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THE LIMITS OF CONSTITUTIONAL REVIEW OF THE ORDINARY COURT´S DECISIONS IN CONSTITUTIONAL COMPLAINT PROCEEDINGS

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REPORT

LIMITS OF FACT, LAW AND REMEDIES: MYTHS AND REALITIES OF CONSTITUTIONAL REVIEW OF JUDICIAL DECISIONS CONSTITUTIONAL COURT OF SPAIN EXPERIENCE

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I. Presentation

I am honoured by the task of addressing you in this Conference. It is a challenging honour, because I am well aware of the fact that the Czech Republic created the first Constitutional Court. My only consolation is that Spain followed your example promptly, when the Spanish Constitution instituting the II Republic in 1931 established a Court inspired in the Czech and Austrian model. The fact that both the Czech and Spanish Constitutional Courts perished under violence is also a link: both countries know first hand the value of a Constitution, as well as the importance of effective safeguards of the freedoms, democracy and the rule of law declared by the constitutional text. There is no law without courts to protect it.

The topic to be addressed is the constitutional review of judicial decisions in individual complaints procedures. Why is this matter an issue? Why is the Conference devoted to the "limits" posed to this constitutional review?

An obvious answer to this questions is offered by the fact that constitutional courts are new institutions: the Spanish court was created in 1980; the Czech court, in 1993. Both have been added to an existing judicial structure: a constellation of judicial bodies forming a pyramid, which is headed by a Supreme Court, different to the new Constitutional Court. The 1978 Constitution adopted in Spain and the 1992 Constitution of the Czech Republic do no introduce changes into the pre-existing judicial powers other than this addition at the summit. And the new constitutional courts have been entrusted with a supervisory function: to oversee the decisions adopted by all public authorities, judicial authorities included, in regard to the fundamental rights and freedoms of the people.

This supervisory power, which is the subject of our Conference, is very narrow and very broad at the same time. It is narrow in its purpose, devoted exclusively to the protection of human and citizens rights "only". The task entrusted to constitutional courts is, at the same time, very broad: the scope of individual complaints procedures encompasses all and any decision adopted by public authorities, whatever their rank and legal powers, and even of private companies and individuals (the *drittwirkung* or horizontal effect of constitutional rights). The constitutional supervision affects specially the judicial bodies: the constitutional courts usually renders judgment only after the judicial or "ordinary" courts have adjudicated the case or controversy and, therefore, in review of prior judicial decisions. This is so both in the Czech Republic and in the Kingdom of Spain because both countries follow the subsidiarity principle (following the model established in Germany by the 1949 *Grundgesetz* and departing from the alternative system prevalent in Austria): individual complaints can be filed at the constitutional courts only after exhaustion of available judicial remedies.

This explanation of new courts trying to find a proper position in a pre-existing judicial structure subject to a general supervisory power for the sake of fundamental rights is, nevertheless, insufficient. There is a second element to explain why constitutional review of judicial reviews, and its limits, is a question in need of study we should not overlook. And this is that the Kelsenian model is not useful to address this question. The idea of a "negative legislator" does not explain the role of a constitutional court when protecting human rights in the face of other courts. Therefore, the Kelsian theory offers no guidance to the workings of the individual complaints procedures and its limits.

The paradox is that the Kelsenian ideal is at the origins of the constitutional courts in the first place, and it has shaped this new and even strange type of courts invented by the Prague-born professor and erected in the Czech and Austrian Republics in the rubble after the disintegration

of the Austro-Hungarian Empire after the I World War. Only with reference to the Kelsen ideas can we understand the title of this Conference, with its references to a "constitutional review" and to "ordinary courts". And, indeed, it is the Kelsenian model that explains the other source of jurisdiction of constitutional courts: not review of judicial decisions (a novelty introduced in Germany at the end of the II World War) but review of legislation.

This function to make sure that statutes passed by parliament are not in breach of the Constitution is the most distinctive role of constitutional courts. And most people would agree that review of legislation is the most important duty of constitutional courts.

But nobody can deny that review of legislation is not anymore the main task of constitutional courts (to the surprise of founders of constitutional courts in all countries, I must underline): the number of cases dealing with the abstract review of legislation is a trifle in comparison to the number of individual complaints that European constitutional courts must solve. The numbers referred here are eloquent enough: more than 3000 cases are brought to the Czech court by citizens demanding protection to their fundamental rights; in Germany there are 5100 *Verfassungsbeschwerden*; and the Spanish court received a historical record of almost 8000 complaints last year 2004. And every year the number is on the increase: in Spain we have already reached in early November 2005 the number of cases registered last year, so it is likely by the end of this year we shall receive a new record of 9000 new individual complaints (*recurso de amparo*).

So it is also obvious the interest in "limits": limits are necessary so that constitutional review of judicial decisions in individual complaints procedures does not distract constitutional courts from its unique task of ensuring that laws respect the Constitution; also, that Judgments rendered in individual complaints do not disturb the judicial structure in each country and, specially, the position of the supreme court.

In order to analyse the question thus posed, I shall address three different aspects of judicial power: the determination of facts, the construction of laws, and the issuance of remedies. In all those areas of judicial work the question of limits to the constitutional review of judicial decisions is posed. The limit on the number of cases is another dimension of the problem, which will be addressed briefly at the end.

I shall rely in my exposé on the experience of the Spanish Constitutional Court. The obvious reason is because it is the experience I am more familiar with. But I suspect the Spanish experience is very similar to that you can find in constitutional courts endowed with the power of adjudicating individual complaints. Whether that power is a blessing or a curse, this is a question left for you to discern.

