ATTENTI AL LUPO: THE VENICE COMMISSION STRENGTHENS THE ROLE OF THE JUDGMENTS ISSUED BY CONSTITUTIONAL COURTS BUT WARNS OF THE RISKS OF THEIR ENFORCEMENT

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At its plenary session on 10-11 March 2017, the Venice Commission of the Council of Europe issued an interesting Opinion on the Law of 16 October 2015 amending the Organic Law No. 2/1979 on the Constitutional Court and, more particularly, on the enforcement of its decisions. According to this Opinion, the judgments of Constitutional Courts are binding because of the supremacy of the Constitution. And when a public official refuses to execute a judgment of the Constitutional Court, they violate the Constitution, separation of powers and the rule of law. The Opinion aims to confirm that the goal of the reform is legitimate. And a message to the Catalan pro-independence politicians and public opinion: the strategy of their secessionist process, based on not complying with the laws, leads them to an antidemocratic situation and out of Europe.

This Opinion, written in a diplomatic, measured and elegant English, does not avoid problems but it does not create them either. It is a wake-up call aimed at all those who promoted the reform. Denying this fact would be fooling oneself and preventing some interpretations is needed. The first advice is that European standards demand that the reform of the "institutional legislation" be based on a broad consensus in order to avoid errors. This was not the case.

Secondly, there are no common European standards, although the execution of decisions is a highly political matter and should not be exercised by the Constitutional Court itself. The decision-making body and the executive body should be separated; the attribution of the task to ensure the execution of the decisions is rather exceptional and other bodies should step in to defend the Constitution and the Constitutional Court (which does not have the practical means to force compliance with the decisions).

Thirdly, the power to notify the decisions to any public authority and civil servant is a consequence of the binding nature of the Court's decisions. The same can be said as regards the power to annul any decision contradicting the Court's own decisions. Both powers are correct.

Fourth, the Commission requires the specification of some measures laid down in case of non-execution. Imposing a coercive penalty payment should be clearer as regards the law or its implementation, because the reform does not make a difference between authorities, civil servants and citizens, and does not clarify whether the authority has to pay the penalty from their personal funds. In Judgment 215/2016 the Court considered that penalty payments do not have penal character as this is not their aim. But the Commission understands that they may be considered to be criminal charges because of the level of these penalties under Article 6 of the European Convention on Human Rights. All the more so when private persons are concerned. As regards suspension of officials, it is unclear whether it refers only to civil servants or also to elected officials. The suspension of Members of Parliament who have a

democratic mandate from the sovereign people could also be problematic as they are protected by the prerogatives of the Constitution. Fair trial particular guarantees would thus be required according to Article 6 of the Convention. Additionally, suspension should last only while the office-holder refuses to execute the decision. Concerning substitute enforcement (Article 92.4 of the Law), on the border of Article 155 of the Constitution, the Constitutional Court is likely not to execute this measure itself, but to request the cooperation of the Spanish Government. Penalties and suspensions are the two more problematic measures. However, the Commission does not recommend the Court to perform execution itself.

We already warned about it in this blog when the reform was adopted, and we were not wrong. The secessionist threat had taken the legislator to "adapt to new situations". But many of the execution instruments (some of which had been mechanically transplanted from the administrative branch) were complete strangers to constitutional justice and virtually in comparative law. At the same time, the efficiency of some of them and the constitutional nature of some others raise serious doubts.

Fortunately, the Constitutional Court has been very prudent and has only used those tools that are not controversial such as requests to authorities and annulments of contested decisions. This has contributed to play down the context of the reform. The Court should keep acting this way and controlling its decisions. Self-restraint is a merit that gives strength to the courts, particularly in times of unrest.

However, it cannot be neglected that the Constitutional Court, in its decisions upon the constitutionality of the amendments (Judgments 185/2016 and 215/2016), provided far less guarantees that the Venice Commission now, as condemned by the dissenting opinions.

The Catalan conflict is serious and more cases of disobedience may arise in the future if no political dialogue and legal reforms are offered. When the Catalan Government and Parliament, based on legal ploys, decided not to comply with the rule of law and the Constitution as a political strategy, it was clear that they would also refuse to comply with the judgments. Another step towards tyranny, since no rule of law means no democracy. The convictions for disobedience and the pending criminal proceedings are proof of this tendency. But in a constitutional state not everything is possible – not even in order to fight for secession. It is important to make this clear before new conflicts arise: the force and legitimacy of a constitutional democracy are to be found in the proportion and reasoning of the response and in the respect for the rule of law, even in emergency situations. This is the culture of the European Convention on Human Rights as the Council of Europe reminds us. These recommendations should be borne in mind by both the Constitutional Court and the Parliament, just like the Constitution and the Convention should be respected. And they should be applied through a modification of the Law at issue or, at least, through case law. If the former option is too difficult, the latter, based on a corrective interpretation, should suffice – but this is not obvious. For the future, reforming the institutions should be better thought out and the particularities of the constitutional jurisdiction taken into account more seriously.