The Dialogue between the European Court of Human Rights and Spain's Constitutional Court: a Fruitful Relationship

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The importance of the European Convention on Human Rights and of the doctrine created by the European Court of Human Rights in interpreting and applying it, have undoubtedly been perceived—I would dare say experienced—in those countries, which, like mine, have undergone, only a few decades ago, democratic transition processes. Indeed, for us, the Strasbourg Court's case law has clearly played—particularly in the early years of our restored democracy—a role as our point of reference, as well as being an essential tool for building a democratic system.

Spain ratified the European Convention on Human Rights on the 26 September of 1979; in other words, only months after the entry into force of the 1978 Spanish Constitution, which clearly drew inspiration from the Convention.

This particular ratification was especially significant, because Article 10.2 of our Constitution establishes that the fundamental rights and public liberties recognized therein shall be interpreted in conformity with the international treaties and agreements on human rights ratified by Spain. Therefore, as a result of the ratification of the Rome Convention, all of the doctrinal acquis created by the European Court regarding the rights recognized therein became one of the principal canons for interpreting our own Constitution.

This canon, which from our very first judgments we have called "of decisive relevance" (STC [Constitutional Court Judgment] 22/1981, FJ [Legal Ground] 3), has been extremely fruitful for the interpretive work of the Spanish Constitutional Court, which, in its 35 years of existence, has constantly and repeatedly resorted to the case law of the European Court of Human Rights in order to give substance to the fundamental rights recognized in Spain's 1978 Constitution.

It is difficult to fully describe the scope of this guidance. From a merely quantitative point of view, it amounts to nearly 800 Spanish Constitutional Court decisions expressly inspired by Strasbourg case law. The figures are particularly striking as regards case law

involving appeals for legal protection regarding fundamental rights [*amparo* appeals], in which, according to existing studies, approximately 60 per cent of our judgments contain European references. From a qualitative standpoint, the most balanced assessment reveals data that are no less striking: our doctrine, following the guidelines of Strasbourg, has configured such important rights as equality before the law and non-discrimination[1] (Article 14 CE [Spanish Constitution]), the right to privacy[2] (Article 18.1 CE), the right to secrecy of communications[3] (Article 18.3 CE), freedom of speech[4] (Article 20. 1 CE), the right to assembly and demonstration[5] (Article 21 CE), the right to a fair trial[6] (Article 24.2 CE), the right to defence[7] (Article 24.2 CE) and the right to be presumed innocent[8] (Article 24.2 CE).

These data show that Spain's Constitutional Court has taken very seriously its obligation to engage in dialogue with international conventions and agreements on human rights and with their guarantors, as provided for in Article 10.2 of our Constitution, and that Spain has been fully open to the incorporation of the results of this dialogue, which was the intention of the provision. In this regard, it could be said that the Spanish Constitutional Court has adopted the principle of the "force of the *res interpretata*" of the case law of the European Court of Human Rights.

The result of this influence—and in general of the opening up to internationalization in the interpretation of our Constitution, which has been a hallmark of the Spanish Constitutional Court—has been, I believe, the creation of solid and advanced doctrine on fundamental rights which, in turn, has made its mark on the ordinary jurisdiction and led to effective, high-level protection of human rights in Spain. This situation relieves the Strasbourg Court of part of its workload, because, by virtue of the principle of subsidiarity, our courts—the ordinary courts as well as the Constitutional Court— are the natural and effective guarantors of the rights recognized in the Rome Convention and its additional Protocols. Proof of the effectiveness of our system is the fact that Spain is one of the Rome

[1] STC 22/1981, of 2 July; or STC 9/2010, of 27 April.
[2] STC 119/2001, of 24 May; or STC 12/2012, of 30 January.
[3] STC 49/1996, of 26 March; or STC 184/2003, of 23 October.
[4] STC 62/1982, of 15 October; or STC 371/1993, of 13 December.
[5] STC 195/2003, of 27 October; or STC 170/2008, of 15 December.
[6] STC 167/2002, of 18 September; or STC 174/2011, of 7 November.
[7] STC 37/1988, of 3 March; or STC 184/2009, of 7 September.
[8] STC 303/1993, of 25 October; or STC 131/1997, of 15 July.

