The Rights to a Fair Trial and to Examine Witnesses Under the Spanish Constitution and the European Convention on Human Rights

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I. Introduction

The proper role of federal authority in the protection of fundamental rights and liberties has been a focus of debate in this country since its inception.[1] That debate intensified in the wake of the Civil War, when passage of the Fourteenth Amendment to the United States Constitution bestowed upon citizens constitutional protections against the power of state and local governments.[2] The manner and

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In 1987, during his first Fulbright fellowship, the author had the honor of meeting with Francisco Tomas y Valiente. Don Tomas y Valiente was one of the original members of the Spanish Constitutional Tribunal and its president during the *Barberà* decision in 1991. Upon finishing his term on the court in 1992, he returned to his former life as a professor of law. On February 14, 1996, he was assassinated in his office at the University Autonoma of Madrid by an ETA gunman. The author dedicates this article to the memory of Don Tomas y Valiente.

1. For a recent description of the controversy surrounding the enactment of the Bill of Rights, as well as the failed effort of James Madison to include within those initial amendments a constitutional prohibition on interference by the states with the rights of conscience, freedom of the press, and the right to trial by jury, see JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 288-338 (1996).

2. For recent Supreme Court opinions revisiting aspects of that debate, see *City of Boerne v. Flores*, 521 U.S. 507 (1997) (discussing legislative conflicts accompanying passage

the degree to which our Federal Supreme Court, under the aegis of constitutional interpretation, can and should nationalize legal norms and mandate their application by all levels of government remain issues as controversial today as anytime during the past two centuries.[3]

Questions concerning the enforcement of constitutional rights pit two competing interests: the nation's effort to ensure a threshold of liberty and fair treatment to all of its citizens wherever they may reside, and the interest of those same citizens in state and municipal institutions that tailor substantive rules or procedures to localized needs and desires, rather than to the mandate of a distant centralized power. Conflict over the proper balance to strike between these competing values reflects continued societal recognition of the importance of both.

If the relationship between federal judicial power and local authority is problematic in our union of states, it is all the more so in a confederation of nations, such as the European Community.[4] There, the effort to interpret and apply the legal norms of a charter of rights to which all constituent nations subscribe as a condition of community membership must traverse even more profound barriers, including diverse languages, national histories, socio-economic structures, and political and legal cultures.

It is no easy task to craft definitions of liberty of expression, a fair trial, freedom of religious practice, or guaranteed social services. It is even more difficult to judicially impose those standards on the governments of countries at different stages of economic and political development, countries confronting heterogeneous problems of terrorism,

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of the Fourteenth Amendment) and *Washington v. Glucksberg*, 521 U.S. 702, 752-89 (1997) (Souter, J., concurring) (surveying the Court's case law invoking the Fourteenth Amendment to invalidate state action as violative of constitutionally protected rights or liberty interests).

3. *Compare Glucksberg and* Vacco v. Quill, 521 U.S. 793 (1997) (finding the Due Process and Equal Protection Clauses of Fourteenth Amendment provide no protection against states' ban on physician-assisted suicide) *with* Chandler v. Miller, 520 U.S. 305 (1997) (finding that the Fourth Amendment precludes states from requiring drug testing of candidates for certain state offices) *but see id.* at 328 (dissent argues that this case involves a policy judgment best left to local legislatures "rather than being announced from on high by the Federal Judiciary") *and* Romer v. Evans, 517 U.S. 620 (1996) (holding that the Fourteenth Amendment prohibits state constitutional amendment barring legal protections for homosexuals) *but see id.* at 636 (dissent accuses the majority of "imposing upon all Americans" values of the "elite class from which the Members of this institution are selected. . . .").

4. As used in this article, the term "European Community" refers to the broad coalition of nations that constitute the Council of Europe, which as of the end of 1996 had 40 member states. *See* Jörg Polakiewicz, *The Application of the European Convention on Human Rights in Domestic Law*, 17 H.R.L.J. 405 n.3 (1996).

ethnic conflict, crime, illegal immigration, and poverty. Yet, to have meaning in Europe, the term "community" must signify that its citizens enjoy some minimal legal guarantees and entitlements both while they are at home and in other member nations.

The basic rights which the European Community attempts to ensure are contained in the Convention for the Protection of Human Rights and Fundamental Freedoms ("Convention"), originally signed by twelve states on November 4, 1950, in Rome.[5] The European Convention's prime interpreter is the European Court of Human Rights ("ECHR"), which sits in Strasbourg, France.[6] This article examines a particular instance where the Community, acting through the ECHR, found a violation of the Convention by a contracting state, and analyzes the impact of that finding on the judicial system of the offending nation. In this case, the member nation was Spain,[7] in the case of *Barberà, Messegué and Jabardo v. Spain*,[8] and the rights violated were those of a fair and public trial in general, and the right to confront adverse witnesses in particular.

The *Barberà* matter merits substantial attention for several reasons. First, during the years of its litigation, Spain was an emerging democracy engaged in the process of building new political and legal institutions after years of authoritarian rule. The *Barberà* case traveled through Spain's newly constitutionalized criminal justice system three times: once before the ECHR decision; then during the process

5. *See* Jörg Polakiewicz & Valerie Jacob-Foltzer, *The European Rights Convention in Domestic Law: The Impact of Strasbourg Case-Law in States Where Direct Effect is Given to the Convention*, 12 H.R.L.J. 65, 65 (1991) ("The Convention has proved to be a highly successful treaty, which has gradually acquired the status of a 'constitutional instrument of European public order in the field of human rights.'"); Paul Mahoney, *Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin*, 11 H.R.L.J. 57, 71 (1990) ("It is . . . not illegitimate to attribute to the Contracting Parties shared democratic values, or to see the Convention as establishing a legal community with a common ethos in human-rights matters.").

6. *See* Mahoney, *supra* note 5, 11 H.R.L.J. at 59 ("By virtue of the Convention the European Court of Human Rights is empowered to sit in final and binding judgment on the democratic processes of the Contracting States."); Polakiewicz & Jacob-Foltzer, *supra* note 5, at 65 ("[T]he Court has succeeded in asserting its role as the prime interpreter of the Convention's provisions."); C.A. Gearty, *The European Court of Human Rights and the Protection of Civil Liberties: An Overview*, 52 CAMBRIDGE L.J. 89, 89 (1993) ("It is not improbable that the Court will emerge over time as a supreme court of Europe, at least so far as human rights are concerned.").

7. *See* Polakiewicz & Jacob-Foltzer, *supra* note 5, at 132 ("Spain signed the European Human Rights Convention on 24 November 1977, the date on which it became a member of the Council of Europe. The Convention was ratified on 4 October 1979.").

8. Barberà, Messegué and Jabardo v. Spain, App. Nos. 10588/83-10590/83, 11 Eur. H.R. Rep. 360 (1988) (Court report).

which determined that Spain would accept and apply the ECHR finding; and finally when the defendants in *Barberà* were granted the new trial that the ECHR had mandated. The three journeys spanned more than a decade, and provide a window into the changes wrought in the Spanish criminal justice system over that period.

Second, hosts of newly independent nations in Eastern Europe are now gaining admission into the economic, political, and legal institutions of their Western neighbors.[9] These states may also face an ECHR directive to amplify their protection of fundamental liberties while still attempting to establish their domestic legitimacy. Spain's response to the judgment of the ECHR in the *Barberà* case may provide a model for the internal application of the Convention in other nations.

Third, Spain is by tradition a civil law nation, while the right at the core of the *Barberà* case—the right to confront adverse witnesses—is historically associated with the adversarial process of the common law tradition. The *Barberà* case addresses the extent to which the Convention will move the criminal justice systems of member nations—many of which have traditionally followed the inquisitorial model of criminal procedure—closer to the adversarial practices of common law countries.

Finally, the *Barberà* case has its roots in one of the most difficult problems facing modern society: political terrorism driven by ethnic nationalism. In no other context can a signatory of the Convention claim a greater interest in a flexible and robust police power than when facing a violent indigenous political movement's particular threat to life and property.[10] Conversely, no rubric is more commonly used by states to trample on the fundamental rights of their citizens, particularly those of ethnic minorities, than that of the struggle against terrorism. Indeed, the defendants in *Barberà* alleged that evidence against them was extracted through the state's use of torture. Hard questions make for important cases.

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9. Hungary became the first former member of the Soviet bloc to sign the Convention on November 6, 1990. *See* Polakiewicz & Jacob-Foltzer, *supra* note 5, at 65. Many others soon followed. *See* Polakiewicz, *supra* note 4, at 405 n.2; Jacques Robert, *Constitutional and International Protection of Human Rights: Competing or Complimentary Systems?*, 15 H.R.L.J. 1, 12 (1994). The ECHR's "jurisdiction is coveted by the newly emerging democracies in eastern and central Europe as a badge of legitimacy and a bulwark against future tyranny." Gearty, *supra* note 6, at 89.

10. Organized terrorism "constitutes a threat to the very existence of democracy; the States must have at their disposal adequate weapons to counter organised [sic] terrorism, otherwise the rights and freedoms safeguarded by the Convention risk becoming ineffective." Mahoney, *supra* note 5, at 68.

II. Spain's Criminal Justice System: The Constitutional Framework

Francisco Franco died in November of 1975, ending a forty year dictatorial reign, and permitting the ascension of Juan Carlos de Borbon as King. Contrary to Franco's plans, Juan Carlos did not sit docilely as head of state while a rightist head of government continued authoritarian rule. Rather, he handpicked as prime minister Adolfo Suarez, who he knew would accommodate the powerful social and political forces demanding freedom and democracy in Spain.

By the end of 1978, the Spanish people elected a constituent assembly. This assembly, in turn, drafted and approved a new constitution. The Spanish people approved the constitution overwhelmingly in a national referendum, and the King signed it into law.[11] Spain's transition from dictatorship to Western-style democracy became certain, however, only after the new constitutional regime had survived both a 1981 coup attempt by right wing army officers[12] and an electoral transfer of power from a center-right government to the opposition democratic socialists, who prevailed at the polls in November of 1982.[13]

The Spanish Constitution of 1978 is arguably as protective of civil and human rights as that of any other nation.[14] It explicitly protects

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11. *See* George E. Glos, *The New Spanish Constitution, Comments and Full Text*, 7 HASTINGS CONST. L.Q. 47, 47-48 (1979).

> The Constitution was approved by the Cortes on October 31, 1978, and by the voters in a plebiscite on December 6, 1978. It was signed by the King on December 27, and became effective upon its publication in the official gazette, the *Boletin Oficial de Estado*, on December 29, 1978. It is the tenth or thirteenth Spanish Constitution in Spanish constitutional history, depending upon one's view of the Napoleonic Constitution of Bayonne and two other constitutional projects.

Id. For discussions of the process of drafting and approving the 1978 Constitution, see Mark D. Eibert, Note, *The Spanish Constitutional Tribunal in Theory and Practice*, 8 STAN. J. INT'L L. 435, 435-38 (1982); Henry W. McGee, Jr., *Counsel For The Accused: Metamorphosis In Spanish Constitutional Rights*, 25 COLUM. J. TRANSNAT'L L. 253, 255-57 (1987).

12. *See* McGee, *supra* note 11, at 259-60.

13. *See* JOHN HOOPER, THE SPANIARDS 46 (1986). Hooper writes:

> [I]f one is to put a date to the end of the transition then it must be 28 November 1982, because the fact that the armed forces were prepared to accept [the victory of the Socialist Party] showed that it was possible for power to be transferred from one party to another without bloodshed—and that ultimately, is the test of a democracy.

Id. See also McGee, *supra* note 11, at 259 (citing articles for the proposition that "the political transition came to an end with the Socialist victory in October of 1982").

14. *See* HOOPER, *supra* note 13, at 43. Hooper states:

> The new Spanish Constitution is arguably the most liberal in Western Europe. Spain is defined as a parliamentary monarchy, rather than just a constitutional monarchy. There is no official religion and the armed forces are assigned a

equality before the law;[15] freedom from discrimination based on birth, race, sex, religion, opinion, or personal condition;[16] liberty of ideology, religion, or cult;[17] the right to freedom of expression by all media;[18] the right to travel,[19] to associate,[20] to peacefully assemble,[21] to petition the government,[22] to education,[23] to honor,[24] and the right to form trade unions.[25]

The 1978 Constitution also provides for the rights of an accused. Article 17 guarantees that no person shall be deprived of their liberty except as provided by law, and requires that an arrested party be brought before a judge within 72 hours to be informed of his rights and the charges against him.[26] Article 24.2 grants a person accused of a crime the following rights: to be informed of the accusation against him, to a public trial without unnecessary delay, to present evidence in his defense, to refuse to testify against himself or to incriminate himself, and to the presumption of innocence.[27]

A clear objective of this constitutionalization of procedural guarantees was to emphasize the accusatorial and adversarial aspects of the criminal justice system over its inquisitorial features. Both traditions have deep historical roots in Spain.[28] Indeed, Spain had begun

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strictly limited role. The death penalty is forbidden and the voting age fixed at eighteen.

Id. The 1978 Constitution of "Spain goes to particular lengths in affirming individual rights . . . ." Robert, *supra* note 9, at 10.

15. *See* C.E. art. 14 (1978).

16. *See id.*

17. *See* C.E. art. 16.1.

18. *See* C.E. art. 20.1.

19. *See* C.E. art. 19.

20. *See* C.E. art. 22.1.

21. *See* C.E. art. 21.1.

22. *See* C.E. art. 29.1.

23. *See* C.E. art. 27.1.

24. *See* C.E. art. 18.1.

