CONSTITUTIONAL COURT JUDGMENT 46/2015, of 5 March 2015
("Official State Gazette" No. 85, 9 April 2015).

The Constitutional Court, in full bench, composed of the Honour Judges Mr. Francisco Pérez de los Cobos Orihuel (President), Ms. Adela Asua Batarrita, Mr. Luis Ignacio Ortega Álvarez, Ms. Encarnación Roca Trías, Mr. Andrés Ollero Tassara, Mr. Fernando Valdés Dal-Ré, Mr. Juan José González Rivas, Mr. Santiago Martínez-Vares García, Mr. Juan Antonio Xiol Ríos, Mr. Pedro José González-Trevijano Sánchez, Mr. Ricardo Enríquez Sancho and Mr. Antonio Narváez Rodríguez, has pronounced

IN THE NAME OF THE KING

the following

JUDGMENT

In the action of unconstitutionality number 2502/2010, lodged by the Ombudsman against different provisions of the Law of the Catalonian Parliament 24/2009, of 23 December, of the *Síndic de Greuges*. The Government of Spain has appeared as party to the suit, without submitting any pleadings, represented by the State Attorney. The Catalonian Parliament and the Government of Catalonia (*Generalitat*) have been parties and submitted their pleadings. The Judgment has been drawn up by His Honour Santiago Martínez-Vares García, who expresses the opinion of the Court.

I. BACKGROUND FACTS

1. In a writ presented on March 24, 2010, the Ombudsman lodged an action of unconstitutionality against Articles 1.b), 3.1, 26.b) and c) and 78, and also the full Title VII, Articles 68 to 77 both inclusive, of the Law of the Catalonian Parliament 24/2009, of December 23, of the *Síndic de Greuges*. According to the action of unconstitutionality, the challenged provisions allegedly incur the following constitutional infringements:

a) Article 3.1 of Law 24/2009 confers the *Síndic de Greuges* the supervision of the activity conducted by the Administrations, bodies, companies and persons referred in Article 78.1 of the Organic Law 6/2006, of July 19, to reform the Statute of Autonomy of Catalonia [in Spanish, *Estatuto de Autonomía de Cataluña* (EAC)]. The claim reiterates the grounds of the unconstitutionality claim filed by the Ombudsman against section two of Article 78.1 EAC, developed in Article 3.1 of the Law 24/2009, due to enshrining the "exclusive supervision" of the *Síndic de Greuges*, excluding the Ombudsman, in contradiction with Article 54 of the Spanish Constitution (in Spanish, *Constitución Española*: CE) with respect to the supervision powers of the Ombudsman. It also contradicts Article 14 CE, due to an unjustified unequal situation amongst the holders of fundamental rights and freedoms, depending the Administration in charge of the activity affecting the rights.

b) Article 26 of Law 24/2009 foresees that the *Síndic de Greuges* will supervise the activity of "b) The local Administration" and "c) Any public or private bodies related to or dependent on … the local Administration, including in any case autonomous bodies, public companies, agencies, corporations, civil companies, commercial companies, consortiums, public and private foundations, in the terms established in Article 78.1 of the Statute". The unconditional references made to the "local Administration" in points "b" and "c" of this Article are also claimed to be unconstitutional, in similar terms to the Ombudsman claim against the final section of Article 78.1 EAC, implemented by Article 26 of Law 24/2009. For the same reasons as the provision of the Statute of Autonomy, the unconstitutionality should be declared of the provisions of Article 26 of Law 24/2009 referring to the "local Administration" and "or the local Administration", which cover the entire activity of the local Administration and its related bodies, thereby contradicting Articles 54 and 137 CE, overlooking the jurisdiction of the Ombudsman and the case-law of the Constitutional Court relating the supervision powers of the parliamentary commissioners and the Ombudsman over the local Administrations.

c) Article 78 of Law 24/2009, under the title "Cooperation with the Ombudsman", develops Article 78.2 EAC. It is been contested because it overlooks the competences of the Spanish Parliament and its High Commissioner to regulate all relations between the Ombudsman and autonomous parliamentary commissioners, thereby infringing Articles 54 and 66.2 CE.

Here too, the Ombudsman refers to the grounds of its appeal against the Statute of Autonomy, arguing that Article 78.2 EAC infringes Article 54 CE because this provision cannot be implemented by an organic law that reforms a Statute of Autonomy, and Article 14 CE. This claim adds that the regional Law is not entitled either to regulate collaboration between the *Síndic de Greuges* and the Ombudsman.

