II. NOTAS

RELATIONSHIP SUPREME COURT - CONSTITUTIONAL COURT IN SPAIN

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I) It is not surprising that there are conflicts between ordinary courts and constitutional courts. It is enough to note that precisely one of the reasons behind the model of continental Europe's constitutional courts was precisely to place a body committed to the normative force of fundamental rights above the ordinary courts, which were used to approaching the legal system in a conservative sense, and in particular to considering constitutional provisions recognizing fundamental rights as merely programmatic. Piero Calamandrei, in the Italian Constituent Assembly of 1947, even said that to let the defense of the Constitution in the hands of judges was like setting the wolf to guard the lambs.

II) Obviously, there is an increased need for coordination where there is an amparo appeal —"writ of certiorari" (US)/remedy of amparo— as is the case of Spain. In Spain, Title VI of the Constitution considers the Supreme Court the highest judicial body in all orders, except for the provisions concerning constitutional guarantees, while art. 1 of the Organic Law of the Constitutional Court considers the Constitutional Court as the supreme interpreter of the Constitution.

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Each court should act as "supreme court" in its respective field, the Constitutional Court in the field of interpretation of the Constitution and the Supreme Court as far as the interpretation of ordinary legality is concerned. This is a widely accepted approach, both by the doctrine and even by the Constitutional Court. But as it is well known, sometimes the boundaries between the Constitution and ordinary law are not easy to establish, and, in those cases, self-restraint by the supreme interpreter of the Constitution is in order.

In fact, that our Constitutional Court does not annul many Supreme Court decisions may be true to say. Analyzing the number of resolutions of the Supreme Court, reviewed by the Constitutional Court between 2001 and 2011, in relation to the number of Supreme Court decisions that were overturned, we found a range between 0,31% and 1% -just one year- with an average of less than 0,5%. The year when most resolutions were canceled, 2001, 1710 resolutions were reviewed and 19 judgments were overturned.

III) However, in Spain there have been clashes between the Supreme Court and the Constitutional Court. We even have a resolution that is unmatched in comparative law. It is important to note that, among the five chambers of the Supreme Court, the first one is precisely the one who has had more conflicts, or at least that whose conflicts have been more dangerous. Let's refer to this matter in the short time allotted.

III.1) The tension began to emerge in the first half of the eighties and reached an important peak with STC 7/1994, of January 17, in which the Constitutional Court, deciding an appeal related to a paternity case, not only overturned the Supreme Court ruling, but went further and declared prevalent the ruling of a Provincial Court. This was interpreted among the judges of the Supreme Court as a disavowal of the Court before a lower court, an action that was considered intolerable. The Supreme Court lifted a writing signed by several judges to the King, asking the King to temper the excesses of the Constitutional Court. Also, at the opening ceremony of the judicial year 1994-95, the Chief Justice and the General Council of the Judiciary requested the suppression of amparo appeal in the field of the right to effective judicial protection.

Then two big clashes ensued.

III.2) The first one took place on the occasion of the amparo appeal of a famous lady of Madrid society against a magazine that had published several reports based on private accounts leaked by a person who had worked in the service of that lady. The Constitutional Court, considering that, although the facts revealed posed no demerit, they had affected the right to privacy, granted the amparo. But, since the Constitutional Court had established jurisprudence

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that prohibited itself fixing compensation for damages, they returned proceedings back to the Supreme Court for the latter to fix the compensation, following the criteria established by the Constitutional Court.

Nevertheless, the Supreme Court, while acknowledging the violation of the right to privacy, said that what had been published were "gossip of little importance", so they fixed a compensation to the affected lady that seemed insignificant to her (twenty five thousand pesetas).

Mrs. Preysler turned to the Constitutional Court for amparo appeal. And this time, considering that not the content of the facts revealed, but the enrichment of the magazine through the violation of a fundamental right was the issue at stake, considered that the compensation set by the Supreme Court was a pseudo compliance with the Constitutional Court ruling. But as it had to respect its own jurisprudence and could not determine the amount of the monetary damages, it decided to declare effective the compensation that had been previously set by the Provincial Court of Barcelona, which were ten million pesetas (400 times more than the one granted by the Supreme Court). Again the Constitutional Court, in the opinion of the Supreme Court justices, exceeded its powers by establishing the prevalence of a judgment of a lower court over that of the Supreme Court.

The first chamber, in a different case which was about the right of personal portrayal –also called 'right to self image' in the USA- (Case November 5, 2001) stated that she upheld the decision of the Constitutional Court on legal grounds, but declared that they considered unacceptable its rationale. In order to highlight the disproportionate compensation awarded by the Constitutional Court, the Supreme Court collected a list of compensations to be granted by other more serious events, as could be the loss of a leg or an eye.

III.3) But the matter did not end here. The most surprising decision of the Supreme Court would occur during an appeal action brought by a lawyer who had been expressing indignation at a Constitutional Court's practice: this lawyer considered that the Constitutional Court was in breach of its Charter because no public exams where done to fill vacancies of legal advisors of the Constitutional Court.

The lawyer, José Luis Mazón Costa, filed a complaint before the Board of administrative litigation of the Supreme Court requesting that the Constitutional Court be ordered to fill in all the positions of legal advisors through a public competition. The appeal of Mr. Mazón was dismissed by the Supreme Court in its judgment of June 24, 2002.

Mr. Mazon presented amparo appeal before the Constitutional Court. He demanded that all judges refrain and another court to be formed to resolve his amparo appeal.

The Assembly of the Constitutional Court unanimously decided the inadmissibility of this amparo appeal "because the action is not directed to the Constitutional Court, but to another hypothetical court that should replace this".

Mr. Mazon made application for reconsideration before the Constitutional Court. The latter again declared the appeal inadmissible, this time with a more extensive providence in which the impossibility of attending an appeal as presented was explained, an appeal in which the passage of a bill that would guarantee the constitutional right to a fair examination was requested by the amparo appeal, among other things.

Mr. Mazon presented liability claims before the Civil Chamber of the Supreme Court against the judges of the Constitutional Court, who had issued the above measures, requiring that they imposed an obligation to compensate the plaintiff with the sum of 11,000 euros.

In a judgment of 23 January 2004, the Civil Chamber of the Supreme Court partially granted the application and declared all defendants disqualified on liability; the defendants were eleven judges of the Constitutional Court, sentenced to pay 500 euros each.

III.4) This judgment constitutes a unique case in Comparative Law.

At our point in time, eleven years later, we can summarize the balance of the incident stating the following.

1. The Constitutional Court judges affected by the conviction proceeded to pay the amount to which they had been convicted, but they raised amparo appeal before the Constitutional Court against the judgment of the Supreme Court.

As it was not possible for the own judges of the Constitutional Court to resolve their own amparo appeal it has been necessary to wait nearly a decade to get a new composition of the Constitutional Court. The sentence came in with the number 133/2013, of June 5, which granted the protection requested by the judges of the Constitutional Court, declared violated their right to an effective remedy and annulled the judgment of the Supreme Court of January 23, 2004.

2. Another consequence of the judgment was that the legislative intervened in the matter and, in the reform of the Organic Law of the Constitutional Court of 2007, reinforced the position of the Constitutional Court to prevent something similar from happening again.

3. However, we believe that the judgment has had its influence on the subsequent behavior of the Constitutional Court. In 2001, the percentage of Supreme Court decisions which were among those that were revised by the Constitutional Court was up to 1.11%. In 2010 this percentage was 0.31%. With all the caution required when using statistics in this field, we can see that the number of Supreme Court decisions that were reviewed hereinafter almost fell over 50%.