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Conflict resolution in Federal and Regional systems

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CONFLICT RESOLUTION IN FEDERAL AND REGIONAL SYSTEMS

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1. Judicial conflict resolution

All federal and regional political systems are based on a complex distribution of administrative, financial, legislative and judicial powers. Thus, discrepancies between central and territorial[1] authorities concerning the scope of their respective powers are inevitable. The majority of these discrepancies are resolved through the usual mechanisms of political negotiation; but these mechanisms are often insufficient to enable a negotiated solution to be reached. As a result, very often such discrepancies give rise to formal conflict proceedings involving the central and territorial authorities (or involving different territorial authorities), conflicts which must follow specific procedures and be resolved by a predetermined entity.

In general terms, these procedures may be divided into two types, judicial and non-judicial. Although there are many examples of the latter, judicial procedures are usually preferred in constitutional norms. There are several advantages to entrusting the resolution of central-territorial disputes to the courts. On the one hand, it is assumed that a court will be independent and free of influences from the parties involved. On the other hand, it is likewise assumed that a court will issue its decision based on the mandates of the legal system, and not on political preferences. In addition, although in general the delay in issuing decisions in judicial proceedings may be considered as detrimental to the interests of the parties, in the case of central-territorial conflicts, the delays inherent in all judicial proceedings may occasionally prove to be positive, allowing the confrontations and passions typical of all political controversies to subside, especially in those concerning national, ethnic or linguistic disputes that often arise in complex States.[2]

[1] In this report the term "central" is used to designate the authorities common to the whole political system (such as the "Federal" authorities in the United States or Germany, or the "State" authorities in Spain or Italy), while the term "territorial" refers to federated states, *Länder* or regions.

[2] On this subject, see L. LOPEZ GUERRA, "Constitutional Courts as Arbitrators in Conflicts of Competence: The Case of Spain" in A. RZEPLINSKI, ed., Constitutional Courts in Central and Eastern European Countries in the Period of Transformation, Warsaw: Helsinki Foundation, 1995, pp. 78-85.

2. Conflict resolution on the part of the Constitutional Court

2.1. *Different functions of Constitutional Courts*

The German professor Dieter Grimm has underscored that "there seems to be a certain affinity between constitutional jurisdiction and federalism."[3] The truth is that with only a few exceptions, in Europe the task of judicially resolving conflicts between central and regional or federal authorities is usually assigned to Constitutional Courts or equivalent judicial bodies. As is commonly known, this function extends beyond the task that the classic Kelsenian model attributed to Constitutional Courts, i.e., to review the constitutionality of legal norms. In effect, the Constitutional Courts of Europe have assumed not only the task of the constitutional review of legislation (abstract and concrete review of constitutionality), but also a series of additional tasks which correspond to the former concept of *Staatsgerichtsbarkeit*, i.e., among others, the task of judicially resolving conflicts between public authorities. This has been the case almost from the beginning of this type of courts, as evidenced in the Austrian Constitution of 1920 which conferred on the Constitutional Court the power to resolve central-territorial conflicts.

2.2. *The composition of Constitutional Courts*

In any case, the fact that Constitutional Courts do not only resolve conflicts among federal and regional or federated authorities, but also (and principally) assume other functions is reflected in the composition of those courts. In the European countries that have adopted the Kelsenian model, members of the Constitutional Courts are designated by institutions of the State, rather than by territorial entities.[4] Territorial entities may participate indirectly in the appointment of members of the Court, when some of the members are appointed or proposed by a chamber of parliament with regional or federal representation., such as the *Bundesrat* in Germany or the Senate in Spain. But in no European country has the Constitutional Court been conceived as a body representing the central authorities as well as the *Länder* or autonomous regions, although in some cases, such as in the Belgian Court of Arbitration, the law requires a certain balance as to the linguistic origin of the members of the Court. The decisions of Constitutional Courts are justified, not as the result of negotiations among representatives of the central or territorial authorities, but rather as the impartial application of the law, principally the Constitution, on the part of independent and expert jurists. In that regard, Constitutional Courts are not conceived as political or arbitral entities which attempt to reach compromises, but rather as authentic courts of justice which seek to resolve conflicts in accordance with the law.