Furthermore, the claim alleges unawareness of the provisions established in Article 12 of Organic Law 31/1981, of April 6, of the Ombudsman, to which Article 54 CE, paragraph one, refers. Article 12 entitles the Ombudsman to supervise by himself the activity of the Autonomous Community; paragraph two imposes on autonomous parliamentary commissioners to jointly act with the Ombudsman, and foresees the Ombudsman's right of initiative to require the commissioners' cooperation.

d) Article 1.b) of Law 24/2009 names the *Síndic de Greuges* as the Catalonian authority for the prevention of torture and other cruel, inhuman or degrading treatment or punishment, within the scope foreseen in Articles 3.1 and 69. Title VIII, entitled "Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment" (Articles 68 to 77), regulates this status. These dispositions are challenged on the grounds of affecting the State's exclusive jurisdiction in "international relations", recognised in Article 149.1.3 CE. The Spanish Parliament, through Organic Law 1/2009, of 3 November, appointed the Ombudsman as a national mechanism to prevent torture, in connection with the Optional Protocol of the United Nations Convention against torture and other cruel, inhuman or degrading treatment or punishment, adopted by the United Nations General Assembly on 18 December, 2002, and ratified by Spain on 3 March, 2006. With Law 24/2009, of 23 December, the Catalonian Parliament intends to do the same with the *Síndic de Greuges*. This decision is unconstitutional, not only based on the literal wording of Article 149.1.3 CE but also based on the Constitutional Court's interpretation (STC 165/1994, of 26 May). Although the Preamble of Law 24/2009 tries to justify the *Síndic de Greuges*'s appointment with the provisions of Article 196.4 EAC, which confers the *Generalitat* the adoption of the necessary measures —within the scope of its jurisdiction— to execute the obligations derived from international treaties and conventions, it is also right that jurisdiction of the Autonomous Community do not include the right to limit the State to constitute this mechanism. The Spanish Parliament is empowered, and has decided to establish a single prevention mechanism —the Ombudsman—, which is competent to

supervise all Administrations —including the *Generalitat*— in respect of the control of places where persons are deprived of their freedom within the scope of the Protocol.

2. By a decision dated on April 14th, 2010, the Constitutional Court, in full bench, agreed to grant leave to proceed to the action of unconstitutionality, serving notice of the claim, pursuant to Article 34 of the Organic Law of the Constitutional Court (in Spanish, *Ley Orgánica del Tribunal Constitucional*: LOTC), to Congress and to the Senate, through the president of each chamber, and to the Government, through the Ministry of Justice, as well as to the Catalonian Government and Parliament, through the president of each body, in order to appear as parties to the suit within 15 days and submit their pleading, publishing the filing of the appeal in the "Official State Gazette" and "*Diari Oficial de la Generalitat de Catalunya*".

3. By a writ registered on April 28th, 2010, the Senate appeared as party in the proceedings and offered its cooperation for the purposes of Article 88.1 LOTC. In another writ registered on April 29th, 2010, the Congress of Deputies appeared as party in the suit and also offered its cooperation for the purposes of Article 88.1 LOTC.

4. On April 27th, 2010, the State Attorney, on behalf of the Government, filed a writ appearing as party in the appeal, requiring an extension of the term to make pleadings. In a decision dated on April 29th, 2010, the Government appeared as party in the suit and the term was extended for eight more days.

5. The Catalonian Parliament appeared as party in the proceedings by a writ presented on April 30th, 2010, and requested an extension to submit its pleadings.

6. The Catalonian *Generalitat* appeared as party in the suit in a writ presented on May 6th, 2010. Likewise an extension of the term was requested, to submit its pleadings till the maximum legal term allowed.

7. By a decision dated on May 7th, 2010, the writs of the Catalonian Parliament and *Generalitat* were included in the proceedings; they appeared as parties to the suit and the timeframe granted by the decision of on April 14 was extended for eight more days.

8. The State Attorney, in a writ dated on May 12th, 2010, reported that the deputy committee for regulatory monitoring, prevention and resolution of conflicts, belonging to the Bilateral *Generalitat*-State Committee, had decided to begin negotiations in order to: settle the differences raised in relation to Article 1,Title VIII and other provisions of Law 24/2009; a working group in order to propose a solution to the deputy committee was designated; and the resolution was notified to the Constitutional Court in accordance with Article 33.2 LOTC. The State Attorney declared that he did not will to claim pleadings, but he demanded to be notified about the decision when the process finished.

