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THE PROCEDURE AT THE SPANISH CONSTITUTIONAL COURT IN CASES CONCERNING CONFLICT BETWEEN CERTAIN AUTHORITIES OF AUTONOMOUS REGIONS [1]

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Summary:

Introduction.
First of all, I would like to thank the Constitutional Court of Armenia and the Venice Commission the invitation to take part in this seminar about 'conflicts between State powers before the Constitutional Court'. As a Professor of Constitutional Law and as a former Staff Attorney at the Constitutional Court of Spain, my contribution to this seminar lies in a critical review of the experience with the territorial conflicts in Spain. I hope some of these experiences could have any kind of reciprocal usefulness to the solution of problems -common problems, I am sure- in countries as Spain and Armenia where democracy has been installed and where a constitutional justice system is set after a long period of authoritarian government.

Starting from these premises, my paper is going to be organized in three parts. The first one is a brief introduction to the system of government designed by the Spanish Constitution of 1978 (hereinafter SC). Nevertheless, I will focus on two important elements to the seminar: in one hand the territorial decentralisation of the power -very similar to the modern federalism- and, on the other hand, the establishment of a Constitutional Court and its sole capacity to resolve the conflicts of competence between the State powers. The second part, even shorter, is a superficial revision of the constitutional and legal regulation of the conflicts of competence on the Spanish system. And the last part, and maybe the most interesting one, is a critical opinion on the method of this instrument, by analyzing a significant period of our constitutional experience: the one took in between the beginning of the Spanish

Constitutional Court (in 1980) and the end of 1998. Eighteen years that, in accordance with the Spanish rules, mean full legal age of the people and, perhaps, it is the appropriate time to think about the institutions.

2. The Spanish Constitutional System

2.1 The State of Autonomies

One of the main problems that the SC of 1978 had to deal with was the political decentralization of the Spanish State; besides this, it had to give answer to the autonomic aims of some Spanish regions, especially in Catalonia and the Basque Country. The dictatorial franquist regime joined suppression of liberties with political centralization and it seemed totally essential that, by the moment a regime of personal liberties was confirmed, certain degree of liberty or collective autonomy of the Spainish regions will also be recognized. Democracy and political decentralization are linked therefore.

When we try to analyze the legal reception of this decision, one detail that strucks over our Constitution is the lack of a definition of State. Article 2 says that the Constitution is "based on the indissoluble unity of the Spanish nation, the common and indivisible homeland of all Spaniards, and recognizes and guarantees the right to autonomy of the nationalities and regions which make it up and the solidarity among all of them". There is not, therefore, a constitutional definition nor as a federal state, nor as unitary, neither as decentralized one. Nevertheless, in practice, it has been being shaped like a federal State, defined by the following elements:

- Spain is a decentralized State, organized into seventeen Autonomous Communities, each of them with its own Government and Parliament, which are elected by the citizens in a system of universal suffrage (Art.152 SC and other related provisions). The decentralization is therefore, the inner structure of the State.

- The decentralization has political context; the Autonomous Communities enact their own laws within the limits of the Constitution and in accordance with their Statutes, that are the basic institutional norm of each Autonomous Community.

- The distribution of competences can be compared to the modern co-operative federalisms; that is to say that most of the said very important competences of the Autonomous Communities are shared or concurrented with the State. This means the improvement of the dual federalism and is a common characteristic in all the decentralized systems, eventhough it can not be ignored by this seminar, the fact that this sort of distribution is, unavoidably, more problematic than the dual one.

- perhaps, the main disadvantage of our system is the lack of a Chamber similar to the German Bundesrat. There is the need of the appropriate mechanism of an institucionalized co-operation between the territorial petitions, something that has an unquestionable degree of influence on the conflicts of competences. In this respect, the definition of Senate as "the chamber of territorial representation" (Art. 69 SC) has not been developed**.**

- Finally, a model of constitutional justice, based not only on a sole court but also on an unique judicial power over the whole of Spanish territory, something that it is not taken as a rule in traditional federalism.

2.2. The Constitutional Court

After the Second World War, Germany and Italy adopted a system of constitutional justice, where the basic referent was the control of the legislative power, since both countries had had a law-maker whose actions were more than unfair and broke with the traditional understanding of a rule of law as a State subjected to the Law.

For that purpose, they decide on an adaptation of the Kelsen's monistic theory of Law, not only by creating a system of constitutional jurisdiction based on a sole body, but also by shaping it nor as a political body, neither as a negative legislator. The aim is to have a body that, by its composition and functionality, can be similar to a court but that means a separate and special jurisdiction that does not belong to the judicial power. This is also the key model adopted in Spain, but it has the following characteristics:

- As to the composition of a court, in 1928 Kelsen said "that the body should not be numerous, there is a need of an homogeneous extraction of its members, the appointment should be the result of a wide political compromise, the Magistrates should have a high technical and professional experience and their term of office should be longer that the one of the legislature".

  All these points have taken into account (Art. 159 SC) to the configuration of the Constitutional Court, that it is composed of twelve members. These magistrates shall be appointed for a period of nine years and from among the other powers that shall be under its control (Government, Parliament and Judicial power). Nevertheless, the participation of the territorial authorities is not properly defined, since the Senate is not configured as the chamber with territorial representation, as I pointed out before.

- As to the functions (Art. 161 SC) the Constitutional Court is competent to hear appeals on the grounds of unconstitutionality against laws and regulations having the force of law or appeals against violation of the rights and liberties and conflicts of competence between the State and the Autonomous Communities or between the Autonomous Communities themselves. These competences are quite similar to the ones of the German Constitutional Court, but there are two differences: the first one has no relevance with the topic we are dealing in this seminar but is that the Spanish Court has no competence to declare the unconstitutionality and dissolution of the political parties; the second difference, that has more effect in our topic is that the Court is also in charge of the violation of the regional statutes by the laws of the said region.

3. Conflicts of territorial competences

The Spanish Constitutional Court has another function : it guarantees the separation of powers, between the Parliament, the Government and the Judiciary as well as between the territorial power characteristic in the decentralized States.

Apart from the conflicts between the constitutional bodies -which have few significance since there has been just one decision until now and being another subjected to resolution- we are going to be focused on the territorial conflicts. For that purpose, we shall start from the idea of decentralized States are always unsteady balances between centripetal and centrifuge forces, between union and separation elements, and take into account that the constitutional courts play an essential role by interpreting the constitutional rules to the configuration of the State and Constitution as legal rules.

At this point, the Spanish Constitution has a relatively confused scheme, with two different proceedings:

In one hand, if the regulation that confers the competence under discussion is a law (that is to say there is a legislative invasion) then the proceeding is called appeal for unconstitutionality. The conflict is solved by the declaration of unconstitutionality of the law.

In the other hand, if the invasion is by means apart from the law or normal proceeding, or even by the inactivity, then we are taking about the characteristic conflicts of competence of the Spanish system and it is typify by the following:

- they can appear between the State and one or more Autonomous Community or between the Autonomous Communities themselves. A recent reform of the Organic Law of the Constitutional Court (hereinafter OLCC) on April 21st of this year, has introduced the possibility of a conflict promoted by the Local authorities (Corporations and Provinces) against the State or the Autonomous regulations that interfer on their competences. I am not going to take a long time on this matter, among other thing because it is something really new and there has been no conflict until today.

- they can have positive condition when two or more applications are considered competent over a subject, or negative condition when none assumes that condition.

The relation between the State and the Autonomous Communities on this kind of conflict is very far from being egalitarian:

Thereby, if the conflict is proposed by the government, it can be regularized within a period of two months from the moment the supposed violation of competences has happened, and there is no need of a prior injunction or conciliation action with the Autonomous Community. Moreover, article 161.2 of the Spanish Constitution says that the "Government may contest before the Constitutional Court the previsions and resolutions adopted by the organs of the Autonomous Communities. The challenge shall produce the suspension of the contested provisions or resolution, but the Court must either ratify or lift suspension, as the case may be, within a period of not more than five months. "This means an automatic suspension
On the contrary, the autonomous authorities are forced to undergo a prior conciliation action with the State, by means of a formal injunction and there is a month to be accepted or rejected. They have not the automatic suspension that has the State (they can ask for it, but the last decision is on the Constitutional Court) and they do not have a universal legitimation and the conflict can be requested only if the regulation or act has to do with its own terms of reference -but can not be requested if it is not allocate in its own territory-.

Once the conflict is set and if it has the procedural requirements (about legitimation and expiry date) the Constitutional Court grants the application and it is published in the Official State Gazette. Allegations from the parties are allowed, through a short period of time, and the court can also ask them for further information, without more proceedings, the conflict is ready for its final judgement. In theory, and with the time allowed by law for action before a court, the proceeding should not take longer than six months before the sentence is pronounce.

By this sentence, the Court orders who is the holder of the competence and the defective provisions of incompetence can be revoked and determine the necessary legal remedies to solve the problems while the norm was ruling. In theory, the effects are only suffered by the parties, but these sentences have high importance when the competences have to distributed and tend to have an effect on the entirely State since the statutory principles are, in a physical sense, often identical.

4. Eighteen years of territorial conflicts: a critical review.

If we take a look in the past eighteen years of the territorial conflicts in Spain, we obtain the following conclusions:
4.1 An excessive rate of tension and disputes.

First of all, there has been an excessive rate of tension and disputes. the figures are amazing and, though it is true that we are talking about inherent strains in every kind of decentralized system, it does not look reasonable that there have been 605 conflicts of competence and 419 petitions of unconstitutionality in eighteen years against laws on conflicts of competences between the State and the Autonomous Communities. In other words, each six and a half days, the Constitutional Court has head a conflict from either the State or the Autonomous Community.

The main reason of these data is, without any doubt, the complex and confused system of division of competences in the Constitution and the Statute of Autonomy, and it is, in this sense, a transient action. Thus, in 1980 -when all the communities started- there were 96 conflicts, which is far from the nine in 1998.

The problem of the strains is, therefore, a decreasing phenomenon due to the fact the Constitutional Court has been interpreting the constitutional provisions and setting the rules of acting in the different administrations.

Nevertheless, this can not be the only reason for a phenomenon so distance as, for instance, to the experienced in West Germany. Other reasons shall be, and besides the mistake on the writing of some of the titles that control the constitutional distribution of powers, the lack of dialogue instruments between communities, with the aim of prevent future conflicts.

4.2. A judicial and non-political definition of the competences.

Another conclusion is that there is a judicial but non political definition of the system of distribution of competences. The Constitutional Court had not only to take control over some political controversies, but also had to re-interpret almost all the conflicts of competence.

Since the Constitution is a legal rule and says the Constitutional Court is the sole interpret, there is nothing to complain about. Nevertheless, the Constitution is not only a political but a very difficult territorial agreement.

That is why it is more than anecdotal that the Basque Government, that is to say the government of the politically most important Autonomous Community -since it is the only one community with significant independents activities and a terrorist group that supports them- rejected almost ten years ago to use the conflict way and has opted for the political negotiation with the Government of Spain to solve their disagreement on competences.

4.3. An inappropriate division between the conflicts that the Constitutional Court must resolve and those which are in need of constitutional contents.

The real point of the constitutional conflict is the interpretation of the Constitution: the constitutional provisions shall be understood in two different ways to become a conflict. Any conflict between the Public Territorial Authorities can not be called a conflict of competences that shall be heard by the Constitutional Court; there are many stains which competence relay on ordinary courts.

It is doctrinally essential and extremely advisable to the proper working of the whole system -as it is proved by the German experience- to give to the ordinary courts the right to solve conflicts on public law between the State and the Länder "of non constitutional nature", keeping in reserve those with natural constitution to the Constitutional Court (those which the aim or pretension had nothing to do with an infringement of incompetence.

In Spain there is no distinction between conflicts, and there has been a dangerous interpretation, due to above all, to the Constitutional Court. This Court has turn all the discussions between Territorial Authorities into a constitutional conflict and, for instance, the Court has solved, in Sentences 67 and 74/1992 (hereinafter SCC), petitions as the case of an hydroelectric central with a certain degree of power, to know to whom correspond its administrative licence; in this case there is not legal discussion but just a matter of facts. It is only from this confusion between both kind of conflicts that we can understand the high rates of petitions.

4.4. A long-drown-out in the judicial resolution of conflicts.

The natural consequence of this situation is that the Constitutional Court takes an extraordinary long time to solve conflicts. The figures are very clarifying: an empiric research over the 25 conflicts of competence solved between September 1995 and January 1997, shows that eight of them were posed nine years before (the absolute record is ten years and six months, in SCC 172/96,) and the quickest decision is referred to one conflict posed three years and seven months before (SCC 197/96). By an aritmethic mean, we get that the Constitutional Court takes around seven years and ten months on average to solve these kind of conflicts, and this has nothing to do with the six months that we mentioned before.

This is an unacceptable political and legal time, but it is not only due to the regulation of the conflict but also to the fact that the Spanish Constitutional Court has been surpassed by its role of guarantee of the fundamental rights and liberties of the citizens on the resolution of application for declaration of fundamental rights. Apparently, it is a problem that has nothing to do with the topic of my paper, but i would like to emphasize on the fact that a proper resolution of territorial conflicts needs a Constitutional Court dedicated strictly to constitutional functions -which are, without any doubt, unconstitutional petitions and conflicts of competence- and letting the ordinary courts to protect the fundamental rights of the citizens.

5. Conclusion: territorial conflicts, an essential but subsidiary instrument.

I would like to end this talk by pointing out that the most important conclusion of its topic is that the territorial conflicts and their resolution by the constitutional courts are an essential instrument on the decentralized states, but their existence can not reject political and negotiable channels to reach a solution of the controversies. These channels are essential, as prior actions, to the inner functionality of the conflicts.

It is a question of identifying a simple fact: to require to the Territorial Authorities a pattern of behaviour that we all use in our personal relations; try to deplete all the channels to the solution of personal conflicts before going to a court.
At the same time, we have to guarantee that these conflicts -whenever happened to be unavoidable and due to their essential importance for the structure of the State- will get a fast answer from the Constitutional Court. This is only possible if the Court is not overpassed by secondary petitions and can be focused on those related to its importance as a Court. The experience shows that the best way to give the Court the chance to choose its own cases (or certiorari) But this is another story that has to be count another day.

Thank you very much for your kind attention.

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[1] Preliminary draft of text, valid only for discussion in the seminar and not yet suitable for citation or publication.