[3] D. GRIMM, "Le fédéralisme allemand: développement historique et problèmes actuels" in TH. FLEINER-GERSTER, et. al., Le Fédéralisme en Europe, Barcelona: ICPS, 1991, p. 49.

[4] An exception can be found in Article VI, 1.a. of the Constitution of Bosnia-Herzegovina which provides that the Constitutional Court shall be composed of four members elected by the Federation of Bosnia-Herzegovina, two elected by the Assembly of the Serpska Republic, and three by the President of the European Court of Human Rights.

2.3. *Different procedures for resolving conflicts*

There are many different types of interterritorial conflicts[5] affecting many different interests and, thus, these conflicts may reach the jurisdiction of Constitutional Courts through many different procedures. For that reason, the regulation of such conflicts is complex and varies from country to country. On the one hand, conflicts between central and territorial entities (between federal or central authorities and territorial authorities, or between different territorial authorities) may be resolved by means of the general procedures for the judicial review of laws and the protection of rights typical of Constitutional Courts (procedures of abstract and concrete review of the constitutionality of norm, individual constitutional complaints). But there are specific proceedings that may be brought before Constitutional Courts to resolve conflicts between central authorities and territorial units, and which have their own procedural features.[6]

2.4. *General procedures for the constitutional review of laws.*

Conflicts between central (federal) authorities and territorial entities may be resolved by the customary means of reviewing the constitutionality of laws when the discrepancy between the central (or federal) and territorial authorities arises from a law passed by a legislative assembly (or, in some cases, from general administrative norms).[7] In this event, the procedure involves abstract control (direct appeals) or concrete control (requests for preliminary rulings). By means of abstract control, the central authorities of the State may challenge the norms of the regions or *Länder* by lodging appeals of unconstitutionality, and the authorities of those territorial units may likewise initiate proceedings at the Constitutional Court to challenge the central or federal laws which they deem unconstitutional. This is the system established, for example, in Germany, Austria and Spain. Those having standing to initiate such proceedings vary in each country. Thus, in the Federal Republic of Germany, the laws of the *Länder* may be challenged only by the Federal Government or by a third of the deputies of the *Bundestag*, while in Spain the Government, the Ombudsman or fifty deputies or fifty senators have standing to challenge laws of the Autonomous Communities.

In some countries, such as Portugal, Austria and Italy, among others, there is a system of preventive control of constitutionality in which the Constitutional Courts may rule as to whether central or territorial legal norms reflect the constitutional apportionment of powers before those norms have entered into force. In Italy, this system of prior review may be applied only to regional laws, enabling the Government to request the Constitutional Court to rule as to whether they violate constitutional mandates concerning the apportionment of powers. In contrast, in Austria requests for prior review of constitutionality may be lodged at

[5] The generic term "conflict" is used in this paper in the sense of "differences between central and territorial authorities concerning the apportionment of their powers."

[6] A useful analysis of the proceedings heard by Constitutional Courts can be found in H. STEINBERGER, Models of Constitutional Jurisdiction, Strasbourg: Council of Europe Press, 1993.

[7] For example, in Austria the procedure for abstract control of constitutionality also includes administrative norms (Article 139.1 of the Austrian Constitution).

the Constitutional Court by both the Federal Government and the *Länder*, which have standing to initiate such proceedings against federal laws before they are enacted.[8]

A ruling as to whether the entity enacting a given law (whether the federal parliament or a territorial parliament) has the authority to do so may also arise in the course of concrete proceedings of constitutional review, i.e., in specific proceedings in which the judge hearing the case questions the constitutionality of the applicable law, and refers the case to the Constitutional Court for a preliminary ruling. This permits the Constitutional Court to decide whether legal norms conform to the constitutional distribution of powers, even when these norms have been appealed directly.

