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JUDICIAL REVIEW IN SPAIN: THE CONSTITUTIONAL COURT

*Enrique Guillén López**

This Article aims to briefly describe and analyze the constitutional conflicts that have arisen in Spain since the establishment of the Spanish Constitution of 1978 (the “Constitution”). In doing so, I will discuss the primary points of contention within the Spanish constitutional model. The objective is to illuminate these issues to readers who are not necessarily familiar with the recent legal-political history of Spain.

Part I addresses the introduction of constitutional rights and protections in Spain. Part II then analyzes the aspects of Spain’s constitutional system that are affected by its institutional organization. Parts III, IV, and V outline the most important doctrines of the Spanish *Tribunal Constitucional* (the “Constitutional Court” or “Court”) regarding the guarantee of a constitutional form of government, the protection of fundamental rights, and the resolution of conflicts between the state and Spain’s autonomous communities. Part VI illuminates other significant constitutional issues specific to Spain, such as the government’s ability to enact emergency legislation, the constitutional impact of Spain’s membership in the European Union, and the effects of the Constitutional Court’s decisions. In Part VII, I note some problems that affect the legitimacy of the Constitutional Court but argue in Part VIII that the Court is ultimately a positive and active part of Spain’s constitutional system.

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I. THE INTRODUCTION OF CONSTITUTIONAL GUARANTEES IN SPAIN

After General Francisco Franco's dictatorship, the transition of Spain's government to a democracy revealed the need for a system of constitutional protections in Spain. While there was interest in following the traditions of the Second Spanish Republic, which had relied on an independent Court of Constitutional Guarantees, there was also a need after Franco's death for constitutional authority to be separated from ordinary judicial power. This separate constitutional body would be able to protect the guarantees of the Constitution in a similar fashion to the systems of constitutional oversight employed in Italy and particularly Germany.

These countries simultaneously reintroduced constitutional democracy after the Second World War with systems that were influenced by North American constitutionalism.¹ Yet, the branch of government tasked with final constitutional oversight in these countries was highly influenced by the political theories of Hans Kelsen,² who proposed a concentrated-control model quite different from that used in the United States. The constitutional courts in these concentrated-control systems are considered fundamental to the political stability of their respective constitutions³ because they were, to a large extent, responsible for the social acceptance of these texts (the so-called "constitutional feeling" in Germany). Consequently, Spain incorporated a constitutional court into its new political structure due in part to the extremely positive reception of such courts in Italy and Germany.

1. North American constitutionalism was an important contribution to the reconstruction of the Atlantic civilization. See generally HANNAH ARENDT, ON REVOLUTION 139-78 (1963) (discussing the influence that the American revolution had on European revolutions and vice versa and arguing the American revolution was successful in establishing revolutionary liberty because the colonies engaged in constitution-making immediately following the violent struggle).

2. HANS KELSEN, QUIÉN DEBE SER EL DEFENSOR DE LA CONSTITUCIÓN? (Roberto J. Brie trans., Tecnos 1995) (1931).

3. It is important not to forget the unusual circumstances in which the Fundamental Law of Bonn was approved because no referendum was held. Thanks to the *Bundesverfassungsgericht* (German Federal Constitution Court) and, especially, thanks to its jurisprudence about fundamental rights, the German Constitution was considered the property of the German people, not the product of an occupying power. See PETER HÄBERLE, LA LIBERTAD FUNDAMENTAL EN EL ESTADO CONSTITUCIONAL 56 (Carlos Ramos trans., fondo Editorial de la Pontificia 1997) (1993).

Many scholars have detailed this influence on the development of the Spanish constitutional system. Eduardo García de Enterría's scholarship in particular stands out as an important work on the symbiotic relationship between Spain's Constitution and its Constitutional Court.⁴ Enterría, an enormously prestigious and important professor of public law,⁵ provided essential arguments supporting the necessity of a constitutional court. Indeed, his commentary on the work of John Hart Ely and Peter Häberle helped bring Spain into the modern legal debates taking place in the United States and Europe.⁶ Following in the wake of Enterría's scholarship, other experts in public law have gone even further in examining the static and dynamic aspects of Spain's constitutional system.⁷

II. DEFINING THE SCOPE OF THE COURT'S ROLE THROUGH THE CONSTITUTION AND ORGANIC LAW

Once consensus was reached on the importance of a separate constitutional court in Spain, it was necessary to specify the Court's role in the Constitution of 1978. The Constitutional Court appears in

4. See EDUARDO GARCÍA DE ENTERRÍA, *LA CONSTITUCIÓN COMO NORMA Y EL TRIBUNAL CONSTITUCIONAL* (Civitas, 3d ed. 1985).

5. Enterría has exceeded the grade of importance usually attributed to the scientific community. Among his many achievements, Enterría was President of the Board of Experts in the field of autonomies, which helped guide the first steps of the Spanish federal state in its early years.

6. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (Harvard Univ. Press 1980); PETER HÄBERLE, *DIE VERFASSUNG DES PLURALISMUS: STUDIEN ZUR VERFASSUNGSTHEORIE DER OFFENEN GESELLSCHAFT* (Verlag GmbH 1980).

7. See, e.g., FRANCISCO RUBIO LLORENTE, *LA FORMA DEL PODER: ESTUDIOS SOBRE LA CONSTITUCIÓN* (Centro de Estudios Constitucionales, 1993); JAVIER PERÉZ ROYO, *TRIBUNAL CONSTITUCIONAL Y DIVISIÓN DE PODERES* (Tecnos, 1988); PEDRO CRUZ VILLALÓN, *LA FORMACIÓN DEL SISTEMA EUROPEO DE CONTROL DE CONSTITUCIONALIDAD* (1987). See also JAVIER JIMÉNEZ CAMPO, *ESCRITOS SOBRE JURISDICCIÓN CONSTITUCIONAL* (1998); ENRIQUE ALONSO GARCÍA, *LA INTERPRETACIÓN DE LA CONSTITUCIÓN* (1984). The reception of foreign doctrine about constitutional jurisdiction has been consistent until the present with few interruptions. For representative authors in Spain, see VÍCTOR FERRERES COMELLA, *JUSTICIA CONSTITUCIONAL Y DEMOCRACIA* (Centro de Estudios Políticos y Constitucionales, 1997); MIGUEL BELTRÁN DE FELIPE, *ORIGINALISMO E INTERPRETACIÓN: DWORKIN V. BORK, UNA POLÉMICA CONSTITUCIONAL* (1989). MARIAN AHUMADA RUIZ, *LA JURISDICCIÓN CONSTITUCIONAL EN EUROPA* (2005). In addition, see MIGUEL BELTRÁN DE FELIPE ET AL., *LAS SENTENCIAS BÁSICAS DEL TRIBUNAL SUPREMO DE LOS ESTADOS UNIDOS DE AMÉRICA* (2006). The study of the more specific aspects of the Spanish Constitution has been carried out by a range of lecturers linked with the courts in which they have worked as lawyers. See FRANCISCO CAAMAÑO DOMÍNGUEZ ET AL., *JURISDICCIÓN Y PROCESOS CONSTITUCIONALES* (1997); MANUEL PULIDO QUECEDO, *LA LEY ORGÁNICA DEL TRIBUNAL CONSTITUCIONAL: ANOTADA CON JURISPRUDENCIA* (1995).

Part IX of the Constitution,⁸ clearly separated from the general judicial authority detailed in Part VI.⁹ This separation of constitutional oversight from regular judicial power is an important feature of the Constitution, demonstrating Spain's adoption of a concentrated-control model established according to Kelsenian principles and similar to the Italian and German models.

In deciding between the vague-control model of the United States and the European concentrated model, there is no doubt that a country like Spain, which needed to confirm the fundamental character of its new democratic Constitution, could not leave the Constitutional Court in the hands of judicial authorities because many members of the judiciary had been educated in the legal dogmas of Franco's regime.¹⁰ However, a system of cooperation was established between the judicial branch and the Constitutional Court whereby questions on the constitutionality of laws are submitted to the Constitutional Court when such issues arise in judicial cases.¹¹

A. *Composition, Statute, Term of Office, and Renewal*

The Constitutional Court consists of twelve magistrates, one of whom is the President of the Court.¹² The President is an extraordinarily important figure on the Constitutional Court because he or she possesses the right to cast the deciding vote in the event of a tie.¹³ This places the President in a uniquely powerful position,¹⁴ which explains the ongoing battles concerning the appropriate method for electing the Court's President.

Article 9 of the Ley Orgánica del Tribunal Constitucional ("L.O.T.C.") [Organic Law of the Constitutional Court] establishes that the President shall be elected by a majority vote of the members of the Constitutional Court.¹⁵ In the event of a tie, the voting will be

8. CONSTITUCIÓN [C.E.] arts. 159–65 (Spain).

9. *Id.* arts. 117–27.

10. *See infra* Part I.A.

11. C.E. art. 163.

12. *Id.* art. 160.

13. LEY ORGANICA DEL TRIBUNAL CONSTITUCIONAL [L.O.T.C.] art. 90 (Spain); *see also* Marian Ahumada Ruiz, *La regla de la mayoría y la formulación de doctrina constitucional*, REVISTA ESPAÑOLA DE DERECHO CONSTITUCIONAL, Jan.–Apr. 2000, at 155.

14. *See infra* Part VII.

15. L.O.T.C. art. 9.2

repeated.¹⁶ If the tie vote cannot be resolved, the presidency will pass to the magistrate who has served the longest and, in the event of equal tenures, the oldest magistrate.¹⁷ Recently, a proposal was put forward to amend the L.O.T.C. to extend the current president's tenure until after renewal elections for the magistrates, in order to ensure that the president had the support of a majority of the court.¹⁸ This proposal created a significant political storm,¹⁹ however, because the Conservative Party considered it to be an ad hoc measure to ensure that current President María Emilia Casas, who is felt to be ideologically linked with the Socialist Party, would still hold the presidency when the Court hears an upcoming controversial appeal regarding the Statutes of Autonomy,²⁰ allowing her to cast the tie-breaking vote if necessary.

