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Human Rights Protection by Ordinary Courts

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INTRODUCTION

The Spanish Constitution acknowledges and protects human rights. Principles of equal protection of the law and prohibition of any discrimination are covered in section 14, and in sections 15 to 29 are the fundamental rights and public freedoms.

The capital role fundamental rights play in our Constitution justifies the adoption of a guarantees system to ensure their effectiveness, because it is clear that the acknowledgment of these rights wouldn't be more than a mere rethoric form would'nt it be accompanied by a very concrete and effective way of protection. It is still worth, by that reason, the emphatic statement of the section 16 of the 1789 French Declaration: "...Any society in which the guarantee of the rights is not preserved... doesn't have Constitution at all".

Therefore, if a society wants rights to be considered as real and effective ones and, definitively, to get rights with real existence, those rights should be entirely protected.

Protection of the human rights by the Courts propounds two levels: the domestic and the international. In its turn, from the internal point of view, the constitutional guarantee and the judiciary (ordinary courts) guarantee must be distinguished. And, finally, at the judiciary level, there are several different guarantees provided by every different kind of Courts (civil, criminal, administrative,...).

Anyway, the problem of the human rights protection system by the judiciary had a very strong political meaning fifteen or twenty years ago because there were serious doubts about how this problem would be managed, due to the apparent lack of constitutional awareness of spanish judges. Nowadays, however, it has become a simply technical problem. Doubts have been cleared. The Judiciary, with the prosecutor's collaboration, perfoms perfectly its role of Human Rights guarantor. This performance, of course, can always be improved, but the usual problems are, above all, technical ones: how to improve the effectiveness of that protection, how to develop better systems of proceedings and actions, and other with similar characteristics.

THE SUBMISSION OF JUDGES TO THE HUMAN RIGHTS

It has been acknowledged that ordinary judges in Spain are "constitutional judges". And that is not only because they can not impose or enforce the rules or regulations (not formal law) opposed to the Constitution; or because they must construe or interpret laws according to the Constitution; or because, when they consider that a law they must apply to solve a case might be contrary to the Constitution, they must submit the point to the Constitutional Court. They are "constitutional judges" because the Judiciary is "the immediate and effective protector of all Rights and, in particular, of Fundamental Rights".

The first idea that should be emphasized is, thus, the principle of submission or dependence of judges to Fundamental Rights. This principle is acknowledged in relation to the whole Constitution in general, and then, in particular, in relation to the Fundamental Rights. This finds a clearer expression in the Judiciary Law, that states: "The rights and freedoms recognized ... bind all judges and magistrates and are guaranteed by their effective protection".

This precept synthesizes what the Spanish Protection of Fundamental Rights System should be: a quick and effective system, entrusted to judges and magistrates.

The relationship between judges and courts and fundamental rights has two dimensions:

a) Negative dimension:

It is the duty to eliminate any act that breaks or violates those rights.

b) Positive dimension:

Fundamental rights do not only perform the role to safeguard fields of freedom of the person against public powers; afterwards, they are authentic principles and values that should inspire the everyday doings of those public powers, because our Constitution says the inviolable rights of the person are “the basis of the political order and social peace”.

In the case of the Executive Power and the Legislative Power, this positive dimension justifies legislative and executive policies with a tendency towards going deeply into those rights. This would not be possible for the judiciary: those judicial policies would only be conceivable from a militant position that is not compatible with a jurisdictional function submitted only to the Constitution and the law.

In the Judiciary, this positive dimension is performed through the instruments of juridic interpretation, that is, what scholars have called the “expansive strength” of Fundamental Rights, as, for instance, the pro libertate principle, or the interpretation of every law according to the Constitution. It is a judge obligation to enforce and to interpret all the legal system in the most favorable way to fulfill the effectiveness of the Fundamental Rights.

This submission of judges and courts to fundamental rights turns the Judiciary into natural protector of those rights.

The submission of the judges and courts to the fundamental rights and, subsequently, the protection they must provide them with, enlighten all and everyone of the judicial actions and proceedings, and not only over the specific proceedings of protection.

In other words, rights and freedoms, as all the Constitution, are a part (and an essential one) of the legal system and, by that reason, must be respected by judges and courts, and judges and courts must get everybody to respect them, whatever the proceeding is.

This question, very obvious, sometimes may not be that clear, because of the existence of specific procedures for the protection of fundamental rights, which purpose is, precisely, the protection of those rights.

