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**Conference on preliminary individual requests
(*exception d'inconstitutionnalité*)
to Constitutional Courts**

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**“Brief on the remedy for the protection of individual rights before the
Spanish Constitutional Court (*recurso de amparo*)”**

REPORT

by

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I. Introduction: the role of a Constitutional Court in a young democracy

Spain is a young democracy. After the end of the Dictatorship (1939-1975), there was a transition period (“La Transición”), in which a legal revolution took place, which succeeded in substantially transforming the country, while avoiding grave confrontation.

The dynamics of the transition in Spain are often characterized with two essential elements; the legality of the process, that is, the fact that the existing legal framework, the laws approved under the Franco regime, were taken as a departure point to transform the system; and the will to achieve a maximum degree of consensus among Spain’s very diverse political and social forces.

In this context, the Constitutional Court, envisaged in the 1978 Constitution has played a central role in the transition to Democracy.

The framers of the Constitution devised a system whereby the Constitutional Court is one of the essential institutions or powers of the system (a “constitutional organ”).

The Court is entirely independent from the rest of the powers, including the judicial power. It has budgetary autonomy as well as hiring autonomy.

It is formed by twelve members appointed by the King, of which “four shall be nominated by the Congress by a majority of three-fifths of its members, four shall be nominated by the Senate with the same majority, two shall be nominated by the Government, and two by the General Council of the Judicial Power” (art. 159.1 Constitution). Members of the Constitutional Court shall be appointed among magistrates and prosecutors, University professors, public officials and lawyers, all of whom must have a recognized standing with at least fifteen years’ practice in their profession (art. 159.2). They are appointed for a period of nine years and of nine years and shall be renewed by thirds every three years (art. 159.3), so as not to coincide with electoral cycles.

The Court has been key in implementing, directly or by example, the fundamental rights. The rulings of the Constitutional Court have also played a significant role in the definition of authority in the State of Autonomies. Taking into account that the vast majority of the matters listed in the Constitution are actually shared between the State and the Autonomous Communities, it is not hard to imagine that this has been a source of permanent conflict between these two tiers of Government. This role has been reinforced by the ‘unfinished’ nature of the different provisions regarding regional autonomy established in the Constitution, and by a certain ‘didactic’ tendency of the Court to fully explain and thus serve to clarify the rules governing the State of Autonomies.

The Court has jurisdiction over the whole Spanish territory and is entitled to hear the type of cases listed in article 161 of the Spanish Constitution, as well as those established by an organic law.

Article 161.1 states the following type of procedures:

“a) Against the alleged unconstitutionality of acts and statutes having the force of an act. A declaration of unconstitutionality of a legal provision having the force of an act and that has already been applied by the Courts, shall also affect the case-law doctrine built up by the latter, but the decisions handed down shall not lose their status of res judicata.

b) Individual appeals for protection (recursos de amparo) against violation of the rights and freedoms contained in section 53(2) of the Constitution, in the circumstances and manner to be laid down by law.

c) Conflicts of jurisdiction between the State and the Self-governing Communities or between the Self-governing Communities themselves.

d) Other matters assigned to it by the Constitution or by organic acts”;

Article 2 of the Organic Law 2/1979 on the Constitutional Court, of 3 October 1979, adds the following cases to the list:

“d) in conflicts between the constitutional bodies of the State;

d bis) in any conflicts in defense of local self-government;

e) in any declaration concerning the constitutionality of international treaties

f) in disputes within the scope of Article 161, number 2 of the Constitution;

g) in the scrutiny of appointments of Judges of the Constitutional Court in order to determine whether they fulfill the conditions laid down by the Constitution and by this Law;

h) in any other matter referred to it by the Constitution and by organic laws.”

