinic during a press interview. The injunctions were the consequence from the praise of his own practice and the disparaging remarks about his colleagues, which Mr. Barthold stated in the interview, which, according to the Government, "went beyond the expression of an opinion into commercial advertisement, not covered by Article 10". Alternatively, the Government pleaded the Court to rule that the injunction was justified under Article 10(2) ECHR. See *Barthold case*, ECtHR of 25 March 1985 *cf.*, paragraph 38.

634 The Delegate of the Commission said that the government was estopped from reopening the issue of the applicability of Article 10 ECHR before the Court, since the Commission had already examined the case under this Article. The Court disagreed and ruled that "the applicability of one of the substantive clauses of the Convention constitutes, by its very nature, an issue going to the merits of the case, to be examined independently of the previous attitude of the respondent State" (*Barthold case*, ECtHR of 25 March 1985 *cf.*, paragraphs 40-42).

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aspect of the case<sup>635</sup>.

The decision in *Barthold* generated a dissenting opinion on the issue of the applicability of Article 10 ECHR to commercial speech, according to which this question should have deserved a clearer statement from the Court<sup>636</sup>. Four years later, the Court eventually had an occasion to do it. In the *Markt Intern Verlag* case, the Court now had to face a case of *pure* commercial speech, in which the only way to approach the case from the Article 10 ECHR point of view was to directly rule that commercial speech was covered thereby. This was the conclusion the court came to<sup>637</sup>.

Ruling that commercial speech is included under Article 10 ECHR, however, the Court only took a preliminary step regarding this question: once the applicability of Article 10 ECHR is clear, a number of questions remain to be answered. The most important one is the extent to which advertising, although covered by Article 10 ECHR, implies a different application of the Convention's test on the restrictions to freedom of speech. Here the situation is far less clear. Two aspects should be taken into account as to this respect:

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<sup>635</sup> "All these various components [of Barthold's views expressed in the contested article] overlap as a whole, the gist of which is the expression of 'opinions' and the imparting of 'information' on a topic of general interest. It is not possible to dissociate from this whole those elements which go more to manner of presentation than to substance and which, so the German courts held, have a publicity-like effect. This is especially so since the publication prompting the restriction was an article written by a journalist and not a commercial advertisement. The Court accordingly finds that Article 10 is applicable, *without needing to inquire in the present case whether or not advertising as such comes within the scope of the guarantee under this provision*" [emphasis added] (*Barthold case*, ECtHR of 25 March 1985 *cf.*, paragraph 42).

<sup>636</sup> Judge Pettiti, dissenting, stated that "one cannot ignore the considerable evolution that has occurred, in Europe as well as in North America, within the professional bodies representing the liberal professions in opening themselves up to certain forms of (...) advertising (...) Standards of professional conduct are thereby undergoing development (...) Freedom of expression in its true dimension is the right to receive and to impart information and ideas. Commercial speech is directly connected with that freedom. The great issues of freedom of information (...) cannot be resolved without taking account the phenomenon of advertising" (*Barthold case*, ECtHR of 25 March 1985 *cf.*, dissenting opinion of judge PETTITI).

<sup>637</sup> The Court held that the case "conveyed information of a commercial nature. Such information cannot be excluded from the scope of Article 10(1) which does not apply solely to certain types of information or ideas or forms of expression" (*Markt Intern Verlag case*, ECtHR of 20 November 1989 *cf.*, paragraph 26).

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Firstly, in *Barthold*, the Court managed to grant protection precisely because public interest was found in an expression which, accidentally, took the form of a commercial speech: the advertising effect in *Barthold* was then only taken as an external factor which had to be counterbalanced with the public interest in the message<sup>638</sup>. As a result, a violation of Article 10 ECHR was declared, in which, however, the commercial effect of the message had been taken, in principle, as a legitimate reason supporting the state interest in restricting the applicant's freedom of speech<sup>639</sup>.

The approach of the Court changed in *Markt*: now the Court took into account the fact that protecting advertising would imply a protection of the pure private economic interest which lied behind the expression: actually, the court uncovered in *Markt* an economic private interest, but, unlike what happened in *Barthold*, this now seems to be the *only* present interest of the case: no public interest was directly found in the message. Protection of freedom of speech here, as was granted by the Court, had nothing to do therefore with the protection of messages aimed at the public interest, which was present, together and at the same time that a commercial message, in

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**638** "As the Court has already had the occasion to point out, freedom of expression holds a prominent place in a democratic society (..) the necessity for restricting that freedom for one of the purposes listed in Article 10(2) must be convincingly established (..) it may well be that these illustrations [Dr. Barthold's name, his photograph and the name of his clinic] had the effect of giving publicity to Dr Barthold's own clinic (..) [but] (..) the injunction (..) does not achieve a fair balance between the two interest at stake" (*Barthold case*, ECtHR of 25 March 1985 *cf.*, paragraph 58). The Court probably took into account the *public interest* which had been clearly mentioned in the domestic proceedings: according to the Hanseatic Court of Appeal, before which the case had been taken, "the article was pursuing a specific object, that is to say, informing the public about the situation obtaining in Hamburg, at a time when, according to the two practitioners interviewed, the enactment of new legislation on veterinary surgeons was under consideration. It has not been disputed that the problem discussed in the article was a genuine one (..) the correctness or incorrectness of the applicant's declarations (..) had no influence on the judgment [of the Hanseatic Court of Appeal]" (*Barthold case*, ECtHR of 25 March 1985 *cf.*, paragraphs 56-57). Accordingly, it has been also stressed that "...ocorre tener distinto il problema della tutela dei diritti altrui e degli interessi pubblici che potrebbero venire lesi dall'attività di comunicazione commerciale dal problema della valutazione della maggiore o minore dignità della comunicazione (..)" (SAPIENZA, 1987:737).

**639** What was relevant, according to the Court, was the fact that domestic applicable law "risk discouraging member of the liberal professions from contributing to public debate on topics affecting the life of the community if ever there is the slightest likelihood of their utterances being treated as entailing, to some degree, an advertising effects (..) " (*Barthold case*, ECtHR of 25 March 1985 *cf.*, paragraph 58).

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*Barthold*. The Court now maintained that a commercial, purely economic message also deserves legal protection under Article 10 ECHR<sup>640</sup>. The Court's ruling in *Markt*, therefore, may be interpreted in the sense that even a strict economic, private interest is covered by the Convention provision on freedom of speech.

The evolution of the Court from *Barthold* to *Markt* seems to assure a high degree of protection under the Convention of commercial advertising. It should be emphasised, however, that in *Markt* the message appeared in a specialised journal which was not directly involved in the economic struggle. Possibly, therefore, the conclusion may be reached that a clear standard as to the protection of advertising under Article 10 ECHR has not yet been pronounced by the Court. This standard, however, would be applicable to those cases in which the Court would have to face a message of clear and only commercial nature without the possibility of finding any "public interest" therein.<sup>641</sup>

Secondly, *Markt* also suggests that, when commercial speech is involved, the Court is prepared to grant a wide "margin of appreciation" to the member states, the type of which is enjoyed when the aim of the restriction of freedom of expression is, for instance, morals<sup>642</sup>. This wide margin approach would be justified by the special characteristics of the objective at which the restriction is aimed, namely the preservation of a national market economy, which in principle puts national authorities in a better

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**640** "The wording and the aims of the information bulletin in question showed that it was not intended to influence or mobilize public opinion, but to promote the economic interests of a given group of undertakings. In the Government's view, such action fell within the scope of the freedom to conduct business and engage in competitions, which is not protected by the Convention. The applicants did not deny that they defended the interests of the specialized retail trade (...) However, they asserted that Markt Intern did not intervene directly in the process of supply and demand (...)" (*Markt Intern Verlag case*, ECtHR of 20 November 1989 *cit.*, paragraph 25).

**641** In any case, however, the Court would be likely to find such "public" interest in whatever message, even those of strict economic nature; the public interest would come, for instance, from the protection of consumers or even protection of the economic market or something like that.

**642** "the margin of appreciation is essential in commercial matters and, in particular, in an area as complex and fluctuating as that of unfair competition. Otherwise, the European Court of Human Rights would have to undertake a re-examination of the facts and all the circumstances of each case. The Court must confine its review to the question whether the measures taken on the national level are justifiable in principle and proportionate" (*Markt Intern Verlag case*, ECtHR of 20 November 1989 *cit.*, paragraph 34). On the *margin of appreciation* on morals, see *infra* Chapter VII.

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position than the Court to decide on the question<sup>643</sup>. As in *Markt*, therefore, the Court would not in these cases exercise its control task with a strict scrutiny on measures restricting freedom of expression.

In Spain, commercial speech has rarely been mentioned by the *Tribunal Constitucional* in freedom of expression cases. Whenever it has been mentioned, moreover, the *Tribunal Constitucional* statements have been only *obiter dicta* or incidental arguments not related to the main facts of the case. Therefore, any conclusion about the possibility of including commercial speech under freedom of expression protection in future case-law should be drawn with extreme care. However, it should be noted that the *Tribunal Constitucional* has made a distinction between an expression made for informative purposes and the same expression made later with economic purposes only<sup>644</sup>: in the *Paquirri* case, arguing against the applicant's position regarding this point, the *Tribunal Constitucional* admitted that an expression, even made with the sole view of having economic profits, deserves *protection* under Article 20 CE<sup>645</sup>; however, given the circumstances of the case, a previous decision

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643 "In a market economy, an undertaking which seeks to set up a business inevitably exposes itself to close scrutiny of its practices by its competitors (...) However, even the publications of items which are true and describe real events may under certain circumstances be prohibited (...) a correct statement can be and often is qualified by additional remarks, by value judgement, by suppositions or even insinuations (...) It must also be recognised that an isolated incident may deserve closer scrutiny before made public; otherwise an accurate description of one such incident can give the false impression that the incident is evidence of a general practice. All these factors can legitimately contribute to the assessments of statements made in a commercial context, and it is primarily for the national courts to decide which statements are permissible and which are not." (*Markt Intern Verlag case*, ECtHR of 20 November 1989 *cit*, paragraph 35).

644 *Pantoja case*, Sentencia del Tribunal Constitucional 231/88 of 2 December 1988 in *Boletín de Jurisprudencia Constitucional* 92, pages 157-85. The case concerned a commercial video tape which contained the biography of a famous *torero*. The video tape included the scene of the agony of the *torero*, who had died in a *corrida*; the images of the death had been previously shown on a news program on the national television. The widow alleged a violation of her right to familiar privacy, and the defendants replied that the fact that the images had been previously shown in a nation wide program had situated that scenes outside the scope of privacy.

645 "es necesario tener en cuenta la vía por la que la alegada vulneración se habría producido (...) la difusión y comercialización por una empresa privada de una cinta de video, actividad esta que (...) cabe considerar, genéricamente, incluida dentro de las protegidas como un derecho en el art 20 CE" (*Pantoja case*, STC 231/88 *cit*, fundamento jurídico 5).

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which had given *the same degree of protection* to the same message, once delivered with informative purposes and then again with only economic purposes, was overruled by the *Tribunal Constitucional*. According to its decision, the second time in which the message had been delivered the right to familiar privacy of the applicant had been illegitimately breached, due to the pure economic nature of the release of the information<sup>646</sup>. According to this judgment, therefore, expression intended *exclusively* to obtain economic profits for the speaker may be restricted to a greater degree than a speech with informative or other purposes. That kind of speech would remain, however, under the scope of Article 20 CE.

May this approach be applicable to advertising? The *Tribunal Constitucional* has not dealt with this question yet. It has only stated, in *obiter dicta*, that, for instance, lawyers may be obliged under bar regulations to avoid the advertising of law firms<sup>647</sup>. A dissenting opinion in other cases has stressed, on the other hand, that a private television network should not deserve a greater restriction on broadcasting activities than others on the only ground that it broadcasts commercial spots only<sup>648</sup>. The present status of the *Tribunal Constitucional's* case-law, therefore, does not provide a clear answer as to the extent to which advertising will in the future be covered by all the guarantees which protect freedom of speech. Consequently, only in the future will it be

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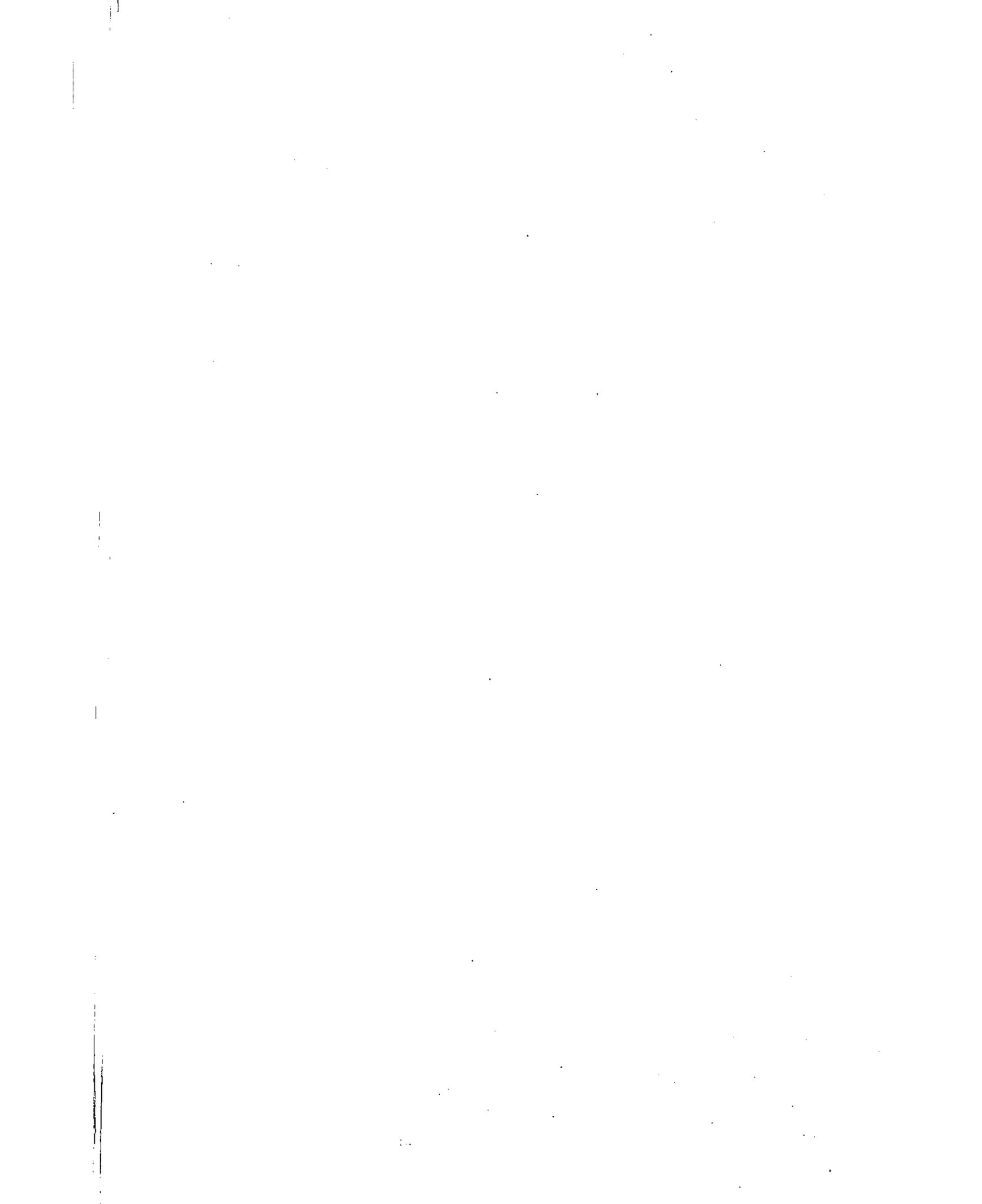
646 "...la emisión, durante unos momentos, de unas imágenes que se consideraron noticiables y objeto de interés no puede representar (independientemente del enjuiciamiento que ello merezca) que se conviertan en públicas y que quede legitimidad (con continúa incidencia en el ámbito de la intimidad de la recurrente) la permanente puesta a disposición del público de esas imágenes mediante su grabación en una cinta de video que hace posible la reproducción en cualquier momento, y ante cualquier audiencia de las escenas de la enfermería y de la mortal herida del señor Rivera, pues no se juzga aquí la información dada en su momento por Televisión Española, sino la difusión de estas imágenes (...) que se produjo con entidad propia, y sin relación con el origen de la grabación por video ni con las informaciones que en su momento se produjeron" (*Pantoja case*, STC 231/88 *cít.* fundamento jurídico 9).

647 *Colegio de Abogados case*, Sentencia del Tribunal Constitucional 286/93 of 4 October 1986, in *Boletín de Jurisprudencia Constitucional* 151, pages 41-45, fundamento jurídico 4.

648 *Video Comunitario de Callosa case*, Sentencia del Tribunal Constitucional 181/90 of 15 November 1990, in *Boletín de Jurisprudencia Constitucional* 116, pages 52-56, dissenting opinion of judge RUBIO LLORENTE)

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seen if the *Tribunal Constitucional* relies on the Convention regarding this question or if an independent interpretation of the Constitution is preferred.



## CHAPTER VI

### LEGITIMATE RESTRICTIONS TO FREEDOM OF EXPRESSION UNDER THE STRASBOURG TEST AND UNDER THE SPANISH CONSTITUTION.

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#### (1) FORMALITIES, CONDITIONS, RESTRICTIONS AND PENALTIES.

##### 1. Introduction.

As has been seen *supra*, paragraph two of Article 10 ECHR allows member states to subject the exercise of freedom of expression to "formalities, conditions, restrictions or penalties", provided that they observe three requirements: firstly, state measures must be "prescribed by law"; secondly, they must be aimed at one of the objectives exhaustively listed in the same paragraph of Article 10 ECHR. And, thirdly, the measures must be "necessary in a democratic society". These threefold requirements are known as "the Strasbourg test".

Once the applicability of Article 10 ECHR to a case before the Court has been clarified<sup>649</sup>, the three elements of the *test* do not necessarily follow in the above mentioned order. Traditionally, however, the three steps of the test are taken by the Court following precisely this order: first, the Court faces the question whether the restriction is prescribed by law; secondly, the Court scrutinizes the objective at which it is aimed, and, finally, the extent to which it is necessary in a democratic society. This order is not, however, intrinsic to the Convention. Moreover, Article 10(2) ECHR lists the

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649 See *supra* Chapter V.

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requirements of the test in a slightly different way: the requisite of *prescribed by law* is mentioned first, the *necessity in a democratic society* comes in second place, and the legitimate state objectives at which interferences may be aimed are listed in third place. Apparently, the only reason by which the Court analyzes the compliance of restrictions to freedom of expression with the requirements of Article 10(2) precisely in the order it does, is that restrictions usually satisfy the first two steps, while the requirement of *necessity in a democratic society* is often the crucial question to be decided<sup>650</sup>. However, the stricter Court's scrutiny to this later requirement, when compared with the others, does not come directly from the wording of Article 10(2) ECHR. It has been developed by the Court on its own. On freedom of expression, there is not to date a reported Court's case in which Article 10 ECHR has been found violated due to the fact that a state restriction has not been *prescribed by law* or that it has pointed to an illegitimate aim under the Convention. On the other hand, the importance given to the requirement of *necessary in a democratic society* has been the casus in the case-law of the Court a counterbalance scapegoat for the states, the doctrine of the "margin of appreciation"<sup>651</sup>.

### 2. States' interferences in freedom of expression.

In the Court's language, "formalities, conditions, restrictions or penalties" which, according to Article 10(2) ECHR may be imposed on the exercise of freedom of expression, are called "interferences". Given the broad scope that all these words seem to have (formalities, conditions, restrictions and penalties), the concept of a state interference on freedom of expression under the Convention must necessarily be very wide. Accordingly, the Court has usually omitted a deep analysis of whether a given

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650 The Court first construed the test in this order in the *Handyside* [ECtHR of 7 December 1976, *cft.*, paragraph 45]. From this case onwards, the three steps of the test have been always approached in this order in all cases concerning freedom of expression, See for instance, the following cases: *Sunday Times*, [ECtHR of 26 April 1979 *cft.*, paragraph 45], *Barthold*, [ECtHR of 25 March 1985 *cft.*, paragraph 43], *Lingens* [ECtHR of 8 July 1986 *cft.*, paragraph 35], *Markt* [ECtHR of 20 November 1989 *cft.*, paragraph 27], *Weber* [ECtHR of 22 May 1990 *cft.*, paragraph 41 ff] and *Schwabe* [ECtHR of 28 August 1992 *cft.*, paragraph 25].

651 On the *margin of appreciation* doctrine, see *supra*, Chapter I.

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interference is really a formality, a condition, a restriction or a penalty, and has directly analyzed the compliance of any alleged state measure with the test. In other words, whatever action from a member state which has allegedly violated freedom of expression and reaches the Court, is analyzed following the three steps test, without a serious analysis of whether it may or may not constitute an "interference" under the Convention.

This question, however, should not be disregarded, at least when some controversial aspects of the contested interferences so advise. Whatever the case, the Court has linked the scope of the allowed interferences with the "duties and responsibilities" which, according to Article 10 ECHR, must be carried out by anybody who exercises freedom of expression. Accordingly, it seems that a broad or narrow understanding of the concept of interference will depend, among other things, on the attitude of who exercises the right<sup>652</sup>.

Three main questions may be posed as to state interferences under Article 10 ECHR: first, who may claim to be subject to an illegitimate state interference?; secondly, how must a state measure affect freedom of expression in order to be seen as an interference?; and, finally, are there state interferences which bring with them, *per se*, a violation of freedom of expression, without any further application of the remaining steps of the test being necessary? These three questions under the Convention will now be compared with the *Tribunal's* approach.

Under Article 10 ECHR, the contested state interference must be imposed by the state on the person who raises the complaint before the Convention's bodies. In general, this previous question is analyzed by the Court under the Convention provision which defines the meaning of a *victim* of a violation of a Convention's right<sup>653</sup>. As to freedom

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652 The Court made it clear in an early case on freedom of expression: "whoever exercises his freedom of expression undertakes "duties and responsibilities" the scope of which depends on his situation and the technical means he uses. The Court cannot overlook such a person's "duties" and "responsibilities" when it enquires, as in the case, whether "restrictions" or "penalties" were conducive to the "protection of morals" which made them "necessary" in a "democratic society" (*Handyside case*, ECtHR of 7 December 1976 *cf.*, paragraph 49).

653 Article 25 ECHR states as follows: "The Commission may receive petitions addressed to the Secretary General of the Council of Europe from any person, non-governmental organization or group of individuals claiming to be a victim of a violation by one of the High Contracting Parties

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of expression, the Court has applied a very broad concept of victim, very similar, sometimes, to an *in abstracto* control of domestic legislation of member states<sup>654</sup>. This has been a controversial point since the Court's first cases on freedom of speech: in 1962, a case was struck off the Court's list due to a withdrawal from the applicant, which followed a change in the domestic applicable legislation of the concerned member state<sup>655</sup>. The decision produced a dissenting opinion claiming for an *objective* control by the Court on state restrictions to freedom of expression, which should not be affected by the fact that an applicant had eventually withdrawn from his claim before the Court<sup>656</sup>. The Court seemed to evolve later in the way described in that dissenting opinion. Furthermore, in the *Irish Abortion* case the majority of the Court has come very close to that position<sup>657</sup>: applicants may be admitted by the Court as victims in a

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of the rights set forth in the Convention(..)"

654 A broad concept of victim in freedom of expression cases may be seen, for instance, in the *Groppera case*, [ECtHR of 28 March 1990 *cit*, paragraphs 46-51] or in the *Irish Abortion case* [Open Door et Dublin Well Woman v. Ireland, Judgment of the ECtHR of 29 October 1992 in *Publications of the European Court of Human Rights* series A, n. 246.

655 See *De Becker v. Belgium*, Judgment of the ECtHR of 27 March 1962 in *Publications of the European Court of Human Rights* series A, n. 4, paragraphs 8).

656 "wether the fact that a State, accused of violating the Convention, amends the relevant legislation after the case has been brought before the Court, makes it ipso facto incumbent upon the Court to consider the case before it in the light of the amended legislation. This question arise independently of wether the Applicant is or not satisfied (..) It seems to me to follow from the spirit of the Convention that the Applicant is entitled to a decision on the question which the Commission has brought (..) wether a withdrawal of the Applicant can reasonably allow the Court to terminate proceedings (..) this question could have been answered in the positive if the function of this Court had been to enforce private claims, which a claimant may, if he wishes, modify during proceedings. This is not, however, the case here (..) the function of the Court is "to ensure the observance of the engagements undertaken by the High Contracting Parties" (..) In view of this, the Applicant is not recognised as a party before the Court (..) for these reasons, I believe that is inexpedient for the Court to terminate the proceedings in this case, even if it has the power to do so. Indeed, I doubt wether the Court has such a power (..) " (*De Becker case*, ECtHR of 27 March 1962, *cit*, dissenting opinion of judge Ross).

657 The case concerned domestic injunctions imposed by Irish Authorities to people seeking information on how to abort in the United Kingdom and to entities which had provided that information. The applicants were, inter alia two child-bearing age women, not directed affected by any injunctions. As to the extent to which they could properly claim to be *victims* of an interference with their rights, the Court stated that " (..) Article 25 [ECHR] entitles individuals to contend that a law violates their rights by itself, in the absence of an individual measure of implementation, if they run the risk of being directly affected by it" and added that, although it had not been asserted

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freedom of expression case even in the absence of a direct restriction imposed by the state.

The Spanish Constitution entitles for initiate a *recurso de amparo* before the *Tribunal Constitucional* to, *inter alia*, "any individual or body corporate with a legitimate interest"<sup>658</sup>. In principle, therefore, not every person entitled to take a case before the Commission and the Court may also claim to have the right to initiate a *recurso de amparo*. This would not be, however, a breach of the Convention, since individually lodged proceedings before a Constitutional Court are not compulsory guaranteed under Article 17 ECHR<sup>659</sup>. As a matter of fact, among the member states of the Convention with a Constitutional Court, *amparo* like proceedings (as, for instance, the German *Verfassungsbeschwerde*) are present only in a few cases<sup>660</sup>. The *Tribunal Constitucional*, however, has broadly acknowledged a *locus standi* for a *recurso de amparo* in freedom of speech cases: in the *Villen* case, for instance, a complaint lodged by a trade union had not been admitted on the grounds that freedom of speech is an individual subjective right<sup>661</sup>. More recently, however, the *Tribunal Constitucional* held that public institutions are entitled to the right to freedom of speech, although to a lower

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that the applicants were pregnant, it was not disputed that "they belong to a class of women of child-bearing age which may be adversely affected by the restrictions imposed by the injunction(..)". The Government had alleged that if these two applicants were considered as victims under Article 25 ECHR, it would mean that *actio popularis* are allowed under ECHR (See the *Irish abortion case*, ECtHR of 29 October 1992 *cit.*, paragraphs 41-43).

658 Article 162(1) (b) CE. According to this Article, The *Defensor del Pueblo* (ombudsman) and the Public Prosecutor are also entitled to lodge a *recurso de amparo*.

659 Article 13 ECHR states as follows: "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in its official capacity".

660 See a review in ARNOLD, R. (1990) *Profili di Giurisdizione Costituzionale Comparata*. Trieste:LINT, pages 112 ff., and in FAVOREU, L. (1986) *Les cours constitutionnelles*, Paris:PUF, *passim*.

661 The *Tribunal Constitucional* ruled that the freedom of expression is "en línea de principio un derecho individual de los miembros de la asociación y solo excepcionalmente cuando se refiera a aquellas facetas respecto de las cuales la asociación sea titular directo del derecho podría ella considerarse lesionada" (*Unión sindical de policía case*, STC 141/85 *cit.*, fundamento jurídico 1).

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extent than that afforded to citizens<sup>662</sup>. Nonetheless, the *Tribunal Constitucional* has stated that the amparo is not exercisable in order to obtain an *in abstracto* control of legislation, which under the Spanish Constitution is restricted only to a reduced number of legitimate agents<sup>663</sup>. This principle has been repeatedly held in freedom of expression cases<sup>664</sup>.

In addition, and this turns us to the second question discussed above, a state interference alleged to breach Article 10 ECHR must be displayed in a case in which freedom of expression has really been the fundamental right exercised<sup>665</sup>. However, and this is a crucial point in this respect, once the case has been admitted by the Court as an Article 10 ECHR case, a state interference may be directed to aspects of the case in which freedom of expression is not directly concerned: a wide concept of *interference* would include, therefore, whatever legal consequences follow after the exercise of freedom of speech: this would include, for instance, measures taken by the state on

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662 In the *Ayuntamiento de Priego* case, Sentencia del Tribunal Constitucional 185/89 of 13 November 1989, in *Boletín de Jurisprudencia Constitucional* 104, pages 175 ff.

663 According to Article 162(1)(a) CE, only the following are entitled to lodge a *recurso de inconstitucionalidad*, that is, an objective procedure in order to review *in abstracto* the constitutionality of a law: the Prime Minister, the Ombudsman, fifty members of Congress, fifty Senators, and the Government and the Parliament of a Autonomous Community.

664 Very frequently in broadcasting cases, in which the *Tribunal Constitucional* has denied on occasions the amparo due to this reason. See, for instance, the *Radio X* case, STC 119/91, *cft*, fundamento jurídico 5-6).

665 However, in such a case, the question should be treated by the Court at an early step of the judgement, when problem of applicability of paragraph one of Article 10 ECHR is analyzed, and before analyzing the compliance of the alleged violation with the test of paragraph 2. Therefore, provided that it has been decided that Article 10(1) is not applicable to an instant case, it should not be relevant whether a state's measure may be regarded or not as an *interference*. A dissenting opinion in *Kosiek*, for instance, pointed out the contradiction in which the Court was involved when it ruled that the contested state measure was not an interference to freedom of expression and held, at the same time, that, notwithstanding this, Article 10(1) was not applicable, so " (...) in deciding (...) that there has been no interference with the exercise of the right protected under par 1 of Article 10, has the Court not implicitly decided that the par 1 of Article 10 of the Convention was applicable in this case? After all, if access to the civil service remain outside the ambit of Article 10, it would surely have been unnecessary to consider whether there had been any interference in the instant case or not. I should have preferred the Court to express its view in this more explicitly (...) " (*Kosiek* case, ECtHR of 28 August 1986, *cft*, dissenting opinion of judge SPIELMANN). The same statement in *Glaserap* case, ECtHR of 28 August 1986, *cft*.)

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economic profits which come as a consequence of the exercise of this right<sup>666</sup>. On the other hand, a strict concept of *interference* will exclude whatever state measure which does not directly make the exercise of the right, impossible that is, which does not prevent the speaker to emit his message.

The Court has adopted a broad concept of state interference under Article 10 ECHR. For instance, a state's measure taken on private property which had been the means by which an expression had taken place has been twice construed as an interference in the freedom of expression. The cases concerned the seizure of a matrix of a book<sup>667</sup> and the confiscation of pieces of art<sup>668</sup>. In one of its early cases, the *Tribunal Constitucional*, on the other hand, upheld a concept of "interference" to freedom of speech clearly below the Convention's standard: a punishment to the applicant, posterior to the expression, was not seen as an interference in the applicant's right, on the argument that the expression itself had not been affected by the punishment<sup>669</sup>. This narrow understanding of a restriction, however, has been modified later<sup>670</sup>, and

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**666** This kind of restrictions on freedom of expression as been embodied in the so called *Son of Sam* laws, enacted in some states of the United States. See a comment on the United States Supreme Court decision on these cases in (1993), *Human Rights Law Journal* 13, pages 378 ff

**667** In the *Handyside case*, ECtHR of 7 December 1976 *cit.* A dissenting opinion stated that the seizure would have been better brought under Article I of the First Protocol which embodies the right to private property.

**668** In the *Müller case*, ECtHR of 24 May 1988 *cit.*, paragraph 28.

**669** According to the ruling decided in that case, the right to freedom of expression "se concreta y satisface en un comportamiento de su titular, consistente en la realización de aquellos actos en que el propio derecho consiste", and therefore, a direct restriction ("lesión directa") on the right was only possible "en todos aquellos casos en que tal comportamiento - los actos de comunicación y de difusión - se ven impedidos por vía de hecho o por una orden o consignación que suponga un impedimento para que la información sea realizada". The Tribunal went on to decide that the applicant's right had not been restricted, since he had been allowed to express his views before the punishment, that is, he had "satisfecho cumplidamente su derecho a comunicar información." (*Vinader case*, STC 105/83, *cit.*, fundamento jurídico 11).

**670** Such a strict concept of a restriction on freedom of expression, indeed, has not been maintained by the *Tribunal Constitucional* in a constant manner. For instance, in a case decided one year before *Vinader*, the *Tribunal Constitucional* did not follow the Public Attorney plea that an punishment to a speaker, posterior to the expression, and which did not prevent him to emit the expression, was not a restriction on his freedom of expression. See the *Almacén de frutas de El Escorial case*, Sentencia del Tribunal Constitucional 2/82, of 29 January 1982 in *Boletín de Jurisprudencia Constitucional* 10 pages 102-106, antecedente 4)

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punishments or any other legal consequences imposed on a speaker as a consequence of his speech is now construed as a restriction on freedom of speech and therefore subject to scrutiny under Article 20 CE. A narrow understanding of interference has nevertheless still been applied to some cases of administrative procedures: in such cases, the *Tribunal Constitucional* has argued that no interference in freedom of expression is present on the grounds that the alleged measure comes as a legal consequence of the applicant's behaviour, whereas no administrative sanction has been released by the state. This approach has been applied overall to broadcasting cases: according to this construction, for instance, administrative ordered closure of a radio station whose owners had not applied for a license for broadcasting was not seen as an interference, but just as a legal consequence of the fact that the license had not been applied for<sup>671</sup>.

In addition to the general guarantees provided by Article 10(2) to any interference on the right of freedom of expression, there are some cases in which, due to the specific kind of the interference released by the state, guarantees, other than those embodied in Article 10 ECHR also apply. This is the case when a state interference takes the form of a "criminal charge" under Article 6(1) of the Convention: in the *Weber* case, a violation of freedom of expression was decided by the Court on the grounds that criminal charges issued against the applicant due to expressions previously emitted, had not respected procedural guarantees embodied in Article 6 ECHR: a fine imposed for revealing facts of a pending proceeding to which the applicant was a party - allegedly a disciplinary measure according to the preliminary objections submitted by the Government<sup>672</sup> - was defined by the Court as a criminal charge<sup>673</sup> which followed the applicant's exercise of freedom of expression. As a result, a violation of Article 6(1) ECHR, in connection with Article 10 ECHR, was held<sup>674</sup>. The approach of the *Tribunal Constitucional* regarding

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<sup>671</sup> For instance in the *Video de Callosa case*, STC 181/90, *cft*, fundamento jurídicos 4-5.

<sup>672</sup> *Weber v Switzerland*, Judgment of the ECtHR of 22 May 1990, in *Publications of the European Court of Human Rights* series A, n. 177.

<sup>673</sup> For the Court's reasoning in this case about the applicability of the concept of a "criminal charge" under Article 6 ECHR, see *Weber case*, ECtHR of 22 May 1990, *cft*, paragraph 2 ff.

<sup>674</sup> *Weber case*, ECtHR of 22 May 1990, *cft*, paragraphs 39-40.

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this point is consistent with the Court's: whenever a judge imposed, alleged restriction to freedom of speech reaches the *Tribunal Constitucional*, compliance of the restriction under procedural guarantees of Article 24 CE is scrutinised<sup>675</sup>. As a matter of fact, the *Tribunal Constitucional* was more likely in its early cases on freedom of speech to find a violation of any of the guarantees embodied in Article 24 CE than a direct breach of freedom of expression. This allowed it to send the case back on remand to the *a quo* judge for a new hearing or a new judgement. This tendency, however, has been changed more recently: now, when a breach of Article 24 CE, read in the light of Article 20 CE, is found by the *Tribunal Constitucional*, it would rather give a direct amparo to freedom of speech than an amparo grounded on procedural guarantees or on the right to a fair trial only. In doing so, a repetition of proceedings before the *a quo* judge will be avoided.

**3. Prior Restraints.**

The question may be finally posed as to the extent to which certain interferences are *per se* prohibited by the Convention. This problem has been ultimately faced by the Court in two recent cases concerning prior restraints on freedom of expression<sup>676</sup>: both in the *Observer and the Guardian* and in the *Sunday Times (II)* cases, the Court ruled that *prior restraints* are not, *per se*, proscribed from the Convention system<sup>677</sup>. The question was raised as a result of the application by English courts, along the domestic

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<sup>675</sup> Article 24 CE embodies the right to a trial with all guarantees. It has been consistently interpreted by the Tribunal following Article 6 ECHR.

<sup>676</sup> *The Observer and the Guardian v The United Kingdom*, Judgment of the ECtHR of 26 November 1991 in *Publications of the European Court of Human Rights* series A, n. 216, and the *Sunday Times v the United Kingdom (second case)*, Judgment of the ECtHR of 26 November 1991, in *Publications of the European Court of Human Rights* series A, n. 217.

<sup>677</sup> This was the first time in which a direct discussion on compatibility of prior restraints with the Convention was raised. The question probably was raised by the affidavits submitted to the Court by non governmental organizations, which the Court "had in mind" (*Observer-Guardian case*, ECtHR of 26 November 1991, *cft*, paragraph 59) when it decided on the issue. The Court ruled that " (...) Article 10 of the Convention does not in terms prohibit the imposition of prior restraints on publications, as such" (*Observer-Guardian case*, ECtHR of 26 November 1991, *cft*, paragraph 60).

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proceedings of both cases, of the *American Cyanamid* standard on interlocutory injunctions: according to this standard, an interlocutory injunction is to be issued unless strong evidence that the case would not succeed in the future is provided<sup>678</sup>. According to the Court, the application of this domestic standard to a case of freedom of expression is acceptable under the *margin of appreciation doctrine*<sup>679</sup>, although the Court expressed the view that a careful scrutiny was necessary when the state interference complained about was a preliminary injunction<sup>680</sup>. Moreover, the Court held, that such a restriction is acceptable in *the Observer and the Guardian* and in the *Sunday Times (II)* cases only in the light of the present circumstances, taking into account the legitimate aim at which the interference was aimed, namely the prevention of disclosure of information received in confidence<sup>681</sup>.

A number of dissenting opinions on the *Observer and the Guardian* decisions, however, approached the question of prior restraints as a kind of prior censorship, and, taking this principle from some United States Supreme Court cases, expressed the opinion that prior injunctions on freedom of expression should not be allowed under the Convention system in whatever circumstances<sup>682</sup>. Therefore, according to a minority

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**678** On the *American Cyanamid* standard, see the *Observer-Guardian case*, ECtHR of 26 November 1991, *cft*, paragraphs 10 ff.

**679** *Observer-Guardian case*, ECtHR of 26 November 1991, *cft*, paragraph 63. On the *margin doctrine* see, in general, *supra* Chapter I.

**680** "(..) the danger inherent in prior restraints are such that the call for the most careful scrutiny on the part of the Court. This is especially so as far as the press is concerned, for news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest" (*Observer-Guardian case*, ECtHR of 26 November 1991, *cft*, paragraph 60).

**681** Otherwise, the newspapers prevented from publishing "would be free to publish that material immediately and before the substantive trial; this would effectively prive the Attorney General, if successful on the merits, of his right to be granted a permanent injunction (..) " (*Observer-Guardian case*, ECtHR of 26 November 1991, *cft*, paragraph 62).

**682** Four judges adhered to the following dissenting opinion: "Under no circumstances, however, can prior restraint, even in the form of judicial injunctions, either temporary or permanent, be accepted, except in what the Convention describes as a "time of war or other public emergency threatening the life of the nation", and even then, "only to the extent strictly required by the exigencies of the situation" [Article 15]" (*Observer-Guardian case*, ECtHR of 26 November 1991, *cft*, dissenting opinion of judge DE MEYER).

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of the Court, the British *American Cyanamid* standard was *in abstracto* incompatible with Article 10 ECHR. The debate on prior censorship was raised again in the Court when the similar *Sunday Times II* case was decided. Noteworthy in this case, the applicant expressly claimed for a declaration of incompatibility of the *American Cyanamid* standard in the face of the Convention<sup>683</sup>. The Court, however, did not make any decision on that point, arguing similar reasons to those held by the majority in the *Observer and the Guardian* case. Similar dissenting opinions on the question were now also issued by a number of judges<sup>684</sup>.

