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Member States Liability for Legislative Injustice

National Procedural Autonomy and the Principle of Equivalence; Going too far in *Transportes Urbanos*?

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Abstract

This article analyses the impact that case Transportes Urbanos might have in the thorny scenario of State liability for legislative injustice, particularly in Spain. After giving a an overview of the legal context that triggered this ECJ preliminary ruling, it analyses the answer given by the ECJ to the Spanish Supreme Court in terms of the principle of equivalence, and also addresses the question of whether an in-depth analysis of the very different positions that the Constitution and EU law have in the Spanish legal order could have justified a different solution. Finally, it considers to what extent the conjugation of the ECJ judgment and the Spanish Supreme Court doctrine on State liability for damages caused by the legislature give rise to spill-over effects and to new difficulties and dilemmas.

1 Introduction: the Ever Thorny Issue of State liability for Legislative Action

'State liability for acts of the legislature is a controversial, unclear and always open question in any modern state under the rule of law'.[1] This assertion was made by the Spanish Supreme Court (*Tribunal Supremo*) in 1991, a few weeks before the European Court of Justice proclaimed in *Francovich*[2] the principle of state liability for loss and damage caused to individuals as a result of breaches of Community law.

Since the seminal decision in *Francovich*, the ECJ case law on state liability has made a significant contribution to the acknowledgment of state liability for legislative acts in the Member States' legal orders.[3] As is well-known,

* The author would like to thank Prof. R. Alonso García for his useful comments. Any errors remain my own.

1 *STS* of 11 October 1991 (*Recurso Nº* 85/1987).

2 ECJ judgment of 19 November 1991 in Joined Cases C-6/90 and C-9/90 *Andrea Francovich and Danila Bonifaci* ECR [1991] I-5357.

3 See F. Senkovic, *L'Evolution de la responsabilité de l'Etat Législateur sous l'influence du Droit Communitaire* (Bruselles, 2000); R. Alonso García, *La responsabilidad de los Estados miembros por infracción del Derecho Comunitario* (Madrid 1997); R. Caranta, 'La tutela giurisdizionale Italiana, sotto L'influenza comunitaria', in M.P. Chiti and G. Greco (Dir.), *Trattato di Diritto Amministrativo Europeo* (Milan, 2007), p. 160-162; S. Marinai, 'Aspetti applicativi

in *Brasserie du Pêcheur/Factortame*[4] the ECJ held that the principle of State liability is also applicable where the national legislature is responsible for the breaches of Community law[5] as, 'in view of the fundamental requirement of the Community legal order that Community law be uniformly applied, the obligation to make good damage enshrined in that principle cannot depend on domestic rules as to the division of powers between constitutional authorities'.[6]

Against this background, the last two decades have witnessed an intricate and yet unresolved debate in Spain on the issue of the State liability for harm caused by legislative acts. A discussion that, nonetheless, has not been particularly concerned with the assumption of the ECJ doctrine on the principle of state liability for breaches of European Union Law:[7] on the contrary, until recently it had been mainly focused on the purely internal doctrine forged by the Spanish Supreme Court on public liability for damages cause to individuals as the result of the enactment of legislation, beyond the scope of European Union Law.[8]

The judgment delivered by the ECJ in Case C-118/08 *Transportes Urbanos*[9] is the last, but not the final, episode of this discussion: the Supreme Court had established different procedural conditions for state liability actions to

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del principio di responsabilità dello Stato per violazione del diritto comuniario', *Dir. Com. E degli Scanbi Int.*, 2002, p. 689 et seq; M. Puder, 'Phantom menace or new hope: member state public tort liability after the double-bladed light saber duel between the European Court of Justice and the German Bundesgerichtshof in Brasserie du Pecheur', in *Vanderbilt Journal of Transnational Law*, vol. 33, 2000 (available in http://law.vanderbilt.edu/publications/journal-of-transnational-law/archives/volume-33-number-2/download.aspx?id=2029). H. Xanthaki, 'Effective Judicial Protection at the National Level Against Breaches of EC Law: The Current Nightmare of Procedural Hurdles', 5 *Eur. J. L. Reform* 409, at p. 413.

4 Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029

5 Para. 36.

6 Para. 33.

7 The Spanish Supreme Court has incorporated this EU law principle into its case law without any reluctance (see, for example, *STS* of 12 June 2003, *Recurso contencioso-administrativo Nº* 46/1999; Case *Canal Satélite Digital*). It has also been welcomed by the academic commentators (see among others, R. Alonso García, *supra* note 3; and J.I. Moreno Fernández, 'La responsabilidad Patrimonial del Estado Legislador frente a disposiciones legales declaradas contrarias a la constitución o al Derecho comunitaria, *Revista General de Derecho Constiticional*, nº 5, 2008).

8 A general scrutiny of the topic of State liability for damages caused by acts of the legislature goes beyond the scope of this article. For a deep and critical analysis in Spain see, in particular, E. García de Enterría, *La responsabilidad patrimonial del Estado Legislador en el Derecho Español*, (Madrid 2007); for contrasting opinions see, for example, Garrido Falla, 'La responsabilidad del legislador', RAP nº 118, 1989, p. 35 et seq.; Mª C. Alonso García, *La responsabilidad patrimonial del Estado-Legislador* (Madrid 1999).

9 Judgment of 10th of January 2010 nyr.

claim damages caused by unconstitutional laws from those others used to claim damages for breaches of Community law caused by the legislature; the preliminary reference was prompted, in fact, by the doubts raised in the Third Chamber of the Supreme Court (*Sala de lo Contencioso-Administrativo*) about the compatibility of its own doctrine with EU law.

This article will, first, give an overview of the legal context that triggered this ECJ preliminary ruling focusing, in particular, in the problematic case law of the Spanish Supreme Court. Second, it will analyse the answer given by the ECJ in terms of the principle of equivalence and will address the question of whether an in-depth analysis of the different positions that the Constitution and EU law occupy in the Spanish legal order could have justified a different solution. Finally, it will consider to what extent the conjugation of the ECJ judgment and the Spanish Supreme Court doctrine on state liability for damages caused by the legislature give rise to spill-over effects and to new difficulties and dilemmas.

2 Why the Preliminary Reference? The Controversial Doctrine of State Liability for Legislative Acts

In the early nineties, notwithstanding the lack of explicit and unquestionable constitutional bases, the Spanish Supreme Court began developing a striking case law on State liability for damages caused by the legislature. This case law, which was forged in the realm of national law, beyond the scope of its obligations under European Law, has hardly had any precedent in other states of our legal environment: leaving aside the generally accepted principle of state liability for breaches of EU law,[10] in most countries the doctrine of sovereign immunity and the principle of separation of powers have traditionally implied that the States would only face claims for damages caused by the legislature, if any at all, in exceptional and very special circumstances.[11]

[10] See the analysis of the impact of the *Francovich* principle in Germany by T. Krümmel and R.M. D'Sa, 'Implementation by German Courts of the Jurisprudence of the European Court of Justice on State Liability for Breach of Community Law as Developed in *Francovich* and subsequent Cases', [2009] *EBLR*, p. 273-282; and M. Puder, *supra* note 3; in the United Kingdom by D. Chalmers, *et al.*, *European Union Law*, Cambridge University Press, Cambridge, 2006, p. 405-408; in Italy by Caranta, *supra* nota 3; in Spain by J.I. Moreno Fernández, *supra* note 7.