II. Limits of fact

1. Constitutional versus appeal jurisdiction

The first area where limiting constitutional review of judicial decisions comes into play is that of facts. The accepted theory is that constitutional courts are strictly limited in regard to the facts of the case that is brought under their jurisdiction by an individual complaint. Constitutional courts do interpret the Constitution: but they should do so in regard to the facts that have been established by judicial courts. It is the province of courts of law to investigate or discover facts, to receive evidence when there is controversy between the parties to the suit and to declare the

judicial truth. constitutional courts are confined to applying the Constitution to those facts that "ordinary" courts have declared as proved.

The contention that I would like to submit here for your discussion is that there are, indeed, limits in the handling of facts by Constitutional courts. But those limits exist not because the courts exercise a "constitutional jurisdiction" which is essentially different to that of civil, criminal, administrative, commercial, labour, family or other judicial bodies exercising "ordinary jurisdiction". Limits in the handling of facts by Constitutional courts can also be explained because they exercise appeal jurisdiction: constitutional courts with individual complaints procedures and prior exhaustion of judicial remedies sit on appeal from other courts Judgments; they are not trial courts, devoted to hearing evidence and declaring the facts of the case under the rules of proof. Constitutional courts hear appeals from trial courts and other appeal courts alike. Their distinctive feature is that of finality: they are the courts of last resort, because they offer the last national forum for the protection of fundamental rights of citizens in each of the European countries. They are only subject to the declaratory jurisdiction of the Council of Europe Court of Human Rights in Strasbourg.

This is a less metaphysical explanation, I grant it. But it seems to me that describes the reality of constitutional complaints proceedings and might offer useful hints on how to solve problems posed by practice. Before we test it, thought, it might be necessary to make two preliminary remarks.

2. Evidence and materials

The Spanish constitutional court has large powers to investigate facts and collect evidence. But those powers are very seldom used in human rights individual proceedings. The court rules on the facts established by prior judicial decisions, with rare minor exceptions.

Evidentiary powers of the court are vested by Article 89 of its Organic Act (thereafter LOTC: Ley 2/1979 of 3 of October, as amended): "Where it is deemed necessary, the Court may, *proprio motu* or at the request of a party, determine the taking of evidence, ruling freely on its form and duration". The court is legally authorised, in addition, to compel the production of documents from any public authority that might shed light on the facts (Article 88): this possibility is used not only in cases accepted for a full judgment, but also when deciding the admissibility of a complaint. It might be of interest to remember that in the hypothesis that an authority asserts official secret, the Constitutional court is called to decide if documents or testimony by a government official must be nevertheless presented and the degree, if any of confidentiality granted (Articles 88.2 and 89.2 LOTC).

When rendering judgment, the Spanish court relies always in two different kind of materials: judicial court decisions or Judgments rendered in the prior proceedings exhausted by the plaintiff; and the transcript of judicial records developed by the deciding courts and other public authorities.

It should not be missed that in most cases there are several Judgments rendered by judicial courts, up to three, maybe declaring conflicting facts. The Spanish constitutional court receives individual complaints in cases decided by trial courts in a large proportion: roughly 40 per 100, usually minor cases when no judicial appeal is provided by law. But the remaining 60 per 100 of cases have been decided or confirmed in appeal, either by Provincial Courts, High Courts or even the Supreme Court itself (in approximately 1 out of 3 cases). In some cases the different judicial bodies have agreed on the facts of the case. But it is not unusual for the different courts

to disagree: in that circumstance the constitutional court will accept the facts that the highest court of appeal has declared formally; but in the not so rare case in which the appeal court is in disagreement with the findings of the trial court without a formal disavowal or textual correction, the margin of appreciation of the constitutional court is considerably enlarged.

The Spanish court, in the same decision accepting to give judgment on an individual complaint, requires the judicial court to send an official transcript of the record. If several judicial bodies have made decisions, the records developed by each and all of them will be received. This is so in the individual cases accepted for a full hearing and judgment, more or less 4 per 100 of the cases registered in the constitutional court: last year 2004 the numbers were 317 cases admitted, so 4,7 per 100 of all decisions on admissibility (6.417 were declared inadmissible).

Records in the hands of the constitutional court are not only judicial records, but police and administrative records as well, in case police or administrative action is challenged on fundamental rights grounds.

It is a matter of practice for the court to demand official transcripts of the records instead of the originals themselves. But in case the examination of any original is deemed relevant, the court will require its production (as was the case in judgment *Rosa Vieitez c. Colegio de Farmaceúticos*, 93/1992 of 11 June).

Sometimes the court will require a judicial court to certify some data before admission having been decided: for example the text of an interim decision or the date in which briefs were filed or orders were served on the citizen. But generally the court decides admission on the documentation that the party is bound to provide as annex to the complaint (Article 49 LOTC). Once admission is agreed, nevertheless, the law governing the Spanish court is clear: judicial records must be received, and the parties to the constitutional proceeding see and comment upon them, before any judgment can be rendered (Articles 51 and 52.1 LOTC).

It is at this moment that any party to the constitutional procedure can demand evidence to be taken. It should be mentioned that the decision to admit for judgment an individual complaint must be served on all the parties to the prior judicial proceedings: they are entitled to appear before the constitutional court as parties to the constitutional case (Article 51.2 *in fine* LOTC). Obviously, the courts whose decisions are challenged are never parties before the constitutional court.

