THE SPANISH CIVIL *CASACIÓN*: PERSPECTIVES FOR REFORM[*]

(ABRIDGED VERSION)

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I. THE TWO SYSTEMS OF *CASACIÓN*

The main characteristic of the Spanish *casación* resides in the coexistence of two different systems for this extraordinary proceeding: a temporary though valid one, and a second one which seeks to become permanently established.

The reason for this coexistence of procedural systems has to do with parliamentary arithmetic. In the year 1999, the draft of *Ley de Enjuiciamiento Civil* (*LEC*, Spanish Civil Proceedings Act) which the Government submitted before Parliament, envisioned a double *casación* proceeding based on two classic motives of violation of substantive and procedural law, albeit assigning them to two different courts: the first one, entitled "extraordinary proceeding for procedural violation", would be heard at the *Tribunales Superiores de Justicia* (*TSJ*, Higher Courts of Justice in the Spanish autonomous communities), while the second, entitled "*casación* proceeding", would remain in the *Tribunal Supremo* (*TS*, Spanish Supreme Court).

However, inasmuch as the passing of this prelegislative text required, in turn, modification of the Constitutional Law precepts – for the passing of which our Constitution demands an absolute majority of the Spanish House of Representatives – on the Judiciary which set forth the respective powers of said courts (specifically, those of arts. 56.1 and 73.1 of the Organic Law on the Judiciary, *LOPJ*), the PP parliamentary group, then in power, was not able to obtain said majority. "In extremis" the Senate passed an amendment which established referred temporary system (nowadays laid out in Additional Provision 16th of the *LEC*), according to which the two proceedings are consolidated, that of an extraordinary proceeding for procedural violation being one and that of substantive *casación* being the other, to attribute the competence of both to the *TS*, as, in any event, has been occurring from the early days of the Spanish review proceedings.

II. THE PROJECTED SYSTEM FOR SPANISH *CASACIÓN*

In the face of the coexistence of both procedural systems, the first question that should be asked is whether our Legislative Branch ought to cancel the "temporary" reform and institute the "definitive" one, which would grant *TSJ* the competence to hear reviews for violations of procedural rules.

In our opinion, the answer to the stated question must perforce be negative, if we take note that the planned reform raises serious doubts of unconstitutionality.

The first of these comes up if we examine said definitive system, on the one hand, in the light of the nature of the Spanish Government of Autonomous Regions,

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which, although decentralised, is "unitary" and, on the other hand, in the constitutional distribution of legislative and jurisdictional competences. Indeed, in enacting procedural statute law in Spain (differently from some federal States) as the exclusive jurisdiction of the central State and in erecting the *TS* as the "highest" jurisdictional body of all areas of law, it is clear that said tribunal is to continue having the last word also in the application of procedural law, without the legislator being lawfully able to remove that competence.

In the second place, if *TSJ* were to hear this extraordinary proceeding for procedural violations, seventeen legal doctrines would arise (corresponding to the seventeen *TSJ*, existing in Spain) which, in the manner of concentric circles, would coexist with the ever more dwindling legal doctrine of the *TS*, which would cause, in practice, a violation of the constitutional principle of equality in the application of procedural law throughout the country.

Finally, were the "definitive" amendment to be passed, it would also violate the right of access to justice, in its manifestation of access to proceedings, and in particular in the event that, as a result of incurring the judgment in procedural and substantive defects, the appellant sought to appeal on both grounds, in which case, as the *TS* would not be able to act "as a court of fourth instance", the decisions of *TSJ* fall in "its" procedural *casación*, art. 466 *LEC* compells any party to waive the filing of one of the two types of proceeding, whether it be that of a violation of a substantive rule, or that of a procedural one, which in any event appears totally absurd.

For all these reasons, and because Parliament is absolutely sovereign, without being able to be self-linked "pro futuro", we think the best solution for our *casación* proceedings consists in allowing it to stand as it is: that the temporary system become a definitive system, and that the *TS* continue to hear both grounds for review, both for a violation of substantive law and for procedural violations.

III. THE *CASACIÓN* SYSTEM CURRENTLY IN EFFECT

Within our temporary system, which has been in effect for more than eight years, it is important to differentiate between appealable orders, requirements of procedure, reasons for challenge, and the review procedure.

