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THE CONSTITUTIONAL COURT SUSTAINS THAT THE NEW MEASURES ABOUT THE COMPLIANCE OF ITS DECISIONS RESPECT THE CONSTITUTION

The Plenum of the Constitutional Court has sustained that the reform of the Organic Law of the Constitutional Court is in accordance with the Constitution. The Court has dismissed the action of unconstitutionality lodged against the reform of its Organic Law by the Government of the Basque Country. The Judgment, whose rapporteur has been the Judge Pedro González-Trevijano, states that the Constitutional Court has been designed by the Constitution as a "*real judicial body*", and as such, it has the power to execute its decisions. The measure of temporary suspension of an authority or public employee who refuses to comply with the Court's decisions, is not punitive and does not involve a disqualification for office given that its objective is to ensure the compliance of the Court's decisions. Consequently, the Plenum denies that these measures distort the constitutional jurisdiction, modify the check and balances system of Autonomous Communities or violate the rule of Law. The Vice-president of the Court, Adela Asua and the Judges Fernando Valdés Dal-Ré and Juan Antonio Xiol have presented three dissenting votes.

The action of unconstitutionality is brought against paragraphs b) and c) of the new Article 92.4 of the Organic Law of the Constitutional Court. The first paragraph provides the temporary suspension of authorities, public employees or individuals who breach the Court's decisions. The second one foresees the alternative execution of decisions, which may require the Government collaboration.

The Court reminds that the review of constitutionality of Laws is a legal issue, not a political one. Therefore, it does not include "*the legislator intention, its political strategy or purpose*". It is an "*abstract*" review, it does not deepen into specific considerations of application. The specifics shall be analysed by the Court on a case-by-case basis.

Likewise, the fact that the Constitution does not foresee a mechanism to execute the Court's rulings, does not mean that the Court lacks any power to do it. "*If that was the case, it would lack one of the essentials aspects in the exercise of jurisdiction and, by this, the necessary power to guarantee the supremacy of the Constitution*". Due to the above, the Plenum does not reckon that the reform distorts the constitutional jurisdiction model designed in the Constitution. Moreover, it does not modifies the status or functions assigned to the Court. The Court is not a "*frozen in time*" body and the legislator has a wide range of action to regulate its functioning by Organic Law (Article 165 of the Constitution). This constitutional provision allows to regulate the execution of the Court's decisions and to introduce the necessary measures "*to ensure its compliance and effectiveness*". Thus, the challenged measures are "*tools or powers at the disposal of the due and effective compliance of the Court's decisions and all public authorities (Parliaments included) are bound to them*". Likewise, the Judgment reckons that the intention is legitimate because these measures "*try to defend the institutional position of the Court and the effectiveness of its decisions, in order to preserve the primacy of the Constitution (Article 91), whose supreme interpreter is the Constitutional Court itself*".

The action of unconstitutionality claimed that the contested measures corrupted the functions and the institutional position of the Constitutional Court. The Court does not agree with this

and sustains that its duty is not only to put an end to the proceedings, but also to execute the decisions derived from them. There is no violation of the principle that no one can be sentenced for an action which was not an offence when committed. The temporary suspension of authorities provided in Article 92.4 b) of the Organic Law does not represent a punishment by itself. The characteristics of temporary suspension show that its nature is not punitive. The Judgment explains that this measure "*shall only be used in case of infringement of the decision, this means when there is enough evidence of the deliberate intention of disregarding it*". "*The measure will last strictly the time needed and it should adjust to the functions whose suspension is strictly required in order to ensure the execution of the decision*". "*The measure should be lifted as soon as such intention ceases*".

Ultimately, the fact that the suspension measure is "*burdensome*" for the authorities and public employees "*does transform it into a punitive measure*" because its aime is directly linked to the effective execution of the decisions of the Constitutional Court. Moreover, the measure does not pursue to punish an illegal behaviour (as it would be the breach of the Court decisions by the authorities and individuals). Therefore, there is no violation of the constitutional principle of the Rule of Law. The appellant had declared that the second measure, the alternative execution, foreseen in Article 92.4 c) of the Organic Law, equals to the mechanism already established in Article 155 of the Constitution. The Court denies this and adds that the reform does not involve changes in the State check and balance system regarding the Autonomous Communities.

The Court explains that the mechanism of Article 155 of the Constitution (federal oversight) is different from the alternative execution because it is based on a different principle that justifies its application. Article 155 of the Constitution entitles the State to adopt any necessary measures to prevent that Autonomous Communities breach the duties "*imposed by the Constitution or the Law*". "*This also applies to any behaviour that undermines the general interest of Spain*". First, the President of the Autonomous Community concerned is required and then the Government decides on the measures with the approval of the majority of the Senate. By contrast, the alternative execution foreseen in the challenged law is a mechanism at the Courts disposal "*to encourage the compliance with the decisions resulting from the constitutional proceedings*". The Court decides about its application and it may also, if appropriate, require collaboration from the National Government. In any case, the intervention should "*develop in the terms specified by the Court*". There is no disruption in the check and balance system of the State and the Autonomous Communities because the National Government is not allowed to intervene at its will "*deciding on concrete measures*".

The Vice-president of the Court, in its dissenting vote, states: on the one hand, that the Judgment does not evaluate some relevant constitutional issues raised by the appellant (such as, the compatibility of the measures included in the Organic Law with the jurisdictional model designed by the Constitution). On the other hand, the measure of suspension of authorities or public employees should have been considered unconstitutional given its punitive nature. In her opinion, the suspended public employee loses his/her capacity to enforce the decision in question, so as a result it should no longer be considered as a measure of execution. Its purpose is to "*punish*" for the infringement of the Court's decisions. This purpose does not fall within the constitutional duties, particularly when it applies to authorities whose legitimacy comes "*directly or indirectly from the polls*".

The Judge Valdés Dal-Ré reckons that the Judgment does not analyse if the rules challenged are compatible with our '*democratic model of State'*. The Judgment grounds should have focused on the measure of suspension of authorities who breach a decision. This analysis should include the compatibility of the measure with constitutional principles such as "*separation of powers, parliamentary immunity and autonomy, political autonomy of Autonomous Communities and the institutional position of the Constitutional Court in our democratic model*". In his opinion, the Judgment should have declared the unconstitutionality of both measures: the suspension of authorities and public employees (adhering to the arguments already put forward by Asua) and the alternative execution. In reference to the latter, the measure falls within the coercive power attributed to the Government and the Senate (Article 155 of the Constitution), which rules out intervention of the Constitutional Court.

The Judge Xiol Ríos esteems that the abstract analysis carried out by the Court should not have prevented the evaluation of the specific application of the measure, given the socio-political context (the so-called constituent process of Catalonia). Specially, because there will be no further constitutionality review of the Court Judgments. Moreover, the Judge adheres to Asua and Valdés dissenting votes. About the measure of suspension, Xiol deems that its purpose is not the execution of the breached decision but "*forcing the infringing will to cease*". About the alternative execution, he reasons that the Constitution leaves the Court in the background when it comes to the application of Article 155 of the Constitution. This has been amended in the Organic Law because the Constitutional Court has now the power to decide how to perform the alternative execution and how the National Government is going to contribute.

Madrid, 11th November 2016.