It is for the constitutional court to decide whether evidence is necessary for the adjudication of the fundamental rights case. As I mentioned earlier, the need for new evidence is very rarely accepted: the parties do not usually demand evidence to be produced; and whenever they do so, only in the rarest of circumstances will the court accept new evidence, other than those documents that any party might produce with little evidentiary weight, in any case.

When describing how the constitutional court decides on factual issues, it is convenient to discern between the facts of the case (the crime committed, the disputed contract, the actual words exchanged among the parties, etc.), or substantive facts; and the legal acts of the parties and the courts in the judicial proceedings prior to the constitutional complaint, the procedural facts.

3. Procedural facts

What judicial bodies did is usually at stake when constitutional guarantees of fair trial are claimed: although procedural fairness and guarantees are of the essence in connection to several freedoms, like constitutional protection of personal liberty, privacy of home and correspondence or the right to vote. Procedural facts refer to questions such as: Was the application filed within the prescribed time limits? Were powers of attorney presented to the trial court valid or sufficient to represent a client? What was the reasoning supporting the judicial finding that wiretapping was necessary or custody pending trial? (See, respectively, Judgments 167/1999 of 27 September; 170/2000 of 26 June; 82/2002 of 22 April, and 128/1995 of 26 July).

Procedural facts are usually decided on the record developed by judicial courts. It is extremely rare that the Constitutional court will engaged in some fact finding, and even in those rare instances the scope of the inquiry shall be very limited.

Any contradiction between the facts of the proceedings declared by the courts and the facts unveiled by the judicial records will be solved in accordance to the records. According to Spanish law judicial records, formed and under the custody of judicial clerks, enjoy full faith *(fe pública*). A typical example is provided by the denial of an appeal: the civil court might declare the filing to be late, once time limits have expired; but if the record shows a mistake has been committed, according to the seals of the judicial registry, the Constitutional court will find for the plaintiff in the individual complaint (see Judgments 162/1995 of 7 November; 165/2003 of 29 September).

The legal protection of the facts as recorded by the registrar of courts is also definite for citizens litigating their rights at the constitutional court. Any claim that the record is false or wrong cannot succeed: only in criminal proceedings directed against judicial clerks can records be amended (Judgments 155/1989 of 5 October; 37/1990 of 1 March): an individual complaint on procedural facts can never be won against the record. And asserting facts in the bill that later, when reading the judicial files, are found to be false is reckless: fine and the payment of judicial costs will be imposed on the plaintiff who lies when presenting the facts of his or her case before the constitutional court (for example, Judgments 103/1987 of 17 June; 16/1990 of 1 February).

Only in a very limited number of cases has the Spanish court directed that fresh evidence should be taken. When a court has not served defendants with notice of trial, or even third parties identified in the lawsuit whose rights or legitimate interests will be affected by the adjudication, a breach of the right to a fair trial will be declared; unless there is evidence that the party left aside did nevertheless know the existence of the judicial proceedings and did not take part due to negligence or bad faith. When this defence is asserted in reasonable terms, the Constitutional court might hear the evidence suggested by the parties as far as it seems necessary to determine the facts (cases decided in Judgments 197/1997 of 24 November; 176/2005 of 4 July).

This is a very narrow exception to the general rule: the Spanish constitutional court decides procedural facts looking at the record developed by trial and appellate courts deciding the case before the constitutional complaint was admitted for final judgment. I do not know is this behaviour is adequate to the exercise of "constitutional jurisdiction"; indeed, it fits perfectly with the exercise of appellate jurisdiction.

4. Substantive facts

When the Spanish constitutional court is called upon to decide on the substance of a case, it will engage in "fact revision": the court will make its own appraisal of the facts declared by the judicial courts in the light of the relevant fundamental rights (since Judgment *Justo de las Cuevas,* 46/1982 of 12 July, fj 1).

In many constitutional complaints the substantive facts are undisputed. An obvious example is offered by a typical freedom of expression case: the Article is written in a newspaper or the news were broadcast in a national media; the author and the editor identities are known; and the only question remaining is one of pondering the contents of the opinion or information in light of the conflicting rights (for example Judgment. 185/2002 of 14 October)..

In many other cases, though, the facts are disputed. The Spanish court has developed several policies to deal with factual disagreement in constitutional rights proceedings:

1) One is the duty to give reasons on the part of the public authorities: to decide whether a human right was respected or infringed, the facts that were known at the moment official action was taken, and were given as explanation for it, is of the essence. This is the case with telephone surveillance or wiretapping: the judicial warrant must disclose, explicitly or in reference to police documentation, facts that offer a reasonable ground for the interference in the privacy of citizens communications (Article 18 CE, Judgment 49/1999 of 5 April, for example). Another important area is constitutional adjudication is detention pending trial: violation or respect of right to personal liberty (Article 17 CE, Judgment 47/2000 of 17 February) depends on the facts disclosed in the judicial decision to confine the defendant in a criminal case; if no facts are spelled out by the judicial decision, giving grounds to the suspicion that the defendant might flee or tamper with the evidence or, in limited circumstances, commit some serious new crime, then the detention pending trial is unconstitutional in its face (of course, the facts asserted by the detention decision should be supported by the preliminary evidence offered by the prosecutor; but this forms a second, different level of constitutional analysis).