25. *See* C.E. art. 28.1. For a clause by clause analysis of the 1978 Constitution, with comparisons to related provisions of the constitutions of Germany, Italy, and the United States, see Glos, *supra* note 11.

26. *See* C.E. art. 17.

27. Article 24.2 states:

> Asimismo, todos tienen derecho al Juez ordinario predeterminado por la ley, a la defensa y a la asistencia de letrado, a ser informados de la acusacion formulada contra ellos, a un proceso publico sin dilaciones indebidas y con todas las garantias, a utilizar los medios de prueba pertinentes para su defensa, a no declarar contra si mismos, a no confesarse y la presuncion de inocencia.

C.E. art. 24.2.

28. *See* JUAN-LUIS GOMEZ COLOMER, EL PROCESO PENAL ESPAÑOL (The Spanish Penal System) 47 (1993). Gomez Colomer describes the historical characteristics of an accusatorial system as: (1) the accuser was someone other than a judge; (2) the proceeding

its movement from the canonically-rooted inquisitive tradition towards an accusatorial criminal justice system long before the 1978 Constitution. The enactment of the 1882 Code of Criminal Procedure (*Ley de Enjuiciamiento Criminal*, "LECRIM")[29] was a watershed in the legislative evolution from the inquisitive system of the *Antiguo Régimen* (Ancient Regime) to a system "*acusatorio formal y mixto*."[30]

Under this mixed system, both prior to and since the 1978 Constitution, the prosecution of serious crimes in Spain has had two phases: the preparation of the written case summary by an instructing or investigative judge (*el sumario*) and the trial (*el juicio oral*), which is held before a three judge tribunal or *audiencia*. Under Franco, this process was secret, inquisitive, and summary; it nearly always resulted in a finding of guilt.[31] To change that focus, Article 120.2 of the Constitution declares that the judicial process "shall be predominantly oral, above all in criminal matters."[32] The principle of *oralidad* means

had an oral phase; (3) the process was public; (4) there was an equality of resources between accuser and accused (*igualidad de armas*); (5) the power of the judge to gather evidence was limited; (6) both accused and accuser had the right to offer evidence; and (7) the accused remained free until convicted. *See id.* at 48-49. The characteristics of the inquisitorial system, spawned by the influence of the Canon Law, had as its characteristics (a) the power of the judge to accuse; (b) the secrecy of the proceedings; (c) a totally written evidentiary phase; (d) an identity between decision maker and accuser; (e) freedom of the judge in the collection of evidence; (f) the lack of a right to present proof on the part of the accused; and (g) pre-judgment detention. *See id.* at 49-50.

29. L.E. CRIM (1882).

30. GOMEZ COLOMER, *supra* note 28, at 50. Furthermore, a jury system, perhaps the quintessential feature of the Anglo-Saxon adversarial and accusatorial regime, was introduced in Spain around the same time as the 1882 LECRIM, only to have its fate rise or fall with that of subsequent democratic regimes. The jury system was suspended in 1923, revived in April of 1931 by the Second Republic, and suspended with the outbreak of the Civil War in 1936. *See id.* at 52. Needless to say, it remained a dead letter during Franco's years in power. The jury function is provided for in the 1978 Constitution. *See* C.E. art. 127. Since the Constitution's passage, the jury's reemergence has been prepared, albeit slowly, and a pilot project has been implemented.

31. Writing in 1964, an American law professor observed that:

> [i]n Spain most of the procedural steps occur in advance of the trial (*juicio oral*). In effect there are two trials if one uses the word "trial" in a somewhat loose fashion. The first "trial" is a quasi-inquisitorial procedure known as the *sumario*, a summary or resume of the facts and the law prepared by a judge of instruction who is in charge of the investigation. . . . The *juicio oral* may be, and usually is, a somewhat brief affair because the interrogation of witnesses, examination of the facts, etc., have occurred in the *sumario*, and the witnesses at the trial merely confirm or deny what they have previously stated during the course of the *sumario*.

David E. Murray, *A Survey Of Criminal Procedure In Spain And Some Comparisons With Criminal Procedure In The United States*, 40 N.D. L. REV. 7, 8 (1964).

32. Article 120.2 states: "El procedimiento será predominantemente oral, sobre todo en materia criminal." (The procedure shall be predominantly oral, especially in criminal matters.) C.E. art. 120.2.

that the judge or tribunal sitting in judgment must convict or acquit on the basis of the evidence taken and the facts established at the *juicio oral*, rather than upon material gathered by the judge of instruction during the investigative or *sumarial* process.[33]

The practice of *oralidad* has a multi-faceted, anti-inquisitorial impact. Since under the Constitution the *juicio oral* must be public,[34] the process of determining guilt or innocence is open, unlike the *sumarial* process, which can be conducted secretly.[35] Likewise, under *oralidad* the accused is present, represented by counsel, and is entitled to offer evidence, since the Constitution guarantees these rights at the oral hearing.[36]

Requiring that a criminal judgment rest on the evidence adduced at the *juicio oral* has an additional critical consequence: it gives defendants the right to confront and cross examine witnesses.[37] While the Spanish Constitution's procedural guarantees are fulsome, they do not offer the right afforded by the Sixth Amendment of the U.S. Constitution[38] and, as will be discussed below, by the European Convention:[39] the right to examine adverse witnesses. Under Article 708 of the LECRIM, however, all parties are entitled to ask questions of witnesses who appear at the *juicio oral*.[40] Though the right to examination predated the Constitution's principle of *oralidid*,[41] given the

33. *See* GOMEZ COLOMER, *supra* note 28, at 52, 72-73.

34. *See* C.E. arts. 24.2 & 120.1.

35. *See* GOMEZ COLOMER, *supra* note 28, at 73.

36. Spanish law also now provides, with certain limitations, a right to counsel following arrest. *See* McGee, *supra* note 11.

37. *See* GOMEZ COLOMER, *supra* note 28, at 261-62 ("[T]he evidentiary process regulated by our LECRIM permits the utilization of the system of cross-examination characteristic of Anglo-Saxon law . . . .").

38. *See* Delaware v. Van Arsdall, 475 U.S. 673, 678 (1986) ("The Confrontation Clause of the Sixth Amendment guarantees the right of an accused in a criminal prosecution 'to be confronted with the witnesses against him.'"). *See also* Edward J. Imwinkelried, *The Constitutionalization of Hearsay: The Extent to Which the Fifth and Sixth Amendments Permit or Require the Liberalization of the Hearsay Rules*, 76 MINN. L. REV. 521 (1992). Imwinkelried states:

> [T]he right to cross-examination is the primary interest secured by the Confrontation Clause . . . The central purpose of cross-examination is to augment the accuracy of the factfinding process. Cross-examination allows the questioner to probe for latent deficiencies in the witness's perception, memory, narrative ability, and sincerity. Cross-examination advances a practical concern for testimonial accuracy.

Id. at 525.

39. Article 6 (3)(e) of the European Convention grants a defendant the right "to examine or have examined witnesses against him . . . ." Eur. Conv. on H.R. art. (6)(3)(e).

40. *See* L.E. CRIM. art. 708.

41. *See* Murray, *supra* note 31, at 14.

determinative role of the *sumario* under Franco, the right to confront witnesses came too late in the game to mean much.[42]

Finally, the Constitution of 1978 eliminates the Francoist practice of entirely bypassing the normal judicial system in favor of military tribunals or courts of exception. In the decade prior to Franco's death, the chief engine of political repression was a special judicial tribunal called the *Tribunal de Orden Publico* ("T.O.P."), which conducted 1000 secret proceedings between 1963 and 1973, most involving multiple defendants.[43] When, in 1970 and 1971, Spanish lawyers refused to represent defendants before the T.O.P. on the grounds that it was nothing more than an instrument of political repression, the T.O.P. tried and sentenced the defendants without counsel, and then indicted and tried the lawyers who had refused to defend them.[44] Today, those accused of crimes have the constitutional right to be tried in the judicial system by a judge selected in accordance with the law, rather than by specially appointed judge or tribunal.[45]

III. Spain's Constitutional Tribunal

One of the United States' most significant contributions to the modern conception of a democratic society is the right to judicial review of the constitutionality of executive and legislative action.[46] Since World War II, newly declared democracies have increasingly perceived such review to be a necessary part of their emerging structures of government.[47] To guarantee protection of the rights it cre-

42. As Murray noted in 1964: "Since the *sumario* contains all of the statements (*declaraciones*) of those persons who will testify at the trial and since their statements usually were taken outside of the presence of the *procesado* [accused], he has been denied any right of cross-examination." *Id.* at 13.

43. *See* José J. Toharia, *Judicial Independence in an Authoritarian Regime: The Case of Contemporary Spain,* 9 L. & Soc'y. Rev. 475, 479, 492-95 (1975).

44. *See id.* at 494.

45. *See* C.E. art. 24.2 ("todos tienen derecho al Juez ordinario predeterminado por la ley. . .") (all have a right to an ordinary judge selected according to law); C.E. art. 117.6 ("Se prohiben los tribunales de excepcíon.") (Courts of exception are forbidden.).

46. *See* Mauro Capelletti & William Cohen, Comparative Constitutional Law 12 (1979) (cited in McGee, *supra* note 11, at 289 n.147) ("One of the essential legal developments of our time is, for a growing number of civil law countries, the introduction of judicial review of the constitutionality of legislation. Although this institution has ancient historical precedents, the matrix of its modern growth may certainly be seen, in part, in the American model."). *See also* Robert, *supra* note 9, at 4 ("[T]wentieth-century Europe, belatedly acting on the American example, has made provision for review of acts of the public authorities in terms of constitutionality . . . .").

47. *See* Capelletti & Cohen, *supra* note 46. The authors state that:

> Judicial review of legislation, a rarely encountered institution until recent times, has been introduced in the last few decades in various countries throughout the world. Since the last World War, the growth of this institution has experienced

ated, the Constitution of 1978 established in Spain a Constitutional Tribunal along the lines of the model previously adopted by Italy and West Germany.[48] To some extent, this step also followed the precedents of Spain's own pre-Franco republican phase.[49]

Consistent with those models, the Constitutional Tribunal is not part of the judicial system,[50] nor are its members drawn principally from the ranks of the judicial profession.[51] Reflecting civil law countries' traditional distrust of the judiciary, the drafters of the Constitution designed a tribunal that would sit astride the branches of government, with the ultimate power to decide if their actions were compatible with the provisions of the Constitution.[52]

Eschewing the American case or controversy requirement,[53] the Spanish Constitution encourages direct challenges to the constitution-

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what could well be called a worldwide explosion. It almost appears as if no Western, or even Eastern, country purporting to be a modern democracy, can resist the temptation to adopt some form of control—judicial or otherwise—of the constitutionality of legislation.

Id. at 15.

48. *See* Eibert, *supra* note 11, at 435 ("One of the most important of Spain's new democratic institutions is the Constitutional Tribunal, whose function is to ensure that laws and governmental actions conform with the new Constitution, including the individual rights and liberties which the Constitution guarantees."). The Constitutional Tribunal "was deliberately modeled after three historical examples: the Tribunal of Constitutional Guarantees of the Second Spanish Republic and the post-World War II constitutional adjudicating bodies of Italy and Germany." *Id.* at 438 n.14. *See also* Glos, *supra* note 11, at 75 ("The new Spanish Constitutional Court is similar to its predecessor under the Spanish Constitution of 1931 and to that of Italy.").

49. *See id.*

50. *See* Sentencias del Tribunal Constitucional (Constitutional Judgment Tribunal) Sept. 1981 ("The Constitutional Tribunal does not form part of the Judicial Power and is at the margin of the organization of the Courts of Justice.").

51. *See* C.E. art. 159.2 ("The members of the Constitutional Tribunal shall be nominated from Magistrates and Prosecutors, Professors of the University, public officials and lawyers, all jurists of recognized competence with more than fifteen years of practice.").

52. *See* Eibert, *supra* note 11. Eibert states that:

> Spain is a civil law country. Like the judiciary in other civil-law nations, the Spanish judiciary is a career service which has neither substantial power nor social prestige, and is generally distrusted. The drafters of the 1978 Constitution consequently opted for a concentrated system of constitutional adjudication, with exclusive jurisdiction to decide constitutional questions vested in a small politically appointed body composed primarily of law professors with no prior judicial experience.

Id. at 435-36. *See also* McGee, *supra* note 11, at 291-92.

53. *See* Raines v. Byrd, 521 U.S. 811, 818 (1997), *citing* Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 37 (1976). ("No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies."). *Raines* found a group of Congressman suing to challenge the constitutionality of the recently enacted Line Item Veto Act lacked the standing needed to create a case or controversy. *See id.*

ality of legislation. Indeed, such challenges may be brought immediately upon the enactment of a particular law by means of *el recurso de inconstitutionalidad* (claim of constitutional violation).[54] Citizens may also challenge the facial validity of a statute during the litigation of an action in the judicial system. In such a case a judge is to refer the *question de inconstitucionalidad* to the Constitutional Tribunal if he or she considers that the particular law in question "may be" unconstitutional.[55] In so delineating the Tribunal's power "[w]ith far greater precision and clarity than the U.S. Constitution, the Spanish Constitution made the Constitutional Tribunal supreme."[56]

In addition, and of particular significance to the *Barberà* case, the Tribunal has the power to hear *recursos* or *demandas de amparo* (petitions for protection). These are suits alleging violations of the fundamental rights and liberties enumerated in Articles 14 through 29 and 30.2 of the Constitution.[57] When the Tribunal grants relief in such a case, "it may do whatever is necessary to nullify or suspend governmental acts and to restore the rights of the injured party . . . ."[58] Under the law which governs the operation of the Tribunal, "the applicant [for *amparo*] must exhaust all possible remedies before asking the Tribunal for protection. In the case of challenged judicial acts, exhaustion of remedies means the exhaustion of appeals."[59]

54. *See* C.E. art. 161.1(a) & 162(a). For example, article 162(a) specifically authorizes groups of legislators to challenge legislation through *recursos de inconstitucionalidad* in the manner deemed impermissible in *Raines*.