The magistrates of the Constitutional Court serve nine year terms of office, and one-third of the Court comes up for renewal every three years.²¹ The objective of these rules is to separate the election of the magistrates from the elections for the legislature in order to preserve the Constitutional Court's independence from politics. With the same aim, the L.O.T.C. also establishes guidelines

16. *Id.*

17. *Id.*

18. *Id.* Article 16.3 states that magistrates of the Constitutional Court serve nine-year terms with a third of the Court being renewed every three years, at which time the President and the Vice President will be elected in accordance with Article 9. If the three-year term of office in which they have been appointed as President and Vice-President did not coincide with the renewal of the Constitutional Court, the term of office will be postponed to occur at the moment when the renewal is produced and the new magistrates take power. *See generally* FRANCISCO BALAGUER CALLEJÓN ET AL., *LA NUEVA LEY ORGÁNICA DEL TRIBUNAL CONSTITUCIONAL* (2008).

19. This storm was also legal. On appeal, the Constitutional Court found the amendment to the L.O.T.C. to be constitutional. S.T.C., Apr. 9, 2008, No. 49.

20. The statutes establish the Autonomous Communities and define their power. *See, e.g.*, C.E. art. 147.

21. C.E. art. 159.3; L.O.T.C. art. 16.3. Unlike justices of the U.S. Supreme Court, this post is not held for life. The renewal elections have caused some problems resulting from a lack of consensus among political forces, but the appointment of successors, per L.O.T.C. art. 17.2, has allowed magistrates to keep their functions over quite a long time. *See* Francisco Rubio Llorente, *El Tribunal Constitucional*, *REVISTA ESPAÑOLA DE DERECHO CONSTITUCIONAL*, May–Aug. 2004, at 11, 13–15 [hereinafter Llorente, *El Tribunal Constitucional*]. On one occasion, two separate candidates who did not express a wish to sit on the Court were selected by the legislature, and when they found out the news in press, they surprisingly refused the offer. Agustín Yanel, *PP y PSOE confían en el profesor Garrorena para poder renovar por fin el Constitucional*, *EL MUNDO*, Nov. 30, 1997, available at <http://www.elmundo.es/1998/11/30/espana/30N0037.html>.

under which magistrates should recuse themselves or be barred from hearing certain cases,²² although the current system sometimes leads to surprises.

There are some significant differences, however, between the political affiliation restrictions placed on judges in the judicial branch and those placed on magistrates of the Constitutional Court. Members of the regular judiciary cannot belong to political parties or unions.²³ In contrast, magistrates of the Constitutional Court are only prevented from simultaneously serving in any political role with executive functions.²⁴ As such, it is possible to belong to a political party, albeit without serving in a significant role, while being a magistrate of the Constitutional Court.

B. Appointment

The magistrates of the Constitutional Court are nominated from four different segments of the government: four are nominated by the Congress of Deputies where they must receive a 60 percent majority vote of its members; four are nominated by the Senate, again with a 60 percent majority vote; two are nominated by the executive branch of the Government; and two are nominated by the General Council of the Judiciary with a 60 percent majority vote.²⁵ This process emphasizes the pre-eminence of the representative bodies in the appointment of the members of the Constitutional Court.²⁶ This

22. The grounds sufficient for a magistrate of the Court to be removed from hearing a case are the same as those used in regular judicial cases. L.O.T.C. art. 80. This scenario is manifestly inappropriate, as discussed below. *See infra* notes 40–45 and accompanying text.

23. C.E. art. 127.

24. *Id.* art. 159.4.

25. *Id.* art. 159.1. The Spanish Constitution states that magistrates of the Court will be appointed by the King at the suggestion of these organs, but this parliamentary monarchy, as it is known, bars any possibility of direct intervention by the King in the exercise of these appointments. As the Spanish proverb states, “The King reigns, but he doesn’t govern.” (“*El rey reina, pero no gobierna.*”)

26. It has been recognized for a long time that the Autonomous Communities need to participate in appointments to the Court since resolution of territorial conflicts is one of the Court’s most important duties. The consideration of territorial interests could be significant in the selection of the four magistrates by the Spanish Senate, which the Spanish Constitution defines as *la Cámara de Representación Territorial* (the House of Territorial Representation). C.E. art. 69. The problem is that the Spanish Senate is really more a chamber of secondary significance than a federal senate like the *Bundesrat*, for example. For this reason, the strongest autonomous communities have always tried to influence directly the appointment of magistrates of the Constitutional Court. The most recent amendment to the L.O.T.C. states that the magistrates proposed by the Senate will be elected among the candidates presented by the

approach, consistent with Kelsen's proposals,²⁷ is justified by the fact that the main function of the Constitutional Court is the examination of the constitutionality of laws. Such a task requires special care, and it is logical that the bodies that draft the laws should also be responsible for the appointment of those individuals who will judge their constitutionality.

In the same sense, it is also clear that the political branches involved with selecting magistrates for the Court seek candidates with qualifications beyond those of traditional judges.²⁸ Essentially, the examination of a law's constitutionality is not a common judicial function (i.e., it does not consist of assigning a legal consequence to a set of facts based on an applicable rule). Accordingly, Spanish legislators tend to trust jurists who are familiar with other kinds of methodologies, particularly legal scholars (we could say more "open-minded" without underestimating judges in general). However, there is also an important legal presence on the Court because the magistrates elected by the General Council of Judicial Power are qualified judges.²⁹

Since magistrates nominated by the legislative branches require a 60 percent majority for appointment,³⁰ successful candidates should theoretically have consensus support from the main political forces in the legislature. Recently, the L.O.T.C. was amended to require that candidates being considered by the Congress and Senate appear at a hearing as part of the nomination process.³¹ The reason for this practice is to avoid subsequent controversies that might affect the usual work of the Court and ultimately the Court's legitimacy.

Legislative Assemblies of the Autonomous Communities in the terms determined by the regulations of the chamber. L.O.T.C. art. 16.1.

27. Kelsen, *supra* note 2, at 30.

28. C.E. art. 159.2. This trend has reversed since 1990. See Llorente, *supra* note 21, at 16–17 (discussing the reasons for the reversal). Currently, there are five lecturers for every seven judges or lawyers on the Constitutional Court.

29. This circumstance has marked in great measure the doctrine of the Court, in which the academic background of its members is appreciable. C.E. art. 159.2. This situation reflects in great measure the teaching character of the members of the Constitutional Court. *Id.* (identifying university professors among those who should be named to the Constitutional Court). Indeed, there are opinions from the Court that mention, for example, Kelsen or principles from Germany (e.g., *Vertrauensschutz*—the protection of confidence). See MIGUEL AZPITARTE SÁNCHEZ, CAMBIAR EL PASADO (forthcoming 2009).

30. C.E. art. 159.1.

31. L.O.T.C. art. 16.2

However, the political parties have circumvented this requirement of consensus support by distributing the selection of candidates (once the list of acceptable candidates is narrowed down) according to each party's level of representation.³² The results are obvious: the magistrates are identified immediately with the party that supported them. Consequently, the Court is divided along clear political lines, leaving any contested decision by the Court open to political attack.

In theory, the required qualifications for potential magistrates that are included in the Constitution ensure that magistrates of the Constitutional Court are from a pool of jurists of recognized competence, no matter their origins.³³ These qualifications must be a protective shield for the magistrates' independence, guaranteeing that they are not mere functionaries carrying out the wishes of those who appointed them.

Recently, an interesting controversy has emerged about how to evaluate the qualifications of potential magistrates, particularly university professors.³⁴ Legal scholars, who are and have been members of the Constitutional Court, are often constitutionalists. In the first years of the Court, some of the magistrates came from exile, such as former President Manuel García Pelayo.³⁵ Later magistrates were academics and other legal professionals who had built up their prestige by writing doctrinal works and reports in which they gave their opinions about the most problematic aspects of the Spanish constitutional model, from fundamental personal rights to the territorial division of power.³⁶ This circumstance has caused a series of recent controversies because it has created a supposed conflict of interest for some magistrates, and parties have successfully petitioned to have them removed from hearing certain appeals.³⁷

32. Llorente, *El Tribunal Constitucional*, *supra* note 21, at 16.

33. C.E. art. 159.2 ("The members of the Constitutional Court shall be appointed from among Magistrates and Prosecutors, University professors, public officials, and lawyers, all of whom must be jurists of acknowledged competence with at least fifteen years of professional experience.").

34. STC, Feb. 5, 2007 (No. 26).

35. *See generally* MANUEL GARCÍA PELAYO, OBRAS COMPLETAS (1991) (discussing his personal and professional biography).

36. André Lecours, *Regionalism, Cultural Diversity and the State in Spain*, 22 J. MULTILINGUAL & MULTICULTURAL DEV. 210, 213 (2001).

37. Pablo Pérez Tremps was forced to recuse himself because of a report he had written before his appointment to the Court. Maria Peral, *El Constitucional acepta la recusación del PP*

There has been significant conflict over this issue because the same standards for determining when a regular judge should be removed are used to determine when a magistrate on the Constitutional Court should be barred from hearing an appeal. Using the same standards is wholly inappropriate because magistrates on the Court who determine the constitutionality of legislation serve a distinctly different function than regular jurists who act as traditional triers of fact. Yet, Spain's Popular Party recently convinced the Court to prevent Magistrate Perez Tremps from hearing the upcoming appeal regarding the Statutes of Autonomy—a critical moment in the history of Spain's Constitution³⁸—because he acted as an advisor to the regional government of Catalonia before his election to the Court.³⁹

This situation creates a paradox in that any qualified candidate for the Court with a background in constitutional law will have participated in some manor in the central legal-political debates of the day. Yet, in expressing their point of view on these issues, such a candidate will have potentially established grounds preventing them from hearing future cases.⁴⁰

As a result, the classic debate between Kelsen and Carl Schmitt that questions whether the essence of constitutional justice is political or constitutional⁴¹ takes on an important meaning here. Although settling this question is not my intention, it seems clear that Spain's constitutional model does not assume the postulates of

contra Pérez Tremps en el recurso del Estatut, EL MUNDO, Feb. 6, 2007, available at <http://www.elmundo.es/elmundo/2007/02/05/espana/1170703376.html>. The Spanish newspaper *El Mundo* supported the Constitutional Court's ruling, which contradicted a previous decision. *El Constitucional Confirma la recusación de Pérez Tremps*, EL MUNDO, Mar. 22, 2007, available at <http://www.elmundo.es/papel/2007/03/22/espana/2101285.html>.

