



COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

Strasbourg, 15 July 2003

Restricted
CDL-JU (2003) 24
Eng. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

**Constitutional Review and Democracy –
Constitutional Courts and the Legislative Process**

by
Mr Luis LOPEZ GUERRA
Professor, Universidad Carlos III de Madrid

Seminar on
**“Strengthening of the principles of a democratic state ruled by
law in the Republic of Belarus by way of constitutional control”**

(Minsk, Belarus, 26-27 June 2003)

1. Protection of Individual Rights by Constitutional Courts.

The initial purpose of the Kelsenian model of constitutional justice (concentrated judicial review or European model) was to ensure that laws passed by the legislature do not conflict with the Constitution, considered the supreme norm. For that reason, the defining feature of this model is the existence of procedures for challenging before the Constitutional Court the laws passed by the legislature and (in certain cases) the executive.

The importance that modern constitutionalism has placed on fundamental rights, based on the recognition of personal dignity, such as in the Basic Law of the Federal Republic of Germany, the Spanish Constitution, or the European Charter of Fundamental Rights, has prompted a search for instruments that would effectively insure the protection of these rights. One of these procedures has been to attribute to Constitutional Courts the power to hear individual complaints against the violation of fundamental rights. This implies providing these rights with additional protection to that afforded by the ordinary courts. But it also implies entrusting Constitutional Courts with tasks that are far removed from those of a “negative legislator” in the words of Hans Kelsen, to convert them into what Professor Cappelletti has termed “the jurisdiction of freedom”.

The introduction of an individual appeal for the protection of fundamental rights before the Constitutional Court makes it necessary to regulate several aspects concerning the powers of the Court and the procedures to be followed. Among them are determining the matters are susceptible to such protection, the entities, whether public or private, that may have their actions subject to the jurisdiction of the Constitutional Court, and the respective scopes of the powers of the Constitutional Court and the ordinary courts. Different legal systems have adopted different solutions to each of these questions. This report seeks to outline the general features of the Spanish legal system in that regard to later, briefly, offer some considerations concerning the proposed (and already initiated) introduction of this procedure in Belarus, in light of the Spanish experience.

2. Individual appeals before the Constitutional Court: the case of Spain.

Individual appeals (*recursos de amparo*) before the Constitutional Court are hardly regulated in the Spanish Constitution. The Constitution of 1978 did provide for the defense of citizens’ constitutional rights and freedoms in the ordinary courts and, if warranted, by means of individual appeals lodged at the Constitutional Court. But the Constitution also left to a future law the task of defining in which cases and through which proceedings one may have such access to the Constitutional Court. The Constitution-making Parliament preferred to delegate to future Parliaments the definition and regulation of this type of appeal. The Constitution merely provided that citizens may appeal not only to the ordinary courts, but also to the Constitutional Court to defend their fundamental rights, but it left a wide margin of discretion to the legislator to decide how to organize this defense.

3. Statutory Regulation

The specific regulation of individual appeals before the Constitutional Court was set forth a year after the Constitution was approved in the Organic Law of the Constitutional Court

of 1979. Among the possible models, the Spanish Parliament chose to follow the one provided in the German Constitutional Court Law and, thus, the individual appeal in Spain is very similar to the constitutional complaint (*Verfassungsbeschwerde*) in the Federal Republic of Germany.

4. Individual Appeals as Remedies Before the Constitutional Court

Following the mandates of the Constitution, the Organic Law on the Constitutional Court set forth a procedure before the Constitutional Court for seeking protection for fundamental rights, which differs from both the procedures for defending fundamental rights in the ordinary courts and from the other procedures that may be brought before the Constitutional Court for reviewing the constitutionality of laws or resolving conflicts between public entities. In effect, the creation of this individual appeal implied extending the classic tasks of constitutional courts. In the classic Kelsenian model, the Constitutional Court is conceived as an instrument for defending the constitution through the abstract review of the constitutionality of parliamentary laws initiated by the powers of the State, and does not provide for the intervention of private citizens. However, the individual appeal provides individual citizens with the opportunity to bring proceedings before the Constitutional Court in defense of specific individual rights.