Judges and Courts share their protective role of the fundamental rights with the Constitutional Court. The Constitutional Court protects the Rights and Freedoms through all and every one of the procedures that can be before the Constitutional Court and, specially, through the application for a declaration of fundamental rights (amparo action).

The procedural relationship between the ordinary judicial protection and the constitutional one is sustained by this principle: the constitutional protection before the Constitutional Court is subsidiary in relation to the ordinary one. This principle has been asserted by the Constitutional Court starting from legal statements like these:

- The need to finalize or end the previous ordinary judicial proceedings before applying to the Constitutional Court.
- The need to adduce the violations of rights and freedoms as soon as they are known and there is a chance to do so.

The procedural relationship between the ordinary judicial protection and the constitutional one has one of their pillars in the interpretative supremacy of the Constitutional Court in rights and freedom issues. However, that interpretative supremacy doesn't mean that Judges and Courts should be submitted to the Constitutional Court interpretation in an absolutely and completely passive way. On the contrary, Judges and Courts must be the basic engine that speeds up that constitutional interpretation because it's them who deal with the everyday juridic disputes of the citizens. By that reason, they open and, in some cases, force that interpretation.

The instruments which can be used to accomplish that mission are clear:

- Firstly, judges and magistrates must make fundamental rights effective through each and every one of their decisions.
- Secondly, judges and magistrates have a powerful instrument to speed up the constitutional interpretation, of a more exceptional nature. It is their legal obligation to submit to the Constitutional Court the eventual unconstitutionality of the relevant laws that they are applying in any case they try. This is a basic and powerful mechanism to interpret the Constitution and, very specially, the Fundamental Rights, and a very valuable method to encourage judges and magistrates to take part in and stimulate that interpretation.

THE GUARANTEES SYSTEM

The fundamental rights guarantees system can be synthesized in three different orders:

- a) Legislative guarantees: The Spanish Constitution imposes an organic law restriction to develop fundamental rights by law. The laws that regulate and develop fundamental rights need a qualified majority at Congress of Deputies to be passed: these laws require an absolute majority of votes of congressmen (50% plus one) in a final voting on the whole bill of law.
- b) Supervision guarantees: through the Ombudsman institution, who has the role to protect all the fundamental rights. To develop that function, he will supervise the Administration activity, reporting to the Parliament.
- c) Jurisdictional guarantees: these guarantees try to assure that the Legislative Power is submitted to the Constitution when passing a law, through an abstract and a concrete control. Besides, this guarantee tries as well to face violations of

fundamental rights generated by non legislative acts of public powers or by citizens.

Focussing only on these last guarantees, there are two purposes, as it has been said:

1) The first one is to assure that the Legislative Power is submitted to the Constitution when passing a law.

To achieve that goal, the two mechanisms available are the unconstitutionality action (abstract control of the law), and unconstitutionality issue (specific control that is provided by a judge on the occasion of an open and existent proceeding before him).

This juridic control that can be used against any gender of laws, and it is a guarantee against incidental or possible violations of fundamental rights by legislators.

The abstract control of the constitutionality of laws is a competence of the Constitutional Court, that has the monopoly of this action when the laws have been come into force after the Constitution. This a very important characteristic of the spanish constitutional system: the judicial review of the constitutionality of laws belongs exclusively to the Constitutional Court when the laws have come into force after the Constitution (most of all).

The constitutional control of laws has, therefore, a very important role to guarantee the fundamental rights, although a limited one. The Constitution extraordinarily restricts the capacity or legitimation to submit to juridic control a legislative act might violated a fundamental right: only the Prime Minister, 50 congressmen, 50 senators, the Ombudsman and the regional governments or parliaments are allowed to do so.

Judges and Magistrates can also assume this role, as it has been said before. But within limits. They can only do it when, in a case they have to try there is a law, directly related and essential to that case, that might be unconstitutional.

Given this situation, the rank of the disposition must be considered.

If the disposition has not the formal rank of law (regulations, rules, etc.). the judge can himself declare its unconstitutionality regardless of its date.

If it is a formal law, it depends on its date. If the law in question was passed before the Spanish Constitution came into force, the judge has the power to declare himself the unconstitutionality of the law. If the law was passed after that, all he can do is submitted the case to the Constitutional Court.

2) The second objective of the jurisdictional guarantee is to face eventual violations of fundamental rights generated by non legislative acts of public powers, or by private citizens acts.