It seems that the debate on objective compatibility of prior censorship to freedom of expression with the Convention will be present from now onwards, whenever in a case before the Court interlocutory injunctions have been issued along prior domestic proceedings. Furthermore, after the *Observer and the Guardian* and the *Sunday Times (II)* cases, the same question was raised again in the *Irish abortion case*<sup>685</sup>. Surely, it will be posed again in pending cases before the Court in which prior restraint is involved<sup>686</sup>. It is still too early to anticipate what the evolution of the Court will be in the future, but a middle way solution, already argued in one of the dissenting opinions mentioned above<sup>687</sup>, seems to emerge from the Court's discussion: although prior censorship should not be construed as prohibited *per se* by the Convention, it might in the future be subject to a very strict scrutiny about the necessity and the proportionality

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**683** In its final submissions to the Court, the applicants asked the Court to "make it clear that the test laid down in *American Cyanamid Co. v Ethicon Ltd* did not comply with Article 10" (*Sunday Times (II) case*, ECtHR of 26 November 1991 *cft*, paragraph 47).

**684** The same judges that those in the *Guardian-Observer case* adhered now to a dissenting opinion in which the same position on prior restraint was argued (*Sunday Times (II) case*, ECtHR of 26 November 1991 *cft*, dissenting opinion of judge DE MEYER).

**685** Again, in this case a dissenting opinion pointed out that "There could be very good reasons justifying the adoption of criminal provisions punishing the commission of information of this type, but I do not think that they could warrant a derogation from the, in my view essential, principle that the imposition of prior restraints on the exercise of the freedom of expression, even where they take the form of judicial injunctions, cannot be permitted" (*Irish abortion case*, ECtHR of 29 October 1992 *cft*, dissenting opinion of judge DE MEYER).

**686** It will surely be discussed in the *Otto Preminger Institute v Austria case*, still pending before the Court. See the Report of the Commission [not yet reported], in which this point is discussed.

**687** See the *Observer-Guardian case*, ECtHR of 26 November 1991, *cft*, paragraph dissenting opinion of judge PEKKANNEN).

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of such a measure<sup>688</sup>.

In Spain, prior censorship is strictly forbidden by the Constitution. According to Article 20(2), "the exercise of these rights cannot be restricted by any kind of prior censorship". Article 20(2) applies to all the rights listed in Article 20(1), freedom of expression, freedom of information, and, remarkably, "freedom of artistic creation" included as well. Procedural guarantees embodied in the Constitution therefore, would, for instance, make the seizure of a film prior to the showing to the public impossible. The Constitutional Court has defined the concept of "prior censorship" in a very broad way, ruling that, under Article 20(2) of the Constitution, it cannot be accepted under whatever circumstances<sup>689</sup>. Forfeiture of films, books, newspapers or any other means by which freedom of expression is exercised is nevertheless allowed by Article 20(5) of the Constitution, provided that a judicial decree is issued<sup>690</sup>.

In principle, a higher standard of protection, directly provided by the Constitution, may be seen at least for prior censorship, for which the *Tribunal Constitucional* has preferred an *independent* construction of the Constitution. As for judicial seizures of books or other media, Spanish practice is at the moment very scarce and it is still too early to foresee whether the *Tribunal* will rely on the Court's case-law or not to construe a more precise domestic standard<sup>691</sup>.

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**688** The criteria by which the scrutiny may be made have been also pointed out in the *Observer-Guardian case*, ECtHR of 26 November 1991, *cft*, in the dissenting opinion of judge MORENILLA).

**689** According to the *Tribunal Constitucional* prior censorship is forbidden "(..) haciendo (..) abstracción de apelaciones a cualesquiera clases de intereses, incluidos los de carácter más general o comunitario", as stated in the case of the *Decreto de la Generalidad Catalana sobre depósito previo de publicaciones*, Sentencia del Tribunal Constitucional 52/83, in *Jurisprudencia Constitucional VI*, pages 211-21, fundamento jurídico 5.

**690** However, the forfeiture has been rarely adopted in cases in which morals or the reputation of institutions were involved. In a case of 1982, the Constitutional Court upheld the forfeiture of a book on sexual matters which had been used in a number of schools. The Court, however, put forward that the book was aimed at children as a relevant argument to uphold the forfeiture of the book See the *A ver case*, STC 62/82, *cft*.

**691** The necessity of a judicial order for seizure and forfeiture of publications has been narrowly construed by the Tribunal in the *Radio Canfali case*, [Sentencia del Tribunal Constitucional 144/87 of 23 Septemebrer 1987 in *Boletín de Jurisprudencia Constitucional* 78 pages 1340-44], in which the Tribunal ruled that this constitutional provision does no cover confiscation of broadcasting

**(1) FORMALITIES, CONDITIONS, RESTRICTIONS AND PENALTIES**  
**3. PRIOR RESTRAINTS.**

**(2) "PRESCRIBED BY LAW".**

**1. Accessibility and Foreseeability of a law.**

Any legitimate restriction to freedom of expression must be under the Convention system *prescribed by law*. This requisite of Article 10(2) ECHR has posed to the Court one of the typical questions which arise from the multinational character of the Convention. From a continental law point of view, *prescribed by law*, or *prevue par la loi*, as the French version of the Convention says, could be identified with the *principe de légalité*<sup>692</sup>. This interpretation of the Convention, however, would be hardly applicable to common law member states. The Court, due to this reason, had to solely construe a Convention's meaning of this clause, which can therefore be seen as an *autonomous concept* in the Convention's system<sup>693</sup>. The question arose in one of the first cases on freedom of expression in which the United Kingdom was involved, which was brought before the Court in the late seventies: the *Sunday Times case*<sup>694</sup>. The Court then ruled that an interpretation of the requisite of *prescribed by law* as implying a piece of law embodied in domestic legislation would be incompatible with the legal roots of the common law system<sup>695</sup>. According to this assumption, the Court had to construe its

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material: "no cabe justificar de secuestro una actuación que no se dirige contra publicaciones o grabaciones o cualquier otro soporte de una comunicación determinada, esto es, de un mensaje concreto, sino contra el instrumento capaz de difundir, directamente o incorporándolas a un soporte susceptible a su vez de difusión, cualquier contenido comunicativo" (*Radio Confali case*, STC 144/87 *cit*, fundamento jurídico 3). This confiscation, may affect however freedom of expression and must therefore be analyzed under the Article 20 CE perspective: "en la medida en que el uso de instrumentos de este genero puede resultar indispensable para la difusión eficaz de ideas o informaciones, su utilización esta también protegida por los derechos fundamentales enunciados en los apartados a) y d) del artículo 20 CE (..) y no puede ser limitada o entorpecida si no es en lo estrictamente necesario para salvaguardar el derecho ajeno o proteger otros bienes jurídicos (..)" (*Confali case*, STC 144/87 *cit*, fundamento jurídico 3).

692 According to the French version of the Convention, Article 10(2) ECHR provides that a state interference in the freedom of expression must be "(..) prévue par la loi (..)"

693 On the *autonomous concepts* in the Convention, see *supra* Chapter I.

694 *Sunday Times case*, ECtHR of 26 April 1979 *cit*.

695 It would be clearly contrary to the intention of the drafters of the Convention to hold that a restriction imposed by virtue of the common law is not 'prescribed by law' on the sole ground that it is not enunciated in legislation: this would deprive a common-law State which is a Party of the Convention of the protection of Article 10(2) and strike at the very roots of that State's legal system" (*Sunday Times case*, ECtHR of 26 April 1979, *cit*, paragraph 47).

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**LEGITIMATE RESTRICTIONS TO THE FREEDOM OF EXPRESSION.**

own meaning of *prescribed by law*: it ruled that any state interference in freedom of expression would be respectable with the prescribed by law principle provided that the interference was *foreseeable* under the legal system of the member state. This further includes that the domestic applicable law in question should be *accessible* to the public<sup>696</sup>. The interpretation of the *prescribed by law* clause as accessibility and foreseeability has allowed the Court to accept to date as complying with this requirement every alleged interference on freedom of expression which has been alleged before the Court. Moreover, a broad construction of this clause has been applied not only to common law member states, as it was originally intended<sup>697</sup>, but also to member states belonging to a continental civil law system<sup>698</sup>.

The Court has further refined the meaning of *accessible* and *foreseeable* under the Convention, at the same time as a number of questions regarding this point have been posed by freedom of expression cases. As to this respect, the following points should be noted: first, the foreseeability of a "law", this concept being taken in the above mentioned way, does not preclude cases in which interpretation is needed in order to foresee the exact way in which a law will be applied. This rule has allowed the Court to find no breach of the *prescribed by law* principle in cases in which the interpretation given by domestic authorities to the domestic law applicable to the case has been difficult to reach or controversial<sup>699</sup>. Furthermore, no breach of the *prescribed by law* clause has been found when the provision in question had been admittedly interpreted

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<sup>696</sup> "Firstly, the law must be adequately accessible; the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail" (*Sunday Times case*, ECtHR of 26 April 1979, *cit.*, paragraph 49).

<sup>697</sup> For instance, in the *Observer-Guardian case*, ECtHR of 26 November 1991, *cit.*, paragraphs 47-57).

<sup>698</sup> For instance in the *Lingens case*, ECtHR of 8 July 1986, *cit.*, paragraph 36.

<sup>699</sup> As, for instance, the interpretation reached by domestic courts as to Article 161 of the Spanish Criminal Code in *Castells*, see *Castells case*, ECtHR of 23 April 1992, *cit.*, paragraph 35-38). On this Article, see *infra* Chapter VIII.

**(2) "PRESCRIBED BY LAW".**

**1. ACCESSIBILITY AND FORESEEABILITY.**

in a extensive way by domestic authorities<sup>700</sup>, even when departing from prior well established case-law<sup>701</sup>. Secondly, any particular kind of law is included under this requisite: this applies to international law, even in cases in which application of international law to the case is not easy to foresee<sup>702</sup>. This applies also even to laws not directly passed by any public authority, as is the case of rules passed by private corporations, for instance, a professional council<sup>703</sup>. Moreover, the Court has made it clear that the consideration of anything as a law, and its interpretation, is a task mainly for domestic authorities. Although the Court has not withdrawn from a European control on this point to date, it has not decided that a state interference has not filled the requisite.

There is however, a type of case in which particular problems as to this requirement of Article 10(2) ECHR arise: cases in which there is not any act of Parliament or any other law allowing the state to interfere in freedom of expression, and a state interference is nevertheless exclusively granted on a domestic constitutional provision, not directly related to freedom of expression. This was the main point that the *Irish Abortion* case, decided by the Court in 1992, presented regarding the *prescribed by law* aspect<sup>704</sup>. Furthermore, this case may be seen as the case in which, to date, the requirement of states' interferences in freedom of expression to be *prescribed by law* has been debated most: in order to allow the defendant state to pass the *test* on this point, the Court stressed the special character of the Irish Constitution, directly self-executing as abortion, according to Irish Courts<sup>705</sup>; against this background, the

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700 As the interpretation given to Article 108 of the Icelandic Penal Code by domestic courts in *Thorgeir Thorgeirson v. Iceland*, Judgment of the ECtHR of 25 June 1992, in *Publications of the European Court of Human Rights* series A, n. 239, paragraph 58.

701 As in the *Muller case*, ECtHR of 24 May 1988, *cf.*, paragraphs 38-39.

702 See *Groppera case*, ECtHR of 28 March 1990, *cf.*, paragraphs 065-68.

703 As in the *Barthold case*, ECtHR of 25 March 1985, *cf.*, paragraph 48.

704 *Irish abortion case*, ECtHR of 29 October 1992 *cf.*

705 The Court pointed out that "it is clear from Irish case-law (...) that infringement of constitutional rights by private individuals as well as by the State may be actionable (...) Furthermore, the constitutional obligation that the State defend and vindicate personal rights 'by its laws' has been interpreted by the courts as not being confined merely to laws [enacted by Parliament] (...) but comprehending judge-made law. In this regard, the Irish courts, as the

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injunction imposed on applicants was in addition easily foreseen<sup>706</sup>. As a result, the Court finally ruled that the injunction imposed on the applicants by Irish Courts had been *prescribed by law*, due to the special consideration that domestic courts due to the Constitution in Ireland, by which criminal charges may be ground directly on the Constitution even in the lack of a criminal law provision on the case. The question, however, is much discussed in a dissenting opinion on the Court's decision; remarkably, this is the only reported dissenting opinion on the *prescribed by law* requisite on cases concerning freedom of expression<sup>707</sup>.

#### 2. The Reserva de Ley Orgánica.

Restrictions to freedom of expression are subject, under the Spanish Constitution, to a *Reserva de Ley*. This places the Spanish standard beyond the Convention's requirements, given the above mentioned broad interpretation of the European Court on the *prescribed by law* clause. Moreover, the freedom of expression, as a fundamental constitutional right, is subject to the special *Reserva de Ley Orgánica*: according to Article 81 CE, laws relating to fundamental constitutional rights must be Organic Laws, that is, a law which needs the vote of absolute majority in Parliament in order to be passed<sup>708</sup>. Given this clear provision of the Spanish Constitution, which is, unanimously

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custodians of fundamental rights, have emphasized that they are endowed with the necessary powers to ensure their protection" (*Irish abortion case*, ECtHR of 29 October 1992 *cft*, paragraphs 56-60).

**706** "Taking into consideration the high threshold of protection of the unborn provided under Irish law generally and the manner in which the courts have interpreted their role as the guarantors of constitutional rights, the possibility that action might be taken against the corporate applicants must have been, with appropriate legal advice, reasonably foreseeable (...) the restriction was accordingly prescribed by law". (*Irish abortion case*, ECtHR of 29 October 1992 *cft*, paragraph 60).

**707** A judge of the Court missed a Bill of Parliament thanks to which the *principe de legalité* would have been respected, and stated that, in the absence of specific legislation, the Irish Constitution "did not provide a clear basis for the individual to foresee that imparting reliable information about abortion clinics in Great Britain would be unlawful (...)" (*Irish abortion case*, ECtHR of 29 October 1992 *cft*, dissenting opinion of judge MORENILLA).

**708** Article 81 CE reads as follows: (1) "Organic acts are those relating to the implementation of fundamental rights and public liberties, those laying down Statutes of Devolution and the general electoral system, and other laws provided for in the Constitution. (2) The passing, amendment or repeal of Organic Acts shall require the overall majority of the members of Congress in a final vote

**(2) "PRESCRIBED BY LAW"**  
**2. RESERVA DE LEY ORGÁNICA.**

interpreted by Spanish legal literature in the above mentioned sense<sup>709</sup>, the tribunal has never paralleled the Convention interpretation with regards to this point, applying a lower European standard on the "prescribed by law" clause as construed by the European Court for freedom of expression cases. Furthermore, in a case in early 1981, when applicants claiming a violation of Article 20 CE argued that international agreements on human rights, the European Convention included, ordered respect for the *prescribed by law* clause<sup>710</sup>, the *Tribunal Constitucional* expressly replied that this requirement was *below* Constitutional regulations on the question, which should therefore be preferred<sup>711</sup>. This may be the only occasion in which, in a freedom of expression case, the *Tribunal Constitucional* has expressly followed a *reactive independent* domestic construction of a constitutional provision given a lower international standard.

**(3) THE FREEDOM OF EXPRESSION IN A DEMOCRATIC SOCIETY.**

**1. The Preferred Position of the Freedom of Expression.**

The provision of Article 10 ECHR which decrees that state interferences to freedom of expression must be "necessary in a democratic society" has been construed by the Court in such a way that at present the great bulk of European control concentrates on this aspect. It should be noted, however, that the Court could have construed the Convention's meaning of "necessary in a democratic society" in a much less strict way, closer to a self-fulfilling provision: provided that every member state of the Council of Europe is a democratic state (this is a *sine qua non* condition for incorporation into the Council of Europe), any measure taken by a member state could be interpreted as necessary in a democratic society. The evolution of the Court as to this

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of the bill as a whole."

**709** See a review in LINDE, E. (1990) *Las Leyes Orgánicas*, Madrid:Linde editores, specially pages 90-97.

**710** Applicants claimed that "tanto el artículo 19(2) del Pacto Internacional de Derechos Civiles y Políticos como el artículo 10 de la Convención Europea para la Protección de los Derechos Fundamentales y las Libertades Públicas (...) exigen que toda restricción a la libertad de expresión se haga precisamente mediante Ley (...) (*Voz de España case*, STC 6/81, *cit*, antecedente 4).

**711** "Cualquier limitación de estas libertades sólo es válida en cuanto hecha por Ley, no porque así lo exijan diversos Pactos Internacionales ratificados por España, sino, sobre todo, porque así lo impone la propia Constitución, que, extremando aún más las garantías, exige para esas leyes limitativas una forma especial (...)" (*Voz de España case*, STC 6/81, *cit*, fundamento jurídico 4).

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point, however, has been in the opposite direction, and, to date, compliance with the *necessary in a democratic society* requirement is the greatest obstacle that states must overcome in order to make a state interference compatible with a fundamental right protected by the Convention. Furthermore, the Court has, pointed out the special link between a democratic society and the freedom of expression: freedom of expression not only embodies a fundamental right of citizens, it is moreover a basic prerequisite for democratic societies. An interference in the freedom of expression should, therefore, be balanced, not only against any other present individual interest, but also against the general interest in the preservation of democracy as such<sup>712</sup>. Following this reasoning, taken by the Court from the United States Supreme Court, state measures, even those taken in a democratic society, must clearly convince the Court that the measure does not impair democratic conditions<sup>713</sup>. The mention of a democratic society in Article 10(2) ECHR has, therefore, been applied by the Court not as a scapegoat for states, but on the contrary, to strengthen the protection of the right. A "democratic society" under the Convention, then, means a society in which freedom of expression is a fundamental value.

Since the first cases in which it had to deal with freedom of expression, the *Tribunal Constitucional* has also acknowledged that, under some circumstances, the right to freedom of expression holds a special status which comes from its fundamental role in a democratic society. According to this assumption, the *Tribunal Constitucional* has been prepared to give a "preferred position" to the right to freedom of expression whenever it helps to maintain a free public opinion<sup>714</sup>. The *Tribunal Constitucional* has

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<sup>712</sup> The Court first pointed out this aspect of the freedom of expression in *Handyside*, in which it was stated that the freedom of expression "constitutes one of the essential foundations of such a society [a democratic society], one of the basic conditions for its progress and the development of every man" (*Handyside case*, ECtHR of 7 December 1976, *cit.*, paragraph 49).

<sup>713</sup> As recently confirmed by the Court in the *Thorgeirson case*, "Freedom of expression, as enshrined in Article 10, is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established" (*Thorgeirson case*, ECtHR of 25 June 1992, *cit.*, paragraph 63).

<sup>714</sup> The first statement on the posición preferente of the freedom of expression probably was the following from the *Voz de España case*, STC 6/81 *cit.*, fundamento jurídico 3: "El artículo 20 de la Constitución (...) garantiza el mantenimiento de una comunicación política libre, sin la cual quedarían vaciados de contenido real otros derechos que la Constitución consagra, reducidas a

**(3) FREEDOM OF EXPRESSION IN A DEMOCRATIC SOCIETY.  
1. THE PREFERRED POSITION.**

on occasions explained the meaning of the *preferred position* as a direct prevalence of freedom of expression against a conflicting right<sup>715</sup>: prevalence would follow from its higher hierarchical value under the Constitution<sup>716</sup>. Later, however, the *Tribunal Constitucional* has expressly admitted that the preferred position of freedom of expression does not mean a different hierarchical position for this fundamental right in the face of any other<sup>717</sup>. Therefore, the preferred position only applies in those cases in which freedom of expression has to be balanced against another fundamental right, equally embodied in the Constitution, and the freedom of expression is found to contribute, in that precise case before the Court, to the formation of a free public opinion<sup>718</sup>. The preferred position will often imply that freedom of expression will prevail

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formas hueras las instituciones representativas y absolutamente falseado el principio de legitimidad democrática que enuncia el artículo 1, apartado 2, de la Constitución y que es la base de toda nuestra ordenación jurídico-política. La preservación de esta comunicación política (..) exige (..) una especial consideración a los medios (..) ". The term "posición preferente" has been often used by the Tribunal to express the special status of the freedom of expression. In other occasions, however, it has also called this special status of freedom of speech as "eficacia irradiante", or as a "valor superior": This terms have been used, for instance in the *El Día case* ["esta situación de valor superior o de eficacia irradiante de la libertad de expresión (..)"] *El Día case*, STC 212/89 *cft*, fundamento jurídico 2]. The term "valor superior" should be avoided, since the "valores superiores" are expressly mentioned and listed in Article 1(1) of the Spanish Constitution.

**715** As, for instance, in the *Heraldo case* [See *Heraldo de Aragón case*, Sentencia del Tribunal Constitucional 219/92 of 3 December 1992 in *Boletín de Jurisprudencia Constitucional* 140 pages 258-67, fundamento jurídico 2].

**716** As stated in the *Patiño case*, restrictions on the freedom of expression should be always interpreted "de tal modo que el contenido del derecho a la información no resulte, dada su jerarquía institucional, desnaturalizado ni incorrectamente relativizado" (*Comandante Patiño first case*, Sentencia del Tribunal Constitucional 171/90 of 5 November 1990, in *Boletín de Jurisprudencia Constitucional* 115 pages 125-37 fundamento jurídico 5).

**717** So the right to freedom of expression does not hold a different "jerárquica o absoluta" position, (*Palazuelos case*, Sentencia del Tribunal Constitucional 40/92 of 30 March 1992 in *Boletín de Jurisprudencia Constitucional* 133 pages 28-35, fundamento jurídico 1). The Tribunal confirmed that the preferred position does not imply a different hierarchical position of the right to freedom of expression in the *Cura de Hío case*, in which it was stated that the "posición prevalente, que no jerárquica" of this right should be taken into account to decide the case (*Cura de Hío case*, STC 240/92 *cft*, fundamento jurídico 3).

**718** So when the freedom of expression conflicts with another right of a constitutional character, i.e., the right to honor or to privacy, the Tribunal has ruled that there is a "conflicto de derechos ambos de rango fundamental, lo que significa que (..) se impone una necesaria y casuística ponderación entre uno y otro (..) [but] la dimensión de garantía de una institución pública fundamental, la opinión pública libre, no se da en el derecho al honor, ésta da al artículo 20 CE

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over other conflicting rights, even those which have a fundamental constitutional status as well<sup>719</sup>. After more than ten years of application of the "preferred position" doctrine, however, both legal literature and dissenting opinions in the *Tribunal Constitucional* have warned of the risk of the undervaluation of fundamental rights which often conflict with freedom of expression and which are often restricted when the preferred position applies<sup>720</sup>.

**2. The Preferred Position and Strict Scrutiny.**

It should be noted that, while the Court's approach always sees the right to freedom of expression as an essential cornerstone of democratic regimes, the *Tribunal Constitucional* holds the preferred position only in those cases in which freedom of expression is effectively found to contribute to a free public opinion. The balancing of the circumstances of a case is therefore slightly different before the Court and before the *Tribunal*: preferred position cases will usually be construed by the latter as prevailing on other conflicting rights, while the former will always balance a conflicting state interest in restricting freedom of expression against an essential pillar of a democratic regime. Nevertheless, the preferred position, as has been applied by the *Tribunal Constitucional*, leads to achievements which are in fact very close to those which follow from the strict scrutiny approach applied by the Court to state restrictions whenever matters of public concern are involved in a freedom of expression case. Moreover, the *Tribunal* has often quoted the Convention and the case-law of the Court in order to support its preferred

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una valoración que trasciende a la que es común y propia de todos los Derechos fundamentales (...) \* (*Soria Semanal case*, Sentencia del Tribunal Constitucional 104/84, of 17 July 1986 in *Boletín de Jurisprudencia Constitucional* 64-65 pages 1048-55, fundamento jurídico 5).

**719** In cases in which the freedom of expression conflicts with other legitimate interests which are not fundamental rights, the preferred position may not be necessary, since "la fuerza expansiva de todo derecho fundamental restringe, por su parte, el alcance de las normas limitadoras que actúa sobre el mismo; de ahí la exigencia de que los límites de los derechos fundamentales hayan de ser interpretados con (...) con criterios restrictivos y en el sentido más favorable a la esencia de tales derechos" (*Piquete de Jodar case*, STC 254/88, *cft*, fundamento jurídico 3).

**720** See, for instance, the *El Día case*, STC 212/89, *cft*, dissenting opinion of judge DÍAZ EIMIL.

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2. PREFERRED POSITION AND STRICT SCRUTINY.**

position construction<sup>721</sup>.

The decision on whether a freedom of expression case holds a preferred position is therefore crucial for the *Tribunal* reasoning, since it will affect the way in which the balancing of circumstances is made. As we have seen, the preferred position depends on whether freedom of expression has been exercised in a matter of public concern or not; this point is addressed by the tribunal taking into account a main rule: whether a true public interest lies at the heart of a case<sup>722</sup>.

There are also other elements which are on occasion taken into account in order to establish a preferred position for a case of exercise of freedom of expression. For instance, the mean through which the message has been emitted: according to the tribunal, preference must be given when the information or expression is published by the press or any other established media and not by anonymous bodies or pamphlets<sup>723</sup>. Furthermore, the aim pursued by the speaker<sup>724</sup> or even the context of the information<sup>725</sup> has on occasion been taken into account in order to decide whether the preferred position principle should be applied to a case of freedom of speech or not.

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**721** For instance, in the *Cura de Hío* case, in which the Tribunal stated that the preferred position implies to restrict other fundamental rights which, however, "han de sacrificarse unicamente en la medida en que resulte necesario para asegurar la información libre en una sociedad democrática, como establece el art 20(2) [sic] del Convenio Europeo de Derechos Humanos (...) " (*Cura de Hío* case, STC 240/92 *cit*, fundamento jurídico 3).

**722** "(...) el criterio fundamental para determinar la legitimidad de las intromisiones en la intimidad de las personas es por ello la relevancia pública del hecho divulgado, es decir, que siendo verdadero, su comunicación a la opinión pública resulte justificada en función del interés público del asunto sobre el que se informa" (*Sara Montiel* case, Sentencia del Tribunal Constitucional 197/91, of 17 October 1991 in *Boletín de Jurisprudencia Constitucional* 127 pages 89 ff., fundamento jurídico 2).

**723** In the *Asociación de vecinos de Arrabal* case, Sentencia del Tribunal Constitucional 165/87 of 27 October 1987 in *Boletín de Jurisprudencia Constitucional* 79 pages 1515-23, the fact that the expression allegedly breaching the right to honor of the applicant had been circulated in anonymous pamphlets was taken into account in order to establish that the freedom of expression did not enjoy a preferred position in that case.

**724** The aim pursued by the speaker was also taken into account in the *Asociación de vecinos de Arrabal* case, STC 165/87 *cit*, fundamento jurídico 5, in order to decide that the case could not be brought under the *preferred position* perspective.

**725** As in the *Heraldo de Aragón* case, STC 219/92 *cit*, fundamento jurídico 4.

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Rightly understood, however, these aspects of a freedom of expression case should *not* be taken into account at this stage of the analysis, but as a circumstantial element to be balanced only when the preferred position issue has been decided. In early cases, moreover, even the *content* of a message, rather than its *object*, has been taken into account by the *Tribunal Constitucional* as the main criteria to decide whether to approach a case under the preferred position principle or not. This last point deserves more attention, since it may be a clear case of a constitutional construction based on a *wrong* understanding of the Convention.

3. Facts, Opinions and the Preferred Position.

The distinction between facts and value judgments in order to analyze a freedom of speech case is a well-established doctrine in the case-law of the *Tribunal Constitucional*. It is based on the different wording of Article 20(1)(a) CE, which protects "expressions", and Article 20(1)(d) CE which protects "information"<sup>726</sup>. At present, the only consequence of such a distinction is to decide which limit will be applied to a speech challenged before the *Tribunal*: description of facts are to be restricted if false statements are included, while value judgments will be restricted only if slander or defamation has been committed<sup>727</sup>. This consequence is consistent with the Convention: being its only effect that the limits to freedom of speech are different in the case of value judgments and in the case of description of facts, it is not relevant whether the distinction between these two kinds of messages is embodied in the law (as is the case of the Spanish Constitution) or has been construed by case-law (as is the case of the European Court of Human Rights). Also Spanish legal literature has defined freedom of information as the freedom exercised in cases in which public interest in the

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<sup>726</sup> Article 20(1)(a) CE recognizes "The right to freely express and disseminate *thoughts, ideas and opinions* (..)", while Article 20(1)(d) embodies "The right to freely communicate or receive truthful *information* by any means of dissemination whatsoever (..)" [emphasis added].

<sup>727</sup> A good statement in which the doctrine of the Tribunal as to this respect is summarized may be seen in the decision of the *García* case Sentencia del Tribunal Constitucional 105/90 of 5 July 1990 in *Boletín de Jurisprudencia Constitucional* 111 pages 71 ff, fundamentos jurídicos 4-5).

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publication of facts was present<sup>728</sup>. Furthermore, without any doubt, the content of the message is the prevailing criterium for a distinction between freedom of information and freedom of expression in Spanish legal literature<sup>729</sup>.

However, a close look at the case-law of the *Tribunal Constitucional* on this aspect may reveal that, at least for a few cases, the distinction between facts and value judgments has not been aimed at the only result of not applying the proof of the truth to value judgments. On the contrary, the *Tribunal* has tried to base the application or not

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<sup>728</sup> See, for instance, TERRÓN, J. (1980) "Libertad de expresión y Constitución", in *Documentación Administrativa* 187 pages 201-32 at 217, according to which the Constitution "ha querido distinguir con ello entre lo que es manifestación de una opinión personal y por consiguiente puramente subjetiva, de lo que es comunicación de una realidad externa al sujeto, sometida a los límites objetivos de la veracidad". GÁLVEZ, J. (1985): "Comentario al artículo 20 de la Constitución Española, in GARRIDO e.a *Comentarios a la Constitución*, Madrid: Civitas 2a ed., pages 395-407 at 407 states: "el objeto de la libertad que nos ocupa [freedom of information] es la noticia, entendiendo por tal los hechos verdaderos que puedan encerrar una trascendencia pública". CHINCHILLA, M.C. (1986) "Derecho de información, libertad de empresa informativa y opinión pública libre" in *Poder Judicial* 3 pages :61-73 at 63: "mientras que la libertad de expresión garantiza la libre manifestación por el hombre de sus propias ideas, opiniones, pensamientos, sentimientos etc, el objeto del derecho de información es la noticia, es decir la libre comunicación de hechos de actualidad con relevancia pública". SOLOZÁBAL, J.J. stated at a first moment [(1988) "Aspectos constitucionales de la libertad de expresión y el derecho a la información" in *Revista Española de Derecho Constitucional* 23 pages 139-156 at 146] that the freedom of information should be included within the general right to emit opinions: "tampoco cabe aceptar que el derecho a la comunicación de información abarque exclusivamente las noticias y no las opiniones o juicios de valor", and one year later [(1989) "Libertad de expresión, información y relaciones laborales. Comentario a la STC 6/1988, caso Crespo.." in *Revista Española de Derecho Constitucional* 26 pages 165-179 at 169], accordingly with the *Tribunal Constitucional* case-law, maintained that the freedom of information "es un derecho que cubre preponderantemente la comunicación de hechos, aunque no sea pequeña labor a veces diferenciar hechos y valores, datos de opinión". Only FERNÁNDEZ- MIRANDA (1984:507-08) has clearly maintained an opposite thesis: "el objeto del derecho a la información queda constituido por toda clase de ideas, hechos y juicios que se corresponden con los conceptos técnico/informativos de propaganda, noticias y opiniones, cualquiera que sea la forma que revistan y el medio por el que se transmitan".

<sup>729</sup> Other criteria, however, may include the different scope of each right: according to SOLOZÁBAL (1989:172), "la libertad de información cubre todo el proceso de elaboración, búsqueda, selección y confección de la información. La libertad de información protege no sólo al comunicante, sino a toda la actividad preparatoria de dicha comunicación. El derecho de comunicación en general - la libertad de expresión - abarca quizá más que la comunicación realizada por quien habla: pero alcanza sólo a la transmisión de su objeto y no a la preparación del mismo." On the contrary, GONZÁLEZ BALLESTEROS (1989) "La genérica libertad de expresión y la específica libertad de información" in *Cuenta y Razón* 44-45, pages 41-47 at 43, is of the opinion that the freedom of information has a smaller scope than the right to freedom of expression.

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of the preferred position to freedom of expression on this distinction, in a way clearly inconsistent with the European Court case-law on the issue. Furthermore, the point of departure of this tendency was based on a wrong understanding of the Court's case-law in the *Lingens* case.

In its first cases on freedom of expression, the *Tribunal* Constitucional did not draw any consequences from the factual or valuative content of an expression: the main issue before the Court in those cases was only whether the expression had public interest or not and whether the preferred position was therefore applicable to the case. The first case in which the *Tribunal* had to deal with the difference between facts and value judgments was in the *Vinader* case<sup>730</sup>. In this case, the *Tribunal* Constitucional ruled that freedom of information, as stated in Article 20(1)(d)CE covers description of facts, while freedom of expression *stricto sensu*, as stated in article 20(1)(a)CE covers publication of ideas or opinions, value judgments included. This is still the current doctrine of the *Tribunal*, and, we have seen, does not pose any question as to its compatibility with the Convention. The *Vinader* judgment, however, pointed out another ground for a distinction between the right to freedom of information and the right to freedom of expression: freedom of information, unlike freedom of expression *stricto sensu*, is justified by the public's right to be informed about facts of public concerns. Accordingly, the *Tribunal* suggested, that the real object of freedom of information should be "news", rather than simple facts<sup>731</sup>: freedom of information was therefore more relevant for the public interest than freedom of expression<sup>732</sup>. What follows from this assumption is that, for the *Tribunal*, the preferred position which, under some

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730 *Vinader case*, STC 105/83 *cft.*

731 The *Tribunal* ruled that the object of the right to freedom of information was "el conjunto de hechos que puedan considerarse noticiables o noticiosos (..) y de él es sujeto primero la colectividad y cada uno de sus miembros, cuyo interés es el soporte final de este derecho, del que es así mismo sujeto órgano o instrumento el profesional del periodismo" (*Vinader case*, STC 105/83 *cft.*, fundamento jurídico 11).

732 The object of the right to freedom of information is "diverso del que consiste en expresar y difundir ideas, pensamientos u opiniones, en aras del interés colectivo en el conocimiento de hechos que puedan encerrar transcendencia pública y que sean necesarios para que sea real la participación de los ciudadanos en la vida colectiva" (*Vinader case*, STC 105/83, *cft.*, fundamento jurídico 11).

**(3) FREEDOM OF EXPRESSION IN A DEMOCRATIC SOCIETY.  
3. FACTS, OPINIONS AND THE PREFERRED POSITION.**

circumstances, may be applied to a freedom of speech case, is more likely to be held in freedom of information cases; that is, whenever the objects of the messages are facts of public concern rather than value-judgments. In *Vinader*, the *Tribunal* first linked freedom of information not only with the presence of facts as the object of the message, but also with the general interest of the public in learning about those facts. For the first time, the *Tribunal* reserved the preferred position of freedom of expression to freedom of information cases only, and expressly excluded cases in which facts were not of public interest. Public interest became an essential criterium for the distinction between freedom of expression and freedom of information. Freedom of information, moreover, was the only fundamental right under Article 20 CE based also on the right of the public to know about matters of public concern<sup>733</sup>.

Certainly, the *Tribunal* Constitucional did not expressly state that value judgments are *never* entitled to a preferred position provided that matters of public interest are concerned: both of them may contribute to a free public opinion<sup>734</sup>. Admittedly, too, in cases decided shortly after *Vinader*, the *content* of the message was not taken into account to decide whether freedom of speech had been exercised with a preferred position or not<sup>735</sup>. In the *Crespo* case, however, the rule according to which freedom of information is exercised when relevant facts, that is, news, are the only content of the message, was confirmed<sup>736</sup>. It was in this decision that the *Tribunal* expressly quoted

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733 The right to freedom of information was defined as a "derecho doble que se concreta en comunicar la información y recibirla de manera libre en la medida en que la información sea veraz en este sentido, existe un derecho a recibir información, del que es sujeto primero la colectividad y cada uno de sus miembros, cuyo interés es el soporte final de este derecho" (*Vinader* case, STC 105/83 *cit*, fundamento jurídico 11).

734 In fact, it has stated in several occasions that " (...) el derecho de información, *junto con el de libre expresión*, garantiza la existencia de una opinión pública libre" (the statement is from the *Tiempo* case, STC 168/86, *cit*, fundamento jurídico 3).

735 In the *Asociación de vecinos de Arrabal* case, STC 165/87, *cit*, fundamento jurídico 10.

736 "En el art 20 de la Constitución la libertad de expresión tiene por objeto pensamientos, ideas u opiniones, concepto amplio dentro del que deben incluirse también las creencias y los juicios de valor. El derecho a comunicar y recibir libremente información versa, en cambio, sobre hechos, o, tal vez más restringidamente, sobre aquellos hechos que puedan considerarse noticiables" (*Crespo* case, Sentencia del Tribunal Constitucional 6/88 of 21 January 1988 in *Boletín de Jurisprudencia Constitucional* 82 pages 174-89, fundamento jurídico 5).

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*Lingens* to justify that pure description of facts was to be held closely allied with the public's right to be informed<sup>737</sup>. Indeed, thanks to this linkage, the *Tribunal* gave in *Crespo* the *amparo* to the plaintiff: the *rato decidendi* of the case was that Mr. Crespo had exercised freedom of information, not freedom of expression, and that, therefore, he was covered by the preferred position doctrine<sup>738</sup>.

However, the way in which the *Lingens* doctrine has been applied by the *Tribunal*: may be criticised the Court ruled on that occasion that a careful distinction between facts and value-judgments should be made; but the distinction was made in order to point out that value-judgments by their very nature cannot be disputed by the truth<sup>739</sup>, and not in order to rule that the description of facts is closer to public interest, as the *Vinader* and *Crespo* cases seem to suggest<sup>740</sup>. It seems as if the *Tribunal* Constitucional thought that a value-judgment, even on public issues, should be rarely approached from the preferred position doctrine.

It must be pointed out that the *Tribunal* has not continued in this direction: it has recognised that the only consequence of the distinction between facts and value

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**737** "La comunicación informativa, a que se refiere el apartado d) del art 20.1 de la Constitución versa sobre hechos (TEDH, caso *Lingens*, Sentencia de 8 de julio de 1976) y sobre hechos, específicamente, 'que pueden encerrar trascendencia pública' a efectos de que 'sea real la participación de los ciudadanos en la vida colectiva' de tal forma que de la libertad de información - y del correlativo derecho a recibirla - 'es sujeto primario la colectividad y cada uno de sus miembros, cuyo interés es el soporte final de este derecho'" (*Crespo* case, STC 6/88, *cf.*, fundamento jurídico 5) [the excerpts between inverted commas were taken by the Court from the *Vinader* case]

**738** "las declaraciones por las que el actor fue despedido se formularon y se entendieron por los receptores como relativas a hechos cualquiera que fuese su veracidad (...) poseía trascendencia bastante para poder ser calificado lo en ella expuesto como *noticiable* o *noticioso*" (*Crespo* case, STC 6/88, *cf.*, fundamento jurídico 5).

**739** The judgment in the *Lingens* case stated that "in the Court's view, a careful distinction needs to be made between facts and value-judgment. The existence of facts can be demonstrated, whereas the truth of value-judgments is not susceptible of proof" (*Lingens* case, ECtHR of 8 July 1986 *cf.*, paragraph 44).

**740** *Lingens* have been later quoted with the same purposes, for instance in the *Prisión de Granada* case, Sentencia del Tribunal Constitucional 143/91 of 1 July 1991 in *Boletín de Jurisprudencia Constitucional* 143 pages 211-18, fundamento jurídico 3.

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judgments is that the latter may not be subject to the proof of truth<sup>741</sup>. Moreover, it has expressly admitted that opinions and value-judgments may also be directly linked with public interest, for instance when the expression of value-judgments comes as a result of an ideological dissidence<sup>742</sup>. Finally, it has expressly admitted that, under some circumstances, freedom of expression *sensu stricto* may have a wider margin than freedom of information<sup>743</sup>. However, the tendency to speak of public interest remains only in those cases in which freedom of information is concerned<sup>744</sup>. The *Tribunal* has therefore been reluctant to find the public's right to be informed on cases in which the content of the expression has implied open criticism to public authorities based exclusively on value judgments or opinions<sup>745</sup>.

