

RIGHTS AND FREEDOMS

Cases



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Dret UB



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Edicions

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FOREWORD

The cases included here have been selected for the study of the rights and freedoms guaranteed in the Spanish Constitution. It is, without doubt, a very extensive subject and a difficult task to delve into each and every one of them in a single semester, which is how long a course on the topic usually lasts. This selection of cases seeks to address a significant number of these rights and freedoms, as well as the most important aspects of them. The objective is also to provide an introduction to the constitutional interpretation. Why should one right prevail over another? What are the elements that must be taken into account? Why choose one resolution over another? Who decides? On what basis? What are the guarantees of rights and freedoms? Who is entitled to them? Against whom?

The method of working on these cases is to examine real decisions and/or assumptions and thus learn about the different rights and freedoms involved that are recognized in the Spanish Constitution and in the European Convention on Human Rights, as well as the relationships between them. The strategy, on the other hand, is much more ambitious, and is to learn through these cases to argue based on fundamental and human rights on legal notions, and to cultivate a critical attitude towards the law and constitutional interpretation.

HOW TO ANSWER A CASE? SUGGESTED STEPS

The indications offered below are simple recommendations made in a personal capacity, all of them highly debatable, without exhaustive intentions or any great methodological aspirations but just to trying to answer informally the question that in no academic year students do not ask: How is a case resolved?

- In the first place, it should be noted that these cases are for Spanish constitutional law subjects and specifically deal with fundamental rights and freedoms. This is underlined, because many times the cases address very diverse topics and this can be confusing when approaching their study. It is very important at all times to be aware that responses must focus on the subject of Spanish constitutional law, constitutional jurisprudence and, where appropriate, decisions on European and international human rights. Details of other subjects will not be entered into here.
- Although cases are complex and pose many aspects of reality and constitutional law, it must also be emphasized that each case has a title that refers to the subject/s on which responses should focus.
- Each and every one of the cases presented here refers to the guarantees of rights. Therefore, it is essential that before answering any of them, the basic concepts of national and international guarantees of rights are well understood, at least as they are explained in the recommended course text book.
- Consequently, it is recalled that this issue is only a volume of cases to be resolved, accompanied by some reading material to help resolve them. In no way is it a text book.
- It should also be remembered that, although each case is normally accompanied by a decision/judgment that inspired its statement, answers must be genuine. Therefore, it is not necessary to match the decision that is attached. Even so, when this is done, it must be specified with clarifications such as, “as the Constitutional Court has already established in judgment XX, it would also be appropriate here to recognize [...]”, or a similar formula. Or in disagreeing, “While in the case XX, the European Court of Human Rights decided that... XXX... instead here this would not be proper, in my opinion, because they are not given the same circumstances if we consider that XXX”, or similar phrases.
- To answer a case it is essential to have at least:
 1. a copy of the Spanish Political Laws (The Spanish Constitution, Spanish Constitutional Court Organic Law, etc.), or
 2. a Constitutional Law text book.
- Each case must be submitted with the information detailed below.
 1. Appearing at the top right of each of the pages submitted:
 - a) the surname and name of the student in capital letters;
 - b) the group (m1, t0, etc.), course (1st, 2nd, etc.), name and case number (case 1: Ms. XX) and date (July 7, 2027).
 2. The pages must be numbered, preferably at the bottom of each page.
 3. No need for large bindings or plastic coverings; a diagonal staple at the top-left is sufficient.

Before answering a case, the circumstances in which the case is proposed must be considered. Both the answers and the organization of the course depend on this. It is different if it's just

a single live event with a time limit without material, or a case to be made at home individually over two days, or whether the questions require a group response over a week, a month, or two months. The professor will indicate in due course, and according to the teaching plan of the subject, what type of case is being proposed.

1. Case to answer previously and individually at home and discuss later in class

The cases that are presented in general are to be done at home individually after the theoretical explanation given in class. For this I would advise the following:

1. First it is important to read the facts and questions of the case. It would be nice to keep them in mind throughout the following steps.
2. If the case includes press releases or videos, read and/or watch them. If these suggest any ideas regarding the case and the questions, write them down.
3. Read in the textbook the subjects indicated in the title of the case (for example, principle of equality). If appropriate responses arise to the case, write them down in a schematic way.
4. Read in the textbook the chapters on jurisdictional guarantees of rights (preferential and summary appeal, constitutional question, individual constitutional appeal (*recurso de amparo*), appeal to the European Court of Human Rights, and appeal to other international entities such as the UN Human Rights Committee). It is important to understand these contents well, since they will be necessary for each and every case. Take notes.
5. Normally each case is based on a real case. Read the judgment on which the case has been inspired. Likewise, take notes schematically, again.
6. Start answering the case. Be direct. Without beating around the bush. If the question is: "What right can Ms. X claim?" Well, answer directly: "The right that Mrs. X can claim is ... XXX recognized in art. XX of the CE". It is important to refer to the Constitution (this is a Constitutional Law subject). And so on in each of the questions. Answer directly using first the Constitution, the Constitutional Court Organic Law and the reference law for the right(s) involved in the case (for example, the Organic Law on the right to demonstrate, or the Organic Law on the protection of the right to honor, privacy and self-image), if there is one. That is, use the Political Laws in the answers.
7. Add the corresponding theoretical explanation that is important to answer the case. Write from the notes that have been taken in the previous steps.
8. Now, read the rest of the materials attached or mentioned in the case. Use them to complete the answers already given, to give further and more solid arguments. These materials are especially relevant to questions about reasoning or possible answers from the Constitutional Court or the European Court of Human Rights. It is here that the answers should offer the legal arguments that can be built and inspired by the attached materials in each case.

