

“Some comparisons of Spain’s criminal system with the United States”

Recently, I had the opportunity to travel to various cities in Spain; including, Grenata. Grenata is home to the UNESCO World Heritage site of “the Alhambra”. The Alhambra is a combination of both a fortress and a palace and it is located in the Andalusia region of Spain. Aside from many other significant historical aspects, the Alhambra plays a significant role in the judicial history of Spain. While it was originally constructed as a fortress in the year of 889, it was subsequently converted into a royal palace by Yusuf I, Sultan of Grenata, in or near 1333. A few of the significant architectural features of the Alhambra include the Court of the Vestibule, the Court of the Council Chamber and the Hall of Justice. It was in the Hall of Justice where the sultan served as both judge and arbiter for important cases in the region. Citizens of the Andalusion region could bring significant grievances or cases before the sultan for disposition. The Hall of Justice, in the Alhambra fortress, is where these hearings would take place. The sultan would have the large shutters closed where he could sit and listen to the parties and the cases without being seen. There were no side windows; but the roof was opened at the center. The entrance to the Hall of Justice was through an ornate courtyard.

The Alhambra’s Hall of Justice served as the primary origin for the Spanish judicial system in the Andalusion region. Below please find an outline of the evolution of the Spanish legal system; along with a comparison to the criminal system in place in the United States.

The Spanish legal system is a civil law system based on legal codes stemming from Roman law, as opposed to common law, which is based on precedent court rulings. The American judicial system is primarily rooted in common law, as that was the judicial model brought over from England when American was first settled by English immigrants.

The Spanish penal system was developed during the Middle Ages from local adaptations of its original Germanic heritage. In the 18<sup>th</sup> Century, it was subjected to the influence of rationalist thinkers who asked for the adoption of systematic rules which resulted, during the era of the French Revolution, in requests for adoption of both the Penal and Criminal Procedure Codes. Again, the American penal system is primarily based on the English system.

In 1812, Spanish patriots who, during the Napoleonic invasion had taken shelter in the city of Cadiz in the south of Spain, adopted Spain’s first political Constitution. This liberal constitution also included a proposal for the creation of a Penal Code, but the reestablishment of King Ferdinand VII on the Spanish throne prevented the adoption of the Code. In fact, even the progressive 1812 Constitution was ultimately repealed. A liberal upheaval in 1920 led to the adoption of the first Spanish Penal Code, which had been originally drafted in 1822. Unfortunately, the Penal Code was in force for only one year, after which the monarch resumed absolute rule.

In 1848, and in a more moderate political situation, a new Penal Code was adopted. Since that time, a Penal Code has always existed and been applied, with some brief interruptions during times of military rule. The most recent Penal Procedural Code was adopted in 1991, and was still in force as of 1993.

I. Basic Constitutional Principles:

The Spanish Constitution guarantees respect for the essential principles necessary for the correct functioning of the judiciary:

‡ Legality: in the exercise of their jurisdictional functions, judges and magistrates are subject to the Constitution and must abide by the law just as other branches of government and citizens do.

‡ Self Discipline: judges and magistrates are personally responsible for their disciplinary infractions and crimes committed in the exercise of their office; this responsibility can only be demanded by the established legal disciplinary tract, without interference by the executive or legislative branches of the government or through ordinary legal proceedings.

‡ Impartiality: to guarantee an effective judicial trusteeship to all citizens, judges must remain impartial in cases that they preside over and must abstain from cases where they have some vested interest or connection.

‡ Independence: courts and tribunals are independent of all authority or people in the exercise of jurisdictional power (much like the United States where the judicial branch is independent or operates independently of the legislative and executive branches).

‡ Immobility: Judges and magistrates are immobile and cannot be moved, suspended, separated or retired without cause and with guarantees established by law. In America, federal judges enjoy a lifetime appointment.

II. Crime:

There is a distinction between serious (delitos) and less serious (faltas) offenses. Serious offenses are indictable and less serious offenses are nonindictable. The American judicial system creates a similar division between serious and less serious crimes through the labels of felonies (generally punishable by more than one year in prison) and misdemeanors which are generally classified as carrying less than one year in prison.

‡ Indictable offenses are those offenses against state security, fakes and falsifications, offenses against the administration of justice, offenses against sanitation and health (including drug offenses), behaving causing risk but not actual damage, offenses by public officers, offenses against individuals (murder, homicide, illegal abortions, bodily harm causes by assault and battery), sexual offenses, offenses against reputation (libel and slander), offenses against freedom and personal security, property offenses, and offenses committed recklessly and without intent.

‡ Among the less serious, nonindictable offenses are violations against individuals, and minor property offenses, such as theft resulting in deprivation of less than 30 pesetas (\$200).

