THE FUNDAMENTAL RIGHT TO OBTAIN AN EFFECTIVE JUDICIAL PROTECTION.

1. CONTENT:

The fundamental right to obtain an effective judicial Protection is set down in article 24.1 CE, which states that “All persons have the right to obtain effective protection from the judges and the courts in the exercise of their rights and legitimate interests, and in no case may there be a lack of defence”.

Therefore it is a fundamental right, as it is set down within Chapter II, Title I of Spanish Constitution where fundamental rights are regulated. Thus it has a privileged protection in the event that it is infringed. That means that those who understand that their fundamental right has been violated may apply for jurisdictional protection through a preferential and summary process according to article 53.2 CE and, in addition, may apply for a special appeal before the Constitutional Court by means of “amparo”.

The content and meaning of this fundamental right has been framed by the Constitutional Court case law. The Constitutional Court has held on different occasions that it is a right of complex content from which others rights derive. We then can say that it is a “macro right” due to its several meanings. This complex content, according to Constitutional Court case law, covers matters ranging from the right to access to justice to the right to
obtain a decision on the grounds—when all the procedural requisites are complied with—and the right to the enforcement of the judgment.

What the Constitutional Court makes clear is that the right to jurisdictional protection does not imply the right to obtain a favorable decision, that is, we have the right to obtain a judicial decision but with no specific result.

There are four features or rights that are covered by this fundamental right to jurisdictional protection, according to Constitutional case law, namely:-

1. The right to Access to Justice.
2. The right to obtain a judicial decision on the grounds and justified by the law.
3. The right to the enforcement of the judgment.
4. The right to appeal by using the legally established appeal

2. RIGHTS DERIVED FROM THE RIGHT TO EFFECTIVE JURISDICTIONAL PROTECTION.

A. The right to Access to Justice.

The right to Access to Justice is a logical demand derived from the right to effective jurisdictional protection, because the access to Justice is necessary in order to enable the Courts to reach a decision about pleadings submitted to them by the citizens. Therefore, any obstacle to access must be removed
by the Legislator, including the economic difficulties that can affect the ordinary citizen, by way of granting Legal Aid. In addition, as we said before, the Legislator must also remove any obstacle derived from delays due to unjustified bureaucracy. The slowness of Justice because of an overwhelmed Court’s workload could, sometimes, lead to a violation of the right to Access to Justice when this workload is unjustified. For example, if a case takes three years to be heard by a Judge, it could be justified on workload reasons, but it could be unjustified if the case takes five years to be heard, so it must be justified within a reasonable period of time, not any length of time.

B. The right to obtain a judicial decisión on the grounds and justified by the law.

The right to obtain an effective jurisdictional protection covers also the right to obtain a judicial decision on the grounds and justified by the law. But we must bear in mind that this implies the need to comply with all formal procedural requirements. The result of that judicial decision could be either favorable or unfavorable to the claimant, because he does not have a right to have a favorable decision. This right covers the following issues:

- The judicial decisions should be justified by the law; that is, that they should have as the only rationale the application of the rule of law.
-Judicial decisions should explain the reasons why the judge has taken that particular decision and no other, as only when the judge makes a reasoned decision is it possible to know if he has applied the law, and in doing that, the application of the rule of law is justified. To give reasons by the judge consists of him explaining in his judgment which facts have been proven, which have not been proven, which kind of rules were applied and why; that is, to explain clearly the legal criteria that justifies his decision. Thus, judicial reasoning is a basic guarantee derived from the right to obtain an effective judicial protection because it permits us to check that a judicial decision is justified by the law, or in other words, that it is not an arbitrary decision.

-Finally, judicial decisions should be coherent or consistent with the pleading of the parties and with the judgment itself. That means that the judge cannot grant in his judgment something more or something different from the thing demanded by the claimant. For example, if the claimant claims that his debtor owes him 50 Euros, the judge cannot sentence the plaintiff to pay the claimant 100 Euros, or if the claimant claims the contract to be null and void, the judge cannot sentence the plaintiff to comply with the content of the contract or to give to the claimant an economic compensation if that has not been requested by the claimant. In addition, the judgment should be coherent. The judgment is the part of the judicial decision containing the declaration on the matter at issue. If the judgment contains a declaration of guilt of the accused as the author of a burglary, the facts that have been proven and the reasoned legal justification of the sentence must be coherent. For example, it cannot be said in the related facts, that the facts (taking property that belongs to another by means of violence) has not been proven.
and, in the judgment, to say that the accused is the one who has committed the crime and is guilty of that offence, so therefore he must be punished.

The right to obtain a judicial decision on the grounds only is able to be demanded according to Constitutional Court case law, when all legal procedural formalities are met, and essential legal steps of the proceedings have been taken. In saying that, Constitutional Court is admitting the possibility that judges can refuse the examination of the case in depth, but only as an exception when the case has procedural defects. For example, the court where the claim has been filed lacks jurisdiction (objective, functional and territorial jurisdiction –competence- is a procedural requisite in order for the court to validly start a case). In contrast, if the claim is not filed in the competent court, the judge cannot resolve the conflict but # may refuse the admission of the claim on the grounds that the claimant has failed to meet the legal requirements demanded by procedural law. No right is infringed by the judge when this happens.

C. The right to enforcement of judgment.

In order for an effective judicial protection, the right to obtain a judgment on the grounds is not enough, so an additional right is necessary to enforce that judgment when the sentenced party has not fulfilled his duty as was established in the sentence. Civil judgments are never enforced by courts automatically, so it is always necessary for the successful parties to apply to the court for enforcement. It may be necessary to adopt some cautionary measures in order to grant a successful enforcement, such as preventive taking of assets from the debtor by means of a judicial order. On the other
hand, once the judgment is enforceable, the judge could order all the necessary measures in order to obtain the amount of money that is owed by the debtor (including costs), usually by public auction: (the item seized from the debtor is sold, and after deducting the expenses of execution (costs, that should be paid by the enforcement debtor) the judgment creditor is paid off.

D. The right to appeal by using the legally established appeal procedures.

The last resort in order for the right to jurisdictional protection to be fulfilled is the right to appeal using the legally established appeal procedures.

In this case, the Constitutional Court case law lays down an important limit: the right to appeal is given only in those cases that the law recognizes that possibility. Therefore there is not always a right to appeal any judgment, but Legislator is free to decide the appeal system legally available for the citizen (in other words, there is not a fundamental right in-itself).

However, once the procedure for appeal is legally recognized, the right to apply for leave to appeal has a constitutional protection by way of effective jurisdictional protection.
Until LO 19/2003 was passed by Parliament, the Spanish legal System of appeals was paradoxical, in the sense that the general rule was that all civil judgments could be appealed but criminal judgments could only be appealed in some cases:

- Sentences of punishment for less serious offences could be modified by way of appeal and cassation.

- Sentences of punishment for serious offences only could be modified by way of cassation.

The Constitutional Court case law holds that this situation was not contrary to constitutional mandate on the basis of article 14.5 of International Covenant on Civil and Political Rights (1966). This article establishes that “Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law”. But the article does not demand the establishment of several appeals (for example, appeal and cassation), but only one.

Currently, article 73 of LOPJ, after being reformed by LO 19/2003, establishes that TSJ has jurisdiction to review criminal cases by way of appeal against AP judgments. In the same way, article 64 LOPJ, creates a new Chamber for High National Court that has jurisdiction (has competence) for appeal against judgments of that Court. However, the Legislator still has to create the procedure for the appeal, so we are as we were before the reform.