THE CONSTITUTIONAL COURT, PRINCIPAL PLAYER IN THE SPANISH DISTRIBUTION OF POWERS

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Cambridge, 14th September 2012

I. Introduction

I'd like to start my presentation by telling you a fact which illustrates the current position of the Constitutional Court in Spain. On 9th July 2010, one million people demonstrated in the streets against the Decision of the Spanish Constitutional Court on the new Statute of Catalonia.

I'm not aware of any other country where a Constitutional Court decision has provoked such a strong popular reaction. However, what might be even more significant is the fact that the President of Catalonia headed the demonstration. He is not only the main political authority in the Region, but also the representative of the State in Catalonia. This whole event presents many implications.

The substance of the Constitutional Court's decision may explain this episode. However, in my opinion, the reaction which motivated the demonstration results from deeper concerns. The main one being the federal model which the Spanish Constitution inaugurated.

I'll explain in my presentation that our supreme norm neither created the institutions that rule the regions nor attributed competences to them. However, the Constitution established very detailed controls over the Autonomous Communities. A central plank of the Constitution of 1978 was the founding of a new Constitutional Court; whose mission was to guarantee the submission of the State and the Autonomous Communities to the new constitutional rules.

This disequilibrium between on the one hand, the openness of the distribution of power and, on the other, the precision and extent of the control has -over the years played in favour of the Constitutional Court. The single most important point is that the Court has shaped what the Constitution left unformed.

During the last three decades, the Constitutional Court has supervised the exercise of the competences conferred on the State and the Autonomous Communities, which is what Constitutional Courts ought to do in federal systems. However, the Spanish Constitutional Court has also delineated the distribution of competences and established the relationship between the State Law and the Autonomous Law. We shall

see how the Court jurisprudence on this issue has evolved, changing that relationship from hierarchy to one of complete equality.

To entirely rebalance the Spanish Constitution is a vast power; one that other Constitutional Courts do not have. But this rebalancing exercise has not been easy or unopposed. As a consequence, the Spanish Constitutional Court has been in turmoil on several occasions, especially in recent years. It's true that these problems are not always related to the allocation of competences. It is also true that other federal systems experience other kinds of tensions. Nevertheless, the peculiarities in the position of the Spanish Constitutional Court justify a more detailed analysis.

2. The reasons for the prominence of the Constitutional Court.

It is no exaggeration to say that Spain is peppered with devolved regions; all with different histories and slightly different relationships with central government.

After the demise of Franco's dictatorship –which of course centralised political power- Article 2 of the Constitution of 1978 formally recognized these regions and nationalities (NB not separate independent nations, just various old parts of modern Spain). Spain, like Italy or Austria, is a devolved federal state. Some of these countries, though not all, are based on the ideas of Hans Kelsen and follow the legislative guidelines of the Austrian Constitution of 1920.

According to this model the written and normative constitution not only creates the central state but also the member states or regions. Unlike the American member states, those entities do not have their own constitutions. In Spain and Italy, for example, the regions are organized by Statutes of Autonomy, elaborated according to the national constitution. This supreme norm creates the new territorial entities and allocates competences between the central State and Regions. In addition, the Constitution establishes the relationship between the norms of the central State and the regional norms. Each of these norms have equal status under the Constitution.

The close relationship between this type of federalism and the creation of the system of concentrated constitutional control has been underlined on previous occasions. For example, Pedro Cruz Villalón, former president of the Spanish

Constitutional Court and now Advocate General at the Court of Justice of the European Union, emphasized that Austria, the former Czechoslovakia and Spain were countries that, in the interwar period, introduced the *constitutional control* model known today. All those countries were devolved federalisms. For this reason, the first priority of control was to ensure compliance with constitutional rules that distribute power between different territorial entities.

According to devolved federal model, the Constitutional Court is the guardian of the territorial order imposed by the Constitution. It is neither an institution of the central state nor an institution of the member states, but an independent organ of the total order created by the Constitution. Its mission is to act as the arbiter that solves conflicts between these territorial powers by applying rules, principles and norms stated by the supreme norm.

