(GOVERNMENTAL) NEGOTIATIONS OVER DISCREPANCIES BETWEEN NATIONAL AND REGIONAL LAWS: LESS CONFLICTS AND STATE CONTROL OVER REGIONAL LEGISLATION

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Since the year 2000 the national and regional Governments in Spain have the possibility to negotiate aspects of both national and regional laws in order to dispel any doubt about their constitutionality and, as a consequence, avoid resorting to the Constitutional Court. If bilateral negotiations are successful, the agreement will be published within the 9 months following the publication of the law at issue. If no agreement is reached or some points have been left unresolved, the Governments shall bring the case before the Court. The procedure, laid down in Article 33.2 of the Organic Law of the Constitutional Court, has been frequently used in the last 15 years. Its relevance and capacity to unburden the Constitutional Court has been revealed by recent studies such as the work conducted by Xavier Arbós. However, some debatable points have been long highlighted by many authors such as González Beilfuss in his increasingly important contribution to the 2007 Report on the Autonomous Communities. Also in my recent work for the 2015 Report on the Autonomous Communities, which was debated during the Forum on the Autonomy held in the Senate on 20 April, I tried to carry out an in-depth evaluation of the experiences so far and especially the value and effects of the agreements reached.

From 2000 to 2007 negotiations took place in less than 10 cases per year, while in 2011 there were 38 cases, 55 in 2012, 76 in 2013 as well as in 2014, and 79 in 2015. During the last term of office 271 laws were the object of this procedure (89 laws passed by the national Government and 182 by the autonomous communities) and an agreement was reached in almost 200 cases. Nonetheless, these figures hide a big difference between the cases where the object is a national law and those concerning regional laws to the point that they are subject to two completely different procedures.

Agreements on national laws are much more difficult to reach: this has been the case only in around 30% of the negotiations started. The output is always a specific interpretation of the content of the debated articles, but it never suggests modifications and hardly ever an implementing regulation (the two other options). The agreements are generally of a technical nature and address national basic or horizontal competences. This includes determining the scope of application of the law, the possibility for the autonomous communities to develop it or the legitimacy of some actions carried out by them whose adequacy to the new law is arguable. The procedure becomes an instrument for the clarification of the legal framework (in particular regarding the legal competences) that does not question the basic elements of the law and prevents the autonomous communities from resorting to the Constitutional Court – whose judgments are uncertain and particularly remote in time. Some, but few, satisfactory results are obtained, basically concerning the room for development and implementation of the new law. However, sometimes they contradict the original harmonizing purpose of the law.

On the other hand, agreements on regional laws are clearly more frequent (so is the case in around 70% of the negotiations) and usually involve modifications of the law and implementing regulations (both options adding up to around 50% of the cases). This offers much more room for negotiation and subsequent legislation. The proportion of regional laws affected is noteworthy. It is frequently related to national laws of a horizontal –administrative or economic– nature, particularly in the last few years. Sometimes the conflicts go beyond strictly competence-related matters and become a systematic control of the adaptation of the regional law to the national legislation. Of course, this control also has to do with the distribution of competences, closely linked to the political option of liberalization or deregulation (arguable in terms, again, of distribution of competences). In sum, such agreements generally imply that the central Government does not resort to the Constitutional Court (which would entail an immediate suspension of the regional law) in exchange for an amendment of this law which usually includes modifying some of its relevant elements.

These differences are fundamentally explained by the automatic suspension of the regional law challenged before the Constitutional Court, as opposed to what happens with the national law: while the latter cannot be suspended, the former is subject to this possibility, which the national Government uses systematically instead of assessing the necessity on a case by case basis. It is consequently obvious that the pressure that can be exerted by both parties, as well as their negotiating powers, are entirely different, even if the Constitutional Court tends to lift a large part of the automatic suspensions.

The difference in treatment can also be seen in a series of elements that are common to all procedures set forth in Article 33.2 of the Organic Law of the Constitutional Court: the disregard of a public and parliamentary (that is, plural) debate, the bilateral nature (lack of information and debate with the autonomous communities even when the matter at issue concerns national laws) and the problems arising from the material respect for the legal text and the legislator's will.

To summarize, the procedure created has been relatively useful to unburden the Constitutional Court, to reach agreements that improve the legal security of the public administration in the implementation of the law and to systematize the effective control of the central Government over the legislative action of the autonomous communities. However, in order to achieve this, it has introduced insecurity in aspects such as the general nature, or not, of the agreements reached or their compatibility with the law, it has weakened the public and plural elements of the parliamentary debate, and the main aspects of the laws (which are the root causes of the most important conflicts) have not been negotiated at a political level. The procedure is indeed a limited patch that tries to solve a much more relevant and structural deficiency: the necessary political and competence-related debate (and agreement) between the national Government and the autonomous communities before the adoption of laws. As many other elements of this model based on autonomous communities, the debate is in need of an institution that fosters an effective political participation of the autonomous communities in the national decisions, be it a reformed Senate or any similar system.

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