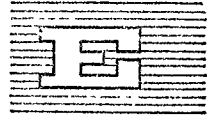


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FURTHER PROMOTION AND ENCOURAGEMENT OF HUMAN RIGHTS  
AND FUNDAMENTAL FREEDOMS, INCLUDING: (b) IMPORTANCE  
OF NATIONAL INSTITUTIONS IN THE FIELD OF HUMAN RIGHTS

Report by the Secretary-General

Addendum

Spain

The approval of the Constitution by the Spanish Cortes on 31 October 1978, ratified by the Spanish people in a referendum held in 1978 and confirmed by H.M. King Juan Carlos I before the Cortes on 27 December 1978, signifies the establishment of a new political and legal system for the protection of human rights which the Constitution extensively recognize. The Constitution is the framework within which the entire organization of the powers and institutions of the State as the surest safeguard of the rights of the individual will have to be developed. In this regard, the preamble to the Constitution reflects the spirit underlying it:

"The Spanish Nation, desiring to establish justice, freedom and security and to promote the well-being of all who form part of it, in the exercise of its sovereignty proclaims its will to: ...

Consolidate a State based on the rule of law which ensures the sovereignty of the law as the expression of the will of the people.

Protect all Spaniards and peoples of Spain in the exercise of human rights, their cultures and traditions, languages and institutions ..."

This purpose is guaranteed in the Constitution by a "Bill of Rights" incorporated into title I of the Constitution and entitled "Fundamental Rights and Duties". Its cornerstone is article 10 and, in view of its significance, we reproduce it in its entirety:

"1. The dignity of the human person, the inviolable rights inherent in the human person, the free development of the personality, the respect for law and the rights of others are the foundations of political order and social peace.

2. The norms relating to the fundamental rights and freedoms recognized by the Constitution shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements on the same subjects ratified by Spain."

The rights recognized in the Constitution are specified in title I, chapters 2 and 3, and are basically the following:

Equality before the law and non-discrimination (article 14). The right to life and physical and moral integrity, prohibition of torture and abolition of capital punishment (article 15).

Ideological and religious freedom and freedom of worship. The non-sectarian character of the State (article 16).

The right to freedom and security. Production of a detained person before the judicial authority within a maximum period of 72 hours.

Enlightenment of the detained person as to his rights and the reasons for his detention. His option to make a statement or otherwise. Legal aid in police and judicial formalities. "Habeas corpus" system and specification by the law of the maximum period of remand in custody awaiting trial (article 17).

The right to self-respect, personal and family privacy, and image of oneself. Inviolability of the home and the confidentiality of correspondence in the absence of a judicial order. Legal restriction on the use of computerized information.

The right to choose one's residence and travel freely within the national territory. The right to enter and leave Spain freely within the limits established by law (article 19).

The right to express and disseminate freely thoughts, ideas and opinions, and to communicate or receive freely truthful information by any communication medium, the right to the conscience clause and professional secrecy being regulated by law. Prohibition of prior censorship. Regulation by law of the organization and parliamentary control of social communication media coming under the State or any other public body. Seizure of information media only by judicial order (article 20).

Right of peaceful and unarmed assembly (article 21).

The right of association: associations which pursue aims and use methods qualified as criminal are illegal. Secret societies and associations of a para-military character are prohibited (article 22).

The right of citizens to participate in public affairs, directly or through representatives freely elected in periodic elections by universal suffrage. Citizens are also entitled to hold public function or office on terms of equality determined by the law (article 23).

The right of citizens to effective protection by the judges and courts in the exercise of their legitimate rights and interests and the right to be defended. The right to a judge ordinary according to the law, to the defence and assistance of counsel, the right to be informed of the accusation made against the individual concerned, to a public trial without undue delay and with due safeguards to produce evidence relevant to his defence; the right not to make self-incriminating statements or to admit guilt, and the presumption of innocence (article 24).

Non-retroactivity of penal and administrative laws in convicting and imposing penalties.

Penalties involving deprivation of freedom and security measures shall be directed towards re-education and social rehabilitation and may not involve forced labour. A person sentenced to imprisonment enjoys the rights enumerated in this chapter, with the exception of those which are expressly limited by the wording of the verdict, the interpretation of the penalty or prison law. The Civil Administration may not impose sanctions which directly or indirectly involve deprivation of freedom (article 25).

The right to education and free instruction (article 27).

The right to engage freely in trade union activities, subject to the exceptions specified in the Constitution. The right of workers to strike in defence of their interests (article 28).

The right of individual and collective petition, subject to the limitations specified by the Constitution concerning armed forces or institutes or corps subject to military discipline (article 29).

