Constitutional Court Judgment No. 236/2007, of November 7 (Unofficial translation)

CONCLUSIONS OF LAW

1.

In this unconstitutionality appeal, the Parliament of Navarre contests twelve points of article one of the Organic Law 8/2000 of 22 December, reforming Organic Law 4/2000 of 11 January on the rights and freedoms of foreigners in Spain and their integration in society.

Prior to embarking on an analysis of the basic issues raised in this appeal we need to examine the first question proposed in the proceedings lodged by the claimant, regarding the legitimacy of lodging this appeal, a matter on which the State Attorney does not comment. The Parliament of Navarre bases that legitimacy on art. 162.1 a) EC, in art. 32 OLCC, and art. 205 of the Regulation on the Parliament of Navarre. Two arguments from our own case law in defence of that legal right are proposed. The first, according to which the Legislative Assemblies of the Autonomous Communities may lodge an appeal of unconstitutionality provided that a regulation is in place attributing to them the authority to act in a particular manner when it forms part of the content of the regulation which they intend to contest, as is the case in this matter since Organic Law 8/2000 regulates aspects relating to foreigners which affect the scope of autonomy of the Regional Community of Navarre such as teaching, housing, the police, juveniles, social and health care, in addition to the rights that the contested law affects namely those which may be exercised against all powers including autonomous regional authorities The second argument is based on the non-restrictive interpretation created in our case law regarding the specific requirement of art. 32.2 OLCC for Assemblies of the Autonomous Communities “to lodging an appeal of unconstitutionality" against state laws “which may affect their own scope of autonomy" ”.

We concur that, in the light of the interpretation of the aforementioned precepts, the legitimacy of the Parliament of Navarre to appeal the Organic Law 8/2000 cannot be denied. To this effect in JCC 48/2003 of 12 March LC1, we recall our reiterated doctrine according to which:

“Art. 162.1 a) of the Constitution entitles “associated corporate bodies of the Autonomous Communities” to lodge an appeal of unconstitutionality. This entitlement shall be defined by the Court's Organic Law article 32.2 of which materially restricts it in the case of state laws which “may affect the scope of autonomy" of the Autonomous Community. Initially, this Court interpreted the restriction in art. 32.2 OLCC in the strict sense of competence (as in CCJ 25/1981, of 14 July), although very soon —as manifested in the JCC 84/1982, of 23 December— case law tended towards rendering this criterion progressively more flexible to the point where at the present time, it may be said that the material conditions for entitling Autonomous Communities to appeal against State laws constitute a real exception. According to JCC 199/1987, of 16 December “The entitlement of Autonomous Communities to lodge an appeal of unconstitutionality is not designed to serve claims against an infringed competence, but rather to streamline the legal system and in this respect,.... it extends to all those cases in which there is a material point of connection between the state law and the sphere of autonomous competence, which in turn cannot be restrictively interpreted" (LC 1)”.

The application of this theory to these proceedings points to the unequivocal entitlement of the Parliament of Navarre to lodge an appeal of unconstitutionality against the Organic Law 8/2000, given that the exercise of Autonomous Region’s duties and tasks may be "affected” by the State law appealed in this case. This is due to the fact that there is a close link between the provisions of that Organic Law on rights and freedoms of foreigners in Spain and the matters cited in the fields of autonomous activity of the Autonomous Region of Navarre, which would presuppose a specific interest on the part of the Parliament in appealing against that Law.

To conclude, the body bringing this unconstitutionality appeal is entitled to contest twelve

points of article one of the Organic Law of the Constitutional Court 8/2000 of 22 December, reforming Organic Law 4/2000 of 11 January on the rights and freedoms of foreigners in Spain and their integration in society.

2.

Having confirmed the legal standing of the Parliament of Navarre to lodge these proceedings, we now need to examine the main issues raised in said appeal. In addition to the specific grounds of unconstitutionality mentioned in respect of each contested precept, which shall be more closely examined in the following legal points, the main appeal overall is sustained by two general arguments which should be addressed beforehand.

The first refers to the freedom granted by art. 13.1 of the Spanish Constitution (SC) to legislature in Title I to regulate the exercise of the public freedoms granted to foreigners in Spain, and the restrictions to which it is subject in establishing differences with respect to nationals. As the State Attorney indicates, this appeal questions the constitutional legitimacy of some of the precepts challenged, in that they condition the exercise of specific constitutional rights of foreigners on obtaining authorisation to stay or reside in Spain and therefore they circumscribe their exercise, confining it only to those persons whose situation in the country has been regularised. According to the appellant body, the law establishes a different treatment based on the aforementioned legal status which lacks constitutional protection. Thus, for the first time the question is raised before this Court of the possible unconstitutionality of a law which denies the exercise of specific rights, not to foreigners in general, but to those who do not possess the pertinent authorisation or residence permit for Spain. This will be a decisive factor in hearing this case, as although the Constitution does not distinguish between foreigners based on the regularity of their situation or residence in Spain, it may however be constitutional for the law to address this difference in order to configure the legal status of foreigners, provided that in doing so no constitutional precepts or rights are violated.

The second general argument on which the appeal is based, although it does not explicitly state as such, sustains the unconstitutionality of the majority of the precepts contested due to their alleged contradiction of international treaties ratified by Spain in matters of rights and freedoms, thus attributing to the latter the condition of parameter of constitutionality of Spanish laws based on the provision established in 10.2 SC, which is rejected by the State Attorney . The aforementioned arguments raise two questions which, despite their connection, should be examined separately, bearing in mind the case law theory laid down by this Court.

3.

In the first question we need to proceed on the basis of the fact that our system does not deconstitutionalise the legal system of foreigners which is initially clear from a reading of the constitutional text overall. In particular, the entitlement and exercise of fundamental rights of foreigners in Spain should be assumed from the precepts contained in Title 1 interpreted systematically. In order to determine these, firstly it is necessary to address every precept recognising rights included in that Title, given that the problem of their entitlement and exercise “depends on the affected right” (JCC 107/1984, of 23 November, LC 4). And secondly, the regulation contained in art. 13 SC, should be examined, section one of which states: “Foreigners in Spain shall enjoy shall enjoy the public freedoms guaranteed by the present Title, under the terms to be laid down by treaties and the law" while the second section establishes that: “Only Spaniards shall be entitled to the rights recognised in Article 23, except in cases which may be established by treaty or by law concerning the right of active suffrage in municipal elections, in accordance with the principle of reciprocity".

“ Art. 13 SC refers to the rights and freedoms of title 1, establishing a constitutional status for foreigners in Spain. On one hand, as we indicated in the Judgment quoted above, the expression “public freedoms” used in the precept should not be interpreted in the restrictive sense, so that foreigners in Spain shall enjoy “not only freedoms but also the rights recognised in title I of the

Constitution. Furthermore, as deduced from its wording and situation in the first chapter ("Spaniards and foreigners") of Title I, this constitutional precept refers to all foreigners, in contrast to persons with Spanish nationality, despite the fact that they may be located in Spain in a variety of legal situations. Referral to the law contained in art. 13.1 does not therefore presuppose deconstitutionalisation of the legal position of foreigners since the legislator despite having a wide margin of freedom in which to specify the "terms" under which said foreigners will enjoy rights and freedoms in Spain, is subject to restrictions deriving from the text of title I of the Constitution and especially the content of the first and second sections of art. 10SC in terms to be explained below.

In fact the legislature to which art. 13.1 SC refers does not enjoy the same freedom to regulate the entitlement and exercise of the various rights contained in Title I, since that depends on the specific right affected. As has been mentioned, a systematic interpretation of the aforementioned constitutional precept would dispel the assertion that in Spain foreigners are only entitled to the rights established in treaties and by the legislature (SJCC 107/1984 of 23 November LC 3, 99/1985 of 30 September LC2) leaving the lawmakers the power to decide which rights established in Title I correspond to them and which do not. Furthermore, this title contains rights the entitlement to which is exclusively reserved to Spaniards (those recognised in art. 23SC along with the proviso therein) with the actual Constitution prohibiting the legislature from extending these to foreigners (art. 13.2 SC)

With respect to the former, our case law has frequently reiterated that Title I contains rights which "correspond to foreigners through constitutional mandate and any treatment other than that which is equal to that accorded to Spaniards is not possible (JCC 107/1984, LC 3) since they are entitled to exercise such rights "in conditions fully comparable (to those of Spaniards)" (JCC 95/2000, of 10 April, LC 3). These rights are those which "belong to the person as such and not as citizens, or in other words, these rights are essential to ensure human dignity which, pursuant to 10.1 of our Constitution, is fundamental to Spanish political order" (SJCC 107/1984, of 23 November, LC 3; 99/1985, of 30 September, LC 2; and 130/1995, of 11 September, LC 2). We have also referred to these as rights "inherent to the dignity of human beings" (JCC 91/2000, of 30 March, LC 7). This would include the right to life, physical and moral integrity, intimacy, ideological freedom (JCC 107/1984, LC 3), but also the right to effective judicial protection (JCC 99/1985, LC 2) and the instrumental right to free legal aid (JCC 95/2003, of 22 May, LC 4), the right to freedom and security (JCC 144/1990, of 26 September, LC 5) and the right not to be discriminated against on grounds of birth, race, sex, religion or any other personal or social condition or circumstance (JCC 137/2000, of 29 May, LC 1). All have been expressly recognised by this Court as pertinent to all persons as such however this list should not be considered a closed or exhaustive one in this respect.

Application of the criterion established by this Court for determining whether or not a specific right belongs to this group presents problems in that all fundamental rights, by their very nature, are associated with human dignity. However, as will be mentioned below, the dignity of persons is " fundamental to political order and social peace." (art. 10.1 SC) requires recognition of those rights and the contents thereof, for all persons, irrespective of their situation, as they are essential to conserve said dignity rendering it at the very least invulnerable to any constitutional imperative imposed by the authorities including the law. This does not imply that the way is blocked for a range of options or political variants which are possible within the scope of the Constitution, seen as a "framework of coincidences (JCC 11/1981, of 8 April, LC 7) as permitted by different legislations in matters of foreign nationals. Furthermore, the judgment of constitutionality which is to be made in these proceedings does not consist of examining whether the constitutional framework covers other options in matters of foreign nationals differing from that adopted by the Organic Law 8/2000 of 22 December, but in determining whether or not the precepts of that Law which are subject to our assessment have exceeded the

limits imposed by the Constitution.
To this effect the degree of association with human dignity of a specific right will be a decisive factor, since the legislature has limited freedom of configuration when regulating those rights “essential to ensure human dignity”. The reason is that when legislating such rights it is not possible to modulate or mitigate their content (JCC 99/1985, of 30 September, LC 2) nor of course deny that foreign nationals should exercise them irrespective of their situation, as the rights "belong to the person as such and not as a citizen".
Given the significance of this in terms of the present appeal, we should examine these rights, since the Parliament of Navarre alleges that some of those regulated in the contested precepts derive directly from the guarantee of human dignity, which is fundamental to political order and social peace (art. 10.1 SC). At this point it is pertinent to recall the comments of previously quoted JCC 91/2000 of 30 March “projected on individual rights the regulation in art. 10.1 SC implies that, insofar as it is a "spiritual and moral right inherent to persons" (JCC 53/1985, of 11 April, LC 8) dignity should remain unaltered irrespective of the situation of persons … constituting as a result an inviolable minimum which should be ensured by all legal statutes” [JCC 120/1990, of 27 June, LC 4; also JCC 57/1994, of 28 February, LC 3 a)]. Therefore the Spanish Constitution wholly safeguards those rights and the content of those rights which “belong to a person as such and not as a citizen, or in other words, these rights are essential to ensure human dignity which, pursuant to 10.1 of our Constitution, is fundamental to Spanish political order” (SJCC 107/1984, of 2 November, LC 3; 99/1985, of 30 September, LC 2, and130/1995, of 11 September, LC 2).
In this same ruling the Court provided guidelines for identifying these rights and their content which the Constitution "universally projects" indicating that "we should proceed in each case on the basis of the abstract type of right and the interests which it basically protects, (that is, its essential content as we defined in SJCC 11/1981, of 8 April, 101/1991, of 13 May and ATC 334/1991, of 29 de October) in order to decide if and to what extent they are inherent in the dignity of the human person perceived as a subject of law, namely as a free and responsible member of a legal community meriting that title and not as a mere object of the exercise of public powers"(LC 7)
And further stipulating, the Court declared that in this process of determining such rights, special relevance is attached to “the universal declaration of human rights and other treaties and international agreements on the same issues ratified by Spain to which art. 10.2 SC refers as an interpretative criterion of fundamental rights (JCC 91/2000 30 March LC7). This decision of the constitutional assembly expresses recognition of our own concurrence with the scope of values and interests that those instruments protect, as well as our intention as a nation to be part of an international legal system which propounds the defence and protection of human rights as a fundamental basis for State organisation.
From the foregoing at this point we conclude that human dignity which is declared at the start of title I of the Constitution (art. 10.1 SC) constitutes an initial constraint on legislative freedom when regulating the rights and freedoms of foreigners in Spain in the light of art. 13 SC. The degree of connection of a specific right with dignity should be determined on the basis of its content and nature, which will in turn permit specification of the extent to which it is essential for the dignity of a person perceived as a subject of law, following in this case the Universal Declaration of Human Rights and the treaties and international agreements referred to in art. 10.2 SC.
4.
The law considered in art. 13 SC is also restricted in terms of regulating those rights which as we have stated “The Constitution directly recognises for aliens” (JCC 115/1987, of 7 July, LC 2), specifically with respect to the rights to assembly and association. This implies from the outset that the law cannot deny such rights to foreigners although it can establish "additional

conditioning factors" with respect to the exercise of those rights by foreigners, although "in all cases constitutional prescriptions shall be observed, as that principle cannot be accepted (art. 13.1 SC] allowing the law to freely configure the content of the right when this has been directly recognised by the Constitution as a right of foreigners. ... One thing is, in effect, the authorisation of different treatment for Spaniards and foreigners and another is to understand this authorisation as a possibility of legislating in this respect without taking into account constitutional mandates" (JCC 115/1987, LC 3). In such cases, as the ruling itself states, the mandate contained in the constitutional precept "constitutes a purely compulsory content of the right (of association) which is imposed on the law when regulating the exercise of that right" by foreigners. For the identification of these rights accorded ex constitutione to foreigners, terms of the precepts of Title I recognising the rights referred to in art. 13.1 SC should be particularly taken into account since these refer normally to their holders by using different expressions ("all, "all persons" "Spaniards" "no one" "citizens") or also employing impersonal formulas (" it is recognised," "it is guaranteed")