38. See BRUCE ACKERMAN, *THE FUTURE OF LIBERAL REVOLUTION* 46–68 (1999) (discussing the window of opportunity for constitutionalizing revolutions).

39. See Peral *supra* note 37 and accompanying text.

40. Some of the Spanish Constitutional Court magistrates are important figures in the country's different schools of constitutional thought (separated more by methodological principles than by political principals). After serving as members of the Court, some former magistrates, such as Luis López Guerra, Secretary of Justice in Rodríguez Zapatero's government, have played a more political role. Others, like Francisco Rubio Llorente who is the current President of the Council of State—the supreme consultative body of the government—have continued to build their legal career.

41. See, e.g., Sylvie Delacroix, *Schmitt's Critique of Kelsenian Normativism*, *RATIO JURIS*, March 2005, at 30.

Schmitt, in either the political and legal sense.⁴² The model is Kelsenian, although Schmitt is always lying in wait.

C. Organization

The Spanish Constitutional Court will consider some matters as a full twelve-member en banc panel, while others are heard by partial panels of six magistrates.⁴³ The en banc panels carry out the most distinctive function of the Constitutional Court by hearing appeals involving the constitutionality of certain acts and statutes.⁴⁴ These full panels also hear cases where laws are alleged to violate basic rights and freedoms.⁴⁵

In turn, the Court is divided into two sections to hear certain appeals, forming two distinct panels with six members each.⁴⁶ The first panel is presided over by the President of the Constitutional Court, and the second panel is presided over by the Vice-President.⁴⁷ The main task of these smaller panels is to hear individual appeals for protection (*recurso de amparo*), which represent the majority of constitutional proceedings in the Constitutional Court.⁴⁸ Each of these smaller panels is composed of two sub-sections of three members who make initial determinations regarding whether the Court will hear the appeal.⁴⁹

42. See Elen Kennedy, *Hostis Not Inimicus: Toward a Theory of the Public in the World of Carl Schmitt*, in *LAW AS POLITICS: CARL SCHMITT'S CRITIQUE OF LIBERALISM* 92 (David Dyzenhaus ed., 1998).

43. C.E. art. 159.1.

44. *Id.* art. 161.1.

45. For this reason, the leading constitutional cases are particularly suitable for resolution by en banc panels. If we accept the idea that the main task of the Constitutional Court is to pacify competing constitutional principles, it will be easier to provide legitimacy to a difficult decision if all of the magistrates are present. One example of this is the resolution of the appeal for protection of judgment. STC, July 18, 2002 (No. 154). According to this judgment, the religious freedom of two married Jehovah's Witnesses was violated when they were found guilty of murder with extenuating circumstance in the death of their son. *Id.* As a result of an accident, the son required a blood transfusion. *Id.* On religious grounds, the parents initially refused to allow the transfusion, and the son ultimately died after he also objected to the procedure. *Id.* In a controversial judgment, the Constitutional Court overturned the murder conviction, specifically noting that the parents rescinded their initial opposition and that the child was 13, an age that the Constitutional Court found allowed him to discern the consequences of his decision. *Id.*

46. L.O.T.C. art. 7.1.

47. *Id.* arts. 7.2, 7.3.

48. LEY ORGANICA 2/1979, DE 3 DE OCTUBRE, DEL TRIBUNAL CONSTITUCIONAL (2007), available at <http://www.tribunalconstitucional.es/tribunal/leyesacuerdos/Texto%20consolidado%20nueva%20LOTC.pdf>.

49. L.O.T.C. art. 8.

With regard to published opinions, it is important to point out that from the beginning, the Spanish Constitutional Court avoided mimicking the style and format of other judicial opinions. The Court tried to better explain its reasoning and avoid the usual archaic language often found in judicial decisions.

To set out the factual background of the cases, a court clerk provides a detailed report of the problem leading to the judgment and summarizes the aims of the parties, as well as the legal arguments put forth. The next common section of a decision by the Court, the fundamental points of law, outlines the main legal elements, defining the controversy in terms of legal reasoning.⁵⁰ To facilitate this summary of the arguments, the fundamental points are divided into specific legal questions.⁵¹

In contrast to the material included in decisions by the U.S. Supreme Court, the judgments of the Spanish Constitutional Court contain neither footnotes nor doctrinal quotes. The internal references in the decisions are the previous judgments of the Court itself (or occasionally the judgments of other courts, such as the European Court of Human Rights). It is common for the fundamental points of law of Spanish judgments to be very long and occasionally confusing.⁵²

After the factual background and fundamental points of law, the judgment finishes with a ruling, whose content will vary depending on the constitutional questions involved and the result. The Spanish Constitution also requires that the Court's decisions include information about dissenting votes,⁵³ which enables magistrates to explain their reasons for dissenting.⁵⁴

The issue of dissenting opinions is considered to be an open wound within the Court. However, the argument for their inclusion in final judgments was that these dissenting votes could increase the opportunity for future adaptation of constitutional doctrine,

50. *Id.* art. 48.

51. *Id.*

52. *See, e.g.,* Llorente, *El Tribunal Constitucional*, *supra* note 21, at 23.

53. C.E. art. 164.

54. *See* GREGORIO CÁMARA, VOTOS PARTICULARES Y DERECHOS FUNDAMENTALES EN LA PRÁCTICA DEL TRIBUNAL CONSTITUCIONAL ESPAÑOL: 1981-1991 (1993); Francisco Rubio Llorente, *Sobre la relación entre el Tribunal Constitucional y poder judicial en el Ejercicio de la Jurisdicción Constitucional*, REVISTA ESPAÑOLA DE DERECHO CONSTITUCIONAL, Jan.-Apr. 1982, at 35.

improving doctrinal coherence, internal consistency, and doctrinal evolution.⁵⁵ The practice has shown that such hope was not groundless, but it is important to point out that it has created disputes within the Constitutional Court.

D. Functions

The Spanish Constitution entrusts powers to the Constitutional Court that are fundamental to the integration of democracy in Spain and the strength of the Constitution. It mandates that the Constitutional Court guarantee the supremacy of the Constitution through two distinct judicial processes: appeals challenging the constitutionality of new legislation and questions from regular courts regarding the constitutionality of laws at issue in other litigation.⁵⁶ This opportunity to challenge the constitutionality of government acts is the defining function of every Constitutional Court, its *raison d'être*, which traces its roots back to *Marbury v. Madison*.⁵⁷

The Spanish Constitution also establishes the right to request protection against the violation of fundamental rights.⁵⁸ This right consists of an appeal along the lines of the German *Verfassungsbeschwerde* (“constitutional complaint”), in which the Constitutional Court is a mechanism used when the ordinary protection of rights fails.⁵⁹

Third, the Constitutional Court is entitled to solve conflicts of jurisdiction between the state and the self-governing communities.⁶⁰

55. There is always the hope of the appearance on the Court of a Justice Holmes, whose dissenting opinions were recently translated into Spanish. See *LOS VOTOS DISCREPANTES DEL JUEZ O.W. HOLMES: ESTUDIO PRELIMINAR Y TRADUCCIÓN* (Cesar Arjone Sebastià trans., 2006).

56. Dennis P. Riordan, *The Rights to a Fair Trial and to Examine Witnesses Under the Spanish Constitution and the European Convention on Human Rights*, 26 HASTINGS CONST. L.Q. 373, 383 (1999). Claims can either be brought immediately after constitutionally suspect legislation is enacted (*el recurso de inconstitucionalidad*) or during litigation, whereby the citizen challenges the “facial validity of a statute” and the presiding judge refers the *questión de inconstitucionalidad* to the Constitutional Court. *Id.*

57. 5 U.S. (1 Cranch) 137 (1803) (holding that the province and duty of the judiciary is to “say what the law is” and to invalidate laws repugnant to the United States Constitution).

58. See C.E. art. 161(b).

59. See C.E. art. 53.2 (“Any citizen may make a claim to the liberties and rights recognized in Article 13 and the first Section of the Second Chapter before the regular courts through a process based on the principles of preference and speed and through the recourse before the Constitutional Court. This last recourse shall be applicable to objections of conscience recognized in Article 30.”).

60. C.E. art. 161(1)(c). Spain is comprised of seventeen separate autonomous regions and two autonomous cities.

The applicable constitutional provision grants the Court the ability to clarify the division of power among the autonomous regions—without a doubt the most controversial aspect of the Constitution.⁶¹

In 1979, the first Organic Law was enacted to establish the Constitutional Court.⁶² Subsequently, the L.O.T.C. has been amended to expand the Court's jurisdiction over conflicts involving questions of local autonomy. However, these new areas of the Court's jurisdiction have not been significantly tested, and the Court's ultimate role regarding them has not been defined.⁶³ In general, these changes have contributed nothing new to the Constitution's original definition of the Court's constitutional jurisdiction.⁶⁴

III. THE DOCTRINE OF THE CONSTITUTIONAL COURT: THE WARRANTY OF THE CONSTITUTION REGULATION

The Court's first task in 1981 was to convince a legal and political class already influenced by the Franco dictatorship that the Constitution was a true legal standard and that the Constitutional Court was its main defender. Indeed, there was an attempt to weaken the new democracy by devaluing the Constitution itself, which was considered, even by the Supreme Court, to be more a statement of principles that needed to be clarified through further legislation than a absolute declaration of fundamental rights.⁶⁵

The preconception of many was that a standard as ambiguous as the Constitution could not produce viable legal outcomes.⁶⁶ The Court forcefully countered this attack from the outset. This effort can be observed in judgments such as 15/1982,⁶⁷ which granted protection to a citizen whose right to refuse military service as a

61. Pedro Cruz Villalón, *La estructura del Estado o la curiosidad del jurista persa*, REVISTA DE LA FACULTAD DE DERECHO DE LA UNIVERSIDAD COMPLUTENSE, 1981, at 58-82. It is important to note that Cruz was a President of the Constitutional Court.

