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**THE RULE OF LAW AND CONSTITUTIONAL JUSTICE
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Constitutional Court of Spain Paper

I. The different concepts of the rule of law

1. *What are the relevant sources of law (e.g. the Constitution, case-law, etc.) which establish the principle of the rule of law in the legal system of your country?*

Spanish law incorporated the principle of the rule of law in the Political Reform Act (Act 1/1977, 4 January), legal beam in the transition from the authoritarian regime established during the Civil War (1936-1939) towards democracy, consolidated by the Constitution adopted in 1978. The 1978 Spanish Constitution (hereinafter CE), supreme law of the Spanish legal system, underlines in its preamble the intention of “Consolidating a State of Law which ensures the rule of law as an expression of the popular will”. Throughout the constitutional provisions, the term “Estado de Derecho” , with Germanic origin (*Rechtsstaat*), is commonly used in the sense of “rule of law” (“imperio de la ley”). Its first article reads:

“Spain is hereby established as a social and democratic State, subject to the rule of law, which advocates as the highest values of its legal order, liberty, justice, equality and political pluralism” (Article 1.1 CE).

This general declaration unfolds in a series of provisions giving a specific shape to the rule of law. Article 9, paragraph 3, establishes a set of related principles:

“The Constitution guarantees the principle of legality, the hierarchy of legal provisions, the publicity of legal enactments, the non-retroactivity of punitive measures that are unfavourable to or restrict individual rights, the certainty that the rule of law will prevail, the accountability of the public authorities, and the prohibition against arbitrary action on the part of the latter” (Article 9.3 CE).

Title I of the Constitution, on fundamental rights and public liberties, establishes and guarantees some principles that are directly linked to the rule of law: citizens equality before the law, liberty and personal safety, legal basis for criminal and administrative penalties or the rights to effective legal protection and fair trial (Articles 14, 17, 25 and 24, pars. 1 and 2 CE, respectively). This latter right is directly linked to the constitutional regulation of the judicial power, exercised “by Judges and Magistrates of the Judiciary who shall be independent, irremovable, and liable and subject only to the rule of law” (Article 117.1 CE). The Constitution of 1978 has stressed that administrative authorities should act “fully subject to justice and the law” (Article 103.1 CE). This latter rule is guaranteed in Article 106 CE:

“1. The courts control the power to issue regulations and to ensure that the rule of law prevails in administrative action, as well as to ensure that the latter is subordinated to the ends which justify it.

2. Private individuals shall, under the terms established by law, be entitled to compensation for any loss that they may suffer to their property or rights, except in cases of force majeure, whenever such loss is the result of the operation of public services”.

Finally, the Constitution compels the compliance with rule of law basic guarantees even in extreme circumstances: “Proclamation of states of alarm, emergency and siege shall not

modify the principle of liability of the Government or its agents as recognised in the Constitution and the law” (Article 116.6 CE).

2. How is the principle of the rule of law interpreted in your country? Are there different concepts of the rule of law: formal, substantive or other?

The Spanish Constitution is fully aware of the principle’s grounds: “The human dignity, the inviolable and inherent rights, the free development of the personality, the respect for the law and for the rights of others are the foundation of political order and social peace” (Article 10.1 CE).

Academic literature normally upholds a substantive conception of the rule of law, directly linked to the popular origin of power, democracy and respect for fundamental rights. That is the conception inspiring the constitutional text (namely, Articles 1, 9, 10 and 53 CE) in harmony with the Council of Europe (Preamble and Article 3 of the Statute of the Council of Europe, signed in London on 5 May 1949) and the European Union (Articles 2, 6 and 7 of Treaty on the European Union). Spain joined those organizations in 1977 and 1985, respectively.

Spanish constitutional case law has not explained the concept of the rule of law in detail: that principle is normally used along with other more specific texts that offer a range of rules determinative of the case to be adjudicated. Among the first decisions, Judgment 58/1982, 27 July, affirms that “the rule of law seeks to establish a government of laws and not of men”. This aspiration should not hide that there is no legislator, no matter how wise, who is able to approve laws exempt from misuse by rulers. This realization leads to a very relevant principle: “mere possibility that legislation might be abused by authorities is never reason enough to declare it unconstitutional” (Judgment 58/1982, 27 July, § 2; also, Judgments 132/1989, 18 July, § 14; 204/1994, 11 July, § 6; 235/2000, 5 October, § 5; 134/2006, 27 April, § 4; 238/2012, 13 December, § 7).

Some Judgments devoted to issues regarding sources of Law or their judicial application offer more elaborate ideas on the rule of law. It is established case law that the principle of legal certainty (Article 9.3 CE) “should be understood as certainty about the applicable law and the interests legally protected (Judgment 15/1986, 31 January, § 1), as the reasonable expectation of the citizen in how public power is going to apply the Law (Judgment 36/1991, 14 February, § 5), or as the clarity of the legislator instead of the normative confusion (Judgment 46/1990, 15 March)”. All these requirements are specific to the rule of law and, therefore, must be scrupulously respected by all public authorities and, even, by the legislator itself. Furthermore, “without legal certainty, there is no rule of law true to its name. Reasonable foreseeability of the legal consequences of behaviour, according to the legal system and its application by the courts, allows citizens to enjoy peaceful coexistence and guarantees social peace and economic development” (Judgment 234/2012, 13 December, § 8). So that if the content or omissions of the rules within the legal system, taking into account the interpretation standards admitted in Law, give raise to confusion or doubts that generate an uncertainty reasonably unsurmountable about the demandable behaviour for its fulfilment or about the forecast of its effects, we may conclude that the rule violates the principle of legal certainty (Judgments

150/1990, 4 October, § 8; 142/1993, 22 April, § 4; 212/1996, 19 December, § 15; 104/2000, 13 April, § 7; 96/2002, 25 April, § 5; 248/2007, 13 December, § 5; 234/2012, 13 December, § 8).