Conscientious objection to the discharge of military duties, in accordance with the law (article 30).

The right to enter into marriage with full legal equality between man and wife (article 32).

The right to own private property and to inherit. The social function of these rights shall delimit their content, in accordance with the law (article 33).

The right of foundation for purposes in the general interest (article 34).

The right to work, to the free choice of profession or occupation, to promotion through work and to remuneration sufficient to satisfy the individual's needs and those of his family (article 35).

The right to collective bargaining in labour matters between representatives of workers and employers. The right of both to take industrial action (article 37).

Free enterprise within the framework of the market economy (article 39).

## II

The constitutional organization of the powers of the State forms the primary "institutional" guarantee for the protection of the rights ascribed to the individual in title I. The political system is based on the principle of the separation of powers, which does not exclude necessary interaction between them. The various powers of the State and the power of the Autonomous Communities constitute an entity that is divided and shared in such a way that the Constitution determines the scope of respective jurisdiction and the points at which they overlap to ensure cohesive action by this network of powers and institutions. Against this background the system of protection of individual rights against abuses by established State bodies stands out in relief.

Accordingly, in regulating these powers of the State and of its institutions, allusion is always made to the primary objective of guaranteeing the fundamental rights of the individual, in response to this purpose as expressed in articles 1 and 2 of the Constitution. Article 1 states that:

- "1. Spain is organized as a social and democratic State under the rule of law which champions as prime values of its legal order freedom, justice, equality and political pluralism.
2. National sovereignty resides in the Spanish people, from whom the powers of the State proceed.
3. The political form of the Spanish State is a parliamentary monarchy."

Article 2 proclaims:

"The Constitution is based on the indissoluble unity of the Spanish Nation, the common and indivisible mother country of all Spaniards, and it recognizes and guarantees the right to autonomy of the nationalities and regions of which it is composed and the solidarity which links them all."

Developing these general principles, the various powers of the State are regulated with this guarantee of individual rights as the goal. Thus, in title 3 ("The Cortes Generales"), article 66 states that:

- "1. The Cortes Generales represent the Spanish people and are composed of the Congress of Deputies and the Senate.
2. The Cortes Generales exercise the legislative power of the State, approve its budgets, control the activities of the Government and discharge such other functions as may be entrusted to them by the Constitution ..."

However, chapter 2 on the enactment of legislation establishes a number of special requirements for laws relating to the "development of fundamental rights and public freedoms" and laws which approve the Statutes of Autonomy, conferring on them the legal status of "organic laws" in respect of which article 81, paragraph 2 states that "the approval, amendment or repeal of the organic laws shall require an absolute majority of the Congress in the final vote on the Bill as a whole". It also contains a further regulation (article 86, paragraph 1), still more restrictive of the powers of the Government, providing that:

"In the event of extraordinary and urgent need, the Government may enact provisional legislation, in the form of decree-laws, which shall not affect the enactments of the fundamental institutions of the State, the rights, duties and freedoms of citizens as regulated in title I, the system of the Autonomous Communities, or the general electoral law."

Similarly, title IV ("The Government and the Administration") states in article 97 -- Scope of action of the Government that:

"The Government shall direct domestic and foreign policy, the civil and military Administration and national defence. It shall exercise the executive function and statutory powers in accordance with the Constitution and the laws."

But at the same time, article 104 states:

"1. The duties of the Security Forces and Corps, under the authority of the Government, shall be to protect the free exercise of rights and liberties and to guarantee the safety of the citizen".

And article 106 provides that:

"1. The courts shall supervise the statutory power and legality of administrative action, and ensure that the purpose of such action is justifiable.

2. Private individuals shall, in accordance with the terms established by the law, be entitled to compensation for all injury to any of their property and rights, except in cases of force majeure, provided that the injury is the result of the operation of the public services."

Title V ("Relations between the Government and the Cortes Generales) regulates (article 116) matters connected with states of alarm, emergency and siege in the following terms:

"1. An organic law shall regulate states of alarm, emergency and siege, as well as the relevant jurisdiction and limitations thereto.

2. A state of alarm shall be declared by the Government by a decree adopted in the Council of Ministers for a maximum period of fifteen days, account being rendered to the Congress of Deputies, which shall meet immediately to that end and without whose authorization the period may not be extended. The decree shall define the territorial area covered by the effects of the declaration.
3. A state of emergency shall be declared by the Government by a decree adopted in the Council of Ministers, with the prior authorization of the Congress of Deputies. The authorization and the proclamation of the state of emergency shall expressly define the effects intended, its territorial scope and its duration, which may not exceed thirty days, subject to extension for a period of equal length, under the same conditions.
4. A state of siege shall be declared by an absolute majority of the Congress of Deputies, exclusively on the proposal of the Government. The Congress shall define its territorial scope, duration and conditions. ...
6. The declaration of a state of alarm, emergency or siege shall not alter the principle of the responsibility of the Government and its agents recognized under the Constitution and the laws."

