STANDARDIZATION OF JUDICIAL PRACTICE AND HARMONIZATION WITH THE ECTHR JURISPRUDENCE IN CRIMINAL LAW. THE SPANISH CRIMINAL JUSTICE SYSTEM

Lorena BACHMAIER*

Abstract

The present paper is based on the data provided for the CKS questionnaire for the comparative study on the "Standardization of judicial practice and harmonization of the European Court of Human Rights Jurisprudence in Criminal Law" of the Nicolae Titulescu University. The report aims to give a brief overview of the Spanish legal system and specifically the way in which it provides a coherent and unified judicial practice in the criminal law field in compliance with the standards set out by the ECtHR.

Keywords: *standardization of judicial practice; European Court of Human Rights Jurisprudence; Spanish legal system; criminal law field;*

I. Introduction to the judiary: The criminal courts

In Spain there are 10.3 judges per 100.000 inhabitants. The total number of judges is 4.836. The total budget of the Court system is 3.558.073.830 euros, which represent aprox. 1% of the total budget[1].

The General Council of the Judiciary is the governing body of the judicial power[2]. Art. 122 of the Spanish Constitution establishes the composition and main competences of the General Council of the Judiciary, and precisely states that "an organic law shall set up the statutes and the system of incompatibilities applicable to its members and their functions, especially in connection with appointments, promotion, inspection and the disciplinary system". According to this constitutional rule, the organic Law of the Judiciary (Ley Orgánica del Poder Judicial) 6/1985 of 1.7.1980 regulates the functions and competences of the General Council of the Judiciary[3].

The State Council, regulated by Organic Law 3/1980, 22.4.1980, is the supreme advisory body of the State[4]. The State Council is not involved in the unification of the case law, nor does it have any competences with regard to the judiciary.

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* Professor, Ph.D., Complutense University of Madrid (e-mail: l.bachmaier@der.ucm.es).

[1] These figures are the statistical data for 2009, published by the General Council of the Judiciary.

[2] To ensure the full separation of powers and the judicial independence, the Constitution establishes the General Council of the Judiciary (*Consejo General del Poder Judicial,* CGPJ) stated at Art.122.2 SC as the institution that will govern the judicial power. Judges are independent and bound only to the rule of law., See, L.BACHMAIER and A. DEL MORAL, *Criminal Law in Spain,* The Netherlands, 2010, p. 24.

[3] Art. 108 of the Law of the Judiciary states the draft laws which require a previous opinion of the General Council of the Judiciary, which are in general all the laws and legal provisions that are related to the judiciary, the judicial power, the staff of the courts, as well as criminal laws and those relating to the penitentiary rules. The opinion of the General Council of the Judiciary with regard to the legal reforms mentioned shall be sent to the Parliament within 30 days. The opinion of the General Council of the Judiciary has no legal binding effect.

[4] Art. 21 Organic Law 3/1980 of 22.4.1980 lists the draft laws and deeds that require to be informed by the State Council before their enactment. The reports of the State Council have no binding effect, but the laws that have been informed by the State council shall indicate if they have followed the opinion of the State Council or not.

The administration of justice is divided into four branches[5]: civil (within the civil branch there are commercial courts and family courts), criminal, labour, and administrative courts, and within each jurisdiction they are organised hierarchically. The Supreme Court is the highest judicial body in all branches of justice except the provisions concerning constitutional rights and guarantees (Art. 123.1 SC). This division allows the judges to develop over the years en expertise in legal specialities, which benefits the accuracy in adjudicating, particularly in complex cases, as well as the efficiency of the administration of justice.

Spanish territory is divided for judicial purposes into (Arts. 30 et. seq. LOPJ):

– Municipalities *(municipios)*

– Judicial Districts *(partidos judiciales)*

– Provinces *(provincias)*

– Autonomous Communities *(Comunidades Autonomas)*

This division is almost equivalent to the administrative division of the territory and it corresponds to the administrative demarcations with the same name, except the judicial districts which are a purely judicial territorial division (Art. 32 LOPJ). The judges only have jurisdiction within the territorial boundaries of their district. Every act that needs to be done outside their territorial jurisdiction will need the judicial cooperation of the competent judge.

The Constitutional Court, envisaged in Section IX of the Spanish Constitution of 1978, is the supreme interpreter of the Constitution.

The various levels of courts within each of the jurisdictional branches are empowered to hear cases depending on subject-matter rules or on the amount of the claim or seriousness of the penalty.

Within the Criminal jurisdiction there are following courts:

1) Justice of Peace *(Juzgados de Paz)* have jurisdiction in the Municipalities, but only in those where there is no Investigating Judge. They are appointed for a term of four years by the city council assembly and they are not professional judges. As to their status and functions, as criminal courts they decide only over a limited number of petty offences or misdemeanours (Arts. 99 et.seq. LOPJ and art. 14 CCP). Their subject-matter jurisdiction is very limited.

2) Investigating Judge *(Juzgados Instruccion)*. They are made up of one judge, who deals with civil as with criminal matters. In the criminal field, the judge acts as an Investigating Judge but is also competent to deal with the *habeas corpus* and with minor offences procedures (Art. 87 LOPJ).

They also act as trial courts in cases of petty offences.

3) Criminal Courts *(Juzgado de lo Penal)*, are trial courts with jurisdiction in the territory of the province. They are competent to deal in the first instance with cases where the imprisonment penalty is lower than 5 years (Art. 14.3 LECrim).

4) Provincial Courts *(Audiencia Provincial)*, whose Criminal Sections – made of three judges – deal as a first instance court with cases sanctioned with a penalty higher than five years imprisonment; in addition they act as appellate courts in respect of the sentences of the Criminal Courts within the province (Art. 80 et.seq. LOPJ). The jury trial takes place within the provincial courts; a magistrate of this court will preside over the jury trial.

