

STUDIA I ARTYKUŁY

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The Spanish Constitutional Court: an Overview

Currently, it can be said that the role of Constitutional Courts is essential for any Democratic State. Their main function is to safeguard the fundamental text and interpret it, ensuring that the rest of the legal system complies with it. The Constitutional Court of Spain is not an exception and our system follows the model that triumphed in Europe after the Second World War¹.

This work aims to present an overview of the Spanish system of constitutional justice that would allow the reader to get a clear view of how the system is organized and functions, making a special analysis of its most important function: the function of interpretation of the Constitution and the legislation, through which the Court exercises a creative role and makes a constructive interpretation of norms, creating norms, rules and principles that adhere to those of constitutional rank.

1. The Origins of the Spanish Constitutional Court

The origins of the Spanish Constitutional Court² date back to 1977–1978, namely: to the process of transition to democracy after Franco's death.

1 An explanation of the triumph of this model can be found in V. Ferreres Comella, *Constitutional...*, p. 3–28.

2 Some analysis in English can be found in V. Ferreres Comella, *The Constitution...*, p. 215–234; M.J. Falcón y Tella et al., *Case...*, p. 64 et seq.; E. Guillén López, *Judicial...*, p. 529–562.

Constitutional framers easily agreed that a Constitutional Court had to be created³ and, like this, the Spanish Constitution of 1978 (hereinafter, SC)⁴ opted for the introduction of a system of concentrated constitutional justice⁵.

When analysing the constitutional configuration of the body, the important difficulties of the constituent process and the huge effort to reach a consensus on the adoption of the Constitution must be taken into account. This explains that, in many cases, it was not possible to reach clearly defined political agreements and that subsequently the Constitutional Court had to interpret many constitutional provisions whose wording was ambiguous or undefined⁶. And, above all, it must be taken into account that there was the need to establish a body completely separated from the judicial power:⁷ body that would safeguard the whole constitutional order.

Therefore, a system of concentrated constitutional justice was adopted, but it also introduced some elements of the diffuse or vague-control model⁸. System in which the Constitution creates an *ad hoc* body, independent from the other powers, and which carries out an abstract control of the constitutionality of laws. This system was influenced by the Italian and German models (especially the German one)⁹, but with important

Information about the Court can be obtained also in < www.tribunalconstitucional.es >, accessed: 18 March 2020.

3 V. Ferreres Comella, *The Constitution...*, p. 215.

4 BOE No. 311, 29 December 1978. An English version can be consulted in: < http://www.congreso.es/portal/page/portal/Congreso/Congreso/Hist_Normas/Norm/const_espa_texto_ingles_0.pdf >, accessed: 18 March 2020. Previously, the most immediate precedent is the Constitutional Court established during the Second Republic (*Tribunal de Garantías Constitucionales*), also a concentrated-control model that was abolished by Franco's dictatorship. Constitutional Court, *The Court...*

5 Like other European States did after their respective transition to democracy. R. Capelleti, *¿Renegar...*, p. 16. And contrary to other European States with uninterrupted democracies, like England or Switzerland. J. Pérez Royo, *Tribunal...*, p. 23–24.

6 J. Pérez Royo, *Tribunal...*, p. 57–58.

7 As in 1978 the judicial power was still integrated by judges appointed during Franco's dictatorship, since the transition did not imply their replacement. P. Pérez Tremps, *Sistema...*, p. 24; E. Torres Dulce, *Título IX...*, p. 145.

8 Since questions on the constitutionality of laws can be brought before the Constitutional Court when such issues arise in a case pending before a judicial body. See art. 163 SC. Therefore, the system contemplates direct and abstract techniques of control (constitutional challenges, previous control of international Treaties), with specific tools (*amparo* appeal, constitutional questions).

9 E. García De Enterría, *La Constitución...*, p. 66. P. Pérez Tremps, *Sistema...*, p. 21. The German Constitution not only has an important influence in the framing of Spanish Constitutional

variations, and it attributes important and broad powers or competencies to the Constitutional Court¹⁰.

2. General characteristics of the Court

Regulations regarding the Constitutional Court are located in Part IX of the Constitution (Articles 159 to 165), what emphasizes the Constitutional Court's function as the body that guarantees the whole constitutional order – since it closes the part of the fundamental text dedicated to regulate the constitutional organizational structure¹¹. It is completely separated from the judicial power (regulated in Part VI), proving the option for the aforementioned model of concentrated constitutional justice¹².

The SC describes the composition, functions and competences of the Constitutional Court, without defining it¹³. Constitutional provisions are further developed by organic statute, the Ley Orgánica 2/1979 del Tribunal Constitucional (hereinafter, LOTC)¹⁴, which provides the detailed regulation regarding the Constitutional Court's organization and powers, Statute of the magistrates, proceedings before the Court and regime of its staff. Thus, Article 1 of LOTC states that: „1. The Constitutional Court, as supreme interpreter of the Constitution, is independent of the other constitutional bodies and subject only to the Constitution and this organic Law. 2. The Constitutional Court is unique and its jurisdiction covers the whole national territory”¹⁵.

Therefore, the Constitutional Court is a *constitutional body*, which is configured as one of the essential ones for the shaping of the State

Court, but also in other provisions of Spanish Fundamental text as the configuration of the fundamental rights.

10 E. García De Enterría, *La Constitución...*, p. 145 et seq.

11 This shows the importance that wants to be granted to the constitutional jurisdiction. J. García Roca, *La experiencia...*, p. 2.

12 E. Guillen López, *Judicial...*, p. 531–532.

13 M.A. Aparicio Pérez, M. Barceló I Serramalera, *Manual...*, p. 271.

14 Organic Law of the Constitutional Court. An English version can be found in < <https://www.tribunalconstitucional.es/es/tribunal/normativa/Normativa/LOTC-en.pdf> >, accessed: 20 March 2020.

15 This definition is merely declaratory, as it just makes explicit an attribute that the Constitutional Court possesses by virtue of the constitutional regulation. M. Medina Guerrero, *Artículo 1...*, p. 70.

model¹⁶. It is independent from the rest of the constitutional bodies, as it establishes the rules governing its own functioning and organization (Article 2.2 LOTC) and draws up its budget (Second additional provision LOTC). Its independence is clearly reflected in the aforementioned Article 1.1 of the LOTC, which emphasizes that the Constitutional Court is subject only to the Constitution and its Organic Law. However, despite its independence, the Constitutional Court also has to establish relations with other constitutional bodies:

- a. With the legislative power, which the Constitutional Court must not substitute, making an effort of *self-restraint*¹⁷,
- b. With the judicial power, since each of them must operate in their respective spheres of action (legality v. constitutionality)¹⁸,
- c. With the executive power, having defined the Constitutional Court its position regarding the Government's authority to enact norms that have the same rank as statutes¹⁹.

16 M. Medina Guerrero, *Artículo 1...*, p. 70.

17 A norm may only be declared unconstitutional when severe and solid reasons demand it. M.A. Aparicio Pérez, M. Barceló I Serramalera, *Manual...*, p. 272. The Constitutional Court shall respect legislator's freedom of political configuration, having recognized the Constitutional Court that it creates law freely within the framework offered by the Constitution and that its competence is only to guarantee that this framework is not exceeded. Judgement of the Constitutional Court 209/1987, of December 22, Para. 3, ECLI:ES:TC:1987:209. Constitutional Court cannot, in an abstract way, determine which interpretation is the most appropriate, relevant or convenient. Judgement of the Constitutional Court 227/1988, of November 29, Para. 13, ECLI:ES:TC:1988:227. Neither can the Constitutional Court assess the opportunity or merits of the election made by the legislator. Judgement of the Constitutional Court 142/1993, of April 22, Para. 9, ECLI:ES:TC:1993:142. For more information see J. Salas, *El Tribunal...*, p. 147 et seq.; J. Pérez Royo, *Tribunal...*, p. 72 et seq.; M. Medina Guerrero, *Artículo 1...*, p. 82-84. All the Judgements of the Constitutional Court can be found through the Court's website: < <https://hj.tribunalconstitucional.es/es> >, accessed: 20 March 2020.

18 Although in certain areas there is a concurrence of competences, like in the case of supervening unconstitutionality (that can be assessed by both jurisdictions, but only the Constitutional Court can hold that the legal norm is invalid and, therefore, declare it void and expel it from the legal order). M.A. Aparicio Pérez, M. Barceló I Serramalera, *Manual...*, p. 272.

19 That is, regarding the Government's authority to enact two types of norms that have the same rank as statutes: decree-law (*Decretos-ley*) and legislative-decrees (*Decretos legislativos*). The Constitutional Court has recognized its competence to control both, but only under strict juridical-constitutional criteria in order to check, on one side, if the requisites determined by the Constitution are respected and, on the other side, if from the material content of the same norm there is or not a violation of the Constitution. Judgement of the Constitutional Court 29/1982, of May 31, Para. 2, ECLI:ES:TC:1982:29 (regarding decree-law) and Judgement

Despite being separated from judicial power and often having to resolve politically relevant disputes, the Constitutional Court is also a *judicial body*. It is a Tribunal as it consists of 12 totally independent Judges (*Magistrados*), and it can only act at the request of the legitimated parties, following jurisdictional procedures²⁰ for the adoption of legally binding decisions subject to Law²¹, since the Constitutional Court is subject only to the Constitution and its Organic Law²².

And, finally, it is the *supreme interpreter of the Constitution* and the so-called ‘block of constitutionality’ (*bloque de constitucionalidad*)²³. But it is not the only one. All the public powers are subject to the Constitution (Article 9.1 SC) and, therefore, they can interpret it: the legislator, whose interpretation is essential for the creation of norms²⁴, and the judicial power, as the ordinary judges also act as „judges of the constitutionality”²⁵. Therefore, interpretation and implementation of the Constitution is not the function of the Constitutional Court exclusively. However, as the supreme interpreter, the Constitutional Court’s interpretation binds the rest of the public authorities²⁶ and, from

of the Constitutional Court 51/1982, of July 19, Para. 1, ECLI:ES:TC:1982:51 (regarding legislative-decrees). See also J. Salas, *El Tribunal...*, p. 155.

20 Judgement of the Constitutional Court 9/1981, of March 31, Para. 1, ECLI:ES:TC:1981:9.

21 Judgement of the Constitutional Court 9/1981, of March 31, Para. 1, ECLI:ES:TC:1981:9. Therefore, it cannot give political orientations or adopt opportunity judgements.

22 M. Medina Guerrero, *Artículo 1...*, p. 72–73.

23 This block includes the norms referred to in Article 28.1 of the LOTC: laws enacted within the framework of the Constitution for the purpose of delimiting the powers of the State and the individual Autonomous Communities or of regulating or harmonizing the exercise of their powers.

24 Judgement of the Constitutional Court 227/1988, of November 29, Para. 3, ECLI:ES:TC:1988:227.

25 F. Rubio Llorente, *La Forma...*, p. 473. Ordinary judges interpret and apply the Constitution, being able to bring a constitutional question (*cuestión de inconstitucionalidad*) before the Constitutional Court in case of doubts (art. 163 SC). They are also entitled not to apply the pre-constitutional laws that are contrary to the Constitution (according to its Repeal provision) and carries out the constitutionality control of regulations (art. 6 of the LOPJ – Organic Law on the Judiciary). Therefore, constitutional justice in Spain is functionally integrated by the Constitutional Court and the rest of jurisdictional bodies. P. Pérez Tremps, *Sistema...*, p. 23.

26 Judgement of the Constitutional Court 1/1981, of January 26, Para. 2, ECLI:ES:TC:1981:1. Interpretation that includes not only the Constitution and the norms contemplated in the block of constitutionality. The constitutional interpretation of law (interpretative judgements),

this position, it also ensures that all the norms and acts that conform the legal order respect the Constitution²⁷.

3. The Court's Powers

The Constitution assigns to the Constitutional Court precise powers to carry out its function, authorising the organic legislator to extend its sphere of competencies (Article 161.1.d SC). Powers that can only be exercised in accordance with the requisites established in the framework of the proceedings laid down in the Constitution and the LOTC²⁸. In particular, the SC provides the Constitutional Court with jurisdiction over the whole Spanish territory, to hear:

- a. Constitutional challenges (*recursos de inconstitucionalidad*) against laws (acts and statutes having the force of an act), either of the State or of the Autonomous Communities (Articles 161.1.a and 153.a SC),
- b. Constitutional questions (*cuestión de inconstitucionalidad*), also against laws of the State or the Autonomous Communities (Articles 163 and 153.a SC),
- c. Individual appeals for protection (*recurso de amparo*) against violation of the rights and freedoms contained in art. 53.2 SC (Article 161.1.b SC),
- d. Conflicts of jurisdiction (*conflictos de competencias*) between the State and the Autonomous Communities, or between Autonomous Communities (Article 161.1.c SC),
- e. Government's appeal against provisions and resolutions adopted by the bodies of the Autonomous Communities, requiring the Court to suspend them automatically (Article 161.2 SC),
- f. The preventive review of international Treaties (Article 95.2 SC).

This set of powers can be extended, as it has already been mentioned, by the Constitution (Articles 95.2, 153.a, 161.2 and 163 SC) or the organic legislator²⁹. Like this, for example, the LOTC has given the Court

as resolutions of the Constitutional Court, and the doctrine that they emanate have also binding effects (arts. 38.1 and 40.2 LOTC, 5.1 LOPJ).

27 Judgement of the Constitutional Court 163/2011, of November 2, Para. 3, ECLI:ES:TC:2011:163.

28 Thus, the Constitutional Court has rejected to accept active legal standings which are not directly contemplated by the Constitution or the Organic Law. Order of the Constitutional Court No. 139/1985, of March 6, Para. 1; ECLI:ES:TC:1985:139A.

29 R. Punset Blanco, *Artículo 2...*, p. 91–92; P. Ibáñez Buil, *Artículo 59...*, p. 621–622.

the authority to settle controversies between various constitutional bodies (*conflictos entre órganos constitucionales*)³⁰, or to protect local autonomy (*conflicto en defensa de la autonomía local*)³¹, among others. Other organic laws have also granted other competences to the Constitutional Court³².

The main function and the most important historically³³, is, similarly to other Constitutional Courts, the control of constitutionality of legislation. Control *a posteriori* that can only be carried out by the Constitutional Court, adjudicating a legislative provision to be invalid and expelling it from the legal order. This monopoly applies equally to the statutes enacted by the national Parliament and the ones enacted by the legislative Assemblies of the Autonomous Communities, as well as to other norms with the same rank as statutes³⁴. Control can also be carried out through the constitutional questions (*cuestión de inconstitucionalidad*) submitted by ordinary judges³⁵. Therefore, as stated previously, a system of concentrated control is established with certain elements of the diffuse or vague model³⁶.

A preventive or *a priori* review is contemplated with respect to international Treaties and the Drafts of Statutes of Autonomy and its reforms proposals (Article 79 LOTC). The first one has only been used on two

30 Articles 2.d, 59.1 and 73 to 75 LOTC.

31 Articles 2.d bis, 59.2 and 75 bis to 75 quinquies LOTC.

32 For example, the LO 5/1985, de 19 de junio, del Régimen Electoral General [Organic law on the General Electoral Regime], whose art. 42.3 regulate the complaints against the proclamation of candidates (*amparo electoral*). With regard to this specific complaints see M. Garrote de Marcos, *El recurso...*

33 The review of the constitutionality of legislation is the main function of Constitutional Courts, although not all the Courts have exactly the same powers or functions. Ferreres Comella classifies them in pure Constitutional Courts (Belgium and Luxembourg), whose only job is the revision of the constitutionality of legislation; Constitutional Courts whose main activity is still this review of legislation but which have some additional tasks (France, Italy and Portugal); and Courts whose most important function is also to determine the constitutionality of legislation but that have jurisdiction over many other matters (Germany, Spain and Austria). V. Ferreres Comella, *Constitutional...*, p. 6–7.

34 V. Ferreres Comella, *The Constitution...*, p. 219–220.

35 When, in a case pending before them, entertain doubts regarding the constitutionality of an act which is applicable thereto and upon the validity of which the judgement depends. Article 163 SC. Ordinary judges can examine the constitutionality of the law, but not decide not to apply it, being obliged to challenge it before the Constitutional Court: the only one that can declare it unconstitutional and, therefore, invalid.

36 I. Torres Muro, *Sinopsis artículo 161...* and I. Torres Muro, *Sinopsis artículo 163...*, p. 72.

occasions, previous to the ratification of EU Treaties³⁷, the second one has been recently re-introduced by a reform carried out in 2015³⁸. It was originally contemplated also against organic laws, but it turned out to be a distortion element for the balance of powers, transforming the Constitutional Court into an arbiter of the conflicts between majority and minority, which led to its suppression in 1981³⁹.

But one of the powers that implies the highest workload for the Constitutional Court are the individual appeals for protection against violation of the rights and freedoms contained in art. 53.2 SC (Article 161.1.b SC)⁴⁰. It is an extraordinary and subsidiary remedy for the protection against breaches of the rights and freedoms enshrined in articles 14 to 29 and 30.2 of the SC, since in the Spanish system the protection of fundamental rights is the task of ordinary judges⁴¹. The appeal can only be lodged once all the remedies available before ordinary courts have been exhausted,

37 In 1992, before the ratification of Maastricht Treaty. See Declaration 1/1992, 1 July 1992. And in 2004, before the ratification of the Treaty establishing a Constitution for Europe. See Declaration 1/2004, 13 December 2004. An English translation can be found through the Court's website: < <https://www.tribunalconstitucional.es/en/jurisprudencia/Paginas/resoluciones-traducidas.aspx> >, accessed: 22 March 2020.

38 LO 12/2015, de 22 de septiembre, de modificación de la Ley Orgánica 2/1979, de 3 de octubre, del Tribunal Constitucional, para el establecimiento del recurso previo de inconstitucionalidad para los Proyectos de Ley Orgánica de Estatuto de Autonomía o de su modificación [Organic Law 12/2015, reforming the LOTC for the introduction of a preventive challenge of constitutionality for the Drafts of Statutes of Autonomy and its reforms proposals].

39 M.A. Aparicio Pérez, M. Barceló I Serramalera, *Manual...*, p. 281–282; R. Punset Blanco, *Artículo 2...*, p. 92.

40 In 2007 a reform was introduced, that pursued to reduce the number of *amparo* appeals by objectivating the remedy, like in the case of the German Constitutional Court, by requiring the plaintiff to prove the „special constitutional significance” (especial transcendencia constitucional) of the breach that justifies a decision about the content by the Constitutional Court. Special constitutional significance „which shall be seen in terms of its relevance for the interpretation and application of the Constitution, or for the effectiveness thereof, and for determining the content or scope of fundamental rights” (Article 50.1.b LOTC). A. Gutiérrez Gil, *Artículo 49...*, p. 539–540. Despite the reform, a considerable number of *amparo* appeals are brought before the Court. In 2018, 6 918 *amparo* appeals were lodged, being admitted for its subsequent substantiation and settlement 115. Tribunal Constitucional, *Report 2018*, p. 13–14. A study of the evolution of the *amparo* appeal after 2007 reform can be found in P.J. Tenorio Sánchez, *¿Qué...*, p. 703–740.

41 Either by using the ordinary procedures, either by means of a preferential and summary procedure before these ordinary courts in the case of the rights contemplated in article 53.2 of the SC. An explanation of the Spanish system can be found in V. Ruiz Almendral, *Brief...*

against the last final judicial decision emanating from the Judicial Power, for having that judicial decision breached any of the aforementioned rights⁴². Therefore, the Amparo appeal is an additional and last guarantee, which is activated only when the other ones have not worked⁴³.

However, the Constitutional Court does not have some powers that other Constitutional Courts have, like the German one. For example, unlike the Bundesverfassungsgericht, the Spanish Constitutional Court cannot declare the unconstitutionality and, consequently, dissolution of political parties⁴⁴, which is the task of the ordinary courts⁴⁵.

Through the use of these powers⁴⁶, the Constitutional Court is able to interpret Spanish fundamental text and the essential principles of a Democratic State governed by the rule of law, ensuring that the legal system respects both of those values. And it has carried out this important role not only in a negative way, but also exercising a positive and creative role.

4. Composition, organization and functioning

4.1. Composition

According to Article 159.1 of the SC, the Constitutional Court consists of 12 members⁴⁷ appointed by the King⁴⁸ and nominated as follow:

- a. Four on the proposal of the Congress by a majority of three-fifths of its members,
- b. Four on the proposal of the Senate by the same majority⁴⁹,

42 M. Garrote De Marcos, B. Vila Ramos, *Jurisdicción...*, p. 70–71.

43 M. Garrote De Marcos, B. Vila Ramos, *Jurisdicción...*, p. 70–71.

44 Article 21.2 of the Basic Law for the Federal Republic of Germany.

45 Article 10 of the LOPP. Ley Orgánica 6/2002, de 27 de junio, de Partidos Políticos [Organic Law on the Political Parties].

46 Obviously, when challenges have arrived to it, as it cannot act *ex officio*.

47 Bearing the title of Judges (*Magistrados*) of the Constitutional Court. Article 5 LOTC.

48 The political form of the Spanish State is, as Article 1.3 of the SC establishes, the Parliamentary Monarchy, an institution that does not have any direct political power. The King is the Head of the State, symbol of its unity and permanence (Article 56.1 SC), but his competences are mainly representative and symbolic, and are exercised according to the Constitution and the Laws. In reality, the decision is adopted by other institutions, like the Congress of Deputies, and the acts of the monarch must be countersigned to be valid (Article 56.3 SC). Therefore, he cannot adopt any political decisions.

49 The Judges proposed by the Senate can be elected among candidates submitted by Legislative Assemblies of the Autonomous Communities in the terms provided by the House's Rules

- c. Two on the proposal of the Government⁵⁰,
- d. Two on the proposal of the General Council of the Judicial Power, by the same majority of three-fifths⁵¹.

The Spanish system has opted for the constitutionalization of the number of members of the Constitutional Court, which has been understood as a guarantee against possible political manipulations that seek to change the aforementioned number, but it is also a factor that adds rigidity to the system since it does not allow to modify it in order to tackle the workload of the Court⁵².

We must also mention that the Court is the only constitutional body in whose procedure of appointment engages the rest of the constitutional bodies, which confers it an inclusive meaning and is proof of its position within the structure of the political system. However, it has also been criticized that the proposal by the two Houses of the Parliament implies a political „inoculation”⁵³. In this regard, even though the majority of three-fifths should lead, in principle, to a consensus between the different political forces, in practice political parties have distributed the selection of the candidates according to their level of representation and, therefore, the Judges are identified with the political party that has proposed them. As a consequence, some of the decisions of the Court have been criticized⁵⁴.

(Article 16.1 LOTC), being able each of them to present a maximum of two candidates (Article 184.7 Senate's Rules of Procedure).

50 The appointment corresponds to the Council of Ministers (arts. 5.1.k, 9, 18.2, 20.3 de la Ley 50/1997 de Organización y Funcionamiento del Gobierno).

51 Article 107.2 LOPJ (Organic Law of the Judicial Power). The General Council is the governing body of the Judicial Power, in charge of the decisions relating issues outside the jurisdictional function (Article 122.2 SC).

52 In general, it has been considered that the number is reasonable, similar to the composition of other Constitutional Courts. Besides, although at the beginning the adoption of an even number was criticized, because of the problems for solving the ties in votes, these situations do not depend on the even or uneven composition, but on the quorum established for the valid adoption of decisions. Therefore, all systems contemplate solutions to solve the ties in the votes, as Germán Valencia Martín points out. G. Valencia Martín, *Artículo 5...*, p. 143–157. See also I. Aranguren Pérez, *Artículos 1 a 15...*, p. 173, 231.

53 I. Aranguren Pérez, *Artículos 1 a 15...*, p. 171, 230.

54 E. Guillén López, *Judicial...*, p. 535–536. With regard to the problems related with the renewal of the institution between 2004 and 2010 see G. Fernández Farreres, *Sobre...*, p. 13–49, where the author proposes a reform of the appointment procedure.

The Judges are appointed among Spanish citizens that are magistrates and prosecutors, university professors, public officials and lawyers. All of the candidates are required to have a recognized standing with at least fifteen years practice in their profession (Articles 159.2 SC and 18 LOTC). However, the evaluation of the qualifications required has caused problems on certain occasions, like the appointment of the Judge Enrique López y López in 2013⁵⁵. The „recognized standing” that Judges have acquired through doctrinal works and opinions during their professional practice has also caused controversy when adjudicating certain appeals, since having expressed their point of view on central legal-political debates they had prejudiced their participation in them⁵⁶.

In order to guarantee that the election of the Judges does not coincide with the parliamentary term and to avoid an immediate link between parliamentary majority and composition of the Constitutional Court, the Magistrates are appointed for a nine year period, with one third of the Court renewed every three years⁵⁷.

Nonetheless, lack of consensus between political forces when making the appointments have caused delays on certain occasions. Article 17.2 LOTC allows, when these problems arise, the retiring Judges of the Constitutional Court to remain in office until their successors take up office. But the Constitutional Court has interpreted that the new Judges will occupy the position only for the time that their predecessors were not able or were not willing to perform it. As a consequence, the mandate of some of the Judges has been reduced to less than six year, while the mandate of others extended to more than twelve years⁵⁸.

55 Being proposed on a first occasion in 2010 by several Autonomous Communities under the government of the Popular Party, his appointment was disregarded after several negative opinions from the Senate and the same Constitutional Court. The Popular Party proposed him again after 2011 elections, being appointed on this occasion. However, a year later he had to present his resignation after being involved in a car accident that received widespread media coverage. G. Fernández Farreres, *Sobre...*, p. 15.

56 E. Guillén López, *Judicial...*, p. 536–537.

57 Every three years four Judges are renewed, not being possible an immediate reelection according to the provisions of Article 16.4 LOTC. To this respect, the four magistrates proposed by the Congress of Deputies configures one third, the four Magistrates proposed by the Senate another third, and the four proposed by the Government and the CGPJ the last one.

58 F. Rubio Llorente, *El Tribunal...*, p. 14–15. The author points out how since we lack of a specific provision that establishes the contrary, the most reasonable option would be subject this

The position of the Judge of the Constitutional Court is incompatible, according to Article 159.4 of the SC, with any position of a representative nature, any political or administrative office, a management position in a political party or a trade union as well as any employment in their service, active service as a judge or prosecutor and any professional or business activity whatsoever; the same incompatibilities as the ones contemplated for the other members of the Judicial Power⁵⁹.

Lastly, the three classic guarantees of any jurisdiction are ensured: independence and irremovability (Article 159.5 SC), since the Judges of the Constitutional Court shall perform their duties in accordance with the principles of impartiality and dignity, and could not be prosecuted for opinions expressed in the exercise of their duties; not being possible to be dismissed or suspended, but on one of the grounds established by the Law (Article 22 LOTC); and liability, since their criminal liability shall only be enforceable before the Criminal Chamber of the Supreme Court (Article 26 LOTC).

4.2. Organization and functioning

The SC refers the organization and functioning of the Spanish Constitutional Court to its organic law, which does not mean that the law configures the institution as it considers more convenient, since Spanish fundamental norm guarantees that all the constitutional bodies take part in the configuration of the Court and, therefore, it can be sustained that all its members⁶⁰ take part in the decisions that represent the essence of its function⁶¹.

In particular, the Court comprises two individual bodies, the President and the Vice-President, and three collegiate bodies, the full Court (*Pleno*), the Chambers (*Salas*) and the Sections (*Secciones*).

appointments to the ordinary regime and that this Judges occupy the position for the nine year period. He criticizes that the current practice, with the rigid renewal of one third of the members every three years, contravenes the constitutional provisions and damages the institution.

59 This provision is further developed by Article 19 of the LOTC.

60 P. Santolaya Machetti, *Artículo 10...*, p. 233 et ff.

61 In particular in the constitutional challenges against laws and acts and statutes having the force of an act, and in the conflicts of jurisdiction between the State and the Autonomous Communities.

The President is appointed by the King from the members of the Court, on the proposal of the full Court itself, for a term of three years (Article 160 SC), being eligible for re-election only once (Article 9.3 LOTC). Among other functions, the President represents the Court before other constitutional bodies, convenes the Court, chairs over its Plenary and convenes the Chambers (Article 15 LOTC). In the event of a tie, the President has the casting vote (Article 90 LOTC). The Vice-President is also elected by the full Court for a three-year term and replaces the President in the event of vacancy or absence for any other reason (Article 9.4 LOTC).

With regard to the collegiate bodies, the full Court is the superior body and consists of all Judges of the Court, having the most relevant competences either of jurisdictional (like the constitutional challenges against laws and acts and statutes having the force of an act) or of governmental (like the scrutiny of compliance with the formalities required for the appointment of Judges of the Court) nature⁶². The full Court can, in any case, bring before it any other matter within the Court's jurisdiction (Article 10 LOTC).

The Chambers are comprised by six Judges appointed by the full Court (Article 7.1 LOTC) and hear the cases which fall outside the jurisdiction of the full Court and the cases which have been referred to the corresponding Sections but which they consider of sufficient importance to be ruled by the Chamber itself (Article 11 LOTC). Among their different functions, the most relevant one is the hearing of the *amparo* appeals (Article 48 LOTC). In any case, if a Chamber considers it necessary to change at any point the constitutional case-law previously established by the Court, the matter must be submitted to the full Court's decision (Article 13 LOTC).

Lastly, the full Court and the Chambers establish Sections, comprising their respective President or their substitute and two Judges. Currently, there are four Sections and they act as a „filter” with regard to the body to which the substantiation and adjudication of the decision is attributed (full Court or Chambers). They are in charge of the ordinary arrangements and the judgment or proposal, as appropriate, on the admissibility or rejection of constitutional processes (Article 8.1 LOTC). They can also

62 See Article 10 LOTC. P. Santolaya Machetti, *Artículo 10...*, 233 et ff.

decide on *amparo* appeals when consolidated doctrine of the Constitutional Court is applicable for its resolution (Article 52.2 LOTC).

With regard to the Court's decisions, the Judgment is the form that the final decision of the Court adopts and puts an end to the constitutional procedures (Article 86.1 LOTC). They compress the constitutional doctrine and produce *ad extra* effects, integrating the whole constitutional order. They have *erga omnes* effects and we can say that, due to these effects, they can be practically identified with norms, but obviously maintaining the clear differences with respect to them as we will explain in section 5.1. Consequently, as they bind all, they are published in the Official State Gazette for a maximum dissemination (Articles 164.1 SC and 86.2 LOTC).

Decisions on initial rejection, withdrawal and expiration take the form of a reasoned order (*auto*), unless otherwise stipulated in the LOTC. They are interlocutory orders, motivated and they settle a determined issue, in which a debate has taken place or the parties have been heard⁶³. Other decisions shall take the form of a reasoned order (*auto*) or a non-reasoned order (*providencia*), depending on their content (Article 86.1 LOTC).

With regard to the form of the Judgments, the two main parts that are characteristic can be identified: the factual backgrounds and the fundamental points of law (facts and grounds), finishing the judgement with a ruling whose content vary depending on the constitutional questions involved and the result – as we will examine below⁶⁴. They are published with the dissenting opinions, if any (Article 164.1 SC), concerning either the judgment or its grounds. They have to be included in the ruling and, in the case of judgments, reasoned orders or declarations; they must be published with them in the Official State Gazette (Article 90.2 LOTC).

Lastly, concerning the content of the Court's rulings, it varies depending on the constitutional procedure and the result⁶⁵. For instance, in the actions of unconstitutionality the ruling declares whether it upholds the action or not and, consequently, whether it declares the nullity and unconstitutionality of the challenged law or not:

63 M.A. Aparicio Pérez, M. Barceló I Serramalera, *Manual...*, p. 278–279.

64 E. Guillén López, *Judicial...*, p. 539.

65 M.A. Aparicio Pérez, M. Barceló I Serramalera, *Manual...*, p. 278.

In consideration of all of the foregoing, the Constitutional Court, BY THE AUTHORITY CONFERRED BY THE CONSTITUTION OF THE SPANISH NATION,

Has decided

To uphold the present action on unconstitutionality and, consequently, to declare the nullity and unconstitutionality of (...)⁶⁶.

In the case of complaints for violation of fundamental rights, the judgment can, of course, grant or deny the protection. If the judgment grants the protection, it can contain one or more of the following pronouncements, according to Article 55 of the LOTC:

- a. Declaration of nullity of the decision, act or resolution that impeded the full exercise of protected rights and freedoms, specifying, where applicable, the scope of its consequences,
- b. Recognition of the public right or freedom in the light of the constitutional provision relating to its substance,
- c. Full restoration of the applicant's right or freedom and adoption, where appropriate, of measures for its preservation.

But the *amparo* Judgement can also carry out an abstract interpretation of the law. We can find cases in which the *ratio decidendi* considers whether a determined interpretation of the law is in conformity with the Constitution or not⁶⁷. For example, Judgement 150/1997 clearly indicates that it is not limited to the subjective recognition of the right of the appellant, but that it also contains a declaration with *erga omnes* effects „in view of which a determined interpretation of art. 321.1 CP is contrary to the Constitution and its application infringes the principle of legality in criminal proceedings”. Therefore, the Judgement not only recognized the right and declared the nullity of the decision or act that impeded its full exercise, but it also noticed that there is „a precise adjudication regarding the unconstitutionality of the implementation that of art. 321.1 CP the Supreme Court was carrying out”⁶⁸.

66 Judgment of the Spanish Constitutional Court 114/2017, of November 17, ECLI:ES:TC:2017:114.

67 I. De la Cueva Aleu, *Artículo 40...*, p. 467–468.

68 Judgment of the Spanish Constitutional Court 150/1997, of September 29, Para. 4, ECLI:ES:TC:1997:150.

5. The Spanish Constitutional Court and its law-making activity: a creative role through its interpretative function

5.1. A 'positive' or a 'negative' legislator?

The Spanish constituent power opted, as examined in section 1, for a system of concentrated constitutional justice with some elements of the diffuse or vague-control model, where an *ad hoc* body, independent from the other powers, carries out an abstract form of control over the constitutionality of the law. The Constitutional Court is the supreme interpreter of Spain's fundamental text (Article 1 LOTC)⁶⁹, guaranteeing its primacy⁷⁰.

When explaining the system, the majority of the doctrine emphasizes its origins in Kelsen's classical definition of a 'negative legislator' and understands that with abstract control the Court is not creating any new laws, but is limiting itself to declaring, with *erga omnes* effects, what is already implicitly contained in the Constitution⁷¹. On the contrary, some authors consider that when the Court fulfils its function as the judge on the constitutionality of the laws, it is acting as a 'positive legislator' that adds content not only to the Constitution but also to the legal norms, and thus participates in the legislative function⁷².

However, taking into account its current configuration and practical development, we understand that the definition as a 'positive' or 'negative' legislator is not adequate⁷³. It is true that through its interpretative function the Constitutional Court can specify the content of the Constitution's provisions and of other legal norms, interpreting their content according to the current cultural and social reality, and integrating the possible

69 In the Court's own words, it is the 'interpreter and guardian of the Constitution'. Judgement of the Constitutional Court 78/1984, of July 9, Para. 4, ECLI:ES:TC:1984:78.

70 As Article 27 of the LOTC establishes: 'Through the procedures for a declaration of unconstitutionality established in this title, the Constitutional Court guarantees the primacy of the Constitution and determines the conformity or non-conformity therewith of contested laws, provisions or enactments.'

71 M. Medina Guerrero, *Artículo 1...*, p. 72–73.

72 F. Fernández Segado, *El Tribunal...*, p. 131–132; A.L. Martínez Pujalte, *Spanish...*, p. 160; A.B. Brewer-Carias, *General...*, p. 1–2.

73 Neither is its definition as a 'commissioner' of the constituent power. The Constitutional Court is a constitutional body subject thereon. J. García Roca, *La experiencia...*, p. 21.

omissions of the legislator in some cases⁷⁴. And it can also be said that, like in other constitutional courts, there is a tendency to carry out innovative and expansive interpretations rather than literal interpretations⁷⁵. However, this law-making activity or creative role must be differentiated from what we understand as ‘statute-making’ activity. The Court makes a constructive interpretation of norms. It creates norms, rules and principles that adhere to those of constitutional rank, and, in this way, participates in the establishment of superior rules of law. But it does not act as a legislator creating abstract norms, since it has none of the elements that characterise the legislator (like the legislative initiative or the procedures that allows for the participation of majorities and minorities). The Court only makes the constitutional provisions explicit; it does not create any new laws⁷⁶. As Rubio Llorente emphasises, it fulfils a law-making activity in a different way than the legislator, as it does not obey opportunity reasons and it is not free, but merely declares a pre-existing law⁷⁷.

The same Constitutional Court has made clear that its function is not that of the legislator, because to interpret is not the same as to legislate, making clear that ‘it is not a legislator and all that can be asked of this Court is a declaration on whether or not the precepts can be deemed to comply with the Constitution’⁷⁸. Therefore, as we have already

74 As García Roca points out, as the supreme interpreter, the Constitutional Court can clarify the meaning of the Constitution’s provisions, integrate them where they are not explicit (making them emerge), or interpret them constructively. J. García Roca, *La experiencia...*, p. 16.

75 An example in Spain can be found in Judgement 198/2012, where the Court adjudicated an action of unconstitutionality against Law 13/2005, which amended the Civil Code allowing for same-sex marriage. The Court made a progressive interpretation of the Constitution, adjusting the constitutional provision (Article 32 of the SC) to the current social and cultural reality of Spanish society. The Court emphasized that the Constitution is a ‘living constitution’ and not only a normative text, idea that the Court uses in order to adjust the constitutional provision to fit the current reality and that allows the Court to conclude that the legislator had opted from among the different available options, and that the option chosen was respectful with the fundamental text. Judgement of the Constitutional Court 198/2012, of November 6, Para. 6–11, ECLI:ES:TC:2012:198. The judgement has two dissenting opinions and a concurrent one.

76 J. García Roca, *La experiencia...*, p. 16–22.

77 F. Rubio Llorente, *La jurisdicción...*, p. 38.

78 F. Rubio Llorente, *La jurisdicción...*, p. 38. See also Judgement of the Constitutional Court 77/1985, of June 27, Para. 4, ECLI:ES:TC:1985:77; Judgement of the Constitutional Court 16/1996, of February 1, Para. 6, ECLI:ES:TC:1996:16.

mentioned, through its interpretative function the Court can create law, but not abstract norms like the legislator does.

5.2. The Constitutional Court's constructive interpretation

The role of the Constitutional Court is not circumscribed merely to expel the norms that contravene the Constitution from the legal order, through a merely declarative resolution with *ex tunc* effects⁷⁹. It can interpret the content of provisions both at constitutional and at sub-constitutional level with constructive patterns creating constitutional principles.

At constitutional level, interpretation is usually necessary for any constitutional text: on one side, because of the open and general character of many of the provisions, which is not a defect of a Constitution⁸⁰; on the other side, because of the need for adaptation required by the evolution of reality, since the Constitution is not only a normative text but a 'living constitution'⁸¹.

The Constitutional Court has carried out this interpretative function since its very origins, as we must take into account that in the case of Spain the huge effort that was needed to reach an agreement on the adoption of the Spanish Constitution implied that some provisions were not clearly defined. Therefore, they have been interpreted subsequently by the CC.

This has been the case of the Spanish regional State (*Estado autonómico*), in which the Constitutional Court has developed a major role⁸². When

79 Although, at first, it seemed that the Constitutional Court had opted for a system of absolute nullity with *ex tunc* effects (see, for example, Judgement of the Constitutional Court 14/1981), since its Judgement 45/1989, it opened up the sphere of situations protected by non-retroactivity. Judgement of the Constitutional Court 45/1989, of February 20, Para. 11, ECLI:ES:TC:1989:45. I. Torres Muro, *Sinopsis artículo 164...*

80 U. Löhms, *The application...*, p. 3.

81 As the Canadian Privy Council already noted in the so-called *Persons* case, where it pointed out that 'The British North American Act planted in Canada a living tree capable of growth and expansion within its natural limits'. *Edwards v. Canada* (Attorney General), 1929 CanLII 438 (UK JCPC), p. 9, < <http://canlii.ca/t/gbvs4> >, accessed: 24 June 2019. See also F. Fernández Segado, *El Tribunal...*, p. 150. This need for adaptation is shown, for example, in the judgements regarding the reasonability of disparity regulations, since they largely refer to social conceptions that are necessarily mutable. A.J. Gómez Montoro, *Artículo 39...*, p. 581.

82 An explanation of Spain's territorial model is in V. Ferreres Comella, *The Constitution...*, p. 161-199. Regarding the Constitutional Court's role in the configuration of the regional State, see G. Fernández Ferreres, *La contribución...*

drafting Title VIII of the Spanish Constitution, since the achievement of political compromises was difficult, it was considered that the most adequate way to reach an acceptable agreement was to design only the principles and framework within which the construction of the regional State could be carried out⁸³. The nationalities and the regions were the ones that, exercising the right to self-government or the right to autonomy provided for in Article 2 of the SC, begun the decentralisation process and constructed autonomous communities (*Comunidades Autónomas*). As a consequence, the Constitutional Court has had to define this regional State, especially with regard to the distribution of competences, a task that has been positively assessed by the doctrine⁸⁴; as well as with respect to the scope of the self-government principle, according to which the Court has maintained that Autonomous Communities have political autonomy and not only administrative autonomy⁸⁵. However, the Court has emphasised that this is a limited power, it is not sovereign and it cannot be opposed to the unity principle enshrined in the Constitution⁸⁶. Therefore, it can never consist of a right to self-determination as a right to foster and accomplish unilateral secession, as the Court has recently noted when adjudicating two actions of unconstitutionality lodged by the State Attorney on behalf of the President of the Government against the Laws of the Catalanian Parliament 19/2017 ‘on the self-determination referendum’⁸⁷ and 20/2017 ‘of juridical transition and the founding

83 Therefore, the SC did not incorporate a design for a specific model of the State with regard to territorial organisation. The SC establishes that there is only one State, the Spanish Nation, characterised by its ‘indissoluble unity’ but, at the same time, it recognises and guarantees ‘the right to self-government of the nationalities and regions’ (Article 2 SC).

84 F. Pérez de los Cobos Orihuel, *El papel...*, p. 372.

85 Judgement of the Constitutional Court 4/1981, of February 2, Para. 3, ECLI:ES:TC:1981:4.

86 Judgement of the Constitutional Court 4/1981, of February 2, Para. 3, ECLI:ES:TC:1981:4.

87 „Not any ‘peoples of Spain’ (...) have a ‘right to self-determination’, in the sense that Law 19/2017 recognises it as a ‘right’ to foster and accomplish unilateral secession from the State on which Spain is established (Art. 1.1 CE)”. Judgement of the Constitutional Court 114/2017, of October 17, Para. 2 b), ECLI:ES:TC:2017:114. Previously, the Constitutional Court had already declared that the ‘right of self-determination’ as a ‘right to decide’ is not recognised in the Constitution” – Judgement of the Constitutional Court 42/2014, of March 25, Para. 3 b), ECLI:ES:TC:2014:42.

of the Republic⁸⁸. Despite this limitation, the Court recognises that this right to self-determination is a political aspiration that can be defended within the constitutional framework⁸⁹.

At sub-constitutional level, the Court also uses the technique of interpretation of the norms according to the Constitution and the principle of their conservation. We must remind that the entire legal order must be interpreted in conformity with the fundamental text and, therefore, that the Court, as its supreme interpreter, can decide about the constitutionality or unconstitutionality of a law – or part of it – and, consequently, declare whether it is valid or invalid.

In accordance with Article 164.2 of the SC: ‘Unless the judgement rules otherwise, the part of the act not affected by unconstitutionality shall remain in force’. The SC, therefore, only contemplates the expulsion of the unconstitutional law from the legal order⁹⁰. The legislator, however, links unconstitutionality with the nullity with *ex tunc* effects⁹¹, since, in accordance with Article 39.1 of the LOTC: „Where the judgement declares the unconstitutionality, it shall also declare invalid the contested provisions and, where appropriate, any other provisions of the same law, regulation or enactment having the force of law to which it must be extended by association or consequence”.

88 Where the Court reminds us again that the right to self-government cannot be understood as a right to promote unilateral secession from the Spanish State, but that any view that seeks to amend the constitutional order is feasible within the framework of the Constitution. Judgement of the Constitutional Court 127/2017, of September 8, Para. 5 c), ECLI:ES:TC:2017:127.

89 F. Pérez de los Cobos Orihuel, *El papel...*, p. 378. „The primacy of the Constitution, however, does not mean that there is a positive duty to adhere thereto. In Spanish constitutional law, there is no room for a ‘militant democracy’, i.e. ‘a model that demands not only respect but also a positive adhesion to the law and, first of all, to the Constitution’ (...) The Court has acknowledged that any ideas will be allowed by Spanish constitutional law if they intend to be upheld (...) Any approach that intends to change the very grounds of the Spanish constitutional order is acceptable in law, as long as it is not prepared or upheld through an activity that infringes democratic principles, fundamental rights or all other constitutional mandates, and its effective achievement follows the procedures foreseen for constitutional reform, given that these procedures are inexcusable” – Judgement of the Constitutional Court 42/2014, of March 25, Para. 4 c), ECLI:ES:TC:2014:42.

90 A.J. Gómez Montoro, *Article 39...*, p. 583; F.J. Díaz Revorio, *Las sentencias...*, p. 104–105; I. De la Cueva Aleu, *Artículo 39...*, p. 438–439.

91 A.J. Gómez Montoro, *Article 39...*, p. 583; F.J. Díaz Revorio, *Las sentencias...*, p. 104–105; I. De la Cueva Aleu, *Artículo 39...*, p. 438–439.

That said, the Court has modulated the effects of these provisions and has taken into account the need to maintain certain elements of the law on certain occasions for legal certainty reasons⁹² and in order to safeguard other constitutionally significant rights and values⁹³. Consequently, on determined cases, unconstitutionality and nullity are separated, and both of them are separated from the *ex tunc* effects⁹⁴.

Therefore, the Constitutional Court can rule that the legal norm has been invalid since the day it was adopted (*ex tunc* effects), since another day (*ex nunc* effects), or from a date in the future in order to give the legislator the opportunity to revise the legal norm (*pro future* effects)⁹⁵. In order to do so, the Court has a wide range of types of judgements at its disposal:⁹⁶

- a. Interpretative judgements, which give the norm an interpretation according to or in conformity with the Constitution,
- b. Judgements of mere unconstitutionality, in which the unconstitutionality derives from an omission by the legislator, therefore they require the legislator to establish the relevant regulations,

92 Interpretation adopted since its Judgement 45/1989 of February 20, Para. 11, ECLI:ES:TC:1989:45.

93 That is, to avoid a lacuna or to respect the sphere of action of the legislator. I. De la Cueva Aleu, *Artículo 39...*, p. 438–439.

94 A.J. Gómez Montoro, *Artículo 40...*, p. 615. Torres Muro recommends to include this exceptions in the LOTC. I. Torres Muro, *Tribunal...*, p. 186.

95 Nonetheless, the general rule remains that of unconstitutionality/nullity/effects *ex tunc*, being necessary to motivate any depart from this general rule. R. Alonso García, *El Tribunal...*, p. 263–264. A clarification must be added in the case of the Spanish system with respect to pre-constitutional laws. Although they were repealed following the entry into force of the SC, the application of the law to the past acts that emerged during the time of their validity can only be impeded if the Constitutional Court declares their supervening unconstitutionality in order to avoid any ultra-activity. A.J. Gómez Montoro, *Artículo 39...*, p. 591. On other occasions, it would be possible to carry out an interpretation in conformity with the Constitution. For example, the right to strike contemplated in Article 28.2 of the SC has not been developed by the legislator and a pre-constitutional regulation is still in force (Real Decreto Ley 17/1977). The Constitutional Court declared that some of its provisions were unconstitutional, but others not, whenever they are understood according to the interpretation given by the Constitutional Court, which is the only interpretation that is in conformity with the fundamental text. Judgement of the Constitutional Court 11/1981, of April 8, ECLI:ES:TC:1981:11.

96 I. Torres Muro, *Sinopsis artículo 164...* An analysis of the different types of interpretative judgements in F.J. Díaz Revorio, *Las sentencias...*; L. Brust, *The interpretation...*, p. 135–136.

- c. Additive judgements, in which the Court adds the content that has been omitted to the precept,
- d. Reconstructive or substitutive judgements, in which the declaration of nullity is avoided by substituting part of the normative content of the precept for another,
- e. Reductive judgements, which reduce the cases to which the precept is applicable or the legal consequences that are derived from it.

The Constitutional Court has recognized that interpretative judgements are used by other constitutional courts ‘in order to avoid unnecessary gaps in the system, at the same time preventing the contested precept from damaging the basic principle of primacy of the Constitution’, and that it is a legitimate means in the hands of the Court, ‘although one which is extremely delicate and difficult to employ’⁹⁷. What the Court has clearly stated is that the use of an interpretation is inappropriate when the unconstitutionality of the law is not eliminated⁹⁸. The Court can establish the meaning or the sense of the text of the legal precept and decide that it is in conformity with the Constitution, but it cannot deduce or reconstruct the mandate that it contains⁹⁹. Therefore, the Court would declare unconstitutionality only when it is unquestionable that there is no interpretation that would ensure a constitutional result¹⁰⁰.

References to this principle of interpretation according to the Constitution can be found in the case law of the Constitutional Court, which has used this principle in order to preserve the will of the legislator. For example, in Judgement 115/1987, in which the Court recognized the ambiguity of the terms used by the legislator¹⁰¹, but provided the terms

97 Judgement of the Constitutional Court 5/1981, of February 13, Para. 6, ECLI:ES:TC:1981:5.

98 Judgement of the Constitutional Court 196/1996, of 28 November 1996, Para. 4, ECLI:ES:TC:1996:196.

99 Judgement of the Constitutional Court 11/1981, of 8 April 1981, Para. 4, ECLI:ES:TC:1981:11.

100 Judgement of the Constitutional Court 4/1981, of 2 February 1981, Para. 1, ECLI:ES:TC:1981:4.

101 In particular, the problem was in Article 26.2 of the Organic Law 7/1985 on the rights and freedoms of foreigners in Spain and their social integration, according to which the government authority agreeing to the arrest of an alien ‘shall address to the investigating judge of the place in which the alien has been arrested, within a period of 72 hours, ‘interesando’, the internment at his disposal in detention centres’. We have not find an exact translation for

under which the precept should be interpreted to be considered respectful to the Constitution, since it understood that the will of the legislator was clear¹⁰². The Court adopted the interpretation that it considered the most consistent with the global context of the law¹⁰³, reminding that laws must be interpreted ‘in the most favourable ways for the effectiveness of the fundamental rights, and in conformity with the Constitution’, and that the precepts can only be declared invalid when their incompatibility with the Constitution is unquestionable, rendering it impossible to carry out an interpretation¹⁰⁴.

6. The Constitutional Court and other Courts and Tribunals

The Constitutional Court usually makes reference in its reasoning to the case law of the ECHR, the CJEU and, occasionally, of other Constitutional Courts. Indeed, case law of other Constitutional Courts and of the ECHR (especially in the field of fundamental rights) has been of high importance and the Constitutional Court has made use of it since its origins. As García Roca points out, without this case law it would not have been possible to create ours¹⁰⁵.

the term „interesando” and, therefore, the best option is not to translate the Spanish word since, as examined, one of the problems is that it was ambiguous and led the Constitutional Court to having to clarify its meaning.