The central role played by the Spanish Constitutional Court is therefore inherent to the constitutional control structure and the type of federalism followed by our framers. In part, it is not a peculiarity of our system but a general character of all the countries which apply a similar structure. However, this leading position is also due to other features that are unique to our system. Alberto has explained in more detail the allocation of powers that our Constitution establishes. For my part, I would like to underline only *two* of its peculiarities. These are the ***openness*** and the ***flexibility*** of the distribution of competences.

In fact, the lack of political consensus during the constitutional debates led to a situation whereby the Constitution did not close the allocation of powers. Instead, the Constitution provided routes to autonomy. The establishment of the institutions and competences of the Communities were referred to the Statutes of Autonomy.

I wish to underline that this “deconstitutionalization” is not as wide as others sometimes claim. Indeed, the powers of the State are listed in the first paragraph Art 149, which reserves substantive powers to the central State. But it is also true that this openness distances our Constitution from the other devolved federalisms that I have previously mentioned. In those legal systems, - I am thinking of Austria and Italy - the

need to ensure the autonomy of new territorial entities (or, in some cases, actual sovereignty) prompted the constitutional closure of competences.

The second note that characterizes our territorial system, namely, the flexibility, mainly plays in favour of the State. That flexibility derives from Art 150 and Art. 149. 3 of the Constitution.

Article 150 empowers the State to intervene in the competence sphere of the Autonomous Communities. The State does this by dictating harmonization laws on Communities exclusive powers or, conversely, ***transferring*** its own competences to Regions.

Art 149.3 contains two clauses that relax the division of powers in favour of the State. These are the prevalence and supplementary clauses. According to the first and in case of conflict, the central State norms prevail over the norms of the Autonomous Communities in all matters not attributed to the regions' exclusive jurisdiction. According to the second, when the region has not implemented a competence, then any court, tribunal or authority may apply State laws on the point.

As a result of these peculiarities, the rules defining the distribution of powers are to be found not only in the Constitution, but also in certain norms under the Constitution which can be submitted to the judgment of the Constitutional Court. We call these norms "constitutional block" and not only are these submitted to the Constitutional Court, but they can also be used to control the constitutionality of other norms. That is, these norms are parameters of control.

As a consequence, the role of our Constitutional Court in the layout of the territorial organization is more prominent than in other federal systems. Of course, in general, constitutional courts ensure that neither the central power nor the peripheral powers act *ultra vires*. That is, constitutional courts mainly verify the correct exercise of competences. In the Spanish case, the Court also has the power to scrutinize the distribution of competences made by the Statutes and other laws enacted by the State, such as basic laws, harmonization or transference laws, and so on. This is of course a vast power that entails deep responsibilities and many risks. I will return to these issues

later. But now, I would like to analyze in more detail the main contributions made by the Spanish Constitutional Court to the construction of our State of Autonomies.

3. The Spanish Constitutional Court and the evolution of the State of Autonomies.

The openness and flexibility of our Constitution in territorial matters have played over the years in favour of the Autonomous Communities. Both factors have allowed the creation itself and the consolidation of a federalism that was just a project at the moment in which the Constitution was written. It is true that this process was largely the result of political decisions taken by the legislative power with the enactment of the Statutes of Autonomy and inferior laws.

Nevertheless, the jurisprudence of the Constitutional Court has not been alien to this evolution. The *main concern* of the Constitutional Court over the years has been to ensure the territorial structure inaugurated by the Constitution. In order to reach this end, it was essential for the Constitutional Court to strengthen the position of the new Autonomous Communities against a State which for centuries had held the monopoly of political power.

Which are the guidelines that have guided the Constitutional Court in this task?

Paradoxically, the Court has not deprived the State of the competences recognize in Art. 149.1 nor has it given the competences a restrictive reading. To the contrary the Court has interpreted the powers granted to the central State in a broad manner.

