

IN THE EUROPEAN COURT OF HUMAN RIGHTS

**Application No. []**

**BETWEEN:**

**BALTASAR GARZÓN**

*Applicant*

**and**

**SPAIN**

*Respondent*

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**EXPERT OPINIÓN ON THE CRIME OF JUDICIAL PREVARICACIÓN  
(MALFEASANCE) IN SPANISH LAW**

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**THE CRIME OF JUDICIAL PREVARICACIÓN (MALFEASANCE) IN  
SPANISH LAW**

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**This expert opinion is presented on behalf of INTERIGHTS in support of the application by Judge Baltasar Garzón to the European Court of Human Rights. The comments and opinions that follow are those of the undersigned, Araceli Manjón-Cabeza Olmeda, Associate Professor of Criminal Law at Universidad Complutense of Madrid.**

## **I. INTRODUCTION**

The Spanish Criminal Code defines the crime of judicial prevaricación in Article 446 as conduct of a judge or magistrate “who, knowingly, dictates an unjust sentence or resolution.” The punishment applicable to this crime depends on the nature of the resolution and its possible effects.<sup>1</sup> In the case, given that the judgments in question are not criminal judgments, the sanctions to be imposed upon conviction would be “a fine of twelve to twenty-four months and a special suspension from public office for ten to twenty years.”

Another provision of the Spanish Criminal Code, Article 447, provides for judicial prevaricación in cases not committed knowingly – not maliciously – but rather out of serious negligence or inexcusable ignorance of the law.

The charge in Judge Garzón’s case is for a crime of malicious prevaricación under Article 446, that is, for knowingly (maliciously) handing down an unjust resolution.

The legal concept of prevaricación under Article 446 of the Criminal Code corresponds to the one supplied by the Dictionary of the Spanish Royal Academy which defines it as a “crime committed by an authority, a judge or an official, knowingly handing down an unjust resolution.”

The etymological source of the term prevaricación can be sought in the Latin word “praevaricatio” (“prae” – before, and “varicare” – to straddle, to walk crookedly) meaning a deviation from the straight line; it can be said that prevaricación entails the “crooked” application of the law, which is different from and much more than a mistaken or simply debatable application.

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<sup>1</sup> Article 446 of the Spanish Criminal Code:

*The Judge or Magistrate who, knowingly, dictates an unjust sentence or resolution will be punished:*

- 1. With one to four years' prison sentence if related to unjust sentence against accused of criminal offense when the sentence has not yet been executed, and with the same sanction plus twenty-four months' fine if it has been executed. In both cases, there will be a sanction of absolute suspension for ten to twenty years.*
- 2. With a sanction of six to twelve months and a special suspension from public office for six to ten years if related to unjust sentence against accused of disciplinary offense.*
- 3. With fine of twelve to twenty-four months and special suspension from public office for ten to twenty years, in the case of any other unjust sentence or resolution.*

The fundamental element in the crime of prevaricación is referred to in Article 446 as an “unjust resolution.” If a sweeping or excessive interpretation is made of this element – as was hitherto made by the Supreme Court in Judge Garzón’s case, but not in others – then judicial independence will be put at risk.

## **II. JUDICIAL INDEPENDENCE**

Article 117.1 of the Spanish Constitution declares that judges and magistrates are ‘independent...and subject only to the rule of law’, which must be interpreted in the following ways:

- 1) Judges and magistrates are subject to the entirety of the legal system, including the Constitution and treaties ratified by Spain (Article 96 of the Constitution).
  
- 2) Judges and magistrates are hierarchically not subject to the decisions of other judges and magistrates and must only comply with the interpretations provided by the Constitutional Court. This is in accordance with Article 5.1 of the Organic Law on the Judicial Power, which states that ‘The Constitution is the supreme rule of the legal system and binds all judges and tribunals, who will interpret and apply the laws and regulations according to constitutional precepts and principles in accordance with their interpretation based on the resolutions handed down by the Constitutional Court.’

