The protection role of the Constitutional Courts in protecting human rights: the Spanish system of "recurso de amparo".

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1.- Domestic Role of the Constitutional Court

Spanish Constitution (SC) lists a number of human rights which violation can be examined, as a last instance, by the Constitutional Court. Even though it is a closed list of "fundamental rights and liberties", art. 10.2 SC allows some openness because provides for their interpretation "in conformity with the Universal Declaration of Human Rights and the international treaties and agreements thereon ratified by Spain". In practice it is the ECtHR's case law which has proved to be by far the most influential resource to this effect.

Human rights listed in SC are directly compelling for every acting public power, not only for the Constitutional Court (CC). Both administrative bodies and the judiciary are supposed to adjudicate their proceedings according to them. They only find a limit in the laws passed by the legislature. Where human right's breach stems from the law, they cannot decide by themselves not to apply the law. On the contrary, they need to bring a remedy of objection before the CC, which is the only one allowed to rule that a law is unconstitutional.

Once exhausted all the ordinary remedies provided for in the law, the victim of a violation of human rights may seek relief before the Constitutional Court through a final remedy called "recurso de amparo". The Constitution refers the circumstances and manner of this extaraordinary appeal to be laid down by law [art. 161 b) SC]

According to the Law on the CC (Organic Law 2/1979), an application is admissible where, apart from complying all the procedural preconditions (time limits, legal standing etc), it seems there could be a violation of fundamental rights or liberties. It is not required at this admission moment that the violation is absolutely clear. It is not completely unusual that the scope of some dimension of a fundamental right is developed in a judgment where the appealed ruling is upheld.

The Law on the CC (1979) was amended in 2007 to add a new admissibility requirement known as "special constitutional relevance". In 2007, almost 30 years after it starts functioning, the CC had built a well-established case law on the human rights protected by the SC. The ordinary judges knew properly the constitutional rulings and apply them regularly in their judgments, to the point that the admissibility rate of individual application before the CC was constantly below 2%. In the light of this situation, the Law on the CC was amended to reduce the scope of this extraordinary appeal, which now is only available where the case entails some constitutional relevance further to the personal interest of the victim.

I would say that the Constitutional Court has played over the last 40 years an important role in protecting human rights. There are three points to be emphasized:

a) the Constitutional Court offers a new opportunity to get a breach of human rights repaired. The procedural law provides for some remedies to that aim. Where they are not successful the individual application acts as an additional and final remedy within domestic law.

b) This final opportunity is not like the previous ones. The great difference is that the Constitutional Court has a special sense for human rights. Ordinary judges are also bound to human rights enshrined in the Constitution, but they don´t have this special perspective that Constitutional Court has.

c) As a result, the CC has developed over the last 40 years a well-established case law on human rights, which is widely followed by ordinary judges

2.- Role of the Constitutional Court vis-à-vis international obligations

A comment is needed on the consequences of the amendment of the Law on CC passed in 2007 adding the new admissibility requirement on “special constitutional relevance”. According to it, even though there could be a violation of human rights the file would be inadmissible unless it entails constitutional relevance other than the interest of the victim of the violation.

As a consequence of this reduced scope of the individual application to the CC, we have seen that some victims of a violation of human rights directly brings their claim to the ECtHR. They argue that it is unnecessary for them to use the individual application before the CC because due to the 2007 ammendment it became a non-useful remedy to get the breach of human rights repaired.

We have see also that those claimants that get an inadmissibility decision based on the lack of “special constitutional relevance” take their claim very often to the ECtHR, when before the 2007 amendment this was not the case.

The conclusion could be that it is not a good idea to use regularly the “special constitutional relevance” as the basis of the inadmissibility decision, unless before the CC has developed a well-established case law which is widely applied by the ordinary judges apply. Otherwise the number of applications submitted to the ECtHR will increase.

3.- Relations with the ordinary judiciary

The main issue is that the CC is able to prefer an interpretation of human rights different to that one adopted by the ordinary judges. The CC is the last instance, which is important, but also, according to the Constitution, it is the highest authority when it comes to the interpretation of the constitutional guarantees, including the human rights enshrined in the Constitution.

This highest position allows the CC where finding a violation of human rights to quash the judicial decision that have caused the breach of human rights or that has failed to get it repaired. The ruling does not limit to declare that violation has happened. The ruling is not merely declarative.

I think here we can see an important difference with the Turkish system. As far as I know theVenice Commission - opinion nº 612/2011 - observed one of the most differential features in the individual application mechanism that the TCC's decision "shall be limited to whether or not a basic right has been violated and the determination of how such violation can be remedied" (49&6 CCL), sending back the file "to the relevant court for holding the retrial in order for the violation thereof to be removed" (50&2 CCL). In other words, as the Venice Commission concluded, "the Chamber cannot annul the ordinary court decision that had been taken in violation of a fundamental right". However, the Venice Commission added immediately afterwards, "in order to make sure that the instructions are implemented, the decision by the ordinary court should be annulled"

This feature could be troublesome in terms of lengthy processes and uncertainties for removing the violations already declared by the CC.