55. *See* C.E art. 163; Eibert, *supra* note 11, at 443-45. *See also* Glos, *supra* note 11, at 75 ("In contrast to American judicial practice, a Spanish court cannot declare a statute unconstitutional, but must submit such matters to the Constitutional Court; the latter has the exclusive jurisdiction to make declarations of unconstitutionality. In this respect, the Spanish practice comports with that in [other] European countries."); Robert, *supra* note 9, at 4 ("The procedure for reference by the courts first appeared in Austria and later in Germany before being developed in Italy. It has now been taken over by Spain, Portugal, Belgium, and others.").

56. McGee, *supra* note 11, at 291.

57. *See* C.E. art. 161(1)(b). *See also* Eibert, *supra* note 11, at 448-49 ("A party can use an *amparo* to challenge almost any governmental act that is not a law, whether it be an administrative act, a judicial act or decision, or even a legislative act without the force of law."). Glos writes:

> The highlight of the new constitution's Title IX is its provision on *amparo*. The *amparo*, a citizen's action contesting the validity of any law or official disposition adversely affecting constitutionally guaranteed civil rights, is first alluded to in a Spanish constitutional context in the Constitution of 1931. Under that document, the *amparo* might have been brought before the Court of Constitutional Guarantees when recourse to other authorities failed to provide redress.

Glos, *supra* note 11, at 75-76.

58. Eibert, *supra* note 11, at 449.

59. *Id.* (quoting the *Ley Organico de Tribunal Constitucional* ("L.O.T.C.")). As with all laws relating to the development of fundamental rights and liberties, the statute gov-

The *demanda de amparo* is thus similar to a petition for a writ of habeas corpus brought in a United States federal court by a state prisoner seeking review of his state court conviction. Federal habeas corpus jurisdiction that emerged in the wake of the Civil War was forged from the concern that state courts would not adequately protect the newly minted rights under the Thirteenth, Fourteenth, and Fifteenth Amendments.[60] The same type of concern led the drafters of the 1978 Constitution to provide those whose claims of fundamental rights violations were rejected by the judicial branch with recourse to the Constitutional Tribunal. In this country, the controlling federal statute limits habeas review to claims that a conviction violated the prisoner's federal constitutional rights. Plaintiffs can bring such claims to the federal courts only if they have been rejected by the highest court of the state in question.[61] There are procedural requirements analogous to those imposed on the Constitutional Tribunal's *amparo* jurisdiction. Of great importance to the present discussion, Article 10.2 of the Spanish Constitution states that the Constitutional Tribunal and the *Cortes* must interpret provisions recognizing fundamental liberties and freedoms in conformity with "international treaties and accords concerning these matters ratified by Spain."[62] Furthermore, Article 96.1 of the Constitution states that international treaties, once formally ratified and published, shall form part of the internal law of Spain.[63]

IV. The Case of *Barberà, Messegué and Jabardo*

A. Round One: The Case in Spain

On May 9, 1977, at the halfway point in the tumultuous period between the death of Franco and the ratification of Spain's democratic Constitution, an armed group invaded a private home in Barcelona and accosted a 77 year old Catalan businessman, Jose Maria Bultó

erning the operation of the Constitutional Tribunal is an "organic law." An organic law is different from an ordinary law in that it "can be passed, repealed, or amended only by an absolute majority of both Houses of the *Cortes* rather than by a simple majority of those voting." *Id.* at 436 (quoting C.E. art. 81). "The importance attached to the Tribunal is indicated by the fact that it was the subject of the first organic law passed by the *Cortes* after the adoption of the Constitution." *Id.* at 438.

60. *See* Fay v. Noia, 372 U.S. 391, 401 n.9 (1963) ("The Act of February 5, 1867 . . . which extended federal habeas corpus to state prisoners generally, was passed in anticipation of possible Southern recalcitrance toward Reconstruction legislation.").

61. *See* 28 U.S.C. § 2254(b) (1998).

62. C.E. art. 10.2.

63. *See* Polakiewicz & Jacob-Foltzer, *supra* note 5, at 133.

Marqués.[64] The interlopers demanded payment of a multi-million dollar ransom within twenty five days.[65] Then, they fixed an explosive device on Bultó's chest, telling him he would receive instructions on how to remove it only when the money was paid.[66] Two hours later, the bomb exploded, apparently unintentionally, killing Bultó instantly.[67]

Investigators quickly focused on Catalan Peoples' Army ("E.PO.CA."), a nationalist group seeking a separate Catalan state through armed struggle.[68] In July of 1977, four members of the group—one of whom was recognized by witnesses at the scene of the break-in—were arrested.[69] That November, however, they were released by court order under a new amnesty law.[70] In early 1978, that decision was reversed by the Spanish Supreme Court, and proceedings were reinstated.[71] By that time, of course, the four had disappeared.

In March of 1979, further investigation of the Bultó case led the police to arrest J. Martinez Vendrell and hold him incommunicado under anti-terrorist laws then in effect.[72] After a week in custody without access to counsel, Vendrell gave a statement describing himself as a leader of an armed group seeking Catalan independence, and stating that he had recruited and trained both Messegué and Barberà and integrated them into underground cells of his operation.[73] Vendrell further stated that he had been told that these two had developed an explosive device that could be attached to a person's body for the purposes of extortion, and that Messegué had in fact shown him the device.[74] In this same declaration at the police station, Vendrell stated that he was told in April of 1977 that the two had chosen Bultó as their first victim.[75] According to Vendrell's initial statement, he was informed after the botched operation that eleven people had participated, and that Barberà and Messegué had attached the device to the victim's chest.[76]

64. *See* Barberà, Messegué and Jabardo v. Spain, App. Nos. 10588/83-10590/83, 11 Eur. H.R. Rep. 360, 362 (1988) (Court report).
65. *See id.*
66. *See id.*
67. *See id.* at 363.
68. *See id.*
69. *See id.*
70. *See id.*
71. *See id.*
72. *See id.*
73. *See id.*
74. *See id.* at 364.
75. *See id.*
76. *See id.*

When Vendrell finally appeared before a magistrate, however, his story had changed. Although he confirmed the general description of his, Barberà and Messegué's roles in revolutionary activities, he retracted his prior statements regarding Barberà and Messegué's roles in Bultó's homicide.[77] Specifically, he stated that though these two might have made the bomb, he did not know the names of those who carried out the attack.[78] The state nevertheless charged Vendrell, Barberà, and Messegué with murder—although Barberà and Messegué were not located at the time.[79] During Vendrell's subsequent prosecution, he once again maintained that he could not identify Barberà and Messegué as participants in the Bultó homicide.[80] In June of 1980, the court absolved Vendrell of murder charges; however, it convicted him of a lesser offense following his *juicio oral* before the *Audiencia Nacional*.[81] As the court sentenced Vendrell to time he had already served, he was released, and quickly disappeared.[82] He was unavailable during subsequent proceedings.[83]

1. The Audiencia Nacional

Police finally arrested Barberà, Messegué, and Jabardo on October 14, 1980.[84] Their homes contained radio transmitters and receivers and political literature.[85] Under anti-terrorism legislation, these three arrestees were also held incommunicado without access to counsel, during which time they signed statements admitting involvement in the Bultó murder.[86] They also led the police to stockpiles of arms and explosives.[87] Notably, their accounts differed from that of Vendrell's police confession.[88] When brought before a judge nine days

77. *See id.*
78. *See id.*
79. *See id.*
80. *See id.*
81. *See id.*
82. *See id.*
83. On an appeal taken by Bultó's son—Spanish law allows the participation in criminal cases of interested private parties—the Spanish Supreme Court found Vendrell guilty of a more serious offense than had the *Audiencia Nacional* (aiding and abetting a murder rather than assisting armed gangs) and dramatically increased his sentence. *See id.* at 365. Nevertheless, he was never located to serve the harsher term. *See id.* According to a 1993 judgment of the *Audiencia Nacional*, Vendrell died in November of 1989, while still at liberty. *See* Audiencia Nacional, Sentencia No. 44/93, at 3 (on file with *Hastings Constitutional Law Quarterly*).
84. *See Barberà*, 11 Eur. H.R. Rep. at 365.
85. *See id.*
86. *See id.*
87. *See id.*
88. *See id.*

later, they all retracted their confessions. Moreover, Jabardo and Messegué complained of being subjected to physical and psychological torture while in custody.[89]

During their subsequent prosecution, the three defendants maintained their innocence and continued to assert that their initial statements had been the result of torture.[90] At no time during the pretrial process were the defendants confronted with any of the prosecution witnesses, most particularly Vendrell, who was no longer in custody.[91] The addition of new material to that gathered earlier in the Bultó case produced a 1600 page *sumario* or case file.

In December of 1981, the Court denied a motion to hold the trial in Barcelona, where the defendants were confined.[92] On January 12, 1982, authorities transported the defendants in a police van overnight from Barcelona to Madrid for what would be a one day trial.[93] The trial was conducted by a senior judge of the division in a high security courtroom, with the defendants handcuffed in a glass cage.[94] At the defendants' trial, the entire investigative file was received in evidence by agreement *por reproducida* (without formally being read out in court).[95] The file included the statements which defendants and Vendrell alleged were coerced and taken in the absence of counsel.[96] The file also contained the less damaging, but nonetheless incriminating, statement made by Vendrell after conferring with counsel.[97] As noted above, Vendrell absconded after his trial and was not available to testify.

The physical evidence and statements which the defendants did not challenge linked them to revolutionary activities and arms stockpiles, but not directly to the murder. Mr. Bultó's brother in law—the only witness who testified at trial for the prosecution—was unable to identify the defendants.[98] The defense called ten witnesses, several to prove their good character, and several to prove that they had been brutalized while in custody before making the confessions they later retracted.[99] The defendants themselves denied any participation in

89. *See id.*
90. *See id.* at 366.
91. *See id.*
92. *See id.* at 367.
93. *See id.*
94. *See id.*
95. *See id.* at 368.
96. *See id.* at 367.
97. *See id.*
98. *See id.* at 368.
99. *See id.*

the murder and again complained of having been tortured.[100] Additionally, they claimed that the crime charged was subject to an October 1977 amnesty covering politically motivated offenses.[101]

Three days later, on January 15, 1982, the *Audiencia Nacional* found two of the three defendants, Barberà and Messegué, guilty of murder and sentenced them to thirty years in prison. According to the court, the state had proved that Barberà and Messegué fixed the bomb to Bultó's chest and demanded the ransom.[102] The court convicted Jabardo on a lesser charge of aiding and abetting in the murder and sentenced him to twelve years imprisonment.[103] It concluded that Jabardo had assisted the extortion attempt by gathering information about public figures—including Bultó—in Catalonia.[104]

Though the *Audiencia* did not disclose the evidence it relied upon, the state's oral testimony at the *juicio oral* was certainly insufficient to justify a finding that Barberà and Messegué were personally involved in placing the bomb. Indeed, the lone prosecution witness, Bultó's brother, did not connect any of the three to the crime. As the defendants' counsel argued to the *Audiencia*, the fact that the defendants knew of the location of weapons did not implicate them in Bultó's homicide.

Thus, the convictions can be explained in one of two ways. The first posits that the *Audiencia Nacional* convicted Barberà and Messegué on the basis of their confessions. This view raises the possibility, or even likelihood, that their convictions resulted from the most repugnant feature of the inquisitive tradition—the use of torture.[105] Indeed, at the time of the defendants' arrest, police violence against suspected terrorists was common.[106] Unless defendants' claim of co-

100. *See id.*
101. *See id.*
102. *See id.*
103. *See id.*
104. *See id.*
105. Gomez Colomer notes that, in its heyday, the inquisitive system "authorized the practice of torture to obtain a confession, the crowning proof in this procedural process." GOMEZ COLOMER, *supra* note 28, at 49.
106. According to Amnesty International investigations in 1975 and 1979,

> the torture and ill-treatment of detainees is 'persistent'. Most of the complaints are lodged by people detained under the anti-terrorist legislation, which was first introduced as an 'emergency' measure in 1977 and which allows the police to hold anyone suspected of a wide range of offenses for up to ten days.

HOOPER, *supra* note 13, at 124-25. These investigations were followed by a study conducted by the Spanish Human Rights Association in 1982 which "found that torture by both the Civil Guard and local police persisted. The organization regarded as indispensable the abolition of legal rules that authorized detention for ten days prior to a judicial hear-

ercion could be refuted—and the *Audiencia* made no finding to that effect—reliance on the confessions would taint the convictions.

Under the second view, the *Audiencia* may have relied on Vendrell's statements which were the only other evidence that tied the defendants to the murder. The first and most incriminating statement was taken while Vendrell was held incommunicado without access to counsel and, according to his later allegations, subjected to torture. Apart from the issue of coercion, Vendrell did not appear at the *juicio oral*, nor was he available to be examined by the defendants following their arrest. Reliance on any of Vendrell's case file statements would again constitute an inquisitive practice offensive to the principle of *oralidad* enshrined in Article 120.2 of the Constitution.[107] Thus, as it entered the appellate process, the *Barberà* case seemed an appropriate vehicle to confirm the importance of the right to confrontation of witnesses under Spanish law.