Legislature in contrast, enjoys greater freedom in regulating "rights to which foreigners are entitled to the extent and in the conditions established in Treaties and Laws" JCC 107/1984, of 23 November, LC 4), or in other words, those rights which are not directly attributed by the Constitution to foreigners but which the law may extend to non nationals "although not necessarily in identical terms to those described for Spaniards" JCC 94/1993, of 22 March, LC 3 "Art. 13.1 SC does not state in effect that foreigners are accorded the same rights as Spaniards with this precept precisely being that which "in our Constitution establishes the subjective limits defining the extension of the entitlement to fundamental rights to non nationals" [Declaration of the Constitutional Court 1/1992, of 1 July, LC 3 b)]. These are rights which foreigners shall be granted "in Spain", " estimate of the extension of the rights contained in (art. 13.1 SC]" (JCC 72/2005, of 4 April, LC 6). In regulating such rights legislature enjoys wider freedom as it is able to modulate the conditions of exercising said rights "based on the nationality of persons introducing unequal treatment between Spaniards and foreigners" although that freedom " is in no way absolute" (JCC 94/1993, of 22 March, LC 3).

Thus art. 13 SC authorises legislature to establish "restrictions and limitations" on those rights however, this possibility is not unconditional in that it shall not be able to affect those rights which are essential to ensure human dignity, which, pursuant to art. 10.1 SC is fundamental to Spanish political order", nor "additionally to the content defined for the right by the Constitution or international treaties to which Spain is party" (JCC 242/1994, of 20 July, LC 4). From our case law we deduce that this would be a legal system of rights such as the right to work (JCC 107/1984, of 23 November, LC 4), the right to health (JCC 95/2000, of 10 April, LC 3), the right to receive unemployment benefit (JCC 130/1995, of 11 September, LC 2), and also specific details of the right to residence and movement within Spain (SJCC 94/1993, of 22 March, LC 3; 242/1994,of 20 July, LC 4; 24/2000, of 31 January, LC 4).

It is important to add to the foregoing the fact that the freedom of the law is also restricted in that the conditions for exercising these rights and freedoms of foreigners in Spain established in legislature shall only be constitutionally valid if, respecting their essential content (art. 53.1 SC), they are designed to preserve other rights, property or interests which are constitutionally protected and which are suitably proportionate to the intended purpose.

The resulting conclusion is that the law is not entitled, according to art. 13.1 SC, to configure the conditions for foreigners to exercise specific rights, taking into account the diverse legal status existing among those who do not hold Spanish nationality, as the Organic Law 14/2003, of 20 November has done in respect of nationals of European Union member states (adding a new section to art. 1 of the Organic Law 4/2000) In particular as has been mentioned already, legislature may take into consideration the fact of their legal and administrative status in Spain and require foreigners to obtain authorisation for their stay or residence as a requisite for the

exercise of constitutional rights which, by their very nature, make it impossible to fulfil the requirements that the same law has established for entering and remaining in Spanish territory. This option is not constitutionally illegitimate as has been stated in several decisions of this Court. Thus in aforementioned JCC 107/1984 of 23 November we admit that " a legislature which requires administrative authorisation for residence in order to recognise the capacity to enter into a valid work contract does not oppose the Constitution". And in the JCC 242/1994 of 20 July we consider that expulsion could become "a measure restricting the rights of foreigners residing legally in Spain " (LC4). Furthermore, JCC 94/1993 of 22 March indicated that art. 19 SC recognises freedom of movement "for foreigners who are legally in Spanish territory" (LC4) citing arts. 12 and 13 of the International Covenant on Civil and Political Rights of 1966. Finally, in JCC 95/2000 of 10 April, the question was debated of whether the complainant fulfilled the condition required of foreigners by art. 12 of the Law 14/1986 of 25 April on general health in order to be granted the right to health care and treatment, namely "who have established their residence in national territory" , without discussing the constitutionality of said requirement.

This option is subject to the constitutional restrictions indicated, as non compliance with the requirements of foreigners' remaining or residing in Spain does not permit legislature to deprive them of the rights corresponding constitutionally as a result of their condition of human being, irrespective of their administrative situation. Failure to comply with those legal requirements prevents foreigners from exercising specific rights or contents thereof which, by their very nature, are incompatible with an irregular situation, however, it is not for this reason that foreigners lacking the corresponding authorisation to remain or reside Spain are deprived of any right while they continue in that situation in Spain

Therefore, in respect of the first general argument of the appeal we would state that art. 13.1 SC grants the law a remarkable freedom to regulate the rights of foreigners in Spain enabling the establishment of specific conditions for their exercise. Notwithstanding, a regulation of this type should take into account firstly, the degree of connection of certain rights with the guarantee of human dignity, according to the criteria expressed; secondly, the compulsory content of the right when it is recognised that foreigners are directly entitled to it according to the Constitution, thirdly in any case, the content defined for the right by the Constitution and international treaties. Finally, the conditions of exercise of the rights established by the Law should lead to the preservation of other rights, property or interests which are constitutionally protected, and are suitably proportionate to the final purpose.

5.

In relation to the foregoing, the second general argument on which the unconstitutionality appeal lodged by the Parliament of Navarre is based holds that the majority of legal precepts contested are non constitutional as they contradict international treaties ratified by Spain in matters of rights and freedoms which in virtue of 10.2 SC would become the canon of the constitutionality of Spanish laws. Said argument is implicit in a considerable part of the grounds for appeal since the Parliament of Navarre does not explicitly invoke art. 10.2 CE although it is plainly evident that said precept is the basis for unconstitutionality of the contested precepts, reproaching the fact that they contradict the corresponding articles of title I of our Constitution and specific articles of the Universal Declaration of Human Rights, of the International Covenant for civil and political rights, and the European Convention for the protection of fundamental human rights and freedoms. This is rejected by the State Attorney who considers that this constitutional precept only requires interpretation of fundamental rights in accordance with those international regulations.

Our case law has frequently emphasised the usefulness of international treaties ratified by Spain "in order to configure the meaning and scope of fundamental rights pursuant to the terms of art. 10.2 CE" (SJCC 38/1981, of 23 November, LC 4; 84/1989, of 10 May, LC 5). In particular we have explained the significance of "interpretation" as referred to in art. 10.2 SC indicating that "such

international treaties and agreements do not become an autonomous canon validating the rules and acts of public authorities from the perspective of fundamental rights. If this were the case, the constitutional declaration of such rights would be superfluous, with it being sufficient for the constitutional assembly to have referred to the International Declarations of human rights or in general to the treaties to which the Spanish State is a party on fundamental rights and public freedoms. In contrast , having made the aforementioned statement there can be no doubt that the validity of the provisions and acts appealed should be measured solely through reference to the constitutional precepts which acknowledge the rights and freedoms likely to be protected in this type of dispute, with the international texts and agreements of art. 10.2 being the interpretive source contributing to the best identification of the content of the rights whose protection is requested for this Constitutional Court " [JCC 64/1991, of 22 March, LC 4 a)].

Furthermore, in our case law we have stated how legislature is bound and possibly controlled by art. 10.2 SC through procedures declaring unconstitutionality. Thus we have denied the possibility of a legal precept may autonomously infringe art. 10.2 SC. JCC 36/1991 of 14 February declared that this "rule is restricted to establishing a connection between our own system of fundamental rights and freedoms on one hand and the international conventions and treaties on the same matters to which Spain is party on the other. Constitutional rank is not accorded to internationally proclaimed rights and freedoms in that they are not also confirmed by our own Constitution, however it does require that corresponding precepts be interpreted in accordance with the content of said treaties and conventions so that in practice this content becomes to a certain extent the constitutionally declared content of the rights and freedoms which the second chapter of title I of our Constitution describes. It is clear, however, that when the law or any other public authority adopts decisions which in relation to one of the fundamental rights or freedoms enshrined in the Constitution restricts or reduces the content which the aforementioned treaties and conventions attribute to it, the directly infringed constitutional precept shall be that which describes that right or freedom, without the indirect and mediated infringement of art. 10.2 CE adding anything, which by definition can never be autonomous but rather dependent on another, which is that which this Court shall be required to take into account, if appropriate" (LC 5).

It should also be pointed out that nor can a possible contradiction of treaties through laws or other regulatory provisions provide any base for a claim of unconstitutionality of a law through opposition to a fundamental right "since constitutional regulations which recognise the rights and freedoms should be interpreted " in conformance with the Universal Declaration of Human Rights and international treaties and agreements on the same matters ratified by Spain" (art. 10.2 SC). However, in a case of this kind nor would the treaty be converted per se into a measure of the constitutionality of the law examined, since said measure would continue to be integrated in the defining constitutional precept for the right or freedom, although interpreted in respect of the precise profiles of its content in conformance with the international treaty or agreement." (JCC 28/1991, of 14 February, LC 5

From the foregoing statements it could not be concluded that Spanish legislature when regulating foreigners' rights is not restricted, according to art. 10.2 SC by the international treaties ratified by Spain. As we have mentioned, art. 13 SC authorises the legislature to establish restrictions and limitations on the rights of foreigners in Spain however without affecting the "content defined for the right by… international treaties (JCC 242/1994, of 20 July, LC 4), which it is required to observe in order to configure the meaning and scope of fundamental rights. Like any other public authority, the Law is also required to interpret the corresponding constitutional precepts in accordance with the content of said treaties or conventions which thus become the "constitutionally declared content" of the rights and freedoms contained in chapter two of title I of our Constitution. The Court has thus acknowledged specifically with respect to the right to entry and permanence in Spain by

declaring that the freedom of the Law to configure those rights “is in no way absolute” (JCC 94/1993, of 22 March, LC 3), as the International Covenant of civil and political rights of 1966 “ gives rise to restrictions on the possibilities open to legislature" (SJCC 242/1994, of 20 July, LC 5; 24/2000, 31 January, LC 4

To summarise, when assessing the Law contested in these proceedings it our task to determine whether legislature has respected the limits imposed according to art. 10.2 SC by international regulations, which oblige it to interpret the rights and freedoms enshrined in our Constitution in accordance with these treaties. However, the international treaty or convention invoked does not in itself become a canon of constitutionality of the specific precepts appealed as the appealing Parliament intends. The legal regulations appealed against should be contrasted with the corresponding constitutional precepts proclaiming the rights and freedoms of foreigners in Spain, interpreted in accordance with the content of said treaties or conventions. As a result, their unconstitutionality should only be declared if those regulations with the rank of law infringe the constitutionally declared content of such rights and freedoms.

6.

The general criteria expressed in our previous points should be used to evaluate the precepts of the Organic Law 8/2000 appealed herein and to provide a response to the specific grounds of unconstitutionality alleged by the appellant against each one of these.

As reflected in the background to this case, the first precept appealed is the content of point 5 of article one, which provides section I of art. 7 of the Organic Law 4/2000) with a new wording according to which

“Foreigners shall have the right to assembly and to demonstrate pursuant to the laws regulating this right for Spaniards and shall be able to exercise those rights when they obtain authorisation or residence in Spain".

The Parliament of Navarre maintains that the precept contravenes art. 21 SC in connection with the Universal Declaration of Human Rights, the International Covenant for civil and political rights (1966) and arts. 9, 11 and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (CEDH). The reason being that since this is a right deriving from human dignity, a distinction is made between Spaniards and foreigners in exercising said right and this lacks constitutional protection, restricting its effective exercise to those who are legally in Spain.

In this respect, the State Attorney responds that the precept does not deny foreigners the enjoyment of the aforementioned rights but conditions their exercise on obtaining authorisation to stay or reside in Spain the meaning of which is commensurate with a right to legal configuration. The precepts contested indicate the incompatibility between the legal situation of foreigners unauthorised to remain or reside in Spain and the practical condition for these rights, which is residence in Spain.