9. The Government of the Catalonian *Generalitat* completed the step in a writ presented to this Court on May 21th, 2010, submitting the following pleadings:

a) In relation to Article 3.1 of Law 24/2009, the *Generalitat* also reiterated its pleadings to the appeal brought by the Ombudsman against Article 78.1 EAC, claiming that the Ombudsman cannot be excluded from the principle of autonomy of Article 2 CE; consequently, its duty to control the Administration does not extend beyond the territorial organization of the State and the distribution of powers,, specifically those conferred to the *Síndic de Greuges*. In any case, both the Statute and current law foresee relationship and collaboration mechanisms enabling the Ombudsman to be informed of any alleged violation of fundamental rights, before bringing the Amparo appeals before the Constitutional Court.

b) The sections "the local Administration" and "or the local Administration", respectively in b) and c) of Article 26 of Law 24/2009, are totally constitutional. The powers of supervision held by the *Síndic de Greuges* are recognised in Article 78 EAC, where paragraph two also recognises that the Ombudsman holds power in Catalonia to control the State Administration, as well as duties to uphold citizen rights, because he is empowered to file Amparo appeals and actions of unconstitutionality. This recognition explains why collaboration needed to be foreseen between the Ombudsman and the *Síndic de Greuges*. Furthermore, to foresee that the Ombudsman is able to supervise the activity of the local Administration in Catalonia does not suggest that this supervision is exclusive.

The constitutional recognition of local self-government becomes an institutional guarantee of the basic self-government of territorial local bodies, but this institutional guarantee does not prevent the local bodies from being externally controlled, by the *Síndic de Greuges*

amongst others. This supervision does not limit the local self-government, as it has no direct and immediate effect on the resolutions of municipal Administrations, which the *Síndic de Greuges* cannot change. Finally, the holders of constitutional rights and freedoms and other rights recognised in the Statute of Autonomy should not be deprived of the *Síndic de Greuges*'s guarantee intervention before the local Administration.

c) Article 78 of Law 24/2009 does not impose a coordination procedure between the Ombudsman and the *Síndic de Greuges*, but instead establishes a principle based on constitutional case-law: the need for collaboration and coordination. Article 78 of Law 24/2009 respects the provisions of the Statute of Autonomy, Constitution and Organic Law 3/1981, of 6 April, of the Ombudsman, recognising that collaboration and coordination are necessary between the Ombudsman and the *Síndic de Greuges*.

d) The appointment of the *Síndic de Greuges* as a national mechanism to prevent torture, Article 1.b), and its regulation in Title VIII of Law 24/2009, represent the execution of the Protocol in matters conferred to the *Generalitat*, and does not affect, disturb or condition the State's reserve, so the Autonomous Communities can manage actions with international projection, as was established in STC 165/1994. The Protocol foresees that all States will establish one or several national prevention mechanisms, as long as they respond to certain characteristics, as it happens in the case of the *Síndic de Greuges*. Once the *Síndic de Greuges* is appointed, the State, as an international subject, must formally notify its appointment to the competent body in the United Nations. Nor is the Ombudsman's entitlement to exercise the national mechanism functions, under Article 3 of Organic Law 1/2009, represents an obstacle for the Catalonian Parliament to establish its own mechanism to act in territorial scopes where the *Generalitat* is competent. The foregoing will apply without prejudice to the various national prevention mechanisms designated by Spain having to coordinate when exercising their duties; certainly, Law 24/2009 does not only prevent this coordination but also encourages and foresees it in several provisions.

Consequently, the Attorney of the *Generalitat* Government requires that, after the adequate proceedings, the decision to be delivered fully dismisses the appeal and states that the challenged provisions of Law 24/2009 are consistent with the Spanish Constitution.

10. The Attorney of the Catalonian Parliament completed the step in a writ presented on this Court on May 26th, 2010, requesting that the action of unconstitutionality be dismissed on the following grounds:

a) The supervision exercised by the *Síndic de Greuges* "on an exclusive basis" over the *Generalitat*'s Administration is not contrary to Articles 54 and 14 of the Constitution. According to the principle of autonomy foreseen in Article 2 CE and the exclusive jurisdiction of the *Generalitat* over its self-government institutions, the autonomous Ombudsman should have exclusively the control over the Administration that depends on the autonomous Government. The reference made to the "Administration" in Article 54 CE does not specify which bodies are mentioned, and if the Constitution had intended that it cover one or all Public Administrations it would have said so, or would have used the word in plural.