[11] See I.B. Lee, 'In Search of a Theory of State Liability in the European Union', *Harvard Jean Monet Working Paper* 9/99, at. p. 18. As Professor García de Enterria points out (*supra* note 8, at p. 18), the Spanish Supreme Court case law has hardly any precedents in other countries of our legal environment, particularly if the legislature does not infringe any superior rule of law; in this regard, the closest case law is the scarce number of decisions in which the French Conseil d'Etat has acknowledged the liability of the legislature, under

The 1978 Spanish Constitution (hereinafter SC) deals with the principle of public powers liability in three articles:

- According to Article 9.3 SC, the Constitution '[...] guarantees the principle of legality [...], the liability of public powers and the interdiction of arbitrary actions on the part of the latter'.
- Article 106.2 SC deals with the non-contractual liability of public administrations in the following terms: 'Private individuals shall, under the terms established by law, be entitled to compensation for any loss that they may suffer to their property or rights, except in cases of force majeure, whenever such loss is the result of the operation of public services'.
- Lastly, Article 121 SC is devoted to judicial liability: 'Damages caused by judicial errors, as well as those arising from irregularities in the administration of justice, shall be subject to compensation by the state, in accordance with the law'.

There is not, however, any specific provision in the SC devoted to the liability of the legislature beyond the general provision of Article 9.3.

Following the Constitutional mandate, Organic Act 6/1985 of the Judicial Power regulated the regimen of the judiciary liability in Articles 411 to 413.[12] A few years later, Act 30/1992 on the Legal Regime of the Administrations and the Administrative Common Procedure introduced several provisions establishing the regime of non-contractual liability of Public Administrations (articles 139 to 144).[13] Besides, Article 139.3 of Act 30/1992 enclosed also the following reference to State liability for harm caused by the *application* of legislative measures: 'Public Administrations will make good for damages caused by the application of legislation that does not amount to an expropriation of rights and that individuals do not have the legal duty

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the doctrine of '*égalité devant les charges publiques*', following the Arret of 14th January 1938, *Société des produits latitairs* '*La Fleurette*' (see further C. Broyelle, *La resposabilité de L'Etat du fait des lois*, Paris 2003). However, where a wrongful use of legislative powers is at stake (ie. national legislation in breach of EU Law) the doctrine of legislative State liability is well known in other States (see in this regard H. Xanthaki, *supra* note 3 at p. 439-442. Furthermore, in the realm of EU law see the recent judgment of the ECJ in Case C-120/06 P and C-121/06 P *FIAM* ECR [2008] I-6513 where the Court has cautiously admitted that '[...] a Community legislative measure whose application leads to restrictions of fundamental rights, such as the right to property and the freedom to pursue a trade or profession, that impair the very substance of those rights in a disproportionate and intolerable manner, perhaps precisely because no provision has been made for compensation calculated to avoid or remedy that impairment, could give rise to non-contractual liability on the part of the Community'.

12 Ley Orgánica 6/1985 del Poder Judicial, enacted the 1 July 1985.

13 Ley 30/1992 del Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común, enacted the 26 November 1992.

to bear, within the extent and terms that such legislation itself establishes'. Though this provision is phrased in such terms that has been very much criticised as it is considered being both dark and superfluous.[14]

Beyond these few legal rules, the courts have played an essential role in the development of the doctrine governing state liability, as it has also happened in other legal orders;[15] this is the case, in particular, in the realm of state liability for legislative measures.

The Supreme Court initially declared that Article 9.3 SC could not support on its own, without further regulation by the Parliament, the state liability for legislative acts.[16] Nevertheless, it eventually acknowledged that, given certain conditions, Parliamentary Acts which were not unconstitutional could give rise to the right to compensation, particularly when they harm individuals' legitimate expectations.[17] Later on, following a quite free interpretation of Article 139.3 of Act 30/1992, the Supreme Court also stated that the contentious administrative judges can look into the 'tacit will of the legislature' ('*ratio legis*') to decide whether a legislative act that *has not been declared unconstitutional*[18] gives rise to the right of compensation for damages that breach legitimate expectations and/or that impose a special and onerous burden on the plaintiff as a result of the implementation of its provisions.[19]

As regards to the doctrine of state liability for 'wrongful' use of legislative powers, there are two distinct situations in Spain in which individuals may sue the state for damages: on the one hand, when the individual has suffered

[14] See, in particular, the analysis of García de Enterría, who concludes that ordinary judges do not have jurisdiction to declare the non-contractual liability of the legislature on the bases of Article 139.3 of Law 30/1992 (*supra* note 8 at p. 234-237). For a detailed account of the interpretative problems and critics that this provision has triggered see M.C. Alonso García, *supra* n. 8, p. 63-134.

[15] See E. García de Enterría and T.R. Fernández, *Curso de Derecho Administrativo*, vol. II, 11ª ed. (Madrid 2008) at. p. 364 et seq.

[16] See, among others, *STS* of 30 November 1992 (RJ 1992\8769); and *STS* of 15, 18, 20, 22 January 1993 (*Recursos Nº.* 918/1990; *Nº* 747/1990; *Nº.* 1617/1990, and *Nº* 394/1990). This case law was applauded by an important sector of legal commentators, led by Prof. García de Enterría, who has argued that the principle of 'public powers liability' (*responsabilidad de los poderes públicos*) enshrined in art. 9.3 SC does not refer to non-contractual patrimonial State liability (*responsabilidad patrimonial*), but to the political accountability of public powers in general (*responsabilidad política*). See García de Enterría, *supra* n. 8, at p. 91.

[17] See, in particular, STS of 5 March 1993 (*Nº Recurso* 1652/1990), 27 June 1994 (*Nº Recurso* 2801/1990), and 16 December 1997 (*Nº Recurso* 333/1995). For a rigorous analysis and sharp critic of this case law, see García de Enterría, *supra* note 8, p. 17 et seq.

[18] Either because the Constitutional Court has declared it to be constitutional, or because its constitutionality has not been put into question.

[19] See, among others, STS of 17 February 1998 (*Nº Recurso* 327/1993); STS of 29 February 2000 (*Nº Recurso* 49/1998), STS of 13 June 2000 (*Nº Recurso* 567/1998).

harm caused by the application of legislation that is declared to be unconstitutional; on the other, when the individual has suffered loss or damage caused by the application of national legislation that infringes European law. The Supreme Court has forged rules entailing dissimilar treatment for actions claiming damages against the state alleging a breach of the Constitution from those others claiming damages for breach of EU Law. The compatibility of these rules with EU law is at the core of the preliminary reference in case *Transportes Urbanos* and, therefore, we will focus first in the analysis of this controversial case law.

2.1 The Spanish Supreme Court Case law on State Liability for Damages Caused by the Application of Unconstitutional Laws: a Dangerous Path for the Principle of Legal Certainty?

According to the doctrine developed by the Supreme Court during the last decade, when the Constitutional Court declares that a law, or an act with the force of law, is contrary to the Constitution, it implies the State obligation to make good for concrete and special damages that its application might have caused.[20] The Supreme Court considers, in other words, that the individuals do not have the duty to bear the unlawful loss or damages caused by legislation declared unconstitutional and that is, therefore, void.