Furthermore, Spanish case law upholds that the independence of the Judicial Power “represents a key element in our legal system as it also does in every other State subject to the rule of law”. The Spanish Constitution establishes a judicial “power”, highlighting this point; whereas that term is not used when regulating the remaining traditional powers of the State, such as the legislative and the executive. Case law adds that the independence of the judicial power protects all and every Judge who exercise jurisdiction in the adjudication of cases (Judgments 108/1986, 29 July, § 6; 238/2012, 13 December, § 7). In the exercise of their constitutional role, Judges and Courts are independent because they are subject only to the law. Judicial independence and subjection to the rule of law are two sides of the same coin. That means that Judges are not subject to orders, instructions or indications from any other public power, especially the executive (Judgments 37/2012, 19 March, § 4; 58/2016, 17 March, § 4).

3. Are there specific fields of law in which your Court ensures respect for the rule of law (e.g. criminal law, electoral law, etc.)?

The rule of law has assumed quite a relevant role in the constitutional case law concerning the judicial power: more precisely, the independence of justice, the impartiality of judges and its government, the General Council of the Judicial Power. Moreover, the concept of rule of law has been relevant to set out the scope of the jurisdiction exercised by the courts: especially when it comes to identifying the areas without judicial control and the problems about the execution of judgments contrary to the interests of the Executive.

Article 24.2 CE does not expressly mention the citizens’ right to an impartial judge. However, the constitutional case law did not hesitate to read such a right into the Spanish Constitution. Impartiality of judges is a fundamental guarantee for the administration of justice because “without an impartial judge, there is not proper jurisdictional process”. Therefore, judicial impartiality, acknowledged in Article 6.2 of the European Convention for the protection of human rights (ECHR) has been declared to be an implicit aspect of the right to due process, with especial relevance in the criminal field. The acknowledgement of this right entails the guarantee that the courts are not prejudiced against the accused. The case law protects not only the subjective impartiality but also its objective dimension, which ensures that the judge approaches the *thema decidenci* without having any previous opinion about it (Judgements 26/2007, 12 February, § 4; 47/2011, 12 April, § 9; 60/2008, 26 May, § 3).

The Spanish constitutional court rendered a decisive Judgment 145/1988, 12 July, declaring unconstitutional the law allowing, for reasons of efficiency, the investigating judges (*Juzgado de instrucción*) to render judgment in cases for less serious offences they had been investigating. The constitutional court severed in a definitive manner the investigating and the adjudicating roles of criminal judges. It expressly affirmed that all criminal procedures should respect the constitutional guarantees, Article 24.2 among others, given the configuration of our legal system based on the rule of law, quoting article 1.1 of the Constitution (Judgment 145/1988, § 5). As a result, the legislator passed an Act establishing new criminal judges (*Juzgados de lo Penal*), to hear and decide criminal cases coming from the investigating judges

that are not under the jurisdiction of the Provincial Courts, which are in charge of the more serious crimes.

Secondly, case law on the rule of law concerning criminal law develops substantive aspects, under the constitutional provision enacting that the *ius puniendi* is subject to the legality principle (Article 25 CE); as for the procedural aspects, the Constitution has enacted due process (Article 24 CE). The wide power enjoyed by administrative authorities to impose fines and other penalties under Spanish law (other than deprivations of liberty, prohibited by art. 25.3 CE) has its own chapter in the case law. Furthermore, constitutional judgments have declared, in light of rule of law principles, that the Spanish Constitution prohibits courts to take into account evidence obtained in violation of human rights. This illicit evidence doctrine was adopted in Judgment 114/1984, 29 November, because of the preferential position that fundamental rights enjoy in the Spanish legal system under the Constitution (Article 10.1 CE). Individual rights are inherent to the rule of law (Judgement 25/1981, 14 July, § 5 which made reference to STC 114/1984, § 3). This constitutional case law had a direct impact on the legislation. The Judicial Power Organic Act, July 1985 (LOPJ), establishes that all procedures must respect *bona fide* and that evidence obtained violating fundamental rights, directly or indirectly, shall have no effect (Article 11.1 LOPJ).

Thirdly, rule of law doctrines have shaped the sources of law: there are relevant cases concerning the temporal effects of legal reform, institutional limits to laws adopting the annual budget or constitutional restrictions imposed to the singular acts. The rule of law is also an important consideration in the string of cases dealing with the secessionist challenge that is swelling in Catalonia.

Spanish constitutional case law has denied that new laws, adopted by a democratic parliament, must respect vested rights. The principle of the non-retroactivity of laws (Article 9.3 CE) concerns only, besides unfavourable criminal law, those laws that “restrict individual rights”. The Spanish court has read this provision very narrowly, in order to avoid confusion with the *ius quaesitum*, as protecting from retroactive laws only the fundamental rights listed in Title I of the Constitution. The 1978 constitutional text did not use the expression “acquired rights” purposely, because prohibiting parliament to change rights granted under the legislation to be abrogated would not be in accordance to the rule of law in a democratic State. A basic premise associated to the democratic principle is that the legislator from the past cannot bind the legislator for the future. Therefore, there is no right to the immutability of the law and of those situations created under its empire. Even if adoption of new laws has some limits connected to the legal certainty principle, there is no constitutional obstacle to change them (Judgments 27/1981, 20 July, § 10; 108/1986, 29 July, § 19; 97/1990, 24 May, § 4; 56/2016, 17 March, § 3).