The Statute of Autonomy is a special Organic Law which, according to the Constitution, establishes the regulation and functions of the *Síndic de Greuges*, as a co-institution, not subordinated to the Ombudsman, saving for him the Administration of the Generalitat. However, this exclusivity is not complete; there are two fields of competence of the *Generalitat* where the Ombudsman only may act, without the *Síndic de Greuges* having any possibility other than suggesting or collaborating: to file an action of unconstitutionality if the Ombudsman considers that a Catalonian Parliamentary law is contrary to the Constitution (Article 32 LOTC) and, secondly, to lodge an Amparo appeal if the autonomous Administration's conduct infringes fundamental rights (Article 46.1 LOTC).

Two more arguments are added. An ombudsman's capacity for action should depend on the body it represents, in such a way that the Ombudsman cannot control the autonomous Administration. That is because the control measures adopted by the Spanish Parliament over autonomous Governments and Administrations are very limited and exceptional; rather, these powers should be held by the *Síndic de Greuges*. Secondly, comparative international law indicates that in complex States where Ombudsman institutions co-exist in federal or state areas, with others of state and regional scope, the coordination between both ones is regulated on an exclusive basis, as foreseen in Article 78.1 EAC.

b) Supervision of the *Síndic de Greuges* over local bodies and the public and private bodies depending on him, foreseen in Article 26 of Law 24/2009, covers matters under the

Generalitat's jurisdiction. The appellant is wrong in upholding constitutional case-law on infra-statutory rules, in reference to a special Organic Law —the Statute of Autonomy of Catalonia—, the foregoing is not applicable to the interpretation of a statutory rule because the latter, on the contrary, acts as a constitutionality parameter, precisely integrated as part of the Constitution. The autonomy of local bodies does not prevent external checks —such as the *Síndic de Greuges*— including other controlling bodies and resources, over the actions of local bodies, whose existence is not being questioned, such as the Catalonian Data Protection Agency and the *Sindicatura de Comptes*.

c) Article 78 of Law 24/2009 respects the constitutional order, as long as it is adequately construed in the context of an Autonomous State. In this context, Article 78.2 of the Statute of Autonomy of Catalonia recognises and demands collaboration between the *Síndic* and the Ombudsman, without configuring this in a specific legal form, establishing that both institutions should do so in the most respectful and efficient manner possible. This same provision of the Statute of Autonomy also provides sufficient hermeneutic guidelines to determine the scope of collaboration agreements or, simply the day-to-day existence of mutual institutional relations. The cases foreseen therein fully abide by the respective competences of one and the other, and constitute an indispensable minimum for this collaboration.

d) Article 1 b) and Title VIII of Law 24/2009 do not invade the exclusive powers of the State in institutional relations, foreseen in Article 149.1.3 CE, as it is established in Article 196.4 EAC and, essentially, in the case-law laid down in STC 165/1994, which notably extended some lines of interpretation considered in the foregoing doctrine (STC 80/1993). Further to this case-law, if the core reserved to the State in Article 149.1.3 CE is not affected, all Autonomous Communities may carry out activities generally encompassed as "action with international projection", always in accordance with the competences conferred in each Statute of Autonomy and with the legitimate purpose of achieving them.

e) Attribution to the *Síndic de Greuges* under Law 24/2009 of the status as a Catalonian authority for the prevention of torture satisfies, not only the rules of the Constitution, but also to the Statute of Autonomy, Protocol and amendment of the Organic Law of the Ombudsman (Organic Law 1/2009).

Article 196.4 EAC foresees: "The *Generalitat* will adopt the necessary measures to execute any obligations derived from international treaties and conventions ratified by Spain, or binding the State in the scope of its competences". And the *Generalitat* is competent in the matter regulated by the Protocol.

The Protocol allows the creation of one or several "national prevention mechanisms" in each State, which establishes, designates or maintains them according to their domestic law; in complex States, any mechanisms established by "decentralized entities" may be designated as national prevention mechanisms. The appointment is a different matter from the formal notification of this appointment in favour of the Catalonian authority, to the competent United Nations body.

The amendment of the Organic Law of the Ombudsman by Organic Law 1/2009, according to the principle of interpretation in accordance to the Constitution, indicates that the attribution made to the Ombudsman of functions related to a national mechanism for the prevention of torture does not exclude the possibility of other national mechanisms established by Autonomous Communities.

The prevention of torture and other cruel, inhuman or degrading treatment or punishment are all functions within the competence of the *Generalitat*, specifically of the *Síndic de Greuges* further to its protection and defence of human rights, even if it co-exists with the competence generically held by the State and, specifically, the Courts, Constitutional Court and the Ombudsman, amongst others.

11. By a decision dated on March 3rd, 2015, it was scheduled the date to debate and vote this Judgment on March 5th, 2015.