5) Higher Regional Courts *(Tribunal Superior de Justicia)*. Each Autonomous Community has a High Court of Justice, which is the top of the judicial organisation of each region, without prejudice of the jurisdiction of the Supreme Court. The High Court of Justice deals as a first instance court with criminal cases in which the accused is a judge, magistrate or a public prosecutor. They also decide the appellate review of the decisions rendered by the Provincial Courts (Art. 73 LOPJ). It also has competence to decide the appeals filed against the judgment rendered in the jury trial (Art. 846 bis a) LECrim).

[5] On the judicial organization see L.BACHMAIER and A. DEL MORAL, op.cit., pp. 197 ff.

6) *National Court (Audiencia Nacional),* has jurisdiction over certain crimes with national effects. In order to avoid the difficulties arising from the necessity of coordinating the investigation of numerous Investigating Judges (whose power is limited to the territory of the judicial district) in more complex cases, in 1977 the National Court was established as a court with national jurisdiction. In the criminal field, it is competent for particularly serious offences that go beyond the borders of several provincial courts. The subject-matter jurisdiction is mainly defined in Art. 65 LOPJ, which are: counterfeiting of coins, fraud possibly affecting the national economy or with repercussions in more than one province, money-laundering, offences against the public health committed by organised groups (drug trafficking), offences against the Head of the State, and crimes committed beyond the Spanish borders, and later also terrorism.

7) Supreme Court *(Tribunal Supremo)*, which sits in Madrid is the highest judicial body, except in relation to constitutional rights. The Supreme Court is divided into five Chambers, one for each of the jurisdictional branches, plus the Military Chamber. The Criminal Chamber has nation-wide jurisdiction to decide the *appeal* and has also power to review certain sentences. It also has jurisdiction to investigate and decide criminal cases against persons that occupy high position in State institutions, as for example, the President of the government, of the Senate, the members of the General Council of the Judiciary, the President of the Constitutional Court or the Magistrates of the National Court *et al*. (Art. 57 LOPJ).

8) Other specialized courts within the criminal jurisdiction are: juvenile courts, gender violence courts and penitentiary courts. Military courts have a very limited scope of jurisdiction over criminal actions committed by members of the military within their premises or during their missions.

II. The system of sources of law and the role of the jurisprudence

1. *Overview of the sources of law*

The first title of the Spanish Civil Code that of 1889 contains the provisions relating the sources of law in the Spanish legal system[6]:

"1. The sources of the Spanish legal order are statutes (*leyes*), custom, and the general principles of law (*principios generales del derecho*).

2. Provisions that contradict those at a superior level lack validity.

3. Custom only applies where there is no applicable statute and then it must not be contrary to morals, or public policy, and it must be proven…

4. General principles of law are applicable where there is no statute or custom…

5. **Case law (*jurisprudencia*) complements the legal order with the doctrine the Supreme Court establishes, by reiteration, interpreting and applying the statutes, the custom and the general principles of law.**

7. Judges and courts have the absolute duty to decide the matters in issue in each case, abiding by the established system of sources of law."

This provision already establishes the order in which the different laws shall be applied. With regard to the sources of law and the priority of rules, the Spanish Constitution expressly states in art.9.3: „The Constitution guarantees the principle of legality, the hierarchy of legal provisions, the

[6] For a general overview of the sources of law in the Spanish legal system see M. MARTÍNEZ SOSPEDRA, *Fuentes del derecho en el derecho español: una introducción*, Valencia 2010.

publicity of legal enactments, the non-retroactivity of punitive measures that are unfavourable to or restrict individual rights, the certainty that the rule of law will prevail, the accountability of the public authorities, and the prohibition against arbitrary action on the part of the latter."

The legal hierarchy means that certain rules cannot contradict those above them in hierarchy. On the other side the rules at a higher level in the hierarchy can override rules down in hierarchy and thus deprive them of legal effect. Thus a Regulation (*Reglamento*) cannot contradict a law, a law cannot contradict an organic law, and none of the legal provisions can contradict the constitution.

The entering into force of the Spanish Constitution determines that the International Treaties concluded by Spain and published in the legislative collection, are part of the domestic legal system. This has a particular importance since the adhesion of Spain to the European Community in 31.5.1985. Spain's adhesion includes the statement that Spain accepts without reserves the treaties and their political aims of the European Community and the primacy of Community law over those national provisions that are contrary to them. The adhesion means also that Spain accepts and is bound by the procedures to ensure uniformity of interpretation of Community Law. It is also crucial to understand the effect of the ECHR and the Standards set out by the ECtHR in the Spanish legal order: Spain ratified the European Convention of Human Rights in 1979.

As to the criminal law, Art. 25 SC recognises the principle of penal legality *(principio de legalidad penal)*, stating that "no one may be convicted or sentenced for any act or omission which at the time it was committed did not constitute a crime, misdemeanour or administrative offence according to the law in force at that time." The question has been raised whether the legality principle requires all criminal offences to be regulated by organic law, or if an ordinary law accomplishes the constitutional requirements.[7] Art. 81 of the Spanish Constitution states:

1."Organic laws are those relating to the development of fundamental rights and public liberties, those which establish Statutes of Autonomy and the general electoral system, and the laws provided in the Constitution. 2. The passing, amendment or repeal of the organic laws shall require an absolute majority of the members of Congress in a final vote on the bill as a whole."

This means that only the matters mentioned in Art. 81 SC shall be regulated by organic law. The problem is to define the scope of rules "relating to the development" of fundamental rights.[8] For some authors,[9] the penal law has to be an organic law as, according to Art. 81 SC, it relates directly to the development of fundamental rights. When imposing a custodial penalty one of the most important fundamental rights, namely the right to freedom is restricted and thus, in accordance with Art. 81 SC, an organic law is needed to enact these legal provisions. However, the Constitutional Court, when recognising that the restriction of every fundamental right requires an authorisation provided in an organic law, states that only when the legislator establishes custodial penalties, this kind of law is needed. In those cases where the penalty is a financial fine or another non-custodial penalty, such organic law is not needed, as no fundamental right is directly affected.[10] Neither the prosecutor nor the General Council of the Judiciary or the institutions of the Autonomous Communities may pass any criminal law. The criminal law making procedure is absolutely centralised.