Prior to undertaking an assessment of the constitutionality of the aforementioned legal precept it is appropriate to point out that, according to the literal text thereof, foreigners in Spain are entitled to the right to assembly and demonstration according to art. 21 SC which they shall enjoy “pursuant to the laws regulating the right for Spaniards” thereby establishing a comparison in respect of entitlement and exercise. The new draft given by the contested Law in section 1 of art. 7 of the Organic Law 4/2000 introduces a condition for the right to be exercised by foreigners, namely, that they should have obtained authorisation to remain or to reside in Spain. The appealed Law thus establishes a distinction between Spaniards and illegal foreigners which in the opinion of the appellant would contradict the Constitution as the right to assembly is a right deriving from human dignity in relation to which the Law cannot establish differences between Spaniards and foreigners who are in Spain illegally.

We should therefore firstly determine the connection of the right to assembly with the guarantee of human dignity. As has been stated in legal finding no. 3 citing JCC 91/2000, of 30 March that

determination should be based on the abstract type of the right and the interests it basically protects (essential content) in order to later specify the extent to which it is essential for a person's dignity, referring for this purpose to the Universal Declaration of Human Rights and other international treaties and agreements ratified by Spain on the same issues.

With respect to the former, art. 21 SC in section 1 states: "The right to peaceful assembly without arms is recognized. The exercise of this right shall not require prior authorisation" Whereas section 2 establishes that "In the case of meetings in public places and of demonstrations, prior notification shall be given to the authorities, who may ban them only when there are well-founded grounds to expect a breach of public order, involving danger to persons or property

Our JCC 284/2005, of 7 November, which includes previous statements of the Court (especially SJCC 195/2003, of 27 October, FLCJ 3 and 4; 196/2002, of 28 October, LC 4; 66/1995, of 8 May, LC 3), 21 SC) comments in the following manner :

"The right to assembly, as this Court has reiterated, is a collective manifestation of the freedom of expression exercised through a transitory association of persons, operating as a technique which is instrumental to the exchange or expression of ideas, the defence of interests or making public problems and claims, the configurative elements of which are subjective - grouping together of individuals, - temporary -transitory duration , final - legality of the purpose - and real and objective - venue (for all JCC 85/1988). We have also emphasised in numerous Judgments the fundamental significance that this law- source of the participatory democratic principle- in fact possesses in both its subjective and objective dimensions in a social and democratic State of Law such as that proclaimed in the Constitution. For many social groups this right is, in practice, one of the few means available to publicly express their ideas and claims. The link between freedom of expression and freedom to hold meetings has also been highlighted by the European Court of Human Rights in many of its judgments ; indicating in this respect that " the protection of opinions and the freedom to express them constitutes one of the objectives of freedom to hold meetings" (JECHR Stankov case, of 13 February 2003, § 85), Our subsequent judgment JCC 163/2006, of 22 May , LC 2. pronounced in similar vein.

In respect of the foregoing, as mentioned, the connection between the right of assembly and freedom of expression reiterated by the European Court of Human Rights (for all, see JECHR in the case of the Freedom and Democracy Party of 8 December 1999, § 37), is of considerable importance and the participatory nature of this right in a democratic society, as an instrument for the dissemination of ideas and claims by social groups which frequently have no other means to express themselves or address public authorities or society in general.

With respect to the latter, both the Universal Declaration of Human Rights and the main international treaties ratified by Spain appear to link the right to hold a meeting to the dignity which "should remain unaltered irrespective of the situation in which persons may find themselves" (JCC 91/2000, of 30 March, LC 7). Therefore, the first text states that "The right to peaceful assembly without arms is recognized" (art. 20.1). And the International Covenant for civil and political rights of 1966 (ICCPR) states in art. 21: " the right to peaceful assembly is recognised." The exercise of such a right may only be subject to the restrictions established in the law as required in a democratic society, in the interest of national security, public safety and public order, or in order to protect the health or public morals or the rights and freedoms of others". Finally, art. 11 of the European Convention for protection of fundamental human rights and freedoms (ECHR) establishes in its section 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. And in section 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 interests 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 does not prohibit the imposition of legitimate restriction on the exercise of these rights for members of the armed forces, of the police or of the administration of the State.

According to the State Attorney the expressions used in the international texts (any person, "it is recognised") or in the Constitution itself (the right of assembly is recognised") do not provide an interpretation which permits elucidation of whether foreigners may be excluded from the right to assembly when their presence in Spain is illegal, as the texts in question do not contain any express declaration on recognition of this right for illegal foreigners. This objection cannot be shared however. Despite the fact that our case law has placed in context the literal wording of the articles acknowledging rights in Title I of our Constitution (thus, for example in JCC 94/1993, of 22 March, LC 2), conclusions have been drawn from the expressions used in the constitutional precepts interpreting them precisely in conformance with the international texts cited by art. 10.2 SC. Therefore we have done so in relation to the right to effective judicial protection based on art. 24.1 SC ("Every person has the right") which interpreted in the light of equivalent precepts contained in international texts, as required by art. 10.2 SC has led us to state that this is a right of every person, recognising foreigners, irrespective of their legal situation (SJCC 99/1985, of 30 September, LC 2; 95/2003, of 22 May, LC 5). and in respect of the right to assembly we have stated that "Article 21.1 of the Constitution generically states that "the right to peaceful assembly without arms is recognised" without any reference to the nationality of the person exercising that right, in contrast to articles contained in Title I, where Spaniards are expressly mentioned, and similarly differing from other comparative Constitutions where this right is expressly reserved for citizens" JCC 115/1987, of 7 July, LC 2

Conversely, it cannot be assumed from expressions such as "everyone within their jurisdiction "(art. 1 ECHR) or "all individuals within its territory and subject to its jurisdiction" (art. 2 PIDCP) cannot be deduced that international texts exclude illegal foreigners from all the rights that the States undertake to ensure, and the State Attorney admits as such

The State Attorney alleges that in JCC 115/1987 of 7 July the Court accepted restrictions on the right to assembly of foreigners based on their legal situation, which is not deduced from a careful reading of that judgment. It also indicates in the first section of art. 7 of Organic Law 7/1985 of 1 July on the rights and freedoms of foreigners a previously assessed precept, was not contested by the Ombudsman in its appeal. The precept states "Foreigners may exercise the right to assembly pursuant to the terms regulating it, provided that they are legally in Spanish territory". The second paragraph of the same article which required residents to be legal and application of the corresponding authorisation to exercise the right to assembly was appealed however, as the Court specified "the problem at issue is not whether it is possible here to make this difference in treatment between foreigners and Spaniards in exercising the right, but whether the law has respected the compulsory and imperative content established in art. 21.1 of the Constitution also for foreigners" (LC2) reaching a negative conclusion.

There is no question that the precept under scrutiny makes a comparison between Spaniards and foreigners in respect of entitlement and exercise of the right to assembly, however, in the case of the latter stipulating a requirement that they should have obtained authorisation to remain or reside in Spain. This could be seen as one of the "additional conditioning factors" which as has been mentioned legislature may legitimately establish for exercise of a right which the "Constitution directly grants to foreigners". Nevertheless, the precept discussed is not restricted to imposing conditions on the right to assembly granted to foreigners in irregular situation, but it also radically prevents exercise of that right by persons in that situation in Spain.

Finally, the State Attorney alleges that it may be deduced from the restrictions established in the aforementioned treaties on the rights recognised as "public order" that there is a justification for the Law to confine the exercise of the right to assembly to those foreigners remaining or having

residence in Spain However, this argument cannot be accepted either. The right to assembly, like any other fundamental right, has its limits as it is not an absolute and unlimited right according to the Constitution JCC 36/1982, of 16 June, LC 6), and international treaties. Nevertheless those limits are imposed on the actual exercise of the right irrespective of whoever exercises it. This is the case with “public order, involving danger to persons or property” indicated in art. 21.2 SC, and which strictly refers to public safety (SJCC 36/1982, LC 6), without providing any possibility of making an extensive interpretation of that limit including the regularity of foreigners in Spain The reason for this is “the principle of freedom of which (the right to assembly) is a manifestation requires that the restrictions established therein respond to cases deriving from the Constitution and where in each case it has been indubitably proven that the scope of constitutionally established freedom has effectively been transferred” (JCC 101/1985, of 4 October, LC 3). The European Court of Human Rights has also taken the same line defending a strict interpretation of restrictions on the right to assembly established in art. 11.2 ECHR so that only convincing and imperative reasons may be employed to justify any restrictions on this freedom (JECHR in the case of Sidiropoulos, of 10 July 1998, § 40). In one specific case in which that Court admitted the restriction of the right to assembly based on the defence of public order (art. 11.2 ECHR) it rejected that “the irregular situation of the claimant was sufficient to justify the infringement of his right to assembly given... that the fact of making a peaceful protest against a legislature which is in contravention does not constitute a legitimate purpose for restricting freedom in the sense of art. 11.2 [ECHR]” (JECHR in the case of Cissé, of 9 April 2002, § 50).

To summarise, the constitutional definition of the right to assembly laid down by our case law and its link to personal dignity deriving from international texts, imposes on legislature recognition of a minimum content of that right for the person as such irrespective of that person's situation. In this regard we have already declared that the “exercise of the right to assembly and demonstration is part of those rights which, according to art. 10 of the fundamental regulation, are the basis of political order and social peace”, and therefore the “principle of freedom of which it is a manifestation requires that the restrictions established in this respect respond to cases deriving from the Constitution and that in each case it has been indubitably proven that the scope of constitutional freedom established has been transferred” (JCC 101/1985)” (JCC 59/1990, of 29 March, LC 4). Organic legislature may fix specific conditions for exercising the right to assembly of foreigners without the corresponding authorisation to remain or reside in Spain provided that part of the content thereof is safeguarded by the Constitution insofar that it pertains to all persons irrespective of their situation.

The new wording given by the contested precept to art. 7.1 of the Organic Law 4/2000 does not modulate the right of assembly by establishing conditions for its exercise but instead denies this right to foreigners who are not authorised to stay or reside in Spain. In accordance with the criteria established in recent legal findings this legal regulation infringes art. 21 SC in its content constitutionally declared by texts referred to in art. 10.2 SC. As a result art. 7.1 of the Organic Law 4/2000 of 11 January should be declared unconstitutional in the new wording given to art. 1, point 5, of Organic Law 8/2000 of 22 December with the effects detailed in legal ground 17 7.

The Parliament of Navarre contests the wording of art. 8 of the Organic Law 4/2000, given to point 6 of article one of the Law appealed herein which states:
“ All foreigners shall have the right to association pursuant to the laws regulating this right for Spaniards and shall be able to exercise those rights when they obtain authorisation or residence in Spain".

The appellant bases the unconstitutionality of the precept on the same ground as that provided for the previous precept, invoking our JCC 115/1987. The State Attorney's reply is also identical

to that made in relation to the right of assembly rejecting the invocation of the aforementioned Judgment as in appropriate to the Law appealed in these proceedings.

This circumstance would appear to merit the same argument used in the previous ground for judging this precept, beginning with an analysis of the content of the right of association and subsequently examining further its link with human dignity in order to determine whether the condition established by legislature for exercising this right, namely that foreigners must have obtained authorisation to remain or reside in Spain, is constitutionally admissible.

With regard to its content in JCC 67/1985 of 24 May, we state that the right of association, interpreted in accordance with the Universal Declaration of Human Rights and the international treaties and agreements on the same issues ratified by Spain includes both positive freedom of association and the negative right not to associate.« In effect art. 20.2 of the aforementioned universal declaration states that “no one may be compelled to belong to an association” whereas positive freedom is recognised within certain limits, by art. 22 of the Covenant on civil and political rights and by art. 11 of the Rome Convention (LC 4). Positive freedom was stated in the same ruling to “assume that the mistrust with which a liberal State regarded the right of association has been transcended” (LC 4) ensuring the “possibility of individuals to unite in order to achieve "all the purposes of human life" and to enable the group thus formed to be structured and to operate free from any state intervention " (JCC 115/1987 of”7 July LC3). Conversely, the negative freedom not to associate “is a guarantee against State dominion of social forces through the creation of coercive corporations or associations having the monopoly on a specific social activity” (JCC 67/1985 of 24 May LC 3).

More recently the Court has been emphasising that the basic content of this right is manifested in three complementary dimensions or aspects, namely freedom to create associations and membership of those already created; freedom not to associate and to cease to belong to such bodies and finally the freedom of internal organisation and operation without any public interference. Alongside this three pronged content the right of association also has, as stated in JCC 56/1995, of 6 March, a fourth dimension this time inter privates which guarantees a collection of faculties to associates considered individually as opposed to the associations to which they belong, or if appropriate, to private individuals with respect to the associations which they intend to join (JCC 104/1999 of 14 June LC4).

“Art. 22.1 of our Constitution uses the impersonal or passive form “the right of association is recognised” whereas the international texts quoted ensure to “Everyone” the right to freedom of association” (art. 20.1 of the Universal Declaration; 11 ECHR) or the “Everyone shall have the right to freedom of association with others” (art. 22.1 PIDCP) with the restrictions already cited in the previous legal ground.