2. *The Spanish Supreme Court*

Following their convictions, the defendants appealed to the Spanish Supreme Court. They complained that their statements, and those of Vendrell, were both coerced and illegally obtained without the assistance of counsel.[108] The defendants asserted that absent the tainted material, "there was no evidence to rebut the presumption that they were innocent of Mr. Bultó's murder . . . ."[109] They further noted that the *Audiencia* had failed to address their claim of coercion, and had not indicated the extent to which it had relied on the challenged evidence.[110] The defendants maintained, with good reason, that the only way to explain the *Audiencia*'s verdict was through its reliance on the coerced statements.[111]

As discussed above, the defendants' claims could not be easily dismissed; in fact, in its judgment of December 27, 1982, the Spanish

ing." McGee, *supra* note 11, at 261. It was, of course, under the aforementioned anti-terrorist legislation that the defendants and Martinez Vendrell had been held incommunicado and interrogated.

107. At the time of the defendants' trial in 1982, observation of the principle of *oralidad* appears to have been the exception rather than the rule. As Hooper observed in 1985, "[u]nder Spanish law, the trial is divided into two phases—a written stage and an oral stage. The Constitution states unequivocally that 'the procedure shall be predominantly oral'. But despite this the majority of cases are still dealt with mainly on paper." HOOPER, *supra* note 13, at 125.

108. *See Barberà*, 11 Eur. H.R. Rep. at 368-69.

109. *Id.* at 369.

110. *See id.*

111. *See id.*

Supreme Court ordered an inquiry into the allegations of ill treatment.[112] The defendants, however, could not raise that claim directly on appeal. The Spanish judicial system was then still ill-equipped to deal with the system of rights contemplated by the 1978 Constitution: a criminal defendant in 1982 did not possess a statutorily recognized right to challenge his conviction on appeal due to a violation of his fundamental rights during his *juicio oral.* The legislative reform authorizing such a basis for an appeal to the Supreme Court in serious cases (*el recurso de casación*) did not come until 1985.[113] Criminal appeals within the Spanish judicial system (as opposed to *recursos de amparo* to the Constitutional Tribunal) at the time of the first *Barberà* appeal were largely limited to challenges to the trial court's classification of the established facts as a crime of one degree rather than another.

An existing exception to the bar to raising claims of a deprivation of a fundamental right on appeal was that of violations of the presumption of innocence. As the ECHR would later note in its judgment in the *Barberà* case:

> In view of the Constitutional Court's case law in this area, the Supreme Court has extended the scope of proceedings in appeals on points of law. It has held that the presumption of innocence can be relied upon before it in respect of an infringement of the law resulting from an error made by the trial court when assessing the evidence . . . , or on some other ground.
>
> According to a judgment of 3 November 1982, the Supreme Court's review of the evidence is directed only to the question whether evidence was produced and taken and not to the criminal court's final assessment of that evidence.[114]

112. *See id.* at 370.

113. *See* Polakiewicz & Jacob-Foltzer, *supra* note 5, at 133 ("The Institutional Act (*Ley Organica*) on Judicial Authorities (6/1985, of 1 July 1985) improved the system for the protection of fundamental rights by making the violation of a constitutional right a ground of appeal in cassation, (Article 5), thus enabling judicial decisions to be set aside if they breach the principle governing hearings, assistance and defense, provided that the convicted person was improperly deprived of means of defense (Articles 238-243)"). *See also* GOMEZ COLOMER, *supra* note 28, at 286-90.

114. *Barberà*, 11 Eur. H.R. Rep. at 374. The ECHR further noted that:

> [a]n ordinary appeal does not lie against judgments of the *Audencia Nacional*; only the special remedy of an appeal on points of law or procedure is available. By Article 849, the law is deemed to have been violated . . . (2) where an error of facts has been made in assessing the evidence and this appears from authentic documents not contradicted by other evidence. It has been held by the Supreme Court that in the second of these two eventualities the principle of the presumption of innocence can be prayed in aid.

Id. at 376.

The defendants thus argued to the Supreme Court that the Constitution could not support conviction absent valid proof in the record sufficient to overcome the presumption of innocence. In addressing that claim, the Supreme Court would have to come to terms with then-recently issued jurisprudence of the Constitutional Tribunal concerning the probative value, or lack thereof, of statements from declarants who lacked counsel.[115] In a July 28, 1981 judgment, Division One (*Sala Primera*) of the Tribunal had granted a *recurso de amparo* voiding a robbery conviction, holding that a confession taken without the presence of counsel could not overcome the presumption of innocence. It stated that:

> Presumed innocent, the defendant could not be imprisoned or fined without evidence that he had committed a crime. For an item of proof to be considered evidence, the Court reasoned, it would have to be tested judicially. Police testimony concerning statements alleged to have been made by the defendant had the value of an accusation only. In order to be admissible, such a confession would have to be reiterated in court, at which time counsel would be present. In short, the statement would have to be received with the protections afforded by formal proceedings.[116]

Notably, the Tribunal had applied this doctrine to invalidate the convictions of three alleged Basque terrorists in December 1982, just prior to the Supreme Court's decision in the *Barberà* case. At the *juicio oral*, the prosecution offered the Basque defendants' statements made at the police station (which were ultimately repudiated when the defendants claimed that the confessions were obtained by torture) as proof of their guilt.[117] The Tribunal again held that declarations made without the assistance of counsel, as provided in Article 17 of the Constitution, "did not have the character of proof;" therefore, there was insufficient evidence to overcome the presumption of innocence to which the defendants were constitutionally entitled.[118]

115. The Constitutional Tribunal began issuing decisions on January 6, 1981. *See* Eibert, *supra* note 11, at 457. Although the civil law tradition abhorred the concept of judges creating law through precedent, the Spanish Constitution and the L.O.T.C. specifically provide for it. "[A]lthough cases that are *res judicata* generally cannot be reopened, the jurisprudencia derived from such cases is overruled if it conflicts with a judgment of the Constitutional Tribunal. The resulting supremacy of Constitutional Tribunal decisions should therefore theoretically prevent any conflicts of interpretation with the Supreme Court." *Id.* at 444 (quoting C.E. art. 161(1)(a) and L.O.T.C. art. 40.2). *See also* GOMEZ COLOMER, *supra* note 28, at 74.

116. McGee, *supra* note 11, at 295.

117. *See id.* at 292-93.

118. *See id.*

By the time the *Barberà* case reached the Supreme Court, the Government conceded that statements taken in the absence of counsel were not admissible evidence. The defendants in *Barberà* in turn asserted that without the tainted statements, there was insufficient proof to overcome their right under Article 24.2 to the presumption of innocence.[119] The Supreme Court responded by attempting to fashion a statement of the facts which neither referred to the defendants' challenged confessions nor to Vendrell's first and most damaging statement.[120]

The Supreme Court thus relied on the statements the defendants made with the assistance of counsel, in which they admitted revolutionary activity, but denied involvement in the charged murder.[121] The Court also considered Vendrell's second statement which discussed the defendants' revolutionary training, opined that they could have made the Bultó bomb, but denied knowledge of the perpetrators' identity.[122] Rejecting the claim that the judgements violated the presumption of innocence, the Supreme Court affirmed the convictions of Barberà and Messegué: "The mere existence of this evidence, irrespective of its implications and the way in which it is assessed, in [sic] sufficient to rebut the presumption of innocence relied on by the defendants Barberà Chamorro and Messegué Mas . . . ."[123] The Court did overturn Jabardo's conviction for aiding and abetting murder, holding that the established facts amounted to the lesser offense of assisting armed gangs. Jabardo's sentence was thus reduced from twelve to six years.[124]

The Supreme Court's treatment of the defendants' fundamental procedural rights suffers from three glaring deficiencies. First, in spite of its ruling, the Court relied on Vendrell's allegedly coerced statement. While the Court did not directly refer to that statement, it did rely on findings of fact contained in the June 17, 1980 *Audiencia Nacional* judgment convicting Vendrell in the Bultó case.[125] Those findings of fact were obviously based on Vendrell's initial statement that the defendants told him they had chosen Bultó as the first person on whom to use a bomb. The Court thus, at least indirectly, relied on

119. *See Barberà*, 11 Eur. H.R. Rep. at 369.
120. *See id.* at 370-71.
121. *See id.* at 371.
122. *See id.* at 370.
123. *Id.* at 371.
124. *See id.*
125. *See id.* at 370.

evidence that was patently inadmissible under the Constitutional Tribunal's jurisprudence.

Second, even had the Supreme Court avoided reliance on the coerced confessions, a finding of other evidence of guilt could not resolve the defendants' challenge to the statements' use at trial. When facing a claim of coercion, an appellate court must examine whether interrogators employed physical duress, and if so, whether the trier of fact relied on the evidence in reaching a conviction. If the trier did rely on coerced evidence, the court must vacate the convictions because they rest, at least in part, on a human rights violation, and thus, are tainted by it.

That analysis must be more searching in an adversarial system than one in which the weighing of oral testimony is not critical to the decision of guilt or innocence. In a process that relies heavily on the *sumario*, an appellate court is in just as good a position as the trial court in deciding whether a defendant is guilty; and if so, to determine the precise nature of the crime.[126] Accordingly, a trial court's reliance on improper documentary evidence has a simple remedy: the appellate court excises the offensive document from the record and decides the case on the remaining proof.

Such an approach is problematic, however, if a criminal defendant is guaranteed a process in which a trier of fact determines his guilt or innocence at a public hearing where the defendant has a right to present evidence and confront the proof against him with the assistance of counsel. At the hearing conducted in conformance with either the common law tradition or the principle of *oralidad*, the trier of fact must determine the credibility of testimony based on the demeanor of witnesses. In such a system, an appeals court cannot readily remedy an error which skews the trier of fact's findings.[127]

126. This civil law tradition is exemplified by the fact that the Spanish Supreme Court readily felt entitled in the case of Vendrell to convict him on appeal of a more serious offense than had the *Audiencia Nacional*, and in the case of Jabardo, to acquit of the offense found by the *Audiencia Nacional*, returning a less severe verdict.

127. This is particularly true in a system where there exists "the historical and constitutionally guaranteed right of criminal defendants to demand that the jury decide guilt or innocence on every issue . . . ." United States v. Gaudin, 515 U.S. 506, 513 (1995). If an appellate court adds or subtracts evidence to the trial record to remedy an error made in the admission of evidence below and then reweighs the evidence to decide whether it is now adequate to prove guilt or innocence, it is the appellate court which serves as the real decision maker in the case, rather than lay jurors from whom a defendant is constitutionally entitled to a verdict. When a reviewing court speculates as to what a jury may have done, "the wrong entity judge[s] the defendant guilty." Sullivan v. Louisiana, 508 U.S. 275, 281 (1993) (quoting Rose v. Clark, 478 U.S. 570, 578 (1986)).

This point is most crucial in cases involving an improperly admitted confession. The existence of other evidence sufficient to convict can rarely, if ever, save a judgment resting on a record containing a coerced confession. Given the powerful impact of a confession on any trier of fact, the state can rarely establish that in its absence the trier of fact would have found that remaining evidence sufficient to establish guilt.[128] Certainly there was every reason to believe that the *Audiencia Nacional* relied on the entire record before it, including the incommunicado statements which constituted the only unequivocal evidence of the defendants' guilt. Yet, under the then extant statutes governing the content of criminal appeals, the Supreme Court held that the voluntariness of the challenged statements and their impact on the *Audiencia Nacional* did not present cognizable legal issues.[129]

Third, the Supreme Court opinion created, rather than resolved, a conceptually separate issue of a fundamental rights violation. The Court relied heavily on Vendrell's statement to a magistrate following his initial, incommunicado interrogation. Vendrell, however, neither testified at the trial of Barberà, Messegué, and Jabardo, nor was he made available for questioning by defense counsel at any time following the arrest of their clients.[130] Reliance on this statement was consistent with an inquisitive procedure, rather than the principle of *oralidad* or any right to confront adverse witnesses. Like the decision of the *Audiencia Nacional*, the Supreme Court's opinion in December of 1982 failed to come to grips with the essential changes wrought by the constitutionalization of Spain's criminal justice system.

128. *See* Arizona v. Fulminante, 499 U.S. 279 296 (1991). The case stated that:

> A confession is like no other evidence. Indeed, "the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him. . . . [T]he admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have a profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so."

Id. (quoting Bruton v. United States, 391 U.S. 123, 139-40 (1968) (White, J., dissenting)).

129. *See* Barberà, Messegué and Jabardo v. Spain, App. Nos. 10588/83-10590/83, 11 Eur. H.R. Rep. 360, 370 (1988) (Court report) ("As to the validity of the confessions obtained by the police, including Mr. Martinez Vendrell's, [the Supreme Court] noted that the alleged defects related solely to the findings of fact and accordingly did not give rise to the procedural irregularity complained of, which related only to points of law.").

130. The defendants challenged their convictions before the Supreme Court on the ground that there had been no "confrontation of witnesses and accused." *Id.*

3. *The Spanish Constitutional Tribunal*

After the Supreme Court affirmed their convictions, the defendants filed a *demanda de amparo* in the Constitutional Tribunal. Primarily, they claimed that the legally acceptable evidence against them was insufficient to justify a murder conviction, as opposed to a lesser charge of the unlawful possession of weapons and explosives. In support of that contention, they argued specifically that the Supreme Court had erred in relying on Vendrell's second statement, which although contained in the case file that had been introduced through the *por reproducida* procedure,[131] should not be considered probative evidence. The *Barberà* case thus presented the Tribunal with a significant opportunity to address the extent to which the constitutional principle of *oralidad* had invalidated the inquisitorially oriented practice of unlimited reliance on the *sumario*.