[7] See J. CHOFRE SIRVENT, *Significado y función de las leyes orgánicas*, Madrid 1995, pp.134-147.

[8] On the discusión of the scope of the organic laws see J. CHOFRE SIRVENT, op. cit., pp. 102-169.

[9] See N. GARCIA RIVAS, "Los principios del derecho penal constitucional", at http://www.iustel.com; L. *ARROYO ZAPATERO*, "Principio de legalidad y reserva de ley en materia penal", *Rev. Esp. Dcho.Const.*, n. 8 (1983), pp. 24 ff.

[10] SSTC 140/1986, 11 November and 160/1986, 16 December.

2. The rules on the interpretation of legislation

The main provisions on the interpretation of laws are envisaged in the Civil Code, arts. 3 and 4.

Art. 3 CC: 1."The rules shall be construed according to the literal meaning of the words, with regard to the context, the historical and legislative precedents, the social reality of the time when they are to be applied, according mainly to their aim and spirit.

2. Equity shall be considered when applying the rules, although the judicial decisions may only be grounded on equity in those cases where the laws specifically allow it.

Art. 4 CC: "1. Analogical interpretation shall be applied in those cases where the law does not regulate a specific issue, but a similar one, with the same aim.

2. Criminal laws, exceptional laws and temporarily limited laws, shall not be applicable to different cases or times as they were enacted for.

3. The rules of this Code shall supplement the rules of other matters not included in this code."

Additionally, art.5.1 of the Judiciary Act prescribes that the judges will interpret and apply the laws according to the constitutional rules and principles, following the interpretation laid out by the Constitutional Court in all kind of proceedings.

The question if the interpretation criteria set out in the CC are also applicable for the interpretation of constitutional rules has been widely studied by the legal scholars[11]. In this respect, it has been pointed out that the evolutive interpretation —the interpretation seeking to adapt the meaning of the rule to the changing social, political and economic context— has a particular significance in the interpretation of the Constitution. The Constitution is an open text, result of the consensus of the drafters, and therefore, it is through the interpretation that its rules can adapt to new times and situations. Moreover the constitutional interpretation has to give attention to the feature of unity of the Constitution: one constitutional rule cannot be interpreted in an isolated way, but only with regard to the other constitutional provisions, as the Constitution is an integral text. But there are no legal provisions establishing special patterns or rules of interpretation of the Constitution.

3. The role of the jurisprudence

The role of the jurisprudence, as expressed in the aforementioned art. 1.5 of the Civil Code, following the traditional Napoleonic French system of sources of law plays only a secondary role, complementing the other sources of law.

At first the so called "legal doctrine" —the expression used in art. 6.5 of the Civil Code for the case-law— comprised the case-law of all courts, but its scope was narrowed down until it only applied to the case-law of the Supreme Court. For identifying the existence of "legal doctrine", there must be at least two decisions of the Supreme Court in the same sense. A breach of the jurisprudence thereafter by an inferior court can give rise to appeal by cassation to the Supreme Court (infringement of the "legal doctrine").

In order to allow the legal order to evolve and adapt to new circumstances and social needs, the judges may depart from the established case-law. But, the change of reiterated and long established case law on particular matters needs to be motivated: the judgment has to explain the reasons that justify departing from the previous interpretation and what are the grounds for adopting new interpretative guidelines. This function is attributed specifically to the Supreme Court and the Constitutional Court.

[11] On this issue see generally, T. REQUENA LÓPEZ, Sobre la función, los medios y los límites de la interpretación de la Constitución, Granada 2001.

But, as not all the cases and legal issues have access to the Supreme Court and the Constitutional Court, the Appellate Courts also have a say in the interpretation of legal provisions. Even if the infringement of the case-law set out by a superior court may constitute a reason to quash the sentence of the lower court, it does not mean that the lower court is in all events obliged to follow the interpretation adopted by the superior courts.

Usually lower courts tend to follow the case law of the Appellate Court of their territory. However, if they consider that the previous case-law does not apply to the actual case or should be reconsidered, the judges can depart from the precedents, explaining the grounds therefore. For example, if a rule has to be reinterpreted in a different way, because there is a judgement of the ECtHR stating the way in which the law should apply, or there is a new case-law from the Constitutional Court, the lower Court, shall invoke those decisions to depart from the case-law of Appellate Courts.

In sum, the judge is free to follow the legal doctrine of the Supreme Court, but in that case he/she will face the risk of his/her decisions being upset by way of appeal or cassation. This flexibility allows the lower judges to disregard errors or outdated interpretations of the Supreme Court. By motivating the reasons why he/she does not consider the existing jurisprudence not applicable to the case. But continuous disregard of the doctrine set out by the Superior Courts, without motivation, could lead to accountability for neglecting the judicial functions.

As to the case-law of the Constitutional Court, as mentioned earlier, art. 5 of the Judiciary Act (*Ley Orgánica del Poder Judicial*) states its binding effect[12]. Each judge has to apply the laws according to the interpretation given by the Constitutional Court.

The legal doctrine of the Supreme Court and the uniform interpretation of the constitutional provisions by the Constitutional Court bring uniformity in the legal system.

4. The jurisprudence of the Strasbourg and Luxembourg Courts in the Spanish legal system

According to Article 10. 2 of the Spanish Constitution, Spanish rules have to be construed in the light of the international conventions and treaties signed and ratified by Spain and Art. 96 SC states: "Properly concluded international treaties shall form part of the domestic legal order once they have been published in Spain..."[13]

Additionally, Art.93 of the Spanish Constitution provides for the exercise of certain competences to be transferred to the European Community. This constitutional provision states:

"By means of an organic law, authorisation may be granted for concluding treaties by which powers derived from the Constitution shall be vested in an international organisation or institution. It is incumbent on the *Cortes Generales* or the Government, as the case may be, to guarantee compliance with these treaties and with the resolutions emanating from the international and supranational organisations in which the powers have been vested."