JCC 115/ 1987 of 7 July invoked by both parties in these proceedings stated that "in accordance with its own terms art. 22 of the Constitution, in contrast to other compared Constitutions also directly recognises foreigners' right to association" (LC3) and therefore declared art. 8.2 of the Organic Law 7/1985 to be unconstitutional as it established an administrative intervention (the suspension of activities of associations promoted by and in the main comprising foreigners) as "totally incompatible with the guarantee of the right to association acknowledged in art. 22.4 of the Constitution also for foreigners”.

The Court reached this conclusion based on a ratio decidendi to which we have already referred however in view of its importance it is reproduced in full below: “Art. 13.1 of the Constitution recognises the possibility of legislature to establish additional terms for the foreigners’ exercise of fundamental rights-However, in order to do so in all cases constitutional prescriptions must be observed as that precept cannot be accepted by allowing legislature to freely configure the content of that right when it has directly been granted to foreigners under the terms of the Constitution and to whom the mandate contained in art. 22 .4 of the Constitution is also applicable. It is in fact one thing to authorise different treatment for Spaniards and foreigners

and another to understand this authorisation as a means of legislating in this respect without taking into account constitutional mandates" (LC 3).

As a result, although the right of association is directly granted to foreigners by the Constitution, legislature, according to art. 13.1 SC is entitled to establish “additional terms” to that exercise, however at all times respecting constitutional prescriptions which restrict its ability to freely configure their content. As we have indicated, organic legislature may establish specific conditions for exercising the right to assembly of foreigners without the corresponding authorisation to remain or reside in Spain, provided that part of the content thereof is safeguarded by the Constitution insofar that it pertains to all persons irrespective of their situation.

In this respect we have declared that the right of association is configured as "one of the main public freedoms of persons, since it is justly based on the presumption of freedom and ensures a framework of personal autonomy and therefore the exercise with full powers of self determination of the faculties comprising that specific manifestation of freedom” (JCC 244/1991, of 16 December). This prominence given to freedom of association is also an essential component of pluralist democracies, since in this day and age, without it a system would not be deemed viable, which in short, results in one of its structural elements being an ingredient of the Social State of Law configured in our Constitution, and by its very nature it rejects any “interference of public authorities” (JCC 56/1995)” (SJCC 173/1998, of 23 July, LC 8; 104/1999, of 14 June, LC 3).

Furthermore, the European Convention on Human Rights jointly recognises in art. 11 “the right to freedom of peaceful assembly and to freedom of association with others”, both of which are linked to freedom of expression, understood to be an instrument for forming a free public opinion. Similarly, the European Court of Human Rights has declared that, despite its specificity and its own sphere of application, art. 11 ECHR should be considered in the light of art. 10 ECHR, since the protection of personal opinions contained in this precept constitutes one of the objectives of freedom of assembly and association laid down in art. 11 ECHR (JECHR in the Vogt case, of 26 September1995, § 64; JECHR Ahmed case, of 2 September 1998, § 70).

The right of association is therefore linked to human dignity and to the free development of the personality in that it protects the value of sociability as an essential dimension of the person, and as such a requirement for public communication in a democratic society. Given that this is a right, the content of which is conjoined with this essential dimension, the Constitution and international treaties “project it universally” and for this reason its denial to foreigners lacking the corresponding authorisation to remain or reside in Spain is not constitutionally admissible. This does not mean that, as we have mentioned, with respect to the right to assembly, that it is a question of an absolute right, and therefore legislature may establish restrictions on its exercise by any person provided that its constitutionally declared content is duly respected.

As in the previous legal ground, the considerations discussed up to this point lead to the conclusion that the new wording given to art. art. 8 of the Organic Law 4/2000) by art. 1 point 6 of the appealed Law, in excluding any exercise of this right by foreigners who lack authorisation to remain or reside in Spain, has infringed art. 22 SC in its constitutionally declared content by texts referred to in art. 10.2 SC. As a result art. 8 of the Organic Law 4/2000 of 11 January should be declared unconstitutional in the new wording provided for art. 1, point 6, of Organic Law 8/2000 of 22 December with the effects detailed in point of law 17.

8.

The Parliament of Navarre contests point 7 of article one of the Law appealed in these proceedings, in its rewording of section 3 of art. art. 9 of the Organic Law 4/2000). The precept states:

“Foreign residents shall have the right to non compulsory education in the same conditions as Spaniards. Specifically, they shall have the right to accede to levels of education and teaching not

included in the previous section and to obtain the appropriate qualifications, in addition to access to the public system of grants and scholarships".

In the opinion of the appealing party, this new wording infringes art. 27.1 SC in relation to art. 39.4 SC, art. 28 of the Convention of the United Nations on the rights of the child, and art. 26 of the Universal Declaration of Human Rights by preventing access to non elementary education by foreigners under the age of eighteen who do not have legal residence in Spain. The right of the child to education as laid down in art. 27.1 SC would include both elementary and non elementary education (art. 1 of the Organic Law on the right to education), which should form part of the essential content of this right".

The State Attorney replies that the appeal is directed against the term "residents" although it would seem to respond to a contradiction with section 1 of the article which ensures the right to education of children under eighteen, irrespective of their legal situation. The removal of residence as a requirement for the right to non compulsory education would imply a totally indiscriminate system in respect of the legality of the situation and the place of physical residence, which would result in a discriminatory solution, to the detriment of foreigners who respect the laws, which would, in fact, only benefit those infringing them. Furthermore, international treaties refer solely to basic, primary or elementary education and not to higher education.

An examination of the contested section is required and it should be read alongside section 1 of art. 9 of the Organic Law 4/2000 which has also been newly worded by art. 1, point 7 of the appealed Law, the unconstitutionality of which has not been challenged. This precept states: "All foreigners under eighteen years have the right and the duty of education in the same conditions as Spaniards, a right which includes access to basic, free and compulsory education, and to obtain the corresponding academic qualification as a result, in addition to access to the system of grants and scholarships" Section 1 of art. 9 does not therefore require the condition of "resident" in order to exercise the right to education in the case of basic education to which all foreigners under eighteen years shall have access. Conversely, the section appealed herein does exact that requirement in the case of non compulsory education, without making any reference to age.

In accordance with current legislation on education (Organic Law 2/2006 of 3 May , on Education) basic education and compulsory education coincide, since the former, which includes compulsory primary and secondary education (art. 3.1) "is compulsory and free for all persons" (art. 4.1) whereas secondary schooling, mid level vocational training, practical arts and design training and sports education at diploma level constitute upper secondary education " (Art. 3.4). According to this legislation, basic education is provided between the ages of six and sixteen years of age, although students have the right to remain in the basic education system until the age of eighteen (art. 4.2). Within basic education the compulsory secondary education stage includes four academic courses normally pursued between the ages of twelve and sixteen years of age (art. 22.1). Having obtained the compulsory secondary education qualification, it will then be possible to go on to study in the upper secondary education system (art. 31.2) specifically to secondary academic studies, mid level vocational training, diploma courses in arts and design, sports diplomas and to access the world of work (art. 31.2).

Furthermore, the term "foreign residents" is equivalent to obtaining the "authorisation to (remain) or reside in Spain" which is indicated in the previous precepts examined. Thus it may be deduced from arts. 30 bis, 31 and 32 of Organic Law 4/2000 amended by Organic Law 8/2000, which legally define the situations of temporary and permanent residence, both of which are reserved for those who "are in Spain and who have obtained authorisation for residence".

Having clarified these points, the judgement of the appealed precept should begin by examining the content of the right to constitutionally guaranteed education, specifically in its beneficial aspects, and subsequently to ascertain whether it is constitutionally legitimate to exclude from

non compulsory education those who are not considered residents of Spain.
“Art. 27 SC states that “Everyone is entitled to education” (section 1) which shall “have as its objective the full development of the human character compatible with respect for the democratic principles of co-existence and for the basic rights and freedoms” (section 2), with public authorities being responsible for ensuring “ the right of everyone to education, through general planning of education, through general planning of education" (section 5) which when “basic is compulsory and free” (section 4).
As this Court has indicated, the close connection of all the precepts included in art. 27 SC “ enables us to speak indubitably in generic terms denoting overall, the right to education, or including the right of all to education, using as an all encompassing expression that which the aforementioned articles uses as a preliminary formula” (JCC 86/1985 of 10 July LC3).
“Art. 27 SC is significantly similar to art. 26 of the Universal Declaration of Human Rights the first section of which states: “Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.” The second section establishes that “Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace”.
The International Covenant on civil and political rights only refers to the undertaking of States to undertake “to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions” (art. 18.4). The right to education as such is contained in art. 13 of the International Covenant on economic social and cultural rights (ICDESC) which in section one states that “The States Parties to the present Covenant recognise the right of everyone to education” while the second paragraph establishes that “the States Parties to the present Covenant recognise that, with a view to achieving the full realisation of this right: a) primary education shall be compulsory and available free to all; b) secondary education in its different forms, including technical and vocational secondary education shall be made generally available and accessible to all by every appropriate means, and in particular by progressive introduction of free education; c) higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education; d) fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education; e) the development of a system of schools at all levels shall be actively pursued, and adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.”
Finally, art. 2 of the Additional Protocol of the Convention for the protection of Human Rights and fundamental freedoms of 20 March 1952 (Ratification instrument of 2 November 1990, BOE of 12 January 1991) establishes: “No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions”.
From the foregoing provisions, the unequivocal link of the right to education with the guarantee of human dignity is clear, given the undeniable significance that this acquires for the full and free development of the human character and for co-existence in society which is reinforced by teaching of democratic values and respect for human rights consistent with establishing “a democratic and advanced society”, as the preamble to the Spanish Constitution states.
In this respect when ruling on the provisions pertaining to “grants and scholarships” contained in

the aforementioned Organic Law 10/2002 we declare that " it is clear from the aforementioned organic legislation that the system of grants is an essential instrument for creating a genuine model of "Social and democratic State, subject to the rule of law" as imposed by our Constitution 1.1) determining as a result that public authorities will ensure that the freedom and equality of individuals and of the groups to which they belong shall be real and effective, (art. 9.2 SC). Similarly they also ensure human dignity and the free development of personality 10.1 CE) which provides the basis for our system of fundamental rights" (JCC 212/2005, of 21 July, LC 4).

And in respect of its content in JCC 86/1985, of 10 July, we stated that: "The right of everyone to education on which the greater part of the considerations in the appealed judgment and those which are contested today are based, thus incorporates without any doubt together with its prime content of the right to freedom, a practical dimension in virtue of which public authorities shall be required to ensure the effectiveness of that right and provide it in the basic levels of education in the compulsory and free conditions required pursuant to section 4 of art. 27 of the Constitution. In the service of that educational provision, the public authorities shall supply the planning and promotion mentioned in section 5 of that precept, as well as the mandate to provide, as mentioned in section 9, aid to teaching establishments which meet the requirements to be laid down by Law" (LC 3).

Our case law does not therefore, restrict the practical provision for that right as contained in art. 27.1 SC for basic education which should be compulsory and free (art. 27.4 SC) however that practical provision should be made effective by the public authorities ensuring "the right of everyone to education through general planning of education "(art. 27.5 SC).

The European Court of Human Rights in interpreting art. 2 of the additional protocol to the European Convention on Human Rights, has stated that the preliminary work of the Convention confirms that the signatories "do not recognise a right to education which would oblige them to organise at their own cost, or to subsidise teaching in a specific form or level". However the Court elucidates that it cannot be deduced from this that this article does not confer a "right" and that the state does not have a positive obligation to ensure in virtue of art. 1 ECHR the grant of that right " to anyone dependant on the jurisdiction of a signatory States" (JECHR case relating to certain aspects of the linguistic system in Belgium of 23 July 1968 § 3). In this same judgment the Court specifies however, that the Protocol does not oblige States to create a system of education but merely to "guarantee to those persons under the jurisdiction of the Contracting Parties the right to use in principle the means of education existing at any given moment".

As the European Court of Human Rights has declared, art. 2 of the Protocol, forms a whole as the first paragraph recognises a "fundamental right " of everyone to education on which parents ' right is based in respect of their religious and philosophical convictions as contained in the second paragraph. Despite confirming its negative nature, the Court recognises that the right to education has two practical manifestations, since as the additional Protocol prohibits the "denial of the right to education" , the signatory States guarantee anyone dependent on its jurisdiction " a right of access to teaching establishments existing at any given moment" and the "possibility of obtaining official recognition for the studies completed" (JECHR case of Kjeldsen of 7 April 1976 § 52).

From the constitutional provisions on the right to education interpreted in conformance with the Universal Declaration of Human Rights and the international treaties and agreements mentioned, it may be deduced that the constitutionally guaranteed content of that right, in its functional dimension, is not restricted to basic education but it also extends to higher levels, although these are not constitutionally required to be either compulsory or free.

Furthermore, the provisions examined and their correct interpretation indicate that the right to education ensured in art. 27.1 SC corresponds to "everyone", irrespective of whether or not they are a national or a foreigner, and including their legal situation in Spain. This conclusion is reached by interpreting the expression in art. 27.1 SC in accordance with the aforementioned

international texts, where expressions such as “everyone has" or “nobody shall be denied” the right to education. As has been said, access to teaching establishments and the right to use, in principle, the means of instruction available at a given moment, should be guaranteed, in accordance with art. 1 ECHR, “to any person depending on the jurisdiction of a signatory State”. This expression contained in art. 1 ECHR interpreted alongside art. 14 ECHR (SJECHR in the case of Ireland versus United Kingdom, of 18 January 1978, § 238; in the case of Prince Hans-Adams II of Lichtenstein, of 12 July 2001, § 46), should be understood to also include those persons who are non nationals and who are in an irregular or illegal situation.