III. Rights of the Accused:

‡ Detained persons have the right to remain silent, to be informed immediately in a clear and understandable way of what they are accused, to ask for the production of evidence, to a speedy trial, to ask for legal counsel of their own choice and to have counsel appointed “ex officio” in cases where they do not exercise their right

to designate legal counsel. Generally speaking, citizens detained in America are advised of their right to remain silent and the right to legal counsel. The American constitution guarantees citizens the right to a speedy and public trial. Additionally, the court rules of criminal procedure generally guarantees all American citizens the right to be shown the evidence against them.

- ‡ Ex officio attorneys are the Spanish contemporaries to American Public Defenders
- ‡ Interrogation without counsel is allowed only if, after eight (8) hours of notification to the local legal profession association, no lawyer has shown up and the detainee consents to the interrogation. As noted above, in America, custodial interrogation must cease if a detainee asks for an attorney.
- ‡ Detainees also have the right to ask that family members or acquaintances be informed of the detention; to be assisted by an interpreter if necessary; to be assisted by a doctor; and if a minor, to have parents or persons with parental authority informed. The American judicial system does not afford an accused the right to have family members or acquaintances advised of their detention.
- ‡ Defendants are presumed innocent during the course of the proceedings.

#### IV. Assistance to the Accused

- ‡ From the moment of indictment, accused persons have the right to designate legal counsel.
- ‡ After the preliminary investigation, the dossier (report) is sent to the court and if the accused person has not yet designated counsel, an "ex officio" counsel is appointed who is paid by the government. Similarly, American citizens enjoy the right to free and appointed legal counsel through the "public defenders" office.
- ‡ In Spain, it is considered an honor by most lawyers to counsel and defend accused persons even if they are only paid a small fee.

#### V. Alternatives to Trial:

- ‡ In Spain, there are very few alternatives to trial; therefore the majority of cases are decided by trial. This is in sharp contrast with the American system, where the overwhelming majority of cases are decided through the plea bargaining process.
- ‡ Accused persons may plead guilty at the beginning of the oral audience, and, if their lawyers agree, the case may be disposed of without hearings.
- ‡ But in cases where the public attorney (prosecutor) requests a prison penalty of more than six (6) years, the accused cannot plead guilty and must undergo hearing of the case. There is no corollary to this in the American system.
- ‡ It is estimated that approximately 20 percent of all accused persons plead guilty. In the American system, more than 95 percent of all persons whose cases are not dismissed wind up pleading guilty in some type of plea bargain.
- ‡ It is also possible to drop the case when the alleged facts are not proven by investigation, when the facts are clearly not criminal, or when the suspected persons are obviously not responsible.
- ‡ In the last instance, cases are most frequently dropped when it is obvious that the suspect is mentally ill.

## VI. Officers of the Court:

- ‡ The Spanish Judiciary is a professional judiciary whose members are public servants divided into the following three categories: judge, magistrate, and supreme court magistrate.
- ‡ Entrance to the judiciary is limited to Spanish nationals who hold a Bachelors Degree in Law issued by a Spanish university and who are not legally disbarred from applying. American judges who hear felony cases must have law degrees and be members of their respective state bars; some states allow lower court judges who hear misdemeanor cases only to not have law degrees.
- ‡ Applicants must pass a competitive state exam, a state exam with contest of merits, or a contest of merits. Again, upper court American judges have to graduate law school and complete the state bar exam.
- ‡ Selected applicants enter the Judiciary School where they take mandatory courses over a year, as well as carrying out practical courses as associate judges in courts and tribunals of the different jurisdictional orders. Typically, American judges do not go to a particular school to be a judge, they simply sit with a current judge for several weeks to a month before becoming a judge on their own.
- ‡ Candidates passing this course are then sworn in as judges.
- ‡ Magistrates of the supreme court can be drafted in a contest of merits between prestigious jurists and lawyers with more than fifteen (15) years of professional experience. The American system for recruiting/selecting its most upper court judges is strictly political, in that generally a candidate is selected by either the president of the United States or a United States senator from that judge's home state to be either approved or disapproved by the United States Senate. Frankly, it is not a contest of merits as under the Spanish system but much more political in nature.
- ‡ One in every five (5) judges of the supreme court is recruited this way.
- ‡ Justices of the peace do not belong to the judiciary and are local people elected by the town council of the city where they were appointed. The corollary position in the United States would be local magistrates or summary court judges.
- ‡ Judges and magistrates are banned from membership of political parties and trade unions, from issuing messages of congratulation or censuring public powers or official corporations, and from attending public meetings or rallies in their role as members of the judiciary. Similarly, sitting judges in the American system are banned from being actively involved in political parties or trade unions. They are also barred from issuing decisions in cases where they have any type of vested interest such as stock ownership, a family connection, etcetera.

There are a number of similarities between the Spanish and the American judicial systems. Common denominators would include the rights of the accused, establishment of “public defenders” and the large number of constitutional guarantees to accused persons in both systems. Primary differences would include the length of education required to become an attorney and the steps an attorney must take to become a judge.