102 The Court pointed out that it was clear that the will of the legislator was to eliminate the previous situation of total governmental availability over the freedom of aliens pending expulsion, demanding the judicial intervention once the 72-hour deadline passes, although the legislator had not indicated this in an express way. Consequently, the Court interpreted the term „interesando” and explained that, in conformity with the Constitution, it should be understood as equivalent to a request from the judge for the authorisation to extend the internment beyond the 72-hour term, and that what the administrative body must do, in the maximum period of 72-hours, is to request that the judge authorises the internment of the alien awaiting expulsion. Judgement of the Constitutional Court 115/1987, of July 7, Para. 1, ECLI:ES:TC:1987:115.

103 Judgement of the Constitutional Court 115/1987, of July 7, Para. 1, ECLI:ES:TC:1987:115.

104 Judgement of the Constitutional Court 115/1987, of July 7, Para. 1, ECLI:ES:TC:1987:115.

105 The case law with regard to the regional model (*modelo autonómico*) is more creative, since because of the originality of the system the comparative law was not always helpful. J. García Roca, *La experiencia...*, p. 2, 64–65.

Citing the case law of the ECHR is common and usual¹⁰⁶. The Constitutional Court has recognized its interpretative value¹⁰⁷. For instance, in Judgement 12/2012, in which the limits of the freedom of information in opposition to the right to privacy were being discussed, the Court made reference to the case law of the ECHR when determining the concept of ‘public significance of the information’. In particular, case *Von Hannover v. Germany* in which the ECHR remarked that the decisive factor rests on the contribution made by the information published to a general interest debate, and that the mere satisfaction of the curiosity of one part of the public is not considered to be a contribution for such purpose¹⁰⁸. Or in Judgement 198/2012 on the constitutionality of same-sex marriage, the Court cited the case *Schalk y Kopf c. Austria* with regard to the concept of marriage¹⁰⁹.

Constitutional Court often makes references also to EU law and the case law of the CJEU when interpreting fundamental rights. For example, in a recent Judgement in which the Constitutional Court adjudicated the constitutional challenge brought by the Ombudsman against new article 58bis of the LOREG (Electoral Law)¹¹⁰, it invoked the CJEU’s case law with regard to the necessary requisites of the legal regulation for the processing of personal data, pointing out that it coincides with the doctrine of the Court itself¹¹¹.

106 We must take into account, to this regard, that art. 10.2 of the SC open our fundamental text in the area of fundamental rights to international Treaties: „Provisions relating to the fundamental rights and liberties recognized by the Constitution shall be construed in conformity with the Universal Declaration of Human Rights and international treaties and agreements thereon ratified by Spain”. Article that has been interpreted in a flexible way, allowing invoking treaties that have not been ratified already, the EU Charter of Fundamental Rights and, above all, the interpretation that the bodies which those treaties created to guarantee the fundamental rights have carried out. P. Pérez Tremps, *Sistema...*, p. 171 et seq.

107 Judgement of the Constitutional Court 81/1989, of May 8, Para. 2, ECLI:ES:TC:1989:81; Judgement of the Constitutional Court 50/1989, of February 21, Para. 2, ECLI:ES:TC:1989:51.

108 Judgement of the Constitutional Court 12/2012, of January 30, Para. 4, ECLI:ES:TC:2012:12.

109 Judgement of the Constitutional Court 198/2012, of November 6, Para. 8. ECLI:ES:TC:2012:198.

110 Which allowed political parties to compile personal data on people’s political opinions in the framework of their electoral activities without any type of consent. Provision added by the third final provision of the Ley Orgánica 3/2018, de 5 de diciembre, de Protección de Datos Personales y garantía de los derechos digitales [Organic Law on data protection and guarantee of digital rights].

111 In particular, Judgement of 8 April 2014 in joined cases C-293/12 and C-594/12, *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and*

Lastly, with regard to the citation of case law of other Constitutional or Supreme Courts, the Constitutional Court is in general very sparing, but we can still find examples. For instance, when it has referred to the Constitution as a 'living tree', it has made reference to the Judgement of the Privy Council of Canada, *Edwards c. Attorney General for Canada* of 1930¹¹². Another reference to the Canadian case has been made in Judgement 42/2014, with respect to the secessionist problem with Cataluña, as Canada already tackled this issue with Quebec and the Opinion of its Supreme Court enjoys an unquestionable reputation in comparative law¹¹³.

7. A special reference to the effects of the unconstitutionality Judgement

When the norm is declared unconstitutional and, consequently, void, it results in its immediate expulsion from the legal order with *ex tunc* effects, that is, with retroactive effects¹¹⁴. Therefore, it will be possible to review the past situations resulting from the application of the norm declared unconstitutional. The only limit is the effect of *res judicata*¹¹⁵, with the exceptions contemplated in Article 40 of the LOTC¹¹⁶. With

Others and Kärntner Landesregierung and Others, [2014] ERC 2014, Para. 54. Judgement of the Constitutional Court 76/2019, of May 22, Para. 6, ECLI:ES:TC:2019:76.

112 Judgement of the Constitutional Court 198/2012, of November 6, Para. 8, ECLI:ES:TC:2012:198. Where regarding the recognition of same-sex marriage it also makes reference to and to the Judgement of the Supreme Judicial Court of Massachusetts, *Goodridge v. Department of Public Health*, of 2004. Judgement of the Constitutional Court 198/2012, of November 6, Para. 9, ECLI:ES:TC:2012:198.

113 In the Judgement the Constitutional Court rejects the possibility of a unilateral secession, but recognizes at the same time the „right to decide” as a political aspiration. Judgement of the Constitutional Court 42/2014, of March 25, Para. 3, ECLI:ES:TC:2014:42.

114 This, of course, does not occur in the Judgements of mere unconstitutionality or of deferred nullity.

115 Formal *res judicata*, that is, when there is no judicial remedy.

116 Article which exempts this effect of *res judicata* „in the case of criminal proceedings or administrative litigation concerning a sanction procedure where the nullity of the rule applied would entail a reduction of the penalty or sanction or exclusion, exemption or limitation of liability”. The Constitutional Court has added other exceptions, like the consolidated administrative situations. It decides taking into account the circumstances and the rights and values at stake. A.J. Gómez Montoro, *Artículo 40...*, p. 619. What is exempted it is not the retroactive effects characteristic of nullity, but the possibility to review the situations created under the law declared unconstitutional. I. De la Cueva Aleu, *Artículo 40...*, p. 458.

regard to interpretative Judgements, it will also be needed on certain occasions to review past situations, since if a law has been applied in the terms excluded by the Constitutional Court's Judgement, it will be necessary to recognize to it *pro praeterio* effects¹¹⁷.

The declaration of unconstitutionality and nullity can also affect other laws: either because other repealed norms are reintegrated into the legal order, or because the declaration of unconstitutionality affects the validity of other norms dictated under the annulled one¹¹⁸. In principle, the annulment does not imply that the norms repealed by the one declared unconstitutional would come into force again. But there are some exceptions. If the law is void, which happens if the legislator lacks competence or if serious proceeding effects have occurred, it is not logical to accept the validity of the only effect produced: the repeal of the previous law. The same occurs when the declaration of unconstitutionality affects the repealed provision, like in Judgements 47/1980 and 61/1997¹¹⁹. In these cases, if the repealed provision expressly establishes the norms that are repealed, the ones that come into force again can be deduced from the same Constitutional Court's Judgement. Otherwise, the ordinary judges, case by case, will be the ones in charge of determining the existing law. This task also is attributed to them if there is no „reviviscence” of the previous norms¹²⁰.

Another problematic issue with respect to the temporal efficacy of Judgements is their impact on the legal situations arisen since the entry into force of the law. As it is well known, a strict understanding of nullity that would lead to considering all the legal situations null is not possible, for the reasons of legal certainty. Therefore, the interests of the ones that acted in *bona fide* or the general interest that would be seriously damaged if all the effects produced by the law declared unconstitutional are annulled must be protected. Consequently, as already examined, the Constitutional Court separates unconstitutionality from nullity, and both from the *ex tunc* effects of the Judgement¹²¹.

117 A.J. Gómez Montoro, *Artículo 40...*, p. 611.

118 A.J. Gómez Montoro, *Artículo 40...*, p. 611.

119 A.J. Gómez Montoro, *Artículo 40...*, p. 611.

120 A.J. Gómez Montoro, *Artículo 40...*, p. 611.

121 A.J. Gómez Montoro, *Artículo 40...*, p. 614–615.

Since Judgement 45/1989, the Constitutional Court understands that it is its responsibility to determine the effects of its Judgements, pointing out that the linkage between unconstitutionality and nullity is not always necessary, and that the retroactive effects of the nullity are not defined in the LOTC „which leaves to the Court the task of specifying the scope in each case”¹²². Therefore, the Constitutional Court can extend the limits of retroactivity to other cases not contemplated in Article 40.1 of the LOTC. From there on, the ordinary judges are the ones that must determine if the process has finished through a judgement having the force of *res judicata*, or if the unconstitutionality of the law has an impact on the validity of the act whose revision is intended¹²³.

Therefore, with the limits established in Article 40 of the LOTC and the Interpretation given by the Constitutional Court, it is possible to review the legal situations arisen as a consequence of the application of the annulled norm.

8. Enforcement of the judgements of the Constitutional Court

According to Article 164.1 of the SC and Article 38.1 of the LOTC, resolutions that declare the unconstitutionality of a law have *erga omnes* effects and, therefore, are binding on all public authorities, including the judges and Tribunals of the judicial power. As examined, if the law is declared unconstitutional and null, it is expelled from the legal order and it cannot be applied. And when the Constitutional Court interprets law, it must be applied following the given interpretation. However, this does not mean that there are no cases in which the Judgments and the doctrine of the Constitutional Court are not respected.

Regarding the effective compliance of the decisions of the Constitutional Court, Article 92 of the LOTC attributes the task to the Court itself providing, among other measures¹²⁴, the possibility to annul any

122 Judgement of the Constitutional Court 45/1989, of February 20, Para. 11, ECLI:ES:TC:1989:45.

123 A.J. Gómez Montoro, *Artículo 40...*, p. 616, 622–623; I. De la Cueva Aleu, *Artículo 40...*, p. 458. An analysis of Judgment 45/1989 in J. Concheiro del Río, *La revisión...*, p. 75–108.

124 For example, impose penalty payments (between 3 000 to 30 000 €), until the complete fulfilment of the ruling; or suspend from their duties the authorities of public employees responsible for the breach; execute the ruling by substitution. Article 92 LOTC.

resolution that breaches those delivered in the exercise of its jurisdiction, on the occasion of their execution¹²⁵.

Article 92 of the LOTC was amended by the Popular Party's government as a consequence of the Catalanian conflict, in order to give the Court new powers to guarantee the effective enforcement of its judgements¹²⁶. Different constitutional challenges were brought against the reform, which were dismissed by the Constitutional Court. In particular, with regard to the provision contemplated in Article 92.5¹²⁷ the Court declares that it is a „specific provision for a likewise unique situation when a certain type of Court resolution is not fulfilled”, and that its aim is to ensure and guarantee the effectiveness of those resolutions, without extending the scope and effects of the powers of suspension contemplated in Article 161.2 of the SC¹²⁸.

The Venice Commission, in the opinion adopted on its plenary session of 10–11 March 2017, recognized that this type of measures are legitimate and do not contradict the European standards, although it does not recommend to attribute this kind of powers to the Constitutional Court, pointing out the problems that some of the measures contemplated can raise¹²⁹.

125 Measure that must be adopted after hearing the Public Prosecutor Office and the body which delivered it. Article 92 LOTC.

126 Ley Orgánica 15/2015, de 16 de octubre, de reforma de la Ley Orgánica 2/1979, de 3 de octubre, del Tribunal Constitucional, para la ejecución de las resoluciones del Tribunal Constitucional como garantía del Estado de Derecho [Organic Law reforming the LOTC on the enforcement of Constitutional Court's resolutions as guarantee of the Democratic State]. Torres-Dulce shows his doubts regarding the reform, pointing out that the Court has an *auctoritas* and that, as a general rule, the other powers of the State are the ones that must carry out the enforcement, providing for the Constitutional Court's intervention only in exceptional cases. E. Torres-Dulce, *Titulo IX...*, p. 147.

127 „In the case of rulings handed down on suspension of challenged provisions or acts in which special constitutional significance may concur, the Court, ex officio or at request of the Government, shall adopt the necessary measures to ensure due enforcement without hearing the parties. In the same decision the Court will give audience to the public prosecutor and the parties within a joint deadline of three days, after which the Court will deliver decision overruling, validating or modifying the previously adopted measures”.

128 Judgement of the Constitutional Court 215/2016, of December 15, Para. 14, ECLI:ES:TC:2016:215; Judgement of the Constitutional Court 185/2016, of November 3, Para. 17 a), ECLI:ES:TC:2016:185. An English translation can be consulted in < www.tribunalconstitucional.es > (Case-law/Decisions translated), accessed: 30 March 2020.

129 In particular, the coercive penalty payments applied on individuals and the suspension from office of officials. Venice Commission, Opinion 872/2015, of 13 March 2017, on the Law of 16 October 2015 amending the Organic Law No. 2/1979 on the Constitutional

9. Conclusions

Through the present work we have examined the main characteristics of the Spanish Constitutional Court and system of concentrated constitutional justice, aiming to give the reader an overview of its organization and functioning and, in particular, of its main and most important function: the interpretation of the Constitution and the legislation, and the creative role that the Court exercises through it.

Effectively, the interpretative function is the main and essential function of Constitutional Courts nowadays and the Spanish Constitutional Court is not an exception. Through this function the Court can specify and develop the content of provisions both at constitutional and at sub-constitutional level, adapting them to the current social reality and integrating the possible omissions, and even on many occasions carrying out innovative and expansive interpretations, rather than literal interpretations. Its role, therefore, is not merely circumscribed to expel the norms that contravene the Constitution from the legal order.

In general, this role has been positively assessed by legal scholars¹³⁰, but the Court has also received critics on many occasions. In particular, one of the areas in which tensions have been greater and in which the Court has been put in a position that is not desirable¹³¹ has been the one derived from the configuration of Spain as a composite State. In particular, with regard to the reform of the Statutes of Autonomy of certain Autonomous Communities and, more recently, the so-called right to self-determination (*derecho de autodeterminación*). It must be noted that the Court has been forced to fulfil this role due to a lack of political compromise, which has

Court (CDL-AD (2017)003), p. 14–15, < [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2017\)003-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2017)003-e) >, accessed: 25 July 2019. It has been criticised that the Constitutional Court, in its Judgments 185/2016 and 215/2016, has provided far less guarantees than the Venice Commission. J. García Roca, *Attenti...*

130 J. García Roca, *La experiencia...*, p. 4; P. Pérez Tremps, *Sistema...*, p. 189; R.L. Blanco Valdés, *Luz tras...*, p. 183. Specially, the role played during the first years of Spanish democracy. P. Pérez Tremps, *Sistema...*, p. 189 et seq. And, also, its contribution to the pacification of complex conflicts like the one that arose when same-sex marriage was legalized in Spain. R.L. Blanco Valdés, *Luz tras...*, p. 184.

131 Since it risks that society perceives it as another protagonist of the political game. R.L. Blanco Valdés, *Luz tras...*, p. 193.

had an undeniably corrosive effect on the institution¹³². One of the most criticised judgements that seriously affected the Court's reputation was the Judgement of the Statute of Autonomy of Cataluña¹³³, which created a serious gap between the Court and the Catalanian authorities¹³⁴. And the secessionist process of Cataluña has brought again those problematic issues before the Court, forcing it to adjudicate numerous challenges against laws and resolutions of the Catalanian parliament proclaiming, for example, the sovereignty of the people of Catalonia or the right to 'self-determination'. There is no doubt that we are facing a political problem, but the lack of political answers and the challenges to the adopted decisions have transferred the conflict to the Court, which has been put at the centre of the political dispute¹³⁵. The Court has noted that it cannot solve the dispute and that the public powers, including the territorial ones, 'are the ones entrusted with resolving any matters arising in this field, through dialogue and cooperation'¹³⁶.

To conclude, despite some tensions and problems that can be mentioned¹³⁷, it can be said that the Constitutional Court carries out an essen-

132 F. Pérez de los Cobos Orihuel, *El papel...*, p. 369–372.

133 Judgement of the Constitutional Court 31/2010, of June 28, ECLI:ES:TC:2010:31. As Roberto Blanco points out, the political parties were responsible for forcing the Court to enter into a political battle that seriously affected the Court's reputation. R.L. Blanco Valdés, *Luz tras...*, p. 183.

134 J.M. Castellà Andreu, *Tribunal...*, p. 561–565.

135 Castellà Andreu points out that, on this occasion, the Court has recovered its reputation as an impartial body since it has tried to resolve the issues in a short timeframe alongside exercising *self-restraint*. J.M. Castellà Andreu, *Tribunal...*, p. 590.

136 Judgement of the Constitutional Court 42/2014, of March 25, Para. 4, ECLI:ES:TC:2014:42. Already, as early as 1981, the Constitutional Court stated that its role in a system of political pluralism 'is to fix the limits within which the different political options can be raised' and that, applying these criteria to the self-government principle, 'the Constitutional Court's role consists in fixing the limits whose non-compliance would imply a denial of the self-government principle, but within which the different political options can move freely'. Judgement of the Constitutional Court 4/1981, of February 2, Para. 3, ECLI:ES:TC:1981:4.

137 Some have been pointed out through the present work, like the way the members of the Court are appointed and the political „inoculation” that the proposal by the two Houses of the Parliament implies, the workload of the Court, or the occasions when conflicts have been transferred to the Court due to the lack of political answers (the secessionist process of Cataluña). Although there are others that could be mentioned but due to the objective of the present work and the limited space it is not possible to tackle in profundity, like the so-called *Presylser* case, were the Constitutional Court overruled the decision of the Supreme Court but, instead of returning the case for a new decision to it, it affirmed the opinion of the Court of Appeals of Barcelona, since it was the second occasion the Supreme Court had adjudicated the case, not taking into

tial role for Spanish democratic State, granting through its interpretative function the supremacy of the fundamental text.

Summary

Nowadays, Constitutional Courts carry out an essential function in every Democratic State because they safeguard the constitutional provisions and guarantee that the rest of the legal order complies with them. The Spanish Constitutional Court is not an exception and, through its interpretative function, has been able to specify and develop the content of provisions both at constitutional and sub-constitutional levels, creating norms, rules, and principles that adhere to those of constitutional rank. The present work aims to give the reader an overview of the organization and functioning of the Spanish system of constitutional justice, making a particular emphasis on the Constitutional Court's interpretative function because this is the main and most important function of current Constitutional Courts.

Keywords: constitutional justice, Constitutional Court, interpretative function, constructive interpretation

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Bibliography

- Alonso García R., *El Tribunal Constitucional y la eficacia temporal de sus Sentencias anulatorias* [The Constitutional Court and the efficacy of its annullment Judgments], „Revista de Administración Pública” 1989, no. 119.
- Aranguren Pérez I., *Artículos 1 a 15*, in: *Comentarios a la Ley Orgánica del Tribunal Constitucional* [Commentaries to the Organic Law of the Constitutional Court], dir.-coord. J.J. González Rivas, Madrid 2010.

account a previous judgement of the Constitutional Court. Judgement of the Constitutional Court 186/2001, of 17 September 2001, Para. 9, ECLI:ES:TC:2001:186.

- Aparicio Pérez M.A., Barceló I Serramalera M., *Manual de Derecho Constitucional* [Manual on Constitutional Law], Barcelona 2009.
- Blanco Valdés R.L., *Luz tras las tinieblas. Vindicación de la España Constitucional* [Light after darkness: vindication of the constitutional Spain], Madrid 2018.
- Brewer-Carias A.B., *General Report on Constitutional Courts as positive legislators in Comparative Law*, in: *XVIII International Congress of Comparative Law of the International Academy of Comparative Law*, George Washington University Law School, Washington, 27 July 2010, < <http://allanbrewerarias.net/site/wp-content/uploads/2010/07/1062-1008.-Brewer-Carias.-CONSTITUTIONAL-COURTS-AS-POSITIVE-LEGISLATORS.-IACL-Cong.-Exposici%C3%B3n.doc.pdf> >, accessed: 29 July 2019.
- Brust L., *The interpretation according to the constitution and the manipulative sentences*, „Rev. direito GV” 2009, vol. 5, no. 2, < http://www.scielo.br/scielo.php?script=sci_arttext&pid=S1808-24322009000200014&lng=en&nrm=iso >, accessed: 15 July 2019.
- Capelleti R., *¿Renegar de Montesquieu? La expansión y legitimidad de la justicia constitucional* [Deny Montesquieu? The expansion and legitimacy of the constitutional justice], REDC 1986, No. 17.
- Castellà Andreu J.M., *Tribunal Constitucional y proceso secesionista catalán: respuestas jurídico-constitucionales a un conflicto político-constitucional* [The Constitutional Court and the Catalan secessionist process: legal and constitutional answers to a political and constitutional conflict], „Teoría y Realidad Constitucional” 2016, no. 37.
- Concheiro del Río J., *La revisión de los actos nulos por inconstitucionalidad de las leyes* [The review of void acts due to unconstitutionality of the laws], Madrid 2002.
- Constitutional Court, *The Court of Constitutional Guarantees*, < <https://www.tribunalconstitucional.es/en/tribunal/historia/Paginas/Tribunal-de-Garantias-Constitucionales.aspx> >, accessed: 4 February 2019.
- De la Cueva Aleu I., *Artículo 39*, in: *Comentarios a la Ley Orgánica del Tribunal Constitucional* [Commentaries to the Organic Law of the Constitutional Court], dir.-coord. J.J. González Rivas, Madrid 2010.
- De la Cueva Aleu I., *Artículo 40*, in: *Comentarios a la Ley Orgánica del Tribunal Constitucional* [Commentaries to the Organic Law of the Constitutional Court], dir.-coord. J.J. González Rivas, Madrid 2010.
- Díaz Revorio F.J., *Las sentencias interpretativas del Tribunal Constitucional* [The interpretative Judgements of the Constitutional Court], Valladolid 2001.

- Falcón y Tella M.J. et al., *Case Law in Roman, Anglosaxon and Continental Law*, Brill – Nijhoff – Leiden 2011.
- Fernández Farreres G., *La contribución del Tribunal Constitucional al Estado Autonómico* [The Constitutional Court's contribution to the Autonomous State], Madrid 2005.
- Fernández Farreres G., *Sobre la designación de los Magistrados constitucionales* [Regarding the appointment of the constitutional Judges], „Revista Española de Derecho Constitucional”, núm. 105, septiembre-diciembre 2015.
- Fernández Segado F., *El Tribunal Constitucional Español como legislador positivo* [The Spanish Constitutional Court as positive legislator], „Revista Pensamiento Constitucional” 2011, vol. 15, no. 15.
- Ferreres Comella V., *The Constitution of Spain. A Contextual Analysis*, Oxford and Portland, Oregon, 2013.
- Ferreres Comella V., *Constitutional Courts and Democratic Values: A European Perspective*, Part I, New Haven & London 2009.
- García De Enterría E., *La Constitución como norma y el Tribunal Constitucional* [The Constitution as a norm and the Constitutional Court], Madrid 2006.
- García Roca J., *La experiencia de veinticinco años de jurisdicción constitucional en España* [The experience of 25 years of constitutional jurisdiction in Spain], México 2009.
- García Roca J., *Attenti al lupo: the Venice Commission strengthens the role of the judgments issued by Constitutional Courts but warns of the risks of their enforcement*, Blog IDP, Barcelona, 6 April 2017, < <http://idpbarcelona.net/docs/blog/venice.pdf> >, accessed: 25 July 2019.
- Garrote de Marcos M., *El recurso de Amparo electoral*, in: *El Tribunal Constitucional Español: una visión actualizada del supremo intérprete de la Constitución* [The Spanish Constitutional Court: and updated visión of the supreme interpreter of the Constitution], coord. A. Villanueva Turnes, España 2018.
- Garrote De Marcos M., Vila Ramos B., *Jurisdicción constitucional y procedimiento de defensa de los derechos* [Constitutional jurisdiction and the procedure for the protection of fundamental rights], Madrid 2015.
- Gómez Montoro A.J., *Artículo 39*, in: *Comentarios a la Ley Orgánica del Tribunal Constitucional* [Commentaries to the Organic Law of the Constitutional Court], coord. J.L. Requejo Pagés, Madrid 2001.
- Gómez Montoro A.J., *Artículo 40*, in: *Comentarios a la Ley Orgánica del Tribunal Constitucional* [Commentaries to the Organic Law of the Constitutional Court], coord. J.L. Requejo Pagés, Madrid 2001.
- Guillén López E., *Judicial Review in Spain: The Constitutional Court*, „Loyola of Los Angeles Law Review” 2018, vol. 41 (January).

- Gutiérrez Gil, A., *Artículo 49*, in: *Comentarios a la Ley Orgánica del Tribunal Constitucional* [Commentaries to the Organic Law of the Constitutional Court], dir.-coord. J.J. González Rivas, Madrid 2010.
- Ibáñez Buil, P., *Artículo 59*, in: *Comentarios a la Ley Orgánica del Tribunal Constitucional* [Commentaries to the Organic Law of the Constitutional Court], dir.-coord. J.J. González Rivas, Madrid 2010.
- Lôhmus, U., *The application of different techniques of interpretation of the Constitution as a factor of development thereof*, in: *Conference on the „Role of the Constitutional Court in the maintenance of the stability and development of the Constitution”*, Venice Commission, Moscow, 25 February 2004, CDL-JU (2004) 031, < [https://www.venice.coe.int/WebForms/documents/default.aspx?pdffile=CDL-JU\(2004\)031-e](https://www.venice.coe.int/WebForms/documents/default.aspx?pdffile=CDL-JU(2004)031-e) >, accessed: 19 July 2019.
- Martínez Pujalte A.L., *Spanish Legal System: Between Statutory Legal Systems and Case Law*, „Studia Iuridica Lublinensia” 2018, vol. XXVII, 1, DOI: 10.17951/sil.2018.27.1.157.
- Medina Guerrero M., *Artículo 1* [Article 1], in: *Comentarios a la Ley Orgánica del Tribunal Constitucional* [Commentaries to the Organic Law of the Constitutional Court], coord. J.L. Requejo Pagés, Madrid 2001.
- Pérez de los Cobos Orihuel F., *El papel del Tribunal Constitucional en el Estado Autónomico* [The role of the Constitutional Court on the Autonomous State], „Teoría y Realidad Constitucional” 2017, no. 40.
- Pérez Royo J., *Tribunal Constitucional y división de poderes* [Constitutional Court and division of powers], Madrid 1988.
- Pérez Tremps P., *Sistema de Justicia Constitucional* [System of Constitutional Justice], Cizur Menor – Navarra 2016.
- Punset Blanco R., *Artículo 2*, in: *Comentarios a la Ley Orgánica del Tribunal Constitucional* [Commentaries to the Organic Law of the Constitutional Court], coord. J.L. Requejo Pagés, Madrid 2001.
- Rubio Llorente F., *El Tribunal Constitucional* [The Constitutional Court], „Revisa Española de Derecho Constitucional”, año 24, núm. 71, Mayo-Agosto 2004.
- Rubio Llorente F., *La Forma del Poder. Estudios sobre la Constitución* [The form of Power. Studies on the Constitution], Madrid 1993.
- Rubio Llorente F., *La jurisdicción constitucional como forma de creación de Derecho* [The constitutional jurisdiction as a way of law-making], „Revista Española de Derecho Constitucional”, año 8, no. 22, 1988 (enero-abril).
- Ruiz Almendral V., *Brief on the remedy for the protection of individual rights before the Spanish Constitutional Court (recurso de amparo)*, Report presented to the Conference on preliminary individual requests (exception

- d'inconstitutionnalité) to Constitutional Courts, Rabat, Morocco 13 May 2015, European Commission for Democracy through Law (Venice Commission), CDL-JU (2015) 009.
- Salas J., *El Tribunal Constitucional español y su competencia desde la perspectiva de la forma de Gobierno: sus relaciones con los poderes legislativo, ejecutivo y judicial* [The Spanish Constitutional Court and its competence from the perspective of the form of government: its relations with the legislative, executive and judicial powers], „Revista Española de Derecho Constitucional”, año 2, No. 6, 1982 (September-December).
- Santolaya Machetti P., *Artículo 10*, in: *Comentarios a la Ley Orgánica del Tribunal Constitucional* [Commentaries to the Organic Law of the Constitutional Court], coord. J.L. Requejo Pagés, Madrid 2001.
- Tenorio Sánchez P.J., *¿Qué fue del recurso de amparo ante el Tribunal Constitucional?* [What happened with the *amparo* appeal before the Constitutional Court?], „Revista de Derecho Político”, no 101, enero-abril 2018.
- Torres Dulce E., *Título IX. Del Tribunal Constitucional* [Title IX. The Constitutional Court], in: *Homenaje a la Constitución 1978–2018* [Homage to the Spanish Constitution 1978–2018], ed. F. Palomero, España 2018.
- Torres Muro I., *Tribunal Constitucional: composición y funciones* [Constitutional Court: composition and functions], in: *Repensar la constitución. Ideas para una reforma de la Constitución de 1978: reforma y comunicación dialógica. Parte primera* [Rethink the Constitution. Ideas for a reform of the Constitution of 1978: reform and dialogic communication], ed. T. Freixes Sanjuán, J.C. Gavara de Cara, Madrid 2016.
- Torres Muro I., *Sinopsis artículo 161* [Synopsis Article 161 SC], in: *Constitución Española. Índice sistemático*, Congreso de los Diputados, 2003 (updated by M^a J.F. Ostolaza in 2011 and by L.M. Miranda in 2016), < <http://www.congreso.es/consti/constitucion/indice/index.htm> >, accessed: 8 March 2019.
- Torres Muro I., *Sinopsis artículo 163* [Synopsis Article 163 SC], in: *Constitución Española. Índice sistemático*, Congreso de los Diputados, 2003 (updated by M^a J.F. Ostolaza in 2011 and by L.M. Miranda in 2016), < <http://www.congreso.es/consti/constitucion/indice/index.htm> >, accessed: 8 March 2019.
- Torres Muro I., *Sinopsis artículo 164*, in: *Constitución Española. Índice sistemático*, Congreso de los Diputados, 2003 (updated in 2016 by L.M. Miranda), < <http://www.congreso.es/consti/constitucion/indice/index.htm> >, accessed: 8 March 2019.
- Valencia Martín G., *Artículo 5*, in: *Comentarios a la Ley Orgánica del Tribunal Constitucional* [Commentaries to the Organic Law of the Constitutional Court], coord. J.L. Requejo Pagés, Madrid 2001.