II. GROUNDS

1. The Ombudsman challenges the Catalonian Parliament Law 24/2009, of 23 December, of the *Síndic de Greuges*, Articles 1 b), 3.1, 26 b) and c), —sections "local Administration" and "or the local Administration"—, Article 78 and Title VIII, entirely (Articles 68 to 77, both inclusive).

The Ombudsman alleges the unconstitutionality of Articles 3.1 and 26, b) and c), of Law 24/2009, due to granting the *Síndic de Greuges* powers of supervision over the local Administration and its dependent bodies, without limiting these powers to the matters conferred by the Statute of Autonomy, or any which the latter may have transferred or delegated to local bodies. Consequently, this infringes the jurisdiction given the Ombudsman by Article 54 CE, and the self-government protected by Article 137 CE. In turn, Article 78 of Law 24/2009 is considered unconstitutional due to establishing the execution of agreements between the *Síndic de Greuges* and the Ombudsman to specify the collaboration between both institutions, in breach of Articles 54 and 66.2 CE. According to these provisions, the Spanish Parliament and the Ombudsman are competent to regulate relations between the Ombudsman and the parliamentary commissioners of Autonomous Communities.

The creation of a national mechanism for the prevention of torture is foreseen in the Optional Protocol of the United Nations Convention against torture and other cruel, inhuman or degrading treatment or punishment, adopted by the General Assembly of the United Nations on December 18th, 2022, and ratified by Spain on March 3rd, 2006. The Ombudsman challenges Article 1.b) of Law 24/2009 because it assigns to the *Síndic de Greuges* status as a "Catalonian Authority for the Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment"; this attribution is regulated in Title VIII of Law 24/2009, entitled "Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment", including Articles 68 to 77, all of them have been challenged. The Ombudsman claims that all these provisions are unconstitutional because they ignore the State's exclusive jurisdiction in international relations, established in Article 149.1.3 CE; this competence was exercised by the Spanish Parliament through the Organic Law 1/2009, of November 3, designating the Ombudsman as the national mechanism to prevent torture under the Optional Protocol.

The Government of the Catalonian *Generalitat* opposes to the appeal brought by the Ombudsman, claiming that Articles 3.1, 26.b) and c), and 78 of Law 24/2009 should be interpreted according to the principle of autonomy, recognised in Article 2 CE. Article 78.2 EAC grants the Ombudsman powers to control the State Administration and to guarantee citizen rights; in this sense, the Ombudsman can file Amparo appeals and actions of unconstitutionality, what justifies the need for collaboration with the *Síndic de Greuges*. In the other hand, local self-government does not prevent control by external bodies, including the *Síndic de Greuges.*

According to the *Generalitat*, Article 1.b) and Title VIII of Law 24/2009 do not affect the State's exclusive jurisdiction in international relations, as long as Autonomous Communities observe the requirements established in STC 165/1994, to manage action with international projection. The attribution to the Ombudsman of functions as a national mechanism, under Organic Law 1/2009, does not prevent the Catalonian Parliament from establishing its own mechanism to act in the material scope under the competence of the *Generalitat*, and allowing the State, as an international subject, to notify this appointment to the international body in charge.

The Catalonian Parliament sustains the constitutionality of Articles 3.1, 26 and 78 of Law 24/2009, because the first two do not limit the Ombudsman to act in to the jurisidiction of the *Generalitat*, as there are tow fields of jurisdiction where the Ombudsman is exclusively entitled: to file an action of unconstitutionality and to lodge an Amparo appeal. The *Síndic de Greuges* is acting with respect to Catalonian local bodies, based on the regulations provided by the Laws on Local Administration and the powers held by the *Generalitat* in relation thereto. Article 78 of Law 24/2009, in turn, does not intend to regulate the Ombudsman or to oblige it to follow a coordinating procedure with the *Síndic de Greuges*; it only gathers the principle of collaboration and coordination between the State and Autonomous Communities.

The Catalonian Parliament also considers that Law 24/2009 does not invade the State's exclusive powers about international relations, under Article 149.1.3 CE; further to the case-law laid down by STC 165/1994, the Autonomous Communities may carry out activities generally encompassed as "action with an international projection", as they do not affect the core reserved to the State by virtue of Article 149.1.3.CE and according with the competences entrusted thereto by the Statute of Autonomy, and with the legitimate aim of achieving them. In its opinion, this power comes from Article 196.4 EAC, which imposes on the *Generalitat* the duty of adopting the necessary measures to execute the obligations derived from international treaties and conventions ratified by Spain or binding the State in the scope of its competence. The principle of interpretation in accordance with the Constitution, as it was applied to the amendment of Organic Law 1/2009, which confers the Ombudsman the functions as national mechanism to prevent torture, would also allow other national mechanisms established by the Autonomous Communities.