**(4) THE NECESSITY IN A DEMOCRATIC SOCIETY OF A RESTRICTION TO  
FREEDOM OF EXPRESSION.**

**1. The Pressing Social Need.**

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**741** "mientras los hechos, por su materialidad, son susceptibles de prueba, los pensamientos, ideas, opiniones o juicios de valor, no se prestan, por su naturaleza abstracta, a una demostración de su exactitud, y ello hace que al que ejercita la libertad de expresión no le sea exigible la prueba de la verdad o diligencia en su averiguación (..)" (*Navazo case*, STC 107/88, *cít*, fundamento jurídico 2).

**742** The Freedom of expression *stricto sensu*, the *Tribunal* has held, "(..) dispone de un campo de acción que viene sólo delimitado por la ausencia de expresiones indudablemente injuriosas sin relación con las ideas u opiniones que se expongan y que resulten innecesarias para la exposición de las mismas: campo de acción que se amplía aún más en el supuesto de que el ejercicio de la libertad de expresión afecte al ámbito de la libertad ideológica garantizada por el artículo 16.1 CE (..) " (*García case*, STC 105/90, *cít*, fundamento jurídico 4).

**743** "la libertad de expresión es mas amplia que la libertad de información, por no operar, en el ejercicio de aquélla, el limite interno de veracidad que es aplicable a ésta, lo cual conduce a la consecuencia de que aparecerán desprovistas de valor de causa de justificación las frases formalmente injuriosas o a que las que carezcan de interés publico y, por tanto, resulten innecesarias a la esencia del pensamiento, idea u opinión que se expresa" (*Navazo case*, STC 107/88, *cít*, fundamento jurídico 2).

**744** "(..) la formación de una opinión pública libre aparece como una condición para el ejercicio de derechos inherentes a un sistema democrático, por lo que el d a la información no sólo protege un interés individual, sino que entraña el reconocimiento y garantía de una institución política fundamental, que es la opinión pública, indisolublemente ligada con el pluralismo político (..) el órgano judicial deberá (..) ponderar si la actuación del informador se ha llevado a cabo dentro del ámbito protegido constitucionalmente" (*García case*, STC 105/90, *cít*, fundamento jurídico 3).

**745** See *infra* Chapter VIII.

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Once the concept of "democratic society", and its close link with freedom of expression, has been clarified, the second question posed by this aspect of the *test* is obviously how to measure the extent to which a state interference is "necessary". The Court ruled in *The Sunday Times* that, under Article 10 ECHR, "necessary" means the existence of a "pressing social need" for restricting freedom of expression in a given case<sup>746</sup>. This method to ascertain the necessity of a restriction to freedom of expression in a democratic society has since then always been applied by the Court, and it is often the only or the most important issue on which a freedom of expression case is decided in Strasbourg. Only very recently the appropriateness of the "pressing social need" doctrine has been disputed inside the Court. It seems, however, that it will be still applied in the future<sup>747</sup>.

Debatable as it may be, however, the existence of a pressing social need provides the Court with a defined way to approach freedom of expression cases. The most important consequence of this approach is that compatibility of a state measure with the Convention is not decided by directly balancing the circumstances at hand; on the contrary, it is for the respondent state to supply the Court convincing evidence that the interference is necessary. In other words, the initial step is not the question whether freedom of expression has been legitimately exercised by the applicant, but, rather, whether the restriction has been legitimately imposed by the state<sup>748</sup>. This implies that,

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746 The theory of a "pressing social need" for establishing the requisite of "necessity in a democratic society" may be seen as far as the freedom of expression is concerned, for instance, in *Barthold* [ECtHR of 25 March 1985 *cf.*, paragraph 55] and in *Lingens* [ECtHR of 8 July 1986, *cf.*, paragraph 39].

747 "I cannot accept the definition of the term necessary as "corresponding to a pressing social need" which in fact expresses the intention of the European Court to assess for itself whether it is necessary for a national legislature or a national court to seek to attain an aim which the Constitution recognizes as legitimate (...). If the Constitution recognizes as legitimate the aim (...) which the Irish legislation seeks to attain, it is not for the European Court to call in question that aim simply because it may have different ideas in this regard." (*Irish abortion case*, ECtHR of 29 October 1992 *cf.*, dissenting opinion of judge MATSCHER).

748 In *Sunday Times*, the Court replied the Government's submission that the public interest in freedom of expression and the public interest in the fair administration of justice should be balanced in the following terms: "the Court points out that it has to take a different approach. The Court is faced not with a choice between two conflicting principles but with a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted"

**(4) THE NECESSITY IN A DEMOCRATIC SOCIETY OF A RESTRICTION.  
1. THE PRESSING SOCIAL NEED.**

usually, the *onus probandi* is charged on the state, which cannot simply plead on the grounds that the applicant has overstepped the exercise of the right. The restriction, not the right, is at the heart of the case when it reaches the Court. At the moment, it is when the state interference is being checked by the Court, that the special consideration of freedom of expression as an essential foundation of democracy takes place. The Court has, in this way, ruled that freedom of expression cannot be restricted only on the grounds that the message may be offensive to a sector of the public<sup>749</sup>.

**2. Proportionality.**

The Court's test on the necessity of a state interference includes also its *proportionality*: a state measure must be not only *necessary* but *proportional* to the aim pursued as well. Proportionality, therefore, turns the task of of the Court to control aim preserved with the restriction: it introduces in the Court's analysis the extent to which the state restriction effectively preserves the objective at which it is legitimately aimed<sup>750</sup>. The question must be posed, then, of how *proportionality to the aim* may be measured. The Court has not given an exact way of doing it, but some conclusions may be inferred from its case-law on freedom of expression:

First, no absolute restriction of freedom of expression will be admitted, provided that the objective pursued with the state interference may be equally achieved by a partial restriction. Following this principle, the Court has declared incompatible with the Convention a deprivation for life of freedom of expression or information<sup>751</sup>. Breach of

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(*Sunday Times case*, ECtHR of 26 April 1979, *cf.*, paragraph 65).

**749** Article 10 ECHR, the Court has hold, "it is applicable not only to "information" or "ideas" that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society" (*Handyside case*, ECtHR of 7 December 1976, *cf.*, paragraph 49).

**750** See the *Sunday Times case*, ECtHR of 26 April 1979, *cf.*, paragraph 62, and *Barfod case*, ECtHR of 22 February 1989 *cf.*, paragraph 28.

**751** "The Court is first stuck by the absolute nature of the (...) injunction which imposed a "perpetual" restraint (...) On that ground alone, the restriction appears over broad and disproportionate" (*Irish abortion case*, ECtHR of 29 October 1992 *cf.*, paragraphs 73-74). The same conclusion had been reached by the Commission in the *De Becker case*, which was not decided by the Court for the reasons explained *supra* Chapter I. See *De Becker case*, ECtHR of

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proportionality has also been declared in cases in which the restriction, although temporary, was imposed in an absolute way, without making a distinction between messages effectively covered by the state restriction and other messages which were not subject to any state measure<sup>752</sup>.

Secondly, the real effectiveness of the state interference may also be taken into account when measuring proportionality: if a restriction does not in practice achieve its objective (that is, the restriction does not actually preserve the legitimate aim) it may hardly be regarded as necessary or proportional. This approach, however, was first rejected by the Court, which did not take into account the real effectiveness of a contested state measure in order to rule on its necessity or its proportionality<sup>753</sup>. On that occasion, moreover, the Court acknowledged that, once the necessity of a state interference on freedom of expression had been established, an ineffective restriction might be the only possible consequence: the restriction would then be compatible with the Convention, although the objectives at which it was aimed were not completely achieved<sup>754</sup>. In later cases, however, the Court has ruled that state measures which cannot in practice preserve their objective at any rate, due to whatever reasons, must not be seen as either *necessary* or *proportional*<sup>755</sup>. When this applies to information that, though banned by a domestic authority, is otherwise available, the criterion of

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27 March 1962, *cft.*, paragraph 11).

752 *Observer-Guardian case*, ECtHR of 26 November 1991, *cft.*, paragraph 64.

753 *Handyside case*, ECtHR of 7 December 1976, *cft.*, dissenting opinion of judge MOSLER.

754 *Handyside case*, ECtHR of 7 December 1976, *cft.*, paragraph 58.

755 *Irish abortion case*, ECtHR of 29 October 1992 *cft.*, paragraphs 64-80). Relying on *Handyside*, a dissenting opinion to this decision stressed that the injunction was the minimum once the breach of the Constitution had been declared: "The [Irish] Court was simply fulfilling its obligation to uphold the Cons and to defend the right of the unborn guaranteed by the article in question. It was not a case of the Court granting an injunction in exercise of a discretionary jurisdiction. Once the Court had found that the activities of the applicant were unlawful having regard to Article 40(3)(3) [of the Irish Constitution] the injunction followed as a necessary consequence. It was not open to the Court to adopt any lesser measure" (*Irish abortion case*, ECtHR of 29 October 1992 *cft.*, dissenting opinion of judge BLAYNEY).

**(4) THE NECESSITY IN A DEMOCRATIC SOCIETY OF A RESTRICTION.  
2. PROPORTIONALITY.**

effectiveness may be construed as a principle of general application<sup>756</sup>.

Thirdly, since it is for the state to "convincingly prove" the necessity of the interference, the Court may also exclusively take into account in its analysis the reasons given by the state, and may therefore rule that a state interference was not necessary or was not proportional if the alleged reasons are not appropriate<sup>757</sup>. Furthermore, reasons of political or of an other nature may be also argued before the Court<sup>758</sup>.

However, a fourth and crucial factor takes precedence in the case-law of the Court when measuring the necessity and proportionality of a state measure: the Court carefully weighs against the contested interference, the very nature of the legitimate aim pursued by the state. In other words, according to the Court, not every aim listed in Article 10(2) allows the same kind of restrictions to freedom of speech: some of them deserve a stricter control than others: generally speaking, whenever the press is concerned, or whenever public matters or public figures are involved in the message, the European control would be stricter<sup>759</sup>. This point will be discussed further in the

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**756** As suggested by the Court's ruling in the Irish Abortion case, which stated that "limitations on information concerning activities which, notwithstanding their moral implications, have been and continue to be tolerated by national authorities, call for careful scrutiny by the Convention institutions as to their conformity with the tenets of a democratic society" (*Irish abortion case*, ECtHR of 29 October 1992 *cf.*, paragraph 72). This idea was disputed in one of the dissenting opinions of the judgment, according to which "The fact that Ireland cannot *effectively* prevent the circulation of reviews or of English telephone directories containing information on clinics in the United Kingdom [where abortion can be exercised ( .. ) can only, in our view, confirm the *necessity* of a specific measure such as that taken by the Irish courts" (*Irish abortion case*, ECtHR of 29 October 1992 *cf.*, dissenting opinion of judges PETTITI, RUSSO and LOPES ROCHA).

**757** See *Muller case*, ECtHR of 24 May 1988, *cf.*, paragraphs 32-33.

**758** See the arguments based on the national referendum by which the Constitution was reformed in Ireland in 1983 in the *Irish abortion case*, ECtHR of 29 October 1992 *cf.*, dissenting opinion of judge CREMONA).

**759** For example in the *Thorgeirson case*, ECtHR of 25 June 1992, *cf.*, paragraphs 57-70. On the other hand, however, the Court has also sometimes defined the proportionality of the state measure taken into account the general value of open discussion on public matters, regardless the concrete aim at which the restriction is pointed: According to this principle, a restriction would be illegitimate if it dissuade in a disproportionate way the open debate on a question of public concern "In this case, proportionality implies that the pursuit of the aims mentioned in Article 10,2 has to be weighed against the value of open discussion of topics of public concern (..) When striking a fair balance between these interests, the Court cannot over look, as the applicant and the Commission rightly point out, the great importance of not discouraging members of the public, for fear of criminal or other sanctions, from voicing their opinions on issues of public concern."

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following Chapters, in which legitimate aims listed in the Convention will be studied<sup>760</sup>.

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*(Bartod case, ECtHR of 22 February 1989, cft. paragraph 29).*

**760** See *infra* chapters VII-IX.

## CHAPTER VII

### RESTRICTIONS ON FREEDOM OF EXPRESSION FOR THE PROTECTION OF MORALS AND FOR MAINTAINING THE AUTHORITY AND IMPARTIALITY OF THE JUDICIARY.

(1) RESTRICTIONS ON FREEDOM OF EXPRESSION FOR THE PROTECTION OF MORALS. 1. Introduction; 2. The lack of a European standard on morals and the *margin of appreciation*; 3. Morals and the protection of childhood; (2) RESTRICTIONS OF FREEDOM OF EXPRESSION FOR THE PROTECTION OF THE AUTHORITY AND THE IMPARTIALITY OF THE JUDICIARY. 1. The *impartiality* of the Judiciary; 2. The *Authority* of the Judiciary;

#### (1) RESTRICTIONS ON FREEDOM OF EXPRESSION FOR THE PROTECTION OF MORALS.

##### 1. Introduction.

"The protection of (..) morals" is one of the legitimate aims for a restriction on freedom of expression under Article 10(2) ECHR. However, the Court has not given to date, a precise definition of what is meant by "protection of morals", although, when deciding moral-based restrictions cases, it has accepted, in one way or another, a number of domestic law definitions<sup>761</sup>.

Besides, as was the case of other legitimate aims under this Article, "morals" is very seldom the only cause for a restriction of freedom of expression: usually, on the contrary, alleged violations of freedom of expression due to the protection of morals are also concerned with other legitimate aims of restriction. In these cases, the Court decides under which aim the case will be approached<sup>762</sup>. The *Irish Abortion case*<sup>763</sup>

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761 The Court accepted for instance, the following definition of "obscene" from Section 1 (1) of the 1959/1964 English Act on obscenity, which was applied in the domestic proceedings of the *Handyside* judgement: "For the purpose of this Act an article shall be deemed to be obscene if its effect (..) is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it" (*Handyside case*, ECtHR of 7 December 1976, *cit.*, paragraph 25).

762 For instance, in *Handyside*, the Court ruled that only morals were "relevant in this case since the object of the said Acts [domestic law quoted above] is linked far more closely to the protection of morals than to any of the further purposes permitted by Art 10(2) ECHR (*Handyside case*,

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may be a good example of this: several legitimate aims to restrict freedom of expression under the Convention were argued by the respondent government. The Court approached the question as a moral-based restriction case only. Other aims, such as the "protection of the rights of others" - the other being in this case the fetus<sup>764</sup> - or the "prevention of crime"<sup>765</sup> were therefore dismissed. On the other hand, the Court took into account the "protection of rights of others", together with the moral issue, in the *Müller* case, in which a person had initiated domestic proceedings against an allegedly obscene exhibition on the grounds that his rights had been breached when he and his underage daughter entered the exhibition, in which no warning on the obscene content of the pictures had been displayed by the organization<sup>766</sup>. In the same case, moreover, "protection of property" as embodied in Article I of the First Protocol to the Convention<sup>767</sup> was also taken into account by the Court to check both the forfeiture of the paintings<sup>768</sup> and the consequent fine imposed on the painter by domestic courts. Generally speaking, the Court approaches a case as a morals-based restriction to freedom of expression whenever morals are initially alleged by the respondent government. This, as will be seen in this Chapter, introduces a substantive advantage for governmental allegations, since European control is less strict whenever morals are at the heart of the case. In other words, a wide margin of appreciation is granted to the

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ECtHR of 7 December 1976, *cit.*, paragraph 46).

**763** *Irish Abortion case*, ECtHR of 20 October 1992 *cit.*

**764** "The restriction thus pursued the legitimate aim of the protection of morals of which the protection in Ireland of the right to life of the unborn is one aspect. It is not necessary in the light of this conclusion to decide whether the term "others" under Article 10(2) extends to the unborn" (*Irish Abortion case*, ECtHR of 20 October 1992 *cit.*, paragraph 60).

**765** "The Court cannot accept that the restrictions at issue pursued the aim of the prevention of crime (...) However, it is evident that the protection afforded under Irish law to the right to life of the unborn is based on profound moral values concerning the nature of life which were reflected in the stance of the majority of the Irish people against abortion as expressed in the 1983 referendum" (*Irish Abortion case*, ECtHR of 20 October 1992 *cit.*, paragraph 63).

**766** See *Muller case*, ECtHR of 24 May 1988 *cit.*, paragraph 30).

**767** Article I, first sentence, of the first Protocol to the Convention reads as follows: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by general principles of international law".

**768** See the *Muller case*, ECtHR of 24 May 1988 *cit.*, paragraphs 40-44

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states when imposing a morals-based restriction.

Unlike the Convention, the Spanish Constitution does not expressly mention "morals" within the limits of the right to freedom of expression. The *Tribunal Constitucional* once ruled, however, that morals may be included under the reference to the "rights recognised in this title" as a general restriction to freedom of expression<sup>769</sup>, since one of the rights protected by Title I of the Spanish Constitution is the right to "moral integrity" embodied in Article 15 CE<sup>770</sup>. This early ruling, however, has not been taken further by the *Tribunal Constitucional*, which, in later decisions, has relied exclusively on the Convention and on the case-law of the Court in order to hold the constitutionality of morals-based restrictions to freedom of speech in Spain.

**2. The lack of a European standard on morals and the *margin of appreciation*.**

The main problem which the Court has faced in morals-based restrictions on freedom of expression cases is the lack of a "European standard" on morals. Diversity of national standards on this issue has been pointed out in all the cases before the Court in which morals were the alleged aim for a freedom of expression's restriction. This lack of uniformity was emphasised in the first morals related case which reached the Court, the *Handyside* case<sup>771</sup>: the object of the Government restriction was a book on sexual matters addressed to adolescents, previously or simultaneously to the proceedings, freely circulated within other member states to the Convention<sup>772</sup>. Under these

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<sup>769</sup> Article 20(4) CE (full quoted supra in Chapter V), provides that "the rights recognized in this title" are a limit to the right to freedom of expression.

<sup>770</sup> In the "*Almacen de frutas de El Escorial*" case, STC 2/82 *cft*, fundamento jurídico 5. However, is not easy to include a "right to moral integrity" within the meaning of Article 15 CE, which seems to embody another concept of moral integrity, closer to a sense of human dignity, rather than an effective limit on freedom of expression. The article reads as follows: "Every person has the right to life and physical and moral integrity, and may under no circumstance be subjected to torture or to inhuman or degrading punishment or treatment (..)"

<sup>771</sup> *Handyside case*, ECtHR of 7 December 1976 *cft*.

<sup>772</sup> As admitted by the Court in the judgement, "the book has first been published in Denmark in 1969 and subsequently (..) in Belgium, Finland, France, the Federal Republic of Germany, Greece, Iceland, Italy, the Netherlands, Norway, Sweden and Switzerland, as well as several non European countries. Furthermore it circulated freely in Austria and Luxembourg" (*Handyside case*, ECtHR of 7 December 1976, *cft*, paragraph 11).

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circumstances, the question has been posed whether the task of the Court should not precisely be to rule which is the missing uniform European standard on morals as a legitimate restriction to freedom of expression. A clear answer to this question has not been expressly stated by the Court, but, however, nearly twenty years after the *Handyside* case, existing case-law allows' us to presume that the answer would be negative.

According to *Handyside*, the fact that morals-based restriction on freedom of expression may be interpreted in a different way by each member state is not, as such, a violation of the Convention: it does not breach the principle of non discrimination in the enjoyment of the rights secured in the Convention, embodied in Article 14 ECHR<sup>773</sup>. Moreover, the "minimum standard" clause of Article 60 ECHR<sup>774</sup> has also been also applied, *a sensu contrario*, as a provision thanks to which some member states may legitimately grant a *lower* level of protection of freedom of expression than others, provided that this low level is not below the Convention's minimum<sup>775</sup>.

In addition, the question of the different standards of restriction based on "morals" has also been also raised *inside* a single member state: the fact that legal actions did *not* take place in other parts of the United Kingdom but England, for instance, was not

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<sup>773</sup> Article 14 ECHR states as follows: "The enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status". Although the decision stated that Article 14 had not been violated, this Article was nonetheless taken into account by the Court, which acknowledged that it was relevant for the case (*Handyside case*, ECtHR of 7 December 1976, *cft.* paragraph 41).

<sup>774</sup> See the text of Article 60 ECHR *supra* Chapter I.

<sup>775</sup> Paradoxically, the fact that Article 60 ECHR "never puts the various organs of the Contracting States under an obligation to limit the rights and freedoms its guarantees" was argued by the Court in order to rule that the failure to initiate legal proceedings against the publisher by authorities or other European Countries only meant that "the Contracting States have each fashioned their approach [to morals] in the light of the situation obtaining in their respective territories (...) the fact that the most of them decided to allow the work to be distributed does not mean that the contrary decision of the Inner London Quarter Sessions [the English Court which took legal actions against *Handyside*] was a breach of Article 10" (*Handyside case*, ECtHR of 7 December 1976, *cft.* paragraph 58).

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seen as relevant by the Court in *Handyside*<sup>776</sup>. Rather similar allegations were equally ignored by the Court in the *Müller* case<sup>777</sup>. On the other hand, in the *Irish Abortion* case, the Court took into account that information similar to that restricted in the present case, was actually easily available in Ireland, and that the government had not taken any legal action against these other sources<sup>778</sup>. This last assumption of the Court may, therefore, imply that, at least when different moral standards apply to different regions in a single member state, the Court may be prepared to rule that the "necessity" of a restriction has not been duly evidenced before the Court by the respondent government<sup>779</sup>.

Unlike what the Court has ruled for Europe, the *Tribunal Constitucional* has held for Spain that there does exist a minimum common standard on morals, taking it as a

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<sup>776</sup> *Handyside* was charged and prosecuted under the Obscene Publications Act of 1959, amended in 1964. The schoolbook was not the subject of proceedings in Northern Ireland the Channel Islands and the Isle of Man. In Scotland, several proceedings were brought against the book, under local law in Glasgow and under Scottish Law later, but no punishment were imposed (See *Handyside* case, ECtHR of 7 December 1976 *cit.*, paragraphs 11-19). According to the court, this did not imply that the English punishment was not "a response to a real necessity, bearing in mind the national authorities' margin of appreciation" (*Handyside* case, ECtHR of 7 December 1976 *cit.*, paragraph 54).

<sup>777</sup> *Müller* case, ECtHR of 24 May 1988 *cit.*, paragraph 36.

<sup>778</sup> As for the applicants' submission that information on abortion in Great Britain as that provided by the applicants was available in British newspapers and magazines which were imported into Ireland as well as in the yellow pages of the London telephone directory, which could be purchased from the Irish Telephone service and in other publications easily available in Ireland (as the *British Medical Journal*), the Court stated that "It has not been seriously contested by the [Irish] Government that information concerning abortion facilities abroad can be obtained from other sources in Ireland such as magazines and telephone directories or by persons which contact in Great Britain. Accordingly, information that the injunction sought to restrict was already available elsewhere in a manner which was not supervised by qualified personnel and thus less protective of women's health (..)" (*Irish Abortion* case, ECtHR of 20 October 1992 *cit.*, paragraph 76).

<sup>779</sup> As was early stated in a dissenting opinion in *Handyside*, "(..) the diversity of approaches adopted in different regions of the United Kingdom (..) raises doubts about the necessity of the measures taken in London (..) It must follow that the action complained of was not "necessary" within the meaning of Article 10(2) with regard to the aim pursued. Such a measure is not covered by the exceptions to which freedom of expression can be subjected, even if the aim is perfectly legitimate and if the qualification of what is moral in a democratic society remained within the framework of the State's margin of appreciation" (*Handyside* case, ECtHR of 7 December 1976 *cit.*, dissenting opinion of Judge MOSLER ).

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grounds for restricting freedom of expression. This minimum, furthermore, must be the same within the whole Spanish territory. The *Tribunal Constitucional's* decision on this aspect was stated in a case concerning the competencies of the regional government of Catalonia on qualification of pornographic or violent films<sup>780</sup>. The *Tribunal Constitucional* first established that moral qualification of films by public authorities was a kind of "restriction" to freedom of expression. This restriction was, according to the *Tribunal Constitucional*, set on in the constitutional clause which provides for a special protection of childhood and youth<sup>781</sup>.

Therefore, the *Tribunal Constitucional* did not approach the case as a strict competence case, as the Catalan Government had pleaded. On the contrary, approaching it as a fundamental rights case, the *Tribunal Constitucional* was prepared to apply a constitutional clause by which the basic conditions of enjoyment of fundamental rights must be the same throughout the state<sup>782</sup>. What follows is that the prohibition of access to hardcore films to underage people is, as a restriction to freedom of expression, an exclusive competence for the state, which must assure that the restriction will respect the freedom of expression by the same standards throughout Spanish territory<sup>783</sup>.

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**780** The Tribunal ruled that "tratándose de una limitación que tiene su justificación constitucional en el art 20(4) de la Constitución Española, debe garantizarse un mismo contenido básico a esta vertiente negativa de la libertad que proclama el indicado precepto" (*Recurso de la Generalidad Catalana contra la ley de salas especiales de exhibición cinematográfica case*, Sentencia del Tribunal Constitucional 49/84 of 5 April 1984 in *Boletín de Jurisprudencia Constitucional* 36 pages 532-39, fundamento jurídico 4)

**781** "La calificación de películas X (..) se configura como una fenómeno de intervención de carácter negativo, restrictivo de unas actividades (..) [which] se orienta a la protección de un bien constitucionalizado, como es la protección de la juventud y la infancia (artículo 20(4) y, en su caso, artículo 39(4) de la Constitución) (..) el conjunto de medidas, coactivas una y estimuladoras otras (..) se configuran, en un aspecto relevante, como un límite a las libertades que proclama el artículo 20 CE" (*Salas especiales case*, STC 49/84 *cít*, fundamento jurídico 5)

**782** In the *Decreto de la Generalidad catalana sobre calificación espectáculos case*, Sentencia del Tribunal Constitucional 52/85 of 7 November 1985, in *Jurisprudencia Constitucional* XII pages 334-51, fundamento jurídico 1)

**783** Since this restriction "supone una limitación a la libertad de representación que va ligada a la libertad de expresión y de creación literaria y artística garantizadas en el artículo 20 de la Norma Fundamental (..) Al tratarse de una limitación que tiene su justificación constitucional en el artículo 20(4) [of the Constitution] cobra carácter preferente (..) la competencia estatal derivada de dicho precepto de la Constitución en conexión con el artículo 149(1)(1) de la misma"

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Leaving aside the concrete question decided by the case, which, nevertheless, was not unanimously decided<sup>784</sup>, the *Tribunal Constitucional* made it clear that there exists a minimum standard on morals-based restriction to freedom of expression which may not be overstepped by autonomous communities.

In any event, a clear point in the Court's case-law concerning morals is that, precisely because of the broad diversity among member states' moral standards, domestic authorities enjoy a wide "margin of appreciation" in deciding whether a morals-based restriction on freedom of expression may be "necessary in a democratic society". The point of departure of the Court in reaching this conclusion is an inescapable fact that domestic courts - and domestic authorities, in general -, are closer to national reality concerning morals. This "better position" situates domestic courts as the most appropriate bodies to decide on the issue<sup>785</sup>. In terms of the "margin of appreciation" doctrine, this means that it is for national authorities to decide whether the "pressing social need" for a restriction on freedom of expression exists or not<sup>786</sup>.

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(*Calificación de espectáculos case*, STC 52/85 *cit*, fundamento jurídico 5).

**784** A dissenting opinion stated that the Court was not faced with a case of restriction of fundamental rights but only on a case of competencies. See the *Calificación de espectáculos case*, STC 52/85 *cit*, dissenting opinion of judge RUBIO LLORENTE).

**785** "it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by the respective laws of the requirements of morals varies from time to time and from place to place, especially in our era (...). By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements" (*Handyside case*, ECtHR of 7 December 1976 *cit*, paragraph 48). This was, rather, the main argument on which the *Handyside case* was decided: "In these circumstances, despite the variety and the constant evolution in the United Kingdom of views of ethics and education, the competent English judges were entitled, in the exercise of their discretion, to think at the relevant time that the Schoolbook would have pernicious effects on the morals of many of the children and adolescents who would read it" (*Handyside case*, ECtHR of 7 December 1976 *cit*, paragraph 59).

**786** "it is for national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of "necessity" in this context (...). Art 10(2) leaves to the Contracting States a margin of appreciation. This margins given both to the domestic legislator ("prescribed by law") and to the bodies, judicial among others, that are called upon to interpret and apply the laws in force" (*Handyside case*, ECtHR of 7 December 1976 *cit*, paragraph 48). This point was later reaffirmed as for morals in *Muller*, ECtHR of 24 May 1988 *cit*, paragraph 35.

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However, the wide margin given to domestic authorities does not imply that the Court is not equally entitled to supervise the imposed restriction to Article 10 ECHR, in terms of the Convention exigencies. Moreover, the task of the Court is still to secure that the margin of appreciation of member states has not been overstepped including cases concerning morals: in this respect the principle that morals do not preclude European supervision of a restriction on freedom of expression was early established in *Handyside*, in which the Court stated that both instances of national and European control, come "hand in hand" each other<sup>787</sup>. However, it was equally stressed that it is not for the Court to take the place of domestic authorities<sup>788</sup>. Between these two boundaries, the task of the Court may be described only as a supervisor of the exercise of the wide margin granted to member states on this matter.

From *Handyside* onwards, the wide margin approach to morals-based restrictions has not changed in the case-law of the Court. Moreover, the approach has scarcely been discussed in dissenting opinions which have disagreed mostly on the result of its application to the case in hand. This has been the case, for instance, of the dissenting opinions in *Handyside*<sup>789</sup>, in *Müller*<sup>790</sup> or, arguing against a majority which this time

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**787** " (...) Art 10,2 does not give the Contracting states an unlimited power of appreciation (...) [which] goes hand in hand with a European supervision. Such supervision concerns both the aim of the measure challenged and its "necessity"; it covers not only the basic legislation but also the decision applying it, even one given by and independent court" (*Handyside case*, ECtHR of 7 December 1976 *cft.*, paragraph 49).

**788** "it is in no way the Court's task to take the place of the competent national courts but rather to review under Article 10 the decisions they delivered in the exercise of their power of appreciation (...) [the Court] must decide, on the basis of the different data available to it, whether the reasons given by the national authorities to justify the actual measures of "interference" they take are relevant and sufficient under Art 10(2)" (*Handyside case*, ECtHR of 7 December 1976 *cft.*, paragraph 50).

**789** "I am not convinced that the measures taken by the British authorities, including the judgment (...) were "necessary" within the meaning of Article 10(2) for the achievement of their aim, namely the protection of morals (...) the Court must investigate both whether it was necessary (...) to have recourse to the means they employed to achieve the aim and whether they overstepped the national margin of appreciation with a resultant violation of the common standard guaranteed by an autonomous concept (...) " (*Handyside case*, ECtHR of 7 December 1976 *cft.*, dissenting opinion of judge MOSLER).

**790** *Muller case*, ECtHR of 24 May 1988 *cft.*, dissenting opinion of judge SPIELAMNN.

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ruled that a violation of Article 10 ECHR had been committed, in the *Irish Abortion case*<sup>791</sup>.

**3. Morals and the protection of childhood.**

Discussion on the "margin of appreciation" of states should not obscure, however, the Court's doctrine on the substantive arguments by which morals-based restrictions may be imposed on freedom of expression. The most frequent argument as to this respect is the protection of childhood<sup>792</sup>.

Protection of childhood was already argued by the respondent government in *Handyside*: the applicant had pointed out that hard-core pornography was not prosecuted in the United Kingdom, claiming that this was clearly a divergence from the fact that a book containing incidental references to sexual matters was prosecuted<sup>793</sup>. For the respondent government, the crucial feature of the case now before the Court was that the book in question was aimed at children. In fact, domestic courts had stressed this point when the book was banned<sup>794</sup>. Furthermore, this was the crucial factor that allowed domestic courts to define the book as "obscene"<sup>795</sup>. The Court also

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**791** *Irish Abortion case*, ECtHR of 20 October 1992 *cf.*, dissenting opinion of judge MATSCHER

**792** Protection of childhood, however, is not expressly embodied in Article 10(2) ECHR. Article 20(4) CE, on the other hand, expressly contemplates it as a limit to freedom of speech.

**793** *Handyside case*, ECtHR of 7 December 1976 *cf.*, paragraph 56.

**794** the English Court stressed that the book "was intended for children passing through a highly critical stage of their development" and that "As such a time a very high degree of responsibility ought to be exercised by the Court" (*Handyside case*, ECtHR of 7 December 1976 *cf.*, paragraph 30).

**795** The English court concluded "in the light of the whole book that this book or this article on sex or this section or chapter on pupils, whichever one chooses as an article, looked at as a whole does tend to deprave and corrupt a significant number (...) of the children likely to read it", which included a very substantial number aged under 16. It was related to contraceptive, homosexuality, pornography, intercourse and petting and a passage entitled "be yourself". (*Handyside case*, ECtHR of 7 December 1976 *cf.*, paragraphs 31-33).

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carefully weighed up the audience at which the book was aimed<sup>796</sup>, and took into account the fact that the book was directed at people under sixteen. Furthermore, this point was, the real *ratio decidendi* ruling that Article 10 ECHR had not been breached by the state imposed restriction on the circulation of the book<sup>797</sup>.

The same reasoning was later applied in *Muller*: allegedly, the prosecution against the painter and the exhibition's organisation board originated in a pledge submitted to the public prosecutor by a father who had entered the free access exhibition, in which Mr Muller's painting was exhibited, with his daughter and had been extremely impressed by the sexual content of the paintings. In any case, the Court gave particular importance to the fact that the exhibition was open-access and, therefore, that protected audiences (i.e., underage people) could access it freely<sup>798</sup>.

In 1982, the *Tribunal Constitucional* also dealt with protection of childhood in a morals related case: an educational book, addressed to children and adolescents, had been published under the title of "a ver" ("let me see"). It included a number of texts and photographs on sexual matters and was accused of being obscene by several Catholic associations. The controversial parts of the book included affirmations like "people however old or young they may be, have sexual reactions", "only a minor part of sexual activity leads to procreation", the disqualification of virginity and positive comments on masturbation, etc. A court sentenced the publisher, and the Supreme Court confirmed its judgment. He was finally punished with a fine and banned from publishing for six years. He brought the case before the *Tribunal Constitucional* alleging a violation of his right to freedom of expression. The *Tribunal Constitucional* focused on the guarantees

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796 "The Court attaches particular importance to a factor to which the judgment of 20 October 1971 [the domestic court's decision] did not fail to draw attention, that is, the intended readership of the Schoolbook. It was aimed above all at children and adolescents aged from twelve to eighteen (..) " (*Handyside case*, ECtHR of 7 December 1976 *cft*, paragraph 52).

797 "Basically, the book contained purely factual information that was generally correct and often useful (..) However, it also included above all in the section of sex and in the passage headed *Be yourself* (..) sentences or paragraphs that young people at a critical stage of their development could have interpreted as a n encouragement to indulge in precocious activities harmful for them or even to commit certain criminal offenses (..) " (*Handyside case*, ECtHR of 7 December 1976 *cft*, paragraph 52).

798 *Muller case*, ECtHR of 24 May 1988 *cft*, paragraph 36.

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that should be taken into account whenever the right to freedom of expression is limited on the grounds of protecting morals. Furthermore, it expressly considered the *Handyside* case before reaching a decision on the matter<sup>799</sup>.

According to the *Tribunal Constitucional*, two kinds of guarantees, as laid down in the European Convention, were to be analyzed in the "a ver" case: whether the restrictions imposed on freedom of expression were necessary in a democratic society and whether they have been applied to satisfy the purpose for which they had been prescribed. As to the purpose of the restriction, namely the punishment inflicted on the applicant by the Supreme Court, the *Tribunal Constitucional* ruled that, the book having been considered obscene in some parts, its obscene character as a whole should be upheld, and that there were no grounds for the ideological prosecution that the applicant had complained of. The reasoning here was the same as that developed by the Court on the *Handyside*<sup>800</sup> case. As to the necessity of imposing such a restriction on freedom of expression in a democratic society, the *Handyside Tribunal Constitucional* in three points of its reasoning: firstly, in weighing up the importance of this freedom for

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**799** In order to determine "en que medida y con que alcance puede ser delimitada la libertad de expresion por la idea de moral pública (...) ha de rodearse de las garantías necesarias para evitar que bajo un concepto ético, juridificado en cuanto que es necesario un minimum ético para la vida social, se produzca una limitación injustificada de derechos fundamentales y libertades públicas (...) para precisar tales garantías hemos de acudir al Convenio de Roma" (*A ver* case, STC 62/82, fundamento jurídico 3).

**800** In effect, *Handyside*, too, had complained of political prosecution. First, the Court, sharing the view of the British Government and the unanimous opinion of the Commission on this point, found that the 1959/1964 Acts pursued an aim that was legitimate under Article 10(2) of the Convention, namely the protection of morals. The Court did not find any ground to the applicant's claim that the prosecution had its origin in political reasons and a political campaign against a leftist editor. The Court argued that the Judgment of the English Court had not be conducted in such an atmosphere, although certainly some such campaigns had occurred before; it noted also that the second edition of the book, published by *Handyside* too, was not prosecuted although it contained some of the 'political' or radical statements that were to be found in the first edition too and had not been considered "obscene". Consequently, no violation of Article 18 of the Convention (to use a restriction to pursue an aim other the one allowed) and no violation of Article 14 (discrimination for political reasons) were found. (See *Handyside* case, ECtHR of 7 December 1976 *cit.*, paragraphs 46, 52 and 64-67).

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a truly democratic society<sup>801</sup>; secondly, in balancing the fact that the book was aimed at children<sup>802</sup>, and that the protection of childhood led to special considerations; and thirdly, in applying the requirement of proportionality as the final test that should be applied to the restriction.

On this last point, the *Tribunal Constitucional* ruled that the punishment of a six years publishing ban given to the applicant could not be regarded as disproportionate since the applicant's behaviour had to be qualified as a crime since this was the only way the book could be seized. And, under these circumstances, the punishment was the lowest the Supreme Court could have chosen, according to criminal law<sup>803</sup>.

### (2) RESTRICTIONS OF FREEDOM OF EXPRESSION FOR THE PROTECTION OF

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801 According to the tribunal, "no solo las informaciones consideradas como inofensivas o indiferentes, o que se acojan favorablemente, sino también aquellas que puedan inquietar al Estado o a una parte de la población" must be understood as essential for a democratic society, "pues así resulta del pluralismo la tolerancia y el espíritu de apertura, sin los cuales no existe una sociedad democrática (...)" (*A ver case*, STC 62/82, fundamento jurídico 5). This is almost a literal translation of what the Court said in *Handyside* on freedom of speech: "it is applicable not only to 'information' or 'ideas' that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'" (*Handyside case*, ECtHR of 7 December 1976 *cf.*, paragraph 49).

802 The Tribunal stated that it ought to "valorar las circunstancias concurrentes y, entre ellas, muy especialmente tratándose de publicaciones, la forma de la publicidad y de la distribución, los destinatarios (...) [porque] (...) cuando los destinatarios son menores (...) el ataque a la moral pública, y, por supuesto, a la debida protección a la juventud y a la infancia, cobra una intensidad superior (...)" (*A ver case*, STC 62/82, fundamento jurídico 5). This fact had been remarked throughout the proceedings in *Handyside*. The English Court stressed that the book "was intended for children passing through a highly critical stage of their development" and that "as such a time a very high degree of responsibility ought to be exercised by the Court" (*Handyside case*, ECtHR of 7 December 1976 *cf.*, paragraph 30). The Court stated that it "attaches particular importance to (...) the intended readership of the Schoolbook. It was aimed above all at children and adolescents aged from twelve to eighteen (...)" and argued that although "basically, the book contained purely factual information that was generally correct and often useful (...)" it also included "sentences or paragraphs that young people at a critical stage of their development could have interpreted as an encouragement to indulge in precocious activities harmful for them or even to commit certain criminal offenses (...)" (*Handyside case*, ECtHR of 7 December 1976 *cf.*, paragraph 52).

803 In *Handyside* dealing with the claim that the government had not observed the principle of proportionality, the Court found that the prosecution and seizure of the book was the only effective measure in such circumstances, because the applicant would never have agreed to modify the book otherwise (*Handyside case*, ECtHR of 7 December 1976 *cf.*, paragraph 58).

## THE AUTHORITY AND THE IMPARTIALITY OF THE JUDICIARY.

### 1. The Impartiality of the Judiciary.

Closely allied with the preservation of national security, maintaining "the authority and impartiality of the judiciary" is also a legitimate aim under Article 10(2) ECHR on which freedom of expression may be restricted<sup>804</sup>. The Court has clarified what is meant by "judiciary" under this Article: according to its decision in the *The Sunday Times* case, "the term judiciary ("pouvoir judiciaire") comprises the machinery of justice or the judicial branch of government as well as the judges in their official capacity"<sup>805</sup>.

