CONFLICT BETWEEN TRIBUNAL CONSTITUCIONAL AND TRIBUNAL SUPREMO – A NATIONAL EXPERIENCE

by

Pedro Cruz Villalón*

After more than a quarter of a century since the 1978 Constitution came into force, the respective place of each of the Spanish top courts, far from being generally accepted, has turned into a far reaching institutional conflict. In February 2004 the then three living former presidents of the Tribunal Constitucional (TC) issued an unprecedented public declaration, under the headline "A constitutional crisis" [1], following an equally unprecedented ruling of the Tribunal Supremo (TS) condemning the judges of the TC to a fine of 500 euros each, as liable of a supposedly grossly erroneous resolution in declaring *prima facie* inadmissible an individual complaint (*amparo*) [2]. The incident is, for the time being, the peak of an old and ever-growing conflict opposing the TS to the TC. In line with the aforesaid declaration, the Spanish Government is at the moment engaged in a legal reform that should do all TC rulings immune to any other national jurisdiction. But nothing can assure that the reform is going to pass in these terms. It could even be brought by the parliamentary minority before the TC itself[3].

* Universidad Autónoma de Madrid

1 M. Rodríguez-Piñero, A. Rodríguez Bereijo, Pedro Cruz Villalón, "Una crisis constitucional", *El País*,26.2.2004

2 First (Civil) Chamber of the TS, 23rd January 2004. For their part, the judges of the TC have challenged the decision of the TS by means of an *amparo* before the TC itself. After the renewal of a third of the TC in 2004 the TC has theoretically a sufficient number of new judges to impartially decide on the case. See for the details of the case, Leslie Turano, "Spain: *Quis Custodiet Ipsos Custodes*?: The struggle for jurisdiction between the *Tribunal Constitucional* and the *Tribunal Supremo*" International Journal of Constitutional Law, vol. 4, No 1 (Jan 2006), 151-162. On the longlasting conflict see also, Ignacio Díez-Picazo Giménez, Conflictos de competencia entre el Tribunal Constitucional y el Tribunal Supremo". El recurso de casación. Barcelona, 1994, 147-166. Enrique Bacigalupo Zapater, "El conflicto entre el Tribunal Constitucional y el Tribunal Supremo". *Actualidad Pena*l, 38 (2002), 1001-1021. Fernando Garrido Falla, "Tribunal Constitucional y Tribunal Supremo o un entendimiento necesario". *Anales de la Real Academia de Jurisprudencia y Legislación*, 32 (2002), 13-27.

3 *Boletín Oficial de las Cortes Generales*, Congreso de los Diputados, Num. A-60-1 de 25.11.2005 (http://www.congreso.es). Eduardo Espín Templado, Germán Fernández Farreres, Pedro Cruz Villalón. "La reforma de la justicia constitucional". Prólogo de Juan Fernando López Aguilar. Madrid, 2006.

Under the heading "Conflict between TC and TS" I'll expose the dimension, the roots and the feature of this "national experience" or rather national ordeal. It is to be questioned whether others may learn from this dire lesson. If it is so, I should certainly be compensated from the in itself not very rewarding task of publicly exposing one of our most conspicuous constitutional frailties.

As short as possible I'll describe the Spanish constitutional framework concerning the structure and competences of both top national Courts (A), following which I'll identify, in this conflictive context, the different *weapons* at the disposal of either side (B) as well as the *battlefield* marked by some particularly "hot" rights and freedoms (C). The experience is too near for drawing any lesson, but I'll try to end with a final consideration (D).

A. The constitutional framework: The rule and the exception.

The Spanish Constitution, such as in other Union state members, provides for a double-headed judicial structure, a two peak summit, of the judicial branch: the Constitutional Court and the Supreme Court. At a closer sight nevertheless, it is to be distinguished between the Judicial Power as such with the TS at its summit and the TC as a single, separated Court. The structure of the Constitution highlights this dual system

The Judicial Power *stricto sensu*, is regulated by Section VI of the Constitution, after the Crown, the Parliament and the Executive, while the TC receives a whole Section at the end of the Constitution (Section IX) followed by the Amending Power, to whom Section Xth is dedicated. This marked topical separation of both courts, and the simultaneous approaching of the Amending Power and the Constitutional Court is a traditional Spanish feature. The last Section of the short-lived republican Constitution of 1931 ("Safeguards and Reform of the Constitution") was devoted to the jurisdictional guarantee of the Constitution (*Tribunal de Garantías Constitucionales*) and the Amending Power**.** Nowadays the TC is not considered a part of the Judicial Power, but it is vaguely one of the safeguards of the Constitution. As a tribute to this language, article 123 C.E. declares the TS superior in all orders except in what "constitutional safeguards" (*garantías constitucionales*) means. So it is implied, firstly, that in these not further defined "constitutional matters" the TS is not superior, and secondly, that the TC is superior in these matters.

The TS has been existing more or less in its present form well since the middle of the 19th century. It is an institutional survivor to all political changes and divides that Spain has come through in the last century and a half: constitutional Monarchies of various shades, more or less ephemeral Republics, shorter and long-lasting Dictatorships until the present crowned Democracy. Even the intense decentralisation of the State since 1978 has not affected to its main structure.

Today a body of almost hundred judges, assigned to one of its five wholly separated Chambers, it is the paramount court in each and all jurisdictional branches: civil, criminal, administrative, social and military. They are career judges for the most part, with certain, although diminishing, amount of old family ties, which look at the TS as the culmination of their professional career.

In this otherwise much undisturbed state of things, the 1978 Constitution has nevertheless inserted two thorns: The TC and the General Council of the Judiciary (*Consejo General del Poder Judicial*). Both constitutional novelties have contributed, each in its own way, to the devaluation, as it is felt, of the until then undisputed position of the TS. But the degree of the irritation caused by these two new constitutional organs is not to be compared.

In a short period of time the TC earned a prestige as the guardian par excellence of the new constitutional order. It is a single, unique, twelve members court, erected in 1980, shortly after the Constitution came into force. In sharp contrast with the life tenure of the judges of the TS, they are chosen among any categories of lawyers, almost all of them either law professors or professional judges, by the different political powers, two thirds of them by both Houses of Parliament by a three fifths majority. Its members serve for a single nine years period, with a partial renewal of them every three years. These three years periods coincide with the renewal of the President and the Vicepresident, both elected among and by the Judges themselves.

Further to Section Nine of the Constitution (articles 159 to 165), the Court is regulated by the 1979 Organic Law of the Constitutional Court, several times since then amended, although not in a substantial form. This act entrusts it a normative power (*potestad reglamentaria*) for its own internal organisation and functioning. It has resulted in an Order for the organisation and personnel, periodically amended.

The competences of the TC are mainly declared in the Constitution itself, while at the same time allowing for a growth of them through an organic law. Apart from other minor competences, and as the rule in the Continent now is, the TC is the sole court empowered to declare void or invalid while unconstitutional an Act of Parliament, be it the national one (*Cortes Generales*) or the ones of the Regions (*Comunidades Autónomas*). Judicial review by the TC happens through the frequent double procedure of the abstract and the concrete review, as they have come to be known in Europe. The court is furthermore called to decide the conflicts opposing the State and the Autonomous Communities. But the most conspicuous competence of the Court is the individual constitutional complaint, well known also by its Spanish name, the “amparo”. This remedy, as we shall immedately see, lies at the very heart of the conflict opposing the TS with the TC.

B. Equality of arms? The rule and the exception.

The development of the Spanish jurisdictional conflict may be described by means of the "weapons" at the disposal of each party. On the one hand, the TC is the paramount body in declaring a breach of the Constitution by any branch of the State. A naïve reading of article 123 CE would give the false impression that the supremacy of the TS is the rule and that of the TC is the exception. This may be quantitatively the case. But in quality terms it is utterly false. The Spanish Constitution, as the case so frequently is, is pervading all fields of the national legal system (*constitutionalisation* of the national legal order).

The main "weapon" at the disposal of the TC is surely the *amparo*. It places the TC in a position to review every single judicial ruling all over the country, from the lowest to the highest, providing it is final. Through the *amparo*, the TC has an overview of the whole functioning of the Spanish judicial system, which the TS itself by far does not possess.

The "weapons" of the TS *vis à vis* the TC are of a quite different nature. As a matter of fact they are characteristically pathological. Firstly, the TS (more precisely, its penal, also known as "second" chamber), as highest criminal court, is the sole court where Judges of the TC may be brought to trial, but then they may be accused like any other citizen. It is to be noted in this context that in Spain there is no public monopoly of the power to accuse (*actio popularis*), and that applies also to the judges of the TC.

Secondly, the TS (more precisely, its civil, also known as "first" chamber), as highest civil court, may also judge the conduct of the members of the TC in civil matters. In Spain every judge may theoretically be brought to trial through a civil action for a wrongly decided case (*responsabilidad civil*). It is to be doubted whether the judges of the TC are subject to this civil responsibility concerning the exercise of its functions; the organic law of the TC does not expressly exclude it.

Finally, the TS (or rather its administrative or "third" chamber), as highest administrative court, may also judge all actions of the court as an administrative body, in matters such as the regime of different sorts of public officials working for the Court. Likewise the exercise of the normative power of the TC is controlled by this third chamber of the TS (*potestad reglamentaria*).

In general terms it is clear that as a judicial body the Constitution has placed the TC in a higher, while final, position compared to that of the TS. Through the *amparo*, any ruling of the TS may be declared by the TC in breach of a fundamental right and consequently annulled. It is a system where the superiority of the TC is only limited by prudence and at any rate by self-restraint but, on the other side, the TS may *retaliate* by judging the actions of the TC or its members through its jurisdiction in the above mentioned penal, civil and administrative matters. The final result may be seen as a complex of checks and balances albeit a pathological one.

C. The battlefield: Some "hot" rights.

The Spanish experience, and possibly not the only one, shows that the most controvert part of the constitutional jurisdiction is the one concerned with the rights and freedoms. The TS has willingly accepted that the territorial conflicts opposing the State and the *Comunidades Autónomas*, as a new and unfamiliar phenomenon, could well be decided by a new body; even the judicial review of laws by the TC has been on the whole readily accepted by the TS. These are accepted as truly "constitutional safeguards". The trouble begins with the rights and freedoms, the national bill of rights, particularly as guaranteed by the *amparo*. And specially when the addressee is the Judiciary.

In this respect not all rights and freedoms have proved equally sensible. A short number of "hot" rights appear as the recurrent battlefield in the course of the conflict. I'll give but three examples. The generic right of access to a judicial decision and to a fair trial (*tutela judicial efectiva*, art. 24 CE) has given the TC the potential control over every element of the judicial activity. The TC has tried to draw a principled line between the province of the TC (*constitucionalidad*) and that of the Judicial Power (*legalidad*). But this realm of the *legalidad*, either in principle or in its application, hasn't been felt as a safe haven for the Judiciary and singularly for the TS. The presumption of innocence as the right not to be found guilty without a valid evidence has led the TC to ascertain case by case when such a valid proof exists in terms considered by the Judiciary invasive of the criminal jurisdiction.

The equality clause (art. 14 CE) as applied to judicial decisions has led the TC to decide whether similar cases have been decided similarly. From this to a control over the changes introduced by the Judiciary in interpreting the law there is but one step.

My third example is a combination of two rights: privacy and the freedom of speech. Through the amparo the TC has been led to watch over the correct balancing of both rights by the Judicial Power. The TC has frequently censured the balance made by the TS, such confirming the decision of inferior courts.

D. Conclusive consideration.

The decision of the first Chamber of the TS of January 2004 has had the merit of highlighting a permanent conflict opposing both top courts of the Spanish judicial system. But it is more than a mere anecdote. The transition from the legal to the constitutional *Rechtsstaat* asks for a smooth renewal of the Judiciary which, when combined with a political overhaul in countries like Spain, have proved particularly complicated. There is not a single receipt in handling this problem. But quite often, and certainly in the case of the Spanish political transition, too much confidence has

been put in the blessings of a single Constitutional Court set side by side an Administration of Justice largely inherited from an authoritarian regime while at the same time upgraded to "Judicial Power".

At the end, in tackling the issue, a functional approach should recommend neat boundaries separating the jurisdictions of the respective top courts of justice. Now the competence on territorial conflicts or even the judicial review of laws may be clearly marked. But in the case of a constitutional jurisdiction in the form of the individual complaints or *amparo* the task amounts to a feat. The conundrum is that an organic approach should ask for a similar recruitment of the personnel of both top Courts in order to avoid unnecessary mutual estrangements: But then, if they are similar, why have two top Courts? The Spanish case would plead for an evolving approach, both in functional and organic terms.