62. L.O.T.C. art. 1 (1979).

63. See ANGEL J. GÓMEZ MONTORO, EL CONFLICTO ENTRE ÓRGANOS CONSTITUCIONALES (1992); JOSÉ MARÍA PORRAS RAMÍREZ, EL CONFLICTO EN DEFENSA DE LA AUTONOMÍA LOCAL ANTE TRIBUNAL CONSTITUCIONAL (2001).

64. L.O.T.C. arts. 59-75.

65. JUAN ANTONIO SANTAMARÍA PASTOR ET AL., DERECHO ADMINISTRATIVO: LA JURISPRUDENCIA DEL TRIBUNAL SUPREMO 17 (1989).

66. STS May 26, 1979.

67. STC, Apr. 23, 1982 (No. 15).

conscientious objector⁶⁸ had not been recognized because a civil service substitute for military service had not yet been put into law.⁶⁹ In this case, the Court strongly asserted that when the Constitution acknowledges a right, a strong inference in favor of legal protection of that right is assumed and cannot be undercut by legislative delay.⁷⁰ Therefore, the Spanish Constitution is the supreme legal standard, and the Constitutional Court is its main interpreter.⁷¹

One of the first questions that the Constitutional Court had to consider was who could evaluate the constitutionality of laws enacted before the 1978 Constitution.⁷² While the Court established its jurisdiction to overturn such laws if they violated the 1978 Constitution, the Court also allowed ordinary judges to evaluate the constitutionality of these pre-1978 laws.⁷³ In this way, the Constitutional Court maintains its ultimate control over the review of such laws' constitutionality but shares its monopoly with regard to pre-constitutional standards with ordinary judges.

68. See GREGORIO CÁMARA VILLAR, *LA OBJECCIÓN DE CONCIENCIA AL SERVICIO MILITAR (LAS DIMENSIONES CONSTITUCIONALES DEL PROBLEMA)* (1991).

69. C.E. art. 30.2 ("The law shall determine the military obligations of Spaniards and shall regulate, with all due guarantees, conscientious objection as well as other causes for exemption from compulsory military service, and it may, when appropriate, impose a substitute social service.").

70. STC, Nov. 29, 1982 (No. 15) ("Y, puesto que la libertad de conciencia es una concreción de la libertad ideológica, que nuestra Constitución reconoce en el artículo. 16, puede afirmarse que la objeción de conciencia es un derecho reconocido explícita e implícitamente en el ordenamiento constitucional español, sin que contra la argumentación expuesta tenga valor alguno el hecho de que el artículo. 30.2 emplee la expresión [la Ley regulará], la cual no significa otra cosa que la necesidad de la interposición legislatoris no para reconocer, sino, como las propias palabras indican, para [regular] el derecho en términos que permitan su plena aplicabilidad y eficacia." ["And since freedom of belief is the essence of the ideological freedom embodied in Article 16 of our Constitution, it is clear that the right to conscientiously object is both an explicit and implicit right recognized by the Spanish Constitution. Although this notion may appear to conflict with the fact that Article 30.2 uses the expression [the Law will control], such an expression should not be interpreted as the need of the *interposition legislatoris* to recognize, but rather, in the words of the Constitution, [regulate] the right in a way that allows its full application and effectiveness."]).

71. L.O.T.C. art. 1.

72. See STC, Feb. 2, 1982 (No. 4).

73. *Id.* At the beginning of the current Spanish democracy, there was controversy over reforming or breaking from Spanish tradition. Despite the legal subtleties related to legislation, the Spanish Constitution was the result of a real constitutional moment that gave light to the freedom to set up a new constitutional model with aims of permanency. It was a revolution according to Hannah Arendt's well-known work and all the oversights that made it fail (especially the political parties). See ARENDT, *supra* note 1, at 215.

In evaluating the constitutionality of government acts and laws,⁷⁴ the Court looks to both the text of the Constitution and other accepted legal agreements that make up the so-called “block of constitutionality.”⁷⁵ One of the main sources to bear in mind are the Statutes of Autonomy,⁷⁶ which are a significant reference point in the broader interpretation of the Constitution.

Similar to the separate constitutions of the individual states in the United States, the statutes are comprised of the individual agreements made between the national government and the various autonomous regions and communities comprising Spain as a nation.⁷⁷ According to Article 147 of the Spanish Constitution, the statutes establish the basic institutional structure governing each autonomous region.⁷⁸ Especially noteworthy is the degree of legislative independence granted to the autonomous region within this constitutional framework.⁷⁹ For this reason, the statutes themselves are absolutely crucial to the overall interpretation of the Constitution. Since the Constitution only includes general principles and procedures (known as *principio dispositivo*), the statutes detail regional-specific provisions, which could not reach wider agreement in constitution.⁸⁰

74. See STC, Feb. 2, 1982 (No. 4); see also STC, Feb. 12, 2007 (No. 38) (clarifying the possibility of the Court to control the constitutionality of the international treaties).

75. L.O.T.C. art. 28. The block of constitutionality is a legal term found in French doctrine. The term refers to a series of absolute constitutional mandates not included in the Constitution of 1958. This is the case with the Bill of Rights and the preamble of the Constitution of 1946. The concept was spread in Spain thanks to the work of Louis Favoreu, a jurist who made an effort to bring the Spanish and French constitutional cultures closer through his team in Aix-en-Provence. One example of this is the Spanish contribution to the *Annuaire International de Justice Constitutionnelle* and the translations of his work. See LOUIS FAVOREU, CONSTITUTIONAL COURTS (Alain A. Levasseur & Roger K. Ward trans., 2001) (comparing the form and function of various European constitutional courts).

76. L.O.T.C. art. 28. Spain is comprised of 17 autonomous regions and two autonomous cities, which have each been incorporated into the Spanish state while maintaining a significant degree of autonomous rule.

77. C.E. art. 81 (requiring majority votes for approval, modification, or repeal of these laws). Not all the Statutes follow the same procedure of drawing up and reform. To know about the Statutes of Autonomy, see FRANCISCO BALAGUER CALLEJÓN, FUENTES DEL DERECHO (1991).

78. *Id.* art. 147 (“[T]he statutes shall constitute the basic institutional rules . . .”).

79. *Id.* art. 148.

80. See ENRIC FOSSAS ESPALADER, EL PRINCIPIO DISPOSITIVO EN EL ESTADO AUTONÓMICO (2007). It should be put on record that the Spanish constitutional process tried to incorporate the wishes of all the important political forces in the history of Spain, especially the nationalists of Catalonia and the Basque Country. The Catalan nationalists carried out positive work throughout the transition, but the nationalists of the Basque Country have been a Trojan

The statutes are fundamental to the Spanish democratic model. Their drafting began right after the passing of the Spanish Constitution with the first statutes drafted at the beginning of 1979.⁸¹ Today, Spain faces a very important national moment as most of the statutes are being reformed, giving a new boost to the federal nature of Spain's government (a trend that almost no one denies).⁸²

The statutes regarding the autonomous communities of Valencia, Catalonia, Andalucía, Aragón, Islas Baleares, and Castilla-León have already been re-drafted, and the reforms of most the other autonomous communities are practically finished.⁸³ It was almost unanimously believed that the statutes needed an *aggiornamento* (modernization) after almost thirty years of legal effect. In combination with the prior decisions of the Constitutional Court, these reforms should clarify the separation of powers between the

horse, pressuring for their interests and then disassociating themselves once they obtain them, considering them inadequate. See, e.g., JAVIER CORCUERA ATIENZA, *POLÍTICA Y DERECHO. LA CONSTRUCCIÓN DE LA AUTONOMÍA VASCA* (1990); MEREDITH WEISS, *THE BASQUE NATIONALIST MOVEMENT* (2002), available at <http://www.yale.edu/macmillan/globalization/basque.pdf>; MEREDITH WEISS, *THE CATALAN NATIONALIST MOVEMENT* (2002), available at <http://www.yale.edu/macmillan/globalization/catalon.pdf>. One example of this is the survival of a financing system, which clearly benefits the Basque Country and Navarre (under the Additional Provision 2 of the Spanish Constitution, which "protects and respects the historic rights of the territorial charters"). C.E. Disposiciones Adicionales, art. 1; Javier Corcuera Atienza, *La constitucionalización de los derechos históricos*, REVISTA ESPAÑOLA DE DERECHO CONSTITUCIONAL, May–Aug. 1984, at 11.

81. See ELISEO AJA, *EL ESTADO AUTONÓMICO: FEDERALISMO Y HECHOS DIFERENCIALES* 71 (Alianza 2d ed. 2003) (1999).

82. See, e.g., Ministerio do Administraciones Publicas, *Reforma de los Estatutos*, http://www.map.es/inciativas/nueva_agenda_territorial/reforma_estatutos.html (last visited Feb. 23, 2008).

83. A special case is that of the autonomous region of the Basque country that submitted, during the previous government, a reform declaration for its statute before Parliament. Eduardo Virgala Foruria, *La reforma Ibarretxe: Una auténtica ruptura estatutaria*, in *EL ESTADO AUTONÓMICO "IN FIERI": LA REFORMA DE LOS ESTATUTOS DE AUTONOMÍA* 401, 401–40 (Manuel José Terol Becerra ed., 2005). The Basque Parliament had passed the declaration by an absolute majority, but the declaration was rejected by almost half of the members of Parliament. It is surprising that the reform process of the statutes requires a very qualified majority to start, since in the Basque Country this percentage is reduced to the absolute majority. Therefore, one majority can assert itself over another. It is also surprising that the declaration was clearly unconstitutional and was rejected by the Congress of Deputies in the debate to take it into account. It is necessary to add that the relations between the Basque Country and Spain are significantly affected by the terrorist violence of Euskadi Ta Askatasura ("ETA"), which has recently broken another truce in a new attempt to blackmail Spanish democracy. In 1996 the ETA murdered university professor F. Tomás y Valiente, who also served as President of the Constitutional Court. See José J. Jiménez Sánchez, *Nationalism and the Spanish Dilemma: The Basque Case*, 34 *POL. & POL'Y* 532, 534–35 (2006) (presenting this problem in the English language from a very pessimistic point of view).

national government and the autonomous regions in such a way that law-making will not fall on the Court until the need to answer a clear constitutional question (e.g., questions related to state powers in the areas of education or public health).