The scope of this state interference in freedom of expression is, therefore, very wide. Moreover, when judicial proceedings are at the heart of a case, other legitimate aims under Article 10(2) which may in principle also be involved in a freedom of expression case, are not usually taken into account separately: in these cases, the authority and impartiality of the judiciary is the main issue taken into account. This may be the case, for instance, of the "disclosure of information received in confidence" which takes place in the context of judicial proceedings, or of "the protection of the rights or reputation of others" when the "other" is a judge acting in his official capacity. Arguments based on the authority and impartiality of the judiciary are broad enough, therefore, to include almost every freedom of expression case which is related, in one way or another, to the courts<sup>806</sup>.

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**804** On the problems raised by the conflict between freedom of expression and the due respect to the courts, see, in general, *Niekerk, B. (1987) The Cloistered virtue: freedom of speech and the Administration of Justice in the Western World*, New York: Praeger.

**805** (*Sunday Times case*, ECtHR of 26 April 1979 *cf.*, paragraph 55). As is well known, the case concerned the trials of the "thailomide children". One of the arguments of the newspaper to denying such a pressure was that the issue had been broadly discussed in the Parliament. See a comment as to the extent the judgment on this precisely point has influenced Spanish law in DIEZ- PICAZO, 1987.

**806** Although it clearly has its roots in the common law concept of "contempt of court", the Court has ruled that "the authority and impartiality of the judiciary" is an autonomous concept under the Convention. See *Sunday Times case*, ECtHR of 26 April 1979 *cf.*, paragraph 60).

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A provision similar to the one embraced in the Convention under the heading "authority and impartiality of the judiciary" is not found in the Spanish Constitution. Again, the constitutional grounds for limiting freedom of expression are to be found in the general clause of "the rights recognised in this title", since the protection of authority and impartiality of the judiciary may be regarded as a way of protecting the exercise of citizens' fundamental right to a fair trial<sup>807</sup>.

The initial assumption of the Court in these cases points out the importance of freedom of expression as an essential feature for a democratic society. This is also the point of departure of the *Tribunal Constitucional*. Moreover, according to both the Court and the *Tribunal Constitucional*, the freedom of expression does not lack this "preferred position" (as the *Tribunal Constitucional* calls it) only because judicial proceedings are concerned in the given expression or information<sup>808</sup>. According to this principle, the Court has pointed out that the press has also *another* important role to play in judicial proceedings related cases: while the legal settlement of the dispute is certainly for the courts, the press has the duty of informing the public about the proceedings. The "authority and impartiality of the judiciary" does not, therefore, introduce a stricter scrutiny on how freedom of expression has been exercised compared with other cases. Spanish legal order provides judicial proceedings to be heard in public, with some limitations according to procedure law. Since its early cases, the *Tribunal Constitucional* has linked this general principle of procedure (which is, at the same time, a right of the defendant) to the role played by the media. According to a well-established case-law, it is for the media to ensure that judicial activity will be communicated to the general public<sup>809</sup>. Therefore, when journalists cover a hearing, they are exercising the public's right

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<sup>807</sup> *Ultima Hora case*, STC 13/85 *cft*, fundamento jurídico 3.

<sup>808</sup> "As the Court remarked in its *Handyside* judgment, freedom of expression constitutes one of the essential foundations of a democratic society (..) These principles are of particular importance as far as the press is concerned. They are equally applicable to the field of the administration of justice, which serves the interests of the community at large and require the co-operation of an enlightened public" (*Sunday Times case*, ECtHR of 26 April 1979 *cft*, paragraph 65).

<sup>809</sup> "el principio de publicidad de los juicios garantizado por la Constitución (..) implica que éstos sean conocidos más allá del circuito de los presentes en los mismos, pudiendo tener una proyección general. Esta proyección no puede hacerse efectiva más que con la asistencia de los medios de comunicación (..) [the role of the media] (..) se acrecienta con respecto a

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to information, and, as a result, they are covered by the preferred position discussed above<sup>810</sup>.

The presence of the media in judicial hearings, and the nature of the role played thereby, was decided by the *Tribunal Constitucional* in a highly controversial case involving political aspects, the *Diario 16 - 23F* case<sup>811</sup>. The ECHR was at the root of the *Tribunal Constitucional's* decision concerning this aspect<sup>812</sup>: the *Tribunal*

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acontecimientos que por su entidad pueden afectar a todos [and have] resonancia en el cuerpo social" (*Diario 16/23f case, STC 30/82, cit, fundamento jurídico 4*).

**810** "no resulta adecuado entender que los representantes de los medios de comunicación social, al asistir a las sesiones de un juicio público, gozan de un privilegio gracioso y discrecional, sino que lo que se ha calificado como tal es un derecho preferente, atribuido en virtud de la función que cumplen, en aras del deber [sic] de información constitucionalmente garantizado (..) " (*Diario 16/23f case, STC 30/82, cit, fundamento jurídico 4*)

**811** The case was brought before the Tribunal by "Diario 16", a Spanish newspaper. In February 1982, the court martial for the attempted coup which had happened a year earlier, was taking place. In 23 february, exactly a year after the assault, Diario 16 published an article entitled "Asi asaltamos el Parlamento" ("The way we assaulted the Parliament"), with declarations of soldiers who had taken part in it. The day after, the accused (a lieutenant-colonel, two generals and a few officers) protested and denied to enter into the court room if the journalists of Diario 16 were going to be present. As a result, the President of the Supreme Council of Military Justice, who chaired the session, prohibited the Diario 16 journalists access to the room. Later this ban was lifted, except for the Director of the newspaper and the journalist who had signed the article. After exhausting prior remedies, the newspaper brought the case before the Court alleging a breach of article 20 of the Constitution and of Article 10(2) of the Convention. The Tribunal found that the resolution of the Supreme Council of Military Justice had violated the freedom of expression and of information of the applicant. The decision of the Tribunal stated that "La decisión tomada por el Consejo Supremo de Justicia Militar el 23 de febrero de 1982 fue justificada en el marco de las medidas de policía (..) Ahora bien (..) fuera del supuesto de los actos castigados por la ley, que determina que se ponga a los autores a disposición de la autoridad judicial, (..) <no puede> (..) extender sus efectos (..) más allá de la circunstancia concreta y de urgencia que las motivó, por lo cual la resolución en cuestión ha vulnerado los derechos fundamentales de los recurrentes" (*Diario 16/23f case, STC 30/82 cit, fundamento jurídico 5*)

**812** The applicant stated that "no cabe alegar (..) como cobertura (..) la protección (..) de la autoridad e independencia del propio Tribunal, porque la libertad de expresion y, por tanto, la de información, no encuentran limite alguno en la sustanciación de un proceso en relación con los hechos objeto de la manifestación oral o escrita verificada en ejercicio de dichas libertades, como ha declarado el Tribunal Europeo de Derechos Humanos en su sentencia de 26 de abril de 1979, en aplicación del art 10 de la Convención Europeo, incorporada al ordenamiento español" and added that "la vinculación entre el principio de publicidad y el acceso de los medios de comunicación a las sesiones públicas de los procesos en relación con las libertades de expresión y de información es hoy de todo punto evidente, como ha puesto especialmente de relieve, en el constitucionalismo comparado, la jurisprudencia norteamericana" (*Diario 16/23f case, STC 30/82*)

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*Constitucional* ruled that the general function of the media was to inform and that their presence at the trials was justified under Article 120(1) of the Constitution, which guarantees the public nature of judicial proceedings<sup>813</sup>. Publicity, indeed, could only be guaranteed if the media had access to them. Although the Court's judgment in *The Sunday Times* was not quoted by the *Tribunal Constitucional* in this case, and was only referred by the applicant, its influence in the *Tribunal Constitucional's* reasoning is apparent<sup>814</sup>.

Therefore, the media have a "preferred right" to be present at judicial proceedings, due to its special function as a means of information. Although the *Tribunal Constitucional* did not find it necessary in the *Diario 16- 23F* case to expressly consider the right of the public to receive information - a point the Court did in fact address in "The Sunday Times" case - the result was at all events the same: the task of informing cannot be prevented by the mere fact that the object of information is a judicial proceeding<sup>815</sup>. Since this case, the media has been protected by the courts in Spain

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*cít.*, Antecedente 2).

**813** Article 120(1) CE reads as follows: "Judicial proceedings shall be public, with the exception of those contemplated in the laws of procedure".

**814** The Tribunal stated that "el principio de publicidad de los juicios garantizado por la Constitución (art 120.1) implica que estos sean conocidos m a allá del circuito de los presentes en los mismos, pudiendo tener una proyección general. Esta proyección no puede hacerse efectiva mas que con la asistencia de los medios de comunicación", therefore the role of the media "se acrecienta con respecto a acontecimientos que por su entidad pueden afectar a todos" or relating to facts which have some kind of "resonancia en el cuerpo social" (*Diario 16/23f case*, STC 30/82 *cít.*, paragraph 4). In the *Sunday Times* case the Court had ruled that the principle of the importance of freedom of expression in a democratic society was "of particular importance as far as the press is concerned" and that they were "equally applicable to the field of the administration of justice, which serves the interests of the community at large and require the co-operation of an enlightened public" (paragraph 65).

**815** The tribunal stated that "no resulta adecuado entender que los representantes de los medios de comunicación social, al asistir a las sesiones de un juicio publico, gozan de un privilegio gracioso y discrecional, sino que lo que se ha calificado como tal es un derecho preferente, atribuido en virtud de la función que cumplen, en aras del deber de información constitucionalmente garantizado (..) " (STC 32/82, paragraph 4). In the *Sunday Times* case, the Court had ruled in the same way, but using the right to receive information embraced in Article 10 to analyze the presence of the media in the judicial proceedings. It stated that "not only do the media have the task of imparting such information and ideas: the public also has a right to receive them" and that, in that specific case "the families of numerous victims of the tragedy, who were unaware of the legal difficulties involved, had a vital interest in knowing all the underlying facts and

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their role of covering hearings and publishing information on them.

The "impartiality" of the judiciary which Article 10(2) refers to implies, according to the construction of this Article made by the Court, the preservation of courts from external pressure which may affect its task. The Court has made it clear, however, that the "impartiality" of the judiciary is not endangered when information is published on a case in which a social debate is already going on<sup>816</sup>. In this context, published information alleging the breach of impartiality of the judiciary must be balanced against the already existing social "pressure" on the judge or court which must decide a case<sup>817</sup>.

Confidential information received in the course of judicial proceedings may also be restricted on the grounds of the "impartiality" of the judiciary. However, once this information is available, and confidentiality has been breached as a result, later disclosure of the same information the Court has held, may not be subject to a restriction<sup>818</sup>. Accordingly, the Court has dismissed a formal concept of confidentiality of judicial proceedings information, and is of the contrary view that the circulation of

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the various possible solutions. They could be deprived of this information, which was crucially important for them, only if it appeared to be absolutely certain that its diffusion would have presented a threat to the 'authority of the judiciary' (*Sunday Times case*, ECtHR of 26 April 1979 *cft*, paragraphs 65-66).

**816** See the *Sunday Times case*, ECtHR of 26 April 1979 *cft*, paragraph 62.

**817** "The proposed Sunday Times article was couched in moderate terms and did not present just one side of the evidence or claim that there was only one possible result at which a court could arrive (...) Accordingly, even to the extent that the article might have led some readers to form an opinion on the negligence issue, this would not have had adverse consequences for the "authority of the judiciary" especially since (...) there had been a nation wide campaign in the meantime" (*Sunday Times case*, ECtHR of 26 April 1979 *cft*, paragraph 63).

**818** In the *Weber v. Switzerland case*, Judgment of the ECtHR of 22 May 1990 in *Publications of the European Court of Human Rights series A*, n. 177. The case concerned information on a judicial proceeding which was released by the applicant in a press conference but that had been already divulged in another press conference held one year before.

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In Spain, the right to report about trials may also be restricted on the grounds that impartiality of the judiciary must be preserved. The *Ultima Hora* case provides an interesting interpretation of the Spanish Constitution on this matter in the light of the Convention: a judge had applied Article 10(2) ECHR to ban the publication of photographs taken by a journalist in a crime scene. Furthermore, when the case reached the *Tribunal Constitucional*<sup>820</sup>, the Public Attorney also relied on the Convention to correct the wrong interpretation the *a quo* judge had given of Article 10(2) ECHR<sup>821</sup>. The *Tribunal Constitucional*, in its decision, conceded that Article 10(2) ECHR supports the Spanish legal provisions that allow a judge to decide upon the secrecy of proceedings in several situations<sup>822</sup>. Two remarks, however, are made on this point: although the result of such a restriction may be the prohibition of information, this only affects the proceedings but not any information - even though closely related to the proceedings or the facts of the case - whose source originated elsewhere than the proceedings<sup>823</sup>. In addition to this, secrecy of the proceedings may also be breached

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date in which the *second* press conference was held]. On that date, therefore, the penalty imposed on the applicant no longer appeared necessary in order to achieve the legitimate aim pursued. The situation might perhaps have been different at the first press conference, but as the Vaud authorities [domestic authorities concerned] did not bring proceedings at the time, the Court does not have to examine the question" (*Weber case*, ECtHR of 22 May 1990, *cf.*, paragraph 51).

**820** the *Ultima Hora* case, STC 13/85 *cf.* A judge in Palma de Mallorca quoted the Convention as a ground for prohibiting a local newspaper for publishing photographs related to a case pending before him when a photographer of the local newspaper, "Ultima Hora", took some photos before the judge arrived on the spot. When the newspaper appealed, the judge quoted the Convention and said that this restriction was necessary because of the authority of the judiciary.

**821** He argued that "el interés de la justicia a que el juzgado se refiere, esta previsto, efectivamente, en el art 10 del citado Convenio [the ECHR] por supuestos distintos. Y en segundo lugar (...) ni siquiera la invocación a la autoridad del poder judicial configurada como posible limite perfectamente legítimo al derecho fundamental cuestionado, reunió en ese caso los requisitos exigidos por el art 10(2) del Convenio según la interpretación del Tribunal Europeo de Derechos Humanos" (*Ultima Hora case*, STC 13/85 *cf.* antecedente 4).

**822** *Ultima Hora case*, STC 13/85 *cf.* fundamento jurídico 3.

**823** "condiciones fuera de las cuales la limitación constitucionalmente posible deviene vulneración del derecho (...) la previsión (...) se halla dispuesta en norma de ley (...) y puede invocar efectivamente en su apoyo diferentes disposiciones en la materia recogidas en textos internacionales (...) [as the Article 6 ECHR] (...) sobre estas bases, puede decirse que el proceso penal, institución con la que se trata de hacer efectiva la protección del ordenamiento a "derechos reconocidos en este título" (...) según dice el art 20.4) puede (...) tener una fase sumaria amparada por el secreto.<que> (...) no se interpone como limite frente a la libertad de información (...) sino más amplia y genéricamente (...) como un impedimento al conocimiento por cualquiera (...) de las

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proceedings<sup>823</sup>. In addition to this, secrecy of the proceedings may also be breached by anyone who is a party in the proceedings and who, therefore, is subject to a special restriction. The press is not in this position, which includes lawyers, witnesses, the plaintiff and the defendant and judges and judicial staff.

Besides, a lawyer as a party in a legal action may also be specially protected in the exercise of his freedom of speech when freedom of defence is concerned. According to the *Tribunal Constitucional*, this special protection implies that a disciplinary measure should be preferred, rather than a criminal sanction<sup>824</sup>. Whatever the case, the aim of a restriction granted on the preservation of the impartiality of the judiciary, may never be to censor the information on the grounds of any kind of ideological, moral or political disagreement with its content, but only to avoid interference in the course of justice<sup>825</sup>.

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Whereas the preservation of the impartiality of the judiciary is aimed at a correct fulfillment of the courts' task, *authority* under Article 10(2) has been defined by the Court as the "respect" and "confidence" that the people have in the courts as the proper forum for the settlement of legal disputes<sup>826</sup>. While freedom of expression may be restricted

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824 *Rodríguez Oliver case*, Sentencia del Tribunal Constitucional 38/88 of 9 March 1988 in *Boletín de Jurisprudencia Constitucional* 83, pages 392-97.

825 *Ultima Hora case*, STC 13/85 *cft*. fundamento jurídico 1.

826 "The term phrase *authority of the judiciary* includes, in particular, the notion that the courts are, an are accepted by the public at large as being, the proper forum for the ascertainment of legal rights and obligations and the settlement of disputes relative thereto; further, that the public at large have respect and confidence in the courts' capacity to fulfill that function" (*Sunday Times*

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judicial behaviour or decisions when public interest is involved<sup>827</sup>. Furthermore, specific aspects of judicial behaviour, notably those which lead to lengthy proceedings, may be subject to open criticism in the press<sup>828</sup>.

In the *Navazo case*<sup>829</sup>, the *Tribunal Constitucional* found that the real offence committed in a case of criticism of judges was not slander, since the right to Honour is defined in the Constitution in very personal terms, and it is not applicable to institutions like the judiciary<sup>830</sup>. So it analyzed the case as to what extent the authority of the judiciary could have been damaged by Mr. Navazo's declarations, and whether this damage could justify a restriction on his freedom of expression. As to the first question, the *Tribunal Constitucional* agreed with the challenged judgment that the reported declarations seriously damaged the prestige of the judiciary. However, in view of the context of the case the impersonal nature of the declarations and the public relevance to the subject - the functioning of the judiciary - the judge should have concluded that

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827 "Whilst they [the judiciary] are the forum for the settlement of disputes, this does not mean that there can be no prior discussion of disputes elsewhere, be it in specialized journals, in the general press, or among the public at large. Furthermore, whilst the mass media must not overstep the bounds imposed in the interest of the proper administration of justice, it is incumbent on them to impart information and ideas concerning matters that come before the courts just as in others areas(..)" (*Sunday Times case*, ECtHR of 26 April 1979 *cf.*, paragraph 65).

828 "An assessment of the precise status of the [thalidomide] case during the relevant period is not needed for the Court's decision: preventing interference with negotiations towards the settlement of a pending suit is a no less legitimate aim under Art 10(2) than preventing interference with a procedural situation in the strictly forensic sense (..) What is to be retained is merely that the negotiations were very lengthy, continuing for several years, and that at the actual moment when publication of the article was restrained the case had not reached the stage of trial" (*Sunday Times case*, ECtHR of 26 April 1979 *cf.*, paragraph 64)

829 *Navazo case*, STC 107/88 *cf.*

830 Navazo was an conscientious objector who was condemned for defamation of the Armed Forces. When the judgment was emitted, he gave a interview to newspaper where he compared his punishment - a seven months" arrest - with a previous one inflicted on an ultra right-wing captain who slandered the King, and had been punished only with one month arrest. "In my opinion", he said, "this confirms that nothing, absolutely nothing, can oblige them [the judges] to meet out justice" [He declared literally that "es increíble que a mi me metan siete meses y que castiguen con un mes de arresto a un capitán de ilustre apellido que llamo cerdo al Rey" and that "esto me confirma una idea que ya tenía arraigada: nada, absolutamente nada, puede obligarles a hacer justicia"]. For this declaration he was condemned to another month and a day"s arrest and a fine of 20.000 pesetas, once again, for the crime of slander. After sentence was confirmed in appeal, he challenged it before the Tribunal.

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the *Tribunal Constitucional* agreed with the challenged judgment that the reported declarations seriously damaged the prestige of the judiciary. However, in view of the context of the case the impersonal nature of the declarations and the public relevance to the subject - the functioning of the judiciary - the judge should have concluded that a restriction to his freedom of expression was unjustified<sup>831</sup>. In doing so, the *Tribunal Constitucional* pointed out that, since the "authority of the judiciary" as a restriction of freedom of expression is not a subjective right, its capacity to limit freedom of expression is lower than other grounds for restriction, which are directly actionable as fundamental rights.

A few years later, however, the *Tribunal Constitucional* made it clear in the *El Día case*<sup>832</sup> that, although in a less severe manner than the protection of honour, the authority of the judiciary may also be a grounds for a restriction of freedom of speech. The judiciary's approach to the authority as a valid grounds for a freedom of expression restriction was consistent with the previously decided *Navazo case*: since the fundamental right to honour is not involved in general statements criticising the judiciary, the *Tribunal Constitucional* stated that freedom of expression is subject to a lower restriction.

Criticism of judges acting in their official capacity may also be restricted. The grounds for such a restriction, however, is not the authority of the judiciary clause, but the protection of the rights and the reputation of judges, to which they are entitled under

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**831** According to the Tribunal, "resulta indudable que la opinión del demandante de amparo incide negativamente en el prestigio de la institución pública a la que se refiere, siendo lógico y comprensible que la jurisdicción penal la haya considerado, muy acertadamente, injuriosa u ofensiva a la clase del estado a la que se dirigió. A pesar de ello, teniendo en cuenta el contexto en que se producen (...) su alcance de crítica impersonalizada en la que no se hacen imputaciones a jueces singularizados, cuyo honor y dignidad personal no resultan afectados y el interés público de la materia sobre la cual recae la opinión -el funcionamiento de la administración de justicia- la jurisdicción penal debió entender, de haber realizado una correcta ponderación de los valores en conflicto, que la libertad de expresión se ejerció en condiciones que, constitucionalmente, le confieren el máximo nivel de eficacia preferente y, en consecuencia, que la lesión inferida (...) encuentra justificación en la protección que merece el ejercicio de dicha libertad" *Navazo case*, STC 107/88 *cít.*, fundamento jurídico 3).

**832** *El Día case*, STC 121/89 *cít.*

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after the applicant had lost a case against the Greenland Local Government in which two lay judges, who were at the same time employees of the Local Government and had taken part in the decision, he eventually wrote an article criticising the functioning of the Danish judiciary, since employees of a local government could hear a case in which their employer is a party. In addition, he criticised the behaviour of the two judges who heard his case: not only did they not refuse to participate in the hearing, but, Mr Barfod wrote, "they did their duty"<sup>835</sup>. When the case reached the Court, it was found that Mr. Barfod's speech was divided into two different parts: in the first one, the judiciary had been criticised, and, according to the Court, no restriction had been issued by the respondent state because of this; the second part of his speech, however, had been the cause of the alleged restriction<sup>836</sup>: defamation of the two judges had been committed in this part of the applicant's speech, and the Court relied on domestic proceedings in order to scrutinise the state's interference as a restriction based on "the protection of the rights of others", the other being in this case the two judges who had been criticised<sup>837</sup>. No interference had occurred on the applicant's right to criticise the judiciary<sup>838</sup>. According to the Court, therefore, the restriction of freedom of expression aimed at the protection of the rights of judges was the only interference found in the case. It did not

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<sup>834</sup> *Barfod v. Denmark*, Judgment of the ECtHR of 22 February 1989 in *Publications of the European Court of Human Rights* series A, n. 149.

<sup>835</sup> See a summary of the facts of the case in the *Barfod case*, ECtHR of 22 February 1989 *cf.* paragraph 1-26.

<sup>836</sup> "the applicants's article contained two elements: firstly, a criticism of the composition of the High Court in the 1981 tax case and, secondly, the statement that the two lay judges "did their duty", which in this context could only mean that they cast their votes as employers of the Local Government rather than an independent and impartial judges (..) The interference with the applicant's freedom of expression was prompted by the second element alone (..) " (*Barfod case*, ECtHR of 22 February 1989 *cf.*, paragraph 30-31)

<sup>837</sup> "(..) the Court is satisfied that the interference with his freedom of expression did not aim at restricting his rights under the Convention to criticize publicly the composition of the High Court in the 1981 tax case. Indeed, his right to voice his opinion on the issue was expressly recognised by the High Court in its judgment (..) " (*Barfod case*, ECtHR of 22 February 1989, *cf.*, paragraph 32).

<sup>838</sup> "The State's legitimate interest in protecting the reputation of the two lay judges was accordingly not in conflict with the applicant's interest in being able to participate in free public debate on the question of the structural impartiality of the High Court" (*Barfod case*, ECtHR of 22 February 1989, *cf.*, paragraph 34)

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According to the Court, therefore, the restriction of freedom of expression aimed at the protection of the rights of judges was the only interference found in the case. It did not amount to a violation, since the applicant could not provide any evidence supporting his accusation of misconduct the lay judges<sup>839</sup>.

It may be acceptable to make a distinction between the protection of the authority of the judiciary and the protection of the rights and reputation of specified judges when their conduct is criticised: the authority of the judiciary, on the one hand, should grant a restriction of freedom of speech only in those cases in which actual malice may be found in the speech, or, in general, in any other case in which abusive content clearly outweighs public interest in open discussion on matters of general concern. The protection of the rights of judges, on the other hand, might deserve a greater protection, since subjective fundamental rights, as the right to honour or, in general, the right not to be defamed or slandered, must be balanced against the content of the speech. However, in this latter case, the question may be posed whether judges, even those whose subjective rights may have been breached, should not be taken as public authorities or other public figures. In such a case, as the Court has already admitted, open criticism should be allowed beyond what is permissible in cases in which only ordinary citizens are involved.

The Court also faced this problem in *Barfod*: once the distinction between the protection of the judiciary as such and the protection of the reputation of judges had been made, the Court disagreed with the applicant's claim that criticism to judges should be approached in the same way as criticism to politicians or public officials: judges, the Court said, are not politicians. Defamation standards construed by the Court as to politicians<sup>840</sup>, therefore, are not applicable to defamation of judges, which, regarding

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February 1989, *cf.*, paragraph 34)

<sup>839</sup> "It was quite possible to question the composition of the High Court without at the same time attacking the two lay judges personally. In addition, no evidence has been submitted to the effect that the applicant was justified in believing that the two elements of criticism raised by him (..) were so closely connected as to make the statement relating to the two lay judges legitimate. The [Danish] High Court's finding that there were no proof of the accusations against the lay judges remains unchallenged (..) " (*Barfod case*, ECtHR of 22 February 1989, *cf.*, paragraph 33).

<sup>840</sup> See *infra* this Chapter.

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this matter, must be considered as ordinary citizens<sup>841</sup>. This last point brought about the only dissenting opinion to the Court's decision<sup>842</sup>.

The Spanish *Tribunal Constitucional* seems, moreover, to have gone a step further than the *Barfod* judgment: the Court in *Barfod* came to the conclusion that judges should not enjoy a lower standard than ordinary citizens in the protection of their reputation. Under Spanish law, moreover, the reputation of judges may be protected to a *greater* extent than the reputation of ordinary citizens<sup>843</sup>. The only reason it may not be said that judges are protected to a greater extent than other public officials is because the legal provision which protects them (the provision which embodies the crime of *desacato* in the Spanish criminal code) also applies to public officials.

As embodied in the Criminal Code, the crime of *desacato*, demands the punishment of slander or defamation of public figures under criminal law, so civil law proceedings are not applicable<sup>844</sup>. Moreover, the execution of this crime is penalised with a more serious punishment than in all other cases. Furthermore, *desacato* may also be applied when defamation or slander against any public official, other than a judge, has been committed. This is hardly compatible with the principle that allows a broader scope for criticism against politicians (often, public authorities or members of the government as well) is concerned. Certainly, both the *Navazo* and the *El Dia* cases concerned criticism of the judiciary in general, not criticism of one specific judge. Thanks

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**841** "The applicant alleged that, having regard to the political background of the 1981 tax case [that is, the domestic case which the two lay judges later criticized by the applicant heard], his accusations against the lay judges should be seen as part of a political debate (..) the Court cannot accept this argument. The lay judges exercised judicial functions. The impugned statement was not a criticism of the reasoning (..) but rather (..) a defamatory accusation against the lay judges personally (..) the political context (..) cannot be regarded as relevant for the question of proportionality (..) " (*Barfod case*, ECtHR of 22 February 1989 *cft*, paragraph 35)

**842** "Although these two lay judges were not strictly speaking politicians, I consider that this case has political overtones in as much as it involved criticism of a specific judicial system, namely the Greenland judiciary and its composition, which, in the applicant's view, did not inspire public confidence" (*Barfod case*, ECtHR of 22 February 1989, *cft*, dissenting opinion of judge GOLGUCLU)

**843** The step further which was mentioned in the dissenting opinion to *Barfod*: "It is in my opinion not possible to extract an *a contrario* argument from the *Lingens* case in which the Court held that "politicians" must be ready to accept more criticism than non-politicians (..) " (*Barfod case*, ECtHR of 22 February 1989, *cft*, dissenting opinion of judge GOLGUCLU).

**844** See Article 240 of the Spanish Criminal Code.

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2. THE IMPARTIALITY OF THE JUDICIARY.**

to this, in both cases the *Tribunal Constitucional* overruled a punishment which was based on the protection of the right to honour of judges and in which the crime of *desacato* had been applied. The *desacato*, however, was held as compatible with the Constitution<sup>845</sup>.

How can this be compatible, on the other hand, with the principle of a wider margin to freedom of speech when public matters (such as the functioning of the judiciary) are involved? Up to date there is not a direct ruling on the *desacato*. In all related cases, the *Tribunal Constitucional* has not declared it unconstitutional. Recently, however, in a case in which criticism of professional action of an identified judge had been punished, the *Tribunal Constitucional* interpreted the crime of *desacato* in a restricted way<sup>846</sup>: for instance, it ruled that the *desacato* applies only to the protection of the right to honour of public officials, including judges, and not to other related rights which may be violated in a freedom of speech case, i.e. privacy or self-image; these rights would be protected according to general legal provisions protecting ordinary citizens against abusive speech<sup>847</sup>. Moreover, judges and other figures against which a crime of *desacato* may be committed may, if they wish, initiate a civil law action under general protection against abusive speech if they prefer<sup>848</sup>. Whatever the case, the *Tribunal Constitucional* also pointed out that, as such, a more severe protection of public

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**845** In *El Día* case, the Tribunal held that the provision of the Criminal Code in which *desacato* is embodied "no arroja dudas sobre la constitucionalidad del precepto penal aquí aplicado"(580,5) (*El Día* case, STC 121/89 *cít.*, fundamento jurídico 2).

**846** In the *Penalva* case, Sentencia del Tribunal Constitucional 214/91 of 16 December 1991 in *Boletín de Jurisprudencia Constitucional* 129, pages 65 ff. The case concerned criticism to a judge who had been accused by a newspaper of be involved in traffic of narcotics. In the same article, aspects of the private life of the judge were also published.

**847** This was the submission made by the Public Attorney (*Penalva* case, STC 214/91, *cít.*, antecedente 7) which the Tribunal did not find it necessary to answer, since the case, in which photographs of a judge had been published, concerned a joint violation of the right to honor and the right to self-image, see *Penalva* case, STC 214/91, *cít.*, fundamento jurídico 3.

**848** "(..) no pendiendo proceso penal alguno por los mismos hechos a los que el ahora recurrente imputaba la lesión de sus derechos fundamentales al honor, a la intimidad y a la propia imagen y cuya existencia no había sido discutida, ni estando condicionada la decisión de la cuestión que constituía el objeto del proceso civil por la previa calificación de los mismos como constitutivos de delito, es evidente que los órganos judiciales de instancia y apelación no incurrieron en exceso de jurisdicción" (*Penalva* case, STC 214/91, *cít.*, fundamento jurídico 4)

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*Tribunal Constitucional* also pointed out that, as such, a more severe protection of public officials, including judges, against abusive speech is compatible with the right to an equal treatment before the law<sup>849</sup>.

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849 "la diferencia de trato que en el orden procesal puede llegar a producirse por el juego o conexión del art 1.2 de la LO 1/1982 con otros preceptos del Código Penal y de la Ley de Enjuiciamiento Criminal cuando los hechos causantes de intromisión ilegítima en el derecho al honor, a la intimidad y a la propia imagen, puedan ser constitutivos de un delito perseguible de oficio, no es necesariamente discriminatoria ni contraria al art 14 CE (..) Que las autoridades públicas (..) que en el ejercicio de sus funciones o con ocasión de ellas sufran atentados a los precitados derechos fundamentales de la persona, al ejercitar la acción civil regulada por la LO 1/1982, hayan de aceptar que el órgano judicial civil pase el tanto de culpa a la jurisdicción penal y dé preferencia al enjuiciamiento penal de los hechos, no es, ciertamente, susceptible de reproche alguno desde la perspectiva del principio de igualdad (..) pues la condición de autoridad (..) constituye un elemento de diferenciación justificado y razonable que elimina toda desigualdad arbitraria ante la Ley" (*Penalva case*, STC 214/91, *cít*, fundamento jurídico 3

## CHAPTER VIII

### RESTRICTIONS ON THE GROUND OF NATIONAL SECURITY AND THE PREVENTION OF DISORDER

**(1) INTRODUCTION. (2) RESTRICTION OF FREEDOM OF EXPRESSION IN THE INTEREST OF NATIONAL SECURITY. 1. Restrictions in a situation of Public Emergency; 2. Restrictions of information in the interest of national security; (3) RESTRICTIONS OF FREEDOM OF EXPRESSION FOR THE PREVENTION OF DISORDER 1. Restrictions on value-judgments in the interest of the prevention of disorder under Article 10(2) ECHR; 2. *Desacato* to Public Officials and to the Government.**

#### **(1) INTRODUCTION.**

At the time when the Convention was drafted, member states of the Council of Europe were well aware that national security may on occasion force the state to impose a general temporary suspension of human rights within its territory. As a result, provided that some special circumstances are present, state security reasons stand as a valid argument under the Convention to restrict almost all the rights guaranteed therein, freedom of expression included. Moreover, Article 10(2) ECHR also embodies "national security" as a legitimate aim to restrict freedom of expression. Cases concerning national security under this Article may be classified in two different groups: first, those cases in which the dissemination of information is prevented on the grounds of a risk to national security, and as a result either the right to impart information or the right to receive information (or both) is restricted; and second, those cases in which value-judgments or opinions are restricted for the sake of national security. While the case-law of the Court is richer as regards the first kind of case, national security has been more frequently applied in Spain in the second way.

#### **(2) RESTRICTION OF FREEDOM OF EXPRESSION IN THE INTEREST OF NATIONAL SECURITY.**

##### **1. Restrictions in a situation of Public Emergency.**

Article 15 ECHR embodies an emergency clause by which member states may, with due guarantees observed, temporarily derogate from some of their obligations under the Convention. Those circumstances are mentioned in Article 15(1) ECHR as "time of

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war or other public emergency"<sup>850</sup>. According to Article 15(3) ECHR, further guarantees must be observed by those member states which have decided to apply the derogation clause of paragraph (1)<sup>851</sup>.

By its very nature, the freedom of expression is likely to be suspended in a case of state emergency. Article 15 ECHR applies, *inter alia*, to Article 10 ECHR, which is not among the *absolute rights* to which no general derogation under Article 15 is allowed. Absolute rights, exhaustively listed in Article 15(2) ECHR, are only the following: the right to life, the right not to be subjected to torture or to inhuman or degrading treatment, the right not to be held in slavery or servitude and the right not be prosecuted without the observance of the principle of *nulla pena sine lege*<sup>852</sup>.

Apart from Article 15 ECHR, national security is taken as a legitimate aim to restrict freedom of expression in Article 10(2) ECHR also. How must this double consideration of national security as a legitimate ground for a restriction of freedom of speech be approached? The main difference is that Article 15 ECHR applies to serious restrictions made within a general scope, while Article 10(2) ECHR will be argued in the case of a less serious restriction. Moreover, Article 10(2) speaks literally of restrictions imposed "in the interest of national security", while Article 15 ECHR speaks of "time of war or other public emergency". War time may not pose any problem regarding interpretation. A public emergency situation under this Article means, as the Court stated

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**850** See a general discussion on Article 15 ECHR, *supra*, in Chapter I.

**851** Article 15(3) ECHR reads as follows: "Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council or Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed"

**852** Article 15(2) ECHR states as follows: "No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision". In addition, Protocol number 6 to the Convention, concerning the abolition of the death penalty, adds to the protection provided by Article 15 to the right to life as an absolute right, since Article 3 of that Protocol states that "No derogation from the provisions of this Protocol shall be made under Article 15 of the Convention."

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in the *Lawless* case<sup>853</sup>, "an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the Community of which the State is composed"<sup>854</sup>. A situation of "public emergency" under Article 15 ECHR is therefore a more serious risk for the state than the situations in which the "interest in national security" under Article 10(2) ECHR may be argued.

The way in which the Court may control the application of Article 15 ECHR to freedom of expression, however, does not differ very much from other legitimate aims under which Article 10 ECHR may be restricted. Admittedly, the Article 15 ECHR system's background is a temporary suspension of fundamental rights due to reasons of political nature; therefore, the situation may hardly be controlled from a legal point of view<sup>855</sup>. As a matter of fact, however, the emergency clause of Article 15 ECHR may be approached as a Convention provision which has essentially the same effects as the *second paragraphs* embodied in Article 10 and other ECHR: that is, to justify states' interferences in the fundamental rights protected by the Convention<sup>856</sup>.

It must be pointed out, therefore, that the application of Article 15 ECHR must not be analyzed by the Court with a completely different point of view than that applied to ordinary restrictions under the national security clause of Article 10(2)<sup>857</sup>. Furthermore,

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853 *Lawless v Ireland*, judgment of the ECtHR of 1 July 1960 in *Publications of the European Court of Human Rights*, series A, n. 3

854 *Lawless Case*, ECtHR of 1 July 1961, *cit.*, paragraph 28.

855 Article 15, as been said, "necessary requires the Commission and the Court to make judgments of an essentially political character" (JACOBS, 1975:209)

856 On the *second paragraph* system, in general, see *supra* Chapter I.

857 As has been said, both are techniques for the accommodation of a State which is a party to an international treaty on human rights: "In attempting to redress the balance, it is necessary, however, for improved human rights to be matched by accommodations in favour of the reasonable needs of the State to perform its public duties for the common good (...)". Among other techniques available for effecting such accommodations (denunciation of the treaty, reservations, clauses in the text interpreting the scope of the rights and others) "clawback" clauses and "stricto sensu derogations" have a common effect: "By a "clawback" clause is meant one that permits, in normal circumstances, breach of an obligation for a specified number of public reasons [the second paragraphs of the Convention, for instance]. Derogations stricto sensu are those which allow suspension or breach of certain obligations in circumstances of war or public emergency" [HIGGINS, (1977:281). See a review of these "accommodations" clauses both in the U.N. Covenant of Civil and Political Rights and in the ECHR in pages 283 ff].

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legal techniques, such as the margin of appreciation doctrine, commonly applied by the Court to Article 10(2) ECHR, were first applied to Article 15 ECHR cases<sup>858</sup>.

Similar systems of protection of national security to that regulated by Article 15 ECHR are embodied in the Constitutions of every member state to the Convention<sup>859</sup>. The Spanish constitution, furthermore, regulates *two* different systems of derogation from the protection of fundamental rights: Article 55 CE, more precisely than Article 15 ECHR, allows the suspension of a number of rights in cases of public emergency: under Article 55(1), several fundamental rights may be suspended provided that a state of siege is declared by Parliament. That is, these rights may be subject to a general restriction during periods of emergency, in a similar way to what is provided by Article 15 ECHR. Notably, however, the legal delimitation of the rights subject to suspension is made in a slightly different manner in each case: As has been seen, Article 15(2) ECHR lists the rights which are absolute under the Convention, all the others being subject to suspension. On the other hand, Article 55(1) CE lists the rights which may be suspended, all the other rights protected by the Constitution not being subject to a general suspension. Freedom of expression is listed in Article 55(1) CE, so, as is the case of Article 15 ECHR, it may be suspended under the Spanish Constitution<sup>860</sup>.

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858 The different domains of the margin of appreciation doctrine has been pointed out by GANSHOF (1988:209-10). Moreover, for O'DONNELL (1982:495), member states enjoy two margins of appreciation in Article 15 cases: "first, the margin of appreciation can be used to claim that there has been no violation of substantive rights; and second, even if a violation have occurred, the margin of appreciation allowed the government in Article 15 situations excuses the violations. Thus it would appear that the Court will be very reluctant to grant any but the widest margin of appreciation to the government in Article 15 cases". As on the Greek case, one of the few cases in which this Article has been applied, an important difference of approach has been found between the Court and the Commission, since "The Commission while referring to the Government's "margin of appreciation" did not merely consider whether the Greek Government had sufficient reason to believe that a public emergency existed; it considered whether such an emergency existed in fact. This difference of approach is of great importance since it makes stringent the requirements of Article 15" (JACOBS, 1975:207).

859 See, for instance, Articles 11, 17 and 18 of the German Constitution or Article 36 of the French Constitution.

860 Article 55(1) CE states that "The rights recognized in Article (..) 20, clause 1, sub clauses a) and d) and clause 5 (..) may be suspended when the declaration of a state of emergency or siege is decided upon under the terms provided in the Constitution."