In this case law the debate on the effects of the Constitutional Court judgments plays a central role. In accordance with Article 39 of the Organic Act 2/1979 of the Constitutional Court (*Ley Orgánica del Tribunal Constitutional*), when the Constitutional Court declares the unconstitutionality of an Act, it will be also declare it null and void. Furthermore, following Article 161 SC, Article 40 of the Organic Law 2/1979 establishes that 'Judgments declaring the unconstitutionality of laws, or acts with the force of law, will not allow the reopening of procedures in which the unconstitutional provisions were applied if they ended with judgments protected with the principle of *res judicata*, with the exception of criminal procedures or contentious-administrative procedures for the imposition of administrative sanctions if, as a consequences of the nullity of an unconstitutional law, the result would be the reduction of the penalty or sanction imposed'. The Constitutional Court has declared that these limits, as imposed by the principle of *res judicata*, also apply to those administrative decisions, adopted to implement a law that has been declared unconstitutional afterwards, once they become final upon the expiration of the time-limits to request legal remedies before

[20] This case law starts with the judgments of the Supreme Court of 22 February 2000 (*Nº Recurso* 84/1996, Case Seguridad Ciudadana), 29 of February 2000 (*Nº Recurso* 49/1998, Case Tax for games), and 15 July 2000 (*Nº Recurso* 736/1997, Case Tax for games).

the administrative or judicial authorities.[21] On the other hand, and in spite of the literal terms Article 40 of Organic Act 2/1979, the Supreme Court has interpreted Article 39 of Organic Act 2/1979 in the sense that it is the task of the Constitutional Court to determine in each judgment the temporal effects of the its decision (*ex tunc* or *ex nunc*) and, if it does not say anything in this regard, it will be determined by the ordinary judges.[22]

Accordingly, the doctrine of 'final administrative decisions'[23] and the principle of '*res judicata*'[24] could have been an obstacle to acknowledging damages in those cases in which the individual either has not exhausted the remedies against the administrative act that apply a unconstitutional law or have exhausted the administrative and judicial remedies unsuccessfully.

However, the Supreme Court has overcome these obstacles arguing that a liability of action for damages caused as a result of the application of unconstitutional laws is completely different to any other action that aims to react against acts applying such a law: it considers that liability action has different legal nature and foundations and, therefore, 'different legal treatment'.[25]

Regarding those administrative decisions that have become final due to the fact that the individuals did not challenge them in due time before the administrative or the judicial authorities, the Supreme Court has declared that the duty to bear damages as a result of the application of a law eventually declared unconstitutional can not depend on the fact that the time limits to challenge the administrative acts (or the tax self-assessment) that applied such a law has, or has not, expired. As a matter of fact, it considers that 'The liability action is extraneous to such acts in so far as it does not pretend the declaration of nullity of the act or the devolution of sums wrongfully levied by the administration, but only the state liability for the irregular functioning of the legislature'.[26]

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[21] Judgments of the Constitutional Court (hereinafter STC) Nº 45/1989 (Case *IRPF I*); Nº 149/94 (Case *IRPF* II), and Nº 185/95 (Case *Tasas y Precios públicos*).

[22] See, among others, Supreme Court judgments of 15 July 2000 (*Recurso Nº* 763/1997); 17 February 2001 (*Recurso Nº* 349/1998), 3 July 2003 (*Recurso Nº* 678/2000), 11 September 2007 (*Recurso Nº* 99/2006), and 2 June 2010 (*Recurso Nº* 588/2008).

[23] The doctrine of final administrative decisions ('*actos firmes*') precludes individuals from challenging administrative decisions after the expiry of time-limits to bring proceedings before the Administrative or judicial authorities (see in this regard Art. 28 of Law 29/1998 of the Contentious-administrative Jurisdiction).

[24] The principle of *res judicata* entails that judicial decisions which have become definitive after all rights of appeal have been exhausted or after the expiry of the time-limits provided for in that connection can no longer be called in question,

[25] Among others, see TS judgment of 29th January 2004 (*Recurso Nº* 52/2002), Fundamento de Derecho (hereinafter FD) Primero; TS judgment of 24th May 2005 (*Recurso Nº* 73/2003), FD Segundo; TS judgment of 17 November 2009 (*Recurso* de Casación *Nº* 448/2008, FD Tercero).

[26] *Ibid*.

Furthermore, in the case of those acts where the legality has been confirmed by the ordinary courts before the Constitutional Court declared the applied legislation unconstitutional, the Spanish Supreme Court also considers that 'liability action is foreign to the scope of *res judicata* derived from a judgment, since to make good loss and damages caused by the legislature does not imply nullifying the administrative acts (or the self-assessment) at stake – that still maintain its effects – but the acknowledgement that there has been individual, precise and clearly identifiable damage, caused by the payment of undue sums as a result of the application of an unconstitutional law'.[27]

This case law, which entails a very formal understanding of the principle of *res judicata* enshrined in Article 161 SC and Article 40 of the Organic Law 2/1979 of the Constitutional Court, has been sharply criticised for being contrary to the substantive meaning of such a principle. As has been argued not only by prominent legal commentators but also by several judges of the third chamber of the Supreme Court, a judgment granting damages will offset, as a matter of fact, the effects of a former and unappealable judgment upholding a decision based on legislation subsequently declared unconstitutional; furthermore, this doctrine gives the opportunity to get damages to individuals that did not avail themselves in due time of the administrative and judicial remedies at their disposal against such a decision.[28] It is irrelevant to the claimant whether the refund of money paid in breach of the Constitution is eventually achieved by means of 'restitution' or by means of 'damages'. However, it is argued that the principle of *res judicata* losses its substantive effects if a Court awards damages for the same amount that it was denied to the plaintiff in former judgments testing the lawfulness of the self-assessment or the administrative decision on the bases of the law that afterwards has been declared unconstitutional. By the same token, awarding damages for a similar amount that the plaintiff could have previously recovered, by appealing a decision to the administrative or judicial authorities in

[27] Ibid.

[28] García de Enterría, *supra* note 8, at p. 249-252. See in particular the individual dissenting votes casted by several Judges in TS judgment of 2 June 2010 (a judgment that was decided after the ECJ delivered its preliminary ruling in Transportes Urbanos and before the Supreme Court decided such a case in accordance with the ECJ ruling). This decision was delivered by the Plenary of the Third Chamber of the Supreme Court, composed of thirty judges that gathered for the first time to confirm the former case law on State liability for unconstitutional legislation (as so far it has been developed by a couple of Sections of the Third Chamber – the Sixth and the Fourth – each of them composed of five judges). The votes of Honourable Judges Diez-Picazo, Juan Herrero and Martín Timón are particularly enlightening as to the problems that this case law raises in terms of the principle of *res judicata*.

due time, is a way to circumvent the reasonable time-limits that are expedient and acceptable in the interest of legal certainty.[29]

2.2 The Supreme Court Case law on State Liability for Actions for Damages Caused by the Application of National Legislation in Breach of EU Law: a Dangerous Path for the Principle of Equivalence?

In a series of judgments that start in 2004, the Supreme Court consistently declared that action for damages against the State on the basis of the incompatibility of national legislation with EU law is subject, unlike actions based on the unconstitutionality of legislation, to the condition of prior exhaustion of remedies against the administrative measures that apply that legislation.[30]

According to the Supreme Court case law, the different procedural treatment of the liability action in these two cases was justified by the differences that exist as regards the administrative and judicial control between those decisions applying national legislation in breach of EU law and those others that are based in national law that is deemed to be contrary to the Constitution. The main disparity, as explained in the controversial case law, is that whereas the latter can only be declared unconstitutional by the Constitutional Court, following a preliminary reference of constitutionality brought by the judge hearing the case in accordance with Article 163 SC,[31] in the case of administrative measures enacted pursuant to legislation which is incompatible with European Union law, both the administrative authorities and the judges hearing the case are bound, in accordance with the principle of supremacy of EU law, to set aside that legislation and leave without effects the administrative measures that are in breach of EU law. In other words, individuals might invoke that contradiction directly before administrative and national courts to request that the harmful administrative measure does not apply and to obtain complete redress, just as those authorities have the duty of disapplying any legislation and measure contrary to EU law.