Conservative political forces, however, believe that these reforms will ultimately expand the influence of the Constitutional Court beyond advisable limits. In their view, these reforms have gone beyond the needed modernization of the statutes and threaten to violate the national unity of Spain by granting significant independent authority to some of the autonomous regions and allowing others to establish themselves as near independent nations.⁸⁴ For this reason, appeals have been filed challenging the constitutionality of these statutes.⁸⁵ The resolution of these challenges will be a crucial moment in the political development of Spain and will present an important test for the Spanish Constitutional Court.

An appeal of unconstitutionality is a direct appeal that can be lodged against acts and statutes having the force of law in the three-month period of time following their passage.⁸⁶ The right to file such an appeal, however, is limited to specific political representatives: fifty members of Congress, fifty senators, the Prime Minister, the executive body of an autonomous region and its assembly, and the Defender of the People (*Defensor del Pueblo*).⁸⁷

This type of appeal has some defining elements that separate it from other legal actions. First, it is abstract in character, requiring the Court to assess the constitutionality of the act without reference to any specific circumstances. On the other hand, it is also an appeal with a clear political element. Thus, those who can lodge it are politicians, with the exception of the Defender of the People.⁸⁸

84. See, e.g., Generalitat de Catalunya, Statute of Autonomy of Catalonia 2006, Preamble, available at <http://www.gencat.net/generalitat/eng/estatut/preambul.htm> ("In reflection of the feelings and the wishes of the citizens of Catalonia, the Parliament of Catalonia has defined Catalonia as a nation by an ample majority. The Spanish Constitution, in its second Article, recognises the national reality of Catalonia as a nationality.").

85. See, e.g., STC, July 20, 2006 (No. 240); STC, July 6, 2006 (No. 222).

86. L.O.T.C. art. 33.

87. *Id.* art. 34.

88. See C.E. art. 54; JOSÉ MANUEL VERA SANTOS, *EL DEFENSOR DEL PUEBLO EN LA CONSTITUCIÓN Y EN LOS ESTATUTOS DE AUTONOMÍA* (2002).

With this type of appeal, minority political factions can continue a legislative battle lost in Parliament by asking the Court to overturn legislative decisions of the majority. The Court's rulings resolve such conflicts once and for all and have important effects on public opinion. Were it not for the significant delay involved with deciding most cases (up to ten years from the filing of an appeal), such effects could substantially threaten the Court's legitimacy. Yet, since so much time passes, the original controversy is diminished, and the Court is able to deliberate without the pressure of political consequences for its decisions.⁸⁹ However, the way in which the right to appeal is structured essentially establishes that various political factions will try to overturn the legislative choices of other legislative factions through the intervention of the Court: members of Parliament seek to appeal national laws,⁹⁰ the prime minister seeks to appeal laws passed by the self-governing regions, members of the legislative assemblies of self-governing regions seek to appeal national laws, and the Defender of the People is left to appeal decisions by any of these groups affecting personal liberties. Under Spain's model, unlike under other models, an individual citizen cannot contest the constitutionality of legislation and must rely upon the Defender of the People or other political branches to raise constitutional objections.⁹¹

Article 163 of the Constitution provides another procedure for judicial review of government acts.⁹² Under this procedure, the judicial branch and the Constitutional Court cooperate to purge unconstitutional legislation. If judges in the course of deciding a case⁹³ must evaluate the constitutionality of a government act in order to render an opinion, the judicial body should refer the

89. Compare FRANCISCO RUBIO LLORENTE, *LA FORMA DEL PODER: ESTUDIOS SOBRE LA CONSTITUCIÓN* 573–603 (1993) (claiming that political contamination of the Court through the appeal was inevitable, making it better to leave the question as a unique mechanism of objective purge of code), with JOSÉ ANTONIO MONTILLA MARTOS, *MINORÍA POLÍTICA Y TRIBUNAL CONSTITUCIONAL* (2002) (asserting that it is absolutely necessary to keep open that proceeding as a mechanism for minorities to defend their vision of constitutionality).

90. Presently, there is a lack of mechanisms for self-governing members of parliament to appeal the acts of a self-governing community.

91. This situation leaves social groups without significant political representation defenseless against discriminatory legislation.

92. C.E. art. 163.

93. Not in the case of other procedures.

constitutional question to the Constitutional Court.⁹⁴ The Constitutional Court then informs the judge that brought the matter of their opinion and allows the original judge to resolve the case according to the content of the ruling.⁹⁵

This mechanism is very different from the appeals received from the political branches because of two circumstances: (1) the institution that urges the matter and (2) the issue that starts the matter. Since the constitutional question originates from the judicial branch, the motives underlying the referral will be of a legal nature. Further, unlike an appeal, a referral case is linked to a specific controversy and specific set of facts. In other words, it is a constitutional problem linked to a broader issue.

The ramifications of this procedure can be enormous. If a judge finds enough reasons to question an act's constitutionality, the act will have to pass the Constitutional Court. In this way, judges remain as key elements in the judicial review process in Spain, despite the role of the Constitutional Court. The main problem with this process is that the authority to refer cases rests exclusively with the original court hearing the case, with no right of appeal on a judge's decision not to refer the matter to the Constitutional Court. This scenario gives rise to some judges referring matters about acts that other judges consider perfectly constitutional, causing damage to some citizens that is hard to correct.⁹⁶

IV. COURT DOCTRINE: PROTECTION OF FUNDAMENTAL RIGHTS

Due to the distinctive character of fundamental rights in Spain's democratic model, the Spanish Constitution establishes special channels in order to protect such rights. One of these fundamental

94. Dennis P. Rioran, *The Rights to a Fair Trial and to Examine Witnesses Under the Spanish Constitution and the European Convention on Human Rights*, 26 HASTINGS CONST. L.Q. 373, 382-83 (1999).

95. FAVOREU, *supra* note 75, at 99. In practice, however, the underlying proceeding often continues without guidance from the Constitutional Court. *Id.*

96. It has occurred, for example, that some citizens have suffered financial damage caused by an unconstitutional act because the parties did not raise the constitutional issue and the judge did not lodge the matter with the Court. The only procedure later found to resolve the situation is to estimate the demand for financial responsibility lodged by the affected party according to the unconstitutional law.

rights is ordinary legal protection,⁹⁷ regulated recently through several procedural acts.⁹⁸ Another fundamental right is protection by the Constitutional Court, which is considered a subsidiary and unusual appeal.⁹⁹

As outlined in Article 53 of the Constitution, certain rights are given broader constitutional protections: the fundamental rights that appear in Articles 15 through 19, the right to equal protection under the law in Article 14, and the right to conscientious objection to military service in Article 30.2.¹⁰⁰ Accordingly, this mechanism does not protect rights related to such issues such private property (Article 33) as well as it protects the social rights enumerated in Articles 39 through 52. The protected social rights are programmatic character standards that provide rights according to the acts developing them.¹⁰¹ An appeal can be directed against any government act that causes a break-down in these rights.

Initially, many appeals for protection arrived at the Constitutional Court,¹⁰² most of them claiming violations of the rights granted under Article 24 of the Spanish Constitution: effective protection from judges. Accordingly, the Court became the place where judges' actions are corrected. Yet, the ongoing consolidation of Spain's democracy has led to the widespread conviction that ordinary judges are perfectly able to carry out the protection of fundamental rights without help from the Constitutional Court.

In regard to the general protection of rights, the Court has faced difficult cases that often hinge on the Court's constitutional jurisdiction. Some of the most difficult cases have addressed abortion,¹⁰³ euthanasia,¹⁰⁴ forced-feeding of prisoners,¹⁰⁵ limits on

97. LEY DE LA JURISDICCIÓN CONTENCIOSO-ADMINISTRATIVA art. 29 (1998); LEY DE ENJUICIAMIENTO CIVIL art. 1 (2000); TEXTO REFUNDIDO DE LA LEY DE PROCEDIMIENTO LABORAL (B.O.E. 1995, 2).

98. STC, Jul. 6, 1995 (No. 113).

99. C.E. art. 53.2.

100. ELENA MERINO-BLANCO, SPANISH LAW AND LEGAL SYSTEM 202–03 (2d ed. 2006).

101. They do not, however, lack normative force. See Francisco Balaguer Callejón, *Las relaciones entre el ordenamiento estatal y los ordenamientos autonómicos: Una reflexión a la luz de la regla de supletoriedad*, REVISTA DE DERECHO POLÍTICO, 1998, at 285 (discussing how social values are integrated into a system of laws).

102. FAVOREU, *supra* note 75, at 97 (noting that 28,247 appeals for protection were filed between 1980 and 1994).

103. STC, Apr. 11, 1985 (S.T.C. 53/1985).

104. STC, June 27, 1990 (S.T.C. 120/1990).

freedom of expression,¹⁰⁶ character of representation,¹⁰⁷ and the scope of freedom of religion.¹⁰⁸

Particularly with respect to rights like freedom of expression, Spain may soon experience significant constitutional developments if the specific circumstances in which these were first doctrines developed are analyzed.¹⁰⁹ First, Spain has tried to maintain a similar doctrinal position as the “preferred position” given to freedom of the press in the United States.¹¹⁰ Proponents claim that a strong democracy requires the media’s independent content and distribution to inform public opinion.¹¹¹ This necessity has placed freedom of expression in a unique position when compared to other rights that are not as essential for democracy, such as honor or privacy. Evidence that half of the Spanish media have become business giants¹¹² whose primary interest is to seek easy profits has subsequently cast this view into doubt. Once one realizes that half of the media look out for their own interests, not for the public interest, the “preferred position” system becomes meaningless.

Probably one of the most important problems that threatens the Spanish Constitutional Court is the excess work that results from the overload of protection appeals. Every year, thousands of protection appeals arrive at the Court, but only a few are processed and even

105. *Id.*

106. STC, Oct. 15, 1982 (S.T.C. 62/1982).

107. STC, Feb. 21, 1983 (S.T.C. 10/1983).

108. STC, July 18, 2002 (S.T.C. 154/2000); *see also* Javier Martínez-Torrón, *Freedom of Religion in the Case Law of the Spanish Constitutional Court*, 2001 B.Y.U. L. REV. 711, 714–15 (2001) (discussing the legal status of churches and religious groups and the protection of individual freedom of conscience).