5. The Individual Appeal as a Procedure for Defending Fundamental Rights

Access to the Spanish Constitutional Court through an individual appeal has one important limitation. This is not a universal appeal that may be used in the defense of any type of rights, and not even for the defense of any type of rights recognized in the Constitution. The individual appeal is a procedure designed to provide exceptional and strengthened protection to a limited set of rights.

To understand this aspect, it is important to bear in mind that the drafters of the Spanish Constitution did not want to design a constitution that was unrealistic, which would promise a series of rights on paper that would be impossible to guarantee in practice. For that reason, the Spanish Constitution recognizes a long list of rights, but expressly underscores that they include different types of rights that have different binding force and that are afforded different degrees of protection.

- a) On the one hand, there is a series of rights which merely serve as a guideline for the Parliament when drafting its laws. These are, among others, the so-called social rights, rights that provide public services such as healthcare or unemployment benefits. A law must set forth the scope of such rights, and citizens may not invoke these rights in the courts unless they have been implemented in a corresponding law.
- b) The Constitution includes a second group of rights that may be invoked directly in the ordinary courts, even when the Parliament has not regulated the exercise of these rights. In this case, the Constitution is the direct source of such rights.
- c) And among these constitutional rights, the Constitution sets forth a limited list of rights (defined in fifteen articles of the Constitution) that may not only be invoked in the ordinary courts, but also before the Constitutional Court. In effect, only this limited list of rights may be considered as fundamental rights. They include those

rights most closely linked with the individual dignity of the person, and only these rights are afforded protection via individual appeals before the Constitutional Court. These “superprotected” rights include, above all, those affecting personal freedom (including freedom of thought, religion and expression, and the right to security in one’s domicile), equality and the due process of law. Thus, in this peculiar Spanish system, some of the fundamental rights are more fundamental than others.

6. Individual Appeals against Public Powers

Although the Constitution does not contain such a provision, the Organic Law of the Constitutional Court limits individual appeals to defending individuals from violations of their fundamental rights on the part of the public powers, making no reference to violations of such rights on the part of individuals. The Law distinguishes among violations by:

- a) The legislative branch of government. In this case, the Law excludes the possibility of lodging individual appeals against parliamentary laws. Such laws may only be challenged before the Constitutional Court through proceedings to declare them unconstitutional, which can only be initiated by a limited list of those having standing to do so. Individual appeals may not be used to challenge laws, but rather only specific acts of the Houses of Parliament that are deemed to have violated fundamental rights. For example, an individual appeal could be lodged against a House of Parliament if the House were to refuse to recognize a Deputy or Senator who has been validly elected, or if it were to prevent a Deputy or Senator from exercising his right to express himself or to vote, or if it were to prevent an individual citizen from taking a Deputy or Senator to court by denying the judge the right to proceed. But an individual citizen cannot directly appeal to the Constitutional Court to have a law that he considers in violation of his rights declared unconstitutional.
- b) The executive branch of government. Any action of any governmental agency (whether of the central, regional, provincial or local governments) may be challenged before the Constitutional Court if that action is considered to have violated any of the fundamental rights protected by individual appeals. It should be underscored that in the minds of the drafters of the Constitution, this was probably the principal justification for this appeal, as a means of defending these rights against actions of the government and the executive power, traditionally considered to pose the greatest threat to the freedom of citizens. But as we shall see, this has not been the case.
- c) The judicial branch of government. Finally, the individual appeal may be brought before the Constitutional Court against any violation of fundamental rights on the part of the judiciary and the courts. This includes both the violation of rights involving due process (such as the right to legal counsel or to the presumption of innocence), and those related to substantive rights (such as right to equal treatment under the law). It should be underscored that this is the basis on which the individual appeal has been used most frequently,

especially in relation to the violation of the constitutional right to due process on the part of the courts.

