

Jurisprudential Analysis of Torture in Spain and in the European Human Rights System

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Abstract—Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (E.C.H.R.) proclaims that no one may be subjected to torture, punishment or degrading treatment. The legislative correlate in Spain is embodied in Article 15 of the Spanish Constitution, and there must be an overlapping interpretation of both precepts on the ideal plane. While it is true that there are not many cases in which the European Court of Human Rights (E.C.t.H.R. (The Strasbourg Court)) has sanctioned Spain for its failure to investigate complaints of torture, it must be emphasized that the tendency to violate Article 3 of the Convention appears to be on the rise, being necessary to know possible factors that may be affecting it. This paper addresses the analysis of sentences that directly or indirectly reveal the violation of Article 3 of the European Convention. To carry out the analysis, sentences of the Strasbourg Court have been consulted from 2012 to 2016, being able to address any previous sentences to this period if it provided justified information necessary for the study. After the review it becomes clear that there are two key groups of subjects that request a response to the Strasbourg Court on the understanding that they have been tortured or degradingly treated. These are: immigrants and terrorists. Both phenomena, immigration and terrorism, respond to patterns that have mutated in recent years, and it is important for this study to know if national regulations begin to be dysfunctional.

Keywords—European convention for the protection of human rights and fundamental freedoms, European Court of Human Rights, sentences, Spanish Constitution, torture.

I. INTRODUCTION

THERE are institutional reports published in order to shed light on torture and inhuman or degrading treatment. In fact, there are International Committees against torture, one of them being the European Committee for the Prevention of Torture and Punishment or Treatment Inhuman or Degrading (C.P.T.) that through visits will examine the treatment given to persons deprived of liberty [1].

Torture may occur during the execution phase of the sentence or in the previous criminal process. In this study we will refer to complaints filed on the occasion of the process not at the time of incarceration.

In this research sentences of the Strasbourg Court, in which Spain was the defendant, from 2012 to 2016, have been consulted, being able to address any previous sentences to this period if it provided justified information necessary for the study [2]. This proposal addresses an approach to the national and international normative and statistical scope, as well as the revision of judgments that pronounce on the possible violation

of art. 3 of the E.C.H.R.

II. NORMATIVE FIELD

There are several international texts in which articles related to torture are incorporated, making it clear that their regulation transcends borders [3]. Both Article 5 of the Universal Declaration of Human Rights (1948) and Article 7 of the International Covenant on Civil and Political Rights (1966) states that "No one shall be subjected to torture or to cruel, inhuman or degrading"

Similarly, in Europe, Article 3 of the European Convention for the Protection of Human Rights (E.C.H.R.) (1950) [4] and Article 4 of the Charter of Fundamental Rights of the European Union (2007) prohibit torture and degrading treatment. On the other hand, Article XXVI of the American Declaration of the Rights and Duties of Man (1948) presumes that all accused are innocent, until proven guilty and that every person accused of a crime has the right to be heard in impartial and public way, to be judged by courts previously established in accordance with pre-existing laws and not to be imposed cruel, infamous or unusual punishments. Also, in the American Convention on Human Rights (1969), Article 5.2, the right to personal integrity is retained, both physically and mentally and morally, implying that every person deprived of liberty will be treated with the respect due to the inherent dignity to the human being. Similarly, article 5 of the African Charter on Human and Peoples' Rights (1981) prohibits torture and other forms of exploitation and degradation of man, recognizing his legal status.

As for Spanish legislation, it should be noted that the Constitution provides in Article 15 that "Everyone has the right to life and physical and moral integrity, without under any circumstances, may be subjected to torture or inhuman punishment or treatment or degrading The death penalty is abolished, except as may be provided by military criminal laws for times of war"

Other Spanish norms in the fight against torture, in addition to the Criminal Code [5], are the Instruction 12/2007 of the Secretary of State and Security on the behaviors required of the members of the State Security Forces to guarantee the rights of persons detained or in police custody and Instruction 12/2009, of the Secretary of State for Security, which regulates the Book of registration and custody of detainees.

In Fig. 1, we can observe the scheme of the regulations and how they would be interrelated as a transmission belt. It can be seen that Spanish regulations are linked to the European system, but this is not exempt from the influence of other international systems such as the Universal, the American and

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the African. Court of Strasbourg is one of the supervisory bodies of the European system [6].



Fig. 1 Regulatory systems in the international and national scope and some control organisms (source: own elaboration [7])

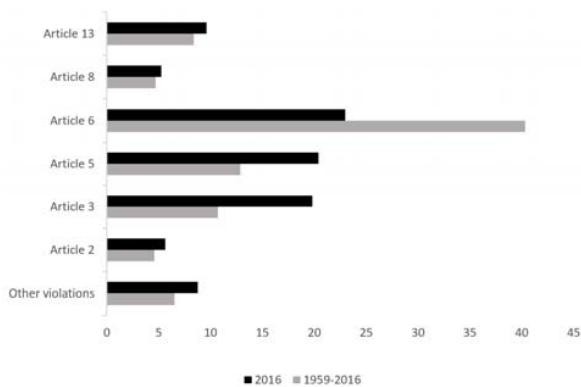


Fig. 2 Articles of the ECHR subject to the study of ECtHR judgments (%) (1959-2016 and 2016) (source: own elaboration [9])

III. STATISTICAL INFORMATION

The European Court of Human Rights offers data incorporated in statistical reports that have been used in this work in order to know the international panorama in terms of torture. Since the Court of Strasbourg started in 1959 until 2016, there have been 712,600 applications and just over 19,500 trials have been held, with Italy and Turkey taking a fourth of these [8]. In 84% of the total number of trials held, E.C.t.H.R. found at least one violation of the Convention by the claimant state.

Fig. 2 shows the object of the study of the E.C.t.H.R. judgments during the aforementioned period and 2016, observing divergences between both milestones in all the revised provisions, although special emphasis will be placed on article 3 which is the one that occupies us in this study. It can be seen that in 2016, sentences on torture and inhuman or degrading treatment (19.82%) almost double those registered between 1959 and 2016 (10.71%). It was this fact that served as an endorsement for the realization of this work and was

championed as its justification.

The Spanish state from 1959 to 2016 was sued 151 times (0.7% of the total of registered claims), detecting some violation of the ECHR in 105 trials (69.5% of the total claims to Spain). Of all the assumptions of violation of an article, 10.4% (n = 11) corresponds to Article 3 of the European Convention, and within this 81.8% (n = 9) is linked to the lack of research efficiency. In 2016, the Spanish state was sued 16 times (1.6% of the total of registered claims that were 993), proportionally increasing the representation obtained in previous years, although only one assumption was included within the lack of an effective investigation.

IV. JURISPRUDENCE OF THE E.C.T.H.R.

In this section the judgments from 2012 to 2016 that respond to lawsuits against Spain were collected from the E.C.t.H.R., to know if there has been a violation of the E.C.H.R. [10].

Table I shows the jurisprudential sample object of study in this work. It can be seen that 14 sentences are grouped in two blocks in the analyzed fork. The first block refers to the possible violation of the prohibition of torture and ill treatment in Article 3 of the ECHR. On the other hand, the second block refers to the lack of investigation as a cause of the violation of Article 3 of the Convention. The sentences of both blocks issue decisions of different sign, inadmitting or filing in the first case and understanding infringement of the ECHR in the second.

We will now proceed to make a detailed reference of each of the issues reflected in Table I and what have been the resolutions of the ECHR:

1. M.B. against Spain: In this case, the asylum application is denied to a Cameroonian national, who was trying to enter Spain illegally through the Madrid-Barajas-Adolfo Suárez airport on March 7, 2015. On March 27, 2015, the plaintiff appealed to the E.C.t.H.R. invoking Articles 2 (Right to life) and 3 (Prohibition of torture or inhuman or degrading treatment) of the ECHR. The plaintiff complained about the risks it would face in the event of return to Cameroon. The E.C.t.H.R. declares inadmissible the complaints regarding articles 2 and 3 as premature.
2. I.A.B.G. against Spain: The plaintiff filed a claim against Spain before the E.C.t.H.R. as a result of being expelled to Colombia. Among others, it alleged a violation of articles 2 and 3 of the ECHR. However, once claims were made by Spain on the grounds of inadmissibility of the application, the plaintiff did not submit observations, and therefore the proceedings were shelved (Article 37.1 of the E.C.H.R.).
3. D.O.R. and S.E. against Spain: In this case, the two plaintiffs requested that articles 2, 3 and 4 of the E.C.H.R. be declared infringed. In the same way, as in the previous cases, prematurely, the E.C.t.H.R. decided to close the lawsuits.

TABLE I
SENTENCES IN SUBJECTS IN WHICH SPAIN HAS BEEN A DEFENDANT ARTICLE 3 E.C.T.H.R.(2012-2016)

| | Subject | Date |
|-------------------------------------------------------------------------------------------------------|--------------------------------------------------------------|-------------|
| Article 3. Prohibition of torture and ill- treatment (Inadmission or file) | 1. M.B. against Spain (15109/15) | 13/Dec/2016 |
| | 2. I.A.B.G. against Spain (45938/2011) | 29/Sep/2015 |
| | 3.D.O.R. y S.E. against Spain (45858/11 y 4982/12) | 29/Sep/2015 |
| | 4.N.D. y N.T. against Spain (8675/15 y 8697/15) | 07/Jul/2015 |
| | 5.O.G.S. y D.M.L. against Spain (62799/11 y 62808/11) | 20/Jan/2015 |
| | 6.Mohameh Raji y Otros against Spain (3537/13) | 16/Dec/2014 |
| | 7.S.L. against Spain 19958/11, 20357/11, 20362/11 y 20366/11 | 18/Dec/2012 |
| Lack of investigation (Violation of Article 3 of the E.C.H.R.) | 8.Beortegui Martínez against Spain (36286/14) | 31/May/2016 |
| | 9.ArratibelGarciaandia against Spain (58488/13) | 05/May/2015 |
| | 10.Etxebarria Caballero against Spain (74016/12) | 07/Oct/2014 |
| | 11.Ataún Rojo against Spain (3344/13) | 07/Oct/2014 |
| | 12.A.M.B. y otros against Spain (77842/12) | 28/Jun/2014 |
| | 13.Otamendi Eguiguren against Spain | 12/Dec/2012 |
| | 14.B.S. against Spain | 24/07/2012 |

Source: Own elaboration based on data from the Ministry of Justice (Jurisprudence E.C.t.H.R.) [11]

4. N.D. and N.T. against Spain: When trying to enter Spain and jump the border fences of Melilla, the plaintiffs were rejected and for this reason they filed their claim. As regards the violation of Article 3 of the E.C.H.R., the E.C.t.H.R. inadmits the application, continuing to seek evidence to decide on the violation of other Articles of the Convention.
5. O.G.S. and D.M.L. against Spain: As in previous cases, the application for a conviction for infringement is dismissed and proceedings are filed as the expulsion order against the plaintiffs was suspended pending a decision on the merits.
6. Mohameh Raji and Others against Spain: On the grounds of being granted an order to vacate the domicile, the plaintiffs asked the E.C.t.H.R. for a violation of, among others, article 3 of the Convention. Proceedings were filed because it was understood that the competent authorities took the appropriate measures to resolve the litigation in respect of Human Rights.
7. S.L. and 3 more c. Spain: The claimants, of Saharawi origin, request international protection before the E.C.t.H.R., complaining about the possible ill-treatment they could suffer if returned to Morocco. By not submitting response observations and not answering notifications sent by Spain, the claims were filed.
8. Beortegui Martínez against Spain: The plaintiff was arrested at his home on January 18, 2011, in the context of a judicial investigation into an alleged crime of belonging to the EKIN organization. The complainant considered that there was no effective investigation by the domestic courts regarding his complaint about the alleged ill-treatment to which he claimed to have been subjected when he was arrested preventively. He maintained that internal jurisdictions refuse to investigate the ill-treatment alleged by Basque detainees and that the authorities ignore the international recommendations on incommunicado pretrial detention and the effective search for evidence of ill-treatment. The E.C.t.H.R. considered that Article 3 of the Convention had been violated in its procedural aspect, not in its material aspect, by insufficient investigation of the allegations of ill-treatment made by the complainant. Spain was ordered to pay compensation for moral damages.
9. Arratibel Garciaandia against Spain: As in the previous case, the plaintiff was arrested at his home in the framework of an investigation into an alleged crime of belonging to the EKIN organization. After filing a complaint of ill-treatment during his incommunicado detention, and subsequently not being taken into account due to lack of evidence, Mr. Arratibel Garciaandi appealed to the Constitutional Court, and the appeal was denied. The E.C.t.H.R. considered that having questioned the agents in charge of its custody during incommunicado detention could have helped to clarify the facts and considered that Article 3 of the ECHR had been violated in its procedural aspect due to insufficient investigation.
10. Etxebarria Caballero against Spain: In this case the plaintiff alleged ill-treatment while he was in police custody incommunicado for allegedly belonging to the terrorist organization ETA. The E.C.t.H.R. ruled unanimously that there had been a breach of the procedural aspect of Article 3 ECHR, although in the material aspect, and due to the lack of evidence, it could not be concluded that the provision had been violated.
11. Ataún Rojo against Spain: As in the previous case and with an investigation resulting from similar events, the E.C.t.H.R. concluded that there had been a violation of Article 3 of the ECHR in its procedural aspect. The E.C.t.H.R. emphasizes the importance of adopting measures to increase the quality of forensic medical examinations of persons subject to incommunicado detention, referring to the Judgment in the Otamendi Eguiguren case c. Spain 1610/12.
12. A.M.B. and others against Spain: The complaint in this case comes from a Spanish claimant for an eviction decision. The E.C.t.H.R. inadmits the application as the internal remedies are not exhausted, as the plaintiff confirmed the filing of the amparo remedy before the

Constitutional Court and the Government noted that the procedure was not completed.

13. Otamendi Eguiguren against Spain: The complainant, a journalist by profession, was at the time of the facts, the editor of the Basque language newspaper Euskaldunon Egunkaria. On February 20, 2003, the plaintiff was arrested at his home by agents of the Civil Guard in the framework of a judicial investigation in relation to alleged crimes of belonging and collaboration with the terrorist organization ETA. After exhausting the domestic remedies and presenting their claim, the E.C.t.H.R. ruled that there had been a violation of Article 3 of the Convention in its procedural aspect.
14. B.S. against Spain: In this case, the applicant is a Nigerian woman detained while engaged in prostitution in an area close to Palma de Mallorca. The sentence has its origin in the denunciations presented by this woman for having received physical and verbal abuses on the part of some agents of the National Police. The E.C.t.H.R. considered that such abuses had not been effectively investigated by the national courts since the witnesses had not been cited or identified and, therefore, there had been a violation of Article 3 of the European Convention on Human Rights [12] (ECHR), both in its material and procedural aspect.

The Strasbourg Court also recalls the absolute nature of this right, which is not justified because such measures were developed in the context of operations to combat trafficking networks of immigrant women [13].

V.CONCLUSION

The national and international normative system on torture is structured in interconnections of similar models that intend to complement each other or, at least, advance in the same direction.

The E.C.T.H.R. is a control body of the European system and it is relevant to know and assess its decisions as they mark trends that influence very different areas. Furthermore, through its statistical reports, it is possible to access a measurement of the existing demands at European level regarding protection with regard to the ECHR. We have been interested in this study in article 3 of said agreement and we have proceeded to the collection and study of judgments.

After the judicial judgments review, it becomes clear that, in Spain, there are two key groups of subjects that request a response to the E.C.t.H.R. on the understanding that they have been tortured or degradingly treated. These are: immigrants and terrorists. For the former, the general trend of the E.C.t.H.R. is the dismissal of case. For the latter, the tendency is to consider that there has been a violation of the Convention, but generally they link their resolution to the "Lack of investigation", considering that Article 3 of the Convention has been violated in its procedural aspect, not in its material aspect. Therefore, we have to focus our attention on the insufficient investigation of the allegations of ill-treatment to understand the weaknesses to improve in our regulations and be able to carry out the recommendations so that the Spanish authorities are not imputed by the E.C.t.H.R.

of depth in their investigations.

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