The Annual Finance Act must include all public expenditures and revenues; otherwise, it would be null and void. The public budget or appropriations law has a “reserved content” by direct constitutional imperative (Article 134.2 CE). The constitutional court has declared that Parliaments (the national *Cortes Generales* as well as the legislative assemblies for the 17 Autonomous Communities) must respect literally the budgetary principle of universality, because it derives directly from the rule of law: only if the annual appropriation bill includes all expenditures and estimates of revenue can Parliament perform its democratic role and the

citizens form an informed opinion on the subject (Judgements 3/2003, 16 January, § 4; 9/2013, 28 January, § 3 3; 206/2013, 5 December, § 5).

Spanish constitutional case law has established strict limits to the adoption of ad-hoc legislation or singular acts. Two varieties have been discerned: acts passed by Parliament adopting specific measures of an executive nature, not general rules; or acts addressed to one individual in regard to his or her particular circumstances, that exhausts their content and efficacy in the adoption and execution of a measure taken by the legislator for this specific situation non applicable to any other case. The Spanish court has accepted the constitutional validity of this kind of legislative enactment, but just as an exception. Consequently, singular or ad-hoc laws are subject to strict limits deriving from the Constitution, namely: the principle of equality; the interdiction to condition the exercise of fundamental rights, subject matter reserved to general laws; and “those other exceptional cases that cannot be regulated in any other way for reasons of an extraordinary transcendence and complexity reasons, that cannot be addressed by administrative authorities in the exercise of their legal prerogatives under the legality principle” (Judgments 166/1986, 19 December, § 11; 48/2005, 3 March, §§ 6, 7; 129/2013, 4 June, § 4; 231/2015, 5 November, § 10; 170/2016, 6 October, § 4). The case law has also added that all singular or ad-hoc acts, whether they take private property or not, must respect the fundamental right to an effective judicial protection (Article 24.1), particularly if they affect the execution of judicial decisions (Judgments 73/2000, 14 March, § 11; 312/2006, 8 November, § 4; 233/2015, 5 November, § 15).

Finally, the Spanish case law has also been forced to remind that public authorities should abide by the Constitution: at a minimum, they must exercise their powers respecting the Constitution and the legal system: a duty directly flowing from our constitutional rule of law (Judgment 259/2015, 2 December, § 4). This respect for the Constitution embodies the submission of all authorities to the popular will, as expressed by the constituent power (Judgments 1087/1986, 29 July, § 18; 238/2012, 13 December, § 6). In a constitutional State, the democratic principle is linked to the unconditional primacy of the Constitution: all decisions adopted by public authorities must abide by the Constitution with no exception, without leaving any open space of immunity (Judgment 42/2014, 25 March, § 4). Therefore, the Parliament of Catalonia’s resolution initiating a self-determination procedure after the regional elections held in September 2015, runs against the rule of law and against the democratic legitimacy of the Parliament of Catalonia, which is acknowledged and protected by the Constitution itself. Constitutional legality cannot be subordinated to democratic legitimacy in the social and democratic State subject to the rule of law that the Constitution of 1978 has established. The legitimacy of political action or policy rests on its accordance to the Constitution and the legal system. Without this accordance, there is no such legitimacy. In a democratic conception of power, there is no legitimacy but that which is founded in the Constitution (Judgment 259/2015, 2 December, § 5).

4. Is there case-law on the content of the principle of the rule of law? What are the core elements of this principle according to the case-law? Please provide relevant examples from case-law.

See the answer to question 2.

5. Has the concept of the rule of law changed over time in case-law in your country? If so, please describe these changes referring to examples.

No.

6. Does international law have an impact on the interpretation of the principle of the rule of law in your country?

Yes. Article 10.2 of the Constitution provides: "The principles relating to the fundamental rights and liberties recognised by the Constitution shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements thereon ratified by Spain".

The fact that Spain is member of both the Council of Europe and the European Union (since 1977 and 1985, respectively) has provided the application of this constitutional rule with a clear European bias. The European Convention for the protection of human rights (ECHR) and its protocols are the legal text that had the biggest interpretative influx in the application of the Spanish Constitution. The case law has also noticed the effect of the EU law in the field of fundamental rights before the Treaty of Lisbon (2007-2009) provided the fundamental rights Charter with legal binding effect.

The Kingdom of Spain has ratified many international treaties about human rights, starting with the United Nations international covenants of 1977 on civil and political rights and on economic and social rights. Those international treaties form part of binding Spanish law (Art. 96 CE) along with many others, for example the treaties for the prevention and punishment of genocide, protecting the rights of women and the convention on the rights of the child.

It should be highlighted that, under the Constitution of 1978, international treaties, once they are officially published in Spain, become incorporated into its legal system with full legal force (Article 96.1 CE; Judgments 140/1995, 28 September, § 3; 197/2006, 3 July, § 3). The 1978 Constitution also provides that Spain might conclude "treaties by which powers derived from the Constitution shall be vested in an international organisation or institution" (Article 93 CE). This provision forms the basis for the participation of the Kingdom of Spain in the European Union and its law (Declarations of the Constitutional Court 1/1992, 1 July and 1/2004, 13 December).

The Spanish constituent power, in 1977, acknowledged the will of the Nation to join an international legal order supporting the protection of human rights, as well as our agreement with the values and interests protected by those international conventions (Judgment 91/2000, 13 March, § 7). As the Constitutional Court said in Judgment 21/1981, 15 June, the fundamental rights written in the Constitution respond to the system of values and principles underlying the Universal Declaration of Human Rights and the international treaties on human rights ratified by Spain, which also inspire all the Spanish legal system (Judgment 21/1981, § 10).