2) The duty to convict for criminal offences on valid evidence, offered in public and adversarial trial, is the essence of fundamental rights governing criminal procedure: presumption of innocence and right to a fair and public trial, specially (see Judgments 31/1981 of 28 July; 91/2000 of 30 March; and 167/2002 of 18 September). The Constitutional court requires criminal courts not only the statement of facts required by Spanish statutes, but a reasoning on the evidence: on circumstantial evidence since 1985 (Judgments 174/1985 of 17 December), on evidence claimed by the defendant to be illicit since 1984 (Judgment 114/1984 of 29 November), and on all criminal convictions "beyond a reasonable doubt" since 1998 (Judgment 81/1998 of 2 April). The lack of a motivated conviction, whether at the trial or at the appellate level, is tantamount to the lack of evidence and, therefore, that the facts asserted by the prosecution are not tenable under the Constitution.

3) A final area is that in which factual disagreement is vital for adjudication of substantive rights and freedoms. In that area, the Constitutional court is inevitably called upon to assess the facts of the case: to distinguish between fact and law is an exercise of philosophy rather than law.

I shall offer you two different kind of examples:

In the field of equal protection of the laws (Article 14 CE), the case law of the Spanish court has developed the idea that indirect discrimination of women is forbidden. In adjudicating cases in

this field, the court has gone so far as to accept statistical evidence: not statistics offered in the individual complaint proceeding itself, but which had been filed with the social courts adjudicating the case at the trial level. It is reasonable that people appointed on a temporary basis to fill civil servant positions should not be entitled to leaves of absence; but when evidence shows that the defendant administrative body has a large number of temporary civil servants; that they are nominated year after year in spite of the legislative limits; and that most of those temporary jobs are filled with women; then, the denial of a maternity leave is shown to be an indirect discrimination on grounds of sex and unconstitutional (judgment 240/1999 of 20 December). Also, the fact that there is evidence that in Spain a large majority of part time workers are women renders unconstitutional new regulation limiting seriously the availability of social security benefits for this sector of the labour force (Judgment 253/2004 of 22 December, decided in an abstract review of legislation procedure).

Freedom of religion and custody of minor children trials offers another example of fact oriented constitutional adjudication. In the *Carrasco* case (judgment 141/2000 of 29 may, Codices 2000-2-019), civil courts had declared the separation of a marriage: both parents were given parental rights upon their minor children, who would live with their mother. The trial court gave the father the usual rights to be with his children on alternate weekends and half of the holidays; but the appeal civil court drastically curtailed those rights, limiting them to weekends and with the ban on the children spending the night at his home. The reason was the fear that the father membership on a Christian minority group might damage the kids. The appeal court based its decision on a psychosocial report that had been introduced in the trial file.

The constitutional court found that such a sharp restriction of the father's rights was in breach of freedom of religion. Its judgment declared that the aim of the restriction on the father's freedom was legitimate: to protect children from the risk of proselitism. But the restriction was disproportionate, because the drastic limits imposed by the appellate court were not grounded in facts: the trial court had prohibited the father to foster his kids implication in his church; and there was no evidence on file that such a prohibition had been disregarded or that even a risk existed on that regard; so the new limits imposed by the provincial court, with no fresh evidence, were excessive and, therefore, in breach of the constitutional freedom.

It seems obvious that assessment of facts is at the hart of this decision. Many other examples could be provided. The basic tenet is inescapable: in individual complaints proceedings, human rights declared in very broad general terms in the Constitution are applied to individual cases with unique human beings and circumstances. The constitutional court must apply the law to the facts as established in the judicial decisions and records. The need to assess evidence and to review the facts declared by the specialized courts is inescapable.

III. Limits of law

In the field of law, as opposed to fact, the jurisdiction of constitutional courts is defined according to a basic principle: the division between the Constitution and “ordinary legislation”. The Constitution is the province of constitutional courts; all remaining laws and regulations is the province of “ordinary courts”.

There are literally hundreds of Judgments of the Spanish constitutional court declaring that issues raised by individual complaints are “questions of ordinary legislation” and, therefore, alien to the court's jurisdiction: it pertains to the judicial courts, headed by the Supreme Court, to interpret and apply ordinary legislation. Unless an infringement of the Constitution itself is detected, the constitutional court has nothing to decide on the matter.

The problem is that the boundary between the Constitution and the remaining laws forming the legal system is a difficult line to draw nowadays. It was not so in XIX century Europe, when constitutional documents had not the force of law but simply of political declarations: only statutes passed by Parliament and regulations adopted by executive and administrative authorities had binding force of law. But with the advent of normative Constitutions after 1945 the situation has been altered. Now constitutional texts are no more programmatic declarations; they embody rules of law with full legal force. All European government authorities must comply with Constitutions and, particularly, they must respect fundamental rights and freedoms enacted by the Constitution. And European courts of law must rule in conformity with constitutional norms, which create rights that the courts must enforce.

The Constitution and laws are intertwined in practice in all European countries. The law governing any fact situation is formed simultaneously by constitutional and legal rules: if a citizen, or perhaps her lawyer, brings forward an issue of fundamental rights and freedoms, the construction and application of "ordinary laws" cannot be separated from the construction and respect of the Constitution.

Spanish case law offers many examples of this mixture of the sources of authority in the legal order. I shall detain your attention in an area of some interest to all of us: European Union community law, which is now the law common to all of us Europeans.

