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# UNCONSTITUTIONALITY BY NAME AND UNCONSTITUTIONALITY BY SUSPICION

Eduard Roig
Professor of Constitutional Law at the UB

Last Tuesday, the Spanish Constitutional Court gave leave to proceed to the conflict of jurisdictions promoted by the Government of Spain regarding the precepts of the Decrees of the Generalitat of Catalonia and 45/2016, which confer certain competences to the Catalan Department of Foreign Affairs, Institutional Relations and Transparency.

The Court's ruling has received extensive media coverage. It is therefore worth keeping in mind that the challenge (and its subsequent suspension) is only applicable to the challenged precepts. These only include the expression "foreign affairs" to the name of the Department and create the "Management and Monitoring Service for Foreign Relations", with the following duties: "managing ordinary relations with the General State Administration regarding foreign relations affairs; monitoring external action of Generalitat's departments; writing proposals of participation in interregional and cross-border territorial cooperation networks and associations; supporting events, meetings and gatherings of cooperation networks and associations and maintaining relations among bilateral Government delegations abroad (…)."

In the words of the Council of State, the challenge can be summed up as follows: "using the expression "Foreign Affairs" (…) in the identification of a department part of the Government of the Generalitat."

In this regard, this challenge raises a primary question: can a name be unconstitutional? The statement by the Council of State published prior to the presentation of the conflict (in Spanish) answers this question providing elements that go beyond the name "foreign affairs" and connect it with an action that implies a jurisdictional or unconstitutional overreaching, thus setting the current situation apart from previous uses of the same expression (Decrees 200/2010, 118/2013 or 80/2014.) The Council of State therefore believes the mere denomination of a body, unconnected to its jurisdictional contents, is not enough to raise a conflict. A potential "unconstitutionality by name" is therefore not applicable at first sight.

The analysis of the contents included in the text raises a second question: Does "monitoring", "supporting" or "maintaining relations" mean anything legally speaking? That is, could these actions be performed without a prior allocation? Would annulling said allocation prevent these actions from being performed? This calls into question whether the "norm" is or ceases to be when it includes such general, undetermined allocations that have no legal precision or are

already covered by other norms. Vacuous law is a notion that explains many precepts in our legal system. A vacuous precept being also challengeable is an interesting question that leads us to the (vacuous) efficiency of the corresponding sentence and even to the total vacuity of the “legal” discussion about it.

The third question lies on the search of these additional elements that explain the actual challenge. The Council of State considers the expression “foreign affairs” to go beyond what has traditionally been understood as foreign action, and is linked to the “purpose of creating an institutional structure typical of a subject of international law.” For that, it refers to:

- The mention of strengthening administrative structures of the foreign affairs department in section 2.2.2 of the “White Paper for Catalonia’s national transition.”
- The mention of a “future Service of foreign affairs” with the purpose of “developing standard diplomacy between the Government of Catalonia and representatives of other States and international organisations”, in the “Report on internationalisation of the consultation and the self-determination process” by the Advisory Council for National Transition.
- The possible consideration of the Department as an enforcement instrument of the annulled “Resolution of the Parliament of Catalonia 1/XI” to inform the International Community about the process of creating an independent state.

Let us leave aside whether the quotes of NTC’s report actually include them, or even whether being able to use an administrative structure for a purpose declared unconstitutional implies said structure’s very unconstitutionality. What is interesting is that this reasoning introduces for the first time the category of unconstitutionality by the suspicion of using instruments that are *per se* constitutional for unconstitutional purposes in the future. It is a fertile category with a possible future if it is welcomed by the CC, and has without a doubt expansion potential to new fields, up to now purely assigned to political debate. Avoiding “unconstitutionality by name”, the Council of State has reluctantly fallen into this new category.

Let us trust that the CC, a conservative and unlikely creative institution, will remain one with a more cautious understanding regarding its role and scope of action. Our legislators’ innovations do not need any jurisdictional help.

Institut de Dret Públic

Adolf Florensa, 8, 1r pis Tel. (+34) 93 403 45 35
08028 Barcelona Fax. (+34) 93 403 45 36
www.idpbarcelona.net idp@ub.edu