109. *See* FRANCISCO J. BASTIDA FREIJEDO, *EL RÉGIMEN JURÍDICO DE LA COMUNICACIÓN SOCIAL* (1994) (analyzing how this right is exercised in practice).

110. *Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943) (“Freedom of press, freedom of speech, freedom of religion are in a preferred position.”).

111. “In 2005, the Spanish Constitutional Court registered 9708 appeals: 9476 of them were individual appeals for protection of the so-called *recurso de amparo*, 222 appeals against unconstitutionality, 8 conflicts of jurisdiction between the State and the Autonomous Communities and 2 conflicts of jurisdiction lodged by the local governments. On the other hand ‘only’ 6339 cases were finally settled . . . (most of them, again, individual appeals for protection of fundamental rights).” Posting of Luis Gordillo Perez, *Report from Spain*, to The Court (Jun. 2, 2007), <http://www.thecourt.ca/2007/06/02/report-from-spain-may-2007/>. The complete statistics are available at Tribunal Constitucional de España, http://www.tribunalconstitucional.es/memorias/2005/memo05_anexo03.html (last visited Feb. 23, 2008).

112. BBC Monitoring, *The Press in Spain*, <http://news.bbc.co.uk/1/hi/world/europe/4470002.stm> (last visited Feb. 23, 2008).

fewer are adjudicated.¹¹³ Some solutions to this problem have been inspired by foreign systems,¹¹⁴ but an ultimate solution has been postponed until the reform of the L.O.T.C.¹¹⁵

The proposed new law assumes, as the doctrine intended, that ordinary judges have an undeniable link with democracy, the Constitution, and fundamental rights that perfectly enables them to repair violations of those rights. On the other hand, Spanish judges have been constricted by more than twenty-five years of Constitutional Court jurisdiction that has precluded judges from hearing any potential conflict over constitutional rights.¹¹⁶ The solution does not mean removing constitutional protection but rather limiting it to those plaintiffs who can prove the importance of their cases by showing the absolute novelty of the issues or new perspectives arising in those cases.¹¹⁷

V. COURT DOCTRINE: TERRITORIAL DISTRIBUTION OF POWER

Article 161 of the Constitution calls for the Constitutional Court to arbitrate territorial conflicts.¹¹⁸ As discussed earlier, territorial distribution of power is one of the matters that the Constitution could not finalize. As such, the Constitution was limited on this issue to general principles and guidelines.¹¹⁹ The generality and vagueness of this territorial model governing relations between self-governing communities and the state led the Constitutional Court to become the real helm of constitutional development. In this aspect of its jurisprudence, it is clear that the Constitutional Court has not limited its role to a mere defender of the Constitution but rather has advanced extended interpretations of it.

113. See the complete statistics at Tribunal Constitucional, www.tribunalconstitucional.es/ (last visited Feb. 23, 2008).

114. See generally María Angeles Ahumada Ruiz, *El "certiorari": Ejercicio discrecional de la Jurisdicción de apelación por el Tribunal Supremo de los Estados Unidos*, REVISTA ESPAÑOLA DE DERECHO CONSTITUCIONAL, May–Aug. 1994, at 89 (discussing the U.S. Supreme Court's discretion in hearing appeals).

115. L.O.T.C. art. 6.

116. See generally FRANCISCO RUBIO LLORENTE, DERECHOS FUNDAMENTALES Y PRINCIPIOS CONSTITUCIONALES: DOCTRINA JURISPRUDENCIAL (1995) (discussing important themes in Constitutional Court decisions).

117. L.O.T.C. art. 49.1.

118. C.E. art. 161.

119. See ESPALADER *supra* note 80 and accompanying text.

The specific constitutional process foreseen for the resolution of territorial matters is called the “conflict of competences” (although when a conflict of competences originates from an act, it is dealt with as an appeal of unconstitutionality).¹²⁰ Only the government of the state and those of the self-governing communities¹²¹ are able to lodge this kind of appeal.¹²² However, the position of these authorized entities is not the same: the government of a community has to ask the state to stop the encroachment of their authority before going to the Constitutional Court. The national government can choose between doing what is requested or lodging the appeal.¹²³

This procedure for addressing such conflicts has a significant influence on the Constitutional Court’s resolution of matters of provincial authority. It is important to note that the governments of the communities usually will only object to encroachments by the national government when they are controlled by different political parties. With the exception of the Basque country and Catalonia, the self-governing communities are not effectively independent from the politics of the national parties in Spain.¹²⁴ This political connection means that the Socialist Party currently controls the national government as well as the regions of Andalucía, Extremadura, Castilla-La Mancha, and Baleares. When the Popular Party was in power, it also held the reins in Galicia, Castilla-León, and the autonomous community of Valencia.¹²⁵ In this way, preservation of the presence of the party is more important than defense of the autonomous community.

As mentioned above, Catalonia and the Basque country are special cases. They are communities that have special party systems dominated by nationalist parties that have ruled, until just recently in

120. L.O.T.C. art. 67.

121. These are the parties in a supposedly “positive” dispute. In so-called “negative” disputes, they are the citizens. There is practically no reporting about these kind of disputes.

122. C.E. art. 162, § 1(a).

123. L.O.T.C. arts. 62–63.

124. See Begona Annue Vgante & Santiago Pérez-Nievas, *Moderate Nationalist parties in the Basque Country: Partido nacionalista vasco and eusko alkantausuna*, in REGIONALIST PARTIES IN WESTERN EUROPE 87 (Lieven De Winter & Hunt Türsan eds., 1998); Juan Mancet & Jandí Angelaguet, *Nationalist Parties in Catalonia: convergència democràtica de catalunya and esquema republicania*, in REGIONALIST PARTIES IN WESTERN EUROPE, at 70.

125. Regional parliaments: political representation 2007, http://www.typicallyspanish.com/news/publish/article_12246.shtml (last visited Feb. 23, 2008).

Catalonia, since the beginning of the autonomous community system). This situation has created a controversy that has fluctuated in spite of the virtue of some elements of the systems.

For example, there was an ongoing dispute during the years that the PSOE (socialist party) used its absolute majority in the national government to try to change the country.¹²⁶ After the party lost its absolute majority in the general elections of 1993, the PSOE had to negotiate with the nationalists from Catalonia for their support in Parliament.¹²⁷ When these nationalists gave their support, they did so in order to guarantee their vision of their community, resulting in a determined decrease in the number of disputes brought before Constitutional Court.

A similar scenario played out during the first term of office of the right-wing *Partido Popular* from 1996 to 2000.¹²⁸ The party needed the support of nationalists from Catalonia in order to confirm José María Aznar as prime minister, so disputes were at a minimum.¹²⁹

Disputes with the Basque country are different. The brand of nationalism found in this region is less pragmatic than in Catalonia, and Basque separatists have tried to keep the area wholly independent from the national state through continuous criticism of national institutions. As a result, the Basque country has excluded itself from the processes of the Constitutional Court, which its leaders have labelled an “organ of Madrid.”

The Court’s main points of constitutional dispute in territorial matters are as follows: (1) the concept of self-government; (2) the supremacy of national law over regional law; (3) the concept of basic government services (4) the reach of the Harmonization Act; and (5) the content of supplemental state law. Regarding the first, the Court defined the outlines of provincial self-governance early on,

126. Derek de Villiers, *Spain: A Model Transition to Democracy—Lessons for South Africa*, POLITEIA, 1999.

127. Encyclopedia Britannica Online, Spain: Year in Review 1993, <http://www.britannica.com/eb/article-9115240> (last visited Feb. 23, 2008).

128. Barry James, *Basques and Catalans Drive Tough Bargain with Aznar*, INT’L HERALD TRIB. (Apr. 30, 1996), http://www.ihl.com/articles/1996/04/30/spain.t_3.php.

129. Increases in government financing to Catalonia occurred in this time period. Francisco Balaguer Callejón, *La Financiación de las Comunidades Autónomas*, in ESTUDIOS DE DERECHO CONSTITUCIONAL: HOMENAJE AL PROF. DR. D. JOAQUÍN GARCÍA MORILLO 477-92 (Luis López Guerra ed., 2001).

conceiving it as a right of each region limited by the unity principle of the Constitution.¹³⁰ As such, it is indisputable that regional autonomy was always “taken seriously” by the Court.

The rest of the Court’s doctrine on territorial matters is consistent with this view. With its very important 76/1983 ruling,¹³¹ for example, the Court held that territorial disputes should always be solved using the jurisdictional principles in the Constitution, relying upon the regional authority outlined there and in the relevant community statute.¹³² This decision meant virtually eliminating the use of the supremacy principle (also outlined in Article 149.3 of the Constitution), which involved the immediate pre-emption of community law by national law where there was conflict. After this ruling, there was no clear indication how the Court would rule on issues involving “concurrent” matters.¹³³ The self-governing of the autonomous communities was not affected by the potential for legislative pre-emption by the national government.

A critical area where the autonomous communities began to develop independent authority involved the clarification of basic governmental services. Under Article 149.1 of the Constitution, basic governmental services, like public education and health care, were to be under the jurisdiction of the national government, and the communities could expand upon these basic services according to their political choice. Due to the lack of clarity in the definition of these roles, the early period of autonomous rule for these regions was not easy. Attempts were made to delay self-government in the regions under the argument that the national government had not yet announced basic regulations required before the regions could take any action on their own.¹³⁴

The Constitutional Court defused this confrontation through the development of the judicial concept of “basic principles,” which allowed the autonomous communities to infer or deduce the

130. C.E. art. 2.

131. STC, Aug. 5, 1983 (No. 76).

132. *Id.*

133. “Concurrent” matters are those over which the autonomous communities and the state would have had identical authority to control. In Spanish legislation only the “culture” issue is of this type. The rest are divided between the state and the autonomous communities, but their faculties are differentiated with categories such as “development bases” or “legislation—realization.”