The cornerstone of this judicial protection is this: any citizen may ask for the protection of fundamental rights by a special procedure based on the principles of preference and summary management, and, eventually, by the application for a declaration of fundamental rights (amparo action).

Really, the words “any citizen”, must be understood in reference to any person and not limited or restricted to Spanish citizens. Most fundamental rights are recognized to everybody, regardless of their quality of national or foreigners and their condition of corporate or natural person.

The sphere of protection of this procedure is clearly established in the Constitution itself: the rights acknowledged in section 14 (principle of equal protection of the law and prohibition of any discrimination), and then sections 15 to 29 (fundamental rights and public freedoms such as right to life, right to physical indemnity, right of privacy, right of personal freedom, freedom of speech, right of assembly and demonstrate, right to hold office, freedom of religion, right to strike, etc), and the conscientious objection (section 30).

And the Constitution states, finally, the characteristic that must have these procedures before ordinary courts should be based on the principles of preference and summary management.

These procedures are different in every jurisdictional order: civil, criminal, contentious-administrative and labour.

GUARANTEES IN THE CIVIL JURISDICTIONAL ORDER

The importance of this civil guarantee lays in its residual nature: any question not assigned to other jurisdictional order in short can be brought before this jurisdictional order. Besides, it is also remarkable its potential to become a very important indirect way to have access to the application for a declaration of fundamental rights (amparo action), in the case of violation of fundamental rights by private citizens.

Nowadays, in accordance to the provisions of the new Civil Procedure Code, actions asking for civil protection of any fundamental right will be ruled by the ordinary procedure with two peculiarities:

- The Public Prosecutor will always be a party in the procedure.
- The management of the case will always be preferent.

The object or aim of these procedures are the interferences or violations of fundamental rights, and that applies for all the necessary measures to put an end to the illegitimate interference, to reestablish the damaged in their complete benefit or enjoyment of their rights, as well as to prevent further interferences.

This procedure requires the assistance of a lawyer and the representation before the court by a legal representative.

The surprising thing about this new regulation of the civil guarantee is this: a procedure that is supposed to be based on the principles of preference and summary management, is handled by the ordinary procedure, that is the longest of the established ones.

GUARANTEES IN THE CRIMINAL JURISDICTIONAL ORDER

Talking about “protection of fundamental rights in the Penal Code” is talking about all the Criminal Law, because Criminal Law is above all the culmination of a whole juridic system, focused to the protection of rights and interests regarded as fundamental for the human being and by a certain society.

Criminal Law has developed the *Protected legal rights theory*, and through this theory has turned those Fundamental Rights into protected legal rights. And Criminal Law grants that these protected legal rights will have a first class protection, by punishing the misbehaviour that might violate or endanger them with the more radical and forceful sanctions available in the Rule of Law.

Criminal Law, however, neither sanction all and everyone of the misbehaviours that violate or interfere a fundamental right, nor is it the one and only way to protect them. As Criminal Law is ruled by the minimum intervention principle (what means that it only punishes the most serious misconducts against the most important rights, and only against these), the legislator is free to choose which fundamental rights should be protected and how to do so.

The offences against the fundamental rights of the person includes in the Penal Code will be triable by the ordinary criminal courts, under their own competence.

A special case of protection of the Right to personal freedom is Habeas Corpus. Habeas Corpus is a special procedure to protect that Right. This procedure is ruled in Organic Law that entrust the protection of the right to personal freedom against the illegal arrest, detention or imprisonment to criminal judges.

Its purpose is to establish an effective and quick remedy for incidental or possible cases of arrests, detentions or imprisonment not legally justified, or detentions which are legal at first but that have become in some way illegal because of its length or because of its terms or conditions. It is, therefore, an accelerated way of judicial control of detentions.

It consists in a hearing of the person under arrest, who is taken before the judge. During that audience, the person under arrest can expose his allegations against the detention reasons or the detention conditions in order to get a decision in which the judge declares if the detention is, or is not in accordance to the law.

This regulation, to be effective, needs a procedure as quick as possible, to get the immediate judicial check of the detention legality and conditions, and as easy as possible, to get it available and accessible to everybody, in order to permit access to judicial authority without unnecessary complications.