The constitutional case law shaping the rule of law in Spain has drawn inspiration directly on the European law on human rights: the Rome Convention of 1950 has played a particularly

important role. We can recall, among many examples, the case law on the right to a public trial. Judgment 96/1987, 10 June, concluded that the publicity of judicial trial fills such an important place in the rule of law, that is a condition for the constitutional legitimacy of the judicial administration of justice (quoting Article 6.1, Convention of Rome, Judgment 96/1987, § 2; 56/2004, 19 April, § 5). The same can be said about the right to an impartial judge, as we have seen previously (Judgment 183/2014, 22 July, § 3). Article 5 of the European Convention on Human Rights has also played an important role in the interpretation of the right to personal liberty: for example, when the Court declared that custody by police officers was subject to very strict time limits (Judgments 31/1996, 27 February, § 4; 224/1998, 24 November, § 3).

II. New challenges to the rule of law

7. Are there major threats to the rule of law at the national level or have there been such threats in your country (e.g. economic crises)?

The main current problem confronted by the rule of law in Spain has been created when one of the seventeen Autonomous Communities forming the Spanish State proclaimed its intention to become independent in order to establish a Republic in Catalonia. The constitutional court has upheld on many occasions that only reforming the Constitution of 1978 could that result be achieved. Article 2 declares that “The Constitution is based on the indissoluble unity of the Spanish nation, the common and indivisible country of all Spaniards”: Therefore, it cannot be accepted that the Catalanian people is sovereign, as the Parliament of Catalonia declared in 2013. Furthermore, none of the many declarations and laws passed by the nationalist majority at the Parliament sitting in Barcelona in flat contradiction to the Spanish Constitution have any legal validity. The unconditional primacy of the Constitution demands that every decision adopted by public powers abides by the Constitution with no exception (Judgment 42/2014, 15 march, § 3).

After that decision was rendered, autonomic elections were held in Catalonia. A coalition of nationalist parties obtained a majority of seats in Parliament ((72 out of 135) with 48 per 100 of the vote. The new Parliament voted to open a “political procedure in Catalonia as a result of the elections held on 27 September 2015”, once again on the basis of the Catalanian people sovereignty, in order to achieve political independence. The constitutional court declared invalid the aforementioned parliamentary decision (Judgment 259/2015, 2 December). Since that date, many legislative acts have been declared null and void for violation of both the Spanish Constitution and the Catalanian By-Law of Autonomy. The Catalanian legislation declared totally or partially invalid includes several laws adopted to build “the structures of the State” to prepare the future independence: Treasure Administration, Social Protection Agency and a series of strategic infrastructures (Judgment 128/2016, 7 July); Foreign relations of Catalonia (Judgments 228/2016, 22 December, and 77/2017, 21 July); popular consultations through referendum (Judgment 51/2017, 10 May); the establishment of a commission for the national transition and the executive plans to prepare structures for the future State (Judgment 52/2017, 10 May); Property Register of Catalonia (Judgment 67/2017, 25 May); audio-visual communication (Judgments 78/2017, 22 June, and 86/2017, 4 July); abuses in the

regulation of Catalan as an official language along with Castilian (Judgments 87/2017, 88/2017 and 89/2017, 4 July); budgetary or appropriation laws to cover the expenditures derived from the organisation of a referendum about the political future of Catalonia (Judgment 90/2017, 5 July). Moreover, the Court has declared unconstitutional several decisions adopted by the governing bodies of Catalanian Parliament disregarding Judgment 259/2015, 2 December (Orders 141/2016, 19 July; 170/2016, 6 October; and 24/2017, 14 February).

The Catalanian nationalist political parties have declared their intention to disobey the Spanish constitutional court decisions. In the initial declaration, invalidated by Judgment 259/2015, the Parliament of Catalonia stated that, as the representative of Catalan sovereignty and expressing the constituent power, no Catalan authority should abide by any decision adopted by the Spanish state institutions, "particularly the Constitutional Court", in regard to the democratic procedure to disconnect Catalonia from the Spanish state (Parliament of Catalonia Resolution 1/XI, 9 November, 2015, section 6). The situation might come to a head next October the 1st, 2017, date when an illegal referendum for the self-determination of Catalonia has been announced.

8. Have international events and developments had a repercussion on the interpretation of the rule of law in your country (e.g. migration, terrorism)?

Without doubt. However, our case law does not give any intimation on this matter.

9. Has your Court dealt with the collisions between national and international legal norms? Have there been cases of different interpretation of a certain right or freedom by your Court compared to regional / international courts (e.g. the African, Inter-American or European Courts) or international bodies (notably, the UN Human Rights Committee)? Are there related difficulties in implementing decisions of such courts / bodies? What is the essence of these difficulties? Please provide examples.

There are not substantial differences between the different European and Spanish case law. Constitutional case law in Spain agrees with the criteria laid down by the Human Rights European Court in Strasbourg. There are some minor differences in several fields: equality before the law, presumption of innocence and respect for family life.

The Spanish constitutional court has construed the right to equality (Article 14 CE) drawing inspiration directly from Strasbourg case law (Article 14 ECHR and Protocol no. 12, 4 November, 2000). Only one dissonance can be found, as summarized in Judgment 181/2000, 29 June (§ 11): it is constant case law of the Spanish court that the right to equality in Article 14 of the Constitution does not protect the right to be treated differently (Judgment 114/1995, 6 July, § 4). There is no enforceable right in Spanish law to an unequal normative treatment (Judgment 16/1994, 20 January, § 5). Neither it is possible to affirm the existence of any constitutional mandate preventing non-differentiation (Judgment 308/1994, 21 November, § 5). The Spanish Constitution establishes the presumption of innocence (Article 24.2 CE), as it also does the Treaty of Rome (Article 6.2 ECHR). Spanish case law has scarcely developed an external aspect of this fundamental right: the presumption of innocence as applied to situations beyond a judicial procedure or, in other words, the right to be treated as an

innocent person and, therefore, not to suffer any consequence or legal effect derived from the commission of criminal offenses (Judgment 109/1986, 24 September, § 1). Most decisions of the Spanish constitutional court are devoted to the respect of the presumption of innocence within trials: whether a criminal conviction or an administrative penalty are supported by licit and regular evidence. The interdiction to treat someone as guilty when he or she has not been convicted by a court after a fair trial is rarely protected. However, this latter dimension has received considerable attention in the Strasbourg case law.