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Besides, Article 55(2), lists other rights which may be suspended on a subjective basis for individuals accused of participating in terrorist activities, without the requirement of a parliamentary declaration of a state of siege, although parliamentary and judicial control on each suspension is required. An Organic Law, the Anti-terrorism Act, must be passed in order to specify the details. Thus, the Constitution allows the Anti-terrorism Act to regulate the extent to which the rights to domicile inviolability, the secrecy of communications and the maximum period of pre-trial detention, may be suspended for members of terrorist groups. Freedom of expression is *not* included among these rights subject to individual suspension<sup>861</sup>.

The *Tribunal Constitucional* has come to two decisions on the Anti-terrorism Act which Article 55(2) CE refers to<sup>862</sup>. The second judgment also concerned the freedom of expression<sup>863</sup>. Although Article 55(1) CE has not yet been applied, the Tribunal reiterated in that decision that the general suspension of rights allowed by Article 55(1) CE may *not* affect the guarantee embodied in Article 20(2) CE, which forbids prior censorship in whatever circumstances<sup>864</sup>. This introduces a variation between the Spanish Constitution and Article 15 ECHR, which does not exclude any aspect of freedom of expression from the derogation a state may decide in a situation of public emergency<sup>865</sup>.

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861 Article 55(2) CE states as follows: An Organic Act may determine the manner and the circumstance in which, on an individual basis and with the necessary participation of the courts and proper parliamentary control, the rights recognized in Article 7, paragraphs 2, and Article 18, paragraphs 2 and 3, may be suspended as regards specific persons in connection with investigations on the activities of armed bands or terrorist groups (...).

862 Organic Law 9/84, of 26 December 1984, *Sobre medidas contra la actuación de bandas armadas y actividades terroristas o rebeldes*. This law was repealed in 1988

863 *Second Anti-terrorism Act case*, STC 199/87 in *Boletín de Jurisprudencia Constitucional*, 81. [there was another decision of the Constitutional Court on a previous anti-terrorism act in 1981; that decision did not concern freedom of expression].

864 According to the Tribunal, "el artículo 55.1 en relación con la declaración del estado de excepción o de sitio permite en tales casos la suspensión de los derechos del art 20 de la Constitución, y además solo los relativos al apartado primero de dicho artículo, letras a) y d) y el apartado quinto (...)" (*Second Anti-terrorism Act case*, STC 199/87, *cft*, fundamento jurídico 12).

865 It is debatable if the Convention protects against prior censorship even when no public emergency has been declared. On prior restraints under the Convention and under the Spanish Constitution, see *supra* Chapter V.

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In the light of Article 55(1) and Article 55(2) of the Constitution, freedom of speech may not be suspended from individuals, even those accused of terrorist activities, whilst it may be suspended on a general basis in emergency situations<sup>866</sup>. However, the Anti-terrorism Act of 1984, passed under Article 55(2), significantly affected freedom of speech: firstly, Article 1(1) included among those persons subject to individual suspension of the fundamental rights listed in Article 55(2) of the Constitution, not only those accused of terrorist acts, but also those accused of advocating the commitment of terrorist acts, which directly affected newspapers sympathetic to terrorist groups. The Tribunal ruled that Article 55(2) of the Constitution allowed Parliament to apply individual suspension of fundamental rights to persons accused of belonging to terrorist groups only, and not to those accused of the crime of advocacy of terrorist groups. Therefore, Article 1(1) of the Anti-terrorism Act was declared unconstitutional<sup>867</sup>.

Furthermore, according to Article 21(1) of the *Anti-terrorism Act*, the only fact that judicial proceedings had been initiated against a newspaper or other media accused of advocacy of terrorism, implied that the judge should order *ex officio* that the media be banned<sup>868</sup>. The Tribunal ruled that this measure too, is unconstitutional. The argument for this was threefold: firstly, the automatic ban of the media was practically an individual

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<sup>866</sup> The Tribunal found "una clara voluntad constitucional de no establecer una regulación diferenciada del ejercicio de los derechos reconocidos en el art 20 en relación con los supuestos previstos en el número 2 del art 55, o sea, los relacionados con (..) elementos terroristas" (*Second Anti-terrorism Act case*, STC 199/87, *cit*, fundamento jurídico 12).

<sup>867</sup> "..debe considerarse contraria al artículo 55(2) de la Constitución la inclusión de quienes hicieran apología de los delitos aludidos en el artículo primero de la ley en el ámbito de aplicación de esta última, en la medida en que conlleva una aplicación a dichas personas de la suspensión de derechos fundamentales prevista en tal precepto constitucional (..) el problema planteado no es el de la razonabilidad de tal inclusión, sino el de si el legislador estaba habilitado para ello por el artículo 55(2) de la Constitución (..)" (*Second Anti-terrorism Act case*, STC 199/87, *cit*, fundamento jurídico 4).

<sup>868</sup> Article 21(1) of the *Antiterrorism Act* stated as follows: "Admitida la querrela presentada por el ministerio fiscal por delitos cometidos por medio de la imprenta, radiodifusión u otro medio que facilite su publicidad, el juez, de oficio o a petición de dicho ministerio, ordenará el cierre provisional del medio de difusión y, si lo creyese conveniente, la ocupación material de los elementos del delito, siempre que por la gravedad de los hechos o por la habitualidad, estime procedente la adopción de esta medida excepcional de aseguramiento"

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suspension of freedom of speech, not allowed by Article 55(2)<sup>869</sup>; secondly, even in the case that such a measure could be understood as an ordinary judicial punishment, and not a suspension of a fundamental right, it would be clearly disproportionate<sup>870</sup>; thirdly, the Tribunal also mentioned that such a measure would lead to a kind of auto censorship for journalists, who would fear the consequences of informing about terrorists' activities, which is incompatible with freedom of information<sup>871</sup>.

It may be stated, therefore, that the guarantees provided by the Spanish Constitution for the case of a suspension of fundamental rights, as far as the freedom of expression is concerned, imply a higher protection than that provided by the Convention. Firstly, according to Article 55(1) CE, the freedom of expression may be suspended during war or any other emergency. Certainly, Article 15 ECHR allows for a suspension on the same basis, too. However, Article 55(1) does not allow the suspension of the guarantee embodied in Article 20(5) CE which forbids prior censorship. Remarkably, the Tribunal has independently construed this constitutional clause. Secondly, individual suspension of fundamental rights, equally allowed by Article 15 ECHR, may not affect, under Article 55(2) CE, freedom of expression. Regarding this point, the Tribunal has also avoided a construction of Article 55(2) CE in the light of the

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<sup>869</sup> "el legislador (...) no estaba habilitado para establecer una suspensión singular del derecho reconocido en el artículo 20 de la Constitución para el caso de los delitos de terrorismo y bandas armadas. Sin embargo, la consecuencia práctica del artículo 21(1) [of the Antiterrorist Act] equivale a una auténtica suspensión del derecho (...) se ha tratado de introducir, sin habilitación constitucional, un régimen de suspensión singular del derecho, que resulta carente de la habilitación contenida en el art 55(2) de la Constitución" (*Second Anti-terrorism Act case*, STC 199/87, *cft*, fundamento jurídico 12).

<sup>870</sup> The judgment stated that "aun si no se entendiera como suspensión singular del derecho a la libertad de expresión e información, el artículo 21.1 impugnado ha establecido una restricción y una limitación del ejercicio de la libertad de expresión que resulta evidentemente desproporcionada al mero hecho de la admisión de una querrela criminal (...) que no puede encontrarse amparada en el límite genérico establecido en el artículo 20.4 (...) no permite una adecuada ponderación de los bienes constitucionales en juego (...) la seguridad pública y la libertad de expresión" (*Second Anti-terrorism Act case*, STC 199/87, *cft*, fundamento jurídico 12).

<sup>871</sup> "no resulta ocioso indicar los efectos indirectos negativos de autocensura (...) que podían resultar de la amenaza potencial de cierre o clausura (...) la disposición legal puede operar así como una coerción indirecta sobre el ejercicio de las libertades de expresión e información del artículo 20 de la Constitución que resultarían incompatibles con éstas y con un estado democrático de derecho.." (*Second Anti-terrorism Act case*, STC 199/87, *cft*, fundamento jurídico 12).

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Convention, which was however quoted by applicants in the Second Terrorist Act decision. Nonetheless, the Tribunal did not justify its construction of Article 55 CE as a *reactive* interpretation of the Constitution against the Convention's: as it usually does in those cases in which an independent construction is preferred, it relied exclusively on domestic sources of interpretation without feeling it necessary to justify its disagreement with the Convention's lower standard of protection.

**2. Restrictions of information in the interest of national security.**

Leaving apart Article 15 ECHR, the most important cases in which national security has been applied by the Court as a legitimate ground for restricting freedom to impart information have been those cases related to the publication of the so called *Spycatcher* book. The main question posed by the *Spycatcher* cases is the extent to which national security may be argued when information which is restricted because it allegedly puts the security of the state at a serious risk, is nevertheless equally available by other means. The question arose when the *Observer* and the *Guardian*, two British newspapers, were prevented by a court's interlocutory injunction from publishing excerpts of the memoirs of an ex-agent of the British Secret Service. Later on, whilst the case was still pending before domestic courts, the memoirs of the ex-agent were published in a book in the United States. The book circulated freely in the United Kingdom. The prevention from publishing, however, was not lifted for the *Guardian* and the *Observer*. Moreover, shortly after the book was published in the United States, the *Sunday Times* also started to publish excerpts of the memoirs in the United Kingdom: it was eventually disciplined and prevented from publishing that information on the same grounds. Both the *Observer* and the *Guardian*<sup>872</sup> and the *Sunday Times*<sup>873</sup> brought the case before the Court.

The Court distinguished, in *The Observer and the Guardian* case, two different periods, before and after the book was published in the United States<sup>874</sup>. After the book

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<sup>872</sup> *The Observer and the Guardian* case, judgment of the ECtHR of 26 November 1991, *cft.*

<sup>873</sup> *Sunday Times (II)* case, Judgment of the ECHR of 26 November 1991, *cft.*

<sup>874</sup> See the *Observer-Guardian* case, ECtHR of 26 November 1991, *cft.*, paragraph 66.

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had been published in the United States, the Court acknowledged this information was easily accessible in the United Kingdom as well. Nothing had been done by the British authorities to restrain this accessibility. The unescapable consequence for the Court, therefore, was that national security could no longer be jeopardised by information which was already at the disposal of the public<sup>875</sup>. Since domestic judicial injunctions on the *Observer* and the *Guardian* had been maintained after the book had been published in the United States, the Court stated that Article 10 ECHR had been violated during that second period. Furthermore, following the same approach the Court also maintained in the *Sunday Times* case (II) that Article 10 ECHR had been violated during the whole period in which the *Sunday Times* had been prevented from publishing the *Spycatcher* excerpts, since the judicial injunction had been issued in this case after the book had been published in the United States and was freely available in the United Kingdom.

From this case onwards, therefore, the fact that information that is already available cannot be the basis for a restriction grounded on national security may probably be taken as a general principle regarding the Court's construction of the "national security" clause<sup>876</sup>.

It must be pointed out that the applicants both in *the Observer* and in *the Sunday Times* (II) cases also claimed a violation of the right to equal treatment under the law as

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<sup>875</sup> According to the Court, however, other legitimate aims were still present in the case, although they did not justify a restriction to the freedom of information: "By then, the purpose of the injunctions had thus become confined to the promotion of the efficiency and reputation of the Security Service, notably by: preserving confidence in that Service on the part of the third parties; making it clear that an authorized publication of memoirs by its former members would not be countenanced; and deterring others who might be tempted to follow in Mr Wright's [the author of the *Spycatcher* book] footsteps (..) the Court does not regard these objectives as sufficient to justify the continuation of the interference complained of (..) " (*Observer-Guardian case*, ECtHR of 26 November 1991, *cf.*, paragraph 69)

<sup>876</sup> A more radical view was stated in the following dissenting opinion to the decision: "whereas for them [majority] the fact that the book had been published in the United States in the mean time is the sole decisive reason for holding that prior restraint on indirect publication in England was thenceforth no longer justified, for me the fact that the book *could* be legally published in the United States made it, even at the time when the attorney general introduced his breach of confidence actions, so unlikely that Mr Wright could effectively be stopped that the interim injunctions should never have been granted (*Observer-Guardian case*, ECtHR of 26 November 1991, *cf.*, paragraph dissenting opinion of judge MARTENS)

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embodied in Article 14 ECHR: information appeared in a book published in the United States, it was argued, that had been subject in the United Kingdom to a different legal treatment from that applied to the same information published by British newspapers. The Court was of the opinion, however, that this does not amount to a separate violation of Article 14 ECHR read in the light of Article 10 ECHR, since this different legal treatment was justified under the Convention<sup>877</sup>.

The question may be posed if national security may also be a legitimate ground for a restriction of the passive right to *receive* information. Such a violation was alleged before the Court in the *Leander* case<sup>878</sup>. Mr Leander, a Swedish national, was dismissed from his job in a naval base after an official investigation into his political past. National security was alleged. Before the Court Mr Leander alleged a violation of the right to receive information under Article 10 ECHR, since the Swedish Law does not allow the Government to release the result of a personal investigation, the kind of which the applicant had been subject to. The right to privacy and the active right to freedom of expression were also claimed to have been breached. None of them, however, were ruled by the Court as having been violated<sup>879</sup>.

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<sup>877</sup> As the Court stated in the *Observer-Guardian* case, "If and in so far as foreign newspapers were subject to the same restriction as the *Observer* and the *Guardian*, there was no difference of treatment. If and in so far as they were not, this was because they were not subject to the jurisdiction of the English Courts and hence were not in a situation similar to that of the *Observer* and the *Guardian*, there was thus no violation of Article 14 (..) " (*Observer-Guardian* case, ECtHR of 26 November 1991, *cft*, paragraph 74). See also the *Sunday Times (II)* case, ECtHR of 26 November 1991, *cft*, paragraph 58)

<sup>878</sup> *Leander v Switzerland*, Judgment of the ECtHR of 26 March 1987 in *Publications of the European Court of Human Rights* series A, n. 117

<sup>879</sup> The applicant worked as a carpenter in a Naval center. As the request of the base authorities, he voluntarily furnished information about his own past political activities: until 1976, he had been a member of the Swedish Communist Party and member of an association which published a radical left. His only criminal punishment was a little fine while military service. As a result of his failure to pass the security control, he became unemployed. Allegedly, reported activities of the applicant had grounded the decision of the base security board, although since the reasons were not disclosed by the board, it was impossible to know it certainly. The negative to release information was grounded on the Swedish Secrecy Acts of 1980. The applicant claimed that the control violated his right to privacy, his right to the freedom of expression, since his past political activities were taken into account to dismiss him, and also his right to receive information since the reasons why he did not pass the control were never communicated to him. (See the

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The Court first approached the case regarding the alleged violation of the right to privacy. It stated that there had been a state interference in this right which was, however, based on a legitimate aim (national security), in accordance with the law (because it was accessible and foreseeable) and necessary in a democratic society, as it corresponded to a pressing social need and it was proportionate to the legitimate aim pursued. In sum, state interference in the right to privacy complied with all the steps of the *Strasbourg test*. In addition the Court relying on *Kosiek* and *Glase nap*, held that the main issue at hand was access to public service, and therefore granted a wide margin of appreciation to the respondent State<sup>880</sup>.

The Court's approach regarding Article 10 ECHR was slightly different: the Court, when dealing with the alleged violation of the right to privacy, had maintained that there had actually been a state interference, but that this interference, since it was justified, did not lead to a violation. Now, as for the right to receive information, the Court went a step further: there had been no interference at all, since this right does not cover a plea as the one made by the applicant. Member states, the Court stated, are not obliged under Article 10 ECHR to furnish information; they are only obliged not to put an

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facts of the case in *Leander case*, ECtHR of 26 March 1987 *cft.*, paragraphs 9-17). It was also pointed out before the Court that against the negative of the Government to release information there is not appeal before the Courts, what made the Court approach the case as to the possible violation of Article 13 ECHR, which provides for the existence of domestic remedies in case of a violation of a Convention's right. The Court did not find a violation of this Article either, since due guarantees were found in Swedish. This was, however, the most polemic point of the case, to which three partly dissenting opinions referred. See *Leander case*, ECtHR of 26 March 1987, *cft.*, paragraphs 76-84 (ruling of the Court as to Article 13 ECHR) and pages of the decision 33-36 (dissenting opinions).

<sup>880</sup> "The Court recognizes that the national authorities enjoy a margin of appreciation, the scope of which will depends not only on the nature of the legitimate aim pursued but also on the particular nature of the interference involved. In the instant case, the interest of the respondent State in protecting its national security must be balanced against the seriousness of the interference with the applicant's right to respect for his private life (..) On the other hand, the right of access to public service is not as such enshrined in the Convention (..) and, apart from those consequences, the interference did not constitute an obstacle to his leading a private life of his own choosing. In this circumstances, the Court accepts that the margin of appreciation available to the respondent State in assessing the pressing social need in the present case, and in particular in choosing the means for achieving the legitimate aim of protecting national security, as a wide one" (*Leander case*, ECtHR of 26 March 1987, *cft.*, paragraph 59)

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obstacle to the right of those who seek information<sup>881</sup>.

The case-law of the *Tribunal Constitucional* on the freedom of information, has also dealt, as for restrictions on the grounds of national security, with the passive right to *receive* information. The Spanish Constitution regulates that the Public Administration must ensure access to official records and archives to interested people, one of the exceptions to this right being information in which national security is involved<sup>882</sup>. The Tribunal has ruled on this constitutional provision, taken in the light of the right to receive information, as for the right of members of Parliament to receive classified information from the Government.

In the first case in which the Tribunal had to deal with this question, the Speaker of the Lower House of Parliament, *el Presidente del Congreso de los Diputados*, had ruled on the manner in which members of Parliament were entitled to receive classified official information. It was established that only a reduced number of members of the House would have access to official secret information<sup>883</sup>. Fifty-six members of the House claimed that the Speaker, by this interpretation of the standing orders of the Congress, had unconstitutionally limited their right to receive information under Article 20(1)(d) CE and brought the case before the *Tribunal Constitucional*<sup>884</sup>.

The extent to which applicants' claims could be grounded in Article 20(1)(d) CE

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881 "the right to freedom of receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him. Art 10 does not, in circumstances as such as those of the present case, confer to the individual a right to access to a register containing information on his personal position, nor does it embody an obligation on the Government to impart such information to the individual" (*Leander case*, ECtHR of 26 March 1987 *c/f*, paragraph 75).

882 Article 105 CE reads as follows: "The law shall make provision for: (...) (b) the access of citizens to administrative files and records, except to the extent that they may concern the security and defence of the State, the investigation of crimes and the privacy of individuals"

883 See the "Resolución de la Presidencia sobre acceso por el Congreso de los Diputados a materias clasificadas", de 18 de diciembre de 1986, in *Boletín Oficial de las Cortes Generales, Congreso de los Diputados*, III legislatura, serie E, num. 14, págs 467-68.

884 *Resolución del Presidente del Congreso sobre materias clasificadas case*, Sentencia del Tribunal Constitucional 118/84 of 20 June 1988 in *Jurisprudencia Constitucional XXI* pages 311-338

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was extensively discussed before the Tribunal. The applicants had effectively claimed that their fundamental right to receive information had been breached<sup>885</sup>. Against this claim, two different arguments were posed before the Court: the state claimed that Article 20 CE was not applicable<sup>886 887</sup>. The legal representative of the House, however, together with the Public Attorney, claimed that, although Article 20 CE might be applicable, restrictions on the grounds of national security were nevertheless justified<sup>88888990</sup>. The Convention was quoted to support this last point<sup>891</sup>.

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**885** "el diputado (..) en su condición de miembro de un órgano constitucional, adquiere un peculiar derecho a la información (..) aunque los titulares ordinarios del derecho a la información son los individuos, el legislador ha extendido el mismo a las Cámaras, tanto a través de lo prevenido en el artículo 109 de la Constitución como (..) impidiendo que se apliquen al Parlamento las facultades restrictivas del deber de información contenido en la Constitución (artículo 102) (..) el derecho a la información corresponde también a los diputados individualmente considerados (..)" (*Materias clasificadas case, STC 118/84, cft, fundamento antecedente 2*).

**886** "el derecho del diputado a recabar información es un derecho peculiar y privativo en atención a su titularidad de funciones públicas, cuya base es el artículo 7 del reglamento del Congreso de los Diputados y no el art 20.1.d) de la Constitución, del que el diputado es titular en pie de igualdad con el resto de los ciudadanos (..) es un derecho de prestación que condiciona el ejercicio de sus funciones y que no se satisface a través de un medio de comunicación, sino por la fuente misma (Administraciones públicas) (..) no se encuentra dentro del ámbito de protección del art 20.1.d)" (*Materias clasificadas case, STC 118/84, cft, antecedente 6*)

**887** "En otro orden de cosas, el artículo 109 de la Constitución reconoce un derecho institucional de las Cámaras, no individual de cada diputado o Senador (..) Si el derecho individual de cada diputado ex artículo 7 Reglamento del Congreso de los Diputados constituya un *quid* diverso al derecho fundamental citado [20(1)(d) CE], *a fortiori* podrá afirmarse lo propio del acceso de los miembros del Congreso o de una de sus comisiones al total conocimiento de una información suministrada en virtud de un derecho que no es del diputado, sino del órgano complejo del que forma parte (..) en definitiva, el artículo 20(1)(d) de la Constitución protege una comunicación social libre, pero no concede el derecho a acceder al conocimiento de información, datos o antecedentes en poder de la Administración (lo que tiene que ver con el artículo 105(b) de la Constitución, cuya regulación se reserva a la Ley)" (*Materias clasificadas case, STC 118/84, cft, antecedente 6*)

**888** Article 20(1)(d) of the Constitution, "no puede servir de fundamento de una presunta vulneración del derecho a la información que ostentan los diputados en virtud de su condición de miembros del Congreso (..) deriva del status jurídico constitucional de los miembros de la Cámara (..) y no del derecho fundamental reconocido genéricamente a todos los ciudadanos (..) de otro lado, las potestades constitucionales de las Cámaras no son identificables con los derechos individuales de cada uno de sus miembros, pudiendo ser conformadas por las Cámaras mismas en virtud de su autonomía organizativa y funcional" (*Materias clasificadas case, STC 118/84, cft, antecedente 7*).

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Due to procedural reasons, the Tribunal did not emit a decision on the merits, and both the questions of the applicability of Article 20 CE and of its legitimate restrictions aimed at national security remained unaddressed. Two years later, the Tribunal had to deal with the same questions again: in the *Gastos Reservados del Gobierno Vasco* case<sup>892</sup>, a number of members of the Regional Parliament of the Basque Country complained about the refusal of the regional government to provide the Parliament with classified information. This time, the Tribunal clarified in which constitutional provision the right to receive information by members of Parliament is grounded: according to its decision, this right does not come from the fundamental right to receive information embodied in Article 20(1)(d) CE, which is intended to protect citizens, not members of parliament<sup>893</sup>. The valid constitutional ground for an *amparo* seeking protection of the right of Members of Parliament to receive government

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**889** "En consecuencia, los ciudadanos no tienen un derecho constitucionalmente reconocido al acceso a datos sobre materias que afecten a la seguridad y defensa del Estado, siendo difícil aducir que quien ostenta la condición de Diputado pueda ver reforzado, por su posición institucional, un derecho que no se atribuye a los ciudadanos" (*Materias clasificadas case*, STC 118/84, *cft.* antecedente 7).

**890** According to the Public Attorney, "la información a que se refiere el art 20(1)(d) es la transmitida por los medios de comunicación sobre hechos de relevancia realmente acaecidos. Parece pues que esencialmente el derecho no se está proyectando en torno a los medios de comunicación social, lo que no supone que con ello se quiera excluir la posibilidad de recabar información de los organismos públicos (...)" (*Materias clasificadas case*, STC 118/84, *cft.* antecedente 8)

**891** "todo ello se ha de tener en cuenta a los efectos de interpretar nuestra Constitución y, específicamente, de apreciar los condicionamientos y restricciones a la información en materia de seguridad nacional (...)" (*Materias clasificadas case*, STC 118/84, *cft.* antecedente 8)

**892** *Gastos reservados del Gobierno Vasco case* Sentencia del Tribunal Constitucional 220/91 of 25 November 1991 in *Boletín de Jurisprudencia Constitucional* 128 pages 68 ff.

**893** The Tribunal ruled that Article 20 CE embodies a fundamental right which "es un derecho que tiene como características esenciales estar dirigido a los ciudadanos en general (...) es decir, se trata de un derecho que no tiene nada que ver con los controles políticos que las leyes atribuyan a las Asambleas legislativas y a sus miembros sobre la acción de gobierno, en el seno de sus relaciones institucionales con el Poder Ejecutivo" (*Gastos Reservados case*, STC 220/91, *cft.* fundamento jurídico 4)

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information is the right to political participation under Article 23 CE<sup>894</sup>. Approaching the case, rather than from the right to receive information, but from the right to political participation, had, moreover, a crucial consequence: this latter right may be broadly defined by the legislator, provided that unreasonable limitations are not imposed. As a result, the Court held that members of Parliament cannot claim a violation of this right due to a government refusal to provide classified information.

**(3) RESTRICTIONS of FREEDOM OF EXPRESSION FOR THE PREVENTION OF DISORDER**

**1. Restrictions on value-judgments in the interest of the prevention of disorder under Article 10(2) ECHR.**

As we have seen, freedom of *information* may be restricted on the grounds of national security arguments. Also, freedom of expression *sensu stricto*, that is, the right to impart opinions or value-judgments, may be restricted on the same grounds. The first time in which national security was alleged by a member state in a freedom of expression case, likewise, the alleged violation was a breach of the right to freely emit opinions or value-judgments. That was the case in the *Kosiek* and in the *Glaserap* cases, in which, as we have seen *supra*, the Court held that neither the freedom of expression nor any other right embodied in Article 10 ECHR lied at the heart of the case: in both cases, however, loyalty to the Constitution of a member state had been taken as a requirement for recruitment into the civil service, and the defendants now before the Court who had failed to become civil servants because of their previous behaviour raised doubts as to their loyalty to the Constitution. A restriction on an applicant's freedom of expression of this kind, granted on national security arguments, the Court held, is not even an interference in freedom of expression as protected by the

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894 According to the Tribunal, "el acto gubernativo recurrido ha sido adoptado frente a los recurrentes en su calidad de miembros de una asamblea legislativa, es decir, de parlamentarios, y no en consideración a su condición de ciudadanos; en atención a aquella cualidad, que es la que los demandantes hacen valer en este recurso, el único derecho fundamental que puede haber vulnerado el acto recurrido es el garantizado por el artículo 23 de la Constitución(..)" (*Gastos Reservados case*, STC 220/91, *cit*, fundamento jurídico 4). Article 23 CE states that "the Citizens have the right to participate in public affairs, directly or through their representatives freely elected in periodic elections by universal franchise".

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Convention<sup>895</sup>.

The Tribunal has also dealt with restrictions of the freedom of expression due to national security reasons in which a value-judgment has been the object of the restriction: the *Egin* case concerned a terrorist group communique which had been published by a newspaper<sup>896</sup>: *Egin*, a radical Basque newspaper, published a communique from the E.T.A., a Basque terrorist group. The communique supported its terrorist activities. The director of the newspaper was punished, and the punishment was upheld by the Supreme Court. The case was brought before the Tribunal, alleging a breach of freedom of expression. In the plea before the Tribunal, Article 10(2) ECHR was quoted by both the parties: the Public Prosecutor claimed that the punishment was covered by the *prevention of crime* aim; the applicant alleged that such a restriction was disproportionate in a democratic society. The Tribunal ruled that restrictions of this kind are unconstitutional as far as the right to freedom of information is concerned: the Supreme Court should have distinguished between support for terrorism and the mere reproduction of a communique, protected by the freedom of information. According to the Tribunal, both the right of journalists to inform and the rights of their readers to receive full and accurate information, imply, in principle, that any criminal will from those who only transmit information should be excluded<sup>897</sup>.

Other cases conflicting with national security might be construed as outside the scope of the right to freedom of speech. They may include expressions which are not covered by the scope of the legal provision protecting the right to freedom of expression<sup>898</sup>. Among these symbolic speech cases, flag burning cases may be

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<sup>895</sup> On the *Kosiek* and the *Glase nap* cases and the problem of the applicability of Article 10 ECHR, see *supra* Chapter V.

<sup>896</sup> *Egin* case, Sentencia del Tribunal Constitucional 159/86, of 12 December 1986 in *Boletín de Jurisprudencia Constitucional* 68 pages 1447 ff

<sup>897</sup> "El derecho de un profesional del periodismo a informar así como el de sus lectores a recibir información íntegra y veraz constituye en último término una garantía institucional de carácter objetivo cuya efectividad exige en principio excluir la voluntad delictiva de quien se limita a transmitir sin más la información (...)" [*Egin* case, STC 159/86, *cít.*, fundamento jurídico 8]

<sup>898</sup> On the scope of freedom of expression provisions in the Convention and in the Spanish Constitution, see *supra* Chapter V.

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construed by a court as a case in which national security conflicts with anything different from a classic speech protected by the right to freedom of expression. Otherwise, flag burning cases may be taken as a good example of restriction of a value-judgment speech on the grounds of national security. The problem of the scope of freedom of speech, and the extent to which it covers the so called symbolic speech, has not yet been fully solved by either the Court or the Tribunal. However, it is very likely that the issue would be approached by the Court from the Article 10 ECHR point of view. In such a case, it could be very well taken as a case in which the freedom of express value-judgments is restricted on national security grounds.

As for Spain, the Tribunal has only twice dealt with a flag burning case. In neither of them, however, was these declared a rule on the extent to which flag burning may be taken as an *expression* covered by Article 20 CE. In the first case<sup>899</sup>, a Spanish national flag had been burned by a group seeking independence for Catalonia in the city of San Feliú de Llobregat, and a Court had asked the Tribunal for a preliminary ruling on the compatibility with the Constitution of applicable statutory law: Article 123 of the Criminal Code, which punishes offenses to the national flag as a crime against the security of the state<sup>900</sup>; and Article 10(3) of the *Ley del Uso de la Bandera de España*<sup>901</sup>, which states that offenses to the national flag should always be punished under Article 123 of the Criminal Code with the most serious punishment foreseen under that Article for those cases in which the offense to the flag has been made publicly. The question issued by the *a quo* court, however, did not ask the Tribunal for ruling on whether the applicable punishment should be taken as a restriction to freedom of expression; it only posed the question of whether the *Ley del Uso de la Bandera de España* complied with the principle of *Reserva de Ley Orgánica* which must be observed

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899 *Ultrajes a la Bandera Nacional* case, Sentencia del Tribunal Constitucional 118/92 of 16 September 1992, in *Boletín de Jurisprudencia Constitucional* 138, pages 6-11.

900 Article 123 is included in Book II, Title I of the Criminal Code, which regulates crimes against the security of the State. It states as follows: "Los ultrajes a la Nación Española o al sentimiento de su unidad, al Estado o a su forma política, así como a sus símbolos y emblemas, se castigarán con la pena de prisión menor, y si tuvieran lugar con publicidad, con la de prisión mayor."

901 *Ley 39/81, del uso de la Bandera de España y de otras Banderas y enseñas*, in *Boletín Oficial del Estado* de 12 de Noviembre de 1981.

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whenever a punishment of privation of liberty is embodied in a legal provision. The Tribunal, relying on a strict interpretation of the principle of *Reserva de Ley Orgánica* held that Article 10(3) of the *Ley del Uso de la Bandera de España* was unconstitutional, without any further pronouncement on the freedom of expression issue<sup>902</sup>.

In the second flag burning case taken before the Tribunal, another provision of the *Ley del Uso de la Bandera de España* was declared unconstitutional due to reasons other than a violation of the right to freedom of expression: Article 10(2), which also provides the application of Article 123 of the Criminal Code to offenses to regional flags, was found by the Court to contradict with the principle of *nulla pena sine lege*, since Article 123 of the Criminal Code speaks only of the national flag and the *Ley del Uso de la Bandera de España*, as was decided in the first flag burning case, lacks formal rank regarding extending the scope of this crime to regional flags<sup>903</sup>.

**2. Desacato to Public Officials and to the Government.**

Spanish Law limits freedom of expression on the ground of national security or allied aims in those cases in which a person commits slander or defamation against public authorities or against the symbols or the organs of the State. Several provisions of the Spanish Penal Code provide for a special protection against abusive speech to public authorities or to the organs of the State: Article 146 of the Penal Code punishes slander to the King<sup>904</sup>; Article 161 punishes slander or defamation to the High bodies

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**902** The judgement relied on previous case-law interpreting the principle of legality and the principle of *reserva de ley Orgánica* as far criminal law as embodied in Article 23 CE and Article 17 CE. See the *Ultrajes a la Bandera Nacional* case, STC 118/92, *cít, passim*.

**903** The case concerned the burning of the flag of the Autonomous Community of Valencia. According to the Tribunal, the question at the heart of the case was not whether regional flags, as well as the national flag, represent the state, but rather whether application of Article 123 of the Criminal Code may be provided by a statutory law lacking the formal rank of *Ley Orgánica*. As stated in the first flag burning case, the Tribunal answered this question in the negative, since it was a violation of Article 17 CE. See *Ultrajes a la Bandera Valenciana* case, Sentencia del Tribunal Constitucional 119/1992 of 18 September 1992, in *Boletín de Jurisprudencia Constitucional* 138 pages 11-17.

**904** Article 161 of the Penal Code, under the heading of "Crimes against the interior security of the State", reads as follows: "Se impondrá la pena de prisión mayor: 1º Al que injuriare o amenazare al Jefe del Estado en su presencia (...)".

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of the Nation<sup>905</sup>; Article 240 embodies the crime of *desacato*, that is, slander to a public authority when the public authority is present<sup>906</sup>; and, finally, Article 244 embodies the crime of slander to a public authority when the public authority is not present<sup>907</sup>.

In the *Castells* case, the Court had the opportunity to directly rule on a *desacato* - like case in which Spanish law was concerned<sup>908</sup>. The case concerned an article wrote by a member of the Senate in which a serious accusation against the Government was made<sup>909</sup>. The Court held that provisions regulating a special protection for public authorities or for the state or its organs against abusive speech are not, *per se*, a violation of the Convention<sup>910</sup>. Nevertheless, the Court made it equally clear that such provisions are subject to the *Strasbourg test* in order to scrutinize their appropriateness

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**905** Article 161 of the Spanish Penal Code, under the same heading that Article 146, states as follows: "Incurrirán en la pena de prisión mayor: 1º Los que injuriaren, calumniaren o amenazaren gravemente al Regente o Regentes, al Gobierno, al Consejo General del Poder Judicial, al Tribunal Constitucional, al Tribunal Supremo o a los Gobiernos de las Comunidades Autónomas (.)".

**906** Article 240 of the Spanish Criminal Code reads as follows: "Cometen desacato los que, hallándose un Ministro o una Autoridad en el ejercicio de sus funciones o con ocasión de ellas, los calumniaren, injuriaren, insultaren o amenazaren de hecho o de palabra, en su presencia o en escrito que les dirija".

**907** Article 244 of the Spanish Criminal Code reads as follows: "Los que hallándose un Ministro o una Autoridad en el ejercicio de sus funciones o con ocasión de éstas, los calumniaren, injuriaren, insultaren o amenazaren de hecho o de palabra, fuera de su presencia o en escrito que no estuviere dirigido a ellos, serán castigados con la pena de arresto mayor y multa de 30.000 a 300.000 pesetas"

**908** *Castells v Spain*, judgment of the ECtHR of 23 April 1992 in *Publications of the European Court of Human Rights* series A, n. 236. The same case had been previously decided by the Tribunal Constitucional; it will be quoted as the *Spanish Castells case* Sentencia del Tribunal Constitucional 51/85 of 18 Mayo 1985 in *Jurisprudencia Constitucional XI* pages 514-38.

**909** Mr Castells published an article in a Basque newspaper, claiming that a number of murders which had been committed in the Basque Country had been in practice allowed by the Government. He added: "no creo en la existencia de las asociaciones fascistas (..) fuera y al margen del aparato del Estado (..) Detrás de estas asociaciones sólo puede estar el Gobierno, el Partido del Gobierno y sus efectivos (..)" (*Spanish Castells case*, STC 55/85 *cft*, antecedente 1).

**910** In the *Castells* case, the Court stated that "(..) it remains open to the competent state authority to adopt, in their capacity as guarantor of public order, measures, even of a criminal law nature, intended to react appropriately and without excess to defamatory accusations devoid of foundation or formulated in bad faith" (*Castells case*, ECtHR of 23 April 1992, *cft*, paragraph 46). This point was also stressed in the concurring opinion of judge CARRILLO SALCEDO.

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and proportionality in terms of the Convention<sup>911</sup>. Two points of the Spanish regulation on *desacato* and similar crimes may raise doubts as to their compatibility with the general approach given by the Court to the freedom of expression: namely, the extent to which the *exceptio veritatis* may be construed in a less permissible manner in *desacato* or similar cases and, in general, the extent to which freedom of expression may be subject to a *greater* restriction in cases in which public authorities are involved.

As to the first point, the manner in which the general doctrine on the *exceptio veritatis* has been applied in Spanish Law to *desacato-like cases* may conflict with the Convention. The Court has repeatedly ruled that the proof of the truth should be granted in those cases in which a statement may be approached as a mere description of facts<sup>912</sup>. The *exceptio veritatis*, however, is not allowed by Spanish law except in the case in which the slander or defamation consists in a *calumnia*, that is, when anybody states that other has committed a crime. Any other kind of slander or defamation is not covered by the *exceptio veritatis*, with the only exception being the expression in which public servants are mentioned<sup>913</sup>. The question may then be posed whether slander or defamation to the King, the Government or public authorities in general, are covered by the *exception veritatis*.

When the Spanish Supreme Court decided the *Castells* case, the defendant tried

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**911** The full quotation of the above cited ruling of *Castells* reads as follows: "The limits of permissible criticism are wider with regard to the Government than in relation to a private citizen, or even a politician. In a democratic system the actions and omissions of the Government must be subject to the close scrutiny not only of legislative and judicial authority, but also of the press and public opinion. Furthermore, the dominant position which the Government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries of the media. Nevertheless, it remains open to the competent state authority to adopt, in their capacity as guarantor of public order, measures, even of a criminal law nature, intended to react appropriately and without excess to defamatory accusations devoid of foundation or formulated in bad faith" (*Castells case*, ECtHR of 23 April 1992, *cft.* paragraph 46).

**912** On the distinction between messages whose content is a description and those whose content is a value-judgement, see *infra* Chapter IX.

**913** Article 461 of the Spanish Penal Code states as follows: "Al acusado de injuria no se admitirá prueba sobre la verdad de las imputaciones sino cuando éstas fueren dirigidas contra funcionarios públicos sobre hechos concernientes al ejercicio de su cargo (..)"

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to prove the truth of his statement, but the Supreme Court held that such an evidence could not be taken into account in the proceedings: according to Article 161 of the Penal Code, under which Mr Castells was prosecuted, the *exceptio veritatis* was not permissible<sup>914</sup>. When the case reached the Tribunal, it stated that the question of the application of the *exceptio veritatis* was not subject to constitutional review<sup>915</sup>. The case was eventually brought to the European Court, which found that the mere fact that the *exceptio veritatis* had not been allowed was, as such, a violation of the Convention. Accordingly, the Court held, Article 10 ECHR had been breached<sup>916</sup>.

From the Court's decision in *Castells*, it is therefore clear that the proof of the truth must be applied in *desacato*-like cases, at least to the same extent to which it is applied to cases in which private citizens are involved. Although there has not been any Tribunal's decision posterior to the Court's in *Castells*, it is foreseeable that any other interpretation of Article 161 of the Penal Code will be held unconstitutional by the Tribunal. This principle, however, would apply to cases in which the *desacato* or any other similar crime has been committed by a statement which may be construed as a description of facts: the problem of which are the boundaries of permissible speech against public authorities remains still open for the case of opinions or value-judgments<sup>917</sup>.

As has been seen, the Court approached *Castells* as a description of facts case. When the case was decided by the Tribunal, however, it was approached as a case of

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914 The Supreme Court held that slander to the Government could not be included under the exception by which slander to public servants may be subject to the *exceptio veritatis*. See (*Spanish Castells case*, STC 51/83, *cit*, antecedente 10).

915 *Castells case*, STC 51/85 *cit*, fundamento jurídico 1.