Since two leading cases, handed down in 1991, the Spanish constitutional court has stated clearly that community law is not constitutional law: therefore, breaches of community rules cannot be corrected by the constitutional court in individual complaints proceedings (Judgments 28/1991 of 14 February, and 64/1991 of 22 March). Community law has its own guarantees, formed by national courts under the unifying supervision of the Court of Justice in Luxembourg. The Spanish court has gone so far as to accept explicitly the powers vested on national "ordinary" courts to set aside national legislation which conflicts with community law: the 1991 Judgments quoted explicitly the *Simmenthal II* (1978) seminal ruling by the Court of Justice. In its recent Declaration on the *constitutional treaty* (declaration 1/2004 of 13 December), the Spanish court has reaffirmed this commitment as *ratio decidendi*: the Kingdom of Spain can ratify the Treaty establishing a constitution for Europe that states explicitly the primacy of community law upon national legislation.

In other words, the Spanish constitutional court treats community law as "ordinary legislation": its interpretation is in the hands of the community courts and the other national courts; and its enforcement lies outside the field of constitutional jurisdiction.

This sharp separation is not so clear in adjudicating real individual complaints, though. I offer you a startling example: Moroccan nationals enjoy in Spain unemployment benefits as a constitutional right because of community legislation enforced in a judgment adopted by the constitutional court: *Antar Ahmed* (Judgment 130/1995 of 11 September).

The textual foundation is the right to equal protection of the laws. The wording of Article 14 of the Spanish Constitution grants that right only to Spaniards: foreigners cannot claim equal protection of Spanish laws. So the case brought to the court by a Moroccan worker, jobless, whose petition of unemployment benefits had been turned down by the Social Security administration and the social courts did not seem with good prospects. Nevertheless the constitutional court granted relief. The reason was that the then European Community and the Kingdom of Morocco had signed an international agreement declaring equal rights in the field of

social security benefits. This community legislation triggered the constitutional protection for equal protection of the laws.

It might be of interest to notice that equal protection under the Spanish constitution does not protect Spaniards from "reverse discrimination" by community law. The preference given in accordance to community free movement of students to a European citizen in admission to a university school, in the face of a Spanish national with better grades, cannot be reversed in constitutional complaint procedure (judgment 78/1997 of 21 April).

Other examples could be brought forward in the interaction between constitutional rights and so called "ordinary legislation" which, in spite of protestations to the contrary, do have an important effect in the reasoning and outcome of individual complaints decided by the constitutional court. Just allow me to mention some of them:

1) Some fundamental rights are implemented by Acts of Parliament: freedom of religion; trade union, association and political parties; and the right to education (respectively Articles 16; 28, 22 and 6; and 27 CE, equivalent to Articles 9 and 11, and 2 of the First Protocol of the European Convention of human rights: ECHR) are important and obvious cases in point. When the court protects those rights inevitably relies on the provisions of the statutes implementing them. In the field of labour rights, the court has developed the theory that legislation creates "additional rights" to those core rights which flow directly from the Article 28 of the Constitution (Judgments 51/1988 of 22 March, and 281/2005 of 7 November).

2) Some fundamental rights consist, wholly or in part, in "law reservations": deprivations of liberty can only be carried out in those cases and following those procedures prescribed by law (Article 17 CE, equivalent to Article 5 ECHR); no crime and no punishment can be imposed that has not been created by statute (Article 25 CE, equivalent to Article 7 ECHR). So cases to be decided by the constitutional court can only be adjudicated after reading the legislation that offers the foundation for the official decisions imposing liberty deprivations or criminal convictions and penalties.

3) Participation fundamental rights do require legislation providing for procedures to exercise them, and institutions where citizens can be represented: individual complaints born in elections cannot be decided without a close reading of electoral legislation, be it at the general level (elections to the national Parliament), at the autonomic and local bodies and even at the European Parliament (Judgments 24/1990 of 15 February, and 36/2003 of 25 February).

4) Finally a mention should be made of rights to receive public services which, in contrast to public freedoms, do require governments to act and legislate: some aspects of education rights are of this kind; as well as procedural guarantees which require no less than a full body of laws creating the courts of law and governing their procedures and judicial remedies.

In more general terms, however, the Spanish legal system requires all judges to interpret the law in conformity with the Constitution. This duty was early declared by the Spanish constitutional court (Judgments 5/1981 of 13 February, and 34/1981 of 10 November) and now is imposed by the Judiciary Act. The legal imperative, by the way, makes it clear that the judicial construction of statutes must follow the case law of the constitutional court (Article 5 of the Organic Act of the Judicial Power 1985).

This brings us to an important point: before defining the "limits" of the constitutional court when interpreting the law in individual complaints proceedings, we must redefine the role of all

courts of law in the first place. They are not anymore engaged in the construction of statutes and regulations only. They must read the Constitution in all cases they adjudicate; courts of law must make sure that "ordinary legislation" is in conformity with the constitutional text (Judgment 17/1981 of 1 June); and even more significant, when construing the meaning of legislative enactments, the courts must select that interpretation which is more conducive to fulfil the rules of the Constitution (Judgments 43/1986 of 15 April; and 254/1993 of 20 July).

In other words, all courts of law are engaged in constitutional interpretation. And that constitutional interpretation is subject to the supervision of the constitutional court through the individual complaints proceedings. The Czech court declared, in its first and very impressive judgment on the legitimacy of the communist government ruling the country between 1948 and 1989 (Czech court Judgment of 21 December 1993), that "Czech law is not founded on the sovereignty of statutory law". The Constitution, having the force of law, changes the essence of the judicial work. And, as far as that work is grounded on the interpretation of the Constitution, the jurisdiction of all courts of law is "constitutional jurisdiction" and, to that extent, it is subject to review by the constitutional court.