1. Appealable orders

Under said Final Provision 16th.1.2 with regard to art. 477.2, at the present time only "judgments delivered in the second instance by *AP*" are subject to review, a rule which prohibits access to *casación* proceedings to more than a few orders and relevant issues.

For that reason, the criteria sustained by the draft bill of 27th January 2006, commonly known as "reform of *casación* proceedings and generalisation of the double penal instance" should be supported, and the scope of application of this proceeding should also be broadened to include final interlocutory orders for violations of procedural rules, all judgments of A*udiencias Provinciales* (*AP*, Spanish Provincial Courts) making the matter *res judicata* and those delivered by *TSJ* in issues of the civil responsibility of judges.

Consequently, even the challenge of judgments delivered in the matter of "exequatur" (which, at present, are heard without any possibility of appeal, by judges of first instance) may also be granted, and, in the immediate future, that is when the *casación* proceedings reach the desired speed, judgments from the *AP*, delivered in the

proceedings of annulment of arbitral awards should also be subject to *casación*, in the well understood event that all these court decisions must comply with specific requirements for *casación*, which we will address hereinafter.

2. Requirements of procedure

In the matter of requirements of procedure for *casación* proceedings, the first thing that has to be pointed out is that the *LEC* 1/2000 established an adequate combination between the "amount of gravamen" (coded at 150,000 euros) necessary to avoid the overload of the Spanish *TS* and the "interest regarding *casación*" of cases that do not reach the expressed amount. For the petition of substantive *casación* to succeed, both requirements must be met, provided that the Sentence challenged falls under any of these three situations: a) it violates the doctrine by the *TS*; b) there is no such doctrine because of the newness of the Law applied, or c) it has violated the constitutional principle of equality in the application of the law, as there is contradictory case law from the *AP*s.

Said balance, however, lasted a very short time, as after the delivery of the decision of the General Meeting of Division One of the *TS*, of 12th December 2000, which improperly assumed regulatory functions, there was and there continues to be a drastic restriction as to the matters which are excluded from *casación*. And let it be enough to remember here that, among others, all judgments delivered in Spanish "verbal hearings" have no right to *casación* (even if they amply exceed the said amount of 150,000 euros), and that there is no right to procedural *casación* for all judgments issued in special and summary proceedings.

On these grounds, the criteria sustained by the present *LEC* should be taken as the doctrine and so the amount of gravamen should be combined with the interest regarding *casación*, also in cases where the challenged judgment violates the doctrine of the *Tribunal Constitucional* (*TC*, Spanish Constitutional Court).

3. Reasons for challenge

As to grounds for *casación*, the current appeal for violation of constitutional rule stated in art. 5.4 *LOPJ* should be overruled (for the uncertainty thereby generated) , and afterwards an additional ground for *casación* should be added, namely, violation of the right of access to justice regarding fundamental rights, whether of a procedural or substantive nature, and whether this has been incurred in by the parties or by the civil courts themselves.

Similarly, and as an integration of the ground for *casación* under violation of the requirements for judgments, art. 209 *LEC* would have to be modified in the sense of introducing, as an external requirement of the judgment, the declaration of established facts and the reasoning of the evidence, which would then diminish the need to use, by the *TS*, the doctrine of the "integration of the factum", which tends to turn this *casación* court into a body of original jurisdiction.

Finally, the general ground for the procedural *casación* under art. 469.1.3 *LEC* ("violation of the legal rules governing the acts and guarantees of the procedure when the violation determines the nullity") should be substituted by an exhaustive list of possible violations of procedural requirements which cause substantive unfairness, which would provide the appellant with certainty, at the same time as contributing to avoid frivolous proceedings.

4. The procedure

On the issue of procedure, the aforementioned Bill of 2006 for reform of *casación* proceedings seeks to obtain greater procedural economy, avoid the overload of the *TS* and obtain a better quality in their decisions.

A) Application of the principle of economy may be seen already in the phase of pleadings. Thus, even when the statute reform of 2000, in transferring to the court "a quo" not only the presentation of the notice of *casación* appeal, but also of the filing or instigation of the proceedings itself may have caused a certain economy which we could categorise as "bureaucratic" (as it has eliminated paperwork in the *TS*), it must perforce be acknowledged that it always compels the respondent to challenge a *casación* proceeding that might very well be framed within the annual media of 90 % of the dismissed cases by the *TS*, at the same time as compelling the performance of a double evaluation (by the *AP* and by the *TS*) of the concurrency of the requirements for success of the review petition.