This apparent contradiction became apparent in the Lizaso Azconebieta case. This person was mentioned in a press conference in the Ministry of Internal Affairs, to declare he belonged to a terrorist organization. In fact he had been arrested by the police, but on wrong information so he was soon released. Judgment 244/2007, 10 December, considered that the refusal to compensate for the fact of having been wrongly accused in public of committing serious crimes did not violate his fundamental rights. Regarding the presumption of innocence, the Judgment declared that the right not to suffer the consequences or legal effects linked to crimes should be protected, in Spanish law, under the right to honour or reputation (Judgment 139/2007, 4 June, § 2). The European Court of Human Rights, on the contrary, declared that the relevant right in the case was the presumption of innocence (art. 6.2 ECHR) and found it had been violated by the Spanish authorities. In Judgment 28 June 2011 (Application 28834/08), the Strasbourg Court affirms that the presumption of innocence is, indeed, one of the elements of a fair criminal trial. but its scope is wider and it requires that no public authority declares someone guilty before having been declared as such by a Court.

Another point where there is controversy is in the right to familiar privacy (Article 18.1 CE) and the right to respect for family life (Article 8.1 ECHR). In Judgment 236/2007, 7 November, the Spanish constitutional court declared that the right of resident foreigners to family reunification is not a matter reserved to organic law (Article 81.1 CE), and is not subject to legislation (Article 53.1 CE). Judgment 236/2007 underlined the contrast between that European convention and the Spanish case law. "Our Constitution does not acknowledge a right to family life in the same terms that the European Convention on Human Rights has interpreted Article 8.1 ECHR".

Regarding the Court of Justice of the European Union, some differences with Spanish constitutional case law can be detected in issues related to the right to equality and to the European Arrest Warrant.

Spanish labour law has created a Fund to guarantee the payment of employees' outstanding claims in the event of their employer's insolvency. That legislation is in conformity with the EU directive on the insolvency of employers. Spanish social courts had interpreted that the Wages Guarantee Fund should pay only those debts awarded in a judgment or administrative decision, but not those awarded in a conciliation agreement. The Constitutional Court considered that this difference in treatment did not violate the right to equality, because the debts were objectively different (Judgment 306/1993, 25 October). However, the European Court of Justice reached an opposite conclusion: the general principle of equality and non-discrimination in European Union law precludes a different treatment between compensation granted by a judgment or an administrative decision and "compensation of the same nature agreed during a judicial conciliation procedure" (Court of Justice Judgment *Cordero Alonso*, 7

September 2006, case C-81/05). In that same Judgement, the Court reminded that since “the general principle of equality and non-discrimination is a principle of Community law, Member States are bound by the Court’s interpretation of that principle. That applies even when the national rules at issue are, according to the constitutional case-law of the Member State concerned, consistent with an equivalent fundamental right recognised by the national legal system”. Furthermore, in “such a situation, a national court must set aside any discriminatory provision of national law, without having to request or await its prior removal by the legislature, and apply to members of the disadvantaged group the same arrangements as those enjoyed by other workers”. This apparent conflict did not have consequences because the Spanish legislator changed the national rules that same year 2006.

In the field of constitutional guarantees in the criminal procedure, the Spanish Constitutional Court had adopted a strict standard on trials *in absentia*. Judgment 91/2000, 30 March, found that the right to defence and due process (Article 24.2 CE) had a core content, to be upheld by Spanish courts in all circumstances, including extradition proceedings and any other form of international cooperation. The Spanish Constitution guaranteed the right of everybody to be present at trial when accused of serious crimes; if somebody was tried *in absentia*, due process implied the right to challenge the conviction. For this reason, Spanish courts could grant the extradition required by countries where conviction in the absence of the accused is lawful, but only conditional to the possibility for the convicted to challenge the decision. This criteria became controverted when applied to the European Arrest Warrant (dissenting votes to Judgment 199/2009, 28 September). In this context, the Spanish court sent its first preliminary reference to the Court of Justice, which rendered the *Melloni* Judgment as a result (Case C-399/11, 26 February 2013). Subsequently, the Spanish court revised its case law to accommodate the European ruling along with the case law of the Strasbourg Court (Judgment 26/2014, 13 February).

Dialogue can also affect European case law. For example, when the European Court of Human Rights had to adjudicate on interception of boats at high seas, it has expressly taken into consideration the criteria set by the Spanish court (ECtHR Decision *Rigopoulos vs. Spain*, 1999; Judgements *Medvedyev vs. France*, 2008 and 2010). In the European Union, Judgment *Unión de Pequeños Agricultores (UPA)*, 2002) upholds with a Spanish flavour the right of individuals to the effective protection of the courts guaranteed by the Charter of fundamental rights.