Title VI ("The Judicial Power") contains regulations governing this authority, which covers the courts and tribunals and the State Counsel's Office, while assigning the judicial power exclusively to the judges and magistrates, whom it makes subject to certain operational conditions guaranteeing the independence and impartiality of the judicial organs, as guarantors of subjective rights and individual liberties. Article 117 refers basically to judges and magistrates, and is worded as follows:

- "1. Justice is derived from the people and is administered in the name of the King by judges and magistrates constituting the judiciary, who are independent, immovable, responsible and subject solely to the sovereignty of the law.
2. Judges and magistrates may not be dismissed, suspended, transferred or retired except for one or other of the reasons, and subject to the corresponding safeguards, provided by law.
3. The exercise of jurisdictional power in lawsuits of every kind, by means of judgements rendered and enforced, is the exclusive responsibility of the courts and tribunals designated by law, in accordance with the rules of jurisdiction and procedure established under the law.

4. The courts and tribunals shall not exercise any functions other than those specified in the preceding paragraph and those expressly assigned to them by law as a guarantee for a specific right.

5. The organization and functioning of the courts shall be based on the principle of jurisdictional unity. The law shall regulate the exercise of military jurisdiction in the strictly military field and in the event of a state of siege, in accordance with the principles of the Constitution.

6. Ad hoc tribunals shall be prohibited.

Concerning the State Counsel's Office, article 124 states as follows:

"1. The mission of the State Counsel's Office, without prejudice to the functions assigned to other bodies, shall be to promote justice in defence of legality, the rights of the citizen and the public interest as protected by the law, either ex officio or at the request of the interested parties, as well as to ensure the independence of the courts and to safeguard the public interest in relation to the courts.

2. The State Counsel's Office shall exercise its functions through organs of its own in accordance with the principles of unity of action and hierarchy, and subject always to the principles of legality and impartiality."

The right to autonomy of the nationalities and regions which make up the Spanish Nation, as recognized and guaranteed in article 2 of the Constitution, quoted above, is stated more fully in title VIII ("The Territorial Organization of the State"), the third chapter of which ("The Autonomous Communities") states that "adjacent provinces with common historical, cultural and economic characteristics, island territories and provinces forming a regional-historical entity shall be allowed to accede to self-government and establish themselves as Autonomous Communities pursuant to the provisions of this title and of the statutes relating to them." The constitutional system is based on a division of jurisdiction between the Autonomous Communities and the State, those belonging to the Autonomous Communities (article 148) and those over which the State has exclusive jurisdiction (article 149) being specifically defined, although in the same article 149, paragraph 3, it is provided that "matters not expressly allocated to the State by this Constitution may devolve on the Autonomous Communities by virtue of the statutes relating to them. ... In any case, the State law shall be complementary to the law of the Autonomous Communities." Furthermore, control of the activities of the organs of the Autonomous Communities (a Legislative Assembly elected by universal suffrage, a Governing Council with executive and administrative functions, a President elected by the Assembly from among its members and appointed by the King, and a Superior Court of Justice -- article 152 --) are to be exercised in accordance with the provisions of article 153 as follows:

"(a) By the Constitutional Court, control relating to the constitutionality of its normative acts having the force of law;

(b) By the Government, subject to the decision of the Council of State, control of the exercise of delegated functions referred to in article 150, paragraph 2;

(c) By the system of administrative challenge, control of the Autonomous Administration and its regulations.

(d) By the Exchequer, control of economic and budgetary affairs."

### III

1. The institutional guarantee of individual rights resulting from the balance and mutual control of the powers of the State and their common dependence on the Constitution is developed through procedures which are provided for in the Constitution itself or are a consequence of the network of organs and powers established therein. An individual who has been injured in respect of his rights and liberties as recognized in title I of the Constitution is entitled to bring suit for protection as referred to in the Constitution, without prejudice to any penal or administrative sanctions which may be incurred by those who have violated those rights and liberties. However, in addition, we have already seen that the Constitution refers to two other organs which are specifically entrusted with the protection of individual rights: the State Counsel's Office and the People's Defence Commissioner.