Furthermore, it should be noted that the Constitution confers on judges – all of them without exception – the function of interpreting the law and of applying it without being obliged to comply with interpretations of other judges. This is naturally no obstacle to a higher tribunal, who under an appeal, is able to cancel and correct the decision taken or the interpretation made regarding the decision subject to appeal. This is what occurred in the procedure initiated by Judge Garzón: the Plenary Criminal Chamber (Sala de lo Penal) revoked his decision to consider himself competent for not sharing the interpretations on which the competence of the Juzgado Central de Instrucción (Central Investigative Court) No. 5 had been based. This is an admissible response under

Spanish law to a resolution that is mistaken or not shared, an appeal and its resolution by the competent judicial body.

The crime of prevaricación is not the goal of the interpretation and the Supreme Court cannot use criminal punishment to restrict the freedom of interpretation that characterises the Spanish system.<sup>2</sup>

### **III. UNJUST RESOLUTION**

Injustice is predicated on a judicial resolution; that is, on a sentence, a decision or a ruling. In the case of Judge Garzón, it was a decision.

As stated above, the most relevant issue in the crime of prevaricación is the one referring to what must be understood by ‘unjust.’ Injustice has been interpreted according to several theories, fundamentally the subjective, the mixed and the objective theories, some of which do not enjoy much pre-eminence in Spain.

#### **1. Subjective theory**

The subjective theory considers that a resolution is unjust not when it is objectively contrary to the law, but when it is opposed to the conviction of the judge him or herself.

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<sup>2</sup> I have referred to this issue in more detail, and in connection with the Garzón case, in MANJÓN-CABEZA OLMEDA, A., “Prevaricación e interpretación judicial (A propósito del Auto del Tribunal Supremo de 3 de febrero de 2010, por el que se deniega el sobreseimiento pedido por el Juez Baltasar Garzón en la causa de la Guerra Civil)” [Prevaricación and judicial interpretation (Regarding the decision of the Supreme Court of 3 February 2010, whereby the dismissal requested by Judge Baltasar Garzón in the Civil War cause is refused)], in *La Ley*, issue no. 7367 of 23 March 2010, pages 1 to 8. Some of the considerations stated in this article are as follows:

*We have left the era of the Enlightenment behind and today the Organic Law of the Judicial Power attributes the application and interpretation of the law to Judges and Tribunals (art. 5.1). To hold that the type of prevaricación should be a way to correct a particular interpretation is equivalent to forgetting that hermeneutic pluralism is a necessary value in legal interpretation; still worse: the authoritarian imposition of a particular interpretation while marginalising other possible ones is the same as “taking over the rule” and to place before it –by “prohibiting” other possible interpretations within the precept’s literal sense – the activity of the judicial application of the Law, depriving the Legislative Power of its function , namely to “open up” the rule to different possible interpretations –.*

*And the ultimate consequence would be to pervert our system of interpreting and applying the Law and replacing it with a species of dictatorship of the High Tribunal that would assume the monopoly of the exegesis of the Law and would transform all other Tribunals and Judges into automatons executing a single doctrine. This is inadmissible and could not even be justified in the interests of gaining legal safety and effective equality in the application of the Law.*

The above reasoning is not acceptable because it would lead to negating prevaricación when a judge is aware that he/she is violating the law but nonetheless does so based on his/her beliefs. This is precisely what occurred in the case of Judge Ferrín Calamita, who wrongfully delayed an adoption file in order to prevent a woman from adopting her female partner's biological daughter, something that, while permitted by law, was questioned by the judge. He was sentenced for a crime of malicious prevaricación under Article 446(3) (Supreme Court Decision 1243/2009 of 30 October 2009). This resolution considers that the judge's decisions represent 'the deployment of active belligerent obstruction to prevent the effective application of the legislative will; most significantly in questioning the suitability for adopting based on the plaintiff's sexual orientation', and concludes that the obstructive actions 'can only be rationally explained from the viewpoint of an unjust resolution.' Should the subjective theory be accepted in this case, the conclusion should be the acquittal of the judge who, in keeping with his personal considerations, wished to avoid applying the law. It should be noted that the independence of judges should be for applying the law, not for circumventing it, and that such independence is justifiable as long as the judge complies with to the legal system.

This theory is not acceptable in deciding what should be understood by an unjust resolution, given that it means dispensing with the judge's submission on the law and instead making him/her a source of law, something that is impossible under Spanish law.