Lacking a certiorari mechanism, the Tribunal in theory must decide all cases filed before it "on the merits." Under the L.O.T.C., however, it possesses the power to deny summarily *recursos de amparo* if they "manifestly lack content that justifies a decision by the Constitutional Tribunal."[132] Since its inception, the Tribunal has used this power to deny hearings to all but a small percentage of the *recursos de amparo* that reach it.[133] Despite the salient issues it posed, or perhaps because of them, the Constitutional Tribunal summarily rejected the *demanda de amparo* on April 20, 1983. The Tribunal characterized the case as a fairly pedestrian claim of insufficient evidence, an area about which the judgment of the judicial system was entitled to great deference:

> As the assessment of the evidence lies within the exclusive jurisdiction of the judges and courts, the Constitutional Court cannot find a violation of this provision unless there has been a failure to produce a minimum of evidence against the accused.
>
> In the instant case, however, this minimum of evidence was produced, namely in the statements made with the assistance of a lawyer to the investigating judge, the official reports on the searches made and on the real evidence discovered and in the facts as established in another judgment. The Constitutional Court cannot therefore review the criminal courts' assessment of the evidence.[134]

131. *See id.* at 372.

132. Eibert, *supra* note 11, at 449 (quoting L.O.T.C. art. 50).

133. *See id.* at 456-57.

134. *Barberà*, 11 Eur. H.R. Rep. at 373.

The Tribunal's action set the stage for the first case in which the European Court of Human Rights ("ECHR") would find Spain in violation of its obligations under the Convention.

B. Proceedings Before the European Court of Human Rights

On July 22, 1983, the defendants appealed to the European Commission of Human Rights,[135] the entity then responsible for processing and deciding which cases the ECHR would hear.[136] In their application, the defendants claimed that the Spanish government had violated their rights under the European Convention because they had not had a fair trial before an impartial tribunal. They further asserted that their convictions rested on coerced confessions, and that "the principles of adversarial proceedings and of equality of arms had not been observed. They complained, among other things, that they had not been able to have the witness Mr. Martinez Vendrell examined."[137] The defendants based these appeals on Articles 6.1 and 6.2 of the Convention, which define the right to a fair trial and the presumption of innocence, respectively.[138]

On October 11, 1985, the Commission found "admissible" the Basque appellants' claims of an unfair trial and a deprivation of the presumption of innocence—that is, not procedurally defective or manifestly unfounded. The Commission rejected the appellants' other contentions as inadmissible.[139] A year later, in its report to the ECHR, the Commission unanimously opined that there indeed had been a fair trial violation under Article 6.1,[140] and that thus there was no need to reach the Article 6.2 issue of deprivation of the presumption of innocence.[141] The Commission then presented the case for decision by the ECHR itself.

135. *See id.* at 378.

136. *See* Gearty, *supra* note 6, at 90. For the changes in screening procedures adopted since the *Barberà* case, see Andrew Drsemczewski & Jens Meyer-Ladewig, *Principal Characteristics of the New ECHR Control Mechanism*, 15 H.R.L.J. 81 n.1 (1994).

137. *Barberà*, 11 Eur. H.R. Rep. at 383.

138. *See id.* at 378.

139. Decision on admissibility is hardly a formality. Up until 1991, only 1038 of 17,116 cases considered by the Commission had been deemed admissible by it. *See* Gearty, *supra* note 6, at 90.

140. *See Barberà*, 11 Eur. H.R. Rep. at 392. Article 6.1 of the Convention provides that "[i]n the determination of . . . any criminal charge against him, everyone is entitled to a fair and public hearing . . . by an independent and impartial tribunal . . . ." Eur. Conv. on H.R. art. 6.1.

141. *See Barberà*, 11 Eur. H.R. Rep. at 392. Article 6.2 provides that "everyone charged with a criminal offence shall be presumed innocent until proven guilty according to law." Eur. Conv. on H.R. art. 6.2.

1. The ECHR Decision

Although they complained that they had not been able to examine Vendrell, the defendants did not expressly base their submission on Article 6.3 of the Convention. Indeed, in its report on admissibility, the Commission never characterized the case as one arising under provision 6.3, which entitles a criminal defendant to the right "to examine or have examined witnesses against him . . . ."[142] Nonetheless, the ECHR included the Article 6.3 issue, along with those under Articles 6.1 and 6.2, on which the applicants based their claims—an addition that proved significant to the case's outcome.[143]

The ECHR began by considering the defendants' claim that they had not been tried before an impartial tribunal, as required by Article 6.1. The defendants argued that the presiding judge, Mr. de la Concha, had been replaced on the day of trial by Mr. Perez Lemaur, who wore a Francoist insignia on his tie and cufflinks and displayed hostility to the defendants and some of the witnesses. The ECHR held that the last minute substitution of judges, while raising a justiciable issue, did not in itself cast doubt on the *Audiencia*'s impartiality. Though the change had "to be considered as regards its possible consequences for the fairness of the trial and notably of the hearing of 12 January 1982,"[144] the ECHR found that any specific objection to Perez Lemaur had not been preserved by means of a contemporary objection.[145]

The Court next reviewed the defendants' confessions. While the Spanish Supreme Court purportedly avoided relying on them, the ECHR noted that this "important item of evidence" had been "appended to the police report and was pivotal in the questioning of the defendants by the investigating judges in Barcelona and by the private prosecutor at the hearing on 12 January 1982."[146] The use of this improperly gathered evidence therefore gave "rise to reservations on the part of the Court."[147]

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142. *Id.* art. 6.3.

143. *See Barberà*, 11 Eur. H.R. Rep. at 384, 387. The Court explained the inclusion as follows: "The Court recalls that the guarantees in paragraphs (2) and (3)(d) are specific aspects of the right to a fair trial set forth in paragraph (1); it will therefore have regard to them when examining the facts under paragraph 1." *Id.* at 384 & n.64.

144. *Id.* at 381.

145. *See id.* A claim "may be taken to the European institutions only after domestic remedies have been exhausted; that is the internationally accepted tradition." Robert, *supra* note 9, at 7.

146. *Barberà*, 11 Eur. H.R. Rep. at 391.

147. *Id.*

The ECHR then turned its attention to the conduct of the *juicio oral*. It was troubled by the fact that the defendants had been transferred from Barcelona to Madrid overnight to

> face a trial that was vitally important for them, in view of the seriousness of the charges against them and the sentences that might be passed, in a state which must have been one of lowered physical and mental resistance.
> Despite the assistance of their lawyers, who had the opportunity to make submissions, this circumstance, regrettable in itself, undoubtedly weakened their position at a vital moment when they needed all their resources to defend themselves and, in particular, to face up to questioning at the very start of the trial and to consult effectively with their counsel.[148]

The ECHR noted that in its report on the *juicio oral*, "[t]he Commission was surprised at its brevity in view of the complexity of the case, [and] the considerable time that had elapsed since the occurrence of the facts and protestations of innocence made by the defendants to the judges concerned."[149] The Spanish government's response to this disquiet was factually accurate. They claimed that the *juicio oral* was brief because it was the conclusion, not the essence, of the process by which the defendants had been convicted. Thus,

> [t]he Government contended that the length of a hearing depended on the nature and circumstances of the case, and on the attitude of the parties; in the instant case, the length was determined by the time needed to take evidence and to hear argument. There were two reasons why this whole procedure took only one day: the hearing was the last stage of proceedings that after two earlier stages of investigation and interim submissions; and then, by adopting the *'por reproducida'* procedure, the prosecution and the defense agreed to admit the file on the investigation in evidence without requiring the 1,600 pages to be read out in court.[150]

According to Spain, a Spanish criminal trial could consist—as it largely did before the Constitution of 1978—principally of lawyers' summations.[151] The trial was thus a procedural phase at which the sides argued the significance of proof already gathered during the earlier inquisitorial stages of the proceeding.[152] This approach did not

148. *Id.* at 385.

149. *Id.* at 386.

150. *Id.*

151. *See id.*

152. Of course, if the *juicio oral* could be viewed as merely an opportunity to present summations by counsel, the fact that the defendants were exhausted by their transfer from Barcelona would not be of any prejudicial consequence.

reflect the open and adversarial fact finding process envisioned by the European Convention. As the ECHR commented:

> In criminal cases, the whole matter of the taking and presentation of evidence must be looked at in the light of paragraphs (2) and (3) of Article 6 of the Convention . . . . Paragraph (1) of article 6, taken together with paragraph 3 . . . requires the Contracting States to take positive steps, in particular to inform the accused promptly of the nature and cause of the accusation against him, to allow him adequate time and facilities for the preparation of his defense, to secure him the right to defend himself in person or with legal assistance, and to enable him to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. The latter right not only entails equal treatment of the prosecution and defense in this matter, *but also means that the hearing of witnesses must in general be adversarial.*[153]

The ECHR found most objectionable the Spanish Supreme Court's judicial reliance on Vendrell's second statement.[154] Although taken before a magistrate, the statement constituted a classic form of unreliable hearsay: a declaration by a suspect to the police in which he minimizes his own responsibility for the offense for which he is being investigated, and then attempts to shift principal responsibility for a crime onto someone else. Such untrustworthy evidence must be subject to the testing of cross-examination.[155]

The ECHR noted that the absence of Vendrell could not be attributed to the government:

> It may seem regrettable that it was not possible to ensure his presence at the trial on 12 January 1982, when the defense could have examined him on an adversarial basis. The respondent

153. *Barberà,* 11 Eur. H.R. Rep. at 387 & n.82 (emphasis added).

154. *See id.* at 390.

155. It is for this reason that the Supreme Court of the United States has deemed inadmissible out-of-court statements, made during police interrogations, and thus not subjected to cross-examination, in which one suspect in an offense implicates not only himself but a co-defendant while minimizing his own liability.

> [S]elf-exculpatory statements are exactly the ones which people are most likely to make even when they are false; and mere proximity to other, self-inculpatory, statements does not increase the plausibility of the self-exculpatory statements . . . . Rule 804(b)(3)[the federal exception for declarations against penal interest] . . . does not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory.

Williamson v. United States, 512 U.S. 594, 600-601 (1994). *Williamson* was a statutory decision, but the same considerations of unreliability undergird the general constitutional prohibition on convicting a defendant on the basis of out-of-court statements, not subjected to cross-examination, of his codefendant. *See, e.g.*, Lee v. Illinois, 476 U.S. 530 (1986).

> State cannot, however, be held responsible for that failure, as, when Mr. Martinez Vendrell was searched for by the police after the Supreme Court had upheld his conviction on 10 April 1981 (the relevant warrant was issued on 24 April 1981), he could not be found.[156]

Nonetheless, the Court viewed the use of the hearsay evidence was unfairly prejudicial to the defendants:

> The evidence of Mr. Martinez Vendrell, who had been set free on June 1980, would have been of crucial importance, as was noted by the Supreme Court in its judgment of 27 December 1982 . . . . The Court observes that the central investigating judge did not even attempt to hear Mr. Martinez Vendrell's evidence after the arrest of the applicants on 14 October 1980, not only to confirm his identification of them but also to compare his successive statements with theirs and arrange a confrontation with the applicants. Admittedly, the latter could also have requested an opportunity to examine him; but this does not exonerate the judge . . . . *In the end, the applicants never had an opportunity to examine a person whose evidence—which was vital, as is clear from the Supreme Court's judgment of 27 December 1982 . . . had been taken in their absence and was deemed to have been read out at the trial . . . .*[157]

Given this language, one might have expected the ECHR to render a seminal decision on the role of Article 6.3's right to examine witnesses in ensuring the more general Article 6.1's right to a fair trial. Instead, by a narrow majority of ten to eight, the ECHR found for the defendants on their Article 6.1 claim to a public and fair trial in terms that diluted the importance of the confrontation issue:

> Having regard to the belated transfer of the applicants from Barcelona to Madrid, the unexpected change in the court's membership immediately before the hearing opened, the brevity of the trial and, above all, the fact that very important pieces of evidence were not adequately adduced and discussed at the trial in the applicant's presence and under the watchful eyes of the public, the Court concludes that the proceedings in question, taken as a whole, did not satisfy the requirements of a fair and public hearing. Consequently, there was a violation of Article 6 (1).[158]

The Court then unanimously rejected the defendant's claim of a violation of the presumption of innocence:[159]

156. *Barberà,* 11 Eur. H.R. Rep. at 390.

157. *Id.* at 390-91(emphasis added).

158. *Id.* at 392.

159. The ECHR had defined the meaning of the presumption of innocence contained in the Convention as follows:

> The presumption of innocence will be violated if, without the accused's having previously been proved guilty according to the law, a judicial decision concerning him reflects an opinion that he is guilty. In this case, it does not appear from the evidence that during the proceedings, and in particular the trial, the *Audiencia Nacional* or the presiding judge had taken decisions or attitudes reflecting such an opinion. The Court therefore does not find a violation of article 6 section 2 of the Convention.[160]

2. *The ECHR's Interpretation Of The Right To Confrontation*

By basing their holding on factors specific to the case before them, the judges in the *Barberà* majority reduced its precedential effect. Arguably, this restraint in imposing on member nations a uniform code of criminal procedure was a prudent exercise.[161] By straying from the confrontation point that was obviously critical to its decision, however, the majority sacrificed logical coherence.