As has been explained, the State Counsel's Office is responsible for promoting the work of justice in defence of legality, of the rights of the citizen and the public interest as protected by the law, either ex officio or at the request of the interested parties, having jurisdiction in suits bearing on these matters brought before regular judges and courts, as well as before the Constitutional Court in the case of action for the enforcement of rights (amparo) (article 162, 1 (b)) alleging violation of the rights and liberties recognized in articles 14 to 30 of the Constitution (article 161, 1, b).

The People's Defence Commissioner is an institution introduced for the first time into Spanish law; it has much in common with the "Ombudsman" and the nature of his office is indicated by the place in the Constitution where it is located, namely in title I, chapter 4, entitled: "Guarantees governing fundamental rights and freedoms". According to article 54, the People's Defence Commissioner "a high commissioner of the Cortes Generales appointed by the latter to defend the rights covered by this title, for which purpose he may supervise the activity of the Administration, reporting to the Cortes."



Consequently, his purpose is to watch over the activity of the Administration in order to ensure the protection of individual rights in respect of matters which it may not appear proper to bring before the ordinary courts of justice but only before the Constitutional Court, to challenge the constitutionality of laws and provisions having the force of law and to seek the remedy of amparo. All this is without prejudice to his relations with the Cortes Generales (articles 162 and 54).

2. The jurisdictional organs responsible for the actual application of the law and its intervention in defence of individual rights are the "judges and courts", defined by article 117, paragraph 1, as the "embodiments of the judicial power", and entrusted with "the exercise of jurisdictional power in cases of all types, rendering judgements and enforcing them". In addition, there is the Constitutional Court, which has jurisdiction throughout Spanish territory and exclusive competence to judge cases challenging the constitutionality of the laws, actions for amparo as already mentioned, cases of conflict of jurisdiction between the State and the Autonomous Communities or between the Communities themselves, and "other matters entrusted to it by the Constitution or the organic laws". The Constitutional Court comprises 12 members appointed by the King, including four proposed by the Congress, four proposed by the Senate, two proposed by the Government, and two proposed by the General Council of the Judiciary.

3. In the exercise of judicial authority, the judges and courts act as organs for the protection of individual rights, not merely by giving effect to the guarantees set out in the relevant regulations, but also by effectively defending the subjective rights of individuals and the substantive law.

"Criminal justice", with its procedural and penal safeguards, constitutes the primary protection for individual rights through the operation of the penal system, which defines as offences, and sanctions by means of appropriate penalties, acts of commission and omission infringing the fundamental rights recognized in the Constitution. For example, the protection of the life or the physical and moral integrity of the individual, ensured by punishment for crimes against the person (homicide, infanticide, abortion, injury: articles 405 to 428 of the Penal Code); crimes against sexual freedom (articles 429 to 442); the prohibition of torture (article 204 bis, incorporated in the Penal Code by Act 31/1978, of 17 July). Attacks on religious freedom constitute the offences mentioned in articles 205 to 212. Book II, title II, chapter II, of the Penal Code is devoted to offences committed by individuals in the exercise of legally recognized rights of the person and to offences committed by public officials against the exercise of the rights of the person laid down in the laws pertaining to freedoms recognized in the Constitution. The right to self respect is protected by the punishment of the offences of calumny and insult (articles 453 to 479); the

right to freedom by punishment for the offence of unlawful detention (articles 480 to 483; and the right to property by punishment for offences against property (articles 500 to 563). Less serious instances of the above-mentioned acts are regarded as "misdemeanours" against which provision is also made in the Code, and they are sanctioned by lighter penalties.

In the civil field, there is protection of other fundamental subjective rights (nationality, family, filiation, marriage, disposal of property, inheritance), through the exercise by their holders of the right to institute civil proceedings. In the field of labour law, workers' rights and other "social" rights are protected in a similar manner.

Finally, if the State Administration should hamper or impede the exercise of those rights by any of its actions, there exists for the protection of individuals a system of administrative challenge. The Act of 27 December 1956 governing this system empowers the relevant judicial organs to hear claims arising from acts by the public authorities that are subject to administrative law or from instruments of lesser status than the Act, with the express exception (article 2 (b)) of questions that arise in connexion with the political actions of the Government.

4. In addition to the normal judicial proceedings which come within the jurisdiction of the "judges and courts", article 53 of the Constitution establishes two special types of procedure for safeguarding the individual rights recognized in articles 14 to 30 already cited: one "constitutional" and two others "jurisdictional" in nature.