Moreover, it must be noted that if a judge encounters a rule that he/she considers to be unjust in its general nature or one that leads to an unjust result in a specific case, he/she cannot dispense with its application but rather must, under criminal rules, proceed in accordance with Article 4.3 of the Criminal Code, under which '...he shall appeal to the Government, setting out the suitability of repealing or modifying the precept or granting a reprieve, without prejudice to the certain execution of the sentence when the rigorous application of the provisions of the law results in the sanction of an action or omission that, in the judgment of the judge or tribunal, should not be sanctioned or when the sanction is notably excessive, taking into account the harm caused by the offense and the personal circumstances of the defendant.'

The drawbacks of the subjective theory have been exposed by the Supreme Court in Decision 102/2009 of 3 February 2009 (presented by Luciano Varela Castro<sup>3</sup>) which considers that, when differentiating between a judge's fallibility or error and an instance of prevaricación, it is wrong to resort to the subjective formulation that states that 'the judge has committed prevaricación or has abused his function by favouring or injuring one of the parties in the process when applying the law or consciously directing the procedure against his conviction regarding applicable law, against the interpretation of the law that he himself assumes, but from which he diverges. This conception has been rejected because citizens are subject to rules and not to a judge's conviction.'

## **2. Objective theory**

The preponderant doctrine in Spain considers that the injustice of a resolution must be sought in its objective contradiction to the law; that is, the objective theory is assumed. The problem lies in deciding when a resolution is objectively contrary to the law.

On one hand, it must be taken into account that prevaricación does not only consist of crookedly applying the law, but also of establishing a set of facts and considering them proven in the face of reality (something that will mean a crooked application of the law only at the end of the judicial process).

Moreover, the degree of the crooked application of the law must be measured in order to reject the following cases as crimes of prevaricación:

1. A mistake in selecting the applicable rule or in establishing the facts.
2. A mistaken interpretation of the rule.
3. A minority interpretation of the rule. It must be remembered that there are rules that accept more than one valid interpretation and that the choice of any of them, though it may be the less accepted one, cannot be labelled as prevaricación. It should be taken into account that at the same Tribunal there may be dissents when it comes to handing

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<sup>3</sup> The Magistrate Luciano Varela Castro is the Investigating Judge of the Supreme Court's case against Judge Baltasar Garzón to which this opinion refers.

down a resolution, with one or several judges manifesting a contrary opinion to the majority one through individual votes authorised by Article 260 of the Organic Law on the Judicial Power. Should it be stated that minority interpretations constitute prevaricación, the conclusion would be reached that individual votes always presume that whoever drafts and signs them is committing a crime of prevaricación. Such a conclusion would be a nonsense and contrary to what is deduced from the above-mentioned Article 260: that a dissent is admissible among judges, even those from the same Tribunal, and that there is no room for the authoritarian or majority imposition of the law.

4. An interpretation of the rule contrary to that made by a higher court. Although opposing the interpretation made by a higher court cannot be prevaricación by the mere fact of such opposition, the Spanish Supreme Court handed down a surprising and scandalous resolution, contrary to the entire Spanish doctrine. Decision 2338/2001 of 11 December 2001 considered that a judge who did not comply with the doctrine of the Supreme Court on prescription was guilty of malicious prevaricación because ‘the decision not only deviates from the doctrine consolidated in the body of laws, but also holds positions that are not legally acceptable and so must be held to be unjust inasmuch as it deviates from legality in the sense determined by this Cassation Court as part of its legal policy functions...with regard to prescription, computation and interruption.’ It is argued that the objective element of prevaricación existed because seemingly the judge ‘does not hold opinions that may be legally sustainable...as they are lacking in any reasonable interpretation and reveal a clear degree of irrationality.’ In its final analysis, the Supreme Court states that prevaricación is committed through deviating from its doctrine.<sup>4</sup> This however is not correct, as what prevaricación directly violates is the law, not jurisprudence.

