

Chapter XV

Court fees and the right to an effective judicial wardship¹

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I. THE MOTHER OF ALL BATTLES

Before considering the question of this study, we shall warn about the lack of economical issues regarding the costs of the Spanish Justice. If they existed, they could support all the commentaries for the purpose of this matter. We should not only fathom the costs implied in the performance of courts, but we should also consider the benefits that implies their activity, with their own dysfunction like the delays, that benefit debtors and, therefore, the public Authorities as well, that are normally occupying the position of the defendant, mainly in the contentious-administrative proceedings. BORRAJO INIESTA (2013) illustrates how the Spanish justice is financed: since its very origins, there was a complicated system of tariffs together with shorter and shorter budgets, until the Law 25/1986, from the 24th of December, removed all the rates and tariffs in force until that moment. In 2002 the legislator introduces not very high rates again in the civil and administrative orders through the Law 53/2002, from the 30th of December: it affected bigger companies and with not very high amounts. After 10 years, the Law 10/2012, from the 20th of November, regulating specific rates in the scope of the Justice Administration and the National Institute for Toxicology and Forensic Science —BOE from the 21 of November— has extended the rates to every juridical or physical

1. This report has been carried out under the project financed by the Spanish Economy Ministry "best legal-procedural practices in the field of labour and European law to reduce labour litigation expenditure at zero cost (I+D DER 2012-32111).

person in the civil, social and administrative orders, increasing their amounts highly. Different circles of persons have maintain that the rates have come to remain in time, that it is not the most convenient thing to keep the justice for free established by the art. 119 Spanish Constitution due to the vertiginous increase of complaints since 1986, when the judicial tariffs were removed—even if there can exist other concomitant factors—, and that the Access to Justice shall be subsidized without any limitation by the taxes, that shall be used as well to attend many other social needs.

In February 2012 and in the frame of a serious economical crisis, the former Ministry of Justice, Mr. Alberto RUÍZ GALLARDÓN announced a regulation about rates, maintaining that they would disappear in the first instance but would remain in the second instance in a symbolic way to discourage people doing a misleading use of Justice. Nobody complained against those declarations awaiting to know how were the concrete measures to imply them, but the Minister did not maintain his word and with the inforce coming of the norm, a general protest among the whole juridical community began and has last more than one thousand days.

The Preamble of the Law 10/2012 from the 20th November established a rationalization of the exercise of the judicial power as the aim of rates and, at the same time, it will be the instrument to improve means to finance the judicial system and, particularly, the free legal assistance. Therefore, the most important finality of it was, not only reducing the litigiousness, but assuming a copayment by the citizens, in a similar way of what happens in specific Autonomic Social Securities. The Preamble also states that it aims promoting solutions of litigation by means that are not juridical, since it offers returning the rate in every process where an agreement is taken.

This Law extended its application to the physical persons, thus requiring the payment of rates in any process applied for, increasing its amount from the previous one established in the art. 35 of the Law 53/2002 from the 30th December on administrative, taxing or social order measures, in order to recover the rate for pleading under the judge, modified by a subsequent reform done by the Law 4/2011 that modified the Law 1/2000 from the 7th January for Civil Judgement, enlarging the payment of the rate to all the monitory processes and by the Law 37/2011 from the 10th October on expedite measures.

Nevertheless, the mentioned Law has only obstructed or inhibited the Access to Justice to thousands of citizens: during the last two and a half years since the in force coming of the rates established by the Law 10/2012 (RCL 2012,1586) there has been an increase of scarcely 500 million euros, and none of those euros has reverted in benefit of the Justice in general and, even less, in free Justice, as stated in the Preamble. The rejection

that the Law 10/2012 has generated in every juridical environment for putting limits to the general access to free Justice is remarkable. The General Council of Lawyers (from now on, the CGAE) has conducted the hard fight for the abolition of the judicial rates in every possible forum—Justice Ministry, Ombudsman, political parties, Constitutional Court, Parliaments, Autonomous Governments or even on the streets, because they consider it a tremendous error. Among the arguments maintain for the removal of that Law are that, Justice cannot be concede against the citizens or establishing barriers—some of them impassable, indeed—to the legitimate exercise of rights; Justice cannot be considered heritage of judges, prosecutors or, even worse, of politicians: Justice belongs to the citizens and is being given for them, so that any obstacle that hinders even more the access to jurisdictional solution of conflicts shall be rejected by all the implied sectors. The Advocacy has sent a letter to the former Minister of Justice Alberto RUÍZ GALLARDÓN since April 2012 when the approval of the Project of the Judicial Taxes by the Council of Ministers, asking for the abolition of rates for being unjust and excessive, not having any legal or constitutional basis to justify its imposition, as already stated in a Report by the Legal Commission of CGAE in June 2012. Since its very beginning, they have been considered an unnecessary and unjustified impediment for accessing to the effective judicial protection, injuring precisely, those with less economical means, making Justice out of reach for a wide part of the society. Since there is no scale of rates depending on the economical capacity, the middle class is suffering its application, if “middle class” can be considered those families surviving with 1.100 euro monthly, amount fixed as the limit for the tax exemption. It is irrelevant for companies, since for them and contrary to what happens to individuals, it is a cost that can be fiscally deductive, like the VAT; debtors in concourse and also the State are exempt of paying the rates. The Law 10/2012 establishes the impunity of the most powerful and a minor protection against the arbitrary performance of the public institutions; let us just consider the contentious-administrative appeal against a traffic fine, where the amount of the rate could be even higher than the fine itself. Even more serious is the disappearance of the consumers’ protection: very expensive rates for small matters, like the complaints of consumers against big companies, where the rates constitute a deterrent element by itself.

The Project of Law approved by the Council of Ministers in July 2012 was negotiated in the Deputies’ Congress with urgent character, being approved in the Justice Committee of the Congress the 30th October 2012. The day after, thousands of lawyers took part in all the protests that were promoted in all the country by the Spanish Association of Young Lawyers. In November 2012, the President of the CGAE asked the ombudsman to present an unconstitutional appeal. Several demonstrations of lawyers

were organized during the 1000 days in which the norm was in force. Together with the demonstration of the one taking place the 31st October, there are remarkable the one of 20th November in Madrid, with more than 25.000 lawyers and the one by Deans and members of the Ruling Councils of the 83 Lawyers Associations, directed by Carlos CARNICER, who was the President of the CGAE (Spanish General Council for Lawyers).

The Law 10/2012 of judicial rates published in the BOE from 21st November was rejected at the same time and getting together by the CGAE, Judges and Fiscals, performing all of them a Public Event defending the Administration of Justice in December 2012. The same month, the Platform Justice for Everybody was created, being formed by the Council of Consumers and Users, the trade unions UGT, CCOO, USO and CSI-F, who rejected in common the Law of Rates and the Preliminary Draft of Free Justice Law, that was an obstacle to the access to Justice for extended sectors in the society.

In the parliamentary scope, the socialist Party presented in February 2013 unconstitutional appeal in the Constitutional Court, that was put together with the ones enacted by the Autonomous Governments in Catalonia, Andalusia, Canary Island and Aragon.

There are also some remarkable initiatives like collecting more than 170.000 signatures through internet or the Resolution by the European Federation of Lawyers Associations demanding the abolition of the Spanish regulation on rates and signing during their Congress in Frankfurt a resolution of total rejection to the regulation adopted by our Government.

There is even an agreement dated on June 2013 from the non jurisdictional Chamber of the Forth Section in the Spanish Supreme Court denying the mandatory requirement of paying taxes for workers, trade unions, Social Security benefit users, functionaries and statutory workers in the case of appeal for supplication and normal appeal. There were also members of the University communities that arose their voices against this regulation: a study by the Autonomous University in Madrid showed in July 2013 how the real number of appeals presented were just 20% of the figures given by the CGPJ (General Council of Judicial Force), so that the figures of appeals cannot be used as an argument used by the Minister of Justice in order to establish a system of rates.

The fight against the Law extended its action to social media: A group called "Brigada Tuitera" was created with more than 8.000 lawyers in it after the first year of enforcement, and since its very beginnings, the group was very active against the Law, even organizing specialized seminars, and meetings like the one called "Night against rates" in

the Lawyers Association in Madrid. They described themselves as a vindictive movement, not connected to any ideology and whose aim was to advise Spanish citizens of the defusing of our Justice. The unanimous rejection was extended all over the year 2014 until the resignation of the former Minister of Justice Alberto RUIZ GALLARDÓN the 23rd September, being his successor Rafael CATALÁN, who announced in his designation the modification of the law for judicial rates, forming a mixed working Commission together with the CGAE (National Lawyers` Association) in order to promote the necessary reforms explained by the Minister. The long awaited reform of the Rates` Law was announced by the Minister in the Parliament, more concrete, in the Senate the 2nd December 2014, arguing that the rates could never imply the limitation to the right of free access to Justice entitled to the citizenship.

A fundamental event in that fierce battle was the publication in the Spanish BOE (States` Official Bulletin) the 18th March 2015 of the Resolution adopted by the Congress the 12 of March, containing the requirement to publish the Convalidation Agreement of the Royal Order 1/2015, adopted by the Ministers Council the 27th of February of mechanisms of second chance and decrease on financial costs and other social measures. This rule establishes the abolition of judicial rates for physical persons because of the hopefully signs of recovery experimented by the Spanish Economy and the necessity of attending an unfavorable economical situation for an important amount of citizens that, not being entitled to an effective and free judicial protection, shall be considered because of the influence over them of the system of rates to exercise their judicial power. This is an euphemistic way to recognize what has been reminded to the Government from every part of the juridical community in the last two and a half years of the Law`s enforcement to physical persons.

The Government has used the Royal Order due to the extraordinary and urgent necessity of the situation, and ending a situation that had provoked an important social rejection because of introducing an element to discourage the access to the court. The Government recognizes in the Explanatory Preamble of the Royal Order 1/2015, faster than a law, the additional effect that should emerge from the using of the Royal Order: that there should be a high number of cases whose judicialization would be postpone until the inforce coming of the rule, thus, provoking a massive entry of cases in courts.

Nevertheless, the battle has not finished yet, since juridical persons shall still pay rates and it can affect, according to the Minister, small companies by many reasons: all the conflicts in which they are involved are usually under two thousand euros, reaching thus the legally exempting amount or companies could used rates to decrease fiscally their Society Tax. It

seems that the Minister pretends to go back to the system of 2003. The CGAE, through its President, Mr. Carnicer, has announced that they will continue the battle until the abolition of all the rates for Autonomous workers and small companies, which will be very positively considered for a higher economical growth and the creation of employment.

II. CONSTITUTIONAL DOCTRINE: THE SENTENCE OF CONSTITUTIONAL COURT 20/2012, FROM THE 16TH FEBRUARY

Judicial rates approved by the Law 10/2012, from the 20th November, conform the judicial happening that has mostly affected to the right to effective and free judicial protection in the last years. It is not a new measure, because the art. 35 of the Law 53/2002, from the 30th December on Fiscal, administrative and social measures was introduced as a requirement to the access of Justice administration. The Law 10/2012 was partially modified by the Royal Order 3/2013 of the 22nd of February, and it introduced some novelties regarding the former regulation: an extension of the rates to the social jurisdictional administration, abolition of the exemption for physical persons and a considerable increase of their amount. As already stated, the reaction of the juridical community has been visceral and, in the legal field, five unconstitutional appeals have been presented, together with some unconstitutional claims presented by different jurisdictional institutions, that have not yet been solved by our Constitutional Court.

However, our Constitutional Court had the opportunity to express its opinion regarding judicial rates in its sentence STC 20/2012 from the 16th of February solving a question aroused by a First Instance Court from La Coruña, that was even used by the legislator as an argument favoring the establishment of a rates` system in the Preamble of the Law 10/2012 stating that the Law had confirmed the constitutionality of the rates, recognizing the possibility of a model in which part of the Administration of Justice cost shall be afford by those who most benefit from it. This sentence considered the constitutionality of art. 35 in the Law 53/2002, from the 30th December (RCL 2002, 3081 and RCL 2003, 933), finding the requirement of rates constitutionally acceptable in that article, and also being this interpretation the one adopted by the legislator in the Preamble of the Law 10/2012. We could discuss if it is really so.

We maintained, following VILLAFÁÑEZ (2014), that the answer to that question shall be negative, since what that sentence really adopted was the general principle of freedom given to the legislator in order to create a system to finance the cost of Justice, so that choosing one or another

model corresponds effectively to the legislator (Legal Foundation 8th). Once settled this principle, the Constitutional Court descends to the specific regulation presented in the discussed statement, art. 35 of the Law 53/2002 and in its Legal Foundation 9th establishing that a norm with legal category requiring the payment of rates to companies of high invoicing does not infringe in principle the Constitution. This cost shall reimburse to finance the jurisdictional activity implied by the appeals freely presented by the companies in the civil order to preserve their legitimate rights and interests.

However, this assertion is nuanced with respect to the Legal Foundation 10th when establishing that this general conclusion could only be modified if proven that the amount of rates is so high that inhibits or blocks the access to court (...) in non reasonable terms, addressing to the criteria maintain in the case-law regarding the right to effective judicial protection from the art. 24.1. Spanish Constitution. That right could be damaged by legal dispositions establishing inhibiting or blocking requirements to the access to court, if those impediments become unnecessary, excessive and lacking of reason or proportionality as regards the objectives search lawfully by the legislator (Legal Foundation 7^o).

The basic conclusions subscribed by MAGRO SERVET (2013) about the sentence of the Spanish Constitutional Court STC 20/2012 (RTC 2012, 20) are the following:

- a) It is constitutional to establish the payment of court fees in the civil order for receiving juridical performance.
- b) It is not logical to protest against the legislator for having chosen a determinate system to finance the Justice. And that the protest to get the exemption of rates is presented by those who are entitled to receive Justice.
- c) The legislator has decided to establish a rate to be paid by big companies when they appeal for Justice as a way to finance partially the cost of attending and solving their appeals.
- d) It is constitutionally valid the limitation imposed by the norm in art. 35 of the law 53/2002, from the 30th December.

VILLAFÁÑEZ (2014) maintains that the sentence not only affirms the constitutionality of the system from the art. 35 of the Law 53/2002, but it also has included a safeguarding of the fundamental right to the effective judicial protection following the case-law by the ECHR and the ECJ: the right to access to court is not an absolute one, and it can be restricted by limitations. Those limitations will be considered against the art. 6.1. of the European Convention on Human Rights if they restrict the

access to court in such way that the very essence of the right should be damaged. The restrictions will only be acceptable towards that norm if they search a legitimate objective and there is proportionality between the measures employed and the legitimate objective search by the legislator, so that when the rates disdained for the financial situation of the citizen or are extremely high and totally inflexible, they become an obstacle or hindrance on their own to the access to Justice.

Some authors maintain that the sentence 20/2012 does not have anything to do with the scope and content of the right to an effective judicial protection, but that it was dictated as regards the compatibility of one article in the Law 53/2002 with the art. 24.1 Spanish Constitution; against this statement, VILLAFÁÑEZ (2014) maintains that the new regulation is similar on the grounds to the one in the Law 53/2002.

The doctrine by the Spanish Constitutional Court mentioned in the sentence STC 20/2012 should be of application in order to determinate the conformity with the constitutional text in the Law 10/2012, since that norm introduces an economical requirement for trials, that is an obstacle to the access to Justice, similar as done by the art. 35 of the Law 53/2002. The author highlights the rigidity of the rates regulation in the Law 10/2012, compared to the flexibility foreseen in the regulation of the right to Free Justice —Law 1/1996, from the 10th of January of Free Legal Aid Act—, where established that the trial costs shall be taken on by those who, in the case of having to assume that cost, should leave the appeal or would extremely risk the minimum level for personal and familiar subsistence.

This regulation contemplates different flexibility mechanism, like the recognition of the right to those who, not fulfilling all the requirements by art. 3, have economical income under certain limits or do not have enough patrimony, or when there are specific familiar or health circumstances in the solicitor. That right is also guaranteed by means of the possibility of judicial challenge to resolutions denying or recognizing the right to free legal assistance.

Unlike this regulation, the Law 10/2012 has not foreseen a similar system to modulate the application of rates depending on determinate circumstances concurring in the taxable subjects. Therefore, the inflexible or rigidity above mentioned. A specific procedure requirement has been passed over. It should have been the suspension of the process until a decision is taken as regards the enforceability or not of the rates. Thus, the Constitutional Court recognizes definitively that those rates that due to their amount will consist practically on an impediment or difficulty to access to court in unreasonable terms are not compatible with the right to an effective judicial protection.

This conducts us to maintain together with BORRAJO HINIESTA (2013) that the Law 10/2012 affects to the fundamental right of art. 24.1. in the Spanish Constitution when establishing rates for appealing or the access to legal resources; therefore, its validity depends on the search of a legitimate objective with proportionate measures.

VILLAFÁÑEZ (2014) maintains that, in the lack of a specific procedure, the Law 1/2000 of the Act of Civil Procedure shall be applied as supplementary in order to use the procedure for incidental questions of prior determination (arts. 392 y 393 of the Law 1/2000) since the rates are an obstacle to continue the trial by its ordinary procedures. It is the case of art. 391.3° of our Act of Civil Procedure as regards facts of prior determination: 3.° any other incidence happened during the trial and whose resolution shall be absolutely necessary, *de facto* or *de iure*, to decide whether to continue with the trial following its ordinary procedures or its ending. This incident of prior determination should have suspensory effect and, in order to adopt the decision, any circumstances that would practically compromise the effectiveness of the right to judicial wardship should be considered.

Definitely, the concurring circumstances should be pondered trying to find the balance between legal requirements and the guarantee of the fundamental right for court access expressed in the art. 24.1 Spanish Constitution, that needs to hold a leading position in a democratic society. It is legitimate thus, using the constitutional challenge or constitutional question to verify the compatibility of the Law 10/2012 to the Spanish Constitution, as has been already happened in the circa one thousand days that the judicial rates whose taxable person where physical persons has been in force.

III. FINAL REFLECTION

Different spheres maintain that the rates have come to remain in our system. It is a contentious issue that Justice is to be free of charge as expressed in art. 119 Spanish Constitution shall be most convenient due to the vertiginous increase of litigiousness since the judicial rates were delete in 1986 — even in the case of other attendant circumstances in this increase, and that the access to Justice shall be subsidized by taxes with no limit at all, that they have to cover many other social needs as well. Nevertheless, the magnificent increase of the rates system established by the Law 10/2012 has been scarcely considered, without any works about the real costs of Justice and not pondering the different interests in conflict, behind the backs of the legal community and the basic interest of citizens. Adding to the circumstance that there has been no reimbursement of

the amount collected by those means, 564,4 millions euros, to improve the financing of the Free Justice, as solemnly proclaimed under art. 11 of the Law 10/2012, not modified by any other subsequent regulations, there shall be deduced that the system devised by the former Minister GALLARDÓN has not been supported by any of the implied sectors, having also been rejected by the advocacy and other judicial sectors even in an institutional scope as on street level. If as above mentioned, the rates have come to remain, it is unavoidable to establish a different system: it will be necessary to potentiate the payment of the proceedings costs in order to avoid any recklessly litigation, that the amounts shall descend to an affordable fixed price, so as to remove them in the Social Jurisdiction and establishing some exemptions in the civil and contentious administrative order.

Even the actual Minister has said that the partial derogation of the rates for physical persons has obeyed to a better economic climate in Spain, and not because of being an obstacle to the access to Justice and because of not being an important amount for the State's budget. This is a disregard towards many and many citizens affected because of not being able to exercise their appeals since they were not able to support the costs of it. We do not understand the scope of the words by the Minister, considering the mass protests of thousands voices from every corner against the norm during its inforce of almost one thousand days. There would be no problem in recognizing the error occurred while universalizing the system of rates to both, physical and juridical persons opting for a different way to finance Justice, if it would have been adopted by consensus of all the sectors involved, with a calm reflexion considering all the interests in conflict.