Let me give you two examples of this.

The first example is the competence to dictate basic legislation. That is recognized at length in Art. 149.1. In a cloud of controversy, the Constitutional Court eventually allowed – albeit under its own supervision - the State to enact singular and regulatory norms as basic legistation.

The second example is the broad interpretation given to certain State competences such as the regulation of basic conditions in order to guarantee equality of Spaniards in the exercise of their rights under Art 149.1.1. The Constitutional Court also

recognizes the right of the State to enact basic rules and coordinate general economic planning (Art 149.13).

In other words, the Constitutional Court has safeguarded the interest of Autonomous Communities by various means. For example, where certain constitutional clauses had favoured the State, the Constitutional Court disabled these clauses making the distribution of powers less flexible. There are several examples of this jurisprudence referring to the harmonization laws or the referral clause by which competences not claimed by Statutes of Autonomy shall remain with the State.

In order to abbreviate my presentation I would just like to mention the evolution of the Court's jurisprudence when interpreting the two clauses previously mentioned. Those were the ***prevalence and suppletory*** clauses.

Since 1983, the prevalence has never been used to solve conflicts between state and regional norms. In fact the Court, when faced with a conflict between State norms and Autonomous Community norms, solves the question according the competence principle. So, the Court analyzes the matter and establishes which territorial entity should rule on the point.

Moreover, from 1995 till now, the Court has also disallowed ordinary courts the use of the prevalence clause. The Constitutional Court considers that our type of concentrated control prohibits inferior tribunals to override norms with the force of law. So, they are obliged to send the constitutional question to the Constitutional Court itself. For those of you who want to read the articles, you'll find these in Arts. 163 and 153 a)..

However, the evolution of the Constitutional Court jurisprudence on the suppletory clause has been much more controversial. Obviously, it is not possible to analyze this issue in detail. I only would like to point out that, at first (e.g. STC 5/1981) the Constitutional Court allowed the State to use this clause as a source of general competence.

In fact, during the first decades of the State of Autonomies, the State used the suppletority to dictate norms on any matter, including the ones which were the exclusive competence of Autonomous Communities. This broad use of the clause was

justified by the nature of the State Law. Those existing laws were more general than the new Autonomous Community Law. It must be noticed that, at that time, many Regions had not yet enacted rules implementing competences which were previously assumed in their own Statutes.

For these reasons, the Court ruled that State Laws were consistent with the Constitution. These laws were ***applicable*** in cases of a legal lacunae in the Law of Autonomous Communities but ***inapplicable*** when the Autonomous Community had already implemented its own competence.

After the controversial Sentence 61/1997, on urban planning, the jurisprudence of the Constitutional Court on suppletority dramatically changed. Since then, the Constitutional Court considers suppletority as a clause of transitory law, justified only during the constructing phase of the State of Autonomies. The central State cannot use the suppletority clause as source of a general competence since all the Autonomous Communities have implemented their own competences; which vary widely. Ordinary courts and authorities *can* still apply State laws as suppletory law. However, that can only happen once the state laws have been enacted ensuring that these competences are exclusive to the central State.

4. Criticisms of the Constitutional Court jurisprudence.

The criteria stated by the Constitutional Court mentioned above had been decisive in the definitive configuration of our federalist model.

On one hand, the practical disappearance of prevalence implies that, at present, State laws and Autonomous Communities laws are equated in the normative hierarchy under the Constitution. This Constitutional Court contribution ***distances*** Spain from other federalisms such as the United States, Germany and Switzerland. In these jurisdictions Federal Law prevails over State Law when the former has been enacted in pursuance of the Constitution. The deactivation of prevalence I mentioned has placed Spain between other devolved federalisms, like Italy or Austria, whose Constitution equates Federal and States Law.

On the other hand, the new interpretation of the suppletory clause, the constraints imposed on harmonization laws and the deactivation of the residual clause have removed the ambiguity in the distribution of competence that could increase the power of the State.