134. C.E. arts. 149.1.13, 149.1.23, 149.1.30.

boundaries of their basic governing authority from pre-existing regulations.¹³⁵ This doctrine increased the degree to which the autonomous communities could manage basic governmental services in the early years of the new Spanish Constitution.¹³⁶ Along the same lines, the Court further increased the independent authority of the regions through its decision in STC 76/1983¹³⁷ involving the Harmonization Law from Article 150.3 that allowed the national government to dictate laws in areas delegated to the regions when necessary to ensure conformity across the country.¹³⁸ The Court ruled that the Harmonization Law is an exceptional constitutional mechanism that the national government may only use in cases where no other appeal is possible because it means an intervention by the national government into areas of autonomous provincial authority.¹³⁹ Finally, the Constitutional Court affirmed in STC 61/1997 that although national law can pre-empt that of the self-governing communities, the national government has limited powers as declared in Article 149.3 of the Constitution,¹⁴⁰ and the national government is not authorized to enact laws on matters outside its jurisdiction.¹⁴¹

In all, constitutional law on territorial issues has been very respectful of the principle of self-government. However, some communities have raised objections over the Court's decisions restraining the extent to which they can affect basic government services in their region.¹⁴²

135. STC, July 28, 1981 (No. 32); see Javier Jiménez Campo, *¿Qué es lo básico? Legislación compartida en el Derecho Autonómico*, REVISTA ESPAÑOLA DE DERECHO CONSTITUCIONAL, Sept.–Dec. 1989, at 39. Javier Jiménez Campo has been the General Secretary of the Constitutional Court for many years.

136. However, this is an interpretation contemporaneously linked to the beginning of the autonomous state. Today, a different interpretation prevails, which demands that the state fix the basic principles in norms preferably of legislative nature. See José Antonio Montilla Martos, *Los elementos formales en el proceso de producción normativa de lo básico*, REVISTA ESPAÑOLA DE DERECHO CONSTITUCIONAL, May–Aug. 2003, at 89.

137. STC, Aug. 5, 1983 (No. 76).

138. C.E. art. 150.3.

139. STC, Aug. 5, 1983 (No. 76).

140. C.E. art. 149.3 (“The matters not attributed expressly to the state by this Constitution belong to the Autonomous Communities by virtue of their respective statutes.”).

141. See Callejón, *supra* note 101 at 285-305. See also Juan Francisco de Asis Sánchez Barrilao, *La regla de supletoriedad a propósito de la sentencia del Tribunal Constitucional 61/1997*, REVISTA DE ESTUDIOS POLITICOS, Mar. 20, 1998, at 281-302.

142. See *supra* note 136 and accompanying text.

VI. COURT DOCTRINE: SOURCES OF LAW, RELATIONS AMONG LEGAL SYSTEMS & EFFECTS OF SENTENCES

In the context of legal theory, the decree-law doctrine of the Spanish Constitution is very important. Established in Article 86 of the Constitution, this doctrine is a source of heightened legislative power for the prime minister to govern through decree during extraordinary and urgent circumstances.¹⁴³ Although decrees do not carry the same weight as other laws, courts can treat them as emergency bills.¹⁴⁴ The Congress of Deputies must ratify or repeal the decree within thirty days of its enactment.¹⁴⁵

In a leading case on the issue, the Constitutional Court held that the executive branch, as the institution in charge of political administration,¹⁴⁶ should decide when these extraordinary and urgent needs arise.¹⁴⁷ Logically, prime ministers have used this doctrine to

143. C.E. art. 86.

144. *Id.*

145. *Id.*

146. *Id.* art. 97.

147. STC, Mar. 28, 2007 (No. 68) (“Es evidente que el concepto ‘extraordinaria y urgente necesidad’ que se contiene en la Constitución no es, en modo alguno, una cláusula o expresión vacía de significado dentro de la cual el lógico margen de apreciación política del Gobierno se mueva libremente sin restricción alguna sino, por el contrario, la constatación de un límite jurídico a la actuación mediante Decretos-leyes. Y en ese sentido, sin perjuicio del peso que en la apreciación de lo que haya de considerarse como caso de extraordinaria y urgente necesidad haya de concederse al juicio puramente político de los órganos a los que incumbe la dirección del Estado, en especial en el caso de las actuaciones desarrolladas en los ámbitos de la política social y económica, es, sin embargo, función propia de este Tribunal Constitucional ‘el aseguramiento de estos límites, la garantía de que en el ejercicio de esta facultad, como de cualquier otra, los poderes se mueven dentro del marco trazado por la Constitución,’ de forma que ‘el Tribunal Constitucional podrá, en supuestos de uso abusivo o arbitrario, rechazar la definición que los órganos políticos hagan de una situación determinada’ y, en consecuencia, declarar la inconstitucionalidad de un Decreto-ley por inexistencia del presupuesto habilitante por invasión de las facultades reservadas a las Cortes Generales por la Constitución. Una vez comprobado que, en el caso de la norma analizada, el Gobierno no ha aportado ninguna justificación que permita apreciar la concurrencia del presupuesto habilitante requerido, no cabe sino estimar los recursos de inconstitucionalidad acumulados” [It is evident that the Constitution’s concept of “extraordinary and urgent necessity” is not, in any way, a clause or expression void of meaning. The phrase embodies the logical margin of the Government’s political appreciation of the desire to move freely: the discovery of a legal limit to using *Decretos-leyes* as a means of governing. (S.T.C. 182/1997, of October 28, FJ 3; 11/2002, of January 17, FJ 4; 137/2003, of July 3, FJ 3; y 189/2005, of July 7, FJ 3). And, therefore, without the prejudicial weight that in appreciation what should be considered a case of extraordinary and urgent necessity, the State’s purely political bodies must concede to the judiciary. This practice should occur especially in enactments developed in social and economic political situations. It is, however, this Constitutional Tribunal’s unique function to “ensure those limits and the guarantee that in exercising this power, like any other, the powers that move within the frame of the Constitution,”

enact dozens of decree-laws every year on matters that would have involved intense, prolonged parliamentary debate.¹⁴⁸ A recent change in this doctrine has forced the prime minister to justify this decision to a greater extent.¹⁴⁹

Since the admission of Spain into the European Union in 1986,¹⁵⁰ the Court has had the opportunity to make declarations on the relationship between the European and Spanish legal systems, although it has avoided doing so whenever possible.¹⁵¹ The Court started by maintaining that European law does not override Spanish constitutional provisions¹⁵² and has recently stated that there are no inherent conflicts between the European constitutional treaty and the Spanish Constitution itself.¹⁵³ However, the laws of the European Union are taken up by the Court because the Spanish Constitutional Court is considered the ultimate guardian of constitutional interpretation in instances of potential conflict.¹⁵⁴

In this context, the application of Constitutional Court orders has caused problems on more than one occasion. The Spanish Constitution does not mention many procedural requirements, and it is necessary to wait for the L.O.T.C. to ratify them.¹⁵⁵ The most problematic procedural issues come from the fact that despite

so that “the Constitutional Tribunal will be able to, when it suspects abusive or arbitrary use of power, reject political entities’ interpretation” (S.T.C. 29/1982, de 31 de mayo, FJ 3) and, as a result, declare the *Decreto-ley* unconstitutional on the grounds that these political entities have assumed the General Courts’ constitutionally guaranteed power. Once it has been confirmed that, the Government has not provided any justification for the law that would permit the required assumed authorization, the only option is to consider appeals *recursos de inconstitucionalidad* . . .”] (S.T.C. 68/2007 at 66)).

148. ANA M. CARMONA CONTRERAS, *LA CONFIGURACIÓN CONSTITUCIONAL DEL DECRETO-LEY* (Centro de Estudios Políticos y Constitucionales 1997).

149. STC, Mar. 28, 2007 (No. 68).

150. *See* Treaty on the Accession of Spain and Portugal, art. 1, Nov. 15, 1985, 1985 O.J. (L 302).

151. Only two such declarations have been made. *See infra* notes 154-155.

152. DTC, Jan. 7, 1992 (No. 1).

153. DTC, Dec. 13, 2004 (No. 1).

154. *See* Treaty Establishing a Constitution for Europe, art. I-6, Dec. 16, 2004, 2004 O.J. (C 310) 12. For the latest developments in the European constitutionalization process after the failure of the Constitutional Treaty, see Francisco Balaguer Callejón, *La constitución europa tras el Consejo Europeo de Bruselas y el Tratado de Lisboa*, *REVISTA DE DERECHO CONSTITUCIONAL EUROPEO*, July-Dec. 2007, at 11.

155. Ramón Punset Blanco, *Las sentencias declaratorias de la inconstitucionalidad de las leyes: consideraciones sobre la posible reforma de los artículos 49.1 y 40.1 de la LOTC*, 7 *ANUARIO DE DERECHO CONSTITUCIONAL Y PARLAMENTARIO* 33 (1995).

language in the L.O.T.C., legislation held to be unconstitutional has not always been found by the Court to be void as to its prior enforcement.¹⁵⁶ For instance, the Court has found tax measures unconstitutional but not required refunds to taxpayers where it would have created a budget crisis for the government.

On occasions, however, the Constitutional Court has declared some tributary laws unconstitutional to avoid forcing the state to refund money to taxpayers, which could cause serious economic damage to the state.¹⁵⁷ In relation to appeals for protection (*recursos de amparo*), the challenge is balancing the obligation to restore appellants' rights¹⁵⁸ with the consideration that ordinary judges are the guarantors of the rights of the citizens.¹⁵⁹

VII. CRISIS AND LEGITIMACY PROBLEMS IN THE CONSTITUTIONAL COURT

Constitutional courts periodically face serious crises that affect their own place in the government. All important courts have suffered such identity crises.¹⁶⁰ The first time the political impartiality of the Spanish Constitutional Court was questioned took place in 1983, when the constitutionality of a decree-law was questioned.¹⁶¹ The goal of the decree-law was to expropriate a holding company called Rumasa.¹⁶² This was one of the first measures undertaken by the Spanish socialist party of Felipe González, and Spain's conservative political sectors were fearful of a communist influence on economic policy.

156. L.O.T.C. art. 39.

157. STC, Feb. 20, 1989 (No. 45).

158. L.O.T.C. art. 50.

159. *Id.* art. 54. The concurrent jurisdiction of ordinary judges and the Constitutional Court in the protection of fundamental rights has created more than a small conflict between these two entities. In 2006, more than a third of the appeals for protection (*recursos de amparo*) were formulated after the Supreme Court intervened. Tribunal Constitucional de España, http://www.Tribunalconstitucional.es/memorias/2006/memo06_anexo03.html#CuadroDest14 (last visited Feb. 23, 2008).

