Value assigned by the Supreme Court to CRPD reports outweighs that afforded to ECHR judgments

The Spanish Supreme Court, in a recent and questionable judgment, assigns binding value to the reports of the Committee on the Rights of Persons with Disabilities ('CRPD') in claims for pecuniary liability and to correct final and conclusive judgments of national courts.

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1. The Supreme Court, in a surprising judgment of 29 November 2023 (appeal no. 85/2023, reporting justice: Antonio Jesús Fonseca), has upheld the cassation appeal lodged by the parents of a disabled person against the *Audiencia Nacional* judgment of 17 November 2022 (appeal no. 2/2022 in accordance with special proceedings to protect fundamental rights, reporting judge: Ana María Sangüesa) that upheld a denial of liability of a Public Authority.

2. The liability claim was based on a violation of fundamental rights due to a series of actions revolving around the schooling of a disabled person in a special needs education centre, the mistreatment of the disabled person prior to this and the criminal proceedings brought against the disabled child's parents for not carrying out said schooling as they considered that an inclusive education in an ordinary centre with the necessary support measures would be more beneficial.

   The claim relied on Views adopted by the Committee on the Rights of Persons with Disabilities ('CRPD'), dated 18 September 2020, concerning a communication submitted by

the disabled child's parents. Said Views stated that the actions and incidents that had occurred amounted to a systematic and serious breach of the obligations and requirements of various provisions of the United Nations Convention on the Rights of Persons with Disabilities ('UNCRPD' or 'UN Convention') and urged the Spanish State to provide an "effective remedy" for the harm suffered by the disabled person and his parents.

The claimant considered that the submitted facts constituted a case of pecuniary liability for malfunctioning of the Administration of Justice, considering that the State, through the Administration of Justice, did not put an end to the situation of discrimination and violation of the fundamental rights of the disabled person. The parents sought an effective remedy for the costs incurred by having to pay for the disabled person's education in private centres and for the legal costs of the proceedings, as well as for the emotional and psychological harm suffered, the total compensation amounting to the sum of three hundred and fifty thousand euros.

3. The impeccable judgment of the *Audiencia Nacional* rejected the appeal on the grounds summarised below:

   a) The Views of the CRPD, on which the liability claim relies, have, for the reasons set out in detail below, "the nature of recommendations and suggestions, within the framework of the very purpose of the Convention [for the Protection of Human Rights and Fundamental Freedoms (ECPHRFF)], and are not endowed with executive force or coercive mechanisms in order to be imposed on the States themselves", as if the Committee were a supranational body with jurisdictional powers ceded by the States (as provided for in Article 93 of the Spanish Constitution). Both the Constitutional Court and the Supreme Court have highlighted these limitations, emphasising that the Committee lacks jurisdictional powers or powers for the authentic interpretation of the rights established in the treaty, since the treaty did not confer these powers to it, unlike the European Court of Human Rights ('ECHR'), whose decisions can, in certain cases, override those of the States, leaving final and conclusive judicial decisions without effect (Art. 5 bis of the Judiciary Act and Art. 46 - Mandatory force and enforcement of judgments - ECPHRFF).

   b) The existence of final and conclusive judgments (of the Judicial Review Court of León and the High Court of Justice of Castilla y León), which exhausted the ordinary appeal tracks, in which, after examining "in great detail" the problems raised, it was concluded, without a doubt, that there had been no violation of the right to equality or the right to education of the disabled person, following the interpretation which, in matters of education and inclusion, has been given by the Supreme Court.

   In this case, in view of the characteristics of the disabled person (uncontrolled behaviour, lack of sufficient autonomy, psychotic outbreaks, among others), the decision of the educational authorities that his schooling in an ordinary centre was not possible was considered justified, from the perspective of the welfare and better development of the disabled person, as corroborated by the different reports issued by the educational authorities' experts.

c) Following these final and conclusive judgments, the parents lodged an appeal with the Constitutional Court and an application with the ECHR. Both the appeal and the application were rejected as - and declared - inadmissible.

4. The *Audiencia Nacional* concluded that "in this case it is not apparent that the actions of the educational authorities caused any violation of rights or the abnormal functioning claimed by the appellant, linked precisely to the violation of fundamental rights derived from the convention for persons with disabilities". The judgment also stated that "upholding the claim, as filed, would entail the review of final and conclusive court decisions by way of views that do not have the scope to do so".

   The judgment was appealed in cassation; the Supreme Court, in the judgment that is the subject of this commentary, upholds the appeal and orders the proceedings to be set aside.