The underlying issue in this matter is, inevitably, the role of the supreme court. From the moment all courts of law engage in constitutional interpretation when constructing legislation, their decisions are subject to review by the constitutional court. So what is the function of the supreme court in the legal system of a constitutional state?

Maybe the answer lies in the institutions themselves, rather than in a philosophical separation between appeals in "ordinary law" and appeals in "constitutional law". Because if you look at the real output of supreme and constitutional courts in European countries, you can see that supreme courts are larger and adjudicate in specialized formations. In Spain, for example, the supreme court is composed of nearly 100 justices; it is organized in five divisions (civil, criminal, administrative, social and military); and delivers around 15.000 judgments and decisions every year, touching upon most subject-matters and problems of interest to the functioning of the legal system (you can see http://www.poderjudicial.es). In comparison, the constitutional court is very small and limited: only 12 Judges sit in it; Judgments are rendered by the plenary court or by 6 judges panels; and rarely more than 300 judgments are adopted every year (see http://www.tribunalconstitucional.es/). The situation is similar in all European countries I can think of.

So a conclusion from these observations could be that -contrary to *communis opinio*- it is judicial courts that are specialized courts; and supreme courts are specialized courts also. By contrast, the constitutional court is a generalist court. It is devoted to any kind of case: criminal convictions, police powers of arrest and investigation, family disputes, contract and property litigation, mortgages, social security benefits, detention on remand, etc. And this vast array of cases are always viewed from a very general angle: that provided by the general provisions embodied in the declaration of fundamental rights and freedoms.

So maybe the unity and coherence of the Constitution, summit of the legal order created in different European nations in the wake of the Second World War, in the 1970's and in the fall of the Berlin wall, is the province of constitutional courts when reviewing the judicial interpretation of laws and regulations in individual complaint proceedings. Constitutional review must ensure that the construction of "ordinary legislation" serves to protect fundamental rights, which are at the core of constitutional legal systems. And beyond that very general perspective, the review of any legal interpretation carried out by judicial bodies which is in conformity to fundamental rights can be corrected and oriented by the specialized jurisdiction of supreme courts. They do

reign supreme in most areas of law: those areas in which there is no case law of the constitutional court, which inevitably are the largest areas in the law of any European country.

In conclusion: there is no sharp separation between "constitutional appeals", carried out through individual complaints after exhaustion of judicial remedies, and "ordinary law appeals" (*recours de cassation*). Both the constitutional court and the supreme court review the interpretation of statutes made by lower courts. It is true that constitutional review is far more limited, both in numbers and scope. But whenever a fundamental right is relevant to the construction of laws and regulations, the interpretation accepted by constitutional judgments is overriding. This precedence happens, though, in a very limited number of cases. In all other areas, the case law of the supreme court offers the most authoritative interpretation not only of "ordinary laws" but of the Constitution itself.

IV. The question of constitutional remedies.

Only some brief remarks on this very important aspect of the jurisdiction of constitutional courts when adjudicating individual complaints.

Constitutional remedies is an essential part of the work carried out by constitutional courts. It could be said that half of the job of deciding fundamental rights cases is devoted to finding out whether citizen's rights and freedoms have been breached or respected; the other half of the job is devoted to deciding what to do to restore or to compensate the constitutional rights that are found to have been violated. The effective protection of human rights is, in the last analysis, what constitutional courts individual complaints are all about.

The emphasis usually placed on the interpretation of the Constitution tends to obscure this important point. The Spanish court offers an example: its Organic Act grants the court extensive powers to remedy any violation of fundamental rights (Article 55 LOTC); but its case law is almost entirely devoted to defining the content of fundamental rights and the interpretative techniques necessary to harmonize conflicting rights. The assumption is that, once a decision is reached on whether the fundamental right has or has not been respected in the particular case, remedies will flow automatically. Only ancillary attention is devoted to fashioning adequate remedies to restore the perturbed constitutional order.

One of the reasons to explain this situation is the idea that "constitutional jurisdiction" is drastically limited in the field of remedies: it is for "ordinary courts" to adopt all measures necessary to restore and compensate any breach of fundamental rights that the constitutional court judgment might declare.
So generally, the Spanish constitutional court will declare null and void any act which infringes constitutional rights or freedoms. It should be underlined that the constitutional court does not reverse judicial decisions, like the supreme court or other appeals courts do: they just declare nullity. The immediate question is: what are the effects of a voidness ruling by the constitutional court?

In many cases the declaration that judicial judgments and proceedings are null and void means the judicial courts must decide them again, but in a way which respects the relevant constitutional right. Usually the constitutional court ruling will explicitly remand the case to the competent court for new procedures and/or judgments to be rendered. If no specific remand is decided, it is up to the parties to the proceedings and the judicial courts to see if fresh judicial action is proper or necessary.

Some of the constitutional judgments declaring judicial acts null and void are final, though: judicial action, following the declaration rendered by the constitutional court, is not possible. This was first declared in the case of criminal convictions: the quashing by the constitutional court of a criminal conviction cannot be followed by a reopening of the case (retrial or a new decision by the criminal court) unless it is so ordered in the constitutional judgment (judgment *Alcalde de Soria II*, 159/1987 of 26 October). The reopening is not possible in cases where the court finds that presumption of innocence has been infringed (Judgments 94/2004 of 24 may, and 199/2005 of 18 July). But remand, even in criminal cases, is ordered when the breach affected essential procedural guarantees, specially the right to due process with some limits (Judgments 215/1999 of 29 November, and 168/2001 of 16 July).