916 "The article (...) must be considered as a whole (...) In fact many of these assertions were susceptible to an attempt to establish their truth, just as Mr Castells could reasonably have tried to demonstrate his good faith (...) The Court attaches decisive importance to the fact that [the Spanish Supreme Court] declared such evidence inadmissible for the offence in question. It considers that such an interference in the exercise of the applicant's freedom of expression was not necessary in a democratic society." (*Castells case*, ECtHR of 23 April 1992, *cit*, paragraph 48).

917 See *infra* Chapter IX.

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freedom to emit opinions<sup>918</sup>. Further, the Spanish Supreme Court stated in its previous ruling, which was not reversed by the Tribunal, that the freedom to emit opinions was more easy to restrict in *desacato*-like cases than in cases not concerning authorities or institutions of the state<sup>919</sup>. Following this approach, *desacato*-like cases in which the expression consists in a value-judgement will be more likely to be restricted than any other opinion. This is the second aspect of Spanish law on defamation to public authorities which may raise doubts as for its compatibility with the Convention.

It should be noted that it is apparent from the Spanish Criminal Law provisions mentioned above that the punishment foreseen for *desacato* -like cases are more serious than the punishment embodied in the Penal Code for cases of slander or defamation of ordinary citizens. In addition, *desacato* is always judged under criminal law proceedings, while defamation to ordinary citizens is usually brought to courts as a civil liability case. This may be incompatible when the general assumption which comes from the Court's case-law and which imply a wider margin for criticism or even strong words in those cases in which public matters or public figures are implied. The Court has ruled that a broader scope must be granted for freedom of expression in those cases in which

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**918** According to the Supreme Court, "Una y otra línea del derecho - las noticias y las opiniones - encuentran un límite indiscutible en la seguridad exterior e interior del Estado, que puede ponerse en riesgo cuando se produce una destrucción del prestigio de las instituciones democráticas, en las que las fuerzas políticas del país se deben reconocer y que expresan no sólo el interés singular de algunos miembros de la comunidad nacional, sino en el interés de la colectividad entera, en la medida en que estas instituciones son expresión de la solidaridad de la Nación y ofender a su prestigio significa incumplir el deber de solidaridad política. Desde estas perspectiva, parece claro que tales violaciones de deberes pueden ser sancionados con normas penales, dentro de los precisos límites que al efecto se introduzcan en tales normas o en las que por vía de una interpretación estimatoria se realizan las normas vigentes" (*Spanish Castells case*, STC 51/85 *c/f*, antecedente 10).

**919** "tales organismos o Poderes, en cuanto tales, escapan a la exceptio veritatis del art 461, referida a funcionarios públicos, revestidos o no de autoridad y a corporaciones (art 467.3) que aún cuando incluyan las de derecho público, no alcanzan a comprender, como es sabido, a las instituciones (poderes) integrantes del Estado, cuya cobertura penal queda así alzada primada (..) (..) sin perjuicio de que los miembros de tales poderes estatales puedan ser inculcados (con la consiguiente posibilidad de exceptio en la materia que nos ocupa) una vez superada la protección procesal que, preciam como integrantes de tales poderes, les es acordada (..) garantías todas ellas que tratan de conjugar el dcho de los ciudadanos a perseguir los delitos cualquiera que se a el que los cometa, con el normal funcionamiento de dichos poderes públicos." por ello no admite pruebas para ver veracidad (*Castells case*, STC 51/85 *c/f*, antecedente 2).

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politicians are mentioned<sup>920</sup>, what seems to be hardly compatible with a provision in which a more serious punishment is foreseen. In *Castells*, further, the principle of greater margin for criticism has been held by the Court applicable also to criticism to the government or the state as such<sup>921</sup>.

The Tribunal has tried to solve this contradiction by means of a narrow construction of the figures of *desacato*, slander to authorities, or similar crimes. Certainly, the Tribunal has never ruled that, due to their contradiction with the freedom of expression, these provisions of the Penal Code must be held unconstitutional. It has, however, introduced the *preferred position* principle in order to grant a higher standard of protection to freedom of expression in cases in which *desacato* was implied<sup>922</sup>; furthermore, according to the Tribunal, the freedom of expression deserves the highest constitutional protection in those cases in which the expression is directly linked to the freedom of thought and ideology, expressly protected by the Constitution as a separate fundamental right<sup>923</sup>. This does not imply that freedom of ideology must be construed as an absolute right, but it provides the right to freedom of expression with a high standard of protection<sup>924</sup>. This principle has been applied to a case of slander to the King, expressly foreseen in the Criminal Code as a serious crime, as has been just seen above.

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920 In the *Lingens case*, ECtHR of 8 July 1986 *cit.*

921 *Castells case*, ECtHR of 23 April 1992 as quoted above.

922 For instance, in the *Carta al Director case*, STC 120/93, *cit.*, fundamento jurídico 6.

923 "(...) queremos destacar la máxima amplitud con que la libertad ideológica está reconocida en el art 16.1 C, por ser fundamento, juntamente con la dignidad de la persona y los derechos inviolables que le son inherentes, según se proclama en el artículo 10(1) de otras libertades y derechos fundamentales y, entre ellos, los consagrados en el artículo 20, apartados a) y b) [*Slander to the King case*, Sentencia del Tribunal Constitucional 20/90 of 15 February 1990 in *Boletín de Jurisprudencia Constitucional* 107 pages 48-55, fundamento jurídico 4].

924 "la visión globalizada de ambos derechos (...) no puede servir de interés solamente para graduar el alcance de la faceta injuriosa (...) sino (...) también (...) y principalmente para determinar si la faceta injuriosa, por no ser ésta la finalidad del artículo (...) puede o debe desaparecer ante la protección de la libertad ideológica del autor (...) Hay pues que partir de este derecho fundamental y no entenderlo simplemente absorbido por las libertades de expresión e información del artículo 20 CE" (*Slander to the King case*, STC 20/90, *cit.*, fundamento jurídico 3).

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This Tribunal's approach is consistent with the Court's ruling in *Lingens* that politicians may be subject to a wider criticism than private citizens. Further, the Tribunal has repeatedly ruled that, in *desacato*-like cases, the right to honour of public authorities is, jointly with the security of the State, a valid ground for a restriction on freedom of expression<sup>925</sup>.

The Tribunal, however, has been reluctant to apply the principle of a great margin for criticism to *all* *desacato* cases. The recently decided *Cuevas* case may be a good example of this<sup>926</sup>: a politician had accused the government of serious crimes and was therefore prosecuted<sup>927</sup>. When the case was brought before the Tribunal, it took into account that the statements of Mr Cuevas had been subject by the *a quo* court to the *exceptio veritatis*, following the approach ruled by the European Court in *Castells*<sup>928</sup>. The tribunal, however, approached the Court as a freedom of expression case, since, in its view, the right to emit opinions, rather than mere description of facts, was concerned<sup>929</sup>. Thanks to this, the Tribunal was prepared to rule that the boundaries of

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925 In fact, the Court in *Castells*, accepted both legitimate aims for restricting freedom of expression, the prevention of disorder and the protection of reputation or others (*Castells case*, ECtHR of 23 April 1992, *cit.*, paragraphs 38-39). The Tribunal has admitted that the reputation of public authorities is also the aim at which the figure of *desacato* is aimed in the following cases: (*García case*, STC 105/90, *cit.*, fundamento jurídico 2; *Prisión de Granada case*, STC 143/91, *cit.*, fundamento jurídico 4; *Carte al Director case*, STC 336/93, *cit.*, fundamento jurídico 5).

926 *Cuevas case*, Sentencia del Tribunal Constitucional 190/92, of 16 November 1992 in *Boletín de Jurisprudencia Constitucional* 140 pages 151-57.

927 Mr Cuevas accused the President of the Government of torturing detained people in the Basque Country.

928 The tribunal stated that "este reproche [the Court's ruling in *Castells* about the *exceptio veritatis*] no puede dirigirse a las sentencias impugnadas en el presente recurso, ya que (...) el órgano judicial de instancia consistió la práctica de la abundante prueba solicitada por la defensa (...) lo único que pudo deducirse es que es cierto que han existido casos de tortura y no, en cambio, que los altos dignatarios expresamente mencionados por el recurrente hubiesen dado órdenes concretas o generales de torturar o de asesinar, o hayan consentido tales comportamientos" (*Cuevas case*, STC 190/92. *cit.*, fundamento jurídico 5)

929 "Con independencia de que el deslinde de las libertades de expresión y de información no sea nunca total o absoluto, así como que en particular la expresión de la propia opinión se apoye en mayor o menor medida en afirmaciones fácticas, es lo cierto que, en el supuesto que nos ocupa, el recurrente no perseguía promordialmente comunicar libremente información al resto de sus conciudadanos cuando exponer el punto de vista de la coalición Herri Batasuna en

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permissible value-judgments criticizing the members of the Government had been overstepped.

Leaving apart the decision taken in this case, two points deserve to be remarked: first, the Tribunal did not apply to the case freedom of ideology or any other principle in order to grant a preferred position to the speech<sup>930</sup>. And, secondly, it quoted the Court's ruling in Castells as a a fortiori ground for upholding the restriction imposed by the Supreme Court<sup>931</sup> since the Court stated in Castells that a restriction to desacato-like cases was permissible, the Tribunal applied this ruling to a case without applying other domestic principles (the preferred position or the freedom of ideology in criticism to the government cases) which might have granted a higher standard of protection.

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relación con determinados altos dignatarios, con el propósito de justificar así su falta de presencia en algunas instituciones estatales. Por consiguiente, es el conflicto entre el derecho al honor de dichas autoridades y el derecho a la libertad de expresión del recurrente el que los órganos judiciales hubieron de ponderar" (*Cuevas case*, STC 190/92. *cit*, fundamento jurídico 5)

**930** "No debe olvidarse que, en caso de invocación de libertad de expresión, la concesión de amparo depende de que, en la manifestación de ideas u opiniones, se hayan añadido o no expresiones injuriosas desprovistas de interés público e innecesarias a la esencialidad del pensamiento formalmente injuriosas(..)" (*Cuevas case*, STC 190/92. *cit*, fundamento jurídico 5)

**931** The Tribunal held that its ruling was "avalada por el Tribunal Europeo de Derechos Humanos en la sentencia Castells, en la que, tras afirmarse que la libertad de discusión política no tiene un carácter absoluto y que los límites de la crítica admisible son más amplios cuando se dirige contra el gobierno que cuando recae un particular, incluso si se trata de un pto (..) , explícitamente se reconoce que ello no impide que las autoridades estatales competentes puedan adoptar medidas, incluso penales, dirigidas a reaccionar de modo adecuado y no excesivo frente a imputaciones difamatorias desprovistas de fundamento o formuladas de mala fe" (*Cuevas case*, STC 190/92. *cit*, fundamento jurídico 5):



## CHAPTER IX

### RESTRICTIONS OF FREEDOM OF EXPRESSION ON THE GROUND OF THE REPUTATION AND RIGHTS OF OTHERS

**(1) THE SPEAKER AND *THE OTHER*: PUBLIC AND PRIVATE ELEMENTS. 1. Introduction; 2. Qualified Speakers; 3. Speakers subject to further limitations; 4. Defamation of Public Figures; (2) THE *CONTENT* OF THE EXPRESSION: VALUE-JUDGMENTS AND DESCRIPTION OF FACTS. 1. Facts and Value-Judgments; 2. Restrictions on factual speech; 3. Restrictions to value-judgments and Opinions.**

#### **(1) THE SPEAKER AND *THE OTHER*: PUBLIC AND PRIVATE ELEMENTS.**

##### **1. Introduction.**

Unlike the *Tribunal Constitucional*, the Court has not expressly given a *preferred position* to freedom of expression in those cases in which the freedom of expression is closely related to matters of public concern. In the Court's view, it is not necessary to make this distinction, since the special status of the freedom of expression has been held as a general principle, even in those cases in which public matters are not concerned. Public interest, however, is always taken into account by the Court when balancing the circumstances of a freedom of expression case. Usually, it is measured through the analysis of three elements of every freedom of speech case: namely, the object of the message, the active subject of the message (the speaker) and the passive subject of the message (the person or persons who are mentioned in the speech). By taking these elements into account when balancing the circumstances of a case, due attention is paid to the extent to which that interest may be concerned in a case. The result is, as a matter of fact, very similar to that reached by the *Tribunal Constitucional's* application of the *preferred position* principle.

As to the *object* of the message, the case-law of the Court seemed in the past to grant a higher protection of freedom of expression whenever *political matters* were concerned: for instance, the political context of an electoral campaign was taken into account by the Court in the *Lingens* case in order to grant a higher protection of freedom

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of expression<sup>932</sup>. Later, however, in the *Thorgeirson* case the Court dismissed a government allegation claiming that restrictions to speech related to non political matters should not be strictly scrutinised: the Court clarified that any matter of public concern should, in principle, be afforded the same protection, regardless the fact that a political speech is concerned or not<sup>933</sup>. According to the present status of the case-law of the Court, therefore, open discussion of any matter of public concern, and not only of political questions, should not be discouraged by excessive restriction of freedom of expression<sup>934</sup>. It should be noted, however, that to date the Court has not been faced with any case in which freedom of speech had been exercised in a purely private relations scheme. In other words, whenever the Court has ruled on a freedom of speech case, matters of public interest have, in one way or another, been found to be concerned.

Beyond any doubt, the *object* of a message is the most relevant element of a case in order to check the legitimacy of a restriction: the more the object of the expression concerns public interest matters, the scrutiny of the restriction. Stricter the both the Court and the *Tribunal Constitucional* have applied this rule when deciding freedom of expression cases, regardless of the legitimate state interest the restriction was aimed at. When the grounds for a freedom of speech restriction is aimed at the protection of the rights or reputation of others, however, the two remaining elements by which the presence of public interest may be measured (that is, the active and the passive subject of the message) are usually taken into account by both courts: who the speaker is and who is mentioned in the speech are then also relevant elements in

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932 "(..) since the case concerned Mr Kreisky as a politician, regard must be had to the background against which these articles were written (..) The impugned expressions are (..) to be seen against the background of a post-election controversy" (*Lingens case*, ECtHR of 8 July 1986, *cit.*, paragraph 43)

933. In the *Thorgeirson* case, when the respondent government tried to afford to a speech on police brutality less protection than granted to politically related matters, the Court replied that "there is no warrant in its case-law [the case-law of the Court] for distinguishing, in the manner suggested by the Government, between political discussion and discussion of other matters of public concern" (*Thorgeirson case*, ECtHR of 25 June 1992, *cit.*, paragraph 64)

934 What was taken into account in the *Thorgeirson* case : "(..) the Court considers that the conviction and sentence were capable of discouraging open discussion of matters of public concern" (*Thorgeirson case*, ECtHR of 25 June 1992, *cit.*, paragraph 68)

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deciding whether public interest lies in a freedom of speech case or not.

### 2. Qualified Speakers.

The Court has stressed the special role which the Press plays in democratic countries as a watchdog of public issues. This conception has allowed the Court to speak of the "freedom of the press" as a special category under freedom of expression<sup>935</sup>. Furthermore, as we have seen *supra*, the press is entitled not only to impart information, but to disseminate ideas which, on the other hand, the public has the correspondent passive right to receive<sup>936</sup>. The *Tribunal Constitucional*, learning from the Court's case-law has also stated that journalists may in principle enjoy the right to freedom of speech with a preferred position<sup>937</sup>.

Journalists, as qualified speakers, may nonetheless be subject to the observation of those *duties* and *responsibilities* which are mentioned in Article 10(2) ECHR. The Court has not yet given a full ruling on the meaning that these provisions may have for journalists. The *Tribunal Constitucional*, on the other hand, has ruled on one specific *responsibility* which journalists, even those which have not directly authored an abusive speech, must observe when exercising the right to freedom of expression: liability for freedom of expression abuse may reach the director of a newspaper. This is provided by a statute of the sixties which has been recently and repeatedly declared compatible with the Constitution by the *Tribunal Constitucional*<sup>938</sup>. The *Tribunal Constitucional* has

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935 "Freedom of the Press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders (...) *Oberschlick v Austria*, Judgment of the ECHR of 23 May 1991 in *Publications of the European Court of Human Rights* series A, n. 204, paragraph 57-8). As will be seen *infra*, this point was crucial for deciding this case.

936 "Regard must therefore be had to the preeminent role of the press in a State governed by the rule of law (...) Whilst the Press must not overstep the bounds set by, inter alia, the protection of the reputation of others, it is nevertheless incumbent to impart information and ideas on matter of public interest. Not only does it have the task of imparting information and ideas: the public has the right to receive them. Were it otherwise, the press would be unable to play its vital role of *public watchdog*" (*Thorgeirson case*, ECtHR of 25 June 1992, *cf.*, paragraph 63)

937 See *supra* Chapter VI.

938 The Tribunal relied on the argument that the director of the newspaper has the right to veto on articles before they are published; this privilege of the Director has been found, further, compatible with the provision of the Constitution which ban prior censorship. The Tribunal has hold on this question that " (...) la responsabilidad civil solidaria, entre otros, del director del medio

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construed the indirect responsibility of the director and the editor of the media in an independent manner, without relying on the "duties and responsibilities" embodied in Article 10(2) ECHR. Nevertheless, the Supreme Court has grounded on the Convention, *a fortiori*, the compatibility with the Constitution of Spanish legal provisions concerning liability of media directors<sup>939</sup>.

Journalists are not the only case of *privileged speakers*. Other speakers may also deserve a special protection in their use of freedom of expression. Elective representatives, for instance, have been pointed out by the Court as speakers whose freedom of expression may be restricted only if the restriction passes a very strict scrutiny<sup>940</sup>. Elective representatives, in addition, may use their freedom of expression by making statements to the press: in this case, two privileged speakers must be taken

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periodístico, y de la propia editora, se justifica en la culpa *in eligendo* o *in vigilando* del editor o el director, dado que ninguno de ellos es ajeno al contenido de la información y opinión que el periódico difunde. El Director tiene el derecho de veto sobre el contenido de todos los originales del periódico, sin que ese derecho sea identificable con el concepto de censura previa - prohibida por el artículo 20(2) de la Constitución - y ello hace evidente (...) que exigirle responsabilidad civil por las lesiones que puedan derivarse de las informaciones publicadas en el periódico que dirige en nada vulnera el derecho de libre información, puesto que ese derecho también se ejercita desde la dirección del medio periodístico, y, por tanto, puede imponérsele la reparación de los daños que su uso incorrecto o abusivo ocasione a terceros, y lo mismo cabe afirmar de la empresa editora, ya que a ella corresponde la libre designación del director (...) " (*Patiño case*, STC 171/90, *cít*, fundamento jurídico 3). See also (*Cura de Hío case*, STC 240/92, *cít*, fundamento jurídico 2) .

939 " (...) la libertad de expresión, institucionalizada como uno de los derechos fundamentales por la Constitución, como trasunto fiel del Convenio de Roma, (...) tiene, asimismo, unas limitaciones institucionalmente señaladas por esas mismas normas fundamentales, y de ahí que la doctrina de esta Sala haya venido estableciendo que la libertad de expresión jamás podrá justificar la atribución gratuita a persona identificada de hechos que, inexcusablemente, la hacen desmerecer en el público aprecio y reprochables de toda evidencia, en cualesquiera los usos sociales del momento (...) y de ahí que aquel precepto originario de la Ley de Prensa e Imprenta mantenga su vigencia en cuanto a la responsabilidad solidaria de autores, editores y directores por las difamaciones que se vierten en las publicaciones en que se verifiquen o dirijan" (*Cura de Hío case*, Sentencia del Tribunal Supremo of 11 December 1989 in *Repertorio de Jurisprudencia de Actualidad Civil*, ref. 318 (1989), considerando 5)

940 "While freedom of expression is important for everybody, it is especially so for an elected representative of the people. He represents his electorate, draws attention to their preoccupations and defends their interests. Accordingly, interferences with the freedom of expression of an opposition member of parliament, like the applicant, call for the closest scrutiny on the part of the Court" (*Castells case*, ECtHR of 23 April 1992, *cít*, paragraph 42)

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into account when deciding the case<sup>941</sup>. The *Tribunal Constitucional* has also admitted, in very general terms, that some people occupy a privileged position in the public debate, so that anything they say automatically gains the public interest<sup>942</sup>. This general statement may be applied to politicians. The consideration of politicians as qualified agents of freedom of speech, however, must be understood in the light of the case-law of the *Tribunal Constitucional* concerning two important aspects: firstly, the applicability of parliamentary privileges when Members of Parliament are exercising freedom of expression. And, secondly, the extent to which politicians' speeches may be protected against *desacato*.

As for parliamentary privileges, the *Tribunal Constitucional* has, in a line of decisions which are still in force, interpreted the privileges of Members of Parliament as those of inviolability and immunity in a very narrow way. Accordingly, whenever Members of Parliament exercise freedom of speech immunity and inviolability are very rarely applied. Moreover, the *Tribunal Constitucional* has expressly ruled that these privileges are not constitutionally established in order to protect freedom of speech of Members of Parliament<sup>943</sup>.

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**941** Freedom of the Press, the Court stated, "gives politicians the opportunity to reflect and comment on the preoccupations of the public opinion; it thus enables everyone to participate in the free political debate which is a the very core of the concept of a democratic society (..)" (*Castells case*, ECtHR of 23 April 1992, *cit.*, paragraph 43).

**942** "No cabe descartar (..) que la notoriedad y relevancia públicas de la persona que hace la declaración convierta en hecho noticiable la declaración misma (..)". In these cases, "no puede exigirse al medio de comunicación que se abstenga de informar sobre lo dicho por quien convierte en noticia cuanto afirme o declare". For this, it is however necessary that "el objeto de la información sea precisamente el hecho de la declaración" (*Cambio 16 case*, Sentencia del Tribunal Constitucional 232/93 of 12 July 1993 in *Boletín de Jurisprudencia Constitucional* 148-49 pages 182-89, fundamento jurídico 4)

**943** " (..) sí bien es evidente que las manifestaciones del Senador se produjeron en un contexto político y en uso -correcto o no- de su libertad de expresión, resulta claro que el instituto de la inmunidad no tiene como finalidad garantizar la libertad de expresión, ni aún cuando ésta viene ejercida por un representante del pueblo español (..)" (*Suplicatorio del Senador González Bedoya case*, Sentencia del Tribunal Constitucional 206/92 of 27 November 1992 in *Boletín de Jurisprudencia Constitucional* 140 pages 198-208. (*González Bedoya case*, STC 206/92, *cit.*, fundamento jurídico 5). A dissenting opinion on this point replied the Tribunal statement as follows: "(..) es cierto que dicha libertad [freedom of expression] se garantiza fundamentalmente a través de la inviolabilidad del artículo 71(1) CE, pero tampoco cabe olvidar que la protección procesal de dicha inviolabilidad se efectúa precisamente a través del suplicatorio, presupuesto procesal que tiene, en mi opinión, como especial misión proteger la independencia del diputado o senador en

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As for inviolability, the *Tribunal Constitucional* has consistently ruled that only speeches made in an official session of a Chamber are covered. Under any other circumstances, MP's immunity applies. Immunity, however, only implies that the Supreme Court must ask a Chamber for permission prior to prosecuting a member<sup>944</sup>. Furthermore, immunity has been very restrictively construed by the *Tribunal Constitucional*: firstly, it ruled in a 1990 decision that immunity in freedom of speech cases applies when an MP is charged of a criminal offense only. The decision expressly declared unconstitutional a statutory amendment by which a chamber permission was also needed to initiate a civil law action against a Member of Parliament for abusive speech. Therefore, after this decision, immunity does not apply to actions taken under the law governing civil liability for abusive speech<sup>945</sup>. Secondly, the *Tribunal Constitucional* recently ruled that, even in such cases in which immunity applies, the Parliament has in fact very little scope to deny the Supreme Court prosecution permission. As dissenting opinions to the decision stated, the *Tribunal Constitucional* has effectively become very similar to the body which decides whether an MP will be prosecuted or not. This privilege, however, is constitutionally granted to the Parliament and not to the *Tribunal Constitucional*, which only eventually may reverse Parliament's decision.

In the light of the *Tribunal Constitucional* case-law, the exercise of freedom of expression by Members of Parliament will be taken before ordinary Courts, in a case of civil liability, without a prior permission of the Chamber; and before the Supreme Court,

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el ejercicio de sus funciones frente a posibles injerencias de los demás poderes del Estado" (*González Bedoya case*, STC 206/92, *cft*, fundamento jurídico dissenting opinion)

944 The privilege of inviolability of the Members of Parliament, according to the Tribunal, "(...) no ampara cualesquiera actuaciones de los parlamentarios y sí sólo sus declaraciones de juicio o de voluntad - opiniones, según el artículo 71(1) de la Constitución (...)" (*Castells case*, STC 51/85, *cft*, fundamento jurídico 5), "decaendo tal protección cuando los actos hayan sido realizados por su autor en calidad de ciudadano (de político incluso), fuera del ejercicio de competencias y funciones que le pudieran corresponder como parlamentario (...) las funciones relevantes para el artículo 71(1) de la Constitución no son indiferenciadamente todas las realizadas por quien sea parlamentario, sino aquellas imputables a quien siéndolo actúa jurídicamente como tal" (*Castells case*, STC 51/85, *cft*, fundamento jurídico 6).

945 *Aplicación del privilegio de la inmunidad parlamentaria al ámbito civil case*, Sentencia del Tribunal Constitucional 9/90 of 18 January 1990 in *Boletín de Jurisprudencia Constitucional* 106 pages 3-9.

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in a case of criminal prosecution, even in those cases in which the Chamber has denied permission which may be in practice very easily reversed by the *Tribunal Constitucional*. Therefore, Members of Parliament may be prosecuted for abusive speech in much the same way as ordinary citizens.

This principle, consistent with the constitutional declaration of equal treatment under the law, should imply however that proceedings in which Members of Parliament, and, in general, politicians, are involved, should take into account that they are acting as qualified speakers in the way described above. Spanish courts, however, are reluctant to apply this approach when a qualified speaker is charged with the crime of *desacato*. The *Tribunal Constitucional* has taken into account the general background of the crime of *desacato vis a vis* the Convention<sup>946</sup>, and has confirmed the tendency of ordinary courts to a certain extent: the unconstitutionality of *desacato* was thus not ruled by the *Tribunal Constitucional* in the *Castells case*<sup>947</sup>, and, after the Court's ruling on the same case, by reversing the *Tribunal Constitucional's* decision, the *Tribunal Constitucional* has again found an occasion to uphold *desacato* in the recent *Cuevas case*<sup>948</sup>.

**3. Speakers subject to further limitations.**

Qualified speakers may under some circumstances deserve a greater protection in their exercise of the freedom of expression. There are also cases, on the other hand, in which freedom of speech may, precisely due to the status of the speaker, be subject to further limitations. In these cases, speakers are, for instance, workers or public servants which must respect the principle of good faith when they exercise their right to freedom of speech in the enterprise where they are working or when speaking about the functioning of the Public Administration.

The Court has not yet ruled on a freedom of expression case in which the applicant was a worker dismissed for abusive speech. As for the *Tribunal Constitucional*,

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946 See *supra* Chapter VIII.

947 See *supra* Chapter VIII.

948 See *supra*, Chapter VIII.

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employees in a private school were dismissed in the *Liceo Sorolla* case<sup>949</sup>, in which the *Tribunal Constitucional* ruled that a communique sent out by a strike committee had broken the principle of *bona fide* between employees and the employer<sup>950</sup>. The same approach, pointing out the duties and responsibilities workers must observe when exercising freedom of expression, was also followed in the *Conjo* case<sup>951</sup>: in this case, the *Tribunal Constitucional* expressly stated that, although workers are also entitled to freedom of expression as a fundamental right, the general principle of *bona fide*, as enshrined in the Spanish Civil Code<sup>952</sup>, must be observed in cases of freedom of expression in the work place. Likewise, in the *Crespo* case<sup>953</sup> the *Tribunal Constitucional* again ruled that a labour relation reduces the scope of the right to freedom of speech<sup>954</sup>.

The principle that some speakers may have their right to freedom of speech reduced due to their respective situations, has been peacefully held by the *Tribunal Constitucional* as far as industrial relations are concerned. In later cases, moreover, the same principle has been applied to other speakers, such as people who have entered an association<sup>955</sup> of professionals, for instance lawyers, whose freedom of expression

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949 *Liceo Sorolla* case, Sentencia del Tribunal Constitucional 120/83 of 15 December 1983 in *Boletín de Jurisprudencia Constitucional* 33 pages 32-39.

950 See the *Liceo Sorolla* case, STC 120/83 *cft*, fundamentos jurídicos 2-3).

951 *Hospital Psiquiátrico de Conjo* case, Sentencia del Tribunal Constitucional 88/85 of 19 July 1985 in *Boletín de Jurisprudencia Constitucional* 52-53 pages 1003-09

952 "La celebración de un contrato de trabajo no implica en modo alguno la privación para (..) el trabajador, de los derechos que la Constitución le reconoce como ciudadano, entre otros el derecho a expresar y difundir libremente los pensamientos ideas y opiniones (..) [but when the expression consists in] aspectos generales o singulares del funcionamiento y actuación de la empresa en la que presta sus servicios (..) ha de enmarcarse (..) en unas determinadas pautas de comportamiento(..)" (*Conjo Hospital* case, STC 88/85 *cft*, fundamento jurídico 1)

953 *Crespo* case, STC 6/88 *cft*, antecedentes 1-2

954 According to the tribunal, a labor relation between the speaker and the subject of the message "genera un complejo de derechos y obligaciones recíprocas que condicionan el ejercicio de la libertad considerada, de modo que - como en otra ocasión dijimos de la libertad de expresión - manifestaciones de tal libertad que en otro contexto pudieran ser legítimas no tienen por qué serlo, necesariamente, dentro del ámbito de esa relación contractual (..)" (*Crespo* case, STC 6/88, *cft*, fundamento jurídico 6)

955 In the *Círculo Mercantil* case, Sentencia del Tribunal Constitucional 218/88 of 22 November 1988 in *Boletín de Jurisprudencia Constitucional* 92 pages 1521-1527).

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may be restricted by bar regulations<sup>956</sup>. In these cases the result is the same as in the case of workers - a higher limitation to freedom of expression than that imposed on people not subject to special limitations - although the grounds are slightly different: the volunteer character of entering an association<sup>957</sup> or to engage in a professional activity<sup>958</sup>.

To which extent may this principle also be applied to public servants? It must be noted that the circumstances are not exactly the same than in the above mentioned cases: on the one hand, public servants should also respect the principle of *bona fide* ; on the other hand, their work place is the public administration, so it is clear that public interest, and therefore, the *preferred position*, as the *Tribunal Constitucional* calls it, should also apply<sup>959</sup>. Arguing the fact that the right to access the public service is not protected by the Convention, the Court has avoided taking a decision based on Article 10 ECHR in freedom of speech cases in which public servants have been directly involved<sup>960</sup>. The *Tribunal Constitucional*, however, has ruled that public servants are entitled to the right to freedom of speech in a more limited manner than ordinary citizens<sup>961</sup>. According to the *Tribunal Constitucional*, this general principle is to be applied taking into account the specific functions the public servant fulfills and whether

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956 In the *Abogado case*, STC 286/93, *cft.*

957 In these cases, the *Tribunal* has spoken of a "haz de derechos y obligaciones recíprocas y una expresa sumisión por parte de quien libremente decide ejercer la profesión al régimen disciplinario que la regula" (*Abogado case*, STC 286/93, *cft.*, fundamento jurídico 4)

958 As has been said, there is no reported case-law of the Court on special limitations to workers, although limitations may be included under the general clauses of Article 10(2) ECHR. The Court, however, dealt with this question in the *Barthold case*, see *supra* Chapter V.

959 See the *Villen case*, STC 81/83, *cft.*

960 On the cases of *Glase nap* and *Kosiek*, see *supra* Chapter V.

961 "la ponderación del ejercicio que un funcionario publico ha hecho de determinados derechos que la Constitución le reconoce (..) el funcionario se encuentra, además, con otros límites derivados de su condición de tal (..) No todos los funcionarios cumplen los mismos servicios ni todos los cuerpos poseen un mismo grado de jerarquización ni disciplina interna (..) otros factores (..) que el funcionario actué en sus cualidad de tal o en su condición de simple ciudadano, si pone en entredicho (..) superiores (..) o compromete (..) la función del servicio" (*Villen case*, STC 81/83, *cft.*, fundamento jurídico 2)

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opinions or information lead to criticism of the functioning of the public service<sup>962</sup>.

More recently, however, the *Tribunal Constitucional* has stated that two different interests must be taken into account when a public servant exercises his freedom of speech<sup>963</sup>: on the one hand, the public interest which may exist in information about the public administration; and, on the other hand, the "administrative interest" in the functioning of a public service. Both may conflict when irregular functioning of a public service is publicly denounced. But the public interest in a free discussion on matters related to the public administration should prevail<sup>964</sup>.

**4. Defamation of Public Figures.**

As we have seen, elective representatives or other public officials (generally speaking, politicians), are taken as specially protected figures when they are the *active* subject of the message. In this way, open public debate is encouraged. The same reason advises that public officials should have a lower protection when they are the *passive* subject of freedom of expression. At present, it is actually clear from the case-law of the Court that politicians, acting in their official capacity, are subject to a wider margin of criticism. This Court's assumption, first stated in the *Lingens* case<sup>965</sup> may be taken as a general principle which has been repeatedly confirmed in the Court's case-

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962 "La crítica a sus superiores (..) aún (..) sindical (..) deberá hacerse con la medida necesaria para no incurrir en vulneración a ese respeto debido y para no poner en peligro el buen funcionamiento del servicio y de la institución policial (..)" (*Villen case*, STC 81/83, *cít*, fundamento jurídico 3)

963 In the *Prision de Granada case*, STC 143/91, *cít*.

964 The Tribunal took into account that "la relación funcional está presidida por la satisfacción de los intereses sociales o interés público que no se identifica necesariamente con el interés administrativo" to rule that "no despliega sus efectos con idéntica virtualidad cuando de la función pública se trata (*Prision de Granada case*, STC 143/91, *cít*, fundamento jurídico 5)

965 "The limits of acceptable criticism are (..) wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance (..) in such cases the requirements of such protection [protection of personal reputation as embodied in Article 10(2) ECHR] have to be weighed in relation to the interests of open discussion of political issues" (*Lingens case*, ECtHR of 8 July 1986, *cít*, paragraph 42)

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law<sup>966</sup>. Defamation of public officials, however, is taken by Spanish Law under the crime of *desacato* and other similar provisions of the Criminal Code. *Desacato*, as we have seen, punishes abusive speech against public officials in the interest of the preservation of national security, rather than on the grounds of *the rights of others* as embodied in Article 10(2) ECHR<sup>967</sup>.

Under Spanish Law, therefore, Public figures other than public officials<sup>968</sup>, are the usual *other* whose rights must be balanced against abusive speech<sup>969</sup>. Public figures, on the other hand, have never applied to the Court in a freedom of expression case. Moreover, the Court to date has not decided a case in which a restriction of Article 10 ECHR has been grounded on the protection of *the reputation or rights of others*, the *other* being a public figure and not a politician or a public official. This makes it very hard to find an argument based on the Convention in the *Tribunal Constitucional* case-law in which this point has been addressed, leaving aside general mentions of the Convention or of general aspects (i.e., legitimacy of restrictions, etc) of Article 10 ECHR.

The *Tribunal Constitucional* case-law seems to be consistent with those general principles of interpretation of Article 10 ECHR: when the *other* is a public figure, for instance, the *Tribunal Constitucional* has often been prepared to take it into account in order to ascertain whether public interest lies at the heart of the case or not<sup>970</sup>. Depending upon the case at hand, it may also be stated that public figures may transmit

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966 See also the *Oberschlick case*, ECtHR of 23 May 1991, *cft.* paragraphs 57-58)

967 See *supra*, Chapter VIII.

968 The concept of public figures includes people which do not hold any official or political position but that are often in the public eye due to other reasons. This concept comes from the United States Supreme Court. See how this construction has been received into Spanish Law in SALVADOR, 1987:35 ff.

969 For the case of defamation of judges, see also *supra* Chapter VII.

970 "El criterio a utilizar en la comprobación de esa relevancia pública en la información varía, según sea la condición pública o privada del implicado en el hecho objeto de la información o el grado de proyección pública que éste haya dado, de manera regular, a su propia persona." (*Patiño case*, STC 171/90, *cft.* fundamento jurídico 5)

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the public interest to an otherwise purely private speech case<sup>971</sup>. Not all information or expression about a public figure, however, will be approached by the *Tribunal Constitucional* as relevant to the public interest. As a general rule, only information which does not go beyond the public activity of the public figure will be construed in this way<sup>972</sup>. A public figure's privacy, moreover, should not be breached<sup>973</sup>. The *Tribunal Constitucional* has admitted that the scope of the right to privacy is extremely difficult to ascertain in such cases: it has ruled, for instance, that the scene of the public death of a *torero* when exercising his profession may not be released with commercial purposes without breaching his family's privacy<sup>974</sup>.

It may happen on occasions that a public figure voluntarily decides to disseminate information on his private life: this would make further information on the same point available without breaching privacy and, due to the public character of the public figure, public interest will also apply<sup>975</sup>. The *Tribunal Constitucional* has carefully distinguished between those aspects of the private life which have been previously released by a

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971 " (...) para indagar, si en un caso concreto, el derecho de información debe prevalecer, será preciso y necesario constatar, con carácter previo, la relevancia pública de la información, ya sea por el carácter público de la persona a la que se refiere o por el hecho en sí en que esa persona se haya visto involucrada, y la veracidad de los hechos y afirmaciones contenidos en esa información (...). Without this analysis, "no resulta posible afirmar que la información de que se trate está especialmente protegida por ser susceptible de encuadrarse dentro del espacio que a una prensa libre debe ser asegurado en un sistema democrático" (*Patiño case*, STC 171/90, *cít.*, fundamento jurídico 5) "el elemento decisivo [for ascertaining the public relevance of the information] no puede ser otro que la trascendencia pública del hecho del que se informa - por razón de la relevancia pública de una persona o del propio hecho en el que ésta se ve involucrado (...) -, pues es dicho elemento el que le convierte en noticia de general interés" (*Heraldo de Aragón case*, STC 219/92, *cít.*, fundamento jurídico 3)

972 See the *Sara Montiel case*, STC 197/91, *cít.*, fundamento jurídico 4.

973 "No toda información que se refiere a una persona con notoriedad pública goza de esa especial protección, sino que para ello es exigible, junto con ese elemento subjetivo del carácter público de la persona afectada, el elemento objetivo del que los hechos constitutivos de la información, por su relevancia pública no afecten a la intimidad, por restringida que ésta sea" (*Sara Montiel case*, STC 197/91, *cít.*, fundamento jurídico 4)

974 In the *Pantoja case*, STC 231/88, *cít.*

975 "Quien por su propia voluntad da a conocer a la luz pública unos determinados hechos concernientes a su vida familiar, los excluye de la esfera de su intimidad, y ha de asumir el riesgo de que si el periodista pudiera contrastar la veracidad de esos hechos y rectificar los errores o falsedades de la información espontáneamente suministrada por los afectados" (*Sara Montiel case*, STC 197/91, *cít.*, fundamento jurídico 4)

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public figure and those which are still covered by the right to privacy<sup>976</sup>. The *preferred position* may even apply to cases in which an anonymous citizen becomes involuntarily involved in an affair of public concern<sup>977</sup>: in these cases, a private citizen may be compelled to see how his own privacy is breached<sup>978</sup>, provided that the *Tribunal Constitucional* has been clearly convinced that public interest lies at the heart of the case. As a general principle, however, whenever a private citizen who has kept his privacy away from the public concern, is involved in a public debate, the public interest on the issue should be clearly established in order to apply the preferred position of freedom of expression. This may be the case, for instance, of a press release in which a private citizen who has been detained by the police is fully identified by his name. According to the *Tribunal Constitucional*, the public interest in knowing the name of detained people is not enough to legitimate the full identification of detained people, who should be identified only by initials<sup>979</sup>. Moreover, when a private citizen is involuntarily sucked into the vortex of public controversy, the *Tribunal Constitucional* carefully scrutinises those aspects of his private life which may be breached due to its direct link with a matter of public concern. Every aspect of private life outside this link is protected against abusive speech<sup>980</sup>.

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**976** Those aspects on which "el velo de la intimidad ha sido destapado", as the Tribunal stated in the *Sara Montiel case*, STC 197/91, *cít*, fundamento jurídico 4. See also *Funcionario del IARA case*, Sentencia del Tribunal Constitucional 227/92 of 14 December 1992 in *Boletín de Jurisprudencia Constitucional* 141 pages 75-79, fundamento jurídico 4).