III. The law and the state

10. *What is the impact of the case-law of your Court on guaranteeing that state powers act within the constitutional limits of their authority?*

Spanish public authorities should abide by the Constitution and the rest of the legal system (Article 9.2 CE). The Constitutional Court, as supreme interpreter of the Constitution (Article 161 CE and Article 1 Organic Act of the Constitutional Court, hereinafter LOTC) must ensure that all authorities respect the Constitution (Judgments 76/1983, 5 August, § 4; 259/2015, 2

December, § 4; and 83/2016, 28 April, § 5). All judgments rendered by the Court must be published in the "Official State Gazette" (BOE). They have *res judicata* effects and are binding on everybody (*erga omnes*: Article 164 CE). The *res judicata* entails two aspects: formally, it means that Constitutional Court judgments cannot be appealed (Article 93.1 LOTC). Secondly, not even the Constitutional Court can ignore the decisions it has already taken. *Erga omnes* means that the Constitutional Court decisions should be applied by all public authorities and that any other similar conflict must be adjudicated in the same terms, except when the Court itself overrules its case law in plenary formation (Article 13 LOTC).

When the Constitutional Court finds a law to be in contradiction with the Constitution, its judgment will declare that legal provision null and void (Art. 39.1 LOTC). This declaration has the effect of *res judicata*; it is binding for all public authorities and it deploys general effects on the day it is published in the official gazette (Article 38.1 LOTC). Therefore, when the Court acts as "negative legislator" there is no need to amend or modify the law: the provisions declared unconstitutional are rendered null directly by the court's decision. Some cases when this situation can be exemplified include the Public Security Act (Judgment 341/1993, 18 November); the Urban Planning Act (Judgment 61/1997, 20 March); some provisions of the 2006 Catalonia By-Law of Autonomy (Judgment 31/2010, 28 June). In some cases, the Court has explicitly stated that the legal provisions declared null and void are expelled from the legal system by the court ruling; no further action is required (Judgments 54/2000, 28 February, 19/1987, 17 February). Legal rules declared unconstitutional cannot be applied from the moment the constitutional ruling is officially published (Judgment 45/1989, 20 February, § 11).

Whenever there is a conflict among public institutions, it is for the constitutional court to declare who has the power to act in the case; the judgment might also declare null and void any decision adopted by the conflicting authorities and decide upon the legal situations created while the conflict was pending (Articles 73.1 and 74.2 LOTC). The Spanish court has adjudicated only two constitutional conflicts among State authorities: on the proper role and composition of the General Council for the Judiciary (Judgment 45/1986, 17 April); and the prerogative to declare urgent parliamentary debates on a Bill before the Senate or Upper Chamber of Parliament (Judgment 234/2000, 3 October).

11. Do the decisions of your Court have binding force on other courts? Do other / ordinary courts follow / respect the case-law of your Court in all cases? Are there conflicts between your Court and other (supreme) courts?

The Spanish Constitutional Court adjudicates questions on the validity of legislation, referred by judicial courts while the case is pending before them; it also hears individual complaints, brought directly by citizens for the protection of their fundamental rights, when judicial remedies have been exhausted (Articles 163 and 161.1.b CE). In the first kind of cases, the Court communicates the ruling on the validity of statutes as soon as it is decided to the judicial courts, which are bound to comply with it; all other courts must follow the declaration that legislation is valid or unconstitutional, as soon as the Judgement is officially published (art. 38.3 LOTC). The declaration that legislation is unconstitutional has no retroactive effect, except in cases of criminal convictions or administrative penalties (Articles 161.1.a CE, 40.1 LOTC).

Judicial bodies are bound to comply with the operative part of the judgments rendered by the Spanish constitutional court. Also, they must abide by the *ratio decidendi* of constitutional judgments, as far as they offer an interpretation of the Constitution which is binding on all public authorities. The 1979 Act on the Constitutional Court states explicitly that the judicial case law regarding the legal acts affected by constitutional judgments is understood to be modified in the light of the case law emanating from the Constitutional Court (Articles 40.2 and 38.2 LOTC). The 1985 Organic Act on the Judiciary (LOPJ) states that the Constitution is supreme *lex* and, therefore, binding on all judges and courts: they must apply the statutes and other ordinary legislation following the rules and principles enacted by the Constitution as construed by the Constitutional Court in any kind of proceedings (Article 5.1 LOPJ). The fundamental rights and liberties declared by the Constitution enjoy a especial relevance (Article 7, paragraphs 1 and 2, LOPJ).

These legal provisions give expression to principles underlying the Spanish constitutional system. Judgments and decisions adopted by the constitutional court when reviewing the validity of legislation, adjudicating on competence conflicts and protecting fundamental rights creates case law, has a general binding character which the judicial courts cannot ignore. Judgement 302/2005, 21 November, expounded the basic principles and added a caveat: Sometimes when the judicial bodies apply the judgments of this Court they have to interpret their scope, in order to reasonably fulfil its content. As result, this will determine the suitable measures to make effective a fundamental right. However, the remedies adopted by the judicial court can neither disregard what is established in the constitutional court's decision, nor alter the legal situation thus declared (Also, Judgments 158/2014, 21 September, § 4; 195/2009, 28 September, § 4. Art. 87.1 LOTC).

In the first decade after the Constitutional Court establishment in 1980, there were some minor frictions with two of the Supreme Court five divisions (Civil and Criminal). The reform of the Constitutional Court Organic Act in 2007 and Judgment 133/2013, 5 June, have put to rest definitely any possibility of misunderstanding. Both highest courts collaborate now in the framework of an agreement signed by the constitutional court and the supreme court presidents on 21 November 2014.

12. Has your Court developed / contributed to standards for law-making and for the application of law? (e.g. by developing concepts like to independence, impartiality, acting in accordance with the law, non bis in idem, nulla poena sine lege, etc.).

Certainly. See reply to questions 2 and 3.