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<sup>4</sup> I have referred to the Supreme Court Decision 2338/2001 of 11 December in MANJÓN-CABEZA OLMEDA, A., ‘La cuestión de la interrupción de la prescripción y el enfrentamiento entre el TS y el TC’ (The issue of the interruption of prescription and the confrontation between the Supreme Court and the Constitutional Court), in *Considerando. Revista del ilustre Colegio de Abogados de Lucena*, issue no. 9, (2008), pages 58-66, stating that the Supreme Court considers ‘a judge to be guilty of malicious prevaricación who does not comply with the Supreme Court doctrine on prescription. This was a Decision by a Tribunal that perceived the prescription of certain deeds, understanding that the period of prescription was interrupted not by the proceeding of a complaint (which had been submitted on the day of the deadline), but by the summons of the defendant (which the Investigating Judge did after the prescription deadline had passed). The Supreme Court understood that handing down the Decision constituted a crime of prevaricación because ‘not only does it deviate from the doctrine consolidated in the body of laws but also holds positions that are not legally acceptable and so must be held to be unjust

It should be pointed out here that in the case of Judge Garzón it cannot be said that his decisions are based on interpretations contrary to those held by the Supreme Court, given that the points resolved by him have never been submitted to the consideration of the High Court (nonetheless, it has already been mentioned that opposing the interpretations of the Supreme Court is not a crime of prevaricación).

The four assumptions enumerated here are resolved in Spanish law through admissible appeals against legal resolutions.

5. An interpretation of the rule that may give rise to constitutional protection for the infringement of the right to criminal legality. The above (I repeat here some of the considerations made in my work quoted in note 2) means that ‘prevaricación cannot punish either reasoned dissent or an error in the application of the law.’ Between a fair unanimous decision and a decision resulting in prevaricación, there are several other options: a fair decision though not the only one, given that another valid one exists; an unusual decision but founded on an interpretational method accepted as valid; an erroneous decision that must be resolved through the route of appeals (because evidently the infringement of the relevant law for considering an appeal is not equivalent to the injustice of prevaricación); and, finally, a decision that the Constitutional Court may cancel for having infringed the right to criminal legality. Prevaricación would be the last step in the enumeration made and cannot be mistaken for the previous ones. The Constitutional Court Decision 13/2003 of 28 January 2003 (and many others in this same line) states that ‘...any criminal rule accepts different interpretations... our role as legal protection jurisdiction is reduced to safeguarding the values of legal certainty and of legislative monopoly... ascertaining whether the

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inasmuch as it deviates from legality in the sense determined by this Cassation Court as part of its legal policing functions... with regard to prescription, computation and interruption.’ It argued that the objective element of prevaricación existed, in other words that the decision ‘does not hold opinions that may be legally sustainable...as they are lacking in any reasonable interpretation and reveal a clear degree of irrationality’. In the final analysis, prevaricación is committed through deviating from the doctrine held by the Supreme Court. What is startling is that the decision on what constituted prevaricación according to the Supreme Court – proceeding with the complaint does not interrupt the prescription – is the same as the one maintained by the Constitutional Court in Decision 63/2005. It is a cause for grave concern that the Supreme Court Decision perceives prevaricación because a judge ‘reasonably dissents’ from a High Court thesis – highly debatable – to then agree with a more reasoned thesis, but it is even more worrying that such conduct might become widespread, making of prevaricación a species of ‘punishment for dissidence.’

interpretation made was one from among several possible interpretations... although since the Constitutional Court Decision 137/1997 of 21 July 1997, we have emphasised that it is not limited to verifying the patent error or manifest unreasonableness of judicial decisions but...requires the positive substantiation of the decision's reasonableness... in other words, the sanctioning resolutions sustained by a subsumption of facts that is foreign to the possible meaning of the terms of the rule applied are not the only ones that infringe the principle of legality. Also subject to constitutional rejection are any applications that, owing to their methodological basis – an illogical or indisputably extravagant line of argument, or axiological basis – an evaluative basis foreign to the criteria that informs our constitutional system, may lead to solutions that essentially oppose the material orientation of the rule and are consequently unforeseeable to their recipients.’

It seems obvious that if the field of legal protection against the infringement of the principle of legality demands an interpretation that is unreasonable or is based on an illogical or indisputably extravagant line of argument, in order to sentence for prevaricación, more has to be demanded, unless one should wish to conclude that every time that the Constitutional Court grants legal protection against an unreasonable or extravagant judicial resolution, it follows that the responsible judge or tribunal should be sentenced for prevaricación.

What must be understood is that prevaricación does not operate as a corrective measure of an interpretation that is possible, though that may not be the preferred one; that role is played by the appeals and ultimately by the Constitutional Court. Rather, the opposite is true: when an interpretation is possible because it is well-founded, though novel, or held by a minority, prevaricación must be ruled out. It is the possible interpretation that limits the scope of the crime of prevaricación and not the crime of prevaricación that severs the freedom to interpret.