The combination of arts. 93 and 96 SC allows the European Community law to be integrated into the Spanish legal system. Art. 93 guarantees compliance with treaties by the government and by parliament and art. 96 states that once signed and officially published in Spain, the treaty becomes part of the internal law. With regard to the European Union the signature of the adhesion treaties by Spain entail the acceptance of a restricted sovereignty in certain areas and the acceptance of the supremacy of the European Law over the national law in those areas, as declared by the European

[12] Vid. J. LÓPEZ BARJA DE QUIROGA, "La vinculación de la doctrina del Tribunal Constitucional", in La casación: unificación de doctrina y descentralización. Vinculación de la doctrina del Tribunal Constitucional y vinculación de la jurisprudencia del Tribunal Supremo, Estudios de derecho Judicial, vol. 87 (2006), pp. 11-33.

[13] See L.BACHMAIER and A. DEL MORAL, op.cit., p. 49.

Court of Justice. Art. 5 of the Treaty of Rome requires that national judicial bodies should apply European law instead of any contradictory national law. The national law may file a question of unconstitutionality of the domestic provision with the Constitutional Court or can by his/her own authority leave unapplied the national rule and instead give preference to the application of the Community law.

Spain is party to many treaties relevant to criminal law. International treaties have the status of a directly applicable legal rule. If the treaties contain provisions which are contrary to the Constitution, they require for their approval prior constitutional reform. The government and the parliament may ask the Constitutional Court to declare if a treaty is in conformity with the Constitution. Once the Constitutional Court declares the compatibility the treaty will be published in the legislative bulletin and become part of the legal system. Some treaties require the prior consent of Parliament to become part of the Spanish legal order. As a member of the United Nations Spain has signed the International Covenant on Civil and Political Rights (New York 1966), which became effective in Spain on 13 April 1977. Other treaties ratified by Spain are the International Convention on the Elimination of all Forms of Racial discrimination (New York 1966), the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (New York 1987), the Convention against Illicit Traffic of Narcotic Drug and Psychotropic Substances (Vienna 1988), and the International Convention for the Suppression of the Financing of Terrorism (New York 1999).

Within the Council of Europe Spain has ratified many treaties relevant to criminal law and procedure. The most relevant is, of course, the European Convention on Human Rights (Strasbourg 1950) and its amending protocols, which became effective in Spain on 4 October 1979. Important for the criminal justice are the European Convention on Extradition (Paris 1957) ; the European Convention on Mutual Assistance in Criminal Matters (Strasbourg 1959), ratified on 18 August 1982; the European Convention on the Suppression of Terrorism (Strasbourg 1977); the Convention on the Transfer of Sentenced Persons (Strasbourg 1983); the Convention on the Compensation of Victims of Violent Crimes (Strasbourg 1983); the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (Strasbourg 1990). Other important international conventions adopted within the Council of Europe as for instance the Criminal Law Convention on Corruption (1999), the Convention on Cybercrime (2001), the Convention on the Prevention of Terrorism (2005) or the Convention on Action against Trafficking in Human Beings have not been ratified by Spain by now (March 2008).

5. The relationship between jurisprudence and doctrine

As Merryman says, "the pre-eminence of the scholar in the civil law tradition is very old, where the Roman jurisconsult is considered to be the founder of this scholarly tradition. In the Anglo- American legal tradition although the legal scholarship may be growing, judges still exercise the most important influence in shaping the development of the legal system"[14]. This statement made for the whole civil law tradition is also applicable to the Spanish legal system, where most codes drafted during the 19th century were the work of scholars. Nowadays, government still calls on prestigious jurists to carry out the drafting of laws, and if they are not assigned the drafting itself, they are usually consulted on the legal reforms. In sum, the role of the legal scholars in Spain is still very important in the progress and development of the legal system.

With regard to the question of the relationship between jurisprudence and legal science, if we are to answer it in a few words, it can be said that there is a constant inter-action. Legal scholars when researching a legal topic, they usually start analyzing the case-law on that particular issue, if

[14] J.H. MERRYMAN, The civil law tradition. An introduction to the Legal Systemas of Western Europe and Latin America, Stanford, CA, 1969, 1985, p. 57.

there is already jurisprudence about it. The research methodology always —almost always— includes the critical analysis of the jurisprudence.

Supreme Court and Constitutional Court have rendered benchmarking decisions in many fields of the law and thus the judicial decisions are given importance within the legal research. And conversely, the judges when tackling a legal issue, they resort to the legal science. The basis of any legal study begins with the reading of the legal scholar works, textbooks and treaties on the subject. In finding the applicable law, the meaning of a legal provision and the possible interpretations, judges —if they have time and the workload allows them— they not only look at the judicial decisions, but most often also to the legal scholar work. However, it is still infrequent that a judgment makes a reference to a certain author or to a particular article or book, even if they base the decision on it. However, there are some judges that already include quotations or reference to the legal doctrine. In sum, in Spain the legal scholar work plays a significant role in the jurisprudence, even if the lack of time sometimes impair them to study the whole scientific production on a certain topic. To facilitate the access to the legal books and articles, every court has a basic library, more complete depending on the hierarchy of the court. Moreover, the General Council of the Judiciary publishes monographic volumes of the most actual and complex legal problems, where the authors are not only practitioners but also legal scholars. These books are distributed to all courts throughout the Spanish territory. In addition, several databases allow on-line access to scientific articles published in different legal periodicals. Although the data bases are more and more comprehensive, in Spain we still do not have a research tool like Hein-online.

The Constitutional Court and the Supreme Court not only have very complete libraries and wide access via internet to many scientific reviews, but they have a good number of high qualified judicial clerks (*Letrados*), that undoubtedly study all the relevant publications before drafting a decision. It must be bore in mind that several of these judicial clerks of the Constitutional Court, are themselves first rank University Professors.