2. The challenged articles may be divided into two groups. The first would consist of Articles 3.1, 26.b) ("the local Administration") and c) ("or the local Administration") and Article 78 which, according to the claim, are directly related to the alleged unconstitutionality claimed by the Ombudsman in relation to Article 78 of Organic Law 6/2006, of July 19, that reforms the Statute of Autonomy of Catalonia (EAC), in action of unconstitutionality 8675/2006. The second group would consist of the rest of the articles challenged: Article 1.b) and the entire Title VIII (Articles 68 to 77, both inclusive), regulating the attribution of the status of the *Síndic de Greuges* as Catalonian Authority for the Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

3. As part of the first group of challenged articles, Article 3.1 is being questioned on the grounds of entrusting to the *Síndic de Greuges* the supervision powers "on an exclusive basis" over the administrative activity of the Autonomous Community in all orders, which would prevent action on the part of the Ombudsman, thereby breaching Article 54 CE.

Secondly, it is claimed that Article 26.b) ("the local Administration") and c) ("or the local Administration") confer the *Síndic de Greuges* the supervision power over the entire activity of the local administration and its related bodies, overlooking the competence of the Ombudsman, and the case-law of the Constitutional Court on the powers of supervision held by the national and regional Ombudsmen over those public bodies.

Article 78 of Law 24/2009 is challenged for overlooking the competences of the National Parliament [*Cortes generales*] to regulate relations between the national and the regional Ombudsmen.

This set of challenges has been resolved in the Judgments delivered in actions of unconstitutionality against Organic Law 6/2006, of July 19, that reforms the Statute of Autonomy of Catalonia.

STC 31/2010, of June 28 (Ground 33), resolved the challenge of section one of Article 78 EAC, specifically for conferring the *Síndic de Greuges* the supervision of administrative activity of the Autonomous Communities, in all orders, "on an exclusive basis", since this exclusivity would make it impossible for the Ombudsman to act with respect to the Catalonian Administration, thereby breaching Article 54 CE. We then pointed out that the extra-

jurisdictional guarantee inherent to the Ombudsman cannot be limited in scope to supervising the State's Central Administration, but should also include any public Administrations, in order to totally cover all constitutional guarantees for rights related to any variables of public powers. As a consequence, we declared in the mentioned Judgment that the section "on an exclusive basis" of Article 78.1 EAC was unconstitutional, null and void.

On the basis of the previous Judgment, STC 137/2010, of 16 December (Ground 7), reasoned that stated the unconstitutionality of the exclusivity of the *Síndic de Greuges* when protecting and upholding the rights and freedoms recognised by the Constitution and the Statute of Autonomy, it was in fact not unconstitutional for the *Síndic de Greuges* to be in charge of supervising the activity of the Catalonian local Administration and any public or private related bodies that depend on that Administration (Article 78.1 EAC); thus, not being part of the of the *Generalitat* Administration, local Administrations are regulated in the Statute of Autonomy. Nevertheless, this supervision cannot be considered exclusive or excluding of the Ombudsman's supervision, which covers all Public Administrations, whether of a state, autonomous or local nature.

Given the declared unconstitutionality of the section "on an exclusive basis" of Article 78.1 EAC (STC 31/2010, Ground 33), the reference made by Article 3.1 of Law 24/2009 to Article 78.1 EAC involves an article that has been cleared of all unconstitutionality, in which the expression "on an exclusive basis" no longer exists. This way, the Ombudsman's competence to supervise remains not only for the central State Administration but also any public Administration in Catalonia.

The same is applicable to the challenge of the sections "the local Administration" and "or the local Administration", in b) and c) of Article 26, which state that the supervision by the *Síndic de Greuges* of the local Administration and any related public and private bodies which, likewise through an express reference, is made in the terms of Article 78.1 EAC. Once this article of the Statute has been cleared, the supervision of the *Síndic de Greuges* over the local Administration and its related bodies is not exclusive, thereby it does not exclude the Ombudsman's supervision.

The last provision of this first group is Article 78 of Law 24/2009, regulating collaboration between the *Síndic de Greuges* and the Ombudsman. The Ombudsman is

challenging this precept on the grounds that it regulates collaboration between the *Síndic de Greuges* and the Ombudsman, consequently infringing the powers of the Spanish Parliament to regulate relations between national and regional Ombudsmen, breaching constitutional articles 54 (Ombudsman) and 66.2 (legislative power of the State). The matter was settled in aforementioned STC 137/2010 (Ground 7), delivered in the Ombudsman's appeal. The inclusion of this so-called cooperation principle in Article 78.2 EAC and Article 78 of Law 24/2009, implementing it, is conditioned by the principle of voluntariness. Consequently, the cooperation provisions included in regional Laws impose nothing on the State, that is totally free to act. According to this doctrine, Article 78 of Law 24/2009 cannot be declared unconstitutional.

