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THE CONSTITUTIONAL COURT DECLARES THE INVALIDITY OF SEVERAL PROVISIONS OF LAW 9/2017, REGULATING BULLFIGHTS AND THE PROTECTION OF ANIMALS IN THE BALEARIC ISLANDS, BECAUSE IT INFRINGES STATE PREROGATIVES

The Plenary Session of the Constitutional Court has partially upheld the appeal of unconstitutionality brought by the Spanish Government and has declared the unconstitutionality and invalidity of several provisions of Law 9/2017, dated August 3rd, adopted by the Parliament of the Balearic Islands, on bullfights and the protection of animals.

In particular, the following provisions have been annulled by the Constitutional Court: The words *"in accordance with this law"* of article 1.2; article 5 paragraphs 1, 2, 6 and 7; article 6, 7, 8 and 9; article 15.3 b) as well as the sentence *"so that the journey time from the cattle farm to the bullring is the minimum necessary [...], which [...] will be the nearest, in terms of distance, to the bullring where the bullfighting show is held"* contained in article 4 of this law. Moreover, the Court considered that the following clause is in conformity with the Constitution: *"The cattle supplying the bulls [...] must be registered in the genealogical book of the fighting bovine breed"*.

These provisions refer to the characteristics of age and weight of the bulls that participate in bullfighting shows, the prohibition of both the so-called *"enchiqueramiento"* of bulls and the presence of horses during bullfights, or the use of tools that can cause the death of the animal or produce injuries to it, as well as limiting to three the maximum number of bulls with a participation of no more than ten minutes. Finally, it also regulates the registration of professional participants in bullfights in Section I of the General Register of Bullfighting Professionals.

The sentence, which was drafted by Magistrate Juan Antonio Xiol Ríos, considers that the challenged provisions *"constitute an obstacle to the ordinary celebration of bullfights and cause such a disfigurement of it that it becomes unrecognizable"* as an institution belonging to Spanish cultural heritage, for its qualitative and quantitative alterations of modern bullfighting. In addition, *"they violate the state prerogative for the protection of bullfighting as part of Spain's intangible cultural heritage"*.

The State Attorney considered that Balearic regional law violated several constitutional provisions: the state prerogative to regulate Spanish cultural heritage (article 149.2 of the Spanish Constitution in relation to article 149.1 28); the principle of market unity and of free movement regulated in articles 149.1.13 and 139.2 of the Spanish Constitution as well as article 149.1.1 with respect to the establishment of the basic conditions that guarantee the equality of all Spanish citizens in the exercise of their rights.

The Court reminds that in matters of culture *"it is the duty of the State to preserve the common cultural heritage"*, as well as anything that *"requires general treatment or that cannot*

be achieved by other bodies". In exercise of this competence, Law 18/2013 was promulgated, establishing a general mandate to all public authorities throughout the national territory to ensure the conservation and to promote the enrichment of bullfighting.

The judgment states that *"the Law of the Balearic Islands created a regulation with such a degree of divergence or separation from traditional practices that it is impossible to recognize the core characteristics of bullfighting that the State has protected"*.

On the other hand, the Court points out that the referred autonomous regulation introduces a geographical restriction on the freedom of enterprise by imposing a mandatory condition, namely the proximity of the supplying establishment i.e. the cattle farms to the place where the show is to be held. Hence, the restriction imposed *"is not, among the measures available to pursue its objective, the one with least restrictive or distorting means for economic activity"*.

The judgement is accompanied by several dissenting opinions and one concurring opinion. The first of these is that of the Magistrate who drafted the majority opinion, Juan Antonio Xiol Ríos, who rejects to consider that the state prerogative for the cultural protection of bullfighting can be imposed on autonomous regulations on bullfighting shows based on the exercise of its exclusive prerogative over public shows and animal well-being without an adequate balance. He believes that the Court has given up the chance to make a progressive reading of the previous constitutional case-law that would have allowed to affirm the constitutionality of the challenged regulation. The conformity to the Constitution would thus be founded on the fact that the measures at issue aimed at the survival and preservation of an evolved form of bullfighting, which does not eliminate the essential artistic aspects of modern bullfighting and are historically coherent with its evolution to mitigate the main aspects of cruelty towards animals interpreted according to the sensitivity of the population at each historical time.

The second dissenting opinion is that of Magistrate Cándido Conde-Pumpido, who emphasized that despite the general prohibition of bullfighting in Catalonia has been considered unconstitutional, this does not mean that the autonomous communities – in the exercise of their powers in the matter of public shows and animal protection – cannot establish different modalities of bullfighting shows, such as limiting their bloodiest aspects (eliminating the death of the bull, for instance). This type of bullfighting is common in neighbour countries such as Portugal. In his view, uniformity in cultural matters, in a plural nation like Spain, cannot be imposed by laws or judgments and does not bring strength but weakness.

The third dissenting opinion is that of Magistrates Fernando Valdés and María Luisa Balaguer. In their opinion, it is not admissible to apply to bullfighting, or to any of its particular manifestations, the constitutional technique of "institutional guarantee", because this would protect the *"modern bullfighting"* modality in terms that are close to imposing its absolute intangibility. This feature of intangibility has not been accepted by the Court even regarding institutions that do have an express constitutional protection, such as university autonomy or local autonomy. In addition, they point out that, according to previous constitutional case-law (see STC 198/2012), *"the category "institutional guarantee" seeks the protection of certain constitutionally recognized institutions against legislative action that may attempt to abolish or distort them"*, a doctrine that is not applicable to bullfighting cases.

Finally, Magistrate Andrés Ollero formulated a concurring opinion. His main discrepancy derives from the fact that the appeal should have been upheld in its entirety and not partially, as the ruling has done. What the appellant formulates is amendment challenge to the whole text, resulting from the lack of prerogatives of the Autonomous Community of the Balearic Islands. Thus, it does not make sense to proceed to analyse the possible unconstitutionality of the particular articles to which the appeal referred as mere arguments to reinforce the justification of the amendment to the entirety of the law.

Madrid, 21 December 2018