6. The influences of globalisation on the Spanish jurisprudence

The whole legal system is influenced by the globalisation. The expansion of internet[15], the growth of trans-national commercial exchange as well as the appearance of new forms of trans-national criminality have clearly influenced many legislative instruments regarding the substantive and the procedural law. Legal orders are not immune to the globalisation process and the convergence of legal systems is visible, particularly in the field of human rights[16]. Apart from the obvious globalisation of laws and the inter-action and mutual influence of the Constitutional Courts of different states, it is not easy to identify how the Spanish jurisprudence has been influenced by comparative law or international legal trends. The clearest influence derives from the case-law of the ECtHR. As the judicial clerks and judges of the ECtHR, when studying a case which requires an innovative approach, often have a look at the solutions given by other Supreme Courts or International Courts —precisely from the US Supreme Court, the Australian Courts or the German Constitutional Court—, we could affirm that its decisions are not devoid of the influence of globalisation. The case-law of the ECtHR is present in the Spanish jurisprudence, thus the globalisation has a clear influence, at least through this path, in the Spanish jurisprudence.

Apart from this, it is at odds that Spanish courts when deciding a case refer to comparative law or quote decisions of foreign courts. Constitutional Court and Supreme Court in single cases

[15] See U. SIEBER, "Rechtliche Ordnung in einer globalen Welt", in *Rechtstheorie* 41 (2010), pp. 151-198, p. 153; A. ESER, "Internet y el derecho penal internacional", in *Hacia un derecho penal mundial,* Granada 2009, pp. 73 ff.

[16] On the debate about global law, economy and Human Rights, see the interesting reflections of M. DELMAS-MARTY, *Global Law*, New York, 2003, pp. 10 ff.

acknowledge the solutions followed in other legal systems or foreign courts. For example, in the Constitutional Court jurisprudence regarding the exclusionary rules of evidence in the criminal procedure, the influence of the U.S. Supreme Court is undeniable.

III. Appeal, cassation and other remedies

If we focus on criminal matters, the judgments given in first instance can be challenged by way of appeal to a higher court. The decisions rendered by the Court of Appeal can, in some cases, be challenged by way of cassation before the Supreme Court. Precisely,

the judgments rendered by the Justice of Peace will be appealed before the Investigating Judge, the judgments of the Investigating Judge before the Criminal Court, the ones of the Criminal Court before the Provincial Appellate Court and those rendered in first instance by the Provincial Appellate Court can, at the present, only be challenged by way of cassation before the Supreme Court.

Not all the decisions and judgements given in criminal proceedings can be challenged at the Supreme Court. The judgements rendered within the petty offence proceedings that are attributed either to the Justice of the Peace or to the Investigating Judge, have no access to cassation. Art. 847 CCP expressly states which decisions may be subject to appeal by cassation, and generally only sentences rendered by the Superior Courts of Justice or the Appellate Provincial Courts can be reviewed by way of cassation.

Furthermore, once the judicial remedies are exhausted, the parties to the proceedings may lodge a constitutional appeal grounded on the infringement of a constitutional rule. However, the access to the Constitutional Court since the reform approved in 2007, is very much restricted: in practice the admission of a Constitutional appeal is subject to the assessment made by the Court on the constitutional relevance of the case[17], and this amounts almost to a discretionary admission system.

Appellate review. The regulation of the appeal is not uniform, as there are special provisions for each type of proceedings and due to the overlapping reforms that have taken place the last decades, the regulation is much more confusing than it should be.[18] The CCP of 1881 provides that the judgments rendered by the provincial court (within the ordinary proceedings for serious offences) can only be reviewed by way of cassation and not by ordinary appeal. It must be noted that the appeal by way of cassation can be filed only to challenge legal issues, but not factual issues

The appellate review is not limited to the negative control of the sentence rendered in the instance, but it allows the appeal court to render a new decision over the issues at stake. The appellate review can be grounded firstly on the infringement of procedural rules that have caused a violation of the right to a fair process. And second, it can be founded on the violation of substantive rules or an error in the evaluation of the evidence. These are the different grounds mentioned in Art. 790 CCP, but in practice it does not mean that the grounds for appeal are legally limited: by way of appeal the appellant may state violation of procedural rules, request to review the factual conclusions reached by the instance court or ask for a new evaluation of the evidence. Notwithstanding the broad scope of the appellate review and the possibility of a new evaluation of the facts, the evidence already

[17] Vid. L. BACHMAIER, "La reforma del recurso de amparo en la Ley Orgánica 6/2007, de 24 de mayo", *La Ley*, 10.9.2007 (nº 6775), pp. 1-5.

[18] On this issue see A. DEL MORAL, R. ESCOBAR and J. MORENO, *Los recursos en el proceso penal abreviado*, Granada 1999, pp. 142 ff.; M.P CALDERÓN CUADRADO, *La segunda instancia penal*, Navarra, 2005.

practiced before the trial court will not be repeated before the appellate court (Art. 790.3 CCP). In the appellate proceedings evidence will only be practiced in following cases: 1) evidence that could not be practiced in the first instance, because it was not known or it was produced in a later moment; 2) evidence that was proposed by the parties but, without legal justification, was not admitted by the trial court; and 3) evidence was proposed and admitted by the trial court, but due to any kind of grounds, could finally not been practiced.

There is no „prejudicial appeal" (according to the Luxembourg Court pattern) regulated in the Spanish legal system, although the question of constitutionality resembles the pattern of the European prejudicial appeal, as it will be explained later.

Another issue is related to the right to appeal[19]. Pursuant art.14.5 International Covenant on Civil and Political Rights of 1966: "5. Every one convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law." Spanish laws are bound by this provision, thus, even if the CCP does not expressly recognized the right to a "double instance", the Spanish Constitutional Court and the Supreme Court, have declared that this is a fundamental right applicable to the criminal justice system. Problems have arisen, however, with regard to the meaning of this right to have the conviction judgment reviewed. The Supreme Court,[20] the Constitutional Court[21] and the European Court of Human Rights[22] have established that the right to two instances does not inevitably imply the need for a system of appeals in which an ordinary appeal is granted in every case. It would be enough to have the opportunity to challenge the conviction with a superior court, not necessarily by way of ordinary appeal. In sum, appeal by cassation would, according to the Spanish Constitutional Court suffice to comply with the requirements of art. 14.5 UN International Covenant on Civil and Political Rights.