It is important to remember that it is not a matter of copying what the texts and attached court decisions say, but rather that it is necessary to build responses based on them. Thus, for example, one might answer: "According to the judgment XXX of the Constitutional Court, article X of the Constitution would not protect in this case"; or something like: "Instead, here it is..."

Finally, if you like, a statement may be made as an opinion: "In my opinion, in this case the right to XX should prevail over the right to XX because XX". Indeed, it must be explained, with legal arguments, why an opinion is given.

9. Review the answers. The first case done is typically going to take a lot of time, hours! The rest usually not so much. The important thing is to start, read, write, make rigorous references, write again, and reread and rewrite.

2. Case to prepare in a group at home and also present as a group in class

1. All students must prepare the cases as indicated in the previous section: individually and at home. furthermore, if this is decided at the beginning of the course, for each case there will be a small group that will “present” the case through a role play. This will require a minimum of three people and a maximum of nine people per case. If there are foreign students in the class, it is advised that they are divided among the different groups and thus can offer a comparative perspective to the case. The result is usually very positive and offers different perspectives.

The idea is that after the first introductory classes, the cases are assigned among the students, as well as the group and the role that they will play.

2. For each case there must be (i) a student who acts as a defense lawyer/person who believes that his/her right has been violated, (ii) other students who represent the state attorneys or the person who believes that there has not been a violation of the right (or the person accused of having violated the right), and, lastly, (iii) another two or three students who will be the judges of the Constitutional Court or the European Court of Human Rights who will dictate the decision.
3. Once the cases and roles have been distributed, each group will have to prepare the assigned case at home. For this, it is recommended that the steps indicated in the previous section be followed. Here, however, instead of answering the questions of the case, the task will be to focus on defending its position depending on the role assigned by means of legal arguments that must be prepared in a case-role group through a short written paper or opinion.
4. On the day of the presentation, the team that defends the right will begin (or the person whose right has been violated) by explaining the facts and claiming why they believe that the right involved has been violated. For this, it is essential that point-by-point reference be made (whether to incorporate or to reject them) to the arguments presented in the rules and decisions that have been attached to the case. This team will have a maximum of fifteen minutes. Every member must take part. You can use audio recordings and images if they are considered necessary. You can bring accompanying notes and read them out, although it is important that they explain the points well to the rest of the class. Always with legal arguments from a constitutional law perspective.
5. Secondly, the lawyers of the other party, the state or the corresponding public administration will answer, for a maximum of fifteen minutes as well, to which the other team may answer back again. This can be repeated several times.
6. Next, the rest of the class, who will have prepared the case at home individually, will intervene to support or question one or the other party.
7. Finally, the court (Constitutional Court or the European Court of Human Rights) will issue its judgment. The decision handed down by the court does not have to coincide with the one/those that have been attached in the case. Only if deemed correct. Of course, it must be explained why the court concurs or disagrees with any previous decisions (the ones that are attached in the case). Thus the judges can declare: “As already stated in decision xx, we also understand here that ... xxx”; or distance themselves from a previous decision and explain why. Judges will have to bring the written decision from home and read it, explaining it in a didactic way to the rest of the class. They can change their decision after listening to the parties. It is advised that the judgment is delivered in the next class.

8. It is essential that students not making the presentation take note of the different arguments. It does not matter who wins the case or reveals what they think, not here. What is relevant is to reflect upon and identify the criteria used by the courts to decide a case from a constitutional law perspective.

	Day of presentation	Lawyers of the defendant	Public attorney / Other lawyers	Constitutional Court / European Court of Human Rights judges
CASE 1				
CASE 2				
CASE 3				
CASE 4				
CASE 5				
CASE 6				
CASE 7				
CASE 8				
CASE 9				
CASE 10				
CASE 11				
CASE 12				
CASE 13				
CASE 14				

3. Case to be answered in an examination

1. If the exam is a case you will only have with you the Public/Political Laws (*Leyes Políticas*). All the theoretical concepts must have been studied before. Therefore, normally each of the questions – such as what right has been violated? What can the victim do? What would be the Constitutional Court decision? etc. – must be answered based on your previously acquired knowledge in accordance with the corresponding teaching plan. And, of course, the Political Laws must be used.
2. When answering a case, it is important to answer directly and also refer comprehensively to the theoretical part of the course, so that your arguments are rich and take into account the doctrine and the knowledge acquired from having completed the cases in class and having studied at least the text book covering the concepts indicated in the course teaching plan. Therefore, as far as possible, the result should resemble the type of response that would be given in the first type of case, those done at home by consulting the textbook. However, this time the answer must be given after having studied and assimilated the subject matter, from memory.