To achieve these goals, the habeas corpus law is inspired by four complementary principles:

1. Agility, which is essential to get the illegal violation of the personal freedom sorted out as soon as possible. It is achieved by establishing a procedure that must be ended in no more than 24 hours.

2. Simplicity and lack of formalisms: the procedure is developed through an oral hearing with no formalism.
3. Generalization. On one side, no particular or authority can escape this judicial control of the legality of detention, with no exception. On the other side, there are many people legitimated to urge the proceedings, and that includes the public prosecutor and the ombudsman.
4. Universality. The law doesn't rule only the originally illegal detentions, but also all those cases of detentions that are legal in origin but are illegally extended.

GUARANTEES IN THE ADMINISTRATIVE JURISDICTIONAL ORDER

Two different scopes can be distinguished in the administrative order. On the one hand, violations caused by the Public Administrations; on the other hand, violations caused by the Administrative Judicial Courts when judging the business or cases that have been assigned to them.

For the protection of the first above mentioned violations, citizens can apply to the ordinary contentious-administrative procedure, where ordinary legality violations of fundamental rights can be exposed. But they can also apply to a preferent and urgent procedure, a special one, specially stipulated to take knowledge and to remedy the violations of fundamental rights. And this special procedure can be used at the same time or alternatively to the ordinary procedure.

This special procedure is foreseen in the Law 29/1998, 13 of July, of the Contentious administrative Jurisdiction. This procedure aims for an agile and privileged protection of fundamental rights when the violation comes from Public Administration.

The most important novelty is the treatment of the action –and, therefore, of the decision-. Law tries to beat the rigid distinction between ordinary legislation and Constitution, between ordinary legislation and fundamental right, understanding that protection of fundamental rights won't be possible, in many cases, if the legal development of the rights is not considered.

Furthermore, even faster procedures are stipulated to protect any fundamental rights, because the legislator considers that they need a privileged protection. This is the case of the right of assembly or demonstration, and any electoral rights.

The coverage of these procedures is total, granting a privileged protection in respect of the fundamental rights.

So, when the action of a public power violates fundamental rights of the citizens, there are no areas free of judicial review, because there are no restrictions to the judicial review of fundamental rights violations, no matter which public power has produced that violation. Not even the political or government nature of the act justifies the judicial immunity when the violation of a fundamental right has occurred.

When the violations of fundamental rights, specially those enshrined in section 14 (principle of equal protection of the law and prohibition of any discrimination), and in section 24 (actual legal guardianship or effective protection of the courts), are attributed to the Courts themselves, the single system to avoid or correct those violations are legally established remedies.

And this gives rise to important difficulties. Sometimes, because in many cases it is necessary to wait to the decision to correct those violations. In other cases, because there are no remedies available against the decision.

If such is the case, there is no other way but to apply for a declaration of fundamental rights (amparo action) to the Constitutional Court.

In this line, we can point out some legal vacuum or loopholes such as: undue delays, violations in the last or single instance (phase or the procedure) or nullity against firm decisions.

A) Violations originated by the Administration.

1º. Process for the jurisdictional protection of fundamental rights, foreseen in the Law 29/1998, July the 13th, of Contentious Administrative Jurisdiction.

The procedure of judicial protection of rights and freedoms is ruled, in the contentious-administrative order, by the dispositions foreseen in the special procedure of the Law 29/1998 of Contentious Administrative Jurisdiction. In those questions not specifically foreseen in that special regulation, the generic provisions of the same law will be applied.

The pretension or claims that can be the object of this process, if they have as purpose to reestablish, restore or protect the rights or freedoms that have been the reason of the action, are:

- To be provided with a judicial declaration that the administrative action is not adjusted to the law and, eventually, its annulment or reverse.
- To acknowledge an individual juridic situation and to enact proper measures for the full reestablishment of that situation, among them the compensation for damages, where appropriated.
- In the cases against the inactivity of Public Administration, to condemn the Administration to observe its duties or obligations in the concrete terms in which are legally established.
- If the remedy has as object a *fait accompli* by the Administration, the plaintiff can claim that the judge declares that the administrative omission is not adjusted to law. He can claim also the stopping of the action or omission and the adoption of the necessary measures to get the full reestablishment of the right and, where appropriated, the damages.

To all intents, these proceedings will have a preferent nature.

The term or period to submit this action will be of ten days, beginning the next day to the summons of the act, or the publication of the disposition, the demand to stop the *fait accompli*, or the passing of the term fixed.