2.5. *Specific procedures for resolving conflicts of competence*

In addition to the general procedures for reviewing the constitutionality of laws, Constitutional Courts usually have specific proceedings for resolving central-territorial conflicts, with their own rules of procedure. These procedures are usually applied (although not only) in those cases in which abstract or concrete review of constitutionality is not warranted, i.e., in those cases in which the conflict between the federal or central authorities and the regional or territorial units does not question the constitutionality of a law, but rather whether the central or territorial entity respects the constitutional apportionment of powers in the exercise of their administrative or fiscal functions, or in the execution of laws. In effect, the different activities carried out by the public authorities in their administrative capacity, whether they be federal or regional, may result in their overstepping the bounds of the powers granted them.

In principle, any unlawful administrative act should be subject to review by the ordinary courts having jurisdiction in administrative matters. However, in many cases, to resolve conflicts of competence, the Constitutions of European countries have preferred to create specific proceedings to adjudicate administrative matters in the Constitutional Courts. Thus it is the Constitutional Courts rather than the ordinary courts having jurisdiction in administrative matters which hear complaints lodged by the central authorities or by the *Länder*, based on the alleged ultra vires acts of other central or territorial units. Such cases involve procedures to resolve conflicts of competence *strictu sensu*, different from the both the constitutional review of laws exercised by the Constitutional Courts and the administrative proceedings heard in the ordinary administrative courts.

Examples of specific Constitutional Court proceedings to handle such conflicts may be found in the Austrian Constitution (Article 138 c), in the Fundamental Law of Bonn (Articles 93.3 and 93.4), or in the Spanish Constitution (Articles 161.1 and 161.2).[9] However, it should be underscored that the number of interterritorial conflicts in these countries varies considerably. In Austria and Germany only a few dozen interterritorial conflicts have been resolved by their

[8] In Austria this preventive control may be applied not only to parliamentary laws, but also to administrative acts.

[9] Other examples include Article 125.3 of the Russian Constitution, Article 167.4.a. of the Constitution of the Republic of South Africa, and Article VI.3.a. of the Constitution of Bosnia-Herzegovina. Concerning the case of Spain, see the (preliminary) report of P. SANTOLAYA, "The Procedure at the Spanish Constitutional Court in Cases Concerning Conflicts Between Certain Authorities of Autonomous Regions," Venice Commission CDL-JV (2000) 29.

Constitutional Courts using these specific proceedings in the last thirty or forty years. In contrast, in Spain these proceedings have been used to hear hundreds of cases in the last few years, especially those involving conflicts between the Central Government and the Basque and Catalan Autonomous Communities.

Although these specific proceedings usually involve conflicts arising from administrative decisions, in some cases they involve rules having the force of law. This is the case of the Belgian Court of Arbitration which has the jurisdiction to resolve conflicts of competence concerning rules or decrees having the force of law.[10]

The specific rules of procedure in proceedings involving conflicts of competence vary according to the legal system, but they do have certain characteristics in common. For example, standing to initiate these proceedings is usually reserved for the executive branches of the central or territorial governments (the governments of the regions or *Länder*), and excludes the parliaments or private individuals. This is the case in Germany in which bringing such actions is reserved for the Federal Government or the governments of the *Länder*,[11] and in Spain in which standing to initiate actions to resolve conflicts of competence is reserved for the Central Government and the governments of the Autonomous Communities. An exception to this rule can be found in the so-called "negative" conflicts of competence, i.e., those in which neither the central or territorial governments deem that they have the competence to act in a given matter. In such cases, it is the individual citizen affected by this failure to act who must initiate proceedings to defend his claim.