II. The Spanish system for the protection of fundamental rights: judicial protection and “recurso de amparo”.

Article 53.2 of the 1978 Spanish Constitution¹ envisages two procedures or remedies for the protection of fundamental rights;

“Any citizen may assert a claim to protect the freedoms and rights recognized in section 14 and in division 1 of Chapter 2, by means of a preferential and summary procedure before the ordinary courts and, when appropriate, by lodging an individual appeal for protection (recurso de amparo) to the Constitutional Court. This latter procedure shall be applicable to conscientious objection as recognized in section 30”.

The “recurso de amparo”, or appeal for constitutional protection, is a remedy for the protection of individual rights before the Spanish Constitutional Court.

It is regulated in Title III of the Organic Law 2/1979 on the Constitutional Court, of 3 October 1979² (articles 41 to 58).

Only fundamental or essential rights and freedoms may be protected via *recurso de amparo*; that is, those regulated in articles 14 to 29 of the Spanish Constitution (Part I of the Spanish Constitution, Chapter 2, Division 1), as well as art. 30.2 (freedom of conscience), which can be summarized as follows:

Section 14: Equality before the law

Section 15: Right to life and to physical and moral integrity

Section 16: Freedom of ideas, religion and worship

¹ Passed by the *Cortes Generales* in Plenary Meetings of the Congress of Deputies and the Senate held on October 31, 1978 Ratified by the Spanish people in the referendum of December 7, 1978 Sanctioned by His Majesty the King before the Cortes on December 27, 1978

² As amended by the Organic Laws 8/1984, of December 26; 4/1985, of June 7; 7/1988, of June 9; 7/1999, of April 21; 1/2000, of January 1; 6/2007, of May 24; 1/2010, of February 19, and 8/2010, of November 4. English version available at the Official website of the Spanish Constitutional Court:

<http://www.tribunalconstitucional.es/en/tribunal/normasreguladoras/Pages/NormasReguladoras.aspx> (accessed 8 May 2015).

Section 17: Freedom and security; preventive arrest, guarantees of prisoners; habeas corpus
Section 18: Honour and personal reputation; right to privacy; secret of communications
Section 19: Liberty of residence within Spain
Section 20: Free expression; Academic freedom; Freedom of information.
Section 21: Right of assembly; to public demonstrations.
Section 22: Freedom of association.
Section 23: Participation of citizens in public affairs.
Section 24: Due process, judicial guarantees.
Section 25: legal definition of offences and penalties
Section 26: Prohibition of Courts of Honour.
Section 27: Right to education. Rights of parents. Autonomy of Universities.
Section 28: Right to join trade unions. Right of strike.
Section 29: Right to individual and collective petition.
Section 30, par 2: Military service and objection of conscience.

1. Admissibility criteria (formal) for the recurso de amparo.

Recurso de amparo is always subsidiary. The Constitutional Court does not belong to the ordinary judicial power. This means all remedies must have been exhausted once the claim reaches the Constitutional Court.

The scope of amparo is quite broad:

“The appeal for constitutional protection shall be available, in accordance with the provisions of this Law, against violations of the rights and freedoms referred to in the previous paragraph resulting from provisions, legal enactments, omissions or flagrantly illegal actions (vía de hecho) by the public authorities of the State, the Autonomous Communities and other territorial, corporate or institutional public bodies, as well as by their officials or agents” (art. 41.2 Organic law).

There are actually two mechanisms for the protection of fundamental rights (leaving aside parliamentary amparo):

a) Should the violation of a right or freedom result from an action or inaction of the Public Administration (that is, deriving from *“provisions, legal enactments, omissions or flagrantly illegal actions by the Government, its authorities, or its officials or by the executive bodies of the Autonomous Communities or their authorities, officials or agents”*, art. 43.1 Organic Law), the plaintiff must first exhaust the relevant judicial remedy.

In this case, the deadline for lodging the appeal for constitutional protection is twenty days from the date of notification of the ruling given in the previous legal proceedings.

b) The violation may be originated in an act or omission by a judicial body. In this case, all remedies by the procedural rules must also be exhausted and it must be formally reported; that is, the judicial body must be given an opportunity to remedy the violation or breach (the so-called *“incidente de nulidad de actuaciones”*; a special process in which the judicial body itself voids its own opinion).

The deadline in this case is thirty days, also counted from the date of notification.

1. Formal requirements of the claim.

1. Must be clear and concise.
2. Must expressly indicate what the violation consist of ("*Appeals for constitutional protection shall be initiated by an application setting out clearly and concisely the circumstances on which they are based, mentioning the constitutional precepts that are deemed to have been violated and giving details of the protection sought with a view to preserving or restoring the allegedly violated right or freedom*"; art. 50.1 Organic law).
3. Must be accompanied by:
 - a) The document (deed) mandating the representative of the applicant for protection (practical issues in immigration cases)
 - b) Where appropriate, a copy, notification or certificate of the decision that terminated the judicial or administrative proceedings.
4. There must be a express justification to justify the special constitutional relevance (*especial transcendencia constitucional*) of the appeal.

2. Substantial criteria: a breach of a fundamental right or freedom.

First and foremost, a violation of a fundamental right or freedom (arts. 14-30.2 of the Spanish Constitution) must have taken place.

Breach must also have had material consequences. Thus, for example, a due process breach consisting of denial of evidence will not be protected if the evidence was not substantial or would not have been helpful; *effect utile* so to speak. This also means that no hypothetical or potential breaches will be admitted; *ie*, a legal rule that may be discriminatory will have to actually have produced such effect. In other words, amparo is a specific, not an abstract, remedy. Plaintiffs must therefore have and prove that they have a direct interest.

How does the Court actually remedy the breach? The Court may annul and retract the procedure to the stage prior to the breach, if an inferior Court has caused the breach.

The Court may however go further and declare the executive/administrative act null. Should the breach be originated in a law the Court may then examine whether the legal provision applicable is constitutional; this is the so-called "self-question" of unconstitutionality, whereby, instead of resolving the *amparo* itself the law, as origin of the breach, is examined. Should the Court find the law unconstitutional, it will declare so and solve the individual appeal accordingly.

3. The objective dimension of the breach: special constitutional relevance.

The constitutional breach must be both directly relevant for the plaintiff and relevant for the interpretation of the Spanish Constitution.

This is a consequence of a still recent reform, undertaken by Organic law 6/2007 and which has substantially altered the nature of the recurso de amparo.

Introducing the "special constitutional relevance" entails a substantial shift of focus from the subjective perspective, the breach, violation, of a fundamental rights, to the pedagogical, didactic role of the Constitutional Court *vis a vis* the ordinary Courts and Institutions.

The reform should reinforce the role of ordinary courts in the protection of fundamental rights, although the Constitutional Court still has the role of ultimate remedy.

It is for the plaintiff to prove, or rather, to argue, that her case has special relevance. Not always easy to determine (in particular, in poorly argued cases).

The main change is that the violation of a fundamental right is no longer sufficient. There must be also, an objective dimension, the “special constitutional relevance”.

Violations of fundamental rights will be protected by ordinary judges through normal processes or through an appeal for annulment (“*incidente de nulidad de actuaciones*”).

An appeal will be deemed to have special relevance so long as “*the case in appeal justifies a decision about the content by the Constitutional Court because of its special constitutional significance (especial transcendencia constitucional), which shall be seen in terms of its relevance for the interpretation and application of the Constitution, or for the effectiveness thereof, and for determining the content or scope of fundamental rights*”.

Formally, the special relevance implies the burden, by the plaintiff, to specifically justify that such relevance is present. Justifying the special relevance is different from arguing that the right has been violated (In 2014, 24 per cent of rejected appeals were rejected due to a lack of justification of special relevance; 12 per cent were rejected because the justification was insufficient).

From a substantive perspective, in Opinion 155/2009 the Court has farther specified the meaning of relevance, with an open list:

- a) New cases that raise problem of a fundamental right on which there is no case law of the Constitutional Court yet (Example: Opinion 174/2011, minor victim of a sexual crime, protecting a witness without reducing the defendant’s process guarantees).
- b) A change: a case provides the occasion to the Court to clarify or, if needed, change its doctrine, as a consequence of a process of internal reflection (Opinion 155/2009), or due to the new social realities (Opinion 26/2011, male discriminated against on the grounds of gender because he couldn’t change his work shift to take care of his children), or due to important changes in laws relevant for the configuration of the content of the fundamental right.
- c) The breach originated in a law; (the above mentioned “self-question”).
- d) Reiteration of the breach originated in ordinary courts; ie, when ordinary courts systematically interpret a legal provision in a way that is contrary to a fundamental right or freedom.
- e) Disregard of precedent; cases where the Court’s case-law regarding the fundamental right at issue is not being respected by the ordinary courts in a general and reiterated manner, or that there are contradictory rulings of the ordinary courts regarding such a right.
- f) Disobedience: a case in which an ordinary court declines its duty to observe the case law of the Constitutional Court (Case 133/2011, Supreme court does not fully follow constitutional case law about the statute of limitations of crimes).
- g) Cases which raise a legal issue which has general and relevant, social or economic repercussions, or has general political consequences, as it could be said with respect to certain appeals for constitutional protection in the area of electoral or parliamentary issues.

In order to balance out the “objectivation” of the process, the process before ordinary courts has been reinforced via the so-called appeal for annulment or “*incidente de nulidad de actuaciones*”).

The appeal for the constitutional protection of fundamental rights in Spain is now more restrictive, altogether. There is a real risk that the level of protection of fundamental rights will be reduced. That will most definitely happen if ordinary courts do not reinforce this protection too. That is the goal of the appeal for annulment. It entails an extension of the scope of the already existing appeal for annulment of judicial decisions, a remedy traditionally reserved for procedural and formal infringements, and which since 2007 can be used to challenge judicial decisions which violate any fundamental right.

According to Article 241 of the Organic Law on the Judiciary the appeal for annulment has the nature of an extraordinary remedy, since it can only be used when the plaintiff cannot contest the judicial decision through an ordinary appeal, and only as long as the violation has been produced by the last judicial decision, so that it could not be alleged before.

A question that arises is whether the current objective element, the said constitutional relevance requisite actually entails a sort of writ of certiorari³. It is not. The current Spanish system does not expressly bestow discretion to the Court; as ample and subject to interpretation as the criteria for special relevance may be, they are still objective measurable criteria. In other words, the Spanish Constitutional Court does not freely select cases.

III. The Court in numbers.

In comparative terms, the Spanish Constitutional Court very well may be one of the most productive of its kind. In amparo, the vast majority of claims (about 75%) are article 24 claims (due process).

Article 24

1. 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 defense.

2. Likewise, all have the right to the ordinary judge predetermined by law; to defense and assistance by a lawyer; to be informed of the charges brought against them; to a public trial without undue delays and with full guarantees; to the use of evidence appropriate to their defense; not to make self-incriminating statements; not to plead themselves guilty; and to be presumed innocent.

The law shall specify the cases in which, for reasons of family relationship or professional secrecy, it shall not be compulsory to make statements regarding allegedly criminal offences.

Source of all Tables: Memoria Tribunal Constitucional 2014 (available at www.tribunalconstitucional.es)

³ See: Rule 10 of the USSC (Adopted January 12, 2010):

- "Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
- (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
- (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
- (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.
- A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law".

1. Incoming cases during 2014 (by type of process)

Alleged unconstitutionality of acts and statutes having the force of an act (<i>Recurso de inconstitucionalidad</i>)	60
Alleged unconstitutionality of acts and statutes having the force of an act presented by an ordinary court (<i>Cuestión de inconstitucionalidad</i>)	141
Recurso de amparo	7.663
Conflicts of jurisdiction between the State and the Self-governing Communities or between the Self-governing Communities themselves (positive)	5
Conflicts of jurisdiction between the State and the Self-governing Communities or between the Self-governing Communities themselves (negative)	3
Conflicts between the constitutional bodies of the State	-
Conflicts in defense of local autonomy	2
Challenges of other resolutions by Autonomous Communities	4
Declaration concerning the constitutionality of international treaties	-
Total	7.878

2. Incoming recurso de amparo by type of legal order (civil, criminal...)

Parliamentary amparo	9
By type of Law Court	7.654
Civil Law	1.137
Criminal Law	3.485
Prisons	382
Public law	2.221
Labour law	352
Militar	30
Other	47
Total	7.663

3. Number of incoming “amparos” by type of plaintiff

Type of Plaintiff	Number of claims
Individuals	6.488
Companies	754
Public entities	417
Ombduswoman	-
Public Attorney (Ministerio Fiscal)	4
Total	7.663

4. Incoming amparo sorted out by fundamental right or freedom involved in the claim

Fundamental right or freedom invoqued in the claim	Total	Percentage
Section 14: Equality before the law	1.090	14,22
Section 24: Due process, judicial guarantees.	5.570	72,68
Other rights and freedoms	1.676	21,87
Section 15: Right to life and to physical and moral integrity	271	3,53
Section 16: Freedom of ideas, religion and worship	13	0,16
Section 17: Freedom and security; preventive arrest, guarantees of prisoners; habeas corpus	497	6,48
Section 18: Honour and personal reputation; right to privacy; secret of communications	340	4,43
Section 19: Liberty of residence within Spain	27	0,35
Section 20: Free expression; Academic freedom; Freedom of information.	68	0,88
Section 21: Right of assembly; to public demonstrations.	6	0,07
Section 22: Freedom of association.	24	0,31
Section 23: Participation of citizens in public affairs.	140	1,82
Section 25: offences and penalties	261	3,40
Section 26: Prohibition of Courts of Honour.	2	0,02
Section 27: Right to education. Rights of parents. Autonomy of Universities.	3	0,03
Section 28: Right to join trade unions. Right of strike.	21	0,27
Section 29: Right to individual and collective petition.	3	0,03
Section 30, par 2: Military service and objection of conscience.	-	-

5. Reasons recurso de amparo have been not admitted (in 2014)

Reason	Number of claims	Percentage
Constitutional relevance not justified at all	1.331	19,97
Constitutional relevance is not sufficiently justified	1.082	16,27
There is no constitutional relevance	17	0,25

No breach of a fundamental right exists	2.094	31,37
The breach of the fundamental right has not been argued at all	37	0,55
Failure to exhaust all previous remedies	931	13,99
Claim presented outside the deadline	375	5,61
Unresolved process issues	572	8,62
Various reasons at the same time	125	1,9
Other reasons	98	1,47
Total	6.662	100

6. Comparative data (2010-2014)

Incoming claims	2010	2011	2012	2013	2014
Alleged unconstitutionality of acts and statutes having the force of an act (Recursos de inconstitucionalidad)	32	31	38	76	60
Alleged unconstitutionality of acts and statutes having the force of an act presented by an ordinary court (Cuestión de inconstitucionalidad)	50	51	42	106	141
Recurso de amparo	8.948	7.098	7.205	7.376	7.663
Conflicts of jurisdiction between the State and the Self-governing Communities or between the Self-governing Communities themselves (positive)	6	9	8	12	5
Conflicts of jurisdiction between the State and the Self-governing Communities or between the Self-governing Communities themselves (negative)	1	-	1	-	3
Conflicts between the constitutional bodies of the State	-	-	-	-	-
Conflicts in defense of local autonomy	4	3	-	2	2
Challenges of other resolutions by Autonomous Communities	-	-	-	1	4
Declaration concerning the constitutionality of international treaties	-	-	-	-	-
Total	9.041	7.192	7.294	7.573	7.878

7. Court's productivity in 2014 (total cases argued or otherwise fully processed during 2014)

	Total
Opinions (Sentencias)	215
Judicial Decrees (Autos)	305
Rulings (Providencias)	
Admitted	208
Rejected	6.662
Other	19
Total Decrees	6.889
Total	7.409