4.- The effects of a CC ruling on a "recurso de amparo" procedure.

In Spain the CC rulings on an individual application procedure have inter partes effect. Only the claimant gets relief from a ruling in which the CC finds that a violation of human rights has taken place.

However, there are two provisions that give somehow general effects to the CC rulings.

4.1.- The Organic Law on the judiciary, in its art. 5, orders ordinary judges to adjudicate disputes before them following the case law of the Constitutional Court. In other words ordinary judges are compelled to apply the interpretation of human rights delivered by the Constitutional Court, so that similar cases to those already adjudicated should have the same result or at least a result based on the same interpretation of the human rights.

In Spain, ordinary judges are independent, in the sense that they have no legal obligation to follow the interpretation of the law made by the Supreme Court or in general by higher courts. An exception is provided for the case law of the Constitutional Court, even in the case that the interpretation is set in the context

of a procedure, as it is the case of individual application, where the ruling has no more than inter partes effects.

This system, in the event that functions well, prevents many claimants from bringing their claims to the CC and, as a consequence, reduces the case load of the CC.

4.2.- The problem of the violations that stems directly from the law.

Sometimes the violation of a human right challenged before the Constitutional Court stems directly from a law passed by the legislature. In that case the Section or Chamber initially competent to decide must refer the issue to the Plenary Assembly, which proceeds as in the abstract unconstitutionality procedures and delivers a judgment declaring the law unconstitutional. In other words the Section or Chamber of the CC is obliged to stay the individual application procedure and to promote a kind of internal remedy of objection. I call it internal because the promotion and the decision take place inside the CC.

This mechanism is very useful in terms of general effects. The Plenary Assembly declares the law against the human rights provided for in the Constitution and, consequently, annul the law. This decision has general effects, so that no judge could adjudicate disputes before him or her on the basis of that law.

As far as I know, here in Turkey art. 40 of the Law on the CC provides for a remedy of objection that can be promoted by a judge before the Constitutional Court. But I have heard somewhere that CC is not seen as a judge in this context, so that it is not possible for a Section or Chamber to refer a remedy of objection to the Plenary Assembly. I think this could trigger some problems in terms of lengthy trials and increasing case load.

5.- Challenges to the authority of the Constitutional Court; execution powers

In Spain the Organic Law on the CC provides for a procedure aimed at the correct execution of the CC rulings on individual applications. Their main characteristics are the following:

1,.It is a jurisdictional mechanism, not an administrative one.

2.- It is adjudicated by the same body of the CC that has deliver the judgment in execution.

3.- It is promoted by the victim in the event that he or she considered the execution by the government or the judiciary is not in compliance with the judgment of the CC.

4.- It is very short in terms of time because only consists or checking consitency between the execution and the judgment.

6.- Case load and ways of addressing: special constitutional relevance required for admissibility

The main features of the mechanism are the following:

1.- Since the individual application – “recurso de amparo” - in Spain is a key part of the constitutional jurisdiction from the beginning in 1980, in 2007 there was already an extensive case law established by the SCC which it has been regularly applied by the ordinary courts for decades.

2.- This new admissibility criterion is completely another thing to the violation of a fundamental right. It has nothing to do with the higher or lesser degree of the violation or the more or less importance of the disadvantage suffered by the victim. It is a criterion of an objective nature, in the sense that it is not linked to the subjective effect produced to the victim53.

3.- The appellant must “comply –in addition to the remaining procedural requirements established in arts. 42 to 44 of the OLCC - with the obligatory requirement imposed by art. 49.1 in fine OLCC of justifying in an express manner in the claim for protection the special constitutional relevance of the appeal”54.

4.- Acknowledging that this criterion involves a great discretion in determining its content, the SCC “consider[ed] it appropriate [in 2009], given the time which [had

elapsed] since the reform of the appeal for protection, to put forward an interpretation of this requirement”, listing a “range of cases in which an appeal for protection of fundamental rights has special constitutional relevance” and noting as well that this list could not “being understood as a definitively closed range of cases in which an appeal for protection of fundamental rights has special constitutional relevance, since that understanding is logically opposed to the dynamic nature of the exercise of our jurisdiction, the performance of which, on the basis of casuistry presented, cannot rule out the need to describe or distil concepts, redefine cases considered, and add other new ones, or exclude any which had been initially excluded”.55

Consequently, the Working Group should advise against a direct application in Turkey of this requirement, not only because in itself is somewhat different to the one provided for in art. 48&2 CCL but due to the early stage of development of the latter, which has not yet had the opportunity to established a settled case law in a great number of human right related issues. Nonetheless, it is clear that it could entail, if it will be duly applied, a great help in managing the enormous workload pending before the TCC