5. The Supreme Court, in response to the first of the matters of interest for the formation of case law, states, in short, that, given "the non-existence of a specific and autonomous channel for enforcing the Committee's recommendations in the Spanish legal system", an action for damages against the State "is the last channel for obtaining a remedy" in respect of rights that cannot be asserted in any other way.

   On the basis of this interpretation, what the judgment does is to review the assessment of the evidence already analysed in detail in the judgments handed down in the case in the light of the report issued by the CRPD, to conclude that "in the case under examination, a harm is claimed that is of course real, effective and economically assessable".

6. The second matter of interest was trickier, as it consisted of determining "[w]hether this remedy and compliance with the views entails reviewing final and conclusive court decisions, as the liability claim is based on different circumstances".

   However, the Supreme Court "does not shy away" and, despite recognising that there is a specific channel for reviewing final and conclusive court rulings, which is the *recurso de revisión* (second judicial review application), considers that in this case there is no res judicata due to the fact that the CRPD's views "are not based solely on assessments of the court ruling or rulings, as the Court of First Instance states, but on the finding that the Spanish State, in the actions taken with respect to the disabled person, did not provide an adequate response or adopt effective measures through the bodies that heard all the appellants' claims. In other words, it is all part of the failure to comply with the general obligation to adopt all effective measures to give effect to the rights imposed by Article 4 UNCRPD, as the appellants make clear".

7. With this, the Supreme Court recognises the binding force or value of CRPD reports in the Spanish legal system, to the extent that these reports can allow for the correction of actions that include final and conclusive judgments of the national courts.

   This is not the case, however, since, as highlighted in the judgment of the *Audiencia Nacional* and highlighted in the dissenting opinion of Justice Luis María Díez Picazo, international treaties with institutions capable

of imposing acts with binding legal force in the Member States are exceptional.

Leaving aside the acts of the institutions of the European Union, due to the singularity of this supranational system of integration, the only case that can be cited in this regard is that of the ECHR, whose judgments finding violations are binding on the States concerned, who are obliged to execute such judgments because the contracting parties to the ECPHRFF expressly undertook to do so. Therefore, as the dissenting opinion points out, ECHR judgments "are only enforceable to the extent that each national system grants them enforceability, and in Spain, as is well known, it took a great deal of time and effort to provide them with a fairly limited form of enforceability, such as that provided for in Article 5 bis of the Judiciary Act".

8. The question that then arises, as the dissenting justice points out, highlights the absurdity of this judgment: *why should the acts of the committees of the United Nations or other international organisations infinitely less intent on integration than the European Union or the European Convention on Human Rights enjoy more favourable and generous treatment in the Spanish domestic legal system?*, particularly when neither the UNCRPD nor its Optional Protocol regulating the CRPD provide that the acts of that body should have binding force or value in domestic law. The CRPD 's acts are significantly referred to as *recommendations* and are limited to requiring States to adopt "all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention".

   Consequently, if there is any action or omission by the State that contravenes this UN Convention, there will be a case of international liability, but the Supreme Court cannot arrogate to itself the role of international body in charge of elucidating and applying this liability. If such an interpretation were accepted, it would open the door to the possibility that, in clear violation of Article 117 of the Spanish Constitution, the application of both national and international provisions, which is the sole responsibility of the courts weighing up the elements and circumstances of each case, would be left to non-jurisdictional committees.

9. In addition to the surprising usurpation of this function, there is also the clear inadequacy of the route of liability for the abnormal functioning of the Administration of Justice to reach a determination on the liability claim.

   This is so because, even in the hypothetical case of admitting that the CRPD's views have binding force and value, as the dissenting opinion points out, "the actions or omissions of the courts in the exercise of jurisdictional power - that is, in judging or enforcing what has been judged - can never give rise to an abnormal functioning of the Administration of Justice, but only to judicial error", and this judicial error must have been previously declared through one of the channels provided for in Article 293 of the Judiciary Act; case law is, moreover, extremely restrictive in the characterisation of judicial error, considering as such only "the very serious or inexcusable; not any other error of fact or law".

10. The Supreme Court cancelled the judgement a quo, ordering the proceedings to be set aside so that the lower court could assess the other conditions necessary for the assessment of an abnormal liability of the Administration of Justice. Perhaps, as the dissenting opinion points out, the (clearly erroneous) doctrine of

this judgment could still be corrected if the lower court were to assess the non-existence of one of these requirements or conditions, such as the appellants' use of the appropriate procedural channel to claim compensation: the claim for compensation derived from the judgments should have been arbitrated through the route of judicial error and that of "the other actions of the State" produced with respect to the disabled person referred to in the CRPD's report, through the route of Public Authority liability for the functioning of the public services under Article 32 of the Public Sector (Legal Regime) Act 40/2015.