Due to these differences, the Supreme Court considered that the principles of *res judicata* and of legal certainty, which makes administrative decisions become final also if the individuals affected do not appeal in

[29] See in this regard P.J. Wattel, 'National Procedural Autonomy and Effectiveness of EC Law: Challenge the Charge, File for Restitution, Sue for Damages?', *Legal Issues of Economic Integration* 35(2) [2008], at p. 111, 124-125), who analyses the recent ECJ cases on national time-limits (and, in particular, *AssiDoman, Metallgesellschaft, Kraft Thin Cap Group, Arcor and i-21*).

[30] See, in particular, TS judgments of 29 January 2004 (*Recurso Nº* 52/2002), and 24 May 2005 (*Recurso Nº* 73/2003).

[31] On the preliminary reference on constitutionality, see further heading 3.2.

due time, justified the fact that State liability actions for breach of EU law required prior exhaustion of administrative and judicial remedies against the contested decision.

Finally, the Supreme Court also tried to justify the different treatment given to both types of State liability action with the following misleading argument: it stated that 'the existence of a breach of European Union law which could lead to a finding of State liability must be established by a preliminary ruling of the Court',[32] and then, it concluded that the effects of a judgment of the ECJ given under Article 267 TFEU are not comparable to those of a judgment of the *Tribunal Constitucional* declaring legislation to be unconstitutional, in that only the decision of the Tribunal results in that legislation's being void with retroactive effect'.

However, this assertion was based on a misunderstanding of the ECJ doctrine of state liability for infringement of EU law: the ECJ has never made the state liability dependent on the previous existence of an ECJ's judgments declaring such a infringement a condition. Certainly, in *Brasserie/ Factortame* the ECJ declared that the national judge should take into account, in order to determine whether the Member State's breach of EU law is 'sufficiently serious' (one of the three conditions that have to be met for an individual harmed to have a right to reparation) that:

> '[...] a breach of Community law will be sufficiently serious if it has persisted despite a judgment finding the infringement in question to be established, or a preliminary ruling or settled case law of the Court on the matter from which it is clear that the conduct in question constituted an infringement'.[33]

Therefore, as the ECJ also pointed out in *Transportes Terrestres*, the fact that there is a prior judgment of the Court finding an infringement will certainly be determinative, 'but it is not essential in order for that condition to be satisfied'.[34] Furthermore, in *Danske Slagterier* the ECJ also made clear that an individual may bring action seeking reparation under the detailed rules laid down for that purpose by national law without having to wait until a judgment finding that the Member State has infringed Community law has been delivered.[35] In short, this latter argument was built up upon a misconception, and could not justify at all the different treatment given to liability action for breach of EU law.[36]

This case law has also been highly controversial, and some legal commentators have argued that the Supreme Court should have overruled it in order to give the same treatment to state liability action for damages

[32] *Supra* note 25.

[33] Para. 57 and 93.

[34] Para. 38.

[35] Case C-445/06 *Danske Slagterier* [2009] ECR I-2119, para 39.

[36] Consequently, we will not consider it further in our analysis of the preliminary ruling.

caused by wrongful legislation, no matter whether the legislation is contrary to the Constitution or to EU law.[37] Furthermore, the uncertainties and discussions that surrounded it triggered the preliminary reference in Case C-118/08 *Transportes Urbanos*, as judges of Section Six of the third chamber suspected that it went beyond the limits that the EU law principles of equivalence and effectiveness impose upon the national procedural autonomy that, in the absence of EU procedural rules, govern actions for state liability in the national courts.

3 The Preliminary Ruling in *Transportes Urbanos*: a Correct Answer Based on a Partial Question?

Transportes Urbanos y Servicios Generales SAL (hereinafter Transportes Urbanos) had paid to the Spanish tax authorities the undue amount of EUR 1,228,366.39 for the years 1999 and 2000 as a consequence of the incorrect transposition of the Sixth Directive on Value Added Tax[38] into Spanish Law (as Act 37/1992 on Value Added Tax provided for limitations to the right to deduct VAT that were incompatible with the aforementioned Directive). Though General Tax Law 58/2003[39] grants taxable persons the right to request the rectification of their self-assessments and the refund of overpayments, *Transportes Urbanos* did not exercise such a right within the prescribed period of four years. Several months after such time limit expired, the ECJ declared in Case C-205/03 *Commission v. Spain* that the limitations established in Spanish law 37/1992 were incompatible with the aforementioned Directive.

In this scenario, *Transportes Urbanos* decided to claim damages before the Council of Ministers, but the application was dismissed on the basis that the *direct causal link* between the infringement of European Union and the damages suffered by that company had been broken due to the fact that *Transportes Urbanos* had failed to request rectification of those self-assessments in due time. However, according to the Supreme Court doctrine on state liability for unconstitutional law, had *Transportes Urbanos* been able to base its action for damages on a judgment of the Constitutional Court,

[37] R. Falcón Tella, 'La STJCE 6 octubre 2005 sobre incidencia de las subvenciones en la prorrata y su interpretación por la Res. DGT 2/2005, de 14 de noviembre (II): el procedimiento para instar la devolución y los 'matices' introducidos por la Instrucción 10/2005', *Quincena Fiscal Aranzadi* n.º 1/2006; C. Checa González, 'El derecho a la deducción del IVA en la jurisprudencia del Tribunal de Justicia de Luxemburgo', *Revista Impuestos, segunda quincena de 2006, Ed. La Ley.*

[38] Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment, as amended by Council Directive 95/7/EC of 10 April 1995.

[39] BOE nº 303 of 18 December 2003, p. 44987.

declaring the legislation in question to be void on the ground of breach of the Constitution, that action would have succeeded in spite of the fact that the company had not requested the rectification of its self-assessments in due time. Taking this into account, the company challenged the decision of the Council of Ministers before the Supreme Court on the basis that the different procedural conditions applying to state liability actions for damages caused by infringements of Community law, on the one hand, and to State liability actions for damages caused by unconstitutional acts, on the other, were contrary to the principles of equivalence and effectiveness that limit national procedural autonomy.

On the 1st of February 2008, the Third Chamber of the Spanish Supreme Court suspended proceedings between *Transportes Urbanos* and the state administration in order to refer a question to the ECJ concerning the interpretation of the principles of effectiveness and equivalence in the light of the rules applicable in the Spanish legal system for action regarding damages against the state caused by the legislature.[40]

The Supreme Court asked in essence, as the ECJ reworded the question, 'whether European Union law precludes a rule of a Member State under which action for damages against the state, alleging a breach of that law by national legislation, are subject to a condition requiring prior exhaustion of remedies against a harmful administrative measure, when those actions are not subject to such a condition where they allege a breach of the Constitution by national legislation'.[41]

Though this preliminary reference should be praised as it indicates the best will of the Supreme Court in order to cooperate closely with the ECJ to improve the judicial enforcement of EU law in Spain, it should be also noted that it did not address other fundamental issues that also affect the adequate application of the principle of State liability for infringement of EU law in Spain.[42] Thus, it did not give sufficient guidance to the ECJ on the basic characteristics of public non-contractual liability in this Member State and, in particular, on the conditions that has to be fulfilled in order for state liability to arise.