Cassation. The appeal by way of cassation[23] (*recurso de casación*) may be lodged against the decisions of courts of appeal, e.g., the sentences of the Provincial Courts or the Criminal Chamber of the National Court, when acting as appellate courts. But, as already mentioned, cassation may also be filed against the judgments rendered by the Provincial Courts as trial courts, the judgments of the Superior Courts of Justice and all other final decisions of these courts (Arts. 847 y 848 CCP).

The appeal in cassation was generally introduced in the Spanish legal system in 1870 with two main objectives: to control the application of the statutory law by the lower courts; and to reach a uniform doctrine when construing the legal rules. But these two aims should be achieved while promoting the adequate protection of the parties' rights within the criminal procedure (protection of the *ius litigatoris*). Later, the protection of the fundamental rights recognized in the Constitution was added as an objective of the appeal in cassation (Art. 5.4 Judiciary Act).

Cassation in the interest of law is not admissible within the criminal procedure. The cassation is always linked to the protection of the rights of the parties to the proceedings (protection of the *ius litigatoris*). There is no cassation grounded exclusively in providing coherence to the legal system without affecting the particular rights of the parties in the relevant criminal proceedings. Cassation in the interest of law is regulated within the civil procedure (arts. 490-493 Code of Civil Procedure), to

[19] See generally, A. DEL MORAL, R. ESCOBAR and J. MORENO, *op.ult.cit*., pp.126 ff.

[20] For example, STS of 8 February and STS 27 March 2000; and STS 4 December 2000, which was preceded by a Non-Jurisdictional Agreement of the Second Chamber of the TS (dated 13 September 2000) in which the issue was discussed after learning of the opinion of the UN Committee, expressed in the first of the Communications referred to above.

[21] STC 80/1992 of 28 May, STC 113/1992 of 14 September, STC 29/1993 of 25 January, STC 120/1999 of 28 June, STC 70/2003 of 3 April, STC 80/2003 of 28 April and STC 116/2006 of 24 April.

[22] Dismissing decisions of 18 January 2000 - *Pesti and Frodl* case, 30 May 2000 – *Loewenguth* case, and 22 June 2000 –*Deperrois* case.

[23] On the cassation in criminal proceedings, see generally J.M. LUZÓN CUESTA, *El recurso de casación penal*, Madrid 2000.

provide for uniformity of procedural rules. Those who have standing to lodge cassation in the interest of the law are: the Public Prosecutor, the Ombudsman and certain public agencies that show a special interest in the issue at stake. The cassation in the interest of law shall be filed within one year since the last judgment that applies the controversial procedural rule.

The competence of the Spanish Supreme Court within the criminal jurisdiction is regulated in art.57 of the Judiciary Act. The appeal by cassation will be decided by the Supreme Court (Second Chamber) made of a panel of three or five judges. The grounds for appeal by cassation are legally limited. Cassation can be grounded on:

a) an infringement of substantive criminal law;

b) error in the assessment of documental evidence. The Supreme Court under this paragraph can control the existence of sufficient evidence and if in the assessment of the evidentiary value of documents, the rules of logic, experience and accepted and scientific evidence have been respected or conversely have been manifestly disregarded. To quash a sentence on this ground there must have been documentary evidence timely produced, the document must show the erroneous evaluation made by the judge, or be evident that the document has not been taking into account when adjudicating, and third, that the evidentiary value of the document has not been contradicted by another evidence;

c) violation of a procedural rule. Specifically art. 850 CCP mentions as grounds for cassation based on procedural rules, the following: 1) the denial to present and practice evidence timely announced. To accept this appeal by cassation it is required that the evidence has been not only duly announced, but it must also be appropriate and admissible evidence. 2) when any of the parties have not been legally summoned to appear at trial; 3) when the court without sufficient grounds refuses to allow a witness to answer to adequate questions, and the witness deposition may be relevant for the outcome of the proceedings. 4) when a question has been rejected on the grounds that it was tricky, and in fact it is not; 5) if the trial is not suspended existing legal causes to halt it in order to safeguard the right of defence of any of the defendants. 6) if the rules on sentencing have been infringed (851 CCP).

Review of sentences. The Supreme Court has also competence to decide on the special remedy or appeal by review. The appeal by review (revision) is an extraordinary remedy based upon reasons of justice against a sentence which is *res iudicata*. The appeal by review, differently from the ordinary remedies is not aimed at precluding the judgment from being final but rather to quash a judgment that has already gained *res iudicata* effect. This extraordinary remedy aims to have a sentence annulled when there are substantial reasons of justice that must prevail over the application of the normal criteria of legal security that govern *res iudicata*.[24] Only final conviction sentences —and not other types of judicial decisions— are susceptible of revision (Art. 954 CCP). Contrary to what occurs in other legal systems, in Spain the appeal by review can be exercised only in favour of the defendant and therefore is not available against acquittal sentences.

The competent court is the Criminal Chamber of the Supreme Court, which can decide on these reviews exclusively in the specific cases listed in Art. 954 CCP: 1) when there are two contradictory sentences convicting two persons for the same crime when that crime could have only been committed by one single person; 2) when the conviction was based upon the death of someone who later is proved to be alive (this is a very rare case in practice); 3) when the conviction judgment was the direct result of a criminal behaviour —e.g. if the ground for the sentence was a document that was later declared false in a judicial process; 4) when new facts or new evidence, which were unknown and could not be taken into account in the conviction sentence, may prove the defendant's innocence. The latter cause for appeal by review is the one most often alleged in practice. It has been

[24] See STC 124/1984, 18 December.

discussed, in this respect, whether a change in the case law of the courts can be considered a "new fact" that constitutes a valid ground for the revision of a sentence with effect of *res iudicata*. The question has been controversial, and tackled in contradictory ways by the two highest Spanish courts. A decision of the Constitutional Court in 1997 provided an affirmative answer, in those cases in which the change in the case law led to the decriminalization of the conduct on which the sentence was based, but the Supreme Court held the contrary opinion two years later —in a decision (*acuerdo*) of 30 April 1999[25].