- d) So is it not possible to file an individual appeal at the Constitutional Court based on the violation of fundamental rights on the part of individual citizens? The Law does not expressly provide for such cases. But in practice, the Constitutional Court has admitted this possibility by ruling that if any public agency tolerates or affirms the violation of any of these rights on the part of an individual, it is assuming that violation as its own. Thus, if a citizen denounces the violation of a fundamental right before a court (such as a case of discrimination) and that violation is not remedied by the court, the court's decision may be challenged in an individual appeal before the Constitutional Court, which is considered to be an appeal against the public powers. This is a case of what is known as indirect protection or the indirect effect of fundamental rights (or *Mittelbare Drittwirkung*, to use the German term).

7. The Subsidiary Nature of Individual Appeals

An essential characteristic of the individual appeal in the Spanish legal system is that it may only be used subsidiarily when all other remedies in the ordinary courts have been exhausted. Thus, with few exceptions, it is the judges in the ordinary courts who must resolve cases involving the protection of fundamental rights. In that regard, cases of violation of fundamental rights by administrative authorities are heard in specialized contentious-administrative courts. If the violation is the result of decisions rendered in the lower courts, they must be appealed in the superior courts. And in any event, a petition to remedy the specific right violated must be clearly formulated before these courts (i.e., the obligation to have previously invoked the right in question). And only when these prior remedies have been exhausted (including, if applicable, a cassation appeal before the Supreme Court) will it be possible to lodge an individual appeal at the Constitutional Court. Thus, individual appeals complement rather than replace the action of judges in the ordinary court system. In reality, in the Spanish system it is the ordinary court judges who are entrusted with the day-to-day protection of fundamental rights, while the role of the Constitutional Court is complementary in cases in which this protection has not proved adequate.

8. Individual Appeal Proceedings

Several observations should be made concerning individual appeal proceedings. First, together with the allegations of the appellants and the persons or entities involved in the appeal, the Constitutional Court must hear the arguments of the Public Prosecutor, as the objective defender of fundamental rights and the overall legal system. Secondly, lodging an individual appeal does not stay the execution of the act under appeal (whether it be an act of the executive, the legislature or the judiciary), unless the appellant petitions for a stay and the Court expressly grants it. Finally, the large number of cases pending before the Court has resulted in the majority of their being written proceedings. Only exceptionally are hearings held in cases of individual appeals.

9. Individual Appeals in Practice

As was foreseeable, in practice litigants in specific proceedings and their lawyers have generally sought to convert the individual appeal into an additional instance, turning to the Constitutional Court when they have exhausted all available judicial remedies, including the Supreme Court. To do so the formula they have used is to allege that there has been a violation of fundamental rights, usually in the course of one of those proceedings, and usually in relation to the guarantee of due process pursuant to Article 24 of the Spanish Constitution, equivalent in general terms to Article 6 of the European Convention of Human Rights. In consequence, there is an authentic flood of individual appeals filed at the Constitutional Court (around 5,000 annually).

This has made it necessary for the Court to create a filter mechanism for selecting, among the thousands of appeals filed, those cases which really have arisen as a result of violations of fundamental rights. This filter mechanism has been achieved by establishing a prior procedure for admitting the appeals, in which the Court examines each one to determine if there are sufficient grounds to warrant a decision on the merits. If the result of this prior examination is positive, the Court grants leave to proceed and resolves the case in a formal judgment. If the result is negative, the Court denies the appellant leave to proceed, and this decision is unappealable. It should be underscored that 95% of the appeals filed are denied leave to proceed through this procedure. Although the Court receives over 5,000 individual appeals annually, it renders a maximum of 300 judgments on individual appeals each year.