In this way, the Constitutional Court has closed many of the lacunae and uncertainties that our Constitution left open. In other words, the Constitutional Court has played the role that, in other countries, is played by constitutional framers or, at least, later by lawmakers.

This phenomenon has occasionally put our Constitutional Court in the eye of the hurricane. Although the Constitutional Court decisions have been taken on juridical bases and founded on technical arguments, this jurisprudence has been read in political terms and has been criticized from political points of view.

Those who advocate for strengthening the central State authority consider that the Court has deprived the State of the preeminence which the Constitution provided to it. From this point of view, the restrictive interpretation on prevalence and suppletority departs from the federalist model intended by the framers. This interpretation has deprived the central State of competences that are essential to guarantee unity and solidarity between the different territories of Spain. According to this opinion, the Constitutional Court interpretation has provoked an implicit mutation in the Constitution. It is argued that the Court has not taken into account that the Constitution can only be changed expressly and according to the proceedings stated by the Constitution itself.

Those who are in favor of ***increasing*** the role of Autonomous Communities consider that the Constitutional Court has interpreted too broadly the powers of the central State. This point of view, which inspired the latest and most controversial Autonomous Statutes reforms, criticizes the interpretation given by the Court to the State competences. They consider that the Court has been too ***generous*** to central interests. For this reason, the Autonomous Communities lack the power to implement their own policies, even in matters guaranteed by the Constitution. Thus, they argue,

theirs is an autonomy of "low intensity", since they are forced to ***accommodate*** political decisions taken by the State.

Until now, the Constitutional Court has not been sensitive to these criticism. What is more, in its latest jurisprudence, the Constitutional Court has vindicated its central role as supreme guardian of the Constitution. Let me give an example of this attitude.

One of its most controversial decisions in the last few years has been the STC 31/2010, dictated on the latest reform of the Statute of Catalonia. In this decision the Constitutional Court analyzes the limits that the Statute establishes on the basic laws of the State. The Constitutional Court does ***not*** recognize that to decide what is basic or not is a competence of the State. The court does ***not*** declare that the State disposes of certain freedom under the Constitution previsions. In addition, the Court does ***not*** restrain its mission to review the State decision on the issue.

The Court put the point succinctly by declaring that to decide what is basic "is not a matter to elucidate in a Statute, but only in the Constitution, namely, in the doctrine of this Tribunal which interpreters it."

3. Conclusion.

Until now, we have analyzed a few of the characters which distinguish the allocation of powers stated in the Spanish Constitution from other federal structures. The partial "deconstitutionalization" and the ***flexibility*** of the competence system, far from limiting the role of the Constitutional Court, actually strengthens it.

It is inherent in the nature of most federal systems that the Constitutional Court acts as the "guardian" or the arbiter between the State and the Autonomous Communities. However, the authority of the Court in Spain is greater than that. As we have just seen, the Court has not only the supervisory power over the ***exercise*** of the competences but also over the ***distribution*** of the competences. This decisive influence could put in danger the territorial equilibrium and position of the Constitutional Court in the entire system.

The main problem is that, in the end, the Constitutional Court position varies. The Court is not anymore an institution created to review the decision taken by representatives democratically elected. Far from this, the Court becomes the central actor in the decision making process.

To trace the thin red line that divides the State competences from the Autonomous Communities competences is a delicate task that can be done in technical terms. However, this mission also involves a certain degree of discretion. In fact, there are as many arguments to sustain a particular solution as there are in support of the contrary one. Therefore, certain decisions should be taken by political actors in political terms. And such decision making should be done not only by laws but, specially, modifying the Constitution.

Recently the Court has experienced difficult moments. Its independence and neutrality has been questioned by public opinion and political forces. In this situation, in my opinion, the best contribution to the stability of the Constitutional Court should be to fix the territorial organization by constitutional reform.

Thank you very much for your kind attention.