As a matter of fact, the difference between the EU State liability conditions, as established by the ECJ in *Brasserie du Dêcheur/Factortame*,[43] on the one hand, and the conditions for state liability under Spanish law, on the other, raises an important question that the Spanish Supreme Court could

[40] DO C 128, 24 May 2008, p. 24.

[41] Para 28.

[42] For a critical analisys of the Supreme Court Order for Reference see J.R. Rodríguez Carbajo, 'La responsabilidad patrimonial del Estado español derivada de las normas internas que infringen el Derecho comunitario después de la STJCE de 26 de enero de 2010', *Actualidad Administrativa, Nº* 8, Tomo 1, Editorial LA LEY, Quincena del 16 al 30 Abr. 2010, at p. 1000 *et seq*.

[43] For the EU State liability conditions see heading 3.1 below.

have addressed in its preliminary reference, but that was either overlooked or avoided.

In brief, according to settled ECJ case law the state liability for loss and damage caused to individuals as a result of breaches of Community law is subject to three basic conditions: (i) the rule of law infringed must be intended to confer rights on individuals, (ii) the breach of that rule must be sufficiently serious, (iii) and there must be a direct causal link between the breach and the loss or damage sustained by the injured person.[44] Though these three basic conditions 'are necessary and sufficient' to found a right in favour of individuals to obtain redress, they do not preclude Member States from being liable under less restrictive conditions, where national law so provides.[45] This entails that if national law establishes more favourable conditions for individuals to be awarded damages national conditions would be given precedence over the *Brasserie* conditions ('principle of preference').[46]

In Spain, individuals harmed have a right to reparation where the following conditions are met:[47] (i) there must be an individual right affected; (ii) there must be an actual harm, economically valuable, individualised as regards to a person or a group of persons and; further, the damage must be 'unlawful', in the sense that the individual affected 'has no a legal duty to bear it'; (iii) there is a casual link among the public authority action and the damage.

The main difference with the *Brasserie/Factortame* conditions stems from the the fact that state liability in Spain is of an 'objective nature' (strict liability). Furthermore, the Supreme Court in its case law on legislative liability for unconstitutional laws. The Supreme Court has consistently stated that the mere fact that a law is declared unconstitutional is enough, without further qualifications, to fulfil one of the essential conditions that the Spanish legal system requires to render the state liable: the 'unlawfulness of the damage' (in the sense that the individual affected 'has no a legal duty to bear it'). It does not require, therefore, a test similar to the one established in *Brasserie/Factortame*, which demands a *sufficiently serious breach* of a superior rule of law.

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44 See *Brasserie du Pêcheur/Factortame*, para. 51; Case C-5/94 *Hedley Lomas* [1996] ECR I-2553, para. 25; and Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 *Dillenkofer and Others* [1996] ECR I-4845 para. 21; Case C-445/06 *Danske Slagterier* [2009] ECR I-2119, para. 20.

45 *Ibid.*

46 We borrow here this term from R. Alonso García, 'La responsabilidad patrimonial del Estado-legislador, en especial en los casos de infracción del Derecho comunitario: a propósito del auto del Tribunal Supremo de 1 de febrero de 2008 y las cuestión prejudicial planteada al TJCE (C-118/08), QDL, 19 February 2009, at p. 178.

47 Though these are the conditions established for Public Administrations liability in Article 139 and 141 of Act 30/1992, they also apply to the State liability caused by the any public power. See, for example, *STS* of 10 June 2010 (*Recurso* 588/2008) FJ 9º.

On the contrary, Spanish Courts have applied the test of 'sufficiently serious breach' very strictly to discard state liability for breaches of EU Law.[48]

In this point, the national conditions applying to the actions for damages caused by the application of unconstitutional law are less restrictive than the condition established in *Brasserie/Factortame* and, therefore, it seems that the should apply also to actions of state liability for infringement of EU law. This would make it, by far, much easier for individuals harmed to succeed when invoking a right to reparation under EU law.[49] Notwithstanding, at the time the Supreme Court made the preliminary reference in *Transportes Urbanos*, it was not concerned with this issue. The answer given by the ECJ in its preliminary ruling is going, however, to make this problem more visible.

3.1 An Answer Exclusively Based on the Principle of Equivalence

As is well known, the principle of national procedural autonomy entails that, in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law. Therefore, it is on the basis of national procedural rules on liability that the state must make reparations for the consequences of the loss or damage caused, provided that the conditions for reparation of loss or damage laid down by national law are not less favourable than those relating to 'similar domestic claims' (principle of equivalence) and are not so framed as to make it in practice impossible or excessively difficult to obtain reparation (principle of effectiveness).[50]

Following the Opinion of Advocate General Poiares Maduro, the ECJ based its decision in *Transportes Urbanos* on the principle of equivalence in the following terms:

> 'European Union law precludes the application of a rule of a Member State under which an action for damages against the State, alleging a breach of that law by national legislation which has been established by a judgment of the Court of Justice of the European Communities given pursuant to Article 226

[48] See in this regard M.C. Alonso García, 'La necesaria reformulación de la teoría de la responsabilidad patrimonial del Estado-Legislador (reflexiones al hilo de la Sentencia del Tribunal de Justicia de las Comunidades europeas de 26 de enero de 2010)', in *El cronista del Estado Social y de Derecho* Nº 12, 2010, at p. 74 *et seq*; and J. R. Rodríguez Carbajo, *supra* note 39.

[49] Ibid.

[50] See, to that effect, C-6/90 and C-9/90 *Francovich and Others*, para. 41,42 and 43; Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame*, para. 67; Case C-224/01 *Köbler* [2003] ECR I-10239, para. 58, and Case C-524/04 *Test Claimants in the Thin Cap Group Litigation* [2007] ECR I-2107, para. 123.

> EC, can succeed only if the applicant has previously exhausted all domestic remedies for challenging the validity of a harmful administrative measure adopted on the basis of that legislation, when such a rule is not applicable to an action for damages against the state alleging breach of the Constitution by national legislation which has been established by the competent court'.

Once it concluded that in the light of the circumstances described in the order for reference, the principle of equivalence precluded the application of such a rule, the ECJ considered that it was not necessary to examine such a rule in the light of the principle of effectiveness.[51] In *Transportes Urbanos* the ECJ did not enter to assess, as it did before in cases such as *Metallgesellschaft and Others,*[52] *Test Claimants in the Thin Cap Group Litigation,*[53] *Lucchini,*[54] *Danske Slagterier,*[55] whether it was reasonable, in accordance with the principle of effectiveness, to require the injured parties to utilise the legal remedies available to them. As the Advocate General recalled:

> '[...] making the admissibility of the action to establish state liability, as a result of legislation being in breach of Community law, subject to the condition that the injured party has first challenged the administrative measure based on that legislation is not, in principle, contrary to the principle of effectiveness, provided that, by challenging in good time the validity of the harmful measure, the injured party could have obtained reparation for the entirety of the damage or loss claimed'.[56]

In the case of *Transportes Urbanos* the period of four years from the date on which the taxable person submits his self-assessments did not make the bringing of an action for repayment of tax unduly paid in breach of Community law in practice impossible or excessively difficult. Therefore, the Advocate General concluded that, it complied with the principle of effectiveness, even though the period had already expired and therefore no longer permitted an application for correction of the self-assessments made for the years 1999 and 2000 when the Court declared that the Spanish law was incompatible with the provisions of the Sixth VAT Directive.[57]

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[51] Para. 47.

[52] Cases C-397/98 and C-410/98 [2001] ECR I-1727

[53] Case C-524/04 [2007] ECR I-2107.

[54] Case C-119/05 ECR [2007] I-6199

[55] Case C-445/06 [2009] ECR I-2119.

