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“THE ROLE OF THE CONSTITUTIONAL COURT IN THE
PROTECTION OF CONSTITUTIONAL VALUES”

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The Role of the Constitutional Court in
Strengthening Constitutional Values:
The Spanish Experience

REPORT

by
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First of all I would like to thank the Latvian Constitutional Court and the Venice Commission for the invitation to join this round table Conference about the Role of The Constitutional Courts on a comparative perspective.

My intervention is going to be a personal approach to the Spanish Constitutional Court, which first judgment is dated on the 23th of January 1981. I will focus on two of it's main characteristics;

Firstly, the assessment of the existence of a universal legitimation to protect Fundamental rights through the "The Appeal of protection" and the role of Constitutional Court.

Secondly, the success to guarantee the independence of his Judges from the political game.

But before, I would like to remark some links between the Latvian and Spanish constitutional justice that makes of mutual interest the comparison.

Both are born in a transitional period, after a long experience trough a non-democratic system, with little trust in the ability of the old judicial system to adapt the new fundamental values.

As a result, the Constitutional Court, and not the Judiciary, will be the final guardian of the fundamental rights, obtaining the necessary tools to become, at the same time, Supreme Court and negative lawmaker.

The model guarantees the universal access to the defense of constitutional values, but at the same time gives relevant roles to the Ombudsman and each single Judge.

Finally, the composition of our Constitutional Courts is similar: few Magistrates, very qualified, from the academic or judicial world, elected for a long period, by the rest of the democratic powers.

But now please allow me to examine the Spanish system.

I will firstly remark the importance of the appeal of protection as the main tool of the Constitutional court to strengthen Constitutional values; it has been the appeal of protection, and not the appeal against the alleged unconstitutionality, the way through the Court has had the opportunity to define all the fundamental rights and values, implementing jurisprudence to be applied for all the Judiciary.

This effect has been caused by the art. 5 of the Organic Law of the Judiciary establishing the obligation for all the judges to apply the Court decisions and interpretations, allowing all citizens to apply for protection to the Constitutional court if they don't do so.

As a result, Spain has high standards of Fundamental Rights as prove by the very few convictions from the European Court of human rights.

The task of spreading constitutional values through the Judiciary its almost done, I may add perfectly done, but on the other hand, new problems have arisen.

Among them the so-called Spanish "war of the courts" between the Constitutional Court and the Supreme Court, which main field have been the conflicts between the right to honour and privacy and the right of information.

But the main problem is the court's undue delays due to its overburden.

In order to solve this mayor problem, the legislator decided to follow the path opened by the German Constitutional Court in 1993, and nowadays by the European Court of Human rights, adopting his own version of the American certiorari, by giving more importance to the interpretation of the law, the objective dimension of the appeal, than to solving the singular case.

The reform of the Organic Law of the Constitutional Court passed in 2007, demands some objective criteria to admit the appeals, Specified by the court in his Judgment 155/2009.

The court will only accept a case if

- Lack of jurisprudence
- Need to overrule the Court's jurisprudence
- Need to correct the interpretation given by the judicial system
- When infringement are originated by the Law or a provision of general nature
- When the case is relevant from a social, political or economic perspective.

As a result from this essential reformation, the number of appeals for protection has been reduced 22% between 2006 and 2010, allowing the Court to resolve more appeals that presented. The structural delay is in the process of being resolved.

On the other hand, it seems the appeal of protection, as it happened before in Germany, has reached a dead ending, no form, no cost, no hope. Only 134 cases where admitted in 2010, less than 1.5%.

Furthermore, the Court's interpretation of the Constitutional values is nearly done, pushing into the background the appeal of protection.

Another result is the importance gained by the Questions of Constitutionality raised by judges or law courts which seems to become the new stream for the constitutional interpretation, allowing the judges to express their doubts during the exercise of their task.

The advantage of the Question is the control made by the judiciary before reaching the Constitutional Court, acting as a filter for no relevant problems, because Judges must strictly justified their Questions, and at the same time, keeping the standards created by the appeal of protection

To conclude; only the real fundamental rights conflicts will reach the Court, ending the Spanish war of the Courts and leaving the Constitutional Court for the most relevant cases.

Now I will examine the flaws appeared in the process for selecting new magistrates for the Constitutional Court.

Theoretically the system seems to be quite appropriate. It's based on the recommendations made by Kelsen as soon as in 1928.

The court has 12 members. To be elected is necessary to be a jurist of recognized standing with at least 15 years of experience, 4 elected by the Congress and 4 by Senate the parliament with a 3/5 of the support, 2 by the Government and 2 by The General Council of the Judiciary., all of them appointed for a period of 9 years, and removed by thirds every tree years. This system has proved to be good but not good enough. The idea of the political control over the court is widely spread among the public opinion, specially the feeling that in relevant conflicts the magistrates will be loyal to the political leaders instead the law, dividing the Judges according to their political ideology.

Furthermore the blockade in the selection process in the parliament it's a sad and daily reality. Every time one of the major political parties feel that is going to lose power insight the Constitutional Court, he just paralyze the process, as it has happen in the last two opportunities, in November 2007 not resolve until January 2011, and in November 2010, not yet solved. But, what caused this system malfunction?

Before 2001 the political parties negotiated in parliament recognizing each other the power to exclude the candidates closer to the parties, searching more neutrals candidates. This system has been modified to a free an undisputed quota belonging to every party, knowing they need to fulfill the legal requirements.

The second reason is the Judgment of The Catalanian Statute 31/2010, passed by a close majority, discussed for more than four years, generating great breach between its members and in the society, producing damage in the institution not yet repaired.

The solution needs the political parties to take seriously the role of Institutions, and particularly the one of The Constitutional Court, and select candidates chosen by their capacity and independence more than political loyalties. It has been proved the quota system is far more than inappropriate.

Another attractive solution could be to reinforce the legal requirements to nominated Judges. As, for example imposing to be previously a member of the Supreme Court, improve parliamentary hearings, to extend the magistrates mandate to 12 years (like in Germany) or life members until retirement as set in Austria....

All this measures should be taken if we want to preserve and improve the role of the Constitutional Court and to reinforce the fundamental values in Spain. Without any doubt, this round table is extremely beneficial as a new source of ideas.

Thanks for your attention.

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<http://www.satv.tiesa.gov.lv/?lang=2&mid=9>

A partial access to information on English of the Spanish's Constitutional Court on his web page: <http://www.tribunalconstitucional.es/en/Pages/Home.aspx>

STC 155/2009 (English version):

<http://www.tribunalconstitucional.es/en/jurisprudencia/restrad/Pages/JCC1552009en.aspx>

STC 31/2010 (only available in Spanish)