First, while in most cases a delay in bringing the defendants to court would be devastating to their ability to prepare with their lawyers for the *juicio oral*, in the *Barberà* case this was probably not a factor; as noted by the Court, the government's presentation at the oral hearing was perfunctory. The defendants most likely did not need more time to counter the state's case at the *juicio oral* because no witness gave evidence which incriminated them at that proceeding.[162] Indeed, the basis for their conviction was not the evidence ad-

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> Paragraph 2 embodies the principle of the presumption of innocence. It requires, *inter alia*, that when carrying out their duties, the members of a court should not start with the preconceived idea that the accused committed the offence charged; the burden of proof is on the prosecution; and any doubt should benefit the accused. It also follows that it is for the prosecution to inform the accused of the case that will be made against him, so that he may prepare and present his defense accordingly, and to adduce evidence sufficient to convict him.

Id. at 387.

160. *Id.* at 392.

161. *See, e.g.*, Mahoney, *supra* note 5. Mahoney writes:

> The Court's jurisdiction . . . is optional. Consequently, no useful purpose would be served by the Court frequently imposing, through evolutive interpretation, radical changes of direction on the participating governments . . . This preoccupation doubtless explains both the Court's frequent assertion in judgments that its reasoning is limited to the particular facts and its avoidance of deciding contested legal issues when there is no need to do so in the circumstances, even though the point may be an important one in general terms for the functioning of the Convention system.

Id. at 77.

162. Thus, as to the belated transfer of the defendants to Madrid, the dissenters found the delay regrettable, but found no way in which it "appreciably hindered the defense" or "flawed the proceedings to the point of depriving the defendants of adequate means of defense." *Barberà*, 11 Eur. H.R. Rep. at 394 (Dissenting Op.).

duced at the oral hearing, but that contained in the *sumario,* and it is on the use of the *sumario* that a finding of an unfair trial should have rested.

Second, the ECHR's summary of a fair trial violation blurs its criticism of the Spanish court's reliance on the second Vendrell statement. The ECHR's objection to the fact that the declaration was not "discussed at the trial in the applicants' presence and under the watchful eyes of the public"[163] somewhat misses the point. While society's interest in open judicial proceedings would have been served by the publication in court of all proof against the defendants, certainly the essential unfairness of the proceeding would not have been mitigated by a reading of Vendrell's declaration during the *juicio oral.* As the majority opinion recognized, the core problem was not that the defendants were convicted on evidence not made public because of the *por reproducida* procedure; rather, it was that the defendants were convicted on the basis of evidence, the credibility of which was untested by an adversarial examination.[164] By obfuscating its ruling, the ECHR judgment arguably could have permitted Spain to convict the defendants again on the basis of the second Vendrell statement, provided only that it was read into the record at a more orderly retrial.

The ECHR majority would have done better by holding that reliance on Vendrell's second statement was a clear breach of the Article 6.3 right to confront witnesses. The ECHR should further have held that this violation deprived defendants of their fair trial right under Article 6.1, since the offending evidence plainly affected both the *Audiencia Nacional* and the Spanish Supreme Court's judgments. The precedential basis for such a decision lay in *Unterpertinger v. Austria,*[165] an earlier ECHR opinion cited in *Barberà.* In *Unterpertinger,* the ECHR voided a conviction based on alleged victim reports to the police, where those same witnesses were not available to testify or face cross-examination at ensuing judicial proceedings.[166]

163. *Id.* at 392.

164. *See id.* at 386-87. Furthermore, to the extent that the majority suggested that the *Audencia Nacional* merely erred in relying on the statement without reading it aloud, it left itself open to the dissenters' retort that the defense "agreed to admit the investigation file in evidence without requiring the 1,600 pages to be read out in court" and that "nothing prevented the defendants from analyzing and impugning [any documents in the file] during the hearing." *Id.* at 395 (Dissenting Op.).

165. App. No. 9120/80, 13 Eur. H.R. Rep. 175 (1986) (Court report).

166. In *Unterpertinger,*

> a law entitling members of the accused's family to refuse to give evidence was held to have been applied in a way which infringed article 6. The accused had

Such a ruling need not have prohibited all use of evidence taken during the investigative stage from witnesses unable to appear at trial. For example, such testimony from the pretrial stages of criminal cases is commonly admitted at trial in the United States, provided it was subjected to the adversarial cross-examination at the pretrial hearing. Indeed, the ECHR decision recognized that even Spanish criminal procedure permits an investigating judge to convene a confrontation between an accused and the witnesses against him,[167] and suggested that, had such a procedure been used in this case, the resulting evidence would have been admissible.

Nor would a new trial order based on the violation of Article 6.3 have required a holding that all statements not subjected to cross-examination are inadmissible per se during trial proceedings. For example, the Supreme Court of the United States has interpreted the Confrontation Clause of the United States Constitution to permit the admission of statements of unavailable witnesses, provided the statements carry an indicia of reliability sufficient to moot the need for cross-examination.[168] The ECHR could thus have ruled simply that the state may not use statements of criminal suspects, given their generic unreliability,[169] to convict anyone other than the declarant, unless the statements are subjected to the testing of adversarial examination by the party against whom they are to be admitted. The party would of course have the option of representation at such an examination.

Since *Barberà*, the ECHR has issued a series of decisions buttressing the conclusion that the right to confront adverse witnesses in

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been charged with causing bodily harm to his stepdaughter and his wife, both of whom reported him to the police but then refused to give evidence in court.

Gearty, *supra* note 6, at 104 n.77.

167. *See Barberà*, 11 Eur. H.R. Rep. at 387-88. *See also* L.E. CRIM. §§ 451-55 (defining the procedure of the *careo*, or pretrial confrontation of witnesses and defendant). *See also* GOMEZ-COLOMER, *supra* note 28, at 185.

168. The United States Supreme Court has stated that a constitutional challenge to the admission of an out-of-court statement introduced for the truth of what it asserts can be overcome when the statement "bears adequate 'indicia of reliability.' Reliability can be inferred without more where the evidence 'falls within a firmly rooted hearsay exception.' [Otherwise,] the evidence must be excluded absent a showing of 'particularized guarantees of trustworthiness.'" Idaho v. Wright, 497 U.S. 805, 814-15 (1990) (quoting Ohio v. Roberts, 448 U.S. 56, 65-66 (1980)). *See also* Imwinkelried, *supra* note 38, at 524 ("All courts agree that to satisfy the dictates of the Confrontation Clause, the prosecution must comply with a reliability requirement. The prosecution may do so by demonstrating either the reliability of the hearsay statement itself or the hearsay declarant's availability at trial.").

169. The United States Supreme Court "has spoken with one voice in declaring presumptively unreliable accomplices' confessions that incriminate defendants." Lee v. Illinois, 476 U.S. 530, 541 (1986).

front of the trier of fact is an important component of a fair trial. In the case of *Kostovski v. Netherlands*,[170] for instance, witnesses were permitted to give declarations against the defendant anonymously. The defendant never had an opportunity to confront or question the witnesses themselves, and at trial could only question those who took the witnesses' declarations. This anonymous testimony formed the basis upon which the defendant was convicted. The ECHR found that this procedure was a violation of the Convention's fair trial right.

While much of the Court's reasoning in *Kostovski* focussed on the difficulty of challenging the credibility of anonymous witnesses (emphasizing the need to test that credibility through questioning in front of the trier of fact), the Court observed that because trial judges are precluded from studying the comportment of anonymous witnesses, they are unable to form an opinion as to the witnesses' credibility.[171] Similarly, in *Windisch v. Austria*[172] and *Delta v. France*,[173] the Court found violations of the Article 6.3 right to examine witnesses which in turn deprived the defendants of the 6.1 fair trial right.[174]

The ECHR again confronted the issue of the admissibility of unavailable witness testimony in *Isgro v. Italy*.[175] In *Isgro*, when interviewed by the police, a Mr. D accused Isgro ("defendant") of having participated in a kidnapping in which the victim died; D claimed the defendant had asked him to participate as well, but that he had refused. The defendant, however, claimed D had asked him to participate in the kidnapping, but he had declined. D repeated his statements before the investigating magistrate, who then arranged a confrontation before him between D and the defendant.[176] Under Italian law at that time, however, neither the prosecutor nor defense counsel had the right to be present at the confrontation.

During the transcribed confrontation before the magistrate, D affirmed his allegations. The defendant again denied them, accusing D

170. App. No. 11454/85, 12 Eur. H.R. Rep. 434 (1989) (Court report).

171. *See id.* at 448.

172. App. No. 12489/86, 13 Eur. H.R. Rep. 281 (1990) (Court report).

173. App. No. 11444/85, 16 Eur. H.R. Rep. 574 (1990) (Court report).

174. In other cases, however, an ECHR majority has held over vigorous dissent that a court's reliance on other evidence than the statement of the absent witness to convict cured any deprivation of the defendant's right to confront the absent witness. *See, e.g.*, Artner v. Austria, 13 H.R.L.J. 461 (1992); Asch v. Austria, 12 H.R.L.J. 203, 205 (1991) (majority distinguishes *Unterpertinger* and *Delta* on basis of corroborating medical evidence of statement to police by witness who refused to testify at trial that she had been assaulted by defendant).

175. 21 H.R.L.J. 100 (1991).

176. *See id.* at 101.

of lying due to animosity generated by past incidents between them. A similar confrontation took place between D and one of the codefendants. At trial, D could not be located and, over defense objection, the record of his statements to the magistrate and confrontations with the defendants were read into the record. Following his conviction and unsuccessful appeal, the defendant took his case to the ECHR, claiming a violation of his rights to a fair trial and to examine the witnesses against him.

In its opinion, the ECHR characterized *Kostovski* as standing for the proposition that the rights contained in paragraphs 3(d) and 1 of Article 6 "[a]s a rule, . . . require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him, either when he was making his statements or at a later stage of the proceedings."[177] The ECHR noted, however, that "the use as evidence of statements obtained at the pre-trial stage is not in itself inconsistent with paragraphs 3(d) and 1 of Article 6, provided the rights of the defense have been respected."[178] Overruling the Commission, which had voted 10 to 3 in favor of a finding of a violation of Article 6 sections 1 and 3(d), the ECHR distinguished its earlier precedents in *Kostovski*, *Windisch*, and *Delta*,[179] largely on the basis that, unlike the defendants in those cases, Isgro himself had been able to confront the witness against him:

> In the case under examination the purpose of the confrontation did not render the presence of Mr. Isgro's lawyer indispensable; since it was open to the applicant to put questions and to make comments himself, he enjoyed the guarantees secured under Article 6 § 3(d) to a sufficient extent. The Court draws attention to the fact that during the trial the applicant's lawyer was able to carry out his brief with knowledge not only of Mr. D's allegations, but also of his identity; he thus could challenge the accuracy of those allegations and the credibility of the witness himself. In sum, any limitations which may have been imposed on the rights of the defense were not such as to deprive him of a fair trial.[180]

Isgro's holding that the Convention's right to examine witnesses does not necessarily include a concomitant right to have counsel conduct this examination certainly seems parsimonious by common law standards. Nonetheless, the *Barberà* decision could have rested on the confrontation point even in light of *Isgro*, since the defendants in

177. *Id.* at 103.
178. *Id.*
179. *See id.*
180. *Id.*

Spain had no opportunity to confront and question Vendrell, with or without counsel. In any event, under Spanish law a right to examine witnesses would necessarily produce a right to have such examination conducted by a defendant's counsel; by constitutional and statutory provision, Spain guarantees a criminal defendant the right to have his counsel participate at all pretrial proceedings.[181]

Though "extremely narrow," the decision in *Barberà* has been viewed as "important" and "courageous."[182] Ultimately, *Barberà* made several broad statements about the nature of the trial required by the Convention, particularly in a serious and politically-charged case. First, the majority was not disposed to accept a judgment obtained through a coerced confession, even if there was other evidence in the record sufficient to support the judgment.[183] Second, the majority was troubled by a perfunctory public hearing in a matter of substantial evidentiary complexity. Third, the majority found unsatisfactory a process in which the key pieces of evidence entered the record as part of an undifferentiated mass of documents without discussion or analysis, much less the presence and examination of the key prosecution witness.

The majority thus determined that the Convention required that a trial be the pivotal event in the adjudicative process, i.e., the stage at which all of the evidence is tested by an adversarial process. The dissent, however, was willing to accept a proceeding rooted in the civil

181. *See* GOMEZ COLOMER, *supra* note 28, at 66 (citing C.E. arts. 17.3, 24.1, & 24.2). *See also* Barberà, Messegué and Jabardo v. Spain, App. Nos. 10588/83-10590/83, 11 Eur. H.R. Rep. 360, 374 (1988) (Court report): "Since the reform of 4 December 1978 (Act 53/1978), the adversarial nature of criminal proceedings applies to the investigation stage; this enables the accused, assisted by his advocate, to intervene in respect of steps concerning him." (citing Articles 118 & 302).

182. Gearty, *supra* note 6, at 103 n.281, 104.

183. In a recent decision, the ECHR considered a twist on the facts of *Barberà*: whether a court denied a defendant a fair trial by relying not on a confession taken from that defendant while he lacked access to counsel, but on the defendant's refusal to answer questions during a period when he was denied an attorney. In *Murray v. United Kingdom*, 17 H.R.L.J. 39 (1996), the ECHR held that a British court did not deny a suspected I.R.A. member accused of unlawful imprisonment a fair trial under the Convention simply by relying on his silence during post-arrest interrogation by the police, a reliance authorized by special anti-terrorist legislation directed at Northern Ireland. (Such reliance would plainly not be permitted under the Fifth Amendment's privilege against self-incrimination. *See* Doyle v. Ohio, 426 U.S. 610 (1976)).