The abolition of residence as a requirement for the right to non compulsory education should not entail, as the State Attorney has alleged, discrimination in detriment to foreigners in a regular situation, since those lacking authorisation for residence may be expelled, pursuant to legally established procedures, however while they are in Spanish territory they cannot be deprived of this right under Law.

To conclude, the content constitutionally declared by the texts referred to in art. 10.1 SC on the right to education ensured in art. 27.1 SC includes access, not only to basic education, but also to non compulsory education, of which foreigners in Spain who do not hold authorisation for residence cannot be deprived. The precept appealed prevents foreigners under eighteen years of age, without authorisation to stay or residence, from having access to upper secondary education, to which however, according to current legislation those who have obtained the compulsory secondary education qualification may have access, normally at the age of sixteen. This right to access non compulsory education of juvenile foreigners forms part of the content of the right to education, and its exercise may be subject to the requirements of merits and capacity, however exercise of that right shall not be subject to any other circumstance such as the administrative situation of the minor. Therefore, we should declare the unconstitutionality of the term “residents” of art. 9.3 of the Organic Law 4/2000 of 11 in the new wording given to art. 1, point 7 of the Organic Law 8/2000 of 22 December.

9.

The Parliament of Navarre contests point 9 of article one of the Law appealed in these proceedings which rewords art. art. 11.1 of the Organic Law 4/2000) . The precept states:

“Foreigners shall have the right to freely join a trades union or a professional organisation, in the same conditions as Spanish workers, and may exercise this right when they have obtained authorisation to stay or reside in Spain”.

The appellant claims the unconstitutionality of the precept on the grounds that it infringes the essential content of the right recognised in art. 28.1 SC and is contrary to the terms of art. 23.4 of the Universal Declaration of Human Rights, art. 22 of the Covenant on civil and political rights and by art. 11 of the European Convention on Human Rights. Exercise of the right to join a trades union would not depend on the employment situation of the holder of that right, contrary to the right to strike, and therefore it cannot be argued that only workers are able to hold that right.

The State Attorney responds that foreigners who are not authorised to stay or reside in Spain are similarly not authorised to work validly and it would be absurd to permit a person who is unauthorised to work to enjoy such rights.

It should be emphasised that the Parliament of Navarre contests the new wording given to section 1 of art. 11 of Organic Law 4/2000 on the right to join a trades union, however it does not contest section 2 in respect of the right to strike, and therefore our assessment must of necessity be confined to the contested section. In addition, the grounds for the appeal are based solely on the alleged infringement of union freedom (Art. 28.1 SC) referred to in the first paragraph of the precept (“Foreigners shall have the right to join a trade union”) but not the second which recognises the right “to join a professional organisation” and which should be part of art. 52 SC where it is not configured as a right since the constitutional precept is restricted to

referring the law to the regulation of “professional organisations”.
Having made these clarifications, the examination of this ground for unconstitutionality should begin by examining the constitutionally declared content of the right to join a union, in order to subsequently analyse whether the restriction imposed by the law, namely confining the exercise of that right to foreigners staying or residing in Spain, is constitutionally legal.
“Art. 28.1 SC states: “Everyone has the right to freely join a trade union. The law may limit the exercise of this right or make an exception to it in the case of the Armed Forces or institutes or other bodies subject to military discipline, and shall regulate the special features of its exercise by civil servants. Trade union freedom includes the right to found trade unions and to join the union of one's choice, as well as the right of the trade unions to form confederations and to found international trade union organizations, or to become members thereof. Nobody may be compelled to join a trade union."
Following the interpretative criterion according to art. 10.2 SC which we have used to assess the foregoing precepts, the terms of art. 23 of the Universal Declaration of Human Rights should be considered, according to which “Everyone has the right to form and to join trade unions for the protection of his interests and art. 22 PIDCP which states : “Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests” which is also stated in similar terms in art. 8 PIDESC declaring “The right of everyone to form trade unions and join the trade union of his choice”. Furthermore, as has been seen art. 11.1 ECHR declares the right of “Everyone” 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” whereas in the European social charter the contracting parties undertake that national law shall not be such as to impair, nor shall it be so applied as to impair, this freedom” (art. 5). Finally two ´Conventions of the International Labour Organisation (ILO) both ratified by Spain and should be mentioned with a possible interpretation according to art. 10.2 SC (as stated in JCC 191/1998, of 29 September, LC 5): Convention no. 87, on trade union freedom and protection of the right to join a union in which art. 2 guarantees here that “Workers …, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing”; and Convention no. 98 on the Application of the Principles of the Right to Organise and to Bargain Collectively article 1 of which states that “Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment”.
It could be understood, although not without difficulty, that the precept appealed herein refers solely to one of various aspects of the right enshrined in art. 28.1 of the SC the content of which has been amply defined in established constitutional case law. In line with the argument sustained by the Parliament of Navarre the disjunctive that the precept contains could give rise to the interpretation that "the right to freely join a union" can also be extended to affiliation to a professional organisation, with this legal precept restricting as a result the right to form trades unions to an individual right of affiliation and excluding from its content both the foundational aspect of the right within the associative aspect of union freedom (the right to form unions) and its significance or functional aspect (right to union activity) aspects which are also part of the essential content of that freedom, (JCC 281/2005, of 7 November, LC 3), in contrast to their additional content (for all, see JCC 241/2005, of 10 October, LC 3).
However, this restrictive interpretation of the concept of the appealed precept is not possible, as the right to union freedom has the essential content that this Court has defined, with it being appropriate for us to pronounce on its constitutionality in that the knowledge that the precept excludes foreigners lacking authorisation to remain or reside in Spain from that essential content and not simply the right of affiliation to already existing unions.
In our case law we have related entitlement to union freedom to "all” workers in their material characterisation and non formal legal characterisation and to “all” unions (art. 28.1 SC in relation

to art. 7 SC) considering in this way the subjective universal projection made on that right by the aforementioned international treaties, which notably include Convention 87 of the ILO on freedom of association and protection of the right to organise, article 2 of which recognises for all workers, without distinction and without prior authorisation the right to establish and to join organisations. As this is the case, it is not constitutionally admissible to require that foreign workers should be in a legal situation in Spain in order to exercise their rights, although it is permissible in order to validly enter into a work contract and, as a result, in order to obtain the legal, formal situation of the worker (art. 38 of the Organic Law 4/2000) and arts. 1.1, 7 c) and 9.2 of the revised text of the Statute of Workers' Rights approved by Royal Legislative Decree 1/1995 of 24 March). Obviously this does not mean that organic legislation cannot establish restrictions or exceptions to its exercise in the terms referred to in art. 28.1 SC. However, by not extending those limitations or exceptions to foreign workers, the total exclusion from the right to freedom of association of those foreigners who are in work, despite the fact that they are not authorised to remain or reside in Spain, does not fit with the recognition of the right to freedom of association contained in 28.1 SC interpreted in conformance with international regulations on this right ratified by Spain. Similarly, the subsequent restriction of the right of unions to defend and promote the interests of these workers does not sit easily with the recognition of this right. This perception, according to which the right to freedom of association would be exclusively exercised by those considered to be workers in the legal sense, that is, those "who are subject to an employment contract" (in the terms of art. 1.2 of the Organic Law on freedom of association: LOLS) does not correspond to entitlement to the fundamental right, one of the purposes for which it may be exercised being in defence of workers' interests, in order to achieve that legal formal condition. For this reason it is not absurd, as the State Attorney alleges, to recognise this specific right for foreigners who are not authorised to remain or reside in Spain who may join Spanish unions in the defence of their interests, which include regularisation of their situation, despite their irregular situation at the time. We should also mention here that organic legislation may set specific conditions for exercising the right to assembly of foreigners without the corresponding authorisation to remain or reside in Spain, provided that part of the content thereof is safeguarded by the Constitution insofar that it pertains to all persons, irrespective of their situation.

As a result of the foregoing, our reasoning would suggest the unconstitutionality of art. 11.1 of the Organic Law 4/2000 of 11 in the new wording provided for art. 1, point 9 of the Organic Law 8/2000 of 22 December as it contradicts art. 28.1 SC. As we have mentioned, the unconstitutionality of this paragraph refers exclusively to the right to free association however, not the right to join a professional organisation with effects which will be detailed in legal finding 17.

10.

The appellant contests points 12 and 13 of article one of the Law 8/2000, which provide a new wording for arts. 16.2 and 17.2 of Organic Law 4/2000, and add a new art. 18, all relating to family privacy and family reunification. As mentioned in the background to this case, the grounds for appeal are based on the blank referral made by the foregoing precepts to regulations for their subsequent development which is reputed to be contrary to the reserve of Organic Law pursuant to art. 81.1 SC, or alternatively the legal reserve of art. 53.1 since it affects the content and limitations of the right to privacy (art. 19.1 SC) and fails to comply with constitutional requirements of such remissions.

The State Attorney replies that the alleged unconstitutionality which could not be claimed on the basis of art. 16.2 as it does not contain any referral to the regulation, is based on the Law's erroneous concept of family reunification, perceiving it as an adjunct to the right to family privacy (art. 18.1 SC) which has led to the "rank" of Organic Law being attributed to arts. 16, 17 and 18 of the appealed Law (final provision one). The legal regulation on family reunification

contained in the aforementioned articles should be perceived as a mode of legal protection of the family as contained in art. 39.1 SC which is confined to establishing a mandate in respect of which there is no constitutional reserve. The precepts appealed would not invalid as such but would lack the passive force of Organic Laws. Furthermore, the appeals to the regulation which they contain would not contradict constitutional theory on the regulation's collaboration with the Law, since they are not designed to develop a fundamental right but rather to regulate the conditions required to exercise the right.

It would be appropriate in the analysis of this ground of unconstitutionality to quote in full the specific precepts of the Organic Law 8/2000 appealed herein:Point 12 of article one of the contested Law states that sections 2 and 3 of art. 16 should be worded as follows:

"Article 16. Right to family privacy

2. Foreigners resident in Spain have the right to reunite those family members determined in art. 17.

3. The spouse who has acquired residence in Spain for family reasons and his family members are united with him shall retain residence even when the matrimonial bond which gave rise to the acquisition of residence is broken.

The requisite period or previous coexistence in Spain which is to be attested in these cases shall be determined by regulatory means".

Point 13. of article one of the contested Law provides for a second paragraph to be added to art. 17 and the first paragraph of art. 17 is worded as follows, removing sections e) and f) of this article and adding two new articles numbers 18 and 19.

"Article 17. Reunification of Family members

1. The resident foreigner has the right to reunite the following family members to accompany him in Spain:

d) Ascendant family members of the resident initiating the reunification or his spouse, when they are dependant and there are reasons which would justify authorisation of their residence in Spain.

2. Regulations shall determine the conditions for exercise of the right to reunification and in particular that corresponding to those who have acquired residence through a previous reunification.

Article 18. Procedure for family reunification

1. Foreigners wishing to exercise this right should request authorisation for residence on the grounds of family reunification for family members wishing to join them. At the same time, proof should be provided attesting to adequate accommodation and sufficient means of subsistence to provide for the needs of the family once they have been reunited.

2. They shall be permitted to exercise the right of reunification with their family members in Spain when they have resided legally for one year and have been authorised to reside for at least a further year.

3. When the application for family reunification has been accepted, the competent authority shall issue a residence authorisation to family members to be reunited for a duration equal to the period of validity of the residence authorisation of the person applying for that reunification.

4. Regulations shall determine the conditions for exercise of the right to reunification by those who have acquired residence through a previous reunification".

Prior to analysing this ground for unconstitutionality we should determine the precepts effectively contested in the appeal. The State Attorney alleges that the unconstitutionality claimed in respect of the regulatory references could be claimed in respect of the new wording of arts. 17.2 and 18.4, however, not of art. 16.2 which does not contain any reference as that is found in art. 16.3 which has not been appealed. In the brief of complaint, this ground is addressed in section e) which states as follows: "The wording given to articles 16 section 2, 17 section 2 and 18 section 4 of Organic Law 4/2000 by points 12 and 13 of Organic Law 8/2000"

(page 12). And in support of this ground the following statement is made: “Articles 16, 17, and 18 of Organic Law 4/2000, in the wording given by Organic Law 8/2000 articles having the rank of Organic Law through express declaration of final provision one of the latter law cited, regulate the right to family privacy and as a result the right of foreigners to family reunification in Spain, however the conditions for exercising this right are directed through regulatory means which infringes the reserve of the organic law established in the Constitution for development of the content of fundamental rights contained therein” (page 12).

Furthermore, in the petition of the claim a declaration of unconstitutionality is declared in respect of article one of Organic Law 8/2000 in specifically "points 12 and 13 amending articles 16, section 2; 17 section 2 and 18 section 4, of Organic Law 4/2000” (page 23). As a result of its part in the order issued by Section Two of this Court, dated 22 May 2001, the appeal of unconstitutionality is admitted to proceedings “against article one, sections 5, 6, 7, 9, 12, 13, 14, 16, 20, 50, 53 and 56 of the Organic Law 8/2000, of 22 December”.

