PRIMACY OF THE NATIONAL LAW OVER THE REGIONAL LAW, AND IT GOES ON AND ON…

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In our previous post of 14 July 2016 we explained the innovative nature of Judgment 102/2016 of the Constitutional Court, which has been supported by subsequent Judgments 116/2016 and 127/2016. At the end we posed the question as to whether the Judgment was limited to that specific case or opened up a new scenario where all courts can verify the constitutionality of the laws, no more, no less.

These three Judgments refer to the same case where a "primary legal operator" decided the non-implementation of a law adopted by an autonomous community on the grounds of contradiction with a national basic law, this contradiction arising at a later point in time (the so-called "inconstitucionalidad sobrevenida"). The Constitutional Court turned to the primacy clause laid down by the Constitution and assumed this decision diverged from the previous case-law (as in Judgments 1/2003 or 66/2011). These Judgments were based on the assumption that the regional legislator did not aim to contradict the national law but simply did not adapt to its reform. The decisions included this action within the scope of "leges repetitae", of an act of mimicry by the regional legislator.

The recent Judgment 204/2016, of 1 December, takes a (big) step forward. It gets rid of many determinants of the previous Judgments, although it is hard to say if there will be a limit for this, in which case the previous case-law would come back into play.

This Judgment also examined the possible unconstitutionality of the regional law, but this time due to the subsequent entry into force of a basic provision that did not exist before. Another similarity is that the regional administration (this time, the Bilbao City Council) defended its actions under the umbrella of the national law. The dispute revolved around whether the statute of limitations of a local disciplinary measure had expired or not: the answer was positive by virtue of the Basque Civil Service Law 6/1989, but negative according to the Spanish Civil Service Law.

The first aspect that draws our attention and is also mentioned by the dissenting opinions is that the decision does nothing but reproduce Judgment 102/2016.

The relevance of this case certainly requires a qualified argumentation by the Court, but every opportunity is a lost opportunity here. Operators should construe what the Court says, not what it omits.

Here is an example: Judgment 204/2016 recognizes that the facts are not those of Judgment 102/2016. Nevertheless, it does not sufficiently explain why it suffices to reproduce the latter and apply its results straightaway (dismissal due to lack of referral to the constitutionality of the national law and support to non-application of the regional law because there exists a subsequent national basic law in accordance with the principle of primacy of the national law as laid down by Article 149.3 of the Constitution).

The Judgment even recognizes that, unlike in the previous cases, when the Basque law was adopted it aimed at a subject that had not been regulated by national law. This meant that the regional legislator had made use of its competence, although the law ended up being incompatible with the national law when it later came into force. In the previous case (Galicia), the regional law followed and reproduced the then enforceable national basic law ("without making use of an own competence", as stated by the Constitutional Court), but then the latter changed. It is two different things.

There are actually other differences: in the Galician cases, the national basic law had been supported and ratified in several occasions by the constitutional interpreter, but not here.

Although it is not specifically mentioned in the Judgment, it looks like the Court places value on the fact that the regional legislator does not want to step away from the national one and what happened is just that it did not adapt the law to the national law appearing at a later stage. However, it also seems that the principle of "leges repetitae" is not strictly applicable here anymore based on what has been mentioned above on the Basque regional law.

Old expressions are being reintroduced whose literal understanding would bring us to presume that the new doctrine goes beyond these cases and is much more general: "we are talking about a regional law that was not unconstitutional when it was adopted but has become incompatible with a national basic law adopted afterwards". This applies to any case where unconstitutionality appears at a later stage.

Last but not least, let me mention the usefulness of dissenting opinions in order to understand all dimensions of the majority opinion.