The ECHR went on to hold, however, that because the decision to remain silent could result in a conviction, the defendant was entitled to have the advice of counsel in making it, and the failure to provide Murray with counsel during his post-arrest interrogation, when combined with the court's reliance on his ensuing silence, did deprive him of the fair trial guaranteed by the Convention. *See Murray*, 17 H.R.L.J. at 47. Like *Barberà*, *Murray* reaches a correct result by reliance on case-specific facts rather than a general principle.

law tradition of written and documentary evidence, culminating in a relatively brief hearing to discuss the adequacy of previously gathered evidence. The rejection of the latter view in favor of the former is a significant victory for the Europeanization of the adversarial process.

The ECHR majority opinion may also have been driven by a quasi-political imperative. In 1982, the year that the convictions of the *Barberà* defendants were returned and affirmed by the Spanish judicial system, Spain "still suffer[ed] from the tragic wounds of a long and repressive dictatorship. People still [went] to jail for writing politically sensitive newspaper articles."[184] *Barberà* can be viewed as a pointed message to a relatively recent signatory nation: the Convention's protections ought not merely be formally reflected in domestic legal provisions, as they surely are in Spain's Constitution of 1978. Rather, they must be honored in spirit and practice, even—or especially—in a controversial case involving allegations of political violence.

C. Round Two: The Case in Spain

The judgment rendered by the ECHR in the *Barberà* case was declaratory, and nothing more. It did not void the defendants' convictions, much less open the prison gates for Barberà and Messegué, who remained in custody. Indeed, only a Spanish court or tribunal could provide such a remedy.[185] In 1991, a survey of the effect of ECHR

184. Eibert, *supra* note 11, at 437. Mark Eibert, the author of this seminal note on the founding of the Spanish Constitutional Tribunal, may well have been referring to the case of Miguel Castells, which eventually also would produce an ECHR judgment finding a violation of the Convention by Spain. *See* Castells v. Spain, 13 H.R.L.J. 427 (1992).

In 1979, Castells, a senator elected as a member of the Basque coalition Herri Batsuna, generally regarded as the political arm of the violent separatist ETA organization, published an article accusing the government of involvement in an unacknowledged "dirty war" against terrorists that had resulted in the killing of innocent Basque citizens by undercover police operatives. In 1983, Castells was convicted and sentenced to a year in prison under a Francoist statute (now repealed) prohibiting insults to the government, after the Spanish Supreme Court ruled that the truth of Castells' allegations could not be pled or proven as a defense to the charges.

The ECHR found "that such an interference in the exercise of the applicant's freedom of expression was not necessary in a democratic society" and thus constituted a violation of Article 10 of the Convention. Spain was ordered to pay Castells $30,000 in costs. *Id.* at 435. For a discussion of the ECHR's jurisprudence on freedom of expression, see Gearty, *supra* note 6, at 115-25.

185. *See* Robert, *supra* at note 9, at 8:

> In domestic law, a sovereign act held to be unconstitutional will be declared null and void. The same cannot apply to the European Court, which cannot annul the act of the defendant State or set aside a judgment given in one of its courts. All the Strasbourg bodies can do is give declaratory judgments, recording that this or that provision of the Convention has been violated by a specified act of a speci-

judgments on the domestic law of party nations observed: "So far there has been no case law [in Spain] concerning the review of proceedings following a finding by the European Court of a breach of the ECHR in domestic procedure."[186] After noting that Spain's law of criminal procedure did not appear to permit reopening a judgment in such a circumstance, the authors predicted that "the *Barberà*, *Messegué*, and *Jabardo* case will give the Spanish courts an opportunity to consider this question."[187]

1. The Audiencia Nacional

On June 29, 1989, the *Audencia Nacional* issued an order in the *Barberà* case stating that the Spanish Supreme Court was the appropriate body to review the impact of the ECHR judgment. Until such a hearing could take place, the *Audencia* released the defendants on the condition that they report twice a month to their local court, and that they not leave the country.[188]

2. The Spanish Supreme Court

On April 4, 1990, the Spanish Supreme Court held that Spanish law provided no means by which to reopen a conviction on the basis of an ECHR judgment; therefore, it ordered Barberà and Messegué back into custody. As recapitulated by the Constitutional Tribunal in its later opinion, the Supreme Court reasoned that ECHR sentences are not self-executing and therefore only declarative in effect. Only a statutory appeal can nullify a member nation's judicial order, and no such appeal was available following the Spanish Supreme Court's earlier final judgment. Judgments of the ECHR have no direct effect or execution in the Spanish judicial system, which does not contemplate the execution of international sentences, as opposed to those of tribunals of foreign states. Furthermore, the ECHR is not a supernational judicial body, as Article 46 of the Convention prohibits giving it the effect of a national tribunal of ultimate jurisdiction.[189]

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fied authority, but ordering no special measures having a direct impact on the act or the legal basis for it. A person convicted in a manner held at Strasbourg to be contrary to the Convention remains convicted, and the law under which he was convicted remains in force. It is solely for the defendant State to annul the act and eliminate its consequences.

Id.

186. Polakiewicz & Jacob-Foltzer, *supra* note 5, at 133.

187. *Id.* at 134.

188. *See* S.T.C., Dec. 16, 1991 (B.O.E., 245/1991, 777, 779) ("S.T.C. 245/1991").

189. *See id.* at 781.

In its decision, the Supreme Court suggested that it might be useful to create a procedural mechanism by which it could comply with an ECHR judgment. In the absence of such legislation, however, the Court had to declare the impossibility of executing a sentence of the ECHR. Barring such action, the only remedy available to the petitioners would be a pardon or an action for money damages against the Spanish state, based on the judgment of the ECHR.[190]

3. The Constitutional Tribunal

On April 17, 1990, less than two weeks after the Supreme Court's decision, Barberà interposed a *demanda de amparo* before the Constitutional Tribunal contending that the Supreme Court's refusal to honor the ECHR judgment, was itself violative of the Constitution.[191] The Tribunal accepted the case for full argument on July 12, 1990.[192] In an order of July 18, 1990, the Constitutional Tribunal suspended the execution of the Supreme Court's order, thereby leaving in effect the order of the *Audienca Nacional* releasing the defendants from their sentences.[193]

While the petitioners' claim that the ECHR judgment had to be enforced domestically was one of first impression for the Tribunal, its members were already quite familiar with the application of both Convention provisions and ECHR case law. By 1991, it had been observed that:

> The Strasbourg organ's practice plays an important role in Spanish constitutional case-law. On the one hand, the Convention is the human rights instrument most frequently invoked in case-law applying Article 10 §2 of the Spanish Constitution. Moreover, when the Constitutional Court cites the Convention[,] it regularly refers to European Court judgments interpreting the ECHR provision at issue . . . . In this way the case-law of the Strasbourg court has become directly relevant to the interpretation of the Spanish Constitution.[194]

190. *See id.* at 782.

191. *See id.* at 781.

192. *See id.* at 783.

193. *See* JACOBO LOPEZ BARAJA DE QUIROJA, EL CONVENIO, EL TRIBUNAL EUROPEO Y EL DERECHO A UN JUICIO JUSTO 18 (1991).

194. Polakiewicz & Jacob-Foltzer, *supra* note 5, at 134. The authors note that in "its influential Judgment 145/1988," the Constitutional Tribunal relied on the ECHR's decision in *De Cubber v. Belgium*, App. No. 9186/80, 7 Eur. H.R. 236 (1984) (Court report), in declaring unconstitutional a law which permitted summary proceedings for minor offenses in which an investigating judge could also serve as a trial judge. "Its judgment led to a legislative reform which brought this part of the criminal procedure into line with the requirements of both the European Court's and the Constitutional Court's case-law." Polakiewicz & Jacob-Foltzer, *supra* note 5, at 135.

The Constitutional Tribunal, sitting en banc,[195] granted relief to the petitioners on December 16, 1991.[196] Magistrate Miguel Rodriguez-Pinero y Bravo-Ferrer, joined by nine of his colleagues, penned the opinion. Magistrate Jesus Leguina Villa filed a separate concurrence, and a dissenting opinion was written by Magistrate Jose Vincente Gimeno Sendra.

After discussing the Spanish Supreme Court's holding and the parties' positions, the Tribunal framed the issue not as whether Spain should apply the ECHR sentence internally, but rather whether the challenged Supreme Court judgment had violated fundamental rights recognized in the Spanish Constitution, the protection of which ultimately lay with the Constitutional Tribunal.[197]

The Tribunal agreed with the government that Spain's recognition of the European Commission's right to hear complaints about human rights violations and the State's acceptance of the ECHR jurisdiction did not mean that the judgments of the ECHR were more than declarative. Indeed, the ECHR itself recognized that its judgments were declarative and left each state to devise the methods of adopting those judgments to its own internal system.[198] The Tribunal also noted that the Convention neither introduced a supernational judicial level, nor imposed on member states specific procedural mechanisms of revision or annulment.[199] The Tribunal then stated that the fact that a judgment of the ECHR did not have direct effect did not mean that Spain's constitutional system should remain indifferent to the body's findings, particularly given the provisions of the Constitution concerning the status of international treaties and law.[200]

The Tribunal noted that the Convention formed part of Spain's internal law under Article 96.1 of the Spanish Constitution,[201] and that Article 10.2 of the Constitution further provided that constitutional

195. *Amparos* are generally decided by *Salas*, or divisions, of the Tribunal, but it decides important cases of *amparo* as a full court. *See* Eibert, *supra* note 11, at 450-51 (citing L.O.T.C. art. 10).

196. *See* S.T.C. 245/1991. For analyses of the decision, see Requejo Pages, *La Articulacion De Las Jurisdicciones Internacional, Constitucional, Y Ordinaria En La Defensa De Los Derochos Fundamentales (A Proposito de la STC 245/91; "Caso Bultó")*, 12 REVISTA ESPANOLA DE DERECHO CONSTITUCIONAL 179 (1992); Escobar Hernandez, *Problemas Planteados Por La Aplicacion En El Ordenamiento Espanol De La Sentencia Bultó*, 20 REVISTA DE INSTITUCIONES EUROPEAS 139 (1993).

197. *See* S.T.C. 245/1991, at 786-87.

198. *See id.* at 787.

199. *See id.*

200. *See id.* at 788.

201. Article 96.1 of the Spanish Constitution states that "the international treaties validly ratified, once officially published in Spain, will form part of the internal order. Their

guarantees should be interpreted in conformity with similar international treaties approved by Spain.[202] As it was the ECHR's function was to interpret the Convention, it followed that if it found a violation of a right secured by the Convention, that violation could likewise be considered offensive to the Constitution of Spain.[203] The Tribunal thus read Articles 10.2 and 96.1 as effectively incorporating into Spanish constitutional law the judgments and jurisprudence of the ECHR.

The Tribunal then turned to the question of whether there existed in Spain's internal law a method to rectify the violation of a fundamental right found by the ECHR. The Tribunal emphasized that the right to liberty (recognized by Article 17.1 of the Constitution) was at issue;[204] and that this violation could not be adequately remedied economically.[205] The ECHR's finding of a violation of 6.1 of the Convention necessarily meant that the prisoners were denied their Article 17.1 constitutional right to liberty; the judicial process did not provide the defendants a public trial with all the guarantees which Article 24.2 of the Spanish Constitution supposedly ensured. Were the judgment of the Supreme Court to remain in effect, the violation of the Convention and Constitution would continue.[206]

In ringing language, the Tribunal then affirmed that every public power in Spain had an obligation to comply with the Constitution and remedy any continuing violation of it—both because the Constitution itself imposed such an obligation and also a democratic state would suffer irreparably if it consented to a situation which violated the Constitution's fundamental rights.[207] Furthermore, monetary compensation would not be sufficient from a constitutional viewpoint in a situation where the right to liberty recognized by Article 17.1 was at stake.[208]

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effect can only be nullified, modified or suspended in the form provided for by the treaty itself or in accord with the general norms of international law." C.E. art. 96.1.

202. Article 10.2 of the Spanish Constitution provides that "[t]he norms relative to fundamental rights and liberties that the Constitution recognizes shall be interpreted in conformity with the Universal Declaration of Human Rights and the treaties and international agreements concerning the same matters ratified by Spain." C.E. art. 10.2.

203. *See* S.T.C. 245/1991, at 788.

204. Article 17.1 of the Spanish Constitution states: "Every person has the right to liberty and security. No one can be deprived of his liberty, except with the observance of the procedures established by this article and in the cases and in the form provided by the law." C.E. art. 17.1.

205. *See* S.T.C. 245/1991, at 789.

206. *See id.*

207. *See id.*

208. *See id.* at 790.

In the Tribunal's view, by focusing on the ECHR decision's lack of enforceability, the Supreme Court did not take into account that, in accordance with section 10.2 of the Spanish Constitution, a violation of Article 6.1 of the Convention also involves a violation of the right to a public hearing contained in Article 24.2. That left to the Tribunal the task of correcting the continuing violation of fundamental rights.[209]

The Tribunal declared that *amparo* is "at present the only remedy available in situations of unconstitutionality caused by procedural flaws exposed after the judgment is final, when no procedural remedy is provided before ordinary tribunals."[210] In such a situation, the Tribunal's organic law permitted it to nullify a final judgment.[211]

The Tribunal joined with the Supreme Court in suggesting that the legislature create procedural methods by which the ordinary courts could enforce ECHR judgments regarding fundamental rights.[212] In the interim, the Tribunal decided that it would act to rectify an acknowledged violation of fundamental rights.[213]

The Tribunal thus nullified the Supreme Court judgments of April 4, 1990 and December 27, 1982, which in turn required voiding the sentence of the *Audiencia Nacional* of January 15, 1982. Such action placed the parties back where they were prior to the rights violation, meaning there could be a new *juicio oral* with all constitutional guarantees afforded.[214]

Magistrate Gimeno Sendra's dissent sets in relief the seminal nature of the majority opinion. Gimeno Sendra asserted that a grant of *amparo* against the Supreme Court opinion denying recognition of the ECHR judgment was unjustified; *amparo*, he wrote, is only appropriate to remedy a violation of the law.[215] As the majority essentially conceded, the Supreme Court was technically and legally accurate in holding that the Legislature had provided no procedure for vacating final judgments on the basis of subsequent ECHR declarations. Since the Supreme Court's ruling was correct, in Gimeno Sendra's view it provided no legal violation which the *amparo* could remedy.