Convention's signatories on which the Strasbourg Court has handed down the fewest sentences.

As expected, over the years, and with the development and enhancement of our own case law, this incorporation of European doctrine is becoming increasingly more dialogue-based and less unilateral, to the extent that there are many cases that could very well be included in a "code of best practices" on dialogue between courts.

I could mention a great many examples of the fruitful relationship between our Courts; however, I would like to focus on one outstanding example, given its importance for the consolidation of the reform of our system of *amparo* appeals, which came into force in 2007. I am referring to the Judgment handed down by the European Court on 20 January 2015, in the case of *Arribas Anton v. Spain* in which, over and above the applicant's private interest, the case decided upon involved compatibility between the European Convention and the reform of Spain's *amparo* appeal system, or right of access to a court, carried out in Organic Law 6/2007, of 24 May. This reform, which sought to rationalize our *amparo* appeal system, basically consisted in introducing into our Organic Law the concept of "special constitutional importance" as a requirement for admissibility of *amparo* appeals, so that after approval of this Organic Law, for such an appeal to be admitted appellants not only need to prove that their fundamental rights have been infringed, but also that the case has sufficient constitutional importance for the Court to hand down judgment.

Turning to the case of this appeal, rejecting that the new requirement violated the Rome Convention, the Strasbourg Court took the view that it did not need to examine this case and admitted the compatibility of this new legal regulation with the European Convention, stating in particular:

a) That the configuration of an appeal such as that of *amparo*, or right of access to a court, is the responsibility of the national legislator, and the aim pursued by the legislative amendment of Organic Law 6/2007 (to improve the functioning of the Constitutional Court, strengthening its subsidiary role and attributing to the ordinary courts the main role of guarantor of fundamental rights) is legitimate (§§ 49 and 50).

b) And that the fact of submitting the admissibility of an *amparo* appeal to the existence of objective criteria, such as the constitutional importance of the case, is neither disproportionate nor in breach of the right to a fair trial (§ 50).

However, the European Court, while endorsing our legislative amendment, gave our Constitutional Court two general indications (§ 46 of the Judgment):

- Firstly, that the Constitutional Court should define the content and scope of "special constitutional importance". This had already been duly carried out by our STC 155/2009, of 25 June, where, in a non-exhaustive way, circumstances that merit the consideration of special constitutional importance were identified.

- The second indication—namely, the description of the special constitutional importance identify in each of the appeals admitted—does not form part of our practice, because only on very few occasions has the Court expressed in its judgments the reason for considering the existence of special constitutional importance, and this has only been done in cases where one of the parties had claimed that the appeal should not have been admitted because this special constitutional importance did not exist.

Having said this, the decisions of admission of *amparo* appeals handed down by the Court's Chambers or Sections currently do contain a mention of which of the circumstances listed in our STC 155/2009 have been considered in that specific case. Moreover, for that consideration to become sufficiently disseminated, it is specified in the "factual background" of the judgments or, as the case may be, on legal grounds.

I have described this example in some detail because it is a true example of "dialogue between Courts", an expression that has gradually lost part of its strength as a result of overuse. As has been rightly observed, dialogue between courts is not merely knowledge of and possibly making references to resolutions handed down by foreign or international courts, but, rather, the process of mutual influence that occurs when a court consciously reacts to the appreciation of its work made by another court. This process, in our case, is obligatory as a consequence of the wealth and complexity of the European human rights protection system, of which we form part.

All in all, any satisfaction regarding the examples of good interaction between the European Court and our own Court should not conceal the difficulties resulting from the multilevel fundamental rights protection system which we have created.

In our legal framework, the rights enshrined in the European Convention on Human Rights are added to those recognized in national constitutions; moreover, in those countries belonging to the European Union, those set forth in the EU Charter of Fundamental Rights are, as well, added. These are overlapping declarations of rights, each of which is supported by the jurisdiction of a court that is considered its ultimate interpreter.