In respect of the object contested in the appeals, this Court confirmed in JCC 233/1999 of 16 December which "the petition is the ´decisive part for recognising and specifying the object of any appeal' (JCC 195/1998 LC 1) so that in principle, our examination should be confined exclusively to the provisions they contain. In an interpretation of art. 33 OLCC distanced from any formal rigour however, we have noted on reiterated occasions how the fact that a precept is not reproduced in a petition should not be an obstacle to considering that it has been appealed, if said omission may be attributed to a simple error ((SJCC 178/1989, LC 9; 214/1994, LC 3), which will occur when the allegations made in the body of the appeal clearly indicate the intention of the appeal (SJCC 214/1994, LC 3; 68/1996, LC 1; 118/1996, LC 23)” (LC 2).

Therefore, a reading of the paragraph on page 12 of the appeal, reproduced above indicates clearly that it provides arguments for basing the presumed unconstitutionality of arts. 16, 17 and 18 of Organic Law 4/2000, in its new wording: and that said arguments referring to the three articles is based on infringement of the reserve of the organic law caused by the regulatory remissions contained in the three aforementioned precepts, including that of art. 16.3 although art. 16.2 is erroneously cited. As a result the body of the appeal contains arguments to support the presumed unconstitutionality of the regulatory reference contained in art. 16.3 of Organic Law 4/2000 in the new wording provided by the appealed Law, and therefore we should consider that the Parliament of Navarre has appealed this precept, requesting that it should be declared unconstitutional.

11.

When evaluating the substance of this ground for appeal it should be emphasised that the alleged unconstitutionality of the regulatory references may only be perceived if previously it has been ascertained that the appealed precepts address the fundamental right to privacy enshrined in art. 18.1 SC which is the object of the legal reserves established in allegedly infringed arts. 81.1 and 53.1 S SC. And the reason for this is that the the precepts under appeal could only be deemed unconstitutional if they actually deferred to a subsequent regulation determining the conditions for exercising the fundamental right to family privacy (art. 18.1 SC) as the Parliament of Navarre sustains in its appeal.

As may be attested in the text transcribed, art. 16 of Organic Law 4/2000 is entitled “Right to family privacy”, and section 1 of said article which has not been amended by the appealed law, states: “Resident foreigners have the right to family life and family privacy as stipulated in this Organic Law and in accordance with the provisions of the international treaties to which Spain is a party”. “Art. 16.2 regulates the case of a spouse who has acquired residence in Spain for family reasons and that of his family members united with him, who are allowed to retain residence even when the matrimonial bond is broken, with determination of the "previous term of coexistence in Spain" to be determined through regulations. (art. 16.3) which shall be attested in these cases. The precept does not regulate or develop any aspect of family privacy nor that of

family life, since it only refers to the possibility of the spouse retaining his residence acquired through reunification, and that of his family members when the matrimonial bond no longer exists. In addition, art. 17.1 as well as new art. 18.1 regulate the so called right to family reunification, referring to the regulation for determination of the "conditions for exercising the right to reunification" (Arts 17.2 and 18.4).

This right to family reunification however, does not form part of the content of the law enshrined in art. 18 SC which regulates family intimacy as an additional dimension of personal privacy, and our case law has reflected this. We have in fact considered that the right to personal privacy referred to in art. 19 SC implies the "existence of a personal sphere preserved from the actions and knowledge of others, and which is necessary - in accordance with our cultural values -to maintain a minimum quality of human life" (JCC 231/1988, of 2 December, LC 3). And having stipulated that the right to privacy "extends not only to aspects of one's own personal life but also to specific aspects of other persons with whom one has a personal and close family link, aspects which, due to this relationship or family bond, affect the individual's own personal sphere protected by the rights contained in article 18 SC. "It is quite clear that certain events affecting parents, spouses or children, pursuant to the culture of our society, are imbued with significance for an individual and if they were inadvertently made public or disseminated directly would affects that individual's own personal sphere. Therefore, in this respect there is a right - which is uniquely personal - to constitutionally protected privacy" (JCC 231/1988)" (JCC 197/1991, of 17 October, LC 3). To summarise, the right recognised in art. 18.C attributes to the holder of that right the power to safeguard that sphere reserved by the individual for himself and his family from unsolicited publicity (JCC 134/1999, of 15 July, LC 5; JCC 115/2000, of 5 May, LC 4).

"Art. 8.1 ECHR establishes that "Everyone has the right to respect for his private and family life, his home and his correspondence". The case law of the European Court of Human Rights in contrast to that of this Court has deduced from that precept " a right to family life", which would include as one of its basic elements the enjoyment by parents and children of their mutual company JECHR in the Johansen case, 27 June 1996, § 52). Nevertheless it has not explicitly recognised an authentic right to family reunification deriving from art. 8 ECHR (SJECHR in the Abdulaziz case, of 28 May 1985, § 68; the case of Ahmut, of 28 November 1996, § 67; case of Gül, of 19 February 1996, §§ 39-43), which would only be effective in the event that family life was not possible in any other place, due to legal or real impediment (SJECHR in the case of Sen , of 21 December 2001, §§ 28-40; case of Boultif, of 2 August 2001, §§ 53-56). Furthermore, the European Court of Human Rights has admitted that in some cases art. 8.1 ECHR may act as a restriction on the potential for application of the legal grounds for expulsion of foreigners, although taking into account in turn the restrictions imposed by art. 8.1 ECHR, the circumstances of the case, and the weighting of the interests in play (among several JECHR in the Dalia case of 19 February 1988 §§ 39-45, 52-54).

Based on art. 8.1 ECHR the European legal system has also regulated the right to family reunification in Council Directive 2004/86/EC of 22 September 2003, by means of which the system for family reunification of non community nationals residing in a member State has been harmonised, although in the same Directive conditions are established for exercising that right it leaves a broad margin for regulation by each member state.

"Art. 16.3 of the Universal Declaration of Human Rights , and art. 23.1 PIDCP, which is worded identically state: "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State." However, it is not possible to deduce from these precepts an interpretive criterion of art. 18.1 SC, which would lead to the assumption that it includes a right to family reunification.

We therefore concur with the State Attorney in that our Constitution does not recognise a "right to family life" in the same terms as those employed by the case law of the European Court of

Human Rights in its interpretation of art. 8.1 ECHR, and even less so a fundamental right to family reunification, as none of these rights form part of the right to family privacy guaranteed in art. 18.1 SC. The State representative maintains that family reunification regulated in the precepts under appeal constitutes a mode of protection for the family, making effective the governing principle contained in art. 39.1 SC. However, it is not appropriate for us to declare in respect of this question, since for the purpose of our argument the decisive "fundamental rights and public freedoms" which should be regulated by Organic Law in accordance with art. 81.1 SC are exclusively those contained in the first section, chapter two, title I of the Constitution (arts. 15 a 29: SJCC 76/1983, of 5 August, LC 2; 160/1987, of 27 October LC 2).

In view of the foregoing it is clear that the contested precepts (arts. 16.2 and 17.1 of Organic Law 4/2000, in addition to new art. 18, in the wording of points 12 and 13 of article one of the Law 8/2000), since they do not regulate or develop the fundamental right to family privacy (art. 18.1 CE), are not subject to the reserve of the Organic Law (art. 81.1 SC) nor the legal reserve established for the "rights and freedoms recognised in chapter II" (art. 53.1 SC) without the need for the court to make any declaration in that respect in our ruling, given the terms in which the appeal has been lodged in these proceedings. As a result, the regulatory references contained in the appealed articles have not infringed those constitutional provisions, and therefore for this reason this ground for unconstitutionality should be dismissed.

12.

The Parliament of Navarre opposes point 14 of article one of the Law appealed in these proceedings which rewords the final paragraph of section 2 of art. 20 (previously 18), stipulating:

"The administrative procedures established in matters of foreigners shall respect at all times the guarantees contained in general legislation on administrative procedure, particularly in terms of publishing regulations, contradiction, hearing for the interested party and grounds for decisions, except for the terms of art. 27 of this Law".

The new wording given in the Organic Law 8/2000 to section 5 of art. 27 (previously 25) of Organic Law 4/2000 is appealed where it states:

"Grounds for denial of a visa should be provided in the case of residence visas for family reunification or for work contracts. If the denial is due to the fact that the applicant for the visa is included in the list of non admissible persons, pursuant to the applicable Convention of the Schengen Agreement of 14 June 1990, he shall be notified of this fact in conformance with the rules established in that Convention.

The decision shall indicate the appropriate appeals which may be lodged, the body to which they should be addressed and the term within which to lodge them".

The appellant states that the precepts transcribed permit that in some cases it is not necessary to provide grounds for refusing a visa, in particular when it is not related to family reunification or to an application for a work permit for a work contract. As a result they are deemed to be contrary to arts. 24.1 SC in relation to art. 9.3 and 106.1 SC as grounds for an administrative decision are not required, preventing jurisdictional control which presupposes a hindrance to the right to defence, as well as supporting the arbitrary nature of decisions issued by the Authorities.

According to the State Attorney it is not clear from the appealed regulation that the precept obviates the need for grounds in cases which are not indicated therein. Furthermore, the constitutional provisions invoked do not in any case require grounds for the refusal of visas in administrative decisions in that obtaining a visa is not a foreigner's regulated right but rather an instrument of the immigration policy exercised by the State in a sovereign manner in accordance with its own interests and based on international undertakings.

It is appropriate to point out that the object of the appeal is confined to the final paragraph of section 2 of the new art. 20, and to paragraph 5 of art. 27 (previously art. 25) of Organic Law

4/2000 in that the need to provide grounds for the refusal of visas is obviated except in the cases assessed in those same precepts. From a reading of these it is concluded that effectively, grounds for refusal of a visa only need to be provided in three cases (residence visas for family reunification, for the provision of work for third parties, or when the visa is denied because the applicant is included in the list of non admissible persons contained in the applicable Convention of the Schengen Agreement, however, in no other cases, in which the non provision of grounds has certainly not been imposed, as the State Attorney alleges, but rather such grounds are simply not required. The appellant's accusation of unconstitutionality is based therefore on this failure to provide grounds for the refusal of visas in administrative decisions which is deemed contrary to art. 24.1 SC in relation to art. 9.3 and 106.1 SC.

The examination of this ground for unconstitutionality should begin by recalling that the right to judicial protection contained in art. 24 SC ,as this Court has declared, constitutes one of the fundamental rights " to which a person is entitled as such rather than as a citizen" or in other words, it is one of "those which are essential to guarantee human dignity which pursuant to art. 10.1 of our Constitution constitutes the foundation of Spanish political order " (JCC 107/1984 of 23 November LC3) a conclusion which is obtained "not only through the literal wording of the aforementioned article ("all persons") but because this same conclusion is reached by interpreting it as required in art. 10.2 SC in relation to art. 10 of the Universal Declaration of Human Rights, and art. 6.1 of the Rome Convention of 4 November 1950 and art. 14.1 of the International Covenant on civil and political rights of New York of 19 December 1966 texts in all of which the equivalent right to which our Constitution accords effective judicial protection is granted to "every person" or "all persons" irrespective of their nationality" SJCC 99/1985, 30 September, LC 2; 95/2003, of 22 May, LC 4).

The preceding statement should be followed by a second which is that the right to effective judicial protection, according to reiterated case law of this Court, "always requires, obviously and without prejudice to specific requirements imposed by each of its different features or perspectives, that judgments should be motivated and based on the law, and should be neither unreasonable, arbitrary nor patently erroneous" (for all JCC 5/2002) of 14 January LC2).

The claim of unconstitutionality of the precept analysed herein is based on the aforementioned exemption from the requirement for grounds, not for a judgment but for an administrative decision refusing a visa with the exceptions mentioned. In this respect we indicated at the time that "in view of the general regulation pursuant to which the requirement to justify administrative acts is a mandate deriving from regulations which are active in the scope of what we may term ordinary legality, in certain exceptional cases, that requirement attains a constitutional dimension which makes it prosecutable through a constitutional appeal. This is the case of acts which limit or restrict the exercise of fundamental rights (SJCC 36/1982, 66/1995 or 128/1997, among others). Also in relation to administrative acts which impose sanctions" (JCC 7/1998, of 13 February, LC 6).

It should be recalled that the normative case examined herein does not properly consider the restriction of a right, since obtaining a visa is not a regulated right granted to a foreigner, as the State Attorney claims, given that the right to enter Spain is not a fundamental right to which foreigners are entitled pursuant to art. (19 SC" (JCC 75/2005, of 4 April, LC 8). In addition, these proceedings are judging the constitutionality of specific precepts of the Organic Law 8/2000, however, an administrative act is not prosecuted by means of an appeal for protection.

Therefore, our judgment needs to focus on the alleged unconstitutionality of the legal precepts contested, which have been identified above, as they are deemed to be contrary to art. 24.1 SC in relation to arts. 9.3 and 106.1 SC. Therefore the exemption from the duty to provide motivation and grounds for the refusal of visas in administrative actions established in those precepts should not be deemed contrary to 24.1 SC, since these are actions which do not impose any sanctions nor do they restrict the exercise of any fundamental right, as has been explained.