[56] Opinion of Advocate General Poiares Maduro, Para. 23.

[57] *Ibid.*, para. 27.

3.2 Fleshing out the Principle of Equivalence: A Dangerous Path for the Principle of Procedural Autonomy?

Since *Edis*,[58] the ECJ has consistently declared that the principle of equivalence requires that '[...] all the rules applicable to actions apply without distinction to actions alleging infringement of European Union law and to similar actions alleging infringement of national law'.[59] However, as the ECJ recalled in *Transportes Urbanos*, 'that principle is not to be interpreted as requiring Member States to extend their most favourable rules to all actions brought in a certain field of law'.[60] This seems to entail that it does not require Member States to extend their most favourable procedural rules governing liability under national law to all actions brought for compensation based on a breach of Community law.

As the ECJ explained in *Palmisani*,[61] in order to establish the comparison of two systems of non-contractual liability applying within a Member State,[62] 'the essential characteristics of the domestic system of reference must be examined'.[63] In ulterior cases, such as *Levez*, *Preston*, and *Pontin*, the ECJ clarified that the principle of equivalence requires the national court to consider, in particular, both 'the purpose and the essential characteristics of allegedly similar domestic actions'.[64] Furthermore, it has consistently stated that '(i)n principle, *it is for the national court, which alone has direct knowledge of the detailed procedural rules governing actions in the field of domestic law*,[65] to consider both the purpose and the essential characteristics of domestic actions which are claimed to be similar'.[66] Though, 'with a view to the

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[58] Case C-231/96 *Edis* [1998] ECR I-4951.

[59] See *Edis* para. 36; Case C-326/96 *Levez* [1998] ECR I-7835, para. 41; Case C-78/98 *Preston and Others* [2000] ECR I-3201, para. 55; and Joined Cases C-392/04 and C-422/04 *i-21 Germany and Arcor* [2006] ECR I-8559, para. 62; and Case C-118/08 *Transportes Urbanos*, nyr. para. 33.

[60] See *Edis* para 36; *Levez*, para. 42; Case C-343/96 *Dilexport* [1999] ECR I-579, para. 27; Case C-63/08 *Pontin* [2009] nyr, para 45, and Case-118/08, *Transportes Urbanos*, para. 34.

[61] Case C-261/95 *Palmisani* [1997] ECR I-4025.

[62] This case dealt with two systems of non-contractual liability in Italy: (i) The ordinary system of reparation, in matters of non-contractual liability, under Article 2043 of the Italian Civil Code; (ii) and the system established in Legislative Decree No 80 (GURI No 36, 13 February 1992) transposing Council Directive 80/987/EEC relating to the protection of employees in the event of the insolvency of their employer.

[63] Para 38.

[64] *Levez* para 43, Case C-78/98 *Preston and Others* [2000] ECR I-3201 para. 56; and Case C-63/08 *Potin* [2009], para 45.

[65] Author's italics.

[66] See, inter alia, *Preston* para. 49, 50 and 56; *Potin* para 45, and Case C-40/08 *Asturcom Telecomunicaciones SL* [2009] ECR I-9579, para 50.

appraisal to be carried out by the national court, the ECJ may provide guidance for the interpretation of Community law'.[67]

In *Transportes Urbanos* the ECJ did not restrict itself to giving guidance on the interpretation of EU law, but it entered directly to assess whether the two state liability actions in question (actions alleging infringement of European Union law and actions alleging infringement of the Constitution) could be considered as 'similar'. This was probably due to the terms in which the order for reference was drafted, as it suggested that the Spanish Supreme Court felt unable to ascertain on its own whether the two national actions at issue could be considered to be 'similar' or not and, therefore, to conclude whether the different treatment, as regards the requirement of prior exhaustion of remedies, was or was not in breach of the principle of equivalence. In short, it seems that the Supreme Court gave up performing the task that, until now, the ECJ had reserved for the national courts.

Though it was clear that the purpose of the two actions for damages under consideration were the same (namely compensation for the loss suffered by the person harmed as a result of an act or an omission of the state), it was not so evident that the decision on the second element under assessment, the 'essential characteristics' of those actions, could be made by the ECJ with enough knowledge of the Spanish system of non-contractual state liability, since the preliminary reference of the Supreme Court had focused the questions in a very narrow sense as posed by the Supreme Court's own case law and did not give, as mentioned above, an overview of the essential characteristics of non-contractual liability that could have been useful to resolve the case.

Notwithstanding, the ECJ eventually considered that, in the context which gave rise to the case in the main proceedings as described in the order for reference, 'the only difference between the two actions' (the action for damages brought by *Transportes Urbanos*, alleging breach of European Union law, and the action which that company could have brought on the basis of a possible breach of the Constitution) was 'the fact that the breaches of law on which they are based are established, in respect of one, by the ECJ in a judgment given pursuant to Article 226 EC and, in respect of the other, by a judgment of the *Tribunal Constitutional*'.[68]

Therefore, it held that:

> '[...] this fact alone, in the absence of any mention in the order for reference of other factors demonstrating that there are further differences between the action for damages against the State actually brought by *Transportes Urbanos* and the action which it might have brought on the basis of a breach of the Constitution established by the *Tribunal Constitucional*, cannot suffice to

[67] *Preston and Others*, para. 50, *Potin* para. 50.

[68] Para. 43.

> establish a distinction between those two actions in the light of the principle of equivalence'.

It concluded, as a result, that 'the two abovementioned actions may be regarded as similar' and, therefore, that 'the principle of equivalence precludes the application of a rule such as that at issue in the main proceedings'.[69]

Nevertheless, it could be argued that the Supreme Court did not provide the ECJ with enough knowledge to assess in depth whether the two actions could be, indeed, regarded as 'similar'. Furthermore, though the Supreme Court case law under discussion, as explained in its preliminary reference, provided some reasons that might justify a different procedural treatment among these two actions, one the most relevant arguments was not considered by the ECJ in its preliminary ruling: the ECJ did not explain why the essential differences between the centralised system for constitutional control of laws in Spain, and the decentralised judicial system to control the conformity of national legislation with EU law, could not justify the application of different procedural rules with regards to the prior exhaustion of legal remedies, according with the arguments of the Supreme Court case law in question.

It should be noted, first of all, that the Spanish regime of action for damages caused by unlawful administrative acts or by the application of unlawful regulations requires, as a general rule in Spain, that the individual concerned avail himself first of the administrative or judicial remedies to have the act or the regulation declared illegal.[70] The controversial doctrine of the Supreme Court on damages caused by the application of unconstitutional laws is an exception to this rule.

One of the main reasons alleged by the Supreme Court to justify this controversial case law is that such an exception is founded on the procedural difficulties that the centralised system of constitutional control of laws, as enshrined in the Spanish Constitution, entails for individuals. In Spain, due to the monopoly of the Constitutional Court to declare the constitutionality of laws, and acts with the status of law, neither the administrative authorities nor the judicial authorities may annul the measures adopted in application of legislation contrary to the Constitution, unless the Constitutional Court first declares that such law infringes the Constitution and is, therefore, null and void. In accordance with Article 163 SC, if ordinary courts hearing a case have doubts about the constitutionality of the legislation applicable,

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[69] Para. 45.