The configuration of each of these courts responds to a different institutional logic—a circumstance which can lead us, in our attempts at dialogue, to speak at cross-purposes. Staying on the theme of those courts that are the subject of my speech, the jurisdiction of the European Court of Human Rights extends to 47 countries—countries with very different realities in terms of political, economic, social and cultural development and which face very different kinds of problems insofar as protection of human rights is concerned. In this regard, the hard work carried out by the Court of Strasbourg in defence of democracy and the essential elements of rule of law deserves our deepest admiration and respect. That said, no one can deny the difficulties involved in interpreting the Rome Convention in a single manner for such a wide variety of situations.

Furthermore, the European Court of Human Rights safeguards fundamental rights without regulatory conditions apart from the Rome Convention and its Protocols, whereas national Constitutional Courts are entrusted with protecting the entire constitutional system. We have a duty to the Constitution as a whole, which compels us, in our resolutions, to also consider and guarantee the effectiveness of those constitutional precepts that do not encompass fundamental rights.

Although the protection of fundamental rights is indeed our common ground, the problems that we have to face in our interaction are not negligible: the regulatory instruments that govern us and that we apply are very different; the rights recognized therein do not always fully coincide, nor do the interpretations that the different courts make of them. Inevitably, there have been and will continue to be discrepancies in legal interpretation which, naturally, will result in different levels and standards of protection.

It is well known that the entry into force of Protocol 15 of the European Convention on Human Rights is going to involve the express recognition of the principles of subsidiarity and of States' "margin of appreciation" contained in the Preamble to the Convention, and this is perhaps an opportunity to fine-tune the relations between our courts. In the future, these principles shall not be self-restrictions drafted by the Court of Strasbourg, but provisions of the Convention, binding on all parties. The new paragraph at the end of the Preamble says: "Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention (...)". [9]

If we take a closer look at the terms used in the new wording, we can see the whole balancing act that it is trying to ensure. This balancing act is inherent to the very idea of subsidiarity. Firstly, the affirmation that securing the rights and freedoms recognized corresponds, firstly, to States. Secondly, that in so doing they enjoy a margin of appreciation. And finally, the Protocol stresses the basic supervisory role of the European Court of Human Rights. A role that is certainly subsidiary, but also ultimate and supreme.

Probably, as I was saying, a cautious but comprehensive reading of the principle of subsidiarity and its implications could contribute decisively to overcoming some of the difficulties of articulation presented by Europe's multilevel human rights protection system. Among other things, encouraging and enriching this frank dialogue, which we have been trying to promote.

The first demand of the principle of subsidiarity is incumbent upon States. In view of the fact that States are on the front lines of enforcing the Convention, it is necessary that legislators (in making laws) and judges (in adjudicating cases under their jurisdiction), as well as we ourselves, in interpreting and applying the Constitution, always be aware of the European Convention and the European Court of Human Rights' interpretation of it. To the

[9] In accordance with Article 7 of the Protocol, it shall enter into force on the first day of the month following the expiration of a period of three months after the date on which all High Contracting Parties to the Convention have expressed their consent to be bound thereby.

extent that we provide the protection required thereunder, no subsequent action on the part of Strasbourg is necessary.

The second requirement refers to the European Court of Human Rights in the exercise of its jurisdiction –a jurisdiction that, as has been said, should be exercised out of respect for the margin of appreciation corresponding to States. Although the scope of this "margin of appreciation" must be defined, and probably redesigned, it seems indisputable that its express provision is a call to prudence in judging the instruments and standards of national protection. A call that necessarily involves an updated approach to the different developments in rights carried out by States, taking into account the diversity of regulations and legal systems that coexist in Europe. In order for this to be possible it is essential for national judges to make the effort to explain the regulations that they apply, and the local circumstances that determine their decisions.

As Europeans, we have wanted to make the protection of human rights into one of our most important signs of identity; however, at the same time we have wanted this protection to be carried out through a decentralized and pluralist system—convergent but not uniform—because this diversity is yet another of our European signs of identity.

Thank you very much.