IV. The constitutional review

There is no annulment of criminal laws or other legal provisions in the Spanish legal system. The judge who considers that a law enacted after the entry in force of the Constitution is contrary to it, he/she shall lodge the question of unconstitutionality and suspend the adjudication of the case until he/she gets a decision from the Constitutional Court. The decisions on questions of unconstitutionality have *erga omnes* effect, and thus every judge is bound to follow that decision. When deciding a case, the judge considers that a legal provision that is previous to the entry into force of the Constitution is contrary to it, he/she shall not apply it, on the grounds of unconstitutionality, without being obliged to raise the question of unconstitutionality. This interpretation of the single judge has only effect to the single case he/she is deciding on.

Following rules of the Organic Law of the Constitutional Court regulate the constitutional review in the Spanish legal system:

Article 27

1. 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.

2. A declaration of unconstitutionality may be issued in respect of the following:

a) Statutes of Autonomy and other organic laws.

b) Other State laws, regulations and enactments having the force of law.

In the case of legislative decrees (*decretos legislativos*), the Court's jurisdiction shall be exercised without prejudice to the provisions of Article 82, number 6, of the Constitution.

c) International treaties.

d) Rules of Procedure of the Houses and the Spanish Parliament (*Cortes Generales*).

e) Laws, enactments and regulations having the force of law of the Autonomous Communities, subject to the same reservation as under sub-paragraph b above with respect to cases of legislative delegation.

f) Rules of Procedure of the legislative Assemblies of the Autonomous Communities.

Article 28

1. In order to determine the conformity or non-conformity with the Constitution of a law, regulation or enactment having the force of law issued by the State or the Autonomous Communities, the Court shall consider, in addition to constitutional precepts, any 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.

[25] J.A. TOMÉ GARCÍA, (et al.), *Derecho Procesal Penal*, Madrid 2007, pp. 631-632.

2. Furthermore, the Court may declare unconstitutional, on grounds of infringement of Article 81 of the Constitution, the provisions of a decreelaw, a legislative decree, or a law other than an organic law or an enactment of an Autonomous Community, where such provisions regulate matters reserved for an organic law or require an amendment to, or a derogation from such an law, irrespective of its content.

Article 29

1. A declaration of unconstitutionality may be issued in response to:

a) an action of unconstitutionality (*recurso de inconstitucionalidad*);

b) a question of unconstitutionality (*cuestión de inconstitucionalidad*) raised by judges or law courts.

2. The dismissal, on grounds of form, of an action of unconstitutionality against a law, regulation or enactment having the force of law, shall not impede the raising of a question of unconstitutionality with respect to such law, regulation or enactment in other legal proceedings.

Article 30

The *admission* of an action or question of unconstitutionality shall not suspend the entry into force or the enforcement of the relevant law, regulation or enactment having the force of law save where the Government invokes the provisions of Article 161.2 of the Constitution to challenge, through its President, laws, regulations or enactments having the force of law of the Autonomous Communities.

Action of unconstitutionality

Article 31

An action of unconstitutionality against laws, regulations or enactments having the force of law may be brought from the date of their official publication.

Article 32

1. The following have standing to bring an action of unconstitutionality against Statutes of Autonomy and other State laws, organic or of any character whatsoever, against regulations and enactments of the State or Autonomous Communities having the force of law, and against international treaties and the Rules of Procedure of the Houses and the Spanish Parliament (*Cortes Generales*):

a) the President of the Government;

b) the Ombudsperson (*Defensor del Pueblo*);

c) fifty Deputies;

d) fifty Senators.

2. The executive collegiate bodies and the Assemblies of the Autonomous Communities, following prior agreement to that effect, shall also have standing to bring an action of unconstitutionality against State laws, provisions or enactments having the force of law that may affect their own area of autonomy.

Question of unconstitutionality raised by judges and courts

Article 35

1. Where a judge or a court, *proprio motu* or at the request of a party, considers that an enactment having the force of law which is applicable to a case and on which the validity of the ruling depends may be contrary to the Constitution, the judge or court shall raise the question before the Constitutional Court in accordance with the provisions of this Law.

2. The judicial body may raise the question only on completion of the proceedings and within the prescribed deadline for delivering its judgement, or the appropriate judicial resolution, by specifying the law or enactment having the force of law whose constitutionality is contested and the constitutional precept that is deemed to have been violated, and by indicating with supporting evidence the extent to which the judgement emanating from the proceedings depends on the validity of the enactment in question. Before delivering its final judgement, the judicial body shall hear the parties and the Public Prosecutor Office so that, within a joint deadline of ten days that may not be extended, they can put forward such arguments as they see fit regarding the appropriateness of raising a question of unconstitutionality, or on its content, whereupon the judge shall give a ruling without further process within three days. That ruling may not be appealed. However, the question of unconstitutionality may be raised again at successive stages of the proceedings or in higher courts until such time as a judgement not subject to appeal has been delivered12.

3. The raise of the question of constitutionality shall cause the temporary suspension of the proceedings on judicial procedure until the Constitutional Court decides on its admission.

Article 36

The judicial body shall lay the question of unconstitutionality before the Constitutional Court together with a certification of the records in the main proceedings and the arguments provided for in the previous article, where they exist.

V. Other mechanisms for unifying the jurisprudence

1. Data bases regarding legal decisions

The access to the courts decisions, before electronic and internet data bases were implemented, was provided through the publication of the judicial decisions in the collection of jurisprudence. All the Supreme Court decisions could be read on paper in the so called "Aranzadi collection", and the most important judgments given by the Appellate courts were also accessible in those collections through a very well structured index (by date, type of court, matter, and legal provision).