10. Some considerations concerning the Constitutional Court of Belarus.

It is certainly difficult to transfer the proceedings and institutions existing in a given legal order to a different one. The complexity of any legal system and the interrelations among its constituent parts prevent any automatic transfer, or borrowing, of foreign institutions. Even so, concerning the individual appeal for the protection of constitutional rights, the experience thus far (not only in Spain, but also in many other countries) enable us to suggest some proposals with respect to the introduction of this remedy in Belarussian law, taking into account all necessary precautions.

- a) *Would an individual appeal before the Constitutional Court be possible under the Belarus Constitution?* The Belarussian Constitution does not provide expressly for an individual appeal of this type, but neither does it preclude its existence. In this context -and in a way that could be of interest from the point of view of eventual reforms of the powers of the Constitutional Court of Belarus- it may be stressed that the Spanish Constitution establishes a core or nucleus of powers for the Constitutional Court, but, at the same time, it establishes an open clause stating that the Court will have, in addition, those powers which a parliamentary law may attribute to it. Therefore, there is a general enabling clause, which allows Parliament to increase the powers of the Court in the future, in addition to the mandatory core powers expressly provided for in the Constitutional text. A reading of the Belarus Constitution leads to the conclusion that a similar technique has been employed with respect to the Constitutional Court, since after enumerating several powers attributed to the Court, in its final paragraph Article 116 establishes that “the competence, organization and procedure governing the activities of the

Constitutional Court shall be determined by the law”. Consequently, it appears that a law could introduce an individual claim before the Constitutional Court to defend constitutional rights, following the German or Spanish model. In the Spanish case, the individual appeal is referred to expressly in the Constitution and, therefore, the legislature has a specific constitutional mandate to regulate it. But in addition, and pursuant to the open clause of Article 161.1.d) of the Spanish Constitution (“The Constitutional Court shall have competence on all the matters attributed to it by this Constitution, or an Organic Law”) the Organic Law of the Constitutional Court has introduced several powers for the Court not foreseen in the constitutional text itself.

- b) *Would it be possible to introduce an individual appeal before the Constitutional Court in the Belarus legal system by way of judge-made law, interpreting the Constitution?* Court practice in Belarus seems to point in this direction, on the basis of Article 40 (“Everyone shall have the right to address personal or collective appeals to state bodies”) and Article 122, last paragraph (“Decisions of local councils of deputies and their executive and administrative bodies that restrict or violate civil rights and liberties and the legitimate interests of citizens, and in other instances specified in law, may be challenged in a court of law”) of the Constitution. This last mandate provides for remedies against decisions by local authorities, which may include (or at least do not exclude) appeals before the Constitutional Court. Certainly, the introduction of an appeal of this kind would contribute to the better control of local administrative authorities. However, the introduction of individual appeals before the Court by way of case law must be considered as a provisional or ad hoc stage, for several reasons. On the one hand, the constitutional coverage provided by Article 122 of the Belarus Constitution refers only to the activities of local authorities. Therefore, the activity of other administrative bodies at the national level affecting constitutional rights would remain beyond the reach of the powers of the Court. Additionally, the expression employed in Article 122 “civil rights and liberties” (in its English translation) seems too vague to adequately define which rights and liberties are effectively protected by an appeal before the Constitutional Court. And, finally, it must be somehow defined in which cases the appeal before the Court would be appropriate, and in which cases remedy must be sought from other jurisdictional organs.
- c) *The need for a legal regulation of an individual appeal before the Constitutional Court.* All these questions are very similar to the one posed in all countries which have included in their legal systems an individual appeal before the Constitutional Court. Which activities of what powers of the State should be reviewed by means of the individual appeal? Which rights and liberties must be protected by this remedy? When does the power to protect constitutional rights belong to the Constitutional Court, and when it does belong to other, common courts? All these and similar questions must be carefully regulated in order to protect legal certainty, and to give legitimacy to the protective action of the Constitutional Court. Therefore, it would be necessary or at least quite advisable to introduce a corresponding reform in the Law on the Constitutional Court (if we admit that the Constitution does indeed enable of the Court to rule on individual appeals).