13. Do you have case-law relating to respect for the rule of law by private actors exercising public functions?

The Spanish Constitution binds the citizens along with the public powers (Article 9.1 CE). However, the duty to comply with the Constitution has a different meaning in each case. The citizens have a general negative duty to abstain from any action against the Constitution,

regardless of any specific positive duties they also might have in the military or tax fields (Articles 30 and 31). As for the public powers, they have a general positive duty to exercise their functions according to the Constitution. That is to say, once public authorities take up office, they must respect and follow strictly the Constitution, which does not mean they must agree with its full content: they can aspire to modify any constitutional provision, as far as they do so respecting the legal procedures (Article 166 CE; Judgments 101/1993, 18 November, § 3; 48/2003, 12 March, § 7; 42/2014, 25 March, § 4; 259/2015, 2 December, § 7).

For historical reasons, the Spanish Constitution of 1978 provides a large array of safeguards for fundamental rights, which cannot be limited for being used with an unconstitutional purpose. A militant democracy, in the sense of a legal system requiring not only the respect, but the positive adherence to the present Constitution, has no place in Spain. This conception has clear consequences in the construction of the freedoms of thought, expression and information and rights to political participation, because it implies the necessity to differentiate between those activities contrary to the Constitution and those consisting in the dissemination of ideas and ideologies. The democratic and representative system is grounded in pluralism and the free exchange of ideas. Therefore, public authorities are prevented from any activity whatsoever intended to control, select or determine the public circulation of ideas (Judgments 235/2007, 7 November, § 4; 52/2017, 10 May, § 5). Individual liberty protects also political parties, which are not public powers nor State bodies. They can only be asked to respect the constitutional values in their activities, which is compatible with the whole ideological liberty (Judgment 48/2003, § 10).

On another front, Spanish case law admits to some degree that fundamental rights are relevant in relationships among individuals. Certainly, Article 53.1 of the 1978 Constitution establishes that public authorities are bound by fundamental rights. However, case law has declared that this provision does not imply a complete exclusion of other possible subjects: in light of the social State clause, it is unmistakable that the beneficiary of constitutional rights should enjoy them in social life also (Judgment 18/1984, 7 February, § 6). The Spanish court has declared that private activities can violate fundamental rights; it has declared, furthermore, that citizens are entitled to constitutional individual redress whenever judicial courts do not protect fundamental rights effectively in private law cases. Relationships between individuals are not excluded from the application of the principle of equality, for example. Article 1.1 of the Constitution declares equality to be a superior value of the whole legal system; and Article 9.2 CE provides that public authorities should promote conditions which ensure that the freedom and equality of individuals and of the groups to which they belong may be real and effective. Nevertheless, fundamental rights in private situations are nuanced to make them compatible with other legal principles, particularly the freedom of contract and individual autonomy (Judgments 177/1988, 10 October, §§ 4 and 5; 171/1989, 19 October, § 1; 2/1998, 12 January, § 2; 27/2004, 4 March, § 4).

14. Are public officials accountable for their actions, both in law and in practice? Are there problems with the scope of immunity for some officials, e.g. by preventing an effective fight

against corruption? Do you have case-law related to the accountability of public officials for their actions?

The Spanish Constitution ensures “the accountability of the public authorities” as an essential ingredient to the rule of law. This general principle is declared in Article 9.3 of the Constitution and inspires different elements in the constitutional architecture. It can be mentioned, among others, political and criminal liability of the president and cabinet members of the Executive branch (Articles 102 and 108 CE); state liability from damages caused by public Administrations (Article 106.2 CE) as well as the authorities and public officers themselves (Articles 103 and 136. 2 CE). The judges, independent and subject only to the rule of law, are also “liable” (Article 117.1 CE). This principle applies also to the whole of the judicial power: the State is liable for “damages caused by judicial errors as well as those arising from irregularities in the administration of justice” (Article 121 CE).

Public officials are liable even in time of emergency: “Proclamation of states of alarm, emergency and siege shall not modify the principle of liability of the Government or its agents as recognised in the Constitution and the law” (Art. 116.6 CE). These extreme situations are governed by a specific law (Organic Act 4/1981, 1 June). The Constitution notes that “Unjustified or abusive use of the powers recognised in the foregoing organic law shall give rise to criminal liability where it is a violation of the rights and liberties recognised by the law” (Article 55.2 CE).

Constitutional case law has declared that officers elected by citizens should never confuse the implementation of their legitimate political goals with the illegal exercise of the public authority they have been temporarily granted. No fundamental right is violated when a public authority is convicted for the commission of a crime by a judgment delivered by a court after a public trial with all due guarantees (Order 154/1992, 25 May). Disbarment from office and the concomitant prohibition to run in future elections after a criminal conviction for crimes carried out in the exercise of public functions is not unconstitutional: those who exercise public office can be expected to behave in an exemplary way, given that they act as representatives of the citizens (Judgment 151/1999, 14 September, § 3).

It might be relevant to underscore that liability of public authorities has been reaffirmed in Spain in difficult cases. For example, the disappearance and murder of two young people in 1983, in the context of the dirty war carried out in those years against the terrorist organization ETA, ended up in prison convictions to the then Home Affairs Minister and other significant state security officers, as well as several police force officials and servicemen. The Constitutional Court dismissed the fundamental rights appeals brought against those convictions, observing that no constitutional breaches were discernible (Judgment 69/2001, 17 March, and connected).

IV. The law and the individual

15. Is there individual access to your Court (direct / indirect) against general acts / individual acts? Please briefly explain the modalities / procedures.