4. The second set of challenged provisions includes Article 1.b) of Law 24/2009, that confers to the *Síndic de Greuges the* status of Catalonian authority for the prevention of torture and other cruel, inhuman or degrading treatment or punishment; and Title VIII —entitled "Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment" (Arts 68 to 77, both inclusive)— regulating this attribution. The Ombudsman is challenging these articles because they breach the State's exclusive jurisdiction on international relations, foreseen in Article 149.1.3 CE; they breach constitutional case-law on the matter, implemented in STC 165/1994, of 26 May; and they contradict Organic Law 1/2009, of November 3, whereby the Spanish National Parliament designated the Ombudsman as the national mechanism for the prevention of torture. Instead, the Catalonian Parliament and Government consider that the challenged regulations do not affect the core reserved to the State under Article 149.1.3 CE. Conversely, this Autonomous Community activity would generically fall within the concept of foreign action, enabling the Catalonian Parliament to establish a mechanism for the prevention of torture in order to act in the material scope where the *Generalitat* is competent. Once a mechanism is established by an Autonomous Community, it is the State, as an international subject, which should appoint it before the competent international body.

The optional Protocol of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, signed in New York on December 18 2002 and ratified by Spain in 2006, aims at establishing a system of periodic visitation performed by both international and national independent bodies, to places where persons are deprived of their freedom, in order to prevent torture and other cruel, inhuman or degrading treatment or

punishment (Article 1). To do this, the signatory States have established a non-judicial preventive system, consisting of an international body (Deputy Committee for Prevention) and one or several national bodies, if so decided by each State (national prevention mechanism), which will visit any place under the jurisdiction and control of the State where persons are or may be deprived of freedom (Articles 2 and 3). To that effect, the deprivation of freedom will refer to any type of detention or imprisonment or custody of a person, by order of a judicial or administrative authority injunction or other public authority, in a public or private institution that cannot be freely abandoned (Article 4).

Article 17 of the Protocol provides that "Each State Party shall maintain, designate or establish, at the latest one year after the entry into force of the present Protocol or of its ratification or accession, one or several independent national preventive mechanisms for the prevention of torture at the domestic level. Mechanisms established by decentralized units may be designated as national preventive mechanisms for the purposes of the present Protocol if they are in conformity with its provisions". This is why Organic Law 1/2009, of 3 November, complementing the Law reforming procedural legislation to deployment of the new judicial office, amending Organic Law 6/1985, of 1 July, of the Judiciary, added a new final single provision to Organic Law 3/1981, of 6 April, of the Ombudsman, related to the national mechanism for the prevention of torture, in the following terms:

> "First. The Ombudsman will act as the National Mechanism for the Prevention of Torture pursuant to the Constitution, this Act and the Optional Protocol of the Convention against torture or other cruel, inhuman or degrading treatment or punishment.
>
> Second. An Advisory Council will be established to act as a technical and legal cooperation body, when exercising the tasks inherent to the National Prevention Mechanism, to be presided by the Attaché, entrusted by the Ombudsman with the duties foreseen in this provision. The Regulations will determine its structure, composition and operation."

Resolution of January 25 2012, issued by the Boards of the Congress of Deputies and the Senate, amended the Ombudsman Organization and Operation Regulations in order to comply with the amendment of the Organic Law of the Ombudsman, by the Organic Law

1/2009, of 3 November, in order for it to act as the national prevention mechanism. Specifically, the amendment establishes the structure, composition and operation of the Advisory Council, which foresees the reform, as the technical and legal cooperation body to exercise the duties inherent to the national prevention mechanism.