In the writing of claim it will be expressed clearly and with precision and accuracy the right or rights for which protection is demanded and, in a concise way, the arguments that support the claim.

Once the claim is submitted, the Court will ask the Administration to send the administrative record, with all the reports considered pertinent.

At the same time the Administration will let the procedure be known to everybody who might be interested in it, inviting them to appear in Court as defendant.

2°. Right of meeting and demonstration.

The law establishes a special procedure in the contentious-administrative order to impugn or oppose the prohibitions of the meetings or demonstrations or the proposal of alteration of the foreseen route.

It is a really brief procedure, even in relation to the special procedure foreseen for the fundamental rights protection: it is predominantly oral because, apart from the initial written statement, that must be submitted in the next forty eight hours to the summons of the prohibition or alteration, the procedure is concentrated in a single hearing, a public and oral one, where the parties' allegation and the proposal and practice of the evidences take place. After the hearing, the Court passes its decision, and there is no remedy.

It is a procedure with a maximum length because if the focus is to decide if the prohibition or alteration of the meeting or demonstration scheduled for a certain and concrete day and hour is or is not against the law, the judicial decision must be passed or taken before that day, or it will be absolutely useless.

3°. Electoral matter.

In the electoral legal regime, provisions are taken to make sure that some particular decisions in the electoral administrative procedure can be obtained in a reasonably short period of time.

This special contentious-electoral process is established against these decisions:

- Candidacies and candidates proclamation.
- Elected candidates proclamation
- Election and proclamation of mayors.

In these cases it is supposed that the rights protected in these cases are those to free participation and access to public elective charges of political nature. These are urgent remedies, and have as well absolute preference in its handling.

Besides, and for any other decision in the electoral procedure that can violate fundamental right, the ordinary procedure before seen is allways available.

B) Violations origined by Courts.

Judicial Organs may violate fundamental rights of citizens, specially, rights acknowledges the Spanish Constitution. The most frequently alleged violations are those of the actual legal guardianship or effective protection of the courts right. In these cases, there is not a preferent and summary procedure. The sollution for these possible violations are the remedies legally stipulated and, if there isn't any, the application for a declaration of fundamental rights (amparo action) before the Constitucional Court.

GUARANTEES IN THE LABORAL JURISDICTIONAL ORDER

Until 1990 there was a significant loophole in the protection of fundamental rights in the labour sphere. In 1990, a procedure specifically for the protection of fundamental rights in this sphere was created.

Before that legal reform, the jurisprudence had recognized to the labour jurisdiction the competence to try claims related to a violation of a fundamental right in the labour sphere. At first, the labour procedure was considered as a substitute to the contentious-administrative procedure to try the violation before applying to the Constitucional Court. Then, at a later stage, the labour procedure was considered as the natural way for it. Finally, as the single way of access to ask the judicial review of the fundamental rights in the labour sphere.

Later, jurisprudence began to incorporate into the labour procedure the guarantees foreseen for the civil, criminal and contentious administrative procedure. So, it was possible to make compatible the ordinary labour procedure rules with the principles and specialities of a controversy on violation of fundamental rights.

The question was complicated in 1985, when the Organic Law of Trade-Union Freedom came into force. This law stipulated that any worker or Union that considered their right of trade-union freedom violated could apply for its protection through the special proceedings foreseen in the 1978 Law for jurisdictional protection of fundamental rights of the person which were the first one stipulated for the civil order, the criminal order and the contentious-administrative order, before they were all replaced as it has been said before, by new procedures).

At that moment, the problem was which of those special proceedings (civil, criminal or contentious administrative) should be chosen. Besides, that regulation in the Organic Law of Trade-Union Freedom rose another problem: wether only the Trade-Union Freedom or any freedom had this jurisdictional protection before the Labour Jurisdictional Order.

The question was solved with the 1990 Law of Labour Proceedings, as it has been said before. Now, the special protection is opened to all kind of violations of any fundamental rights.

The main characteristics of this kind of process, as the others, are similar to those stipulated for other jurisdictions:

1. Absolute preference in the handling of these procedures by the Labour Courts.
2. The proceedings are very brief and quick.

There are, besides, certain specialities:

1. The public prosecutor is always party in this kind of proceedings.
2. There is an opportunity to suspend or adjourn the effects of the act which is object of the proceeding.
3. The decision may include a compensation for damages.
4. The decision is reliable to provisional enforcement.