The 1978 Spanish Constitution has established a constitutional court with jurisdiction to adjudicate on the constitutionality of the laws, the protection of fundamental rights and liberties and the resolution of conflicts among State bodies and among State general institutions and Autonomous Communities. The Court is a constitutional body, governed by Title IX of the Constitution, as well as Articles 95 and 123. The Court has been established as an autonomous institution, separate from the Judiciary (Titles IX and VI). The Court is unique within its order; it exercises jurisdiction over the whole national territory and its seat is located in Madrid (Article 1 LOTC). The Court is the supreme interpreter of the Constitution and also the superior jurisdictional body in constitutional guarantees (Article 123 CE, Article 1 LOTC). No conflict of jurisdiction or competence can be formulated against the Court. Its decisions cannot be reviewed by any other jurisdictional body of the State. Any public activity that contradicts or undermines the Court jurisdiction is null and void; it could be so declared *ex officio* by the Constitutional Court (Article 4 LOTC; Judgment 133/2013, 5 June).

Constitutional review of legislation in Spain is mixed. The Constitutional Court is empowered to declare null and void any act of Parliament, or any other provision having the force of law, that runs against the Constitution. However, the judicial courts must examine whether the laws they apply in individual cases might be contrary to the Constitution. In case they think so, they can refuse application to any act passed before December 1978, when the Constitution took effect, unless they rather submit a question of unconstitutionality (Judgment 4/1981, 2 February, § 1); in regard to legislation passed later than the entry into force of the Constitution, judicial courts should always request from the Constitutional Court a ruling on the validity of legal provisions before giving final judgment (Article 165 CE; Judgments 17/1981, 1 June; 23/1988, 22 February). Nevertheless, Spanish courts apply European Union law, whose norms prevail over those of its Member States. The Spanish Constitutional Court has accepted that, as a consequence, regular courts can refuse application to national legislation in contradiction with European rules in the terms defined by the Court of Justice (Declaration 1/2004, 13 December, § 4; Judgments 28/1991, 14 February, § 6; 145/2012, 2 July, §§ 5-7; 61/2013, 14 March, § 5).

Individuals are entitled to have their fundamental rights and liberties protected by the Constitutional Court. This protection can be achieved in an indirect manner, whenever a judge refers to the Constitutional Court a question on the validity of legislation that governs the disposition of the case (Article 163 CE; Judgment 133/1987, 21 July, § 1). Direct protection from the Constitutional Court is provided in individual complaints proceedings (*Amparo* appeal: Articles 53.2 and 161.1.b CE). This remedy only lies after all legal remedies have been exhausted before the competent judicial courts: civil, criminal, administrative, social or military. Citizens cannot challenge directly an statute in *amparo* appeals; but the Constitutional Court can review the validity of legislation applied by a judge in a specific case (Articles 42 and 55.2 LOTC; Judgments 41/1981, 18 December, § 1; 83/2016, 28 April, § 11).

16. Has your Court developed case-law concerning access to ordinary / lower courts (e.g. preconditions, including, costs, representation by a lawyer, time limits)?

The Spanish Constitutional Court has developed an extensive case law concerning access to justice, grounded on the fundamental right to an effective remedy (Article 24.1 CE, equivalent to Art. 6.1 ECHR). Only some general ideas can be offered here,

There is constant case law stating that the right to an effective remedy includes the right to obtain a judicial decision on the merits of the case when no legal obstacles prevent it. This right is also satisfied when the judicial decision dismisses a civil or criminal case without reaching the merits, as long as that decision is the consequence of the reasonable and proportionate application of a procedural rule (Judgments 107/1993, 22 March, § 2; 158/2000, 12 June, § 5; 39/2015, 2 March, § 5).

There are many aspects to take into account when it comes to the access to courts. In general, the case law makes a difference between the constitutional protection of access to trial and access to any later appeal established by law. The right to receive a judgment on the merits of the case is at the heart of the constitutional right of access to justice and is specially protected. However, once a decision on the merits has been rendered by a court of law, the right to appeal is less stringent: it depends on the terms of the law creating the revision procedure and the rights of the remaining parties to the execution of judgments must be taken into account (Judgments 37/1995, 7 February; 149/2016, 19 September). The only appeal that legislation is bound to create is connected to the right enjoyed by everyone convicted of a criminal offence by a tribunal to have his conviction or sentence reviewed by a higher court (Judgments 76/1982, 14 December, § 5; 48/2008, 11 March, § 2).

Economic conditions for access to justice are defined by law, but they must respect Article 24 CE. Court fees and costs may constitute an unlawful restriction on access to justice if they are too high or disproportional (Judgments 20/2012, 16 February; 140/2016, 21 July). The Spanish Constitution acknowledges the right to legal aid to whomever demonstrates they lack enough economic means to plea or to defend themselves (Art. 119 CE; Judgments 16/1994, 20 January, § 3; 128/2014, 21 July, § 3).

17. Has your Court developed case-law on other individual rights related to the rule of law?

See the answers to questions 2 and 3.

18. Is the rule of law used as a general concept in the absence of specific fundamental rights or guarantees in the text of the Constitution in your country?

No. Constitutional case law refers to the rule of law (*Estado de Derecho*) along with some other provisions in the Constitution of 1978 which are relevant to the case at hand and more specific: usually fundamental rights or rules governing legislative or judicial institutions. Where appropriate, the Court case law will apply, along with the general idea of the State of

law, some of the principles foreseen in Article 9.3 CE that, as we have already explained in question 1, contain several essential principles of the rule of law: legality, publicity of the law, legal certainty, among others.

As for the rule of law in the strict sense (*imperio de la ley*), references in the Spanish case law are to be found mostly in judgments regarding the independence and impartiality of the courts. The constitutional cases reflect the wording of Article 117.1 CE (“Judges and Magistrates of the Judiciary ... shall be independent, irremovable, and liable and subject only to the rule of law”).