Constitutionele rechtspraak in Spanje: het Tribunal Constitucional en zijn jurisprudentie in hun historische context

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SUMMARY IN ENGLISH

The title of this thesis is: “Constitutional Adjudication in Spain. The Tribunal Constitucional and its Case Law in their Historical Context.”

The general index is as follows:

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Concluding Observation

The main purpose of this research is to examine the various functions the Spanish Constitutional Court fulfils in Spain’s legal and social life. This objective is achieved by placing the Court and its case law in a broad historical perspective. Part one describes the historical setting in which the 1978 Constitution was originated. In part two, the Court’s functioning and its case law are analysed.

Part one

Chapter one is a concise description of Spain’s political and social history until 1975. Emphasis is laid on three key factors that have troubled Spain during the last two centuries, economy, religion and regional differences. The foundations of francoism and the political events of the last years before Franco’s death in 1975 are described in more detail.

In chapter two the process of the so-called ‘transition’ is outlined. It is shown how the changes in the political system were entirely premeditated and co-ordinated by the king and an inner circle of leading figures of the former autocratic regime. It was not until after
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the first free elections of June 1977 that the opposition could exercise direct influence on the transition. The first democratically elected Cortes (Parliament) since the Second Republic could start with the designing and implementation of a new Constitution. For the first time in Spanish history since the Cortes de Cádiz of 1812, a Constitution could be founded on a very broad consensus. The second section of the chapter deals with the factors that contributed to the building of this consensus and with those issues that were not regulated in detail in the 1978 Constitution in order to preserve the consensus.

Chapter three provides an outline of the Spanish tradition in constitutional review. In spite of some interesting forms of constitutional review avant la lettre during the Middle Ages, Spain has had an almost purely autocratic system. Political power has been traditionally concentrated and unchecked by institutional forms of control. Even so, the system has normally been one of moderate authoritarianism. This moderate nature of traditional Spanish authoritarianism is owed to some strong forms of social control and, since 1808, to the weakness of the administration because of an almost continuous legitimation deficit. The Court of Constitutional Guarantees set up during the Second Republic was one of the very first 'European style' constitutional courts, but was destined to have a short life. During francoism autocracy was formally reinstalled and not withstanding some 'constitutional cosmetics' in the last years of the dictator's life, the 'New State' did not pass the stage of possessing a 'semantic constitution'.

Part two

Chapter one discusses why the 'fathers' of the 1978 Constitution maker were so eager to introduce constitutional adjudication by a new and independent branch of government. The installation of a Constitutional Court was one issue on which the political forces agreed almost entirely, so that no substantial discussion was held on its necessity. The first concern of the fathers of the Constitution was to 'Europeanise' Spain and possessing a Constitutional Court was thought to be one of the most modern attributes of being 'European'. In academical and political circles constitutional review by a court that is independent from all other branches of government was considered to be the perfection of the Rechtstaat. It is based on the —partly fallacious— theory that only if the legislative's compliance with the Constitution is safeguarded by judicial control, a truly constitutional system is guaranteed.

Chapter two presents a full description of the Constitutional Court, its organisation, its powers, its procedures etc. The Court's interpretation of its own statutes, especially on the way it applies the legal terms and on its powers to take provisional measures, is critically commented on.

Chapter three deals with the most controversial part of the Court's powers: the power to review acts of Parliament and international treaties. A description of the evolution of Spain's constitution provides insight into today's working constitutional and political system. The authority possessed by the Constitutional Court is put into this perspective, showing the extent of the Court's influence on the overall (lack of) power distribution among the other branches of the central administration. Special attention is given to the
several controversial methods the Court has developed on its own, i.e. with no legal base, in order to avoid the annulment of laws: the so-called ‘interpretive judgments’; declaring acts of Parliament unconstitutional without annulling them etc. In addition the excess of self-restraint exhibited by the Court when reviewing legislative decrees — i.e. governmental decisions with the legal force of an ordinary acts of Parliament — is critically discussed. The main conclusion is that, albeit the Court has shown itself not to be insensitive towards some of the imminent symptoms of modern demo-authoritarianism, as evident in most of the main political and parliamentary parties, the Court has still failed to enhance parliamentary democracy. As to the review of international treaties, it is concluded that, in fact and in spite of its own pretensions, the Court can only control effectively those treaties to which Spain has not yet committed herself according to international law.

In chapter four the procedures on the protection (amparo) of fundamental rights are analysed. Both individuals and private and public corporations can file an amparo-complaint at the Constitutional Court, if they believe that one of their fundamental rights has been violated. In most cases, though, the complaint can only be admitted by the Court, if all legal remedies have been exhausted. This means that, in practice, the Constitutional Court mainly reviews the decisions of the ordinary courts. It is the Constitutional Court’s case law on the distribution of powers between itself and the ordinary courts that is most problematic and interesting from a constitutional point of view. Therefore this chapter starts with a portrayal of today’s judicial power in Spain. The research on the Constitutional Court’s case law is focused on two fundamental rights that have originated most dilemmas about the Court’s self-restraint: the right to effective judicial remedies for the protection of rights and legitimate interests (art. 24 CE) and the right to equal treatment (art. 14 CE). Also the Court’s case law on freedom of speech is discussed and contrasted with the case law of the European Court of Human Rights, for it is here where the Spanish Court shows most clearly its remarkable view on the ratio of fundamental rights. The Court’s case law on the complaints against parliamentary internal decisions is discussed next. The chapter ends with the troublesome relationship between the Constitutional Court’s supreme power to interpret the Constitution’s fundamental rights on the one hand, and the power of the European Court of Human Rights to convict a member State like Spain because of a violation of the European Convention of Human Rights on the other hand.

In chapter five the Court’s role as an arbiter in the conflicts on territorial and on constitutional competencies is discussed. It is in keeping a fair balance between the different players in the continuous constitutional process of the making of the Estado de las Autonomías where the Court’s case law has probably been most fruitful. Special attention is given to case law on the constitutionally recognised and protected ‘historical rights’ of different regions in Spain, especially the Bask country and Navarra.

The thesis ends with a concluding observation. The most important conclusion is that the Constitutional Court plays many different roles in Spain’s constitutional and political system. The defence of the Constitution is only one of those different roles and definitely not the most important one in practice. The function of legitimating existing and future legislation has shown itself to be by far the most important function the Court has, for the cases in which the Court actually overrules decisions made by the other branches of
government by imposing its own interpretation of the Constitution, are very few. Even so, one cannot say that the Court’s work has not been useful.

The thesis contains an extensive bibliography, a case law index, and a general index. In the book’s supplement one can find the full Spanish texts and the Dutch translations of the 1976 Law on Constitutional Reform, the present 1978 Spanish Constitution, and the 1979 Organic Law on the Constitutional Court. Moreover, the supplement contains many facts and details on Spanish recent political history and on the Constitutional Court and its procedures, and it concludes with three maps of Spain’s historical and present geographical political organisation.