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**“COURAGEOUS COURTS:
SECURITY, XENOPHOBIA AND
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**Limits of constitutional interpretation on the issues of security
and xenophobia.
The Peruvian Case**

REPORT BY

Mr. Eloy ESPINOSA-SALDAÑA BARRERA
Judge at the Constitutional Tribunal of Peru

It is no secret for anyone that in the last years, particularly after September 11, 2001, a negative and unfair situation has arisen: the connection between the migrant status, even the refugees' status, with terrorism, or to say the less, with criminality. To this effect, migrants become, without any objective basis, in a more than potential risk for public safety or even for national safety.

Undoubtedly, this perception is based upon such spontaneous and unfortunate opinion, very common among certain authors, which leads to lack of trust to those who come from abroad, or with "the different one". Along with this misconception, we have the tendency of blaming the different one with regards to our own frustrations, limitations and deficiencies. Own mistakes or own responsibilities are not acknowledged. Rather, without any objective support, the one who is not the same as us is blamed for being a threat for attaining our own achievements or improving our personal, family or national situation.

This erroneous point of view is strengthened by disqualifying the other person, the migrant: like more than one author has stated, the migrant is considered as an intruder; a poor person willing to do anything to make a living, doing the job of those who come from that place, or placing at risk the integrity or rights of these people. A culturally inferior person, a criminal or suspected felon. Thus, gradually, and unfortunately in many cases, mistrust grows and becomes the humiliation of the other one, or even in hate.

And, as it has been said, xenophobia, nuisance or hatred for the immigrants, for those who are different, is only the consequence of prejudiced reactions of those who do not accept themselves or do not acknowledge their limitations and thus, blame without objective justification and uncontrollable fanaticism, others for being responsible for all ills within a society. The strange one is the enemy, and since there is a security crisis, the enemy foreigner is the criminal.

The aforementioned situation leads to criminalizing migrants for just being different, making them criminals without any reason, or at least, with no apparent reason. The intention is not to inflict punishment. Denigration and diminishing dignity of those who are different is sought through administrative or even government decisions which hide xenophobic feelings with the excuse of protecting public or even national safety.

Unfortunately, this has also happened in many States, wherein citizens of neighboring countries, or people who come from other areas within the same country, but far from the capital, are considered criminals by a sector of the population. This, leads to the promotion of drastic limitations against such migrants with no legitimate justification.

On the other hand, constitutional judges face a great responsibility, especially if he or she is part of a constitutional court or a high court. First, constitutional judges cannot forget that there is no public or even private activity in a Constitutional State that can contravene constitutional parameters. Hence, secondly, a decision cannot be considered according to law, if with no reasonable justification, not only rights of third parties are limited, but there is non-recognition of rights, and an infringement of human dignity.

It is therefore deemed appropriate that a constitutional judge has the duty to control and even reverse excesses. However, this brings us to the question about the guidelines and scope of such control, as well as the mechanisms available to this judge if there is no willingness to comply with his or her decision, based against political and non-actionable issues.

Let's say that to this respect, in comparative law, there are several alternatives to this effect. In North American law, "Baker vs. Carr" acknowledges the possibility of controlling *political questions* based upon matters of procedure, or upon matters of substance. This guideline has also been followed by the Inter-American Court of Human Rights in two cases: "La Cantuta versus Peru" and "Barrios Altos versus Peru".

In Europe, other techniques have been used for controlling political events or government actions. Even though these two terms are not synonyms, they both point in the same direction: the existence of decisions subject to judicial review. To this effect, there are those who want to use the balancing test, the protection of fundamental rights or other techniques.

Special mention deserves those who consider political events or government actions as discretionary acts of the Administration and, thus, applying for its control, the evaluation guidelines of administrative discretion.

Finally, we ought to ask what needs to be done by a constitutional judge if his or her decisions are not complied with. In this case, it is usually said that such decisions (especially if they constitute public policies) are beyond his or her range of control. In this scenario, the constitutional judge must use the existing legal mechanisms for enforcing final judgments. If this is not viable, and should we be facing violation of rights or omissions which lead to violations of such rights, we can use more drastic techniques, which are well-known in Latin America, such as a decision declaring an unconstitutional state of affairs or even the approval of a structural induction. This last option must only be taken in emergency situations.

As can be seen, constitutional judges have mechanisms for acting in these situations and for requiring compliance of certain actions. However, we must not forget that in constitutional states, there is no such thing as unlimited power, but only limited competences.

Constitutional judges do have limited power. First of all, the content of the Constitution to be interpreted by the constitutional judge. The second limitation is the authority of the constitutional judge, by which, he or she must always act with reasonableness, rationality, duty to state the reasons, and functional correctness.

The third limitation is given by the jurisdictional nature of a judge's job: a judge cannot make judgments based in quality or opportunity; he or she must comply to some extent, with standards of procedural law; he or she has to comply with the existing treaties or peremptory norms. Likewise, he or she must comply with the technical nature of certain topics, and last, but not least, he or she must acknowledge that such judgments must not only be entered in easy cases, but also for the protection of difficult or even tragic cases.

As may be seen, constitutional judges must ignore such decisions which under the pretext of safeguarding safety, only seek to denigrate migrants (for being different). Nowadays, constitutional judges have many important criteria and tools for questioning or even reversing situations of unconstitutionality for possible violations of fundamental rights. This is the only way that a constitutional judge will fully carry out his or her rationale: limitation of power in order to assure full exercise of citizens' rights.