Furthermore, nor can that exemption be deemed incompatible with the prohibition of arbitrary action by public authorities (art. 9.3 SC) and with the compulsory control of administrative actions by the Courts (art. 106.1 SC) which the Law judged herein ensures " in any case when the foreigner is Spain" (art. 65.2).

The unconstitutionality of the precept could only be sustained if the contested regulation had prevented jurisdictional control of these administrative actions basing them on its optional or discretional nature as "with this basis, the scope of prohibition of the arbitrary action by public authorities declared in art. 9.3 CE is denied" (JCC 163/2002, of 16 September, LC 5). However the contested Law submits this administrative activity to the control of the Courts (art. 106.1 SC), and therefore the Authorities should be at all times in a position to explain that they have not arbitrarily exercised their discretional faculties.

As a result, we should declare that section 5 of art 27 of the Organic Law 4/2000 of 11 January should not be declared unconstitutional in the new wording provided for art. 1, point 20 of Organic Law 8/2000 nor the reference made to that precept in section 2 of new art. 20 of the Organic Law 4/2000 in the new wording given to art. 1, point 14 of the Organic Law 8/2000)

13.

Point 16 of article one of the Organic Law 8/2000 is appealed in these proceedings in its rewording of the final paragraph of section 2 of art. 22 (previously 20) of Organic Law 4/2000, where it states:

" Foreign residents who attest their lack of financial resources to take legal action shall have the right to free legal aid in equal conditions to Spaniards in the proceedings in which they are involved, irrespective of the jurisdiction in which said proceedings are heard".

The precept is deemed contrary to art. 119 SC in relation to art. 24.1 SC as well as arts. 2 and 10.1 SC to art. 10 of the Universal Declaration of Human Rights , art. 14.1 of the Covenant on civil and political rights and by art. 6.1 of the European Convention on Human Rights. The reason being that it introduces a restriction to a right to provisions and assistance with a legal configuration which is part of the essential content of the right to judicial protection (art. 24 SC) and presupposes de facto prohibition of access to jurisdiction and the right to effective judicial protection of those non resident foreigners who lack resources for taking legal action.

The State Attorney in turn, maintains that the clause in art. 1.2 of the Organic Law 4/2000 (in the new wording given by art. 1.1 Organic Law 8/2000) requires the consideration that the new art. 22.2 of the Organic Law 4/2000 leaves aside the most beneficial rules which special treaties or laws may contain in respect of legal assistance, including art. 2 of the Law 1/1996 of 10 January on free legal aid (LFLA) and therefore abrogative effectiveness of domestic or international regulations, which are more favourable in matters of free legal aid to foreigners should not be attributed to that precept. In defence of the constitutionality of the precept, the State Attorney refers to the allegations made in the unconstitutionality appeal 1555-1996, lodged by the Ombudsman against art. 2 LFLA in its phrase "who reside legally in Spain".

The ruling on that appeal in JCC 95/2003 of 22 May also applies to this ground for unconstitutionality. The precept evaluated in that Judgment (art. 2 LFLA) states as follows: "in the terms and with the scope established in this Law and in international Treaties and Conventions on this matter to which Spain is signatory, the following shall have the right to free legal aid: a) Spanish citizens, nationals of other member states of the European Union, and foreigners who reside legally in Spain when they attest to having insufficient resources for legal action".

The Ombudsman's claim was directed against the phrase "who reside legally in Spain" contained in the aforementioned precept, by considering that it excluded from that right foreigners in Spain without authorisation to stay or to reside, infringing the essential content of the right to effective judicial protection (art. 24 SC), given the relation between the right to free legal aid to those with insufficient means to litigate (art. 119 SC) and that fundamental right. The unconstitutionality of the precept was based exclusively on the fact that foreigners finding

themselves in an irregular situation in Spain and who lack financial means could not lodge a contentious-administrative appeal against administrative decisions on their alien status, and particularly those decisions ruling on their expulsion.

Therefore, JCC 95/2003 of 22 May, based on the "instrumental connection between the right to free legal aid and the right to effective judicial protection" (LC 3) and reiterating the entitlement of foreigners to effective judicial protection "irrespective of their legal situation" (LC5) concludes that the regulation appeals is indeed unconstitutional as it entails a "an infringement of the right to effective judicial protection as stipulated in art. 24.1 SC to which, as mentioned, all persons (including foreigners illegally residing in Spain)" (LC6) are entitled. Furthermore, when specifying the scope of the declaration of unconstitutionality in art. 2 LFLA the Judgment points out that: "Having perceived unconstitutionality in the requirement of legal residence, foreigners in Spain who fulfil the legally required conditions, shall be entitled to legal aid in respect of any type of proceedings for the effect of which they enjoy the requisite legitimacy" (LC8)

The application of this case law to the judgment of art. 22.2 of Organic Law 4/2000 amended by the Law contested herein, leads directly to its estimation as unconstitutional. In effect, Section 1 of art. 22 grants "foreigners in Spain who lack sufficient financial means " the right to free legal aid " in the administrative or judicial proceedings which may lead to refusal of their entry or to their deportation or expulsion from Spanish territory in all proceedings relating to asylum". In turn section 2 of art. 22 appealed herein, reserves the right to free legal aid to "foreign residents" in equal conditions to Spaniards in procedures in which they take part, irrespective of the jurisdiction hearing the case". This assumes the requirement of legal residence in order for foreigners to be granted free legal aid in respect of any kind of litigation for the effects of which they are entitled to precise legitimacy, which is in fact unconstitutional for the reasons explained.

Therefore, we should declare the unconstitutionality of section 2 of art. 22 (previously 20) of Organic Law 4/2000, in the wording given by point 16 of article one of the Organic Law 8/2000, as it is contrary to art. 24 SC.

14.

Point 50 of article one of the Law 8/2000 is contested in the new wording given to sections 2 and 8 of art. 57 (previously 53) of the Organic Law 4/2000. Section 2 of art. 57 states:

"Grounds for expulsion shall also include, prior to carrying out the corresponding formalities, the fact that the foreigner had been found guilty, either in or outside Spain, for illegal conduct penalised in Spain with a prison sentence of over a year, unless the criminal records had been cancelled"

Section 8 of art. 57 states:

"When foreigners, irrespective of whether or not they are residents, have been found guilty of conduct defined as offences in arts. 312, 318 bis, 515.6, 517 and 518 of the Criminal Code, expulsion shall take effect when the prison sentence has been completed".

Although appeal was declared against sections 2 and 8 of art. 57, the Parliament of Navarre restricts its arguments to section 2, claiming its unconstitutionality on the grounds that it contravenes the principles of re-education and social rehabilitation (art 25.2 SC); and also its infringement of art. 25.1 SC as it presupposes an infringement of the principle non bis in idem, connected to the principles of legality and classification of offences and penalties (art. 25.1SC) by establishing that the grounds for administrative sanction are the same as those of criminal sanction.

The appeal is rejected by the State Attorney who questions the disciplinary nature of the expulsion; thus in his opinion there is no infringement of the principle non bis in idem is claimed, as the facts and bases of the criminal sanction and those of expulsion, which constitute the basis for determining its existence, are completely different.

Commencing our judgment with the claim of unconstitutionality relating to the prohibition of bis

in idem contained in the legal principle of art. 25.1 SC, its examination should be based on reiterated constitutional case law, initiated with JCC2/1981 of 30 March according to which the principle non bis in idem was constitutionally rooted in art. 25.1 SC to the extent that this precept makes the legal principle constitutional in matters of penalties and sanctions and "presupposes in one of its most prominent manifestations that there should not be a duplicity of penalties –administrative and criminal– in cases in which the subject, act and substance are identical" (LC4)

We have stated that said principle constitutes a genuine fundamental right of citizens in our Law (JCC 154/1990, of 15 October, LC 3), which has also been expressly recognised in international texts addressing human rights, and in particular art 14.7 of the UN International Covenant on civil and political rights and in art. 4 of Protocol no. 7 of the European Convention for the protection of human rights and fundamental freedoms – which, although Spain is a signatory has not yet been ratified–, protecting citizens not only from a previous penalty – albeit administrative or criminal – but from further punitive prosecution for the same acts when the initial punitive procedure has issued a final judgment, irrespective of the result thereof –acquittal or sentence" (JCC 2/2003 of 16 January LC 2 and 8).

According to the Parliament of Navarre, the contested precept infringes the material or substantive dimension of the principle (SJCC 154/1990, of 15 October, LC 3; 177/1999, of 11 October, LC 3) Therefore constitutional prohibition of en bis idem is applicable, that is, the subject, act and substance are identical as we have stated in our case law (for all see, JCC 2/2003, of 16 January, LC 5).

It is certainly true that this principle "has been applied mainly to determine a prohibition on duplicity of administrative and criminal penalties in respect of the same cases (JCC 154/1990, of 15 October, LC 3) a situation which is, however, questioned by the State Attorney as it places in doubt the fact of whether the expulsion established in art. 57.2 of Organic Law 4/2000 in the new wording given by the Law 8/2000, effectively constitutes an administrative sanction. This objection does not require an in depth analysis here as we should point out that, in any case, the alleged infringement of the principle non bis in idem should be rejected as there is a lack of identity between the grounds for the criminal sanction and the expulsion.

Aside from the nature of the expulsion established in art. 57.2 of Organic Law 4/2000, the determining factor for rejection of the appeal against this precept is the lack of identity between the grounds for that measure and the grounds for the criminal sanction established therein, which, as has been mentioned, constitutes the case for application of the constitutional prohibition on bis in idem The precept establishes a governmental expulsion, having completed the corresponding formalities of the case in question with the "grounds for expulsion" being that the foreigner has been found guilty either in outside Spain, for misconduct which in Spain merits an offence punishable with more than one year's prison . Therefore, it is clear that the two measures do not apply to the same basis as they pursue the protection of different legal interests. In this respect we have declared that the requirement of a different ground requires "that each of the punishments meted out should be principally designed to protect diverse legal interests, each in turn meriting protection in the sense of legislation or regulations (prior to sufficient legal cover) and classified in the corresponding legal regulation (respecting the principle of legal reserve). Or, expressed in the terms of JCT 234/1991 of 10 September it is not enough "simply with the duality of regulations to consider imposing a double penalty on a person for the same acts, since if this were the case the principle of non bis in idem would only have the scope that the legislature (or if appropriate the Government in its role as regulatory power) wished to give it. For this dual nature of sanctions to be constitutionally admissible it is necessary moreover, for the regulations imposing it to be capable of justifying why its consider the same acts from the perspective of a legally protected interest which is not the same as that

which the first sanction intends to safeguard, or, if wished, from the perspective of a different legal relation between penalising body and the penalised party" (LC2)" (JCC 188/2005, of 4 July, LC 5). In the precept appealed herein, the sentence and expulsion are designed to protect various legal interests, since, as we have indicated, the sentence is imposed within the context of the State's criminal policy, whereas expulsion from national territory has been decided within the framework of the policy on foreigners, which are two areas addressing markedly different public interests (ACC 331/1997 of 3 October , LC6). That is, without further deliberation, we may conclude that grounds for the punishment are based on protection of legal interests though preventive effects associated with their problematic nature. Conversely, the expulsion measure conforms to the actual objectives of the policy on foreigners which, in any case are related to the control of migratory flow with a view to achieving harmonious integration and co-existence in State territory. In effect, the expulsion considered in the appealed precept consists of a measure which has been legitimately decided by the Spanish State within the context of its policy on foreigners, which includes establishing the requirements and conditions for foreigners to enter and take up residence in Spain which is not one of the fundamental rights to which they are entitled, according to art. 19 SC" (JCC 72/2005, of 4 April, LC 8). Thus, the same Organic Law 4/2000 establishes the requirements for entry to Spanish territory (art. 25) as well as the grounds for prohibition of that entry which are those "legally established or in virtue of international conventions to which Spain is signatory" (art. 26.1, worded according to Organic Law 8/2000) In this respect it is worth recalling European regulations on the status of nationals of third countries who are long time residents (Council Directive 2003/109/CE, of 25 November 2003), 6). In addition European regulations on mutual recognition of decisions on the expulsion of third country nationals (Council Directive 2001/40/EC of 28 May 2001) includes expulsion based on serious and present threat to public order or national security and safety taken in the case of "conviction of a third party national by the issuing Member State for an offence punishable by a penalty involving deprivation of liberty of at least one year" (art. 3). It is therefore lawful for the Law on Foreign Persons to subordinate the law on residence in Spain to compliance with particular conditions such as that of not having committed offences of a specific degree of seriousness. This conclusion is corroborated by case law of the European Court of Human Rights which, without failing to recall that European states should respect the human rights established in the Rome Convention, should at the same time emphasise the broad powers accorded to public authorities to control the entry, residence and expulsion of foreigners in their territory ((SSTEDH in the case of Abdulaziz, 28 May 1985; case of Berrehab, 21 June 1988; case of Moustaquim, 18 February 1991, and that of Ahmut, 28 November 1996: ATC 331/1997 of 3 October LC4) .

The foregoing arguments point to the rejection of the alleged unconstitutionality of art. 57.2 of Organic Law 4/2000 in the new wording provided by art. 1 point 50 of the Law 8/2000 in that the provision in question does not constitute an infringement of the principle non bis in idem contained in art. 25.1 SC.

