TRIBUNAL CONSTITUCIONAL
Gabinete del Presidente
Oficina de Prensa

NOTA INFORMATIVA Nº 53/2013

THE CONSTITUTIONAL COURT REJECTS ITS PRESIDENT's RECUSAL, SOUGHT BY BOTH THE GOVERNMENT AND PARLIAMENT OF CATALONIA, BY A BROAD MAJORITY

The Plenary Meeting of the Constitutional Court has outright rejected the recusals sought by the Government and Parliament of Catalonia against its President in a total of 26 proceedings. The decision was reached by a broad majority of the Plenary Meeting and includes the dissenting opinion of two magistrates. The appellants believed that the Constitutional Court President was subject to the grounds for recusal and abstention foreseen under Article 219.9 and 10 of the Organic Act of the Judiciary ("intimate friendship" with one of the parties and a direct or indirect interest in the suit) due to his former political affiliation. The decision not to hear this appeal is based on the belief that, in this case, in order to reach a decision in law it was not necessary to obtain any further information than that which was submitted by the appellants.

The Court verifies that "membership in political parties is a specific case of exercising the right to association acknowledged in Article 22 of the Spanish Constitution, "which the legislator may limit "for certain groups of people based on the functions they perform." This limitation does not affect the magistrates of the Constitutional Court, whom the Constitution, on the contrary, only prohibits from "performing management functions in a political party or labour union" and "employment in service of such entities" (Art. 159.4 CE). As a result, "mere membership in political parties is a right of which the Constitutional Court magistrates are not deprived," and therefore "it is not appropriate to associate the exercise thereof with automatic consequences in terms of their suitability for performing their function."

The lack of limitation on the exercise of the right of association marks "a difference in nuance" amongst the Constitutional Court members and members of the General Council of the Judiciary "that the constituent has consciously established –as demonstrated by the parliamentary tasks of drafting the constitutional text– and which corresponds with the special nature of the Constitutional Court, with the time limitation of the mandate of its members, with the political nature of its appointments by the three branches of power of the State and with the effect of the rulings of the Court itself, which may correct the decision by these three branches of power."Moreover, it is ordinary practice in neighbouring countries such as Germany, France, Italy and Portugal.

The decision reminds that the Constitutional Court magistrates are subject "to the swearing in or promise which they give when they take their position before the King, of faithfully safeguarding and enforcing the Constitution," and it adds that "the various circumstances which define the personality of each of the magistrates and make up their personal career cannot be considered, without further consideration, negative conditioning factors which affect their impartiality, because the impartiality

which is required by Article 22 of the LOTC is not equivalent to a mandate of general neutrality or a requirement of social and political isolation, nearly impossible to fulfil amongst any professionals, including legal experts of acknowledged competence.""In exercising its functions," adds the Plenary Meeting, "the members of this Constitutional Court act with subjection to strict legal parameters and with the sole means of legal argumentation to resolve the disputes which it comes to examine, even those which have a more clearly political profile or consequences. The arguments, which undergo the proper and occasionally lengthy deliberation at group sessions, are duly recorded with the legal foundations upon which the decision is based."

This ruling cites case-law of the European Court of Human Rights and highlights a judgment in which that Court denied that the membership of a judge of the Appellate Court of Helsinki, Finland to a political party and to that country's Parliament entailed a violation of Article 6.1 (right to a fair trial and impartial judge) of the European Human Rights Convention.

In light of the above considerations, and bearing in mind that the appellants, in their writ, admit the constitutionality of the Constitutional Court magistrates' political affiliation, the Plenary Meeting also rules out that the participation in seminars of Faes, the publication of the book of aphorisms titled "Parva memoria" and the appearance before the Senate Commission, in which Pérez de los Cobos failed to mention his political affiliation, are elements of sufficient entity to accept to hear the recusals.

As for instances of professional collaboration, the decision points out that "one cannot seek the recusal of a judge for the mere fact that he or she possesses legal prior criteria regarding the topics to be decided. Not only the Constitutional Court but also the remaining jurisdictional courts must be made up of judges who do not have an empty mind regarding the legal matters subject to their consideration."They are "legal experts of acknowledged competence," and it is common, before they are named magistrates, for them to have made a statement "regarding legal subjects which may in the end become the direct or indirect object of the task of constitutional judgment which they are legally attributed."

Nor is there any "reasonable objective" basis to be able to claim that any of the aphorisms included in the book "Parva memoria" "compromised the opinion of Magistrate Pérez de los Cobos regarding the constitutional proceedings to which the writs of recusal makes reference."

As for the Pérez de los Cobos' appearance before the Senate, the Plenary Meeting indicates that, because at this act "the question of his membership in political parties" was not brought up, "one cannot conclude that his failure to make a statement regarding his membership in one specific political party constitutes an act of concealment of a circumstance which might affect the exercise of his functions as a constitutional magistrate."

In his dissenting opinion, Magistrate Fernando Valdés dissents from the decision by the majority regarding procedural treatment of the recusals. In his judgment, the opening of a court proceeding for the ancillary suit of recusal would have provided the Plenary Meeting with greater information to reach the final decision. In this sense, he finds that the proceeding would have been more "transparent" and appropriate for strengthening the "public's trust" in the institution.

As for Magistrate Luis Ortega, he disagrees with the majority opinion because, he points out, the principle of independence holds priority over the system of incompatibilities. This magistrate claims that both the principle of independence and

that of objective impartiality are incompatible with status as a member of a political party, given the obligations which those entities' by-laws impose upon their members and militants. As a result, he defends that the decision should have been reached to hear the recusals.

Madrid, 23 September 2013