The access to the jurisprudence has been enormously facilitated since comprehensive data bases are in place. There are different data-bases —private and official—, that provide easy and swift access to the judicial decisions. The Judicial Centre of Documentation (CENDOJ) publishes the most relevant judgments and its access is free. The web page of the Constitutional Court includes a link where all the constitutional decisions are accessible through a very efficient searcher, also for free. There are also various data-bases that every practitioner is familiar with: WestLaw, LaLey, Iustel, El Derecho among others.

There is no legal provision that imposes the obligation to publish or post on a website all the court decisions. This obligation applies legally only to the Supreme Court decisions, which have to be published. But, there is no equivalent provision with regard to the decisions of first instance courts. However, the data bases include the most important decisions of these courts too.

If there is a divergent application or interpretation of the law within different courts of first instance it will become known by way of appeal or cassation.

Every court has on-line access to the data-bases containing all the legislation, the case-law of the Constitutional Court, Supreme Court and Appellate Courts. Some decisions of the lower courts which are controversial or benchmarking decisions, are also to be found in the data bases. Furthermore, there is also on-line access to the ECtHR's decisions via HUDOC, in French and in

English. The courts are informed of the decisions rendered by the ECtHR affecting directly to the Spanish State.

Constitutional Court and Supreme Court have a body of highly qualified legal assistants (*Letrados*), that support the decision making body in defining the applicable law, the case-law and in drafting the sentences.

2. Judicial training

Spanish judges are mainly professional, selected on the basis of highly competitive examinations and are appointed for their lifetime. They may only be removed, suspended, transferred or retired on the grounds and subject to the safeguards provided for by the law (Art. 117.2 SC y 379 LOPJ). Once the examination procedure has ended, the candidates selected will undergo a 12 month up to 18 month training in the judicial school that sits in Barcelona.

Training in the judicial school was initially planned to last two years, but finally this period was reduced in order to allow the newly appointed judges to take hold of their destiny. The judicial school is organized by the General Council of the Judiciary (art.307 Organic Law on the Judiciary, OLJ). The training program is designed by the General Council of the Judiciary body that also selects the faculties that teach in the judicial school. It aims to give integral, specialized and high quality formation to the judges. The law expressly states that the selection and training process will respect the principle of equality and the prohibition of gender discrimination (art. 310 OLJ) While at the judicial school the candidates are already considered civil servants and are paid a salary as judges under training. The initial training period consists of full-time attendance of courses, lectures, seminars and workshops and case-study practices. The candidates are required to elaborate decisions, solve legal problems, draft sentences and prepare papers on particular topics. During the second period, the training is done directly at a court as "assistant judges" (art. 307.II OLJ). The failure to pass the evaluations during the training programme would result in the need to take the course again (art. 309 OLJ). If a candidate fails for a second time, he/she will be excluded from entering the judicial career. (art. 309.2 OLJ) However, this possibility is rather theoretical, as we do not know of any case where this situation has happened. At the end of the training program the grading of the students is taken into account together with the score obtained in the selection exam, to elaborate the ranking list of the newly recruited judges (art. 308 OLJ).

The judicial school is in charge of the initial training as well as the continuous training of judges. Art. 433 OLJ expressly grants the judges the right to receive continuous training throughout their entire judicial career. The General Council of the Judiciary every two years will approve a continuous training programme, specifying the aims, contents and priorities. Specifically the OLJ states that every year there shall be a course specialized in the judicial protection of the principle of equality between men and women (art. 433.5 OLJ).

VI. Concluding remarks

No system can reach perfection with regard to uniformity in the application and interpretation of the laws. There will always be divergences in the judicial process. The independence of every judge while deciding on a case, where he/she is only bound by the rule of law, gives the judges certain leeway in departing from previously established interpretations. Judges are also confronted with new legal problems where there is no precedent or guideline defined by superior courts that can be followed. So, it is not unusual that different lower courts and even different appellate courts give a diverse answers to the same o similar legal questions.

One of the functions of the Supreme Court is to eliminate those discrepancies and set up a uniform interpretation. However, this mechanism does not run without problems. First, it may take certain time until the Supreme Court has the chance to decide on a legal issue where the doctrine of the appellate courts appears to be divergent. Second, as there are several Sections within the five Chambers of the Supreme Court, sometimes there might also appear contradictory interpretations within the Supreme Court.

The complexity of the legal system, the heavy workload of the judges and the time pressure, sometimes causes that the judges oversee the case-law of superior courts or are not aware of the most recent sentences given by the Constitutional Court. The parties to the case and good lawyers play an important role in that sense, as in their defence statements they can invoke the case-law they deem to be applicable to the case.

Despite the existing mechanisms for providing legal uniformity, there are areas of the law where there is still uncertainty as to which is the correct interpretation of the law. It is difficult to make an assessment on how wide this phenomenon is extended. I would not judge it as a severe general problem that poses risks for the coherence of the legal system, but undoubtedly every system can be improved in this sense.

Finally, we were asked to make an assessment on the question of to what extent is the judge responsible for the violation of the laws in a country. This question is too broad to be answered in a questionnaire or in a short written report. To what extent the judiciary can be responsible for the infringements of the law is a question that requires a deep analysis and research of manifold factors, sociological, cultural, geographical, historical psychological, philosophical and criminological. Such an analysis is clearly beyond the objective of this short overview of the Spanish legal system and the mechanisms to provide coherence and unified judicial practice. However we can affirm that in Spain there is no corruption within the judiciary. There might be isolated cases of malpractice or neglect in the performance of their duties, and single disciplinary proceedings. But these are the exception.

The main problem of the judiciary is the existence of important delays in many jurisdictions and the lack of enough resources to make it work more efficiently. In the criminal jurisdiction there is no extended perception of impunity, and where this perception exists it is mainly due to the shortcomings in some legal provisions, but not in the defective functioning of the judiciary. The prosecution and sanctioning of complex economic criminality poses new challenges for the judiciary as there are more resources and special training needed to cope with these complex forms of criminality. The Spanish judicial practice complies adequately with the ECHR requirements and follows closely the ECtHR case-law, largely due to the excellent job done by the Constitutional Court in controlling the respect for Human Rights, particularly visible in the criminal jurisdiction.