All these aspects will be discussed in more detail in class, where questions and proposals that may arise will also be answered.

Case 1

RIGHT NOT TO BE DISCRIMINATED AGAINST, THE RIGHT TO MARRY AND RULE OF LAW: ROMA MARRIAGE CASE (MS MUÑOZ DÍAZ)

1. Facts

Ms Maria Luisa Muñoz Díaz, known as “La Nena” and Mr Manuel Domingo, both Gypsies, married in 1971 according to the rites of their community. The celebration was held before their friends and relatives for three long happy days and nights, following all the steps marked by the Roma tradition. The young couple was supported and publicly recognized by their community, pledging to live together and to fulfil all the duties of mutual assistance related to the institution of marriage. However, this marriage was never registered in the Spanish Public Civil Registry. The couple had six children. And there was a public record of each of them. The Domingo-Muñoz Díaz family obtained the corresponding “family book” (*libro de familia*) from the Civil Registry on 11 August 1983. In 1986 they were also recognized as a first-degree “numerous family”.

The father of the family, Mr Manuel Domingo, worked all his life and was listed by the social security for over nineteen years, where it was recorded that he was responsible for his wife and six children and paying all the applicable taxes. After 30 years of marriage, Mr Manuel Domingo perished. His widow, Ms Muñoz Díaz, contacted the Spanish National Institute of Social Security (INSS) to claim the corresponding widow’s pension. The pension was denied “to the extent that [Ms Muñoz Díaz] is not and never was the wife of the deceased prior to his death, as required by paragraph 2 of the Seventh Additional Provision of Law 30/1981, of July 7, 1981 [...]”.

2. Questions

1. Can Ms Maria Luisa Muñoz Díaz file any appeal against the INSS’s refusal? Against whom? How? Through which procedure?
2. What right(s) can Ms Muñoz Díaz claim?
3. Could this case end up before the Constitutional Court? If so, what would the proceeding be? What do you think would be the reasoning of the Constitutional Court?
4. Could this case end up before the European Court of Human Rights? On what basis? What would the procedure be? What do you think the decision of the ECHR would be?

3. Judgments

- **European Court of Human Rights Judgment, Case of Muñoz Díaz v. Spain, 8 December 2009 (attached).**

- Spanish Constitutional Court Judgment, Muñoz Diaz case, April 16, 2007.
- Spanish Constitutional Court Judgment 199/2004, Widower of an official case.
- Spanish Constitutional Court Judgment 198/2012, Marriage between same sex partners case.

4. Other suggested materials

- www.gitanos.org/upload/15/35/Recortes_prensa_diciembre_2009.pdf
- www.errc.org
- www.coe.int/en/web/no-hate-campaign/roma-rights
- www.europe.ohchr.org/Documents/Publications/RomaInclusion.pdf
- www.ohchr.org/EN/Issues/Minorities/SRMinorities/Pages/StudyProtectionRoma.aspx
- <https://vimeo.com/160316837>
- www.google.com/url?sa=i&url=https%3A%2F%2Fwww.youtube.com%2Fwatch%3Fv%3DZqxQA-tw_FM&psig=AOvVaw2N_Jfrh3sD1jQuYkqaMZVj&ust=1607250939449000&source=images&cd=vfe&ved=0CA0QjhxqFwoTCICk29fStu0CFQAAAAAdAAAAABAg
- www.youtube.com/watch?v=IGUwCy3xy-s
- www.youtube.com/watch?v=rjKAuEJQPdE

5. Most relevant decisions

European Court of Human Rights Judgment, Case of Muñoz Díaz v. Spain, 8 December 2009

THIRD SECTION

CASE OF MUÑOZ DÍAZ v. SPAIN

(Application no. 49151/07)

JUDGMENT

STRASBOURG

8 December 2009

FINAL

08/03/2010

This judgment has become final under Article 44 § 2 of the Convention.

MUÑOZ DÍAZ v. SPAIN JUDGMENT 1

In the case of Muñoz Díaz v. Spain,

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Josep Casadevall, President,

Elisabet Fura,

Corneliu Bîrsan,

Boštjan M. Zupančič,

Alvina Gyulumyan,

Egbert Myjer,

Luis López Guerra, judges,

and Santiago Quesada, Section Registrar,

Having deliberated in private on 26 May and on 17 November 2009,

Delivers the following judgment, which was adopted on the last mentioned date: