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**CONFERENCE
ON**

**"ACCESS TO THE COURT - THE APPLICANT IN THE
CONSTITUTIONAL JURISDICTION"**

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REPORT

**"THE ACCESS TO THE SPANISH CONSTITUTIONAL COURT:
THE ADMINISTRATION OF A LIMITED GOOD"**

by

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I. Introduction

First of all, I would like to thank the Constitutional Court of Latvia and the Venice Commission the invitation to attend this Conference on Access to the Constitutional Court. Constitutional Jurisdiction is an issue in which a comparative approach is especially useful, so that I am sure that we will all learn from the experiences of other countries. However, Constitutional Courts operate at national level, so that it is also necessary to take into account the context in which each Court works.

The title of my presentation - "Access to the Spanish Constitutional Court: the administration of a limited good- tries to point out something that is common to all countries that have decided to concentrate constitutional review: constitutional jurisdictions are always limited institutions. In other words, concentrating constitutional review in one Court implies necessarily that its jurisdiction is restricted to some constitutional proceedings, so that not all violations of the Constitution can be taken to the Court. Who can appeal, which decisions can be reviewed, what can be asked and with which time and formal requisites must an appeal be lodged, all these are questions that limit the access to the Courts; and, with it, the jurisdictional guarantee of the Constitution. At the same time, however, it is also obvious that Constitutional Courts can only fulfil their task accurately if the number of appeals they have to answer is limited. Therefore, one of the main problems of all Constitutional Courts is to find a balance between access to constitutional jurisdiction and efficient dealing of the proceedings that have reached the Courts.

This balance can change not only from country to country, but also over the years. The Spanish experience, for example, shows the convenience of permitting an easy access to the Court at the very beginning of its activity as a way of extending the supremacy of the Spanish Constitution –and particularly of fundamental rights- in a country that came out of a long dictatorship. For the promotion of a constitutional culture it was crucial, indeed, that the provisions that influence the access to the Constitutional Court were interpreted widely. But the easy way to reach the Spanish Constitutional Court increased quickly the amount of cases to be solved. And it did it in such a way that at the beginning of the 90's the Court nearly collapsed. As a reaction to it and to the delay with which the Court solves the appeals, in 2007 Parliament passed an amendment to the Law that regulates the Court. As we will see, the new law has introduced a new admission system for individual complaints that will limit the access to the Court in a drastic way. But what the Spanish experience shows is that access to the Constitutional Court can be regulated and interpreted in different ways, depending on the circumstances of each moment.

II.

Access to the Spanish Constitutional Court is regulated basically at constitutional level. Spain's Constitution provides not only the main proceedings that fall under its competence, but also who can submit an application to the Court. Contrary to Latvia, this regulation varies depending on the concrete proceeding.

Controlling if a law is in accordance to the Constitution is something that can be done basically through two proceedings: the abstract and the concrete appeal. As stipulated in the Spanish Constitution, the abstract appeal can be lodged by the Prime Minister, the Spanish Ombudsman, 50 members of any of the two Chambers of Parliament, and by the Governments and Parliaments of the Autonomous Regions. On the other hand, the concrete control can be started by any judge that in a particular case has to apply a law that in its opinion is unconstitutional.

Citizen can never lodge an appeal against a law. What they can do is to submit an individual complaint against judicial or administrative behaviour that violates a fundamental right. In this proceeding the Constitution allows any natural or legal person with a rightful interest to lodge an

individual appeal after exhausting all legal remedies. The Spanish Ombudsman and the public prosecutor can also initiate such appeals, but without having this rightful interest in the case. Spain's Constitution provides also the so-called conflicts of competences, a proceeding that enables national and regional governments to appeal against administrative regulations and acts that violate their own competences.

And finally, the Organic Law that regulates the Constitutional Court has also introduced some proceedings –that are not very important in practice- that can be lodged by local administrations or by the national Parliament or Government.

In summary, one can say that the Spanish Constitutional Court has wide competences that enables it to review if almost every behaviour of public authorities is in accordance with the Constitution; and especially with the fundamental rights provided in it.

The Organic Law that regulates the Constitutional Court also prescribes that the applicants need to be legally represented and assisted by a lawyer. Legal assistance is guaranteed by the State if applicants cannot afford it. Taking into account that no special skills are required to act as a lawyer at the Constitutional Court and that fees do not depend on the success of the appeal, one can rather say that this requisite does not hinder the access to the Court; on the contrary, it promotes it, because submitting appeals has never negative consequences for itself.

III.

As mentioned before, the easy access to the Constitutional Court has played a very important role in protecting and promoting constitutional provisions; and especially fundamental rights. Public authorities and citizen have taken the Constitution seriously mainly because their violation could be easily brought to the Court. But the negative consequence of this fact is that the number of appeals submitted to the Court increased quickly, so that it was not able to solve them on time.

Some statistics may illustrate the current situation of the Court. Last year (2008) 10.410 appeals were lodged at the Court: 10.279 individual complaints, 24 abstract appeals against laws, 93 concrete appeals and 14 conflicts of competences. Like in previous years, individual complaints are more than 95 % of all proceedings, while the amount of abstract control and conflicts of competences depends mainly on the political relationship between national and regional Governments.

In any case, such an enormous demand of constitutional protection cannot be satisfied by a Court of 12 judges, assisted by nearly 50 referendars. As a consequence of it, the delay in solving the different appeals has reached unacceptable rates. At the end of 2008, for instance, almost 500 cases were waiting to be judged (302 individual complaints, 194 abstract appeals, 226 concrete appeals and 71 conflicts of competences), while the admission of nearly 9000 individual complaints was also pendant.

As mentioned before, this situation brought the Parliament to amend the Law that regulates the Constitutional Court. The description of the changes introduced with this amendment would take too much time. But the reform focuses basically on a new admission system for the individual complaints that -similar to Germany- requires that the appeal has "especial constitutional significance". The terms used by the Law to describe this requisite (especial constitutional significance) are very open and vague. The new Law only stipulates that this significance has to be in relation with the importance of the case for the interpretation of the Constitution, for its application or general effectiveness, and for determining the content of the fundamental right concerned. All these concepts are still very open and the Court has recently started to concretise them. In the judgement 155/2009, of July 25, the following criteria have been fixed. The appeal has special constitutional significance if it raises a new case or if the

Court decides to change its jurisprudence. It has also constitutional significance if the violation of the fundamental right has its origin in a law or in a frequent judicial interpretation that infringes the Constitution. Constitutional significance is also given if the jurisprudence of the Constitutional Court is not being followed by ordinary judges or if the case raises a question of general interest. However these criteria will be interpreted, it is obvious that the new admission system of individual complaints has changed radically the access of individuals to the Court. The applicant has not only to show that his right has been violated. It has to demonstrate that this infringement has especial constitutional significance.

IV.

The other issues mentioned by the organisers of the seminar and that have been discussed this morning have not changed with the new Law.

As I said before, access to the Constitutional Court depends on the concrete proceeding that falls into its jurisdiction. The control of a law's constitutionality can only be introduced by political bodies in the case of abstract appeals and by judges of any level in the case of concrete appeals. Abstract appeals are temporarily limited, while concrete appeals can be lodged at any time. The main problem of abstract appeals in Spain is that neither citizen nor political minorities at regional level cannot submit a case to the Court. In the case of concrete appeals the basic problem is related with the Court's delay. An important number of judges try not to lodge such appeals, because they have to interrupt the ordinary proceeding till the Court decides if the law that has to be applied is constitutional or not. The prize of having to wait between 3 and 5 years till the doubt is solved by the Court seems to be too high for an increasing number of judges, that prefer not to take the Constitution seriously.

Much more interesting for the aim of this seminar are the requisites that have to be fulfilled in order to submit an individual complaint to the Constitutional Court. As mentioned before, in Spain this proceeding enables individuals to appeal against administrative or judicial behaviour that may have violated one of their fundamental rights. Considering that these rights are binding for all public powers and that ordinary judges are their natural protectors one basic feature of individual complaints is their subsidiary character. Individual appeals can only be lodged after exhausting the ordinary remedies provided in the Spanish legal system. Taking into account all these elements and that since 2007 the appeals have to have, as mentioned before, "especial constitutional significance", lets focus on the questions mentioned by the organisers of this seminar.

Which is the aim of individual complaints?

Individual complaints seek to protect the main fundamental rights recognised in the Spanish Constitution. Not all rights mentioned in the Constitution can be protected with this proceeding. Only some of the so-called fundamental rights –namely those provided in articles 14-29- can be claimed at the Court after exhausting ordinary remedies. The fundamental rights protected in these articles are the most important ones. They include not only rights related to freedom and political participation, but also social rights like the right to education. Freedoms recognised in international treaties subscribed by Spain cannot be protected by the Constitutional Court. But as prescribed in article 10.2 of the Constitution, they play an important role in the interpretation of the Spanish fundamental rights.

It is important to underline, however, that individual complaints can only be lodged if a fundamental right has been infringed. This infringement has to be real, concrete and effective, so that individual appeals cannot be raised if the violation is only hypotetic, general or provisional. For instance, the lack of founds for organising ordinary tribunals or preliminary or not binding decisions cannot be taken to the Court. In fact, it's main aim is to guarantee the effectiveness of fundamental rights.

What can be appealed?

As mentioned before, individual complaints in Spain can be lodged to appeal all kind of behaviour of a public power. With the exception of legal norms, every rule, act or even omission of an administrative body or a judge can be taken to the Court. In order to guarantee fundamental rights in a wide sense the Spanish Constitutional Court also takes private conflicts under its competence. And it does so by considering that the ordinary judge that didn't put an end to a fundamental rights' infringement has also violated the right for itself.

Who can submit an individual appeal?

As I said before, the Law that regulates the Constitutional Court provides that all natural or legal person with a rightful interest can lodge an individual complaint to the Court. There is also no problem regarding NGO's, enterprises or private associations if they have such an interest. The holder of the concrete fundamental right that has been infringed has always such interest. In some cases, however, the problem is to know if the applicant is the holder of the alleged fundamental right. Do for example have private associations honour? Do have foreigners the same fundamental rights than nationals? Do have public administrations fundamental rights? The answer to all these questions in the Spanish constitutional system is not always easy. Generally speaking, one can say that it depends on the concrete fundamental right. But in some cases the fact of not being the holder of the fundamental right has the refusal of the complaint as its consequence. This is not the case if, as mentioned, the applicant has a rightful interest in the case. The Court has not defined precisely when this interest exists. It usually makes a material approach to this concept that allows a wide access to its jurisdiction. The widow of a person that was dishonoured in a book could for this reason submit an appeal asking for the protection of his husband's reputation. And it is also frequent that a person that has been imprisoned as a consequence of a telephone calling between other people that was intercepted by the police lodges an appeal based on the infringement of the right to secret communications.

V. Summary conclusion

After almost 30 years protecting and promoting fundamental rights by solving individual complaints and by interpreting it's regulation in a wide the Spanish Constitutional Court was completely overburden. The risk of being collapsed by more than 12.000 new proceedings every year brought in 2007 the Parliament to pass a very important amendment to the Law of the Constitutional Court that will change citizens' access to the Court radically. Having to show not only that a fundamental right has been infringed, but also that this infringement has especial constitutional significance, it is obvious that the access to the Court has become narrower. Without amending the Constitution the new individual complaint has reinforced its objective character, so that it is no more a subsidiary remedy to all fundamental right's infringement. Whether this change will be acceptable in terms of an efficient protection of fundamental rights will depend on how the Court interprets the new regulations. An at last, but not least on how ordinary judges play their role as natural protectors of fundamental rights.