160. We cannot forget the current situation in the United States and the U.S. Supreme Court's response every time President George W. Bush loses his way. See generally BRUCE A. ACKERMAN, *BEFORE THE NEXT ATTACK* (2006) (discussing the Supreme Court's failure to challenge presidential authority).

161. STC, Dec. 3, 1983 (No. 111).

162. *Id.*

The most important legal problem was that while Article 86 of the Constitution established that decree-laws may not affect the rights, duties, and freedoms contained in Title I of the Constitution,¹⁶³ the decree-law in question amounted to an expropriation—a violation of property rights defined in Title I.¹⁶⁴ The Court was clearly divided,¹⁶⁵ and the vote of then-President Manuel García Pelayo tipped the balance in favor of the socialists.¹⁶⁶ The majority's interpretation of Article 86 prohibited a general regulation through decree-law of provisions contained in Title I but did not prohibit actions occasionally affecting one right, as was the case.¹⁶⁷ This controversial decision aroused all kinds of suspicions about the Court, especially the fear that the Court had been pressured by the government. President García Pelayo, who had returned from exile in Venezuela and had been a prestigious jurist and author of fundamental works for the training of Spanish constitutionals,¹⁶⁸ died shortly after the decision.

After this controversy and subsequent decisions involving issues of moral significance (e.g., abortion and sterilization of mentally disabled people), the Constitutional Court has been undergoing a period of great tension, particularly during the process of reforming the Statutes of Autonomy.¹⁶⁹

In fact, the ultimate constitutionality of the new statutes will be substantially impacted by three key factors: (1) the conflict between the centrist vision of Spain held by the right-wing PP Party and the federalist view of the Spanish socialist PSOE Party; (2) the fact that the Court is essentially split in two groups, conservative and progressive; and (3) the indeterminacy of the sections of the Constitution regarding the territorial distribution of power. These

163. C.E. arts. 10–55, 86.

164. STC, Dec. 2, 1983 (No. 111).

165. The division did not entirely correspond to the ideology of the Court's members. For example, F. Rubio Llorente, current President of the Council of State and considered a progressive, voted against the constitutionality of the decree.

166. STC, Dec. 2, 1983 (No. 111).

167. *Id.*

168. See, e.g., MANUEL GARCÍA-PELAYO, *Derecho constitucional comparado*, in OBRAS COMPLETAS 223 (1991); MANUEL GARCÍA-PELAYO, *Las transformaciones del estado contemporáneo*, in OBRAS COMPLETAS.

169. STC, July 14, 1994 (No. 215) (discussing the constitutionality of anti-abortion laws); STC, Apr. 11, 1985 (No. 53) (discussing the constitutionality of sterilizing the mentally disabled).

issues have put the Court under significant pressure, which in part led to the decision to bar Magistrate Pérez Tremps from hearing the upcoming appeal on the statutes.¹⁷⁰

These pressures do not come solely from political parties but also from powerful media groups in Spain.¹⁷¹ The criticism of the Court by these new mass-media conglomerates may ultimately leave the Court in an untenable position, harming Spain's democratic system in ways these companies do not seem to appreciate. One can only hope that new jurists coming to the Court will be able to overcome these challenges and protect the Court's constitutional role through their jurisprudence.

VIII. THE SPANISH CONSTITUTIONAL COURT TODAY

In light of my prior discussion, I will now turn to an analysis of the main characteristics of the Spanish constitutional model—a model linked with what are now practically universal tendencies in contemporary democracies. The Constitution as a concept does recognize frontiers, just like democracy and the Constitutional Court. Surely, the challenge for the Spanish Court is to join the ranks of established constitutional courts in other democracies, although this is not an easy task. As political theorist Hannah Arendt reminded us:

Political passions—courage, the pursuit of public happiness, the taste of public freedom, an ambition that strives for excellence regardless not only of social status and administrative office but even of achievement and congratulation—are perhaps not as rare as we are inclined to think, living in a society which has perverted all virtues into social values; but they certainly are out of the ordinary under all circumstances.¹⁷²

The Spanish Constitutional Court has performed a vital function in the development of constitutional government in Spain. In reviewing the role the Court has played, I want to emphasize several of its characteristic features that involve positive action. As I have

170. See, e.g., ElPais.com, El Constitucional acepta la recusación de Pérez Tremps planteada por el PP, May 2, 2007, http://www.elpais.com/articulo/espana/constitucional/acepta/recusacion/Perez/Tremps/planteada/PP/elpepuesp/20070205elpepunac_11/Tes.

171. See, e.g., INT'L COMM'N OF JURISTS, SPAIN—ATTACKS ON JUSTICE 5 (2002), <http://www.icj.org/IMG/pdf/spain.pdf> (discussing media pressure on jurists).

172. ARENDT, *supra* note 1, at 280.

tried to show, Spain is not recognizable without the Constitutional Court. As such, the Court is not merely based upon negative authority. It possesses an *active* power that drives the Constitution and constitutional developments in a specific direction. The more open the constitutional principles embraced by the Court, the more relevant the Court becomes. From its interpretation of Article 149 to the Harmonization Law, the Court's many significant decisions affecting autonomous regions bear out this point.

The Court is an active power that has established a particular view of the Constitution, one that is *open to its citizens and characterized by dialog with other constitutional courts*. This is why, for example, the Court in STC 119/2001 considered how noise can influence the inviolability of homes under the European Court of Human Rights Sentences of December 9, 1994 and February 19, 1998.¹⁷³

The Court is an *active power* when the representative authorities are in crisis. The Court represents the law against politics: what political leaders cannot do (or do not want to do) is requested from the Constitutional Court, leaving the institution weaker at times as a result. As Professor Joseph Weiler noted in commenting about the Court of Justice of the European Union, the primacy of the Union's laws, their direct effects, the union members responsibilities for the failure to comply with community law, and the recognition of fundamental rights throughout the union are the result of the decisions of the Court of Justice, not the representative authorities.¹⁷⁴ Constitutional courts possess an active power, which in secured democracies does not answer to *direct infringements of the Constitution* but discusses the meaning of the constitutional precepts in light of constitutional doctrine.¹⁷⁵

The Court is a *compulsorily* active power because constitutional courts do not have the authority to avoid problematic issues, much like the U.S. Supreme Court. Nevertheless, in practice, the Spanish

173. STC, May 24, 2001 (No. 119). On the dialog of our Court with other constitutional Courts, see Angel Rodríguez, *Las resoluciones del Tribunal Constitucional español previas a las sentencias condenatorias del Tribunal Europeo de Derechos Humanos (Primeras reflexiones sobre las dificultades de un diálogo)*, in DERECHO CONSTITUCIONAL Y CULTURA: ESTUDIOS EN HOMENAJE A PETER HÄBERLE 517 (Francisco Balaguer Callejón ed., 2004).

174. JOSEPH H.H. WEILER, *EUROPA, FIN DE SIGLO* (1995).

175. See MARIA ANGELES AHUMADA RUIZ, *LA JURISDICCION CONSTITUCIONAL EN EUROPA* 49 (2005).

Constitutional Court is avoiding (and sometimes solving) problems by delaying their decisions. Yet as it has been stated, a recent reform of the L.O.T.C. has the aim to limit appeals to the Court over fundamental rights to controversies that are based on substantial facts.

The Court is an active power that is *very politically visible*. Therefore, some maintain that it is better to limit the Court's jurisdiction to legal controversies, removing party controversies from its docket. As it is impossible to identify judges who are completely free from prior opinion on significant legal issues, the challenge is to choose the Court's magistrates appropriately and remove procedures that cause the main political parties to select magistrates according to their political affiliation.¹⁷⁶

The Court is an *active and constructive power*: constructive for the Constitution and for the law by seeking pragmatic solutions to constitutional conflicts. The Spanish Constitutional Court has also been characterized as controlling the interpretation of constitutionality. The presumption that laws are constitutional is prevalent in European models of democracy, and this is where the use of interpretative constitutional decisions comes from. The aim is to save the law by pointing out which interpretation must prevail in order for the law to be in compliance with the Constitution.

The Court is an *active power that governs in a fragmentary way*. Its decisions on issues are necessarily limited, contrary to what happens with parliamentary enactments.¹⁷⁷ The essence of constitutional jurisdiction is in the structural tension between the Court and the law:¹⁷⁸ the new-method constitutionalism adds to the old rivalry between *gubernaculum* and *iurisdictio*,¹⁷⁹ as long as the Court's position is not mistaken.

176. One of the problems of this practice is that while it provides an incentive for those jurists who aim at being part of the Court to join the sphere of one or other party, instead of exercising their duties independent of political influence. *See id.* at 173–74.

177. See Francisco Balaguer Callejón, *Niveaux et techniques internes et internationaux de réalisation des droits en Europe*, 1995 REVUE FRANÇAISE DE DROIT CONSTITUTIONNEL 675.

178. See ELISEO AJA, *LAS TENSIONES ENTRE EL TRIBUNAL CONSTITUCIONAL Y EL LEGISLADOR EN LA EUROPA ACTUAL* (1998).

179. See CHARLES HOWARD MCILWAIN, *CONSTITUCIONALISMO ANTIGUO Y MODERNO* (Juan Jose Solozabal Echavarría trans., 1991).

IX. CONCLUSION

The Spanish Constitution established the Constitutional Court with the objective of guaranteeing the Constitution and its more distinctive elements: the fundamental rights of citizens and a regionally based structure of power. The Court is a separate branch from the ordinary judiciary, following the European model of judicial review. With respect to the Court's composition and appointment, the Constitution tries to establish mechanisms to guarantee the independence of the magistrates, although developments have made that goal more challenging.

The Court's decisions have been true to Spain's constitutional model, and its judgments affecting Spain's federal system have been especially important. The Court has faced moments during which political factions and Spain's citizens have seriously criticized it, but until now, the Court has been able to maintain its prestige and independence in the face of these challenges. However, Spain has reached a new moment of crisis with the coming changes to the Statutes of Autonomy. To maintain its critical constitutional role in the face of those who would attack its authority, the Court will have to exercise great care to protect the delicate political balance that underlies Spain's Constitution and democratic system.