[70] See Article 31.2 Act 29/1998 on the Contentious-Administrative Jurisdiction, and art. 142.4 of Act 30/1992 on the Legal Regimen of the Administrations and the Administrative Common Procedure. See also J. Climent Barberá, 'El procedimiento administrativo de reclamación de responsabilidad', en *Reponsabilidad del Estado legislador, administrador y juez* Cuadernos de Derecho Judicial, II/2004, at p. 195.

they can make a preliminary reference to the Constitutional Court seeking a declaration of unconstitutionality. This is action that only the court hearing the matter may refer to, and that the individual may only suggest to the Court (the individual has no standing to bring action to declare legislation to be unconstitutional; he can merely call upon the court hearing the case to refer that matter to the *Tribunal Constitucional*). Therefore, the Supreme Court considered that:

> '[...] if the prior exhaustion of administrative and judicial remedies against a harmful administrative measure were required as a condition before an action for damages alleging a breach of the Constitution could be brought, that would place on individuals the burden of challenging the administrative measure enacted pursuant to the allegedly unconstitutional legislation, by recourse, first, to the administrative remedy and, second, to the judicial remedy and by exhausting all appeal procedures until such time as one of the courts hearing the matter decides finally to raise the question of the unconstitutionality of that legislation before the *Tribunal Constitucional*. Such a situation would be disproportionate and have unacceptable consequences'.[71]

Furthermore, it should be added that the average delays in the Spanish Courts (including the delays of the Constitutional Court in answering preliminary reference on the constitutionality of law)[72] contribute, indeed, to such unacceptable consequences.

Conversely, the EU's decentralised system of judicial control of Member States' compliance with EU law seems to be at the root of the Supreme Court case law justifying a diverse treatment for state liability action to claim damages caused by legislation in breach of EU law. As explained above,[73] the principle of primacy of EU law plays an important role in this case law as it implies that, if an administrative measure has been enacted pursuant to legislation which is incompatible with European Union law, both, the administrative authorities[74] and the judges hearing the case are bound to disapply that legislation and the administrative measures that are in breach of EU Law.[75] Likewise, individuals might invoke those breaches directly before administrative and national courts to request that a harmful adminis-

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[71] Summary of the Supreme Court reasoning such as it was translated into English in Case C-118/08 *Transportes Urbanos*, para. 18.

[72] For example, it takes and average of four years for the Constitutional Court to answer a preliminary question on the constitutionality of a law to the court hearing the case.

[73] See heading 2.2.

[74] See Case 103/88 *Fratelli Constanzo* [1989] ECR 1839. Though this judgment raises important problems since the Administrations cannot make preliminary references to the ECJ in order to solve their doubts as to the interpretation of EU Law.

[75] Case C-6/64 *Flaminio Costa v ENEL* [1964] ECR 585.

trative measure is not applied and to avail themselves of the existing administrative and judicial remedies.

As Advocate General Poiares recalled in his Opinion, finding that national legislation is incompatible with a rule of EU law may often depend on how a provision of EU law is interpreted through an ECJ preliminary ruling, and the references to the Court of Justice for a preliminary ruling depend also entirely on the national court's assessment as to whether that reference is appropriate and necessary.[76] However, the existence of the preliminary reference proceeding does not invalidate the essential difference that entails the fact that any national judge may, by their own authority and based on the primacy of EU law, disapply a national law that is considered to be in breach of EU law, whilst no judge or tribunal, with the exception of the Constitutional Court, may ever disapply a national law[77] on the grounds that it conflicts with the Constitution.

The Advocate General concluded on this issue that:

> 'It is, however not clear that the fact that the opportunities which individuals have to challenge the constitutionality of legislation are, because of the presumption that the legislation is constitutional, more restricted than those to call into question the compatibility of legislation with Community law is capable of providing justification for the practice of making an action to establish the liability of the state as legislature because of the breach of Community law, but not an action to establish the liability of the state as legislature because of an infringement of the Constitution, subject to the condition that the individual must have first exhausted all remedies, administrative and judicial, against the harmful administrative measure based on that legislation'.[78]

The ECJ, on the contrary, did not give the Supreme Court any feedback as to whether the different rules applying to state liability action for damages caused by unconstitutional legislation, on the one hand, and to state liability actions for damages caused by the infringement of EU law, on the other, could be justified or not by the differences that exists in the system of judicial control to ensure compliance with these two very different norms. It just did not address the issue at all.

Furthermore, there are other differences between the Constitution and EU law that could also cast doubts on the 'similarity' of the two actions at issue in *Transportes Urbanos* (though these differences could not be assessed by the ECJ as the Supreme Court did not point them out neither in its controversial case law nor in its order for a preliminary reference). The most relevant one relates to the different degree of discretion that the Consti-

[76] The Opinion of Advocate General Poiares followed in this point the arguments of Por. R. Alonso García, *supra* note 46, p. 183.

[77] With the exception of pre-constitutional law (see STC núm 4/1981of 4 February 1981).

[78] Para. 39.

tution, on the one hand, and EU law, on the other, leaves to the national legislature, and to the very distinct place that these norms have in the Spanish legal order: whereas the parliament enjoys a high degree of discretion when it adopts national legislation in the realm of the Constitution (as the Spanish 'Supreme Norm' is conceived as a wide framework for the exercise of the legislative powers), the margin of discretion is much narrower, on the contrary, when the national legislature acts in the field of EU law (and particularly narrow when it transposes directives into national law). In the latter cases the normative powers of the legislature resembles the regulatory powers of the Administration:[79] they are much more constrained and subject to the judicial control of the ordinary courts (Article 106 SC). Thus, it could be argued that an action for damages against an administrative measure that applies national law in breach of a Directive is 'more similar' to an action for damages against administrative measure adopted pursuant to an illegal national regulation than to an action for damages against administrative measures adopted pursuant to an unconstitutional law. The two first actions require the injured party to be reasonably diligent by availing himself in good time of the legal remedies at his disposal (either to avoid, when possible, the loss or damage that the application of the norm might cause, or in order to proof the illegality of the harm).[80] The latter, according to the Supreme Court case law, does not.

Since the principle of equivalence does not necessarily require Member States to extend their most favourable procedural rules governing liability under national law to all actions for compensation based on a breach of Community law,[81] the following question remains unanswered: If state liability action for infringement of EU law already receives the same procedural treatment than other action under national law that could be considered to have also the same purpose and the essential characteristics (i.e., action for damages caused by illegal national regulations), does the most favourable treatment given to action for damages against administrative measures that apply an unconstitutional law necessarily conflict with the principle of equivalence? The answer could well be in the negative.

Finally, it should be noted that the ECJ's answer equates as legislative injustices that engender 'similar' actions for damages (in the sense that they have to follow the same national procedural rules): (i) on the one hand, breaches of EU law which have been established by the ECJ in a judgment given pursuant to Article 226 EC (Article 258 TFEU) and, (ii) on the other, breaches of the Constitution by laws that have been declared unconstitutional and void by the *Tribunal Constitucional*.

This equation also gives rise to new questions: would it also apply to breaches of EU law that become evident after the ECJ delivers a preliminary

[79] See also R. Alonso, *supra* note 46, at p. 185.

[80] In accordance with Article 141.1 of Act 30/1992.

[81] See note 60.

ruling following Article 267 TFEU? Further, would it apply to the ECJ judgments given pursuant to Article 258 TFEU when they declare an infringement by another Member State, but also makes evident a similar breach in Spain where an individual is claiming damages?

Due to the peculiarities of the legal context in *Transportes Urbanos*, it is risky to advance an answer to these questions, but it is not difficult to picture the ECJ answering the first one in the affirmative under certain conditions: when the preliminary reference gives guidance as to the interpretation of EU provisions and makes clear, at the same time, that a national law is in breach with these provisions.