Article 53, paragraph 1 states that "the rights and freedoms recognized in title I, chapter II" (articles 14 to 38, already referred to in part I of this report) "are binding on all public authorities. The exercise of those rights and liberties may be regulated only by the law, which shall in all cases respect their essential content, and they shall be protected in accordance with the provisions of article 161, 1, a", in other words, through action challenging the constitutionality of laws and provisions having the force of law. As has already been said, such cases are matters for the Constitutional Court, and "a declaration of unconstitutionality of a legal norm having the status of a law which has been interpreted by court decisions shall affect that norm, although a judgement or judgements already rendered shall not cease to have the status of res judicata" (article 161, para. 1. a). Consequently, an action claiming unconstitutionality does not affect the procedure of the ordinary courts in deciding on a specific case in which a law subsequently declared to be unconstitutional may be applicable. The Constitution clearly separates the jurisdictional activity of the ordinary courts from the constitutional activity of the Constitutional Court by providing, inter alia, that "when a judicial body considers, in the course of any case, that a norm

having the status of law which is applicable to that case and on whose validity the verdict depends, may be contrary to the Constitution, it shall submit the question to the Constitutional Court with the arguments, in the form, and with the statement of the consequences for which the law provides, which shall in no case be suspensive" (article 163).

The following are empowered to bring an action for unconstitutionality (article 162, para. 1. a): "the Head of Government, the People's Defence Commissioner, 50 Deputies, 50 Senators, the collegiate executive organs of the Autonomous Communities and, where appropriate, the Assemblies of those Communities."

5. Article 53, paragraph 2, of the Constitution grants "every citizen" the right to take action for the protection of the freedoms and rights recognized in article 14 and chapter II, section I (articles 15 to 29) by way of two procedures that differ as regards the decision-making organs concerned, their nature, and their entitlement to institute proceedings. The procedures are: special proceedings before the ordinary courts, "based on the principles of priority and summary proceedings", and an appeal for amparo to the Constitutional Court - an appeal which may also be made in cases of conscientious objection as defined in article 30. An action for amparo may be brought not only by "every citizen" who considers that his rights have been breached, but also by "any natural or juridical person who is able to claim a legal interest, such as the People's Defence Commissioner or the State Counsel's Office" (article 162, para. 1. b).

The "procedure" for the protection of freedoms and rights in the ordinary courts is a procedure of "jurisdictional protection" applicable to the protection of the fundamental rights recognized in articles 14 to 24 which the law will have to specify in order to avoid any overlapping with the scope of the remedy of amparo.

Since, however, the law regulating amparo which under article 161, paragraph 1. b already quoted will establish "the cases" to which it applies has not yet been drawn up, the legislation in force is Act No. 62/1978, of 26 December, on "Jurisdictional Protection of the Rights of the Individual". Under its article 1 (2), its scope is limited to "freedom of expression, assembly and association, freedom and confidentiality of correspondence, freedom of religion and of residence, guarantee of the sanctity of the home, legal protection against illegal arrest and, in general, against penalties imposed in matters of public order. These are the freedoms recognized in articles 16 to 22 of the Constitution, although the final provision of this Act envisages the provisional extension of this protection to other freedoms, until such time as the definitive legislation concerning the procedure for safeguarding individual rights and amparo is drawn up.

The jurisdictional protection procedure envisaged in Act No. 62/1978 consists of penal jurisdictional safeguards through the rules of the Law on Criminal Procedure with certain abridgements and the institution of proceedings expedited (not more than 60 days for ordinary proceedings and 45 for those relating to offences committed through the intermediary of the press or other mechanical publication methods). The procedure also includes the system of administrative challenge and the civil jurisdiction safeguards. Under the terms of article 11 of the Act, "complaints relating to violations or disregard of fundamental rights of the individual included within the scope of this Act, or contesting claims concerning them, not included in articles 2 and 6 thereof, (that is to say, relating to crimes and misdemeanours against the fundamental rights of the individual and to actions by the Public Administration, subject to administrative law, which affect the exercise of these rights) shall be filed in the courts of first instance of the place where the event occurred or where the registry or office in which the complaints should be submitted is situated." The procedure is that established for cases coming under the Law on Civil Procedure, and the formalities have been streamlined in order to make it more expeditious.

The scope of the amparo system will depend on the organic laws regulating it, since the Constitution (article 53, para. 2) provides for this remedy specifically only in the case of conscientious objection recognized in article 30 of the Constitution, until the other fundamental rights recognized in articles 14 to 29 and cited frequently can be protected by the aforementioned jurisdictional procedure "and, where appropriate, by means of action for enforcement of rights before the Constitutional Court". The constitutional criterion of separating the jurisdiction of the ordinary courts from that of the Constitutional Court will require a clear decision as to which rights will be protected by the one or the other entity.

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