**977** *Cura de Hílo case*, STC 240/92, *cít*, fundamento jurídico 8. See a general statement in the *García case*, STC 105/90, *cít*, fundamento jurídico 4.

**978** These are cases in which, "puede exigirse a aquellos a quienes afecta o perturba el contenido de la información que, pese a ello, la soporten en aras, precisamente, del conocimiento general y difusión de hechos y situaciones que interesan a la comunidad. Tal relevancia comunitaria, y no la simple satisfacción de la curiosidad ajena, con frecuencia mal e indebidamente fomentada, es lo único que puede justificar la exigencia de que se asuman aquellas perturbaciones o molestias ocasionadas por la difusión de una determinada noticia (...) " (*Diario Baleares case*, Sentencia del Tribunal Constitucional 20/92 of 14 February 1992 in *Boletín de Jurisprudencia Constitucional* 131 pages 101 ff, fundamento jurídico 3).

**979** *Heraldo de Aragón case*, STC 219/92, *cít*, fundamento jurídico 3.

**980** As the Tribunal held in the *Cambio 16 case*, STC 232/93, *cít*, fundamento jurídico 4, the prevalence of public interest over privacy in same cases "no significa en modo alguno que la intimidad, el honor y la propia imagen de cuantos han tenido alguna relación [with a issue of public concern] pueda ser sacrificadas, sin más (...) sólo cuando puedan derivarse datos de interés para aquel fin superior (...)".

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As for the question on how *the other* affects the extent to which *the rights of others* may be the grounds for a restriction of freedom of speech, there is still another point which the Court has not yet decided but on which the *Tribunal Constitucional* has already given a full ruling: the question of the group libel, that is, those cases in which the *other* whose rights are balanced against freedom of expression is not a person but a group of people. The problem may be posed, overall, in the case of racist speech.

Although it has not reached the Court yet, the Commission has already decided a racist speech case, the *Jersild* case<sup>981</sup>.

In 1991, the *Tribunal Constitucional* dealt with the only reported case in which a breach of personal right to honour was decided due to a racist speech in which the defendant was not even mentioned<sup>982</sup>. The Court gave a *locus standi* to the defendant on the grounds that legitimacy for *amparo* is wider than for ordinary access to court, and, notably, even wider than the requisites to be a *victim* under the ECHR<sup>983</sup>. From this case onwards, group libel, at least those committed through racist speech, is protected under the constitutional right to honour embodied in the Spanish Constitution<sup>984</sup>. In the future it will be seen whether this construction is consistent with the Courts case-law on the same point.

### (2) THE CONTENT OF THE EXPRESSION: VALUE-JUDGMENTS AND DESCRIPTION OF FACTS.

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981 *Jersild v. Denmark*, Report of the EComHR of 8 July 1993. The Commission held by twelve votes to four that there has been a violation of Article 10 ECHR in a case in which a Danish journalist had been punished because he interviewed in a radio programme members of a racist band of Copenhagen, who had in the programme a speech with a strong racist content.

982 In the *Friedman case*, STC 214/91, *cít.*

983 *Friedman case*, STC 214/91, *cít.*, fundamento jurídico 3.

984 According to the Tribunal, this is not a contradiction with previous case-law in which a individualistic concept of the right to honour was hold, since "debe de considerarse también como legitimidad originaria la de un miembro de un grupo étnico o social determinado, cuando la ofensa se dirigiera contra todo ese colectivo, de tal suerte que, menospreciando los derechos de un grupo socialmente diferenciado, se tienda a provocar del resto de la comunidad sentimientos hostiles o cuando menos contrarios a la dignidad, estima personal o respeto al que tienen derecho todos los ciudadanos con independencia de su raza o circunstancia personal o social (..)" (*Friedman case*, STC 214/91, *cít.*, fundamento jurídico 3)

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**1. Facts and Value-Judgments.**

In addition to the public interest which may be concerned with the message, other elements must be taken into account in order to balance *the rights of others* which may have been violated in a freedom of expression case. The main element is the *content* of the message, namely whether the message consists of a description of facts or a value judgment.

The necessity of making a distinction between facts and value judgments was first ruled by the Court in *Lingens*<sup>985</sup>. Accordingly to what the Court stated in that case, the reason for making this distinction is clear: facts may be faced with the proof of truth, while value-judgments may not<sup>986</sup>. Therefore, the truthfulness of a message may be taken as a limit to freedom of expression only when the description of facts is the *content* of the message. However, as will be seen *infra*, this does not imply that any false description of facts may be legitimately restricted under the Convention; as well as this, the impossibility of applying the proof of the truth to value-judgments does not imply that value-judgments may never be restricted.

The first aspect which should be clarified, however, is the extent to which a message may be construed as a "description of facts" or as a "value-judgment". Very often, emitted expressions consist of both. In these cases, the Court has "carefully distinguished" inside the message<sup>987</sup>. Thanks to this careful distinction, the Court has taken as a value judgment expressions in which the general scope of the affirmed facts makes it impossible to contrast them with the truth: accusation of police brutality, for instance, has been taken as a "value-judgment" because of this<sup>988</sup>. Value-judgments

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985 "In the Court's view, a careful distinction needs to be made between facts and value-judgment (..)" (*Lingens case*, ECtHR of 8 July 1986, *cit*, paragraph 44)

986 "(..) The existence of facts can be demonstrated, whereas the truth of value-judgments is not susceptible of proof" (*Lingens case*, ECtHR of 8 July 1986, *cit*, paragraph 44)

987 As in the *Thorgeirson case*, ECtHR of 25 June 1992, *cit*, paragraph 65.

988 As for the conviction of Mr. Thorgeirson, based on the failure to justify that unspecified members of the Rekiavik police had "committed a number of acts of serious assault resulting in disablement of their victims, as well as forgery and other criminal offenses", the Court ruled that "In so far as the applicant was required to establish the truth of his statements, he was, in the Court's opinion, faced with an unreasonable, if not impossible, task" (*Thorgeirson case*, ECtHR of 25 June 1992, *cit*, paragraph 65).

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which follow a statement of facts have also been distinguished from each other<sup>989</sup>. Even when the facts on whose description a value judgment is based are objectively false, a restriction on the value judgment has not been allowed, provided that public interests are clearly involved<sup>990</sup>. On the other hand, the Court has missed a minimum factual basis in criticism raised on judges' behaviour<sup>991</sup>. It has also ruled that a value-judgment statement must be taken as a description of facts in a case in which the defendant has unsuccessfully claimed the practise of the *exceptio veritatis* before domestic courts<sup>992</sup>.

Every freedom of expression case brought before the *Tribunal Constitucional* is also carefully examined in order to approach it as either a description of facts or as a value-judgment: cases which consist either of pure factual information or pure opinion

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**989** In the *Oberschlick* case, the Court found that a first part of the allegedly abusive speech of the applicant factually correct. What followed to the description of facts was construed by the Court as a value judgement. It followed that Mr Oberschlick "had published a true statement of facts followed by a value-judgement as to those facts. The Austrian courts held, however, that he had to prove the truth of his allegations. As regards value-judgments this requisite is impossible of fulfillment and is itself an infringement of freedom of opinion" (*Oberschlick case*, ECtHR of 23 May 1991, *cft*, paragraph 63)

**990** In the (*Schwabe v Austria*, Judgment of the ECtHR of 28 August 1992 in *Publications of the European Court of Human Rights* series A, n. 242B), the Court stated that "the facts on which the applicant based his value judgment were substantially correct and his good faith does not give raise to serious doubts (..) he cannot be considered to have exceeded the limits of freedom of expression" (*Schwabe case*, ECtHR of 28 August 1992, *cft*, paragraph 35)

**991** "It was quite possible to question the composition of the High Court without at the same time attacking the two lay judges personally. In addition, no evidence has been submitted to the effect that the applicant was justified in believing that the two elements of criticism raised by him (..) were so closely connected as to make the statement relating to the two lay judges legitimate. The High Court's finding that there were no proof of the accusations against the lay judges remains unchallenged (..)" (*Bartod case*, ECtHR of 22 February 1989, *cft*, paragraph 33)

**992** "The article (..) must be considered as a whole (..) in fact many of these assertions were susceptible to an attempt to establish their truth, just as Mr Castells could reasonably have tried to demonstrate his good faith (..) The Court attaches decisive importance to the fact that [the Spanish supreme Court] declared such evidence [the proof of truth] inadmissible for the offence in question. It considers that such an interference in the exercise of the applicant's freedom of expression was not necessary in a democratic society" (*Castells case*, ECtHR of 23 April 1992, *cft*, paragraph 48)

**(2) THE CONTENT OF THE EXPRESSION: FACTS AND VALUE-JUDGMENTS.**  
**1.FACTS AND VALUE-JUDGMENTS.**

without any factual basis are, the *Tribunal Constitucional* has admitted, extremely rare<sup>993</sup>. Moreover, according to the *Tribunal Constitucional*, not only pure factual description of facts will be excluded from a value -judgment approach. The *Tribunal Constitucional* has repeatedly ruled that the press is entitled to make value-judgments statement jointly with pure objective information and that, further, neutral covering of news may not be seen as compulsory under the Constitution. Remarkably, this last construction on the constitutional requirements for press information is directly grounded on the Court case-law<sup>994</sup>, on which the Court has extensively relied for making it clear that, under the Constitution, the press has the right to publish opinions at the same time as information<sup>995</sup>. In fact, cases in which opinions and facts may be jointly found in a challenged expression are the common freedom of speech cases which usually reach the *Tribunal Constitucional*<sup>996</sup>. A conscientious analysis is therefore necessary in these cases in order to ascertain whether the truth of statements will be an applicable limit to

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993 "es del todo claro que entra en el ámbito de este último precepto [the right to information and not the right to freedom of expression *stricto sensu*] la información escueta y ajena a toda glosa, comentario o apreciación subjetiva, ello sin prejuicio, claro está, de que no falten supuestos para los que han de ser relevantes una y otra libertad" (*Diario Baleares case*, STC 20/92, *cít*, fundamento jurídico 2)

994 "el derecho fundamental reconocido en el artículo 20 CE no puede restringirse a la comunicación objetiva y aséptica de hechos, sino que incluye también la investigación de la causación de hechos, la formulación de hipótesis posibles en relación con esa causación, la valoración probabilística de esas hipótesis y la formulación de conjeturas sobre esa posible causación" (*Patiño case*, STC 171/90, *cít*, fundamento jurídico 9. The Tribunal relied on the case-law of the Court in *Handyside*, *Lingens* and *Barthold*).

995 "La inexistencia de datos inequívocos ha permitido a los diversos medios de prensa formular hipótesis distintas sobre el posible origen del accidente (...) Sería un límite constitucionalmente inaceptable para la libertad de prensa el impedir formular razonadamente conjeturas que, en cuanto tales conjeturas, no pueden ser valoradas desde la exigencia constitucional de la veracidad, sino como ejercicio de la libertad de opinión a partir de unos datos fácticos veraces. Igualmente los derechos reconocidos en el artículo 20 CE incluyen también, más allá de la exposición objetiva de los hechos, la libertad de crítica de actuaciones profesionales que desbordan la esfera privada, incluida la posibilidad de hacer juicios de valor sobre las mismas" (*Patiño case*, STC 171/90, *cít*, fundamento jurídico 9)

996 " (...) cuando se persigue, no dar opiniones, sino suministrar información sobre hechos que se pretenden ciertos, la protección constitucional se extiende únicamente a la información veraz: requisito de veracidad que no puede, obviamente, exigirse de juicios o evaluaciones personales y subjetivas (...) en ocasiones difícil o imposible separar (...) los elementos informativos de los valorativos: en tal caso habrá de atenderse al elemento predominante" (*García case*, STC 105/90, *cít*, fundamento jurídico 4)

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freedom of speech or not. The *Tribunal Constitucional*, however, very often decides which is the *prevailing* content of a case, facts or opinions, and cases are consequently approached either as a description of facts or as an opinion<sup>997</sup>. Distinctions inside a single message regarding this respect are very rarely made. According to this principle, for instance, a racist speech against Jews has been considered a value-judgment, although based on revisionist theories on gas chambers and concentration camps during the Second World War which therefore were not cross-checked with the truth<sup>998</sup>. In addition, the *Tribunal Constitucional* has sometimes only found the *prevailing* content of a case, with great difficulty. Circumstantial elements, as the aim pursued by the speaker<sup>999</sup> or the way in which the audience perceives an expression<sup>1000</sup> have then been taken into account. The *Tribunal Constitucional's* tendency is therefore to approach a single case either under the description of facts approach or under the value

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997 "destacando claramente como elemento preponderante el informativo, aunque en ocasiones se haga referencia al concepto genérico de la víctima, o se incluyan juicios de valor, que en modo alguno alteran aquella calificación" (*Tellado case*, STC 123/93, *cft*, fundamento jurídico 3). In the same way, The Tribunal stated in the *Asociación de vecinos de Arrabal case* that "respondieron al fin de comunicar a los vecinos la información contenida en ellas, así como la repulsa de la Asociación a los hechos que eran objeto de la misma y ello obliga, aunque se invoquen conjuntamente ambas libertades, que las que se dice vulnerada es la de comunicar información reconocida en el artículo 20(1)(d) de la Constitución y, por tanto, a ésta hay que limitar nuestra argumentación" (*Asociación de vecinos de Arrabal case*, STC 165/87, *cft*, fundamento jurídico 10)

998 The statements on concentration camps were seen by the Tribunal "antes que en la libertad de información, dentro del ejercicio de la libertad de expresión (..) en relación con la libertad ideológica (..) puesto que si bien (..) hace referencia a hechos históricos (..) se limita a expresar su opinión y sus dudas sobre esos concretos acontecimientos históricos (..) " (*Friedman case*, STC 214/91, *cft*, fundamento jurídico 7)

999 The Tribunal, in order to decide which fundamental right had been exercised, took into account in the *Punt Diari case*, "la finalidad principal del autor [which was] la crítica de una cierta actividad municipal, cuya carga de profundidad se pone en la acusación de que ha existido una confabulación" (*Punt Diari case*, Sentencia del Tribunal Constitucional 223/92 of 14 December 1992 in *Boletín de Jurisprudencia Constitucional* 141 pages 55-60. fundamento jurídico 2). See also the *Navazo case*, STC 107/88, *cft*, fundamento jurídico 3.

1000 " (..) para el sedicente ofendido se está en el campo del derecho a la información, aún cuando desde la perspectiva de los demás pudiera ser prevalente la libertad de expresión. En el carácter accidentalmente incidental del sr Moner respecto del planteamiento general del artículo periodístico, hemos de situar el énfasis, porque la colisión de derechos tiene un aspecto subjetivo - el titular de cada uno de ellos- que no cabe ignorar. Así pues, el elemento preponderante aquí es el informativo" (*Punt Diari case*, STC 223/92 *cft*, fundamento jurídico 2)

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judgments approach. Only when it has been impossible to decide which element prevails in a case, both approaches have been applied<sup>1001</sup>.

It may therefore be concluded that the *careful distinction* between facts and opinions ruled by the Court has only to a limited extent influenced the *Tribunal Constitucional*. Certainly, the *Tribunal Constitucional* has made it clear that the *exceptio veritatis* will not be applied to value-judgments. But, on the other hand, it has frequently decided on whether a case may be defined as a value-judgments case taking into account the *prevailing* content of the challenged expression.

**2. Restrictions on factual speech.**

As we have seen, the truth may be a limit to those freedom of expression cases in which the expression consists of a description of facts, but not when value-judgments have been challenged before a court. In the Court case-law, the extent to which the *exceptio veritatis* is applicable in a description of facts case depends, furthermore, on whether public interest lies at the heart of the case or not: provided that the freedom of speech has been exercised in a public concern case, false statements may not be legitimately restricted if the speaker has duly verified the story and has diligently contrasted his sources of information.

The *Schwabe* case provides a good example of this principle<sup>1002</sup>: replying with critical statements to a member of his political party who had been arrested for drunk-driving, Mr. Schwabe stated to the press that a relevant member of the political party who had criticised him had also been arrested for the same reason a few years ago; "drunk-driving" implied, according to domestic applicable law, a precise degree of alcohol in the blood<sup>1003</sup>. When a libel action was issued by the politician mentioned in

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**1001** \* (...) ha de concluirse (...) que el sr García transmitió hechos veraces, obtenidos previa comprobación, en un medio institucionalizado de comunicación social, referentes a personas y conductas de interés de relevancia pública: en consecuencia actuó en el ejercicio del derecho a comunicar libremente información veraz protegido por el artículo 20(1)(d) CE (...) \* (*García case*, STC 105/90 *cft*, fundamento jurídico 8)

**1002** *Schwabe v Austria*, judgment of ECtHR of 28 August 1992 in *Publications of the European Court of Human Rights* series A, n. 242-B

**1003** *Schwabe case*, ECtHR of 28 August 1992, *cft*, paragraph 34.

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Schwabe's declarations before domestic courts, the case was approached as a description of facts case and, therefore, Mr. Schwabe was given the opportunity to prove the truth of his statements: he could not. The man he mentioned had affectively had a car accident a few years before, but the degree of alcohol which he was reported to have in his blood by the police was a little below the legal limit<sup>1004</sup>. According to the law, therefore, it was false that he was drunk-driving. Mr. Schwabe was punished, but the Court, when the case was eventually taken to Strasbourg, found that this punishment was a violation of the Convention: it ruled that the domestic court should have taken into account that Mr Schwabe had acquired the information from a press article published in a nation wide magazine at the time when the accident occurred, and that it had not been proven that he had acted in bad faith. Given the public interest in the debate about politicians' private behaviour, the Court declared that the punishment was a violation of Article 10 ECHR<sup>1005</sup>.<sup>1006</sup>

The *Tribunal Constitucional* has also admitted that legitimate restrictions to the freedom of speech may not be imposed on factual speech if the speaker can prove the truth of his statement. The meaning of "truth", however, has been construed by the *Tribunal Constitucional* in a very broad way: when public matters are implied, a speech may be considered to be "true", even if it contains false statements, provided that the speaker has diligently searched the truth and has not acted in bad faith<sup>1007</sup>. This construction of truth in freedom of speech cases, as the *Tribunal Constitucional* admits, has been greatly influenced by other legal systems, namely the United States<sup>1008</sup>. Following this approach, the *Tribunal Constitucional* has overruled restrictions imposed

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1004 *Schwabe case*, ECtHR of 28 August 1992, *cft*, paragraph 27

1005 *Schwabe case*, ECtHR of 28 August 1992, *cft*, paragraph 33.

1006 "(..) It is significant that the applicant described both accidents in completely different terms (..) He nevertheless concluded that they had enough features in common to warrant the resignation of both the politicians concerned" (*Schwabe case*, ECtHR of 28 August 1992, *cft*, paragraph 34)

1007 "un especial deber de comprobar la veracidad de los hechos que expone mediante las oportunas averiguaciones y empleando para ello la diligencia exigible a un profesional significa, pues una información comprobada según los canones de la profesionalidad informativa, excluyendo invenciones, rumores o meras insidias". (*García case*, STC 105/90, *cft*, fundamento jurídico 5)

1008 *García case*, STC 105/90, *cft*, fundamento jurídico 5

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on speeches grounded on official sources which were eventually incorrect<sup>1009</sup>. On the other hand, restrictions of false statements which had not been diligently contrasted have not been overruled by the *Tribunal Constitucional*<sup>1010</sup>. Therefore, false information may be covered by constitutional provisions on freedom of speech provided that the speaker has diligently tried to find out the truth although he eventually may not have succeeded. The constitutional requirement has therefore been construed by the Court as the observance of the due professional diligence of journalists<sup>1011</sup>.

According to this principle, the *Tribunal Constitucional* has been prepared to admit as legitimate speech, news and other information with minor or even relevant errors, including the following cases: (1) incomplete information: a press release stating that somebody had been sentenced and punished, when this judgment had been appealed and eventually reversed<sup>1012</sup>; (2) Minor errors in a piece of information which was true on the whole<sup>1013</sup>; (3) and the wrong identification of a person which did not actually took part in the facts described in a press article, on the grounds that it didn't have enough objective importance to declare the information illegitimate, and leaving aside the subjective importance it actually had for the concerned person<sup>1014</sup>.

Often, errors committed in legal terminology constitute a specific problem which have been brought before the *Tribunal Constitucional* on a number of occasions. In 1991, the *Tribunal Constitucional* declared in a case that such errors must be taken into account only to the extent to which they may lead to a wrong conclusion for the general

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**1009** See the *García case*, STC 105/90, *cft*, fundamento jurídico 7

**1010** In the *Tellado case*, STC 123/93, *cft*.

**1011** The exigency of veracity, the tribunal has held, "no va dirigida tanto a la exigencia de total exactitud en la información cuando a negar la garantía o protección constitucional a quienes (...) actúan con menosprecio de la veracidad o falsedad de lo comunicado (...)" (*Palazuelos case*, STC 40/92, *cft*, fundamento jurídico 2)

**1012** *Palazuelos case*, STC 40/92, *cft*, fundamento jurídico 2

**1013** *Patiño case*, STC 171/90, *cft*, fundamento jurídico 8.

**1014** *Cura de Hío case*, STC 240/92, *cft*, fundamento jurídico 6

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public, and not according to academic or legal standards<sup>1015</sup>. One year later, the *Tribunal Constitucional* affirmed this rule<sup>1016</sup>. In this latter case, however, the rule was applied in a very restrictive way, stating that a newspaper affirmation that a man had been detained as the author of a crime had breached his right to be presumed innocent, since nobody may be held author of a crime before a judicial decision<sup>1017</sup>. Arguing on the general understanding of this principle, two judges strongly dissented with the decision, pointing out that the detention had actually been made because the man was a presumed author of a crime. The omission of the word "presumed", according to the judges who disagreed, should not have been seen as negligent behaviour by the journalist<sup>1018</sup>.

The following aspects of the concept of "diligence" applied to freedom of information cases have been analyzed further by the *Tribunal Constitucional*:

(1) In general, false information may not be justified with the only argument that it has been based on unknown sources<sup>1019</sup>. However, relying on liable sources may

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1015 "Las inexactitudes en la compleja terminología legal solo pueden ser relevantes si el dilaite en la calificación de los hechos llevan al engaño del lector medio" (*Sara Montiel case*, STC 197/91, *cít*, fundamento jurídico 3)

1016 "(..) no cabe exigir al informador una precisión absoluta en el lenguaje técnico-jurídico, sin embargo no puede admitirse que los concretos términos o expresiones empleados en una noticia carezcan de relevancia en relación con el derecho al honor; por lo que debe sopesarse cuidadosamente el significado que poseen en el lenguaje usual (..)" (*Heraldo de Aragón case*, STC 219/92, *cít*, fundamento jurídico 5)

1017 *Heraldo de Aragón case*, STC 219/92, *cít*, fundamento jurídico 5

1018 "La incorrección técnica difícilmente puede estimarse relevante en una información que no pretende ser técnico-jurídica, ni que perjudicara, por su mera presencia, en forma agravada, a la reputación del detenido" (*Heraldo de Aragón case*, STC 219/92, *cít*, dissenting opinion); "los criterios utilizados por la Sentencia ponen de manifiesto una concepción restrictiva de la libertad de información poco acorde con la posición central que este Tribunal ha venido reconociendo a esta libertad en nuestro sistema constitucional(..)" (*Heraldo de Aragón case*, STC 219/92, *cít*, dissenting opinion of judge \$\$vp2a)

1019 "(..) ya que no se cumple ese específico deber de diligenciaron la simple afirmación de que lo comunicado es cierto, o con alusiones indeterminadas a fuentes policiales o colegas del fallecido, en cuanto que, a este efecto, carece de relevancia la remisión a fuentes anónimas o genéricas. Lo cual, desde luego, no supone, en modo alguno, que el informador venga obligado a revelar sus fuentes de conocimiento (..) (..) (*Tellado case*, STC 123/93, *cít*, fundamento jurídico 5)

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be seen as diligent behaviour when the factual error comes from the source<sup>1020</sup>. Interviews-based information, furthermore, obliges the media to check the accuracy of what is published, but this obligation does not cover what the interviewee did or did not say in an incomplete manner<sup>1021</sup>. Moreover, when news takes the form of a "neutral report", that is, when the media literally reproduces what anybody else has said, with express quotation of the sources, there is, according to a recent *Tribunal Constitucional* statement, a double responsibility system with regards to the truth of information<sup>1022</sup>: it is for the source to diligently check the accuracy of his statements; and it is for the media to check that what has been published reproduces exactly what the source said. Although this double system implies that the media is not responsible for any negligent behaviour of the source<sup>1023</sup>, it equally implies, on the other hand, that the media is responsible for an exact reproduction of what was stated by the source. Moreover, regarding this latter point, the "truth" of what is published must be absolute<sup>1024</sup>. Finally, the question may be posed as to the extent to which diligent behaviour should be compulsory when information is objectively true<sup>1025</sup>.

(2) Diligent behaviour may also be showed by the media by *a posteriori* measures, such as spontaneously published corrections when the non accuracy of previously published information becomes evident; according to the *Tribunal*

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1020 *Cura de Hío case*, STC 240/92, *cft*, fundamento jurídico 7.

1021 *Palazuelos case*, STC 40/92, *cft*, fundamento jurídico 2.

1022 *Cambio 16 case*, STC 232/9316, *cft*, fundamento jurídico 3.

1023 "cuando un medio de comunicación divulga declaraciones de un tercero que supone una intromisión en los derechos reconocidos por el artículo 18(1) CE (..) solo puede disfrutar de cobertura por el artículo 20(1) si, por un lado, se acredita la veracidad (..) y por otro, estas declaraciones (..) se refieren a hechos o circunstancias de relevancia pública (..) la veracidad que debe acreditarse se refiere únicamente al hecho de la declaración - no de lo declarado" (*Cambio 16 case*, STC 232/93, *cft*, fundamento jurídico 3)

1024 "El medio de comunicación ha de acreditar la veracidad del hecho de que determinada persona ha realizado determinadas manifestaciones no bastando simplemente la observancia de un mínimo de diligencia (..) como sucede en general (..) es exigible además una perfecta adecuación con la realidad, esto es, con el hecho mismo de la declaración" (*Cambio 16 case*, STC 232/93, *cft*, fundamento jurídico 3).

1025 "Y siendo la información esencialmente veraz, no cabe, a mi parecer, imputar a los informadores que no la verificaran" (*Heraldo de Aragón case*, STC 219/92, *cft*, dissenting opinion).

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*Constitucional*, this indicates that the media did not act with actual malice and bad faith when it published false information<sup>1026</sup>. Since Spanish law may oblige a newspaper to publish such rectifications<sup>1027</sup>, a posterior correction will be taken into account only when it has been published voluntarily<sup>1028</sup>.

(3) Only in a recent decision the *Tribunal Constitucional* has ruled on the *onus probandi* on whether the journalist has looked for the truth diligently or not. In its early cases, however, the case-law of the Court seemed to support the idea that the journalist, or, in general, the speaker, in any case had to provide enough evidence of his diligent behaviour in order to discharge a libel accusation<sup>1029</sup>. In another case, however, the *Tribunal Constitucional* took into account that the alleged negligent behaviour of a journalist had not been sufficiently proved in order to overrule a restriction on freedom of speech: it seemed then that the *onus probandi* was on the other side<sup>1030</sup>. A recent decision, however, has once again turned the pendulum back to its original place: ruling that *onus probandi* of diligent behaviour is for the speaker: the *Tribunal Constitucional*

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1026 \* (...) en estos casos singulares en que se trata de indagar la actitud diligente y responsable del informador no cabe desconocer el hecho de la pronta corrección posterior de la información publicada (...) cuando se produce de modo espontáneo por el propio autor de la información o el medio que la divulgó, por su propia iniciativa o a indicación del interesado (...) es sin duda reveladora de la actitud del medio de información o del periodista en la búsqueda de la veracidad de lo informado" (*Cura de Hlo case*, STC 240/92, *cít*, fundamento jurídico 7)

1027 See *supra* Chapter V.

1028 *Cura de Hlo case*, STC 240/92, *cít*, fundamento jurídico 7. However, compulsory rectification ordered by a judge may mitigate, under some circumstances, the responsibility of the media "si bien, el derecho a la rectificación de la información no supone, ni, por lo tanto, inhabilita ya, por innecesaria, la debida protección al derecho al honor, si la atenúa, y constituye el mecanismo idóneo para recabar lo que solo por omisión de los hechos relatados pudiera constituir intromisión en el derecho al honor" (*Palazuelos case*, STC 40/92, *cít*, fundamento jurídico 2)

1029 "en ningún momento tuvo cabal conocimiento sobre la veracidad o incertidumbre de las informaciones que le suministraba y que suponían gravísimas imputaciones delictivas (...) sin que aquel se preocupara cumplidamente de indagar dichos extremos, consciente de que su publicación podría suponer gran riesgo (...) no se han aportado (...) pueda suficiente tendente a acreditar la veracidad de las actuaciones delictivas que en los artículos citados se mencionan (...)" (*Vinader case*, STC 105/83, *cít*, antecedentes 1-2)

1030 "(...) No se ha declarado judicialmente ni la inveracidad de los hechos ni la falta de diligencia en la búsqueda de la verdad por parte del periódico, por lo que a los efectos del art 20(1)(d) la información publicada no puede dejar de ser considerada veraz" (*Patiño case*, STC 171/90, *cít*, fundamento jurídico 8)

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twice stated, in the *Prisión de Granada*<sup>1031</sup> and *Tellado* cases<sup>1032</sup>, that when a libel action is taken, the journalist must supply enough evidence before the court that he has acted diligently. The placement of the *onus probandi* on the speaker, on the other hand, does not mean that the speaker must supply the court with full evidence of the facts that *the other* has allegedly executed. The *Tribunal Constitucional* has made an interesting distinction between evidence of the speaker's conduct and evidence of the alleged facts: the *onus probandi* which is charged against the speaker refers only to the first question. Evidence in the speaker's diligent behaviour, therefore, must not imply that evidence on the facts mentioned have been equally supplied<sup>1033</sup>. If the speaker were charged with the obligation to provide full evidence of what has been stated in cases of public concern the crucial position that freedom of speech holds in a democratic society will be breached<sup>1034</sup>.

(4) The *exceptio veritatis* in whatever form (i.e., as diligent behaviour or as objective truth) may not justify freedom of speech in cases in which the right to privacy has been breached. It should be noted that, in principle, privacy may only be breached by dissemination of true statements on private life, so it would be illogical to allow

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**1031** *Prision de Granada case*, STC 143/91, *cft*, fundamento jurídico 6.

**1032** " (...) a pesar de la gravedad de las imputaciones, en ningún momento el autor de la información ha manifestado o alegado que hubiese empleado de diligencia en comprobar la veracidad de sus asertos y tampoco en las actuaciones judiciales o en este recurso de amparo existe circunstancia o dato que permita apreciar que se hubiese preocupado en absoluto de tomarse la molestia de contrastar minimamente esa veracidad (...) " (*Tellado case*, STC 123/93, *cft*, fundamento jurídico 5)

**1033** "No es requisito de la prueba de la verdad - que, en todo caso, como señala el Ministerio Fiscal, corresponde a quien se manifiesta en público -, la demostración plena y exacta de los hechos imputados. Basta con un inicio significativo de probanza, que no es, ni lógicamente puede ser, la de la prueba judicial, es decir, más allá de la duda razonable (...) " (*Prision de Granada case*, STC 143/91, *cft*, fundamento jurídico 6)

**1034** "(...) Exigir tal tipo de prueba a quien imputa hechos irregulares a otro -hechos que en el presente caso en ningún momento son calificados por los tribunales ordinarios mas que de graves y nunca de delictivos- supondría cercenar de raíz la posición capital que la libertad de información tiene en una sociedad democrática" (*Prision de Granada case*, STC 143/91, *cft*, fundamento jurídico 6)

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invasion of privacy provided that the truth has been respected<sup>1035</sup>. Furthermore, this is the main difference between privacy and the right to honour and personal reputation, which is nonetheless often wrongly identified with privacy by Spanish ordinary courts<sup>1036</sup>. Likewise, the *Tribunal Constitucional* has admitted that the same case may be imply and unjustified restriction under the *exceptio veritatis* as far as the right to honour is concerned, while a simultaneous breach of privacy may be legitimately restricted. Privacy has been further construed by the *Tribunal Constitucional* relying on Human Dignity and on other constitutional provisions which protect the family and childhood<sup>1037</sup>. Whenever private citizens are concerned, the right to privacy acquires its highest value as valid ground for a restriction on freedom of speech<sup>1038</sup>: in such cases, relevant public information must be carefully weighed against privacy of people who do not hold any official or public position. Remarkably, the *Tribunal Constitucional* has been very reluctant to fully justify the identification of private people involved in facts of public concern even in cases in which public interest could have been satisfied with only anonymous information on the facts<sup>1039</sup>. It should be noted, finally, that either the due diligent behaviour of the speaker or any other form of *exceptio veritatis* must be proportional to the public interest in the disseminated information. Certainly, on the one hand, extreme care should be taken when public matters related to information are published. But, on the other hand, it is precisely the public nature of the object of speech which justifies a wider margin for discussion and even error in such cases. Accordingly, the *Tribunal Constitucional* has taken the public relevance of the case into account when

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**1035** "mientras que la veracidad funciona, en principio, como causa legitimadora de las intromisiones en el honor, si se trata del derecho a la intimidad esa veracidad es presupuesto necesario para que la intromisión se produzca, dado que la realidad de ésta requiere que sean veraces los hechos de la vida privada que se divulgan" (*Sara Montiel case*, STC 197/91, *cft*, fundamento jurídico 2)

**1036** *Sara Montiel case*, STC 197/91 *cft*, fundamento jurídico 3.

**1037** *Sara Montiel case*, STC 197/91, *cft*, fundamento jurídico 3.

**1038** *Diario Baleares case*, STC 20/92, *cft*, fundamento jurídico 3

**1039** See the *Diario Baleares case*, STC 20/92, *cft*. On the identification of detained people, the Tribunal hold unconstitutional in the *Heraldo de Aragón case*, a dissenting opinion however stated that "nada hay en los mandatos del artículo 20 CE que suponga una prohibición de informar sobre la identidad de los detenidos por la fuerza pública" (*Heraldo de Aragón case*, STC 219/92, *cft*, dissenting opinion).

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applying *exceptio veritatis* to an alleged libel case, ruling that diligence must be proportional to the importance of the object of the speech<sup>1040</sup>. Therefore, proportionality also advises to strictly check diligence whenever personal reputation of private citizens is involved<sup>1041</sup>.

**3. Restrictions to value-judgments and Opinions.**

What may be the legitimate cause for a restriction to value judgments? Clearly, the Court has held, not the prove of the truth<sup>1042</sup>. The Court has made it clear, however, that restrictions listed in Article 10(2) ECHR remain nonetheless applicable to the freedom to impart value-judgments or opinions, which is, regarding this respect, only a particular aspect of the freedom of expression<sup>1043</sup>: the extent to which an opinion amounts to slander or contains defamatory or insulting words is, generally speaking, the only ground for a restriction to hold *opinions*. The Court has also stated, however, that expressions containing shocking messages<sup>1044</sup> or press articles in which particularly

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**1040** "tal obligación, es obvio, debe ser proporcionada a la trascendencia de la información que se comunica, pero en todo caso es exigible una actuación razonable, para no defraudar el derecho de todos a recibir una información veraz; máxime si la noticia afecta a personas sin relevancia pública, pues esa diligencia en la comprobación de hechos podrá evitar en muchos casos, que se lesione su derecho al honor" (*Heraldo de Aragón case*, STC 219/92, *cf.*, fundamento jurídico 5). In the *Cura de Hío case*, it was further held that diligence should be "proporcional a la trascendencia de la información que se comunica, dependiendo necesariamente de las circunstancias" (*Cura de Hío case*, STC 240/92, *cf.*, fundamento jurídico 7). See also the *Palazuelos case*, STC 40/92, *cf.*, fundamento jurídico 3.

**1041** "cuando la noticia que se divulga puede suponer por su propio contenido un descrédito en la consideración de la persona a la que la información se refiere, esa obligación de comprobar la veracidad del contenido de la información adquiere, en principio, su máxima intensidad" (*Cura de Hío case*, STC 240/92, *cf.*, fundamento jurídico 7). This was also the case in the *Heraldo de Aragón case*, STC 219/92, *cf.*

**1042** "As regards value-judgment this requirement [the proof of the truth] is impossible to fulfillment and it infringes freedom of opinion itself" (*Lingens case*, ECtHR of 8 July 1986, *cf.*, paragraph 46)

**1043** "The defendant has submitted that the observations in question were value-judgments made by him in the exercise of his freedom of expression (..) The Court, like the Commission, shares this view (..) what was at issue was not his right to disseminate information but his freedom of opinion and his right to impart ideas; the restrictions authorized in paragraph 2 of Article 10 nevertheless remained applicable" (*Lingens case*, ECtHR of 8 July 1986, *cf.*, paragraph 45)

**1044** *Lingens case*, ECtHR of 8 July 1986, *cf.*, paragraph 41

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strong words were included<sup>1045</sup> have nonetheless been, protected by the Court. This principle has also been admitted by the *Tribunal Constitucional*, which has however repeatedly stated that the Constitution does not embody a "right to defame"<sup>1046</sup>.

Given this general background, how has the Court approached the problem of legitimate restrictions to value-judgments or opinions? Two main elements may be taken into account: the bad faith in which the speaker has acted and, again, the private or public position of the person mentioned in the expression.

According to the *Tribunal Constitucional*, public figures' right to honour also deserves constitutional protection. However, here the margin allowed for freedom of speech is wider than in cases concerning private citizens. The legal technique by which the wider margin for public figures related to opinions is guaranteed, comes from the new approach decided by the *Tribunal Constitucional* on the weight that should be given to bad faith or the *animus injuriandi* in these kinds of cases: traditionally, the *animus injuriandi* had been taken as the main or even the only ground on which Spanish courts could decide on alleged defamation cases. Since 1988, however, the *Tribunal Constitucional* has maintained that this approach is not consistent with the Constitution in cases in which the alleged defamed person is a public figure<sup>1047</sup>. This constitutional

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**1045** "It is true that both articles were framed in particularly strong terms. However, having regard to their purpose and the impact which they were designed to have, the Court is of the opinion that the language used cannot be regarded as excessive" (*Thorgeirson case*, ECtHR of 25 June 1992, *cít.*, paragraph 67)

**1046** See, recently, the *Cadena Ser* case, case, Sentencia del Tribunal Constitucional 85/92 of 8 June 1992 in *Boletín de Jurisprudencia Constitucional* 135, pages 57-64, fundamento jurídico 4. Although this point was originally grounded on Lingens in the Tribunal case-law, it is now usually quoted as has been applied by previous decisions of the Tribunal itself.

**1047** "El reconocimiento constitucional de las libertades de expresión y de comunicar y recibir información ha modificado profundamente la problemática de los delitos contra el honor en aquellos supuestos en que la acción infiere en este derecho lesión penalmente sancionable haya sido realizada en ejercicio de dichas libertades, pues en tales supuestos se produce un conflicto entre derechos fundamentales, cuya dimensión constitucional convierte en insuficiente el criterio subjetivo del *animus injuriandi* (...) Este tratamiento del citado problema es constitucionalmente insuficiente, por desconocer que las libertades del art 20 de la Constitución, no sólo son derechos fundamentales de cada persona, sino que también significan el reconocimiento de la garantía de la opinión pública libre, que es una institución ligada de manera inescindible al pluralismo político (...) estando por ello estas libertades dotadas de una eficacia que trasciende a la que es común y propia de los demás derechos fundamentales, incluido el del honor (...) "(*Navazo case*, STC 107/88, *cít.*, fundamento jurídico 2)

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approach has brought with it a crucial change in the way in which criminal law must approach defamation cases: the *animus injuriandi* is still relevant as a final criterium for deciding whether defamation has occurred<sup>1048</sup>, but, prior to this analysis, criminal courts must decide whether freedom of speech covers the alleged defamatory speech. This prior analysis must be made, the *Tribunal Constitucional* has held, regardless the fact that the speaker had conscientiously tried to defame a public figure<sup>1049</sup>. The *animus injuriandi*, however, still appears as a valid ground for a restriction when *private* citizens are mentioned in a speech<sup>1050</sup>.