The Spanish Supreme Court assumes the objective theory to determine what must be understood by ‘unjust resolution’; thus, Decision 2/1999 of 15 October 1999 states that ‘jurisprudence has underlined the importance of the objective element in the crime of prevaricación and in parallel has excluded interpretations based on the so-called subjective theory of this crime, which characterises injustice only as a subjective

attitude by the judge when applying the law, postulating the recognition of the conduct of the judge or officer passing a sentence or resolution against his legal conviction, even when the sentence or resolution is objectively compatible with the rules applied’.

To add to the above, in jurisprudence a resolution may be described as prevaricación when the injustice it contains is contrary to law: manifestly (Supreme Court Decision of 9 March 1910); patently (Supreme Court Decision of 17 June 1950); when it cannot be explained by reasonable interpretation (Supreme Court Decision of 25 January 1911); when it is lacking in any reasonable explanation and is evidently contrary to the law (Supreme Court Decision of 28 June 2004); when it is held that its unlawfulness must be ‘flagrant and glaring’, ‘clearly and manifestly against the law’, ‘nonsensical or grotesque’, when ‘the irrationality of the resolution in question is manifest’ and ‘can be appreciated by a layperson’ (Supreme Court Decision 2/1999 of 15 October 1999, previously quoted for other examples). And there is more in the same line: there is no prevaricación in ‘a mere error in the application of the laws’ (Supreme Court Decision of 3 May 1986), stating that prevaricación consists ‘of the deferment by the author of the validity of the law or of its authority and therefore of the violation of the rule of law ... a grave withdrawal of the law in prejudice of one of the parties’ (Supreme Court Decision 2/1999 of 15 October 1999). Furthermore, as stated by the Decision of 18 June 1992:

*not all infringements of the legal rules, whether in the decision or in the way the matter is conducted, lead immediately to criminal liability, taking into account that the regulatory requirement of the type consists in an unjust resolution, not in a simple illegal resolution, and the admonition that the criminal sanction entails does not manifest itself in the mere infringement of the law, but in the conscious crooked application of the law, with the underlying intention of harming or benefiting someone. Mere illegality, we repeat, is not sufficient to generate a crime of prevaricación, as it can be made to stop through appeals – decisions of 4 July 1996 and 7 February 1967- thus addressing the injustice, which is none other than a grave deviation from the law, through the content of the resolutions – decision of 3 April 1998. In short, it is necessary that the legality in force be breached in a flagrant and glaring manner – decisions of 25 March and 10 July 1995.*

Supreme Court Decision 102/2009 of 3 February 2009 (presented by Luciano Varela) should also be mentioned. Quoted above, this Decision, after rejecting a subjective conception, states the following:

*the essence of the crime of prevaricación lies in the infringement of objective law, and it is understood that there is infringement when the application of same is not objectively sustainable...*

*where several objectively sustainable conducts and decisions are possible, or where there are unsought grounds for doubt in the interpretation of the Law, the choice of one or the other of these possible interpretations –irrespective of the judge's conviction – shall not give rise to an action of prevaricación, given that the judge will have stayed within the boundaries of what is legally acceptable.*

Had the Supreme Court applied its own doctrine (specifically the one contained in the last of the Decisions quoted here) it would not have convicted in the case of Decision 2338/2001 discussed above, nor would it have upheld the trial against Judge Garzón for his investigations into the events of the Civil War and the Dictatorship.

The above means that the issue is not one of extensive and specific interpretation of the elements of the crime of prevaricación in the general doctrine of the Supreme Court, but rather the relinquishment of its own doctrine in two concrete cases: in one of them there was reasoned dissent regarding the Supreme Court thesis (which incidentally was then invalidated by the Constitutional Court, which confirmed the ‘decision of prevaricación’); the other one looks like it is seeking to criminalise an interpretation endorsed, in Spain and outside Spain, by numerous legal operators. Should the decisions manifested by the Supreme Court in these two affairs be maintained, a great many other judges would be condemned for the only reason of having interpreted the laws within the legal margins of the interpretation (Article 3 of the Spanish Civil Code).