Another characteristic of these procedures is that they often provide for a preliminary period of conciliation with a view to reaching a solution before submitting the matter to the Constitutional Court (or to the Court of Arbitration in Belgium). Conciliation procedures prior to formalizing a complaint before the court exist in other types of proceedings in addition to those resolving conflicts of competence. For example, in Italy and Spain there are conciliation or "cooling-off" periods prior to filing an appeal of unconstitutionality. Denmark also has a similar conciliation proceeding prior to lodging interterritorial complaints before the Supreme Court.[12]

2.6. Constitutional complaint proceedings

Occasionally Constitutional Courts resolve territorial disputes by means of proceedings designed to defend the fundamental rights of citizens, such as the Spanish "recurso de amparo" or the German and Austrian *Verfassungsbeschwerde*. This is comprehensible if we take into account that the attribution of powers may serve not only to distribute the tasks of the public administrations based on criteria of efficiency and citizen participation, but that it also serves to ensure the rights of minorities living in a given area, so that political autonomy

[10] In practice, the proceeding before the Court of Arbitration may be considered as a procedure of constitutional review, although limited to specific matters. In that regard see P. VANDERNOOT, "La prevention el le règlement del conflits entre l'etat fédéral et les entités féderées en Belgique," Venice Commission CDL-JV (2002) 28.

[11] Article 68, Law on the Federal Constitutional Court.

[12] Article 127 of the Italian Constitution and Article 33.2 of the Spanish Organic Law on the Constitutional Court.

may guarantee respect for cultural and linguistic differences. In certain circumstances, the violation of the constitutional attribution of powers may also result in the violation of the rights of the members of a given minority. For example, if different public administrations take different measures in identical situations (such as in matters involving the hiring of civil servants or in those involving taxation), not all citizens will receive equal treatment, resulting in discrimination in favor or against certain groups on the part of the central or territorial governments. In such cases, the intervention of the Constitutional Court may extend to reviewing the *ultra vires* acts of the central or territorial authorities which may be deemed to violate the fundamental rights of citizens, either because they actually contravene constitutional mandates (such as the principle of equal treatment under the law), or because they extend beyond the scope of their powers to regulate certain aspects of fundamental rights. In those instances, acting without the authority to do so could also result in a violation of a fundamental right.

2.7. *Procedural advantages afforded the central authorities*

It should be noted that in countries in which the adoption of a federal or regional system has been the result of a process of decentralization from a unitary and centralized State (as is the case in Spain and Italy), this historical heritage is reflected in the particularly privileged position of the central government, which enjoys special procedural advantages. In the case of Italy, if the Government deems that a draft law passed by a regional parliament violates the constitutional apportionment of powers, it may return the law to the Assembly for new deliberations. If the Government's concerns are not addressed, it may remit the draft law to the Constitutional Court, to issue a ruling on the case.[13] The same may occur in Spain, where the Government may obtain from the Constitutional Court the automatic (although temporary) suspension of the entry into force of a law or of acts under appeal.[14]

3. Conflict resolution in the ordinary courts.

The extended role of the jurisdiction of Constitutional Courts in resolving central-territorial conflicts does not prevent the ordinary courts from playing an important role in the resolution of conflicts between territorial entities. This is logically the case in those countries which do not have a Constitutional Court, such as Switzerland, the United States or Canada. In the countries in which there is no concentrated system of constitutional jurisdiction, judges in the ordinary courts may rule on the constitutionality of laws and refuse to apply those which are contrary to the Constitution, including those which violate the constitutional distribution of powers. In Switzerland, the Supreme Court may rule on the constitutionality of laws enacted by the Cantons (although not on those enacted by the federal government). Moreover, in countries in which there is no Constitutional Court, there are many examples in which the Constitution expressly attributes to the Supreme Court the task of resolving interterritorial conflicts. This is the case in Section 2 of Article III of the United States Constitution which provides that the powers of the Supreme Court shall extend to controversies between the states or between the states and the United States.

[13] Italian Constitution, Article 127.

[14] Spanish Constitution, Article 161.2.

But even in countries with Constitutional Courts the ordinary courts may likewise play an important role in resolving controversies between the central and territorial authorities. This is the case in instances of concrete control of constitutionality in which the judge of an ordinary court may question the constitutionality of a norm based on whether the central or territorial government had the power to enact that norm.[15] But, in addition, the ordinary courts are entrusted with protecting individual rights in specific cases of violation of those rights resulting from *ultra vires* acts of the central or territorial authorities. And finally, the existence of specific Constitutional Court procedures to resolve conflicts involving administrative acts does not preclude the possible intervention of the ordinary courts having jurisdiction in administrative matters in the case of controversies between the central and territorial authorities. In such cases, the delimitation of the respective constitutional and administrative jurisdictions may not be entirely clear,[16] and in some countries such as in Spain, it may be possible to choose either one jurisdiction or the other.

4. Political conflict resolution

A third, non-judicial procedure, which may be considered as a *sui generis* means for resolving conflicts, grants the political powers of the central State the authority to issue the final decision in cases of central-territorial disputes. Procedures of this nature seem to reflect the belief that it is ultimately the central (or federal) powers of the State which must protect the common good, especially in times of crisis.

An example of the "political" resolution of conflicts under normal circumstances may be found in the Swiss Confederation. In this country the legislative body (Federal Assembly) is empowered to issue a preliminary ruling as to whether the norms of the Cantons having constitutional force comply with the Federal Constitution. Moreover, *a posteriori* the Federal Assembly may rule on the constitutionality of decisions of the Federal Government in appeal proceedings against measures taken by the Cantons. As an additional example, in Belgium the Senate (Article 142 of the Belgian Constitution) is empowered to resolve “conflicts of interest” between the diverse assemblies having authority to exercise legislative functions.

In situations of crisis, the Fundamental Law of Bonn (Article 37) and the Spanish Constitution (Article 155), for example, provide that the political authority to resolve conflicts shall reside with the "central" powers of the State. In both cases, the constitutional provisions in that regard are similar. In the event that a German *Land* or a Spanish Autonomous Community does not carry out its constitutional duties, the central government may adopt the appropriate coercive measures, with the consent of the German *Bundesrat* or

[15] An interesting example of collaboration between the ordinary courts and the Constitutional Court can be found in Article 280.2 of the Portuguese Constitution: "The Constitutional Court also has jurisdiction to hear appeals against any of the following court decisions: …b) Decisions refusing to apply a provision of a regional legislative instrument on the ground of illegality arising from contravention of the statute of an autonomous region or the general law of the Republic; c) Decisions refusing to apply a provision of an instrument made by an organ with supreme authority on the ground of illegality arising from contravention of the statute of an autonomous region.

[16] In certain cases, the law must clarify which conflicts fall under the jurisdiction of the Constitutional Court and which ones fall under the jurisdiction of the ordinary courts. For instance, Article 12 of the Ukrainian Law on the Constitutional Court provides that the Supreme Court shall have jurisdiction in matters of legality, while the Constitutional Court shall hear cases involving matters of constitutionality.

the Spanish Senate. This is obviously an extreme measure of "federal intervention" which has never been used in either country. In other countries, however, this capacity of intervention on the part of the federal government has been used, sometimes with certain frequency. For example, the provision in Section 3, Article II of the United States Constitution "(The President) shall take Care that the Laws be faithfully executed" has been interpreted as empowering such federal intervention if it is deemed necessary.[17]

[17] Another example can be found in Article 234 of the Portuguese Constitution which provides that "1. The organs of self-government of the autonomous regions may be dissolved by the President of the Republic, after taking the opinion of the Assembly of the Republic and Council of State, for serious actions contrary to the Constitution. 2. If the regional organs are dissolved, the Minister for the Republic shall assume responsibility for the government of the region."