The bad faith or *animus injuriandi* principle is fully applicable whenever private citizens are mentioned in a speech, since opinions on private citizens do not enjoy the *preferred position*<sup>1051</sup>. In these cases, moreover, the *Tribunal Constitucional* uses to uphold restrictions on freedom on speech on the simple ground that anybody's right to honour has been violated, without deeply analyze whether such violation might be justified as a legitimate case of freedom of expression<sup>1052</sup>. Furthermore, as the *Tribunal Constitucional* ruled in the *Cambio 16* case, opinions on private citizens may be allowed only to the extent to which they are rightly founded on reliable information<sup>1053</sup>. This last statement situates the limits on the freedom to hold opinions

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**1048** "No se trata ya de establecer si su ejercicio ha ocasionado lesión, penalmente sancionada, del derecho al honor, para lo cual continúa siendo inevitable la utilización del criterio del *animus injuriandi*, sino de determinar si el ejercicio de esas libertades constitucionalmente protegidas como derechos fundamentales actúan o no como causa excluyente de la antijuricidad (..)" (*Navazo case*, STC 107/88, *cit*, fundamento jurídico 2)

**1049** See (*El Dia case*, STC 121/89, *cit*. fundamento jurídico 4. See also the *Patiño case*, STC 171/90, *cit*, fundamento jurídico 8.

**1050** *Patiño case*, STC 171/90, *cit*, fundamento jurídico 5.

**1051** The *preferred position* implies that the message is connected with the formation of a free public opinion: "al menos la que incide en el honor de personas privadas, debe enjuiciarse sobre la base de distinguir radicalmente, a pesar de la dificultad que comporta en algunos supuestos, entre información de hechos y valoración de conductas personales y, sobre esta base, excluir del ámbito justificador de dicha libertad las afirmaciones vejatorias para el honor ajeno en todo caso innecesarias para el fin de la formación de la opinión pública en atención al cual se garantiza constitucionalmente su ejercicio" (*Asociación de vecinos de Arrabal case*, STC 165/87, *cit*, fundamento jurídico 10)

**1052** As in the *Heraldo de Aragón case*, STC 219/92, *cit*, fundamento jurídico 5.

**1053** *Cambio 16 case*, STC 232/93, *cit*, fundamento jurídico 1.

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on *private* citizens beyond the extent to which slander or defamatory words are included in the speech. Furthermore, a standard for opinions closely linked with the proof of the truth held for description of facts is in this way maintained by the *Tribunal Constitucional* for these cases<sup>1054</sup>. Legitimate restrictions on *opinions* about *private* citizens may also be imposed on speeches related to public aspects of private life, for instance professional skills, since they are also covered by the right to honour<sup>1055</sup>.

In cases in which freedom to hold opinions is connected with freedom of ideology, the scope of the freedom to hold opinions is even wider. In these cases the *Tribunal Constitucional* has ruled that opinions which have clearly been badly founded deserve constitutional protection<sup>1056</sup>. However, these opinions are also limited: racist speech, for instance may not be based on the freedom of ideology, since it would breach the fundamental principle of protection to human dignity on which constitutional rights are founded, including the freedom of speech<sup>1057</sup>. Due to the link it may have with the freedom of ideology, therefore, it would be possible to state that under Spanish law, the freedom to criticise public officials should have also a preferred position. The *Tribunal Constitucional*, however, has not yet expressly stated so, probably because the preferred position for such cases is not easy to reconcile with the criminal figure of *desacato*<sup>1058</sup>.

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**1054** As suggested in the *Cambio 16 case*, STC 232/93, *cft*, fundamento jurídico 1.

**1055** The construction of a right to not to be illegitimately criticized due to professional reasons was expressly stated in *Palazuelos case*, STC 40/92, *cft*, fundamento jurídico 3, and extensively argued in *Punt Diari case*, STC 223/92, *cft*, fundamento jurídico 3, in which the *a quo* judged was obliged by the Tribunal to take into account as to decide whether the right to honor of the plaintiff had been breached.

**1056** "(..) es indudable que las afirmaciones, dudas y opiniones acerca de la actuación nazi con respecto a los judíos y a los campos de concentración, por reprobables o tergiversadas que sean -y ciertamente lo son al negar la evidencia de la historia - quedan amparadas por el derecho a la libertad de expresión, en relación con el derecho a la libertad ideológica(..)" (*Friedman case*, STC 214/91, *cft*, fundamento jurídico 8)

**1057** "ni la libertad ideológica ni la libertad de expresión comprenden el derecho a efectuar manifestaciones, expresiones o campañas de carácter racista o xenófobo (..) la dignidad como rango o categoría de la persona y en el que se proyecta el derecho al honor no admite discriminación alguna por razón de nacimiento, raza o sexo, opiniones o creencias. El odio y desprecio a todo un pueblo o a una etnia (..) son incompatibles con el respeto a la dignidad humana (..)" (*Friedman case*, STC 214/91, *cft*, fundamento jurídico 8) .

**1058** See *supra* Chapter VIII.

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The *Tribunal Constitucional* has nonetheless maintained the *preferred position* of freedom of expression when the expression contains opinions or value-judgments on public figures, that is, for people, other than politicians and public authorities, that are placed in the public eye, due to their own behaviour or due to mere chance. A leading case on the issue concerned a commercial airline pilot who commanded a plane which crashed causing near one hundred casualties in 1986 and whose professional skills were criticised by the media after the accident<sup>1059</sup>. In two judgments, concerning the way in which two different newspapers covered the story, the *Tribunal Constitucional* set the limits to freedom to hold opinions on public figures. The guiding principle is still that slander or defamatory words were not allowed by the Constitution<sup>1060</sup>. However, public figures involved in a situation relevant to public opinion (in this case, a plane accident with nearly one hundred victims) should have to accept opinions and value judgments on his or her behaviour or conduct beyond the general limits applicable to ordinary citizens<sup>1061</sup>. Accordingly, in these cases a prior analysis of the public relevance of the case is due<sup>1062</sup>. Thanks to this prior analysis, the extent to which private citizens can see how opinions on them may be legitimately expressed beyond general standards, may be precisely defined<sup>1063</sup>. Under these circumstances, even shocking or strong opinions on a private person should be admitted, although slander or defamatory

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1059 *Patiño case*, STC 171/90, *cít.*

1060 *Patiño case*, STC 171/90, *cít.*, fundamento jurídico 11.

1061 *Patiño case*, STC 171/90, *cít.*

1062 " (...) para indagar, si en un caso concreto, el derecho de información debe prevalecer, será preciso y necesario constatar, con carácter previo, la relevancia pública de la información, ya sea por el carácter público de la persona a la que se refiere o por el hecho en sí en que esa persona se haya visto involucrada, y la veracidad de los hechos y afirmaciones contenidos en esa información (...) sin ello no resulta posible afirmar que la información de que se trate está especialmente protegida por ser susceptible de encuadrarse dentro del espacio que a una prensa libre debe ser asegurado en un sistema democrático" (*Patiño case*, STC 171/90, *cít.*, fundamento jurídico 5)

1063 "El criterio a utilizar en la comprobación de esa relevancia pública en la información varía, según sea la condición pública o privada del implicado en el hecho objeto de la información o el grado de proyección público que éste haya dado, de manera regular, a su propia persona." (*Patiño case*, STC 171/90, *cít.*, fundamento jurídico 5)

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expressions are still forbidden<sup>1064</sup>. Following these principles, the *Tribunal Constitucional* has made a distinction between permissible value judgments and other opinions which effectively breach the right to honour or privacy of public figures. Crucially, the real link between the opinions and the issue which give the case its public interest is the main rule in defining the scope of permissible value-judgments<sup>1065</sup>.

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**1064** It should be noted, however, that this opinions may not be restricted due, not to the preferred position value judgments speech may have, but to the preferred position which comes from the facts to which value-judgments refer. The preferred position is still said only from the facts to not from the ideas. See on this question *Patiño case*, STC 171/90, *cít*, fundamento jurídico 5.

**1065** "expresiones que (..) por su ausencia de relevancia pública (..) [imply] un sacrificio innecesario del honor y la intimidad de una persona que no encuentran justificación en el valor preferente de la libertad de opinión e información, por tanto, lesionan gratuitamente el derecho al honor e intimidad de la persona a la que se refieren" (*Patiño case*, STC 171/90, *cít*, fundamento jurídico 4). The same may be applied to the right to privacy, since public interest in a fact in which a private person is involved does not allow the media to "entregar a la curiosidad de la opinión pública aspectos reservados de su vida privada más íntima, que en absoluto tienen la más mínima conexión con el hecho de la información (..)" (*Patiño case*, STC 171/90, *cít*, fundamento jurídico 4)

## **PART IV**

### **CONCLUSIONS**

#### **X. RECAPITULATION AND FINAL CONCLUSIONS**



## CHAPTER X

### RECAPITULATION AND FINAL CONCLUSIONS

1. This work started with a initial methodological question which was posed in Chapter I: *does the European Convention on Human Rights still provide just a minimum common standard on fundamental rights protection in Europe?* the sure answer is a clear *yes*, which, to be properly understood, needs to be distinguished from another question: *is the Convention's minimum common standard a lower one?* And in this case the more suitable answer is that on occasion it is and on occasion it is not. This clearly depends on the approach followed by the European Court of Human Rights in each case: sometimes, the Court has applied a *dynamic interpretation* to the Convention, and a high standard of protection of a Convention's right has been reached as a result. On other cases, however, the *margin of appreciation* of the member states has allowed the Court to uphold a low standard on a fundamental right protected thereby. What must be taken into account is that the Court has not yet taken any decision as to the extent to which the *dynamic* interpretation, achieved either by the *consensus principle* or the *autonomous* interpretation of the Convention, or, on the other hand, the *margin of appreciation* doctrine, should be applied in any concrete case. It is very possible that the three principles should remain, at the same time, as different guidelines to be applied, depending upon the circumstances.

2. However, even when a high level of protection is achieved, either by the means of the above mentioned methods of interpretation or by means of any other, this would not imply that the minimum standard rule has been abandoned. The *dynamic* interpretation of the Convention, the conception of the Convention as a *living instrument*, should not be misconceived: certainly, the Court can increase the minimum standard; As a result, and this is one fundamental hypothesis of this work, *the standard of protection would then be a higher minimum standard, but it would still be nothing but the minimum.* The level of the standard can be increased, but the function of the Convention itself cannot be changed: lower or higher as the level of protection guaranteed by the Convention may be, the position that the Convention holds in respect

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with the domestic law of the member states should equally be that of a minimum standard.

3. Should it not be so? It would not be wise to claim this. A constitutional metaphor may be useful as to this point: constitutional techniques of interpretation do not seek the highest standard of protection that a constitution can guarantee for a fundamental right. Indeed, this would be rather a strange outcome for a constitutional law perspective. The typical effect of constitutional adjudication is precisely to establish the constitutional minimum. It is this minimum standard, the substantive core of the right, which can be interpreted dynamically by constitutional courts; but it is always for the legislator (say here, for the member states) to decide to which degree the minimum level should - or not - be increased. The Convention, when compared to domestic law, is always the minimum standard on a fundamental right. On occasion the Convention standard is, however, a high minimum, and domestic law will probably not go beyond it; sometimes, the Convention standard is a low minimum, and domestic law will probably establish a higher standard of protection. In order to comply with the state international obligations under the Convention system, however, domestic law must never go below the Convention standard.

4. The "constitutional character" of the Convention does not therefore make it incompatible with its international character as to this point: since the Convention is interpreted as a Constitution, it should remain as the minimum standard of protection. What the constitutional perspective can add to its international character is the appropriate techniques to increase the minimum.

5. The problem then comes when, breaking this constitutional logic, domestic courts of the member states apply the European standard to construe, not the domestic applicable minimum, but the domestic standard to be fully applied. Whenever domestic courts go to the Convention's standard to construe domestic standards, regardless of domestic sources, the Convention is not taken as the *norma minimale* it should be, and as a result a incorrect application of the Convention may be reached. This has been the main topic of concern of this study. This possible unexpected shortcoming of the Convention's system would in any case be the result of an *incorrect* application of the Convention by domestic courts. Nonetheless, the European Court could avoid this wrong

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application clearly stating in its decisions that it rules only on the minimum standard. Above all, this can be claimed when the minimum standard means also a low level of protection, mostly in the cases in which the *margin of appreciation* principle is applied.

6. Chapter II has reviewed the domestic status of the European Convention in the Italian and the Spanish legal order in order to analyze this possibility. Two different aspects has been reviewed: first, the formal status of the Convention as domestic applicable law; and, second, how domestic courts have effectively applied the Convention.

7. As to the formal domestic status of the Convention as an international treaty, both Spain and Italy have received the Convention into the domestic order. In both countries legal literature has addressed the same problems concerning the Convention, that is, the hierarchial position which the Convention holds and the ability of the Convention to not to be derogated by a *a posteriori* domestic statute. Certainly, the Spanish Constitution is clearer as to this respect than the Italian, but practice in Italy has become close to the Spanish constitutionally ruled situation. Although in Italy the Convention would not prevail in the face of posterior domestic law clearly conflicting with it, the Italian Parliament would unlikely pass such an statute. To date, further, Italian courts have managed to avoid conflicts between the Convention and any posterior domestic law. Moreover, there is not reported judicial decision construing the Convention as derogated by posterior domestic law in Italy.

8. The most interesting point as to the formal status of the Convention, however, has turned to be the so called *constitutional status* of the Convention in the domestic legal order. There are important differences between Italy and Spain as to this point, too. Spain has granted a constitutional status to the Convention by expressly embodying in its Constitution a provision aimed at this purpose. On the other hand, in Italy the constitutional value of the Convention is much less clear. Italian literature agrees that a constitutional status for the Convention should be desired, but the different constitutional provisions proposed as a valid path to reach this position have not succeeded before the Italian Constitutional Court.

9. Despite these formal differences, Italian and Spanish case law, particularly those of the *Tribunal Constitucional* and the *Corte Costituzionale*, have revealed some common trends in their understanding of the Convention as a source of the definition of domestic

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standard of protection of fundamental rights. It is particularly interesting the way in which both constitutional courts seem to understand the relationship between the European and the National law in the protection of fundamental rights. In theory, the Convention would not be applied by the Spanish or the Italian domestic courts which a clear *lowering effect* on the standard of protection of a fundamental right. In practice, however, some cases have revealed that domestic courts may on occasion grant a domestic construction on a constitutional provision embodying a fundamental right on the sole ground of the Convention, without feeling it necessary to apply independent domestic means of interpretation which may eventually lead to a higher standard of protection.

10. At present, there is not a peacefully established legal model under which legal practice may be guided as to this problem. Certainly, the Convention itself provides that member states may grant a higher standard of protection to the Convention's protected right in domestic law. Article 60 ECHR, in which this provision is embodied, presents, however, important problems of interpretation. Furthermore, Article 60 has been never found violated by the Convention's bodies because a state interference may have not complied with domestic standards or because domestic means of interpretation have not been applied instead of the Convention in order to overrule a restriction on a constitutional right. At the present stage of the European integration in the field of Human Rights Law, it is very improbable that the European Court will embark in such a review.

11. Among the different models for a comparative research studied in Part II of the work, the federal context provided by the United States system seems to provide a suitable framework in which the problem of a domestic application of the Convention as described above may be studied. The review made in Chapter III shows how *new federalism* has addressed in the United System the problem of a double standard of protection - state and federal - of fundamental rights.

12. The birth of this movement is clearly rooted in historical, political and legal aspects peculiar to the United States legal system. Three main points seem to have played a major role in *new federalism* development: first, the historical background of the *incorporation* process; second, the conservative federal approach to civil rights construction under the Burger Court; and, third, the traditional doctrine rejecting federal review to state courts decisions grounded on an *adequate and independent state*

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*ground*. As a result, the possibility that state constitutions grant a higher standard of protection to certain civil rights than the federal one has been both considerably developed by state courts and widely accepted by the United States Supreme Court. State right-extending decisions, however, has not completely succeeded in solving two main legal problems.

13. First, those derived from the application of the supremacy clause whenever a higher state standard of protection conflicts with another interest protected by federal law; although the answers to this problems seems to be to only tentative, they clearly points to something different than an automatic application of the supremacy clause regardless of which kind of federal law conflicts with a state constitutional right and of the degree to which the federally protected interest is infringed.

14. Secondly, the problem of covering *reactive* decisions grounded exclusively on a state court's dissent on a federal rule. Two main ways of understanding state constitutionalism try to give an answer to this problem: a *primacy* approach, by which state constitutions should be always independently construed whenever a civil rights issue is raised; and a *interstitial* approach, which broadly admits that the general background in the protection of civil rights is, after incorporation has been reached, for the federal Constitution. The *interstitial* model surely fits better with the current importance of federal law, but it does not *per se* gives, however, a solution to the anti reactive critics: on the one hand, it seems appropriate to apply state bills only to the gaps left unfilled by the federal one, but, on the other hand, this approach facilitates the application of state law instead of the federal law whenever a state court is not satisfied with the federal rule, that is, the typical *reactive* approach.

15. The key distinction as to this point should be that between the *motivation* and the *reasoning* of a judgement: to the extent to which a court expressly states the law in a judgment, the political problem of motivation becomes the legal problem of reasoning. This situates the debate inside the boundaries of legal language. State courts' decisions should not be classified according to a *reactive/pure* scheme of motivation, but according to the legal arguments stated in the decision. This is not to deny that a reaction against a narrow federal ruling may be the basis for a state decision, but only that the legal approach should be circumscribed by the legal reasoning by which the decision is reached. Moreover, motivation is extremely difficult to analyze to the extent

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to which it is not worded in the reasoning, since some right-extending state decisions seems even to anticipatory react to a contrary Supreme Court ruling. The crucial problem is then, rather than to which extent a decision is reactively motivated, whether the divergence from the federal ruling is well reasoned or not. A defective motivation, as the reactive one may be, does not necessarily imply an unprincipled reasoning. Clearly, if the only reasoning of a state court is dissatisfaction with a federal ruling, it would deserve full criticism; if its unhappiness is, however, only the starting point for an accurate legal statement, it is not for a lawyer to criticize it. A decision may therefore be *reactive*, since it decides to apply a state Bill of Rights because dissatisfaction with a federal ruling, and *principled*, provided that the construction of the state Bill of Rights is accurate.

16. The framework provided by the United States may be also useful for studying the problem of a double standard of protection of fundamental rights in a supranational context. Chapter IV has been devoted to the analysis of this problem in the European Community Law.

17. Initially, the European community system seemed to be a very useful system for such a comparative research: the member states involved are the same, the Convention itself is also involved and the problem of standards of protection of human rights has been posed, even in a somewhat dramatically way, in the community system. The community system, however, is different to the Convention system as to this concern, and therefore little insight can be taken from one to another in order to help the proposed research. Summarizing what has been discussed in Chapter IV, it may be said that the possible lower standard of protection of human rights in community law would only have a lowering effect on domestic cases if it were applied in this way by a domestic court to a case in which a community policy is not being implemented.

18. It must be taken into account that a proposed solution to the question of whether a lower or a higher community standard of protection of human rights would be preferred has obtained a negative answer in response to both possibilities of the dilemma: the community standard would be neither higher nor lower than the domestic ones. Influenced by the functionalistic approach followed by the European Court, it has been argued that a specific standard of human rights protection cannot usually be claimed to be higher or lower than any other; since the standard derives from a process

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of balancing the different legitimate interests at hand, what could be seen as a higher standard from one point of view, would be seen as a lower one from the other. However, it should be noted that, although the balancing of interests is the most extended way of adjudication of human rights, this does not mean that one specific judicial decision cannot be compared with another and as a result the former cannot be situated above or below the standard of protection of the latter. The proper way to do this, however, does not come from a comparison of the decision outcomes but, rather, of their reasoning. A fundamental right can claim to have a lower standard of protection before a specific jurisdiction whenever an existing test (or its equivalents) for a legitimate restriction has not been followed in a court's reasoning. Therefore, whenever two individual rights are balanced against each other, before a court, any of the two rights weighted in the decision can claim to have lowered its standard of protection if it has been approached in such a way that the patterns established in order to do this balancing have been disregarded.

19. Assuming, therefore, that the community standard may effectively be higher or lower than the domestic one, on occasion a European Court's decision on human rights has been qualified as a "maximum" in comparison with domestic protection. Indeed, some authors have supported the idea of a maximalistic rule: community standards should always seek the maximum standard of protection within the member states. However, the way in which the community standard of protection is construed clearly shows that, although the European Court would try not to go below domestic standards, the interest of the whole community is the only parameter and a lower result can not be completely disclaimed. Moreover, once the community standard is construed, this would not mean that domestic courts would not be able to reach in the future a higher standard of protection in a domestic matter case.

20. The reasons which supported the hypothesis of a risk of an application of the European Convention on Human Rights by domestic courts of the member states in such a way that a lowering standard effect would be achieved were twofold: the constitutional approach followed by the European Court on Human Rights in seeking the minimum standard of protection of the rights protected by the Convention (despite the fact that the minimum standard had actually sometimes reached a high level) and the relationship between the Convention and domestic law of the member states as established by Article 60 ECHR. Can both arguments now be applied, *mutatis mutandis*,

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to the European community System?

**21.** As far as the first argument is concerned, it has been discussed that the European Court of Justice, like the European Court of Human Rights, holds the position of a constitutional court, that is, they both rule on the minimum level of protection of fundamental rights which cannot be restricted. The methods and techniques of interpretation applied by the Court of Strasbourg (i.e., the *margin of appreciation* and others) have in this way their functional equivalents in Luxembourg. The doctrine of the essential substance of the right as the limit that cannot be trespassed under any circumstances, directly borrowed from the *Bundesverfassungsgericht*, clearly illustrates this point: after a decision of the European Court of Justice in which secondary community law has passed the community test, the possibility for future community legislation increasing the level of protection of a community right remains obviously open.

**22.** Nevertheless, the second argument applied to the ECHR system cannot be applied so directly to the community legal order. To be sure, a direct consequence of the above paragraph is that the minimum standard rule applies equally to the position of the Strasbourg Court in the face of the member states of the Convention and to the position of the Luxembourg Court in the face of the community legislator. However, can it be applied to the European Court in the face of the domestic law of the member states of the community? This is the point at which the differences between the Convention's system and the community system are the greatest. In the Convention's system, the Court will review the compliance of *any* law or action of the member states which reaches Strasbourg and is allegedly incompatible with any of the rights embodied in the Convention: unlike the community system, there is no secondary law under the Convention falling directly under the jurisdiction of the European Court of Human Rights, and there is no law of the member states of the Council of Europe which remains outside. On the other hand, the community Court is entitled to review compliance with human rights only of community secondary law and of the law of the member states which implement any community policy or, at least, which can be regarded as falling into *the field of community law*. In these cases, however, the community standard should be always fully applied and it does not play the role of a mere minimum common standard.

**23.** Unlike the Convention system the European community system implies two legal

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orders: under the Convention there is no separate ground for a restriction of human rights, there is not, apart from the interest of the member states, a Convention's interest whose preservation can be claimed as a task of the Strasbourg Court. Certainly, when the community standard lies below the domestic one, domestic courts would be likely to refer the question to the European Court, and the European Court would probably increase the level of the community standard. However, as well as this, the standard of the community is compulsory for domestic courts when deciding community-related cases and should be fully applied.

24. Taken into account American developments, moreover, some important remarks may be made on the manner in which the European standard is construed in Italy and Spain. In Italy, the most usual judicial approach to the Convention has as a starting point the idea that the national level of protection of fundamental rights is *higher*, when the domestic standard is, however, and despite what the domestic court rules, lower, the Convention itself is domestically construed following the domestic lower standard. This result resembles the *pre incorporation* phase in the United States, in which the federal Bill of Rights did not apply to the states. Remarkably, however, the Convention is construed in such a way in order to add the European legitimacy to the domestic rule. In Spain, on the other hand, the present situation resembles the American *incorporation* phase: domestic courts usually apply the Convention as the full applicable standard, as was the case of the federal Bill of Rights before the new *state constitutionalism* arose.

25. The risk of taking the Convention as a full standard, leaving apart a method of construction exclusively based on a possible higher domestic law, has been, however, occasionally put forward by Italian and Spanish literature. In any case, it should be noted that there is not any reported decision in which a Convention standard of protection have not been applied due to the prevalence of a *higher* domestic construction. This means that neither the *Corte Costituzionale* nor the *Tribunal Constitucional* has emitted any decision similar to those of the American State Supreme Courts seen above. A tentative conclusion at this stage of the work, therefore, may confirm that the *post incorporation* debate on state/federal (say here, national/conventional) standard has not reached yet either Italian or Spanish courts.

26. These hypothesis have been checked in the third part of the study, in which the case-law of the spanish Constitutional Court on freedom of expression has been taken

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as a case-study in which the problems posed by the double standard of protection of a fundamental rights have been analyzed.

27. The study of the *state constitutionalism* in the United States has provided a useful framework in which the application of the European Convention on Human Rights by the Spanish Constitutional Court may be analyzed. Of Course, the relationship between the Federal Bill of Rights and a State Constitution is not the same that between the Convention and the domestic Constitution of a member state. However, the legal debate on *new federalism* in the United States provides a number of concepts and of models which may be successfully applied to the main topic of study of this work.

28. Following this approach, therefore, the following aspects of the domestic application of the ECHR to constitutional adjudication in Spain have be studied: first, the extent to which the Convention is approached by the *Tribunal Constitucional* under the *primacy* or the *interstitial* model; secondly, the extent to which *right-extending* decisions have been issued by the *Tribunal Constitucional*, and whether these decisions are based in a *equivalent plus*, a *reactive* or a *not equivalent or pure independent* argument; and, thirdly, the extent to which the *Tribunal Constitucional* has applied the ECHR to uphold a restriction on fundamental rights, as a kind of *restriction-extending* decision in which the ECHR would have been applied in a contradiction with its theoretical role as a *norma mininimale*.

29. First of all, it must be stated that the *Tribunal Constitucional* has not adopted a *primacy* approach as for the application of the ECHR in *amparo* proceedings. Alleged restrictions of fundamental rights are first scrutinized as to their compatibility with the Spanish Constitution. Therefore, the ECHR is only taken as a complementary source in order to interpret the domestic constitutional provisions. This makes the *Tribunal Constitucional* approach resemble the *interstitial* model proposed by the majority of the literature in the United States for the application of state constitutions: the Spanish Constitution would take here the place of the Federal Bill of Rights, that is, alleged violations of fundamental rights would be first and above all compassed with the Constitution. Nonetheless, the Convention is very often applied by the *Tribunal Constitucional*, although this does not imply that the *interstitial* approach have been abandoned, it must be remarked that, thanks to Article 10(2) CE arguments on the

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convention and on the Court's case law are often dealt with in the Tribunal's reasoning.

30. Within this general framework, the study of the case-law of the *Tribunal Constitucional* on freedom of expression made in Part III has revealed that the Tribunal's decisions in which the ECHR is applied may be classified following the criteria studied on the United States in Chapter III. Thus, the decisions of the *Tribunal Constitucional* may be classified into two general groups: (A) first, those decisions in which the *Tribunal Constitucional* has defined the standard of protection of the freedom of expression overruling previous restrictions imposed to the right which have been held unconstitutional. In other words, decisions in which protection has been afforded to freedom of expression. (B) On the other hand, the second general group covers all the decisions in which a restriction on the freedom of expression has been upheld by the *Tribunal Constitucional*.

31. (A) The decisions of the *Tribunal Constitucional* in which the Tribunal has applied the Convention to protect the freedom of expression may be divided in three groups, depending upon the way in which the Convention or the case-law of the Court has been used by the *Tribunal Constitucional*: a first group would include those decisions in which the Tribunal has relied on the Convention in order to protect the freedom of expression; a second group includes those decisions in which a decision consistent with the Convention's standard has been reached by the *Tribunal Constitucional*, although the Tribunal seems to have applied an independent reasoning; finally, a third group of decisions includes those decisions in which the Tribunal has granted a higher protection to the right to freedom of expression, and a higher standard than that defined by the Convention has been therefore achieved.

32. (I) The first type of decisions includes all the decisions in which the ECHR or the case-law of the Court has been directly applied by the *Tribunal Constitucional* in order to grant protection to the freedom of expression. In all these decisions, the ECHR has been directly quoted or has directly influenced the *Tribunal Constitucional*. Thanks to this influence, the *Tribunal Constitucional* has overruled alleged restrictions on the freedom of expression as a fundamental right. In those decisions, the Convention has been, furthermore, directly quoted in the Tribunal's reasoning, either as the *ratio decidendi* of the judgment or as a *fortiori* argument. These decisions, therefore, resemble the *equivalent analysis* type of state courts decisions described in the American *new*

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*federalism* debate. Three examples of this kind of decisions may be quoted:

33. The doctrine of the Preferred Position: although this doctrine is peculiar to the *Tribunal Constitucional*, the *Tribunal Constitucional* has clearly rooted it in the Court's view of the freedom of expression as a *cornerstone* of a democratic regime. The *Voz de España y Unidad* case, in which the *Tribunal Constitucional* first applied the *preferred position* doctrine expressly quoted the Court's judgment in *Handyside*. Although after the first time in which the *Tribunal Constitucional* has been influenced by the Court's case-law, the tendency of the *Tribunal Constitucional* is to quote its own case law as a precedent (for instance, quoting directly *La voz de España y Unidad* instead of *Handyside*), the *preferred position* doctrine has been beyond any doubt influenced by the Court's case-law on this point.
34. The task of the Press as a *watchdog*. The Court's judgment in the *Sunday Times* case had a crucial influence in the *Diario 16 /23 F* case, and in the other cases in which the *Tribunal Constitucional* has granted a qualified status to the Press and to journalists (for instance, in *Soria Semanal* or in *Comandante Patiño*).
35. The different grounds for restricting opinions or value-judgments and description of facts: thanks to this approach, opinions are not limited by the proof of the truth. This was first rule by the *Tribunal Constitucional* in *Crespo*, which expressly quoted the Court's ruling in *Lingens*. The Tribunal's ruling, however, initially took the Court's doctrine in an incorrect way, and a *preferred position* only to the messages without opinions was grounded on the distinction between facts and value-judgments. This approach has been however eventually changed, as is discussed *infra*.
36. (II) The second group of protecting decisions includes those judgments of the *Tribunal Constitucional* in which the meaning of an element of the right to freedom of expression has been independently construed. In these decisions, the standard of protection achieved by the *Tribunal Constitucional* is consistent with the Convention's, although the Convention has not apparently influenced the reasoning of the Tribunal. One example may illustrate this point:

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37. The concept of interference in the right to freedom of expression has been construed by the Tribunal with the same effect than the Court's but from an apparently independent reasoning: the Tribunal first ruled that only an *interference in the expression* could be seen as an *interference in the right to freedom of expression* (as in *Almacen de Frutas de El Escorial*, or in *Vinader*) to admit later a broad concept of interference (in all the cases in which, although the speaker had not been prevented to express himself, a posterior punishment has been construed as an interference). This is consistent with the Court's approach (for instance in *Muller* or in *Handyside*), although the Tribunal's ruling seem to have been independently construed by its own.
38. (III) The most interesting group of protective decisions of the Tribunal on the right to freedom of expression includes those *right-extending* decisions in which the Tribunal has reached a higher standard of protection to the freedom of speech than the standard provided by the Convention. In these decisions, the *Tribunal Constitucional* has therefore decided not to apply a Convention's lower standard and has preferred a domestic means of interpretation of constitutional provisions. Following the American *new federalism* model studied in Chapter III, these decisions may be classified into two groups:
39. (III.1) *Pure independent* decisions, in which the *Tribunal Constitucional* has not feel it necessary to expressly departure from the Convention standard, but has directly construed a higher standard independently. In doing so, the tribunal has implicitly based its decision in either the following grounds:
40. (a) *A different scope* of the constitutional provisions embodying freedom of expression: the clearest case is the case of
41. Public servants and the access to the civil service: the Court has ruled that access to the public administration is not a right protected by the Convention, and has therefore state that a restriction of this right due to freedom of expression reasons does not breach Article 10 ECHR (*Glasenap, Kosiek*). The Tribunal, on the other hand, has taken into account that the Constitution also embodies the right to access to the civil service, and has therefore interpreted the right in the light of the constitutional provisions on the freedom of expression.

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42. (b) A *different wording* of the constitutional provisions in the face of the Convention. Two cases should be remarked here:
43. The right to professional secrecy of journalists, which is expressly embodied in Article 20 CE and has therefore be seen by the *Tribunal Constitucional* as a element of the right to freedom of expression (as *Carta al Director* or in *Tellado*). Such a right is not embodied in Article 10 ECHR and has not been yet construed by the Court.
44. The case of war or other public emergency, which may not be restricted under Article 55 of the Spanish Constitution to the same extent than under Article 15 the Convention (as the Tribunal ruled in the *Second Antiterrorism Act case*)
45. (c) A *different construction* of the constitutional provision on the freedom of speech, in which the *Tribunal Constitucional* was not bounded by a different wording but has applied other domestic means of interpretation to grant a higher protection to the freedom of expression than that provided by the ECHR.
46. The right to rectification: although this right is not expressly embodied either in Article 10 ECHR or in Article 20 CE, the Tribunal has construed it as an essential element of the freedom of expression and has therefore granted a constitutional status to it (for instance in *Aceite de Colza* or in *Tiempo*).
47. (III.2) The second group of *right-extending* decisions include those decisions of the *Tribunal Constitucional* which have expressly departed from the Convention standard to reach a higher standard of protection. In these decisions, the Tribunal has expressly admitted that the Convention's standard of protection falls below the domestic standard and has therefore applied the latter. They resemble the *reactive* decisions studied in the new american federalism, at least in the sense that a lower standard has been expressly abandoned. The two reported decisions of this kind are both grounded in a *different wording* argument. The concern the following aspects of the freedom of expression:
48. The concept of victim: the *Tribunal Constitucional* expressly ruled in *Friedman* that the locus standi for lodging a *recurso de amparo* on freedom of expression before the Tribunal may include persons other than those recognized as a *victim*

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before the Court or the Commission. On the other hand, however, the tribunal has expressly declared inadmissible *amparos* on freedom of expression which in practice tried a in *abstracto control* of legislation. This has been the case, above al, in broadcasting related cases (as in *Antena 3* or in *Maldonado*). On the contrary, the Court has been prepared to admit appeals in which the possible victim had not been directly affected by the state measure (as some of the applicants of the *Irish Abortion* case).

49. The rule of prescribed by law: as the Tribunal stated in *La Voz de España y Unidad*, this rule, as construed by the Court (for instance in *Sunday Times* and other cases) is clearly below the requirement of *Reserva de Ley Orgánica* embodied in Article 81 CE. As a result, the tribunal has applied this higher standard of protection and has expressly abandoned the prescribed by law rule as construed by the Court.
50. (B) The decisions of the *Tribunal Constitucional* in which the ECHR or the Court's case law has been applied to uphold a restriction on the right to freedom of expression has been also studied in Part III of the work. In theory, Article 60 ECHR should not allow the application of the ECHR to these cases: since there is not a supremacy clause involved (as in the USA), not a separate convention's interest to be protected (as in the EEC), restrictions on a fundamental right should never be grounded on the Convention. The review made in this study, however, has found a number of decisions which may be included under this heading. They may be further classified following the same framework which has been used to study the decisions in which the ECHR has been applied to protect the right to freedom of expression:
51. (I) First, *equivalent analysis* decisions in which to Convention has been applied in order to uphold a restriction on freedom of expression. In these cases, the *Tribunal Constitucional* has used the Court's case law in order to rule that an alleged restriction of the right to freedom of expression is compatible with the Constitution. Thanks to the influence of the Convention, therefore, the *Tribunal Constitucional* has added the European legitimacy to uphold an alleged restriction of a fundamental right. Three examples may be quoted:
52. Morals as a valid aim for a restriction on freedom of expression: this case is remarkable since it is the only reported case on freedom of expression in which

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the ECHR has been applied as the *only source* to uphold a domestic restriction: this was the case of *A Ver*, in which the *Tribunal Constitucional* practically relied on *Handyside* exclusively.

53. *Desacato* and other provision embodying a higher restriction to the freedom of expression in case of defamation or slander to public authorities may also be quoted as an example under this heading. Here, the Convention has been applied as a *fortiori* argument in order to rule that a restriction is compatible with the Constitution: the restriction had been first grounded on domestic arguments (in the *Spanish Castells case*), but, once the Court has ruled that these provisions are not per se incompatible with the Convention (in *Castells*), the Court's case-law has been quoted as a *fortiori* argument to uphold a restriction on the freedom of expression grounded on this kind of provisions (in *Cuevas*). Given the circumstances in which *Castells* was decided (a violation of the Convention was found by the Court, although the Spanish provision of the Criminal Code was not held incompatible with the Convention), *Cuevas* may be also seen as a somewhat *reactive* decision.
54. Broadcasting is another example of how the Convention may be applied as a *fortiori* argument to uphold a restriction on freedom of expression, in this case in order to uphold the state monopoly on television (for instance in *Antena 3* or in *Maldonado*).
55. (II) A second group of decisions upholding a restriction includes those decisions in which the *Tribunal Constitucional* has come to a similar ruling on a restriction although the reasoning has not been influenced, at least apparently, by the Court's case-law. In these decisions, the Convention has not been applied even as a source of interpretation of the Convention, and the Tribunal has seemed to prefer domestic means of interpretation. However, alleged restrictions on freedom of expression which have been analyzed by the *Tribunal Constitucional* have been upheld to the same or similar extent to which they may be deduced from the Court's case-law. Two examples may be quoted:
56. Defamation to judges: although the Tribunal has rooted in domestic means of construction the rule that the judiciary as such must be distinguished from the right to honor or reputation of judges (in *Navazo*), it has also ruled that judges'

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reputation may be protected on a separate ground (in *Palazuelos*). This is consistent with the rule of the Court in *Barfod* in which the claim that judges should be approached as politician as to this respect was dismissed by the Court.

57. Restriction to the right to receive information on the ground of national security: The Court ruled that this restriction may be compatible with the ECHR in the *Observer-Guardian* and in the second *Sunday Times*. The same conclusion was reached by the *Tribunal Constitucional* in *Gastos Reservados*, although the case was approached from Article 23 CE (the right to political participation of the members of Parliament) and not as a case of the right to receive information.
58. (III) A final group of decisions would include those judgments of the *Tribunal Constitucional* in which the Tribunal has abandoned a Convention's standard on a restriction to uphold a higher restriction on the right to freedom of expression. Contrariwise with above mentioned cases, these *restriction extending* decisions would clearly go below the minimum standard rule and, therefore, their application would directly imply a breach of the Convention. Although the Tribunal's case law on freedom of expression has been once found incompatible with the Convention (in *Castell*), the Court's ruling concerned the result of the Tribunal's balancing, and not, as has been seen, the general approach followed by the *Tribunal Constitucional*. There are, however, other cases in which a somewhat restriction-extending decision may have been taken by the tribunal:
59. The distinction between facts and value-judgments, which was initially took by the *Tribunal Constitucional* as ruled by the Court in *Lingens* as a valid argument to grant the preferred position principally to messages containing a mere description of facts. This approach, (followed, for instance, in *Vinader* or *Crespo*) is clearly inconsistent with the Court's doctrine and was eventually changed by the *Tribunal Constitucional*.
60. Broadcasting, whose standard of protection under Spanish law may be in the future below the Convention's standard due to recent developments in the Court's case-law. As has been seen, the Convention was applied as a fortiori argument by the Tribunal in order to uphold the state monopoly on television. This monopoly, which does not exist any longer in Spain, has been declared

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incompatible with the Convention by the Court in the recent *Informationsverein Lentia* decision. Provided that this ruling may be extended to other cases in which, at least at present, there exist a state monopoly on broadcasting in Spain (local television, for instance), the Spanish standard could be in the future below the Convention as to this point.

61. Finally, one more group of decisions must be reminded in these conclusions. Those decisions in which it is still soon to say whether the *Tribunal Constitucional* will be influenced by the Court or not, and how this influence would in any case take place. These group includes those cases in which there is not yet relevant case-law of the *Tribunal Constitucional* (for instance in commercial speech) although the Court's case law has already provided some guidelines (as in *Barthold* or *Markt InterVerlag*); and those cases in which, on the contrary, the Tribunal has already construed a doctrine by its own in the absence of a clear statement from the Court (this would include mainly all the cases in which the freedom of expression has been exercised in a pure private scheme or cases in which public figures, other than politicians, judge or authorities have been involved).

62. Although in a tentative way, a final conclusion emerges from this work after the review made of the different models which have dealt with the problem of a double standard of protection of fundamental rights and of how the constitutional adjudication in Spain has been influenced by the Convention: the impact of the European Convention on Human Rights in the domestic jurisdiction of the member states may not be studied taking only into account domestic decisions which expressly quotes the Convention and without a previous normative model about when and how the Convention should be applied by domestic courts. The model, which, since the Convention itself does not provide anything on the matter, is to be defined by each member state, has still to be built.

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