209. *See id.* at 791.

210. *Id.*

211. *See id.* ("As a consequence, Article 55.1 L.O.T.C. permits that final judgments can be annulled by this Tribunal . . . .").

212. *See id.* at 791-92.

213. *See id.* at 792.

214. *See id.* at 793.

215. *See id.* at 794-95 (Dissenting Op.).

The dissent, like the Supreme Court opinion it defended, constitutes a classic expression of the civil law view that the highest source of law is legislative enactment.[216] Since in this view a constitutional guarantee cannot be enforced unless the Legislature has provided a means for doing so,[217] then it is statutory law that controls the Constitution, rather than the other way around. The majority, however, found in the Constitution the procedural means to remedy a violation of a right created by that Constitution. In this perspective, the absence of a statutory vehicle to cure an injury to the Constitution is regrettable and should be rectified by the Legislature, but it cannot frustrate application of the Constitution's provisions. In perhaps consciously echoing *Marbury v. Madison*,[218] the Tribunal majority set the Constitution, and thus itself, as the ultimate arbiter of the legality of governmental action.

In addition to affirming and strengthening Spain's system of constitutional control, the majority opinion promoted the adversarial nature of its criminal trial process. By holding that the Convention had been incorporated into the Constitution, the Tribunal read into the procedural protections granted criminal defendants under Article 24.2 a right to confront witnesses not expressly stated therein. In one sense this incorporation was little more than a formality because, as the dissent noted, several years before the Tribunal had essentially prohibited the use of the *por reproducida* procedure as a substitute for live testimony, holding such a procedure violated the constitutional principles of *oralidad* and the presumption of innocence.[219] The ECHR decision thus gave the *Barberà* defendants an opportunity to enjoy the procedural guarantees that, while extant in the Spanish Constitution

216. For the best primer on the civil law tradition, see JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE CIVIL LAW SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA (2d ed. 1985).

217. *See* S.T.C. 245/1991, at 795 (Dissenting Op.).

218. 5 U.S. (1 Cranch) 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.").

219. *See* S.T.C. 245/1991, at 796 (quoting S.T.C. 149, 150/1987. In S.T.C. 150, the defendant had been reported to the police as suspicious by a witness; the police then found the defendant under a truck with some burglary tools, with which apparently he broken some store windows. The witness and the police gave statements to the investigating magistrate. The defendant was convicted after a *juicio oral* at which he maintained his innocence; neither the reporting witness nor the police appeared or testified, nor were the burglary tools produced. The Second Chamber of the Tribunal granted *amparo*, finding the lack of evidence at the *juicio oral* could not be overcome by reliance through the *por reproducida* procedure on declarations in the *sumario*.).

at the time of their first trial, had not doctrinally flowered until years thereafter.[220]

D. Round Three: The Case in Spain

The judgment of the Tribunal required a new *juicio oral*. On November 30, 1993, following considerable jockeying by the parties over evidentiary questions, the *Audiencia Nacional* issued a judgment.[221] The *Audiencia* began its analysis of the case by citing those precedents of the Constitutional Tribunal and the Supreme Court that required, in accordance with the presumption of innocence and the principle of *oralidad*, that the state provide sufficient proof to convict at the *juicio oral*. The court noted that statements gathered during the *sumarial* stage generally cannot serve as a basis for conviction.[222] The court further noted that this doctrine was subject to exceptions, such as when a pre-trial deposition has been taken with the defense present to examine the witness, or when a prospective witness unexpectedly dies.[223]

The court then passed on the admissibility of various pieces of evidence. The statements of the defendants at their prior trial were admissible, as were the statements they gave with the assistance of counsel at the sumarial stage.[224] In contrast to its judgment 11 years before, however, the *Audiencia* explicitly ruled that the defendants' confessions during their incommunicado interrogation, which they long had maintained resulted from torture, were inadmissible because

220. Thus Lopez Baraja, writing after the ECHR decision in *Barberà* but before that of the Tribunal, could view the *Barberà* decision as consistent with existing precedent on the right to confront witnesses under Spanish law:

> In criminal matters, the right to a fair trial implies that the accused has to have the possibility to challenge the evidence, which ought to be taken in an adversarial manner between the parties. The evidence ought to be taken in a public session, with the accused present and being able to question the witnesses. The impossibility of interrogating witnesses should lead to the inadmissibility of their testimony, as the formula of *por reproducida* is not acceptable. For this reason the ECHR in *Barberà* considered that the fact that important proofs were not admitted and challenged adequately at the trial, in the presence of the accused and publicly, brings us to the conclusion that the proceeding, considered in total, did not meet the demands of a process just and public, thereby violating Article 6.1.

LOPEZ BARAJA, *supra* note 193, at 117-18.

221. *See* Audiencia Nacional, Sentencia No. 44/93 (on file with *Hastings Constitutional Law Quarterly*).

222. *See id.* at 18.

223. *See id.* at 19-20.

224. *See id.* at 22-23.

counsel had not been available to the defendants.[225] Vendrell's first incriminating statement was inadmissible for the same reason.[226]

The court found Vendrell's second declaration technically admissible under Spanish law, since it had been taken before a judge when counsel was available to Vendrell, and since he now was unavailable to testify for reasons beyond the control of the prosecution: he had died in 1989.[227] However, the court ruled that the declaration was of little probative value because it had not been subjected to confrontation and cross-examination by the defendants during the sumarial process or at the *juicio oral*, and because it did not directly implicate the defendants in the Bultó homicide.[228] In so holding, the *Audiencia* cited the opinion of the ECHR on the same point.[229]

Thus, having whittled down the admissible evidence, the court found that on May 5, 1977, five persons invaded the home of Jose Maria Bultó, attached a bomb to his chest, and demanded a ransom; the court also found that the bomb had exploded for unknown reasons, killing Bultó.[230] The court found, however, that the state had not proved that Messegué or Barberà had entered the house or had any other role in the operation or the making of the bomb—although they were members of E.PO.CA. between 1968 and 1976.[231] The court further found that the state had not proven that Jabardo had neither been a member of E.PO.CA. prior to May 9, 1977, nor that he had gathered information for the group of businessmen and bankers, in general, or Bultó, in particular.[232] The three judge court unanimously acquitted all defendants on all charges.

At the time they arrested Barberà, Messegué, and Jabardo in 1980, the Spanish police had located physical evidence establishing that all three were linked to groups advocating armed struggle against the Spanish state. That being so, a Tribunal of Public Order under Franco would not have been troubled by the likelihood that the evidence tying them to the Bultó homicide was obtained by torture and thus unreliable, or by the very real possibility that the defendants were innocent of the charged crime; innocent or guilty of that particular offense, prison would have been deemed a proper place for them.

225. *See id.* at 23.
226. *See id.* at 24.
227. *See id.* at 24-25.
228. *See id.* at 27.
229. *See id.*
230. *See id.* at 14-15.
231. *See id.* at 15.
232. *See id.*

Although the Constitution of 1978 should have mandated a very different judicial attitude and proceeding from those found in the T.O.P., there was little about the 1982 trial of the defendants that reflected that change.

Eleven years later, however, the defendants were awarded a proceeding that certainly could serve as a model of procedural fairness to criminal defendants. Statements from both the defendants and alleged accomplices taken without the benefit of counsel were excluded from consideration. A crucial piece of evidence against the defendants—the second declaration of Vendrell—was considered but awarded little probative value because its reliability had not been tested through confrontation and cross-examination.

It is finally of great importance that the court meaningfully applied the presumption of innocence. Certainly, the second *juicio oral* did not establish that the defendants had not participated in the Bultó homicide. The fact that a confession is coerced surely means it may be false, but information obtained under duress can be accurate, and often is. On the record before it, the *Audiencia Nacional* could not have acquitted the defendants if it had assumed their guilt until the contrary was proven. Rather, its judgment reflects a rather rigorous application of Blackstone's maxim, adopted as a cornerstone of the American criminal justice system, that "the law holds that it is better that ten guilty persons escape than that one innocent suffer."[233]

E. Article 50 Proceedings in the ECHR

The final chapter of the Bultó case was written in the ECHR. Article 50 of the Convention authorizes the ECHR to provide "just satisfaction" to parties whose rights under the Convention have been violated if the state responsible for that violation fails to make adequate reparation. At the time of its decision in the *Barberà* case in 1988, the ECHR reserved decision on Article 50 compensation.[234]

233. Coffin v. United States, 156 U.S. 432, 455-56 (1895). *Coffin* also quotes scholars who found expressions of the presumption of innocence in Greek and Roman law, including a story of a Roman governor who was on trial before the Emperor Julian. The accused contented himself with denying his guilt, and relying on the lack of evidence against him. The prosecutor Delphidius, seeing that the failure of the accusation, was inevitable, could not restrain himself and exclaimed, "Oh, illustrious Caesar! If it is sufficient to deny, what will become of the guilty?" Julian replied, "If it is sufficient to accuse, what will become of the innocent?" *Id.* at 455 (quoting RERUM GESTARUM, lib. XVIII, c.1).

234. *See* Barberà, Messegué and Jabardo v. Spain, App. Nos. 10588/83-10590/83, 11 Eur. H.R. Rep. 360, 392-93 (1988) (Court report).

On June 13, 1994, the ECHR ordered Spain to pay eight million pesetas (approximately $65,000) to Messegué and Barberà, and half that amount to Jabardo. This judgment has been satisfied.[235]

V. Conclusion

Barberà is arguably the most important criminal case heard in Spain's judicial system since the enactment of the Constitution of 1978. It is significant both for the changes that it wrought in Spanish law and procedure and those that it reflected. The trial eventually awarded the defendants was adversarial and fair, and placed great emphasis on the right of the accused to confront the evidence against him. The 1993 proceeding in the *Audiencia Nacional* plainly was in full accord with the guarantees provided by both Article 24 of the Spanish Constitution and Article 6 of the European Convention. Moreover, the decision of the Constitutional Tribunal in *Barberà* has great significance in areas far beyond that of criminal procedure. It affirmed the transcendental stature of international treaties in domestic law and Spain's fidelity to its international legal obligations.

A nation's commitment to legal principle is continually subject to testing and never is that challenge greater than when a society confronts a very real challenge to its peace and security. Spain's young democracy has never been free of such threat in the form of political terrorism from ETA, the armed Basque separatist organization. ETA has killed hundreds of military and police over the last two decades in its effort to carve from the north of Spain a Basque nation; security forces have responded with "off the shelf" operations that have included the kidnapping, bombing, and killing of ETA suspects—and innocent civilians.[236]

While the ETA issue has waxed and waned in political importance, it took center stage again in the summer of 1997. In June, security forces freed a prison official held hostage in an underground cell for 532 days by ETA in an effort to force a government relocation of ETA prisoners.[237] The public was shocked by photos of the re-

235. Conversation with Simeon Miquel Roe, September, 1995. Attorney Roe represented defendant Barberà at all stages of the proceedings in Spain and the ECHR between 1982 and 1994.

236. In 1996, the government of socialist Felipe Gonzalez fell after 14 years in power, largely over credible allegations that high government officials, and even Gonzalez himself, approved funding operations in this "dirty war" in the 1980s.

237. *See* Julio M. Lazaro, *El Comando Que Secuestró A Ortega Lara Tenía Ordenes de Matarle O Dejarle Morir de Inanicion; El Juez Procesa Como Inductor A 'Pototo' y Calcula Que A Cada Etarra Le Pueden Caer 20 Anos*, EL PAIS, Aug. 19, 1997, at 13.

leased official, whose cadaverous appearance resembled that of a survivor of Auschwitz. Immediately thereafter, ETA kidnapped Miguel Angel Blanco, a city councilor in the Basque country who belonged to the conservative Partido Popular, which presently controls the national government. When the government refused to accede to ETA's demand for the transfer of prisoners within a few days of the councilor's capture, ETA executed Angel Blanco with a bullet to the back of the neck.

The public reaction was swift and massive. Within a week, street demonstrations unequaled since the country mobilized in opposition to the failed *golpe de estado* of 1982 were held in every major city of the country. Literally millions of Spaniards chanted "Basques, si, ETA, no." The generally fractious political parties signed a pact to isolate Herri Batsuna, the political arm of ETA that wields significant electoral power in the Basque country. It would be hard to imagine a political climate more hostile to an accused facing trial on charges that he murdered a police officer at the behest of ETA.

Yet on August 4, 1997, presumed ETA member Jose Joaquin Lizaso Sorozabal was acquitted of just such charges following his extradition from France a year earlier.[238] At his *juicio oral* on July 22nd, the prosecutor had relied on police station statements taken from Lizaso's co-defendant, who was convicted on the same charges. The *Audiencia Nacional* found those statements inadmissible against Lizaso because the co-defendant had not been afforded counsel. In accordance with Article 24.2 of the Spanish Constitution, and likewise the provisions of the Convention, the court further found that any doubt about the defendant's guilt had to be resolved in his favor, thereby requiring Lizaso's absolution. Article 1, section 1 of the Constitution of 1978 asserts that Spain is "a social and democratic State governed by law . . . ." Indeed it is.

238. *See id.*