In general terms, it can fairly be said that the constitutional judgment is final whenever the fundamental right at stake is determinative or decisive of the case or controversy at stake. If next to the constitutional issue there are other factual or legal elements which are also decisive, then the constitutional ruling will have a limited effect: once the constitutional question is definitively decided, the case will be remanded to the specialized judicial court to proceed "in conformity to the fundamental right" (see for example Judgments *Chocolates Elgorriaga*, 29/1989 of 6 February; *Juan Sánchez Domínguez*, 34/1997 of 25 February; or *Ángel Cuellar Llanos*, 203/2004 of 16 November).

The Spanish court has been very restrictive in the use of its remedial powers. Other than declarations of nullity and, eventually, remands to reopen judicial proceedings, the holding of its Judgments usually limit themselves to a declaration or recognition of the right affected in very broad general terms. The court has refrained from adopting other remedies and, particularly, from issuing injunctions and from awarding damages.

Since the decision rendered in the *Unión Alimentaria Sanders* case (STC 5/1985 of 23 January), the court held that damages are awarded by "ordinary courts". The contrast to the jurisdiction of the European Court of Human Rights is illuminating: the Strasbourg Court judgment in the same *Unión Alimentaria Sanders* case not only found for the plaintiff company; it awarded pecuniary damages of 9.000 euros to be paid by the Kingdom of Spain (E Ct. Judgment of 7 July 1989), in sharp contrast to what still today is the judicial policy of the Spanish court (see for example judgment 144/2005 of 6 June, fj 9). And it is legitimate to wonder what other redress can be given to individuals whose right to trial within a reasonable time has been infringed. Not to mention more serious violations of constitutional rights, like death in detention or torture (for example E Ct. Judgments *Aksoy*, 18 December 1996, and *Orhan*, 18 June 2002).

Only in exceptional circumstances has the Spanish constitutional court awarded damages. The case affected the privacy of a well known person. A magazine run for several months stories on her private and family affairs derived from extensive interviews with a former home employee. Civil courts awarded damages to Mrs. Preysler until, surprisingly, the civil division of the supreme reversed and declared that no breach of privacy rights had been committed by the magazine. The constitutional court disagreed and, in its first *Preysler* judgment (judgment 115/2000 of 5 may) declared an infringement of the fundamental right to privacy. Then the civil division rendered a second judgment: it declared itself bound to comply with the constitutional declaration; but it decreased the damages awarded by the lower courts drastically: from 60.000 euros to 150!

The plaintiff filed a second constitutional complaint. The constitutional court, in its second *Preysler* ruling (Judgment 186/2001 of 17 September), declared that such an amount was clearly inadequate to compensate the breach of a fundamental right. And it further declared that the

court would grant compensation directly, without a second remand to the civil court, awarding the same amount of 9.000 euros that had been granted earlier by a lower court. The principle that reparation of constitutional rights infringements might require money awards, and that damages must be assessed in accordance with the idea that fundamental rights and freedoms are at stake, is now firmly established in Spanish law.

In some cases, declaratory Judgments will be rendered. The most significant case is that of constitutional complaints against criminal acquittals. The general rule is that the constitutional court does not declare void any criminal court decision to declare the accused "not guilty" or to discontinue proceedings on substantive grounds; the protection of fundamental rights does not justify the breach of the rights of the defendant in criminal cases (Judgment *secta CEIS*, 41/1997 of 10 March). Only if the acquittal is decided in a criminal trial or procedure in which essential guarantees have been violated, will constitutional redress take the form of a declaration of voidness and reopening of the criminal proceedings (Judgments 215/1999 of 29 November, and 168/2001 of 16 July).

Nevertheless, the protection of substantive rights might justify a declaration that fundamental rights have been infringed without any nullity declaration. An important case is that of a discriminatory criminal legislation which, nevertheless, forces the judicial court to declare the defendant not guilty (judgment *Paloma Martín García*, 67/1998 of 18 March; see also Judgment *Serafín Blasco Parras*, 21/2000 of 31 January, with an important dissenting vote explaining how this solution was prompted by the ruling of the Strasbourg court in the *Riera Blume* case, Judgment 14 October 1999). A second example is offered by the finding that surveillance of telephone conversations was in breach of the right to secret communications; but the conviction of the defendant is supported by independent evidence, not tainted by the illegal wiretapping, son the ruling of the criminal courts is in conformity to the right to be presumed innocent (Judgment 205/2005 of 18 July).

Finally, attention must be drawn to costs and expenses issues (Article 95 LOTC). Constitutional individual complaints are free of charge. And any citizen without means is entitled to free legal aid: roughly 1.500 cases every year are litigated by lawyers appointed by the bar and partially supported by government funds.

Yet the Spanish court has not the power to cover the expenses incurred by successful litigants in individual complaints proceedings, nor even in the prior judicial procedures exhausted before presenting their case to the constitutional court (as the European Court of Strasbourg is entitled to do). This is a clear defect of the system, and possibly the "constitutional jurisdiction" mythology explains its existence and, furthermore, the fact that nobody seems to perceive it.

V. Final remarks: myths and realities

If I might abuse your patience for some few more minutes, I would like to sum up some of the ideas I am submitting for your judgment.