For this reason, it appears to me that the solution proposed by the Bill of 2006 is more economical, consisting in returning to our tradition and separating the authority over the notice of review, from the authority over the filing, conferring the first to the *AP* and the second to the *TS*.

The principle of procedural economy also seeks to maintain a prescription similar to that contained in No. 5 of the Final Provision 16th of the *LEC* (which is neglected by the Bill), according to which, both proceedings being filed, for procedural violation and substantive *casación*, if application of substantive law carried out by the judgment of original jurisdiction is correct, the petition for review for procedural violation should be rejected.

But the same principle of economy also counsels that the pre-trial nature of the procedural *casación* proceedings be eliminated, just as is set forth in No. 5 of the same Final Provision of the *LEC*, under which the *TS* may only hear a petition of review on the ground of violation of substantive rule if that of procedural violation is denied, which always compels it to resubmit the actions to the body "a quo".

B) With procedural economy, the 2006 Bill attempts to palliate, as has been stated, the excess of *casación* proceedings filed before the *TS*, which have already reached, in the year 2005, a stack of 12,000 proceedings pending resolution, even if, under date of 31 December 2007, it has dropped to 5,197 pending matters, all of them having been filed prior to the effective date of *LEC* 1/2000, as the first indications of these proceedings, filed under the current *LEC*, have been finalised for the coming month of June. In other words, the Civil Division of the *TS* has, in the resolution of its *casación* proceedings, a delay of greater than eight years, without up to the present time having been able to issue the necessary legal doctrine on the not so "new" *LEC*.

The existence of such delays, caused by the excess work of the *TS*, has compelled Parliament, in the line advocated by the 2006 Bill, not only to maintain the unpopular amount of gravamen, but also to introduce two new grounds of denial for substantive reasons: the "lack of interest regarding *casación* or lack of merits".

However, the institution of substantive causes for inadmissibility, which would allow a rejection "*a limine*" of frivolous proceedings, contributing to the collapse of the *TS*, cannot justify the transfer to the phase of admission of the civil *casación* of "*cerciorari*" solutions. That would be the case of art. 50.1.c of the Organic Law of the *TC*, as modified by Organic Law 6/2007. In fact, the index of denied petitions lies, as stated, at 90% per year, and, thus, of the number of 3,000 proceedings filed as average

per year (a number quite far from that of the *TC* which heard more than 10,000 proceedings per year), only about 200 are admitted per year. On this background, it does not appear that we can objectively legitimatise a solution so harmful to the "*ius litigatoris*".

C) Finally, the reinforcement of the quality of the case law of the *TS* is sought in the 2006 Bill, not only strengthening the powers of admission (which allows focusing the work effort of judges in the elaboration of good judgments), but also by means of the elimination, on the one hand, of the possibility, contained in art. 475.2 *LEC*, of discovery of evidence in the *casación* proceeding for procedural violations, and, on the other hand, allowing the entrance to the proceeding, during the admission phase, to the Attorney General, in its capacity as "*amicus Curiae*", so that the Chambers may be informed as to the "interest regarding *casación*" of the proceeding, prescription which should also, in our opinion, be extended to the trial hearing and even previous to decisions, provided the public interest is involved, or that of destitute persons, being optional, whenever the Chambers deemed it appropriate, in all other cases.

IV. CONCLUSION

Once the essential characteristics of the proposed reform of the civil Spanish *casación* have been set forth, the general valuation appears to be highly positive.

It is true, and this is not hidden from us, that the maintenance by the 2006 Bill, of the amount of gravamen and the incorporation to this requirement of the need of interest regarding *casación* will produce no few "*ad limine*" rejections, and with these, there will be a great detriment to the "*ius litigatoris*".

But neither can we disregard that the excess of work for the Civil Division of the *TS* justifies objectively enacting such measures, the practice of which will make it possible to comply, in the civil *casación*, both with the forgotten fundamental right "to a speedy process" (art. 24.2 C.E.), as well as to the issuance by the *TS* of its beloved legal doctrine, substantive and procedural, which is to provide all sectors of the legal system with the necessary "legal certainty" (art. 9 C.E.) at the same time as guaranteeing the observance of the also relegated fundamental right of citizens to equality in the application of the law throughout the country (art. 14 C.E.).