As we have mentioned, the Parliament of Navarre itself refutes the alleged violation of the principles of re-education and social rehabilitation of the legal precept analysed which should guide custodial sentences and security measures (art. 25.2 SC).

This ground for unconstitutionality should be rejected as its invocation in respect of the legal precept appealed herein is clearly inappropriate. The reason being not only because the mandate contained in art. 25.2 SC refers to punishments entailing imprisonment and measures assimilated by law (JCC 19/1988 of 16February LC9) which under no circumstances would include expulsion of the foreigner, if not because that constitutional mandate is aimed at penitential legislature and the Authorities created thereby in order to govern criminal and penitential policy (SJCC 28/1988 of 23 February LC 2; 150/1991 of 4 July, LC 4 b) but not at the Law establishing administrative measures in the context of policy on foreigners, as we have

mentioned.
15.
Point 53 of article one of the Law 8/200 is contested in respect of the following wording given to art. 60 (previously 56) of Organic Law 4/2000 :
“Article 60 Deportation
1.
Foreigners refused entry at the country border shall be deported to their point of origin as soon as is feasibly possible. The governing authority ordering the deportation shall approach the examining judge if the deportation is delayed beyond seventy two hours, in order to determine the place where said persons shall be interned until the time of their deportation.
2. The places used for detention of foreigners shall not be prisons and shall be provided with social, legal cultural and health services. Interned foreigners shall only be deprived of the right to movement.
3. During his detention the foreigner shall be at all times at the disposal of the judicial authority who authorised his detention, and the governing authority shall be required to inform the court of any circumstances relating to the status of the foreign detainees.
4. The Ministry of Foreign Affairs and the Embassy or Consulate of his country shall be notified of the detention of a foreigner for the purposes of his deportation to his country”.
From the content of the claim it has been assumed that the Parliament of Navarre contests only section 1 of the article, on the assumption that it infringes art. 17.1 and 2 SC according to the interpretation of the Constitutional Court (JCC 115/1987 of 7 July) as it does not guarantee that beyond the seventy two hour period a court should decide on whether or not to maintain the restriction on freedom, as from the wording of the text it would appear that the Judge does not have the possibility of deciding anything other than internment.
For the State Attorney the grounds contained in JCC 115/1987 would precisely support the constitutionality of the precept since it establishes that it is the court which decides on the personal situation of the foreigner requiring deportation and which determines the place of his internment.
The legal theory behind our JCC 115/1987 of 7 July invoked by the parties in the proceedings directly leads to a dismissal of the grounds of unconstitutionality alleged by the appellant based on an interpretation of section 1 of art. 60 of Organic Law 4/2003 which we cannot condone. In accordance with that interpretation the precept would prevent the Judge from deciding the status of foreigners requiring deportation to their point of origin when the governing authority which ordered the deportation had recourse to the court, in the event that the deportation was delayed beyond seventy two hours. This is due to the fact that the judgment should be confined to determining "the place where they should be interned until the time of their deportation" according to the wording of the precept, thus restricting the scope of that judicial intervention contrary to the terms stipulated in 17.1 and 2 SC
However, this contentious provision unquestionably permits another interpretation in accordance with the Constitution, and as reiterated JCC 115/1987 states, quoting the previous JCC 93/1984, of 16 October, “it only remains to declare the repeal of those precepts whose incompatibility with the Constitution "is indisputable since it is impossible to implement that interpretation” (LC 1) . Therefore, in that Judgment resolving the appeal of unconstitutionality against art 25 of Organic Law 7/1985, of 1 July, we ruled out the unconstitutionality of section 2 of the article in question, which permits internment of foreigners, once the governing authority has informed the examining judge, drawing our interpretation from the legal system in force at the time in which we concluded that the “contested provision respects and is required to respect the block of judicial competence existing in matters of individual freedom, including the right of habeas corpus of art. 17.4 of the Constitution, in that it refers both to the prior governmental phase within seventy two hours, and also to the extension of detention if necessary, beyond the

period of seventy two hours in virtue of a court judgment " (LC1) This statement was made within a context in which it was important to make clear that the "wherewithal for deciding on loss of freedom is the court's prerogative, without prejudice to the administrative nature of the expulsion decision and the enforcement thereof". Therefore the strict subjection of the governing authority to the control of the court was underlined, a fact which did not derive in a strictly clear manner from the literal nature of the legal text, as we recalled in JCC 303/2005, of 24 November (LC 3).

Just as then, we must now declare that "the intention of the law and, naturally, the Constitution mandate, is that, beyond a period of seventy two hours, it is the task of the courts to decide on whether or not freedom should continue to be restricted (JCC 115/1987, LC 1). And as a result the expression "in order to determine the place where they should be detained until the moment of deportation" contained in the contested precept, should be understood as equivalent to requesting or petitioning the judge for authorisation to detain the foreigner awaiting deportation beyond the term of seventy two hours, with the court responsible for freely adopting such a decision.

Consequently, since this is an interpretation aligned to the Constitution, section 1 of art. 60 of the Organic Law 4/2000 in the wording given in point 53 of article one of the Organic Law 8/2000 is not unconstitutional.

16.

The final appeal is directed against point 56 of article one of the Organic Law 8/2000, adding art. 63 of Organic Law 4/2000, in which it regulates the "Preferred procedure " for processing expulsion orders in specific cases established in section 1 of the precept, namely those of points a) and b) of section 1 art. 534 as well as points a), d) and f) of art. 53.

Section 2 of art. 63 establishes:

"When the prospect of deciding expulsion is raised as a result of investigations, the justified proposal shall be submitted to the interested party in writing with a view to his responding with any pertinent allegations within a term of forty eight hours. In cases where the foreigner has been detained in preventive custody he shall be entitled to legal assistance with legal aid, if appropriate, and to be assisted by an interpreter, all of which shall be granted free of charge should the subject lack sufficient financial means."

The Parliament of Navarre considers that the precept is unconstitutional, in that the term of forty eight hours granted to the interested party to formulate allegations in his defence, following initiation of disciplinary proceedings, infringes art. 24 of SC in respect of art. 6 ECHR since it renders that person defenceless, as may be deduced from the case law of the European Court of Human Rights cited in support of this contention.

The State Attorney replies that the appeal does not question the grounds for expulsion justifying the preferential proceedings, but rather the brevity of the term as this causes the state of defencelessness. Such objections however, would be unjustified as legislature has instituted a fast track administrative procedure for expulsion for easily resolved cases or for those which are particularly serious, however the law has also provided sufficient procedures and a right to a motivated decision, thus observing the essential guarantees of any administrative procedure without restricting the forms of control and judicial protection contained in the legal system and therefore, art. 24SC is not infringed in this case.

Any examination of this ground for unconstitutionality should be confined to the alleged infringement of art. 24 Sc based on the defencelessness caused by the brevity of the term within which to reply with allegations, as established in the contested provision. This regulates a preferential expulsion procedure for foreigners in specific cases contained in article 63.1 of the Law, none of which are questioned by the appellant, as the State Attorney points out. In any case, the analysis of these cases justifies the speedy nature of the process in that they are cases which are easily resolved or either particularly serious, namely participation in activities contrary

to the external security of the State (art. 54.1 a) activities promoting clandestine immigration (art. 54.1 b) being in an irregular situation in Spanish territory due to failure to obtain, or having allowed to expire, the pertinent authorisations having failed to apply for their renewal (art. 53. a) failure to comply with measures imposed for reasons of public security and safety (art. 53. d) participation in activities contrary to public order of a serious nature (art. 53) or a very serious nature (art. 54) for which the Law has established specific disciplinary measures (art. 55) or, in their place expulsion from Spanish territory having implemented the appropriate administrative procedure (art 57). In the aforementioned cases, the expulsion case shall be given "preferential" treatment and the measure may be decided by submitting the written justified proposal to the interested party so that he may make any allegations he deems appropriate within a term of forty eight hours.

The manner in which these procedures are regulated cannot be alleged to be contrary to art. 324 SC. It is true that it is a disciplinary administrative procedure, since in such cases expulsion is "the consequence of a conduct classified as administrative offence" (JCC 116/1993, of 29 March, LC 3), and therefore, the essential principles contained in art 24 SC are applicable "insofar as is necessary to conserve the essential values on which the precept is based, and the legal security guaranteed according to art. 9 CE" (from the JCC 18/1981, of 8 June, LC 2), including that which prohibits any situation of defencelessness [SJCC 7/1998, of 13 January, LC 6; 14/1999, of 22 February, LC 3 a)].

The alleged defencelessness that the precept would generate is not as such, as we have repeatedly stated that the brevity of the term does not imply per se infringement of the right to effective judicial protection if its purpose is to accelerate the process, since the fact that the law allows for reducing these terms cannot be deemed constitutionally objectionable when that decision responds to a reasonable and necessary purpose, in accordance with the principles which should govern the corresponding procedure (SJCC 14/1992, of 10 February, LC 8; 335/1994, of 19 December, LC 3; 130/1998, of 16 June, LC 5; 85/2003, of 8 May LC 11). Such is the case in the circumstances established in art. 63.1 of Organic Law 4/2000, as has been argued, with the result that the term established in art. 63.2 cannot be deemed contrary to art. 24 SC.

Furthermore, as the State Attorney points out, foreigners subjected to this preferential expulsion procedure are provided with essential guarantees of the administrative proceedings, such as the right to a hearing and a right to grounds for the judgment as well as judicial control of the decision as guaranteed under the same Organic Law, in that it stipulates that "disciplinary administrative decisions may be appealed pursuant to the terms of the law"(art. 65, drafted in conformance with Organic Law 8/2000).

As a result, we must dismiss this ground of unconstitutionality and declare that point 56 of article one of Organic Law 8/2000, which is added to art. 63 of the Organic Law 4/2000, does not contravene art.24 SC.

17.

This Judgment cannot be concluded without detailing the content and extent of our ruling. The unconstitutionality of the precepts which have thus been considered following their assessment in the corresponding legal point requires mention in this ruling. However, as we stated in JCC 45/1989, of 20 February (LC 11), it is not always necessary to make a connection between unconstitutionality and invalidity; as occurs when "the reason for the unconstitutionality of the precept resides not in any textual determination thereof, but rather in its omission" (similarly SJCC 222/1992, of 11 December, LC 7; 96/1996, of 30 May, LC 22; 235/1999, of 20 December, LC 13; 138/2005, of 26 May, LC 6).

In the present case the articles of the Organic Law 8/2000 ensuring the rights of assembly, association and the right to join unions granted to foreigners possessing authorisation to remain or reside in Spain should not be declared invalid because that would lead to a legal vacuum

which would not be in accordance with the Constitution, as this would entail the refusal of such rights to all foreigners in Spain, irrespective of their situation. Nor should the invalidity solely be declared of the phrase “and who shall be able to exercise when they have obtained authorisation to remain or reside in Spain” which is cited in each of those articles, as this would entail a clear modification of the law’s intention since then all foreigners would be placed on the same level, irrespective of their administrative situation, in the exercise of the aforementioned rights. As we have argued previously, it is not the task of this Court to decide on a specific option in matters of foreign persons, as its declaration should be confined in any case to stating whether or not the subject at issue conforms to the terms of our Constitution. Therefore the question of unconstitutionality raised requires that it should be the law, within the context of the freedom to configure regulations (JCC 96/1996, of 30 May LC 23), deriving from a constitutional perspective, and in the final instance from its specific democratic freedom (JCC 55/1996, 28 March, LC 6), which should establish within a reasonable time frame the conditions for exercising the rights of assembly, association and unions by foreigners who lack the corresponding authorisation to remain or reside in Spain. And this should be without prejudice to any possible constitutional control of those conditions which corresponds to this Constitutional Court.

The scope of the ruling differs with regard to the precepts of Organic Law 8/2000 on the right to non compulsory education and the right to free legal aid for foreigners, the unconstitutionality of which should entail the invalidity of the term "residents " since, as has been stated in the corresponding legal conclusions, such rights are constitutionally recognised equally for all foreigners irrespective of their administrative situation.

RULING

In the light of the foregoing, AND WITH THE AUTHORITY CONFERRED UPON THE CONSTITUTIONAL COURT BY THE CONSTITUTION OF THE SPANISH NATION,

The Court hereby rules

That the appeal of unconstitutionality number 1707-2001, lodged by the Parliament of Navarre against Organic Law 8/2000, of 22 December, reforming Organic Law4/2000, of 11 January on the rights and freedoms of foreigners in Spain and their social integration is partially accepted and as a result:

1º

Arts. 7.1, 8 and 11.1 (exclusively in respect of the right to freely organise) of the Organic Law 4/2000, of 11 January is declared to be unconstitutional, in the wording given by Organic Law 8/2000 of 22 December.

2º

The inclusion of the term “residents” in arts. 9.3 and 22.2 of the Organic Law 4/2000, of 11 January in the wording given by Organic Law 8/2000 of 22 December shall be declared unconstitutional and void.

3º

And declares that art. 60.1 of Organic Law 4/2000, of 11 January, in the wording given by Organic Law 8/2000 of 22 December is not unconstitutional interpreted in the terms expressed in conclusion of law 15 of this Judgment.

4º

The appeal is dismissed in all other aspects.

This Judgment shall be published in the Official State Gazette.

Given in Madrid, on 7 of November two thousand and seven.