The limits to the jurisdiction of constitutional courts adjudicating individual complaints can be derived from the definition of a "constitutional jurisdiction", different to the power vested in "ordinary courts". This path of reasoning is unsatisfactory, and in many other interventions the difficulty of drawing clear lines or boundaries between judicial bodies and the constitutional court have been commented. My aim is to submit to you that maybe the question is wrong: and therefore it should not be surprising that answers are blurred and impractical.

If the jurisdiction of constitutional courts, when they engage in adjudication of individual complaints presented by citizens seeking protection of their fundamental rights, is shaped by the institutional position of constitutional courts, then some limits can be drawn with some certainty:

1) the constitutional court seats as a court of last resort: so it adjudicates on appeal, with the consequent practical limits in the ascertainment of facts; and with the consequent reality that in many cases the interpretation of the law has already been declared, to the facts of that case, by specialized courts and even by the supreme court itself; an interpretation which usually carries great weight, unless of course the highest courts in the land indulge in conflicting constructions of the law which, unfortunately, in not uncommon in Spain and might explain many reversals from the part of the constitutional court (the most astonishing examples are decisions reversing supreme court holdings because they contradict the case law of the supreme court itself: see Judgments 150/2001 of 2 July, and 162/2001 of 5 July).

2) the constitutional court is formed by a limited number of judges; and that number cannot be increased without amending the Constitution, which is a blessing: because the natural tendency to confront a raising docket is increasing the number of judges, as has been done with supreme courts, with negative effects on consistency and authority of Judgments; this limited number (in Spain there are twelve Judges and, in my humble opinion, there are too many) allows the constitutional court to coexist with larger and specialized supreme courts;

3) the final source of limits to the human rights jurisdiction of European constitutional courts stems from its own *thelos*: the purpose of granting the courts with the power and the duty to protect fundamental rights declared by the Constitution is not to supplant the remaining courts in their power and duty to do exactly the same: all courts of law must protect and respect constitutional rights and freedoms. In this realm there is no monopoly in the hands of constitutional courts: the kelsenian model only creates a monopoly in regard to legislation; an only to judge an statute unconstitutional and to declare it, as a consequence, null and void. As we have seen, all courts must scan the conformity of legislation with the Constitution (so as to certify a question to the constitutional court on the validity of statutes if they consider them to be unconstitutional); and all courts, not just the constitutional court, must read and construct laws and regulations in the light of the Constitution, and construe all legal provisions in the way most conducive to give full force and effect to human rights and freedoms.

So the purpose of granting constitutional courts with the power and the duty to protect fundamental rights declared by the Constitution in the last resort must be connected to the fact that there is only one court, formed by a limited number of judges, and with the final say. In other words, constitutional courts are the ultimate guarantee with new or hard cases: they offer guidance to all courts of law, and all officials, as to how respect and abide by fundamental rights; constitutional courts answer the demands of people exerting new rights or exercising them in new different ways; and they uphold the unity of the Constitution (and therefore the legal order itself), making sure that the different provisions, powers and rights conform in a workable society.

Those very general ideas do not address the problem of numbers: and indeed that is a problem, because the increase of individual complaints risks a paralysis of constitutional courts. The case in Spain, with almost 8.000 cases last year 2004 and possibly 9.000 new complaints this year 2005 is a case in point.

The answer to this quantitative question might come from procedural reforms. In Spain the government has presented Parliament a bill that would address the admissibility stage: only

cases with "constitutional importance" would be adjudicated in the merits; the remaining cases should be dismissed without reasoning . Here the Spanish solution follows in the heels of Germany, with the findings of the Benda Commission and the reforms adopted in the 1990's, and those addressing serious quantities problems confronting the European Court of Human Rights itself (draft Protocol 14, amending the control system of the European convention of human rights); and the *certiorari* granted to the United States Supreme Court in 1925, exactly because of the same problems. The idea is that only a handful of important cases will be decided in a full opinion by the constitutional court; and that the excess of individual complaints presented will be disposed quickly and efficiently without undue burden and delay.

I fully agree with the need for these filters. They address obvious problems in a reasonable way. And, by the way, they underline the institutional reasons that might help to explain the existence of a constitutional court and a supreme court side by side. But we should be aware that procedural reform is a limited answer.

In Spain we suffer a serious problem of excessive litigation at the highest courts: not only the constitutional court, but also the supreme court and high courts of justice are overflowed by cases. This reality is the consequence of different factors; but one that should not be overlooked is lawyers. In Spain, as opposed to Germany, individuals complaints cannot be presented without a lawyer signing it. This should be a serious filter, not only of procedure but of substance as well: attorneys should not introduce complaints without serious reasons to fear that a fundamental right has been breached; in other words without a serious probability of success.

The unfortunate fact that lawyers do bring proceedings without merit is a reason for concern. There are several reasons to explain that trend: prestige is based on the amount of cases litigated, not on the winning ratio which, in any case, is unknown; honorariums are paid for introducing cases, never for refusing to do so (as it is the case with English barristers: a good model); the very brief time limits to start a constitutional proceeding, only twenty days after the last judicial ruling, delay which is manifestly insufficient to demand expert advice and prepare well researched and written briefs; etc. etc. Those factors, many of them unrelated to procedural rules and all of them defining the state of the legal profession in Spain, must be addressed if the tsunami of constitutional litigation is to abate. the risk is drowning European constitutional courts in their own success. A result which, once again, would be proof of institutional limits to the constitutional jurisdiction in adjudicating individual complaints.