4 Conclusions on the Outcome of *Transportes Urbanos*

Over the last two decades the doctrine of state liability for legislative injustice, a challenging issue in any State under the rule of law, has experienced notorious development due to the European Court of Justice case law. In Spain, the Supreme Court has developed a doctrine, beyond the scope of its EU obligations, which has sparked a thorny academic and judicial debate. Contrary to the ECJ case law on Community liability, according to which an individual may not by means of a claim for compensation 'to circumvent the inadmissibility of an application which concerns the same illegality and has the same financial view',[82] litigants claiming damages for harm suffered as a result of the application of unconstitutional laws do not need to have first exhausted all remedies against the administrative measure which has caused him harm; the Supreme Court considers that actions for damages caused as a result of the application of laws eventually declared unconstitutional are different and independent of actions to review the legality of acts applying such laws. In this way, it has been argued, the Supreme Court has circumvented the material meaning of the principle of *ius judicata* enshrined in Article 161 SC and Article 40 of the Organic Law 2/1979 of the Constitutional Court. In contrast, the Supreme Court has also ruled, invoking the principle of *res judicata* and legal certainty, that actions to establish state liability in respect of a breach of Community law are subject to the condition of prior exhaustion of administrative and judicial remedies against the administrative measures adopted pursuant to national legislation in breach of EU law.

The preliminary reference of the Supreme Court in *Transportes Urbanos* put into question the compatibility of its own case law with the principles of effectiveness and equivalence that constrain the procedural autonomy that Members states enjoy to implement EU law. Due to the terms of the prelimi-

[82] See Case 25/62 *Plaumann* [1963] ECR 95.

nary reference, and despite the fact that the application of the test of equivalence is normally left to national courts, in *Transportes Urbanos* the ECJ decided itself that the two actions in question could be considered 'similar' and, therefore, should both follow the same procedural rules. This decision entails an important limitation to the procedural autonomy that national courts enjoy in the field of State liability action for breaches of EU law by means of a strict and arguable direct application of the test of equivalence by the ECJ. As a consequence, in those cases in which the ECJ has declared the infringement by the Spanish State of EU law pursuant to Article 258 TFEU, actions to establish state liability as a result of legislation being in breach of Community law are no longer subject to the condition that there must have been first a challenge to the validity of the administrative measure adopted pursuant to that legislation.

After the ECJ delivered its preliminary ruling in *Transportes Urbanos*, the Supreme Court had two options: (i) either to maintain its case law on State liability for unconstitutional law and to overruled its case law requiring previous exhaustion of remedies in liability actions for damages caused by the application of law that infringes EU law; (ii) or to overrule its case law on State liability for unconstitutional law in order to require in both cases the previous exhaustion of remedies against administrative acts that apply both, the unconstitutional law and the law that infringes EU law.

Hypothetically the Supreme Court could have overruled its controversial doctrine on state liability for unconstitutional laws in order to mitigate in the future the impact of *Transportes Urbanos*. Nevertheless, such a doctrine was confirmed by the Full third chamber (composed of thirty judges) in its judgment of 2 June 2010.[83] This decision endorses by and large the former case law on state liability for unconstitutional legislation as it had been developed to date by the Fourth and Sixth Sections of the Supreme Court Third Chamber.

However, this judgment, which had nine dissenting votes, has also introduced an interesting subtle change as regards to the conditions to grant damages for unconstitutional law. As mentioned above, before this case was decided the mere fact that the *Tribunal Constitucional* declared the unconstitutionality of a law automatically entailed that the condition on the 'unlawfulness of the damage' was fulfilled for State liability to arise. Thus, quite contrary to the cases where liability action is based on the breach of EU law, in the cases of action based on the unconstitutionality of a law no test to assess the 'seriousness and gravity of the breach' was applied, as explained in heading 3 *supra*. But, according to the ECJ case law, this most favourable substantial condition applied in Spain to liability action based on the unconstitutionality of a law should have also been applied to state liability

[83] STS of 2nd June 2010 (*Recurso de Casación* Nº 588/2008).

action based on EU law.[84] In this regard the Supreme Court judgment of 2 June 2010 seems to suggest that it is willing to introduce in its case law a sort of 'sufficiently serious breach' test in order to assess the unlawfulness of the breach by the legislature of the Constitution: for the first time the Court states that under certain 'special circumstances' the Court could enter to asses the unlawfulness of the breach by the legislature of the Constitution, and to reach the conclusion 'that the plaintiff has the obligation to bear the harm'.[85] Therefore, the Supreme Court case law seems to be converging with the 'sufficiently serious breach' test established in *Brasserie*.

Few months later, on the 17th of September 2010, the Supreme Court delivered its final judgment in *Trasportes Urbanos*.[86] Section six of the Third chamber eventually decided, in the light of the ECJ preliminary ruling, that the three conditions for the State liability to arise, as established be ECJ case law, were fulfilled in this case: (i) the provision of the VAT directive at issue intended to confer rights on individuals, (ii) the breach of that rule was sufficiently serious, (iii) and there was be a direct causal link between the breach and the loss or damage sustained by *Transportes Urbanos*. In order to follow the ECJ ruling, the Supreme Court declared, as regards this latter conditions, that 'There is a direct causal link between the breach and the damage sustained by the injured person, and it cannot be sustained that such causal relationship is breached because the claimant did not exhaust the administrative and judicial remedies available against the tax decision'. Therefore, it overruled its previous case law in which it has established that failure to challenge in due time administrative decisions applying national laws in breach with EU law entailed the breach of the causal link. Consequently, it awarded to *Transportes Urbanos* damages for the amount of 1,228,366. 39 euros, the same amount that it had paid unduly to the tax authorities.

Therefore, the Supreme Court has eventually opted for the first option that it had after the ECJ preliminary ruling in *Transportes Urbanos*, in spite of the fact that it may be considered a Trojan horse within the material meaning of the principle of *res judicata* that has been introduced far beyond the lines that the Supreme Court had already drawn in its exceptional case law related to state liability for damages caused by the application of laws that are declared unconstitutional.

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[84] As explained in heading 3 above, the substantial conditions established in *Brasserie* for state liability do not preclude Member States from being liable under less restrictive conditions, where national law so provides (and this should be the case with the most favourable substantial conditions of the public strict liability system that applies in Spain). See in particular ECJ case law quoted in note 44 *supra*.

[85] FJ 10.

[86] STS 17th September 2010 (*Recurso Nº* 153/2007).

If this trend is confirmed in the future, as it is most likely,[87] the combined effects of the judgments that the Supreme Court delivered on the 2nd of June and on the 17th of September 2010 could be as follows: On the one hand, individuals will not need to exhaust administrative and judicial remedies before claiming for damages, neither when the liability actions are based on the unconstitutional law, nor when it is based on the basis of laws contrary to EU law. On the other, the Supreme Court can continue to apply the 'sufficiently serious breach test' as a condition for the right to damages to emerge in the context of state liability actions for infringement of EU law, as long as it also foresees in the future the possibioity of applying a similar test to liability actions for breaches of the Constitution by the legislature.

Transportes Urbanos will certainly have a deep impact on the Spanish doctrine on state liability for damages caused by the legislature, but it is doubtful that it will appease the legal debate on this topic. Quite the opposite, it might still open new lines of discussion and indirectly have far-reaching spillover effects in the Spanish system of state liability for legislative acts.

[87] It should be noted that on the 17th of September 2010 the Supreme Court also delivered another judgment similar to its decision in *Transportes Urbanos* (see Recurso Nº 149/2007).