The problem does not lie with the drafting of Article 446 of the Criminal Code nor with the interpretation normally made in Spain of the crime of prevaricación (which incidentally has seen very few convictions, something that on occasion has been

described as surprising or scandalous), but with the application made in a specific case and that could be made (in view of recent actions in the Judge Garzón affair) in the case we are dealing with here.

#### **IV. THE SUBJECTIVE ELEMENT IN MALICIOUS PREVARICACIÓN: 'KNOWINGLY'**

The mere existence of an unjust resolution is not sufficient to affirm the crime of malicious prevaricación; according to the legal text, it requires the judge to have acted 'in full knowledge' of the injustice of the decision he has taken. The doctrine offers different explanations for this expression, with some authors understanding that likely malice is excluded (picturing the probability that the decision is unjust) to demand direct malice (knowing the injustice of the resolution). This interpretation is based on the fact that judges, when they take a decision, are in many cases aware that such a decision can be considered erroneous and can be annulled by a higher court, something, however, that cannot lead them to decide in any other way or not to decide; moreover, it must be remembered that a non-decision could mean the commission of a crime according to Article 448 of the Criminal Code – a refusal to judge without legal cause or under the pretext of the law's obscurity, insufficiency or silence.

Other authors conclude that Article 446 does not exclude any kind of malice, with likely malice being possible; they base such a statement on the existence of injudicious prevaricación, from which it is deduced that it makes no sense to punish any malicious prevaricación, even a likely malicious one.

As regards Supreme Court jurisprudence, two trends can be identified when explaining the 'knowingly' element.

At the outset, a special intensity in a judge's subjective attitude was demanded in order to convict for prevaricación. This is reflected in the Decision of 3 May 1986 that, reflecting other previous decisions, points out that 'knowingly' means: deliberate intention of infringing justice, known purpose of violating a legal mandate, with no room for doubt that the action was taken with certainty, malice and true awareness of

the injustice. All of these expressions appear to eliminate the possibility of likely malice in prevaricación in Article 446.

Some more recent decisions appear to lower the level of requirement. Thus, Decision 2338/2001, quoted and critiqued earlier, considers that the 'knowingly' element consists in the judge's awareness that he/she is deviating from 'the principle of legality and from the usual and acceptable interpretations in law', something that 'must be connected to the judge's capacity as a technical expert in law and therefore an expert on law and legal science - *iura novit curia*'. Ultimately, what this Decision affirms is that when a judge, who is an expert in law, hands down an unjust resolution because it deviates from the usual and admissible interpretations and from the principle of legality, he/she is doing so with full awareness of that injustice.

None of the interpretations stated serves, in my opinion, to affirm that in Judge Garzón's case there are any signs of prevaricación. In this case, the trial for prevaricación is underpinned by a false idea: that there is only one correct solution for a case and that any other is not only incorrect or inadmissible but results in prevaricación. That is the false idea that permitted the conviction in the frequently mentioned Decision 2338/2001: that the only correct thesis on prescription is the one held by the Supreme Court and any other constitutes prevaricación (even if that other one is more firmly based on law and is ultimately the one imposed by the Constitutional Court).

In Judge Garzón's case the issue is even more serious if possible: the signs of prevaricación are affirmed because an interpretation is held up that does not run contrary to any previous one issued by the Supreme Court and that is perfectly well founded on law (though this may also be the case with other different ones), while impeding any proof that may tend to demonstrate that the decisions were based on admissible interpretations upheld by a wide number of national and international legal operators.

## **V. CONCLUSIONS**

First. The crime of prevaricación does not limit interpretation.

Second. The following cannot be described as prevaricación:

- a) an error in the choice of rule or in establishing the facts,
- b) an erroneous interpretation of the rule,
- c) a minority interpretation of the rule,
- d) an interpretation contrary to the one held by a higher Court,
- e) an interpretation that may give rise to constitutional protection for infringement of the right to criminal legality.

Third. In accordance with the doctrine of the Spanish Supreme Court, which considers that 'the choice of one or another of these possible interpretations ... will not give rise to an action of prevaricación, given that the judge will have kept within the boundaries of what is legally acceptable', Judge Garzón's case does not present any rational sign of prevaricación. The proceedings should never have gone ahead, and even less should not have reached the stage of an oral procedure.



Signed.: Araceli Manjón-Cabeza Olmeda

Madrid, 8 March 2011