The Constitutional Court, in STC 165/1994, of 26 May, restraining the position upheld until then, specifies the content of the State competence title related to "international relations" of the Article 149.1.3 CE: "it can't be excluded in any way, in order to adequately carry out the tasks assigned, that an Autonomous Community may need to carry out certain activities, not just on a supra-regional level but, even, beyond Spain's territorial boundaries" (STC 165/1994, Ground 3). Previously the Court had stated that "the constituent body —in a provision [Article 149.1.3 CE] with an adequately meditated and unequivocal scope, as inferred from the parliamentary drafts— has exclusively reserved to the central State bodies all competences in international relations. The nature of this matter has already been previously upheld, albeit briefly, by the Court (see Constitutional Court Judgments (SSTC) 44/1982, Ground 4, and 154/1985, ground 5)". (STC 137/89, of 20 July, Ground 3). However, the Constitutional Court immediately specified this statement by dismissing "… any relationship, regardless how remote, with matters involving other foreign countries or citizens, meaning that *per se* or necessarily, this competence is attributed to the "international relations" rule"" (STC 153/1989, of 5 October, Ground 8). In later Judgments, the Court has consolidated the doctrine, in which it is accepted that Autonomous Communities can carry out activities with an impact abroad: "the external dimension of a matter cannot be used to construe Article 149.1.3 CE in broad terms, thereby subsuming in the State's competence any measure endowed with some kind of foreign impact, regardless how remote, given that otherwise this would restructure the constitutional order for the allocation of competences between the State and Autonomous Communities" (STC 80/1993, Ground 3).

However, STC 165/1994, of 26 May, also established precise limits on the foreign action of Autonomous Communities: "Notwithstanding the foregoing, the possibility granted to Autonomous Communities, as part of the exercise of their competences, to carry out activity with an impact abroad, and the scope any such activity may have, is subject to a clear limit: the reservations made by the Constitution in favour of the State, to particularly include the reservation foreseen in Article 149.1.3 CE, which confers the State exclusive jurisdiction on international relations" (STC 165/1994, Ground 5).

The doctrine on Autonomous Community activities with international projection, and the scope of the State's exclusive competence in international relations, have been reiterated in STC 31/2010, of 28 June, Ground 125, expressly citing STC 165/1994, of 26 May, Grounds 5 and 6, referred to by the parties in this action of unconstitutionality and, subsequently, in STC 118/2011, of 5 July, Ground 10, cited in turn by STC 138/2011, of 14 September, Ground 4.

The said doctrine, for what interests us here, may be summarized as follows:

a) Autonomous Communities, as part of the exercise of their competences, may carry out activities with international projection, albeit subject to the limit of any reservations made by the Constitution in favour of the State, and, specifically, the reservation foreseen in Article 149.1.3 CE, which confers exclusive jurisdiction on international relations.

b) When determining the scope of the exclusive State competence foreseen in Article 149.1.3 CE it should be taken into account that international relations, as a matter, cannot be identified with any type or activity entailing a foreign scope or impact; otherwise, this would restructure the constitutional order for the allocation of competences between the State and Autonomous Communities, although the actions covered by such competence title, should be excluded in all cases from the activities with international projection of Autonomous Communities .

c) Without intending to exhaustively describe the State's reservation further to Article 149.1.3 CE, the Court has considered as part of the basic components of its content the conclusion of treaties (*ius contrahendi*), foreign representation of the State (*ius legationis*) as well as the creation of international obligations and the State's international liability; in other words, the international relations covered by the reservation foreseen in Article 149.1.3 CE are relations between international subjects, governed by international law; this necessarily means that any foreign action carried out by Autonomous Communities should be limited to actions that do not involve exercising this *ius contrahendi*, do not generate immediate and actual obligations vis-à-vis foreign public powers, do not affect the State's foreign policy, and do not entail its liability vis-à-vis foreign States or inter or supra-national organizations.

d) The State's powers include the possibility of regulating and coordinating the foreign actions of Autonomous Communities, in order to prevent or remedy any potential harm to the management and implementation of the foreign policy exclusively entrusted to the State.

If this doctrine is applied to the case at hand, according to Article 17 of the Optional Protocol "Each State Party shall maintain, designate or establish… one or several independent national preventive mechanisms for the prevention of torture at the domestic level". Article 17 also foresees that "mechanisms established by decentralized units may be designated as national preventive mechanisms for the purposes of the present Protocol if they are in conformity with its provisions". According to this article, it is clear that the "designation" of a national prevention mechanism, foreseen in Articles 3 and 17 of the Protocol, may only be carried out by "each State Party". From another point of view, the Protocol creates international obligations and foresees the State's international liability, as the only party responsible for compliance with the Protocol, not only as regards the designation of national mechanism(s) but also in relation to all other duties imposed by the Protocol, such as cooperation with the Deputy Committee for Prevention, guaranteed functional independence from national prevention mechanisms, enabling compliance with its mandate, or publishing and disseminating the annual reports of national prevention mechanisms, amongst others.

Consequently, Article 149.1.3 CE, as interpreted by STC 165/1994, of 26 May, is not compatible with a situation such as the one raised by Law 24/2009 in the challenged provisions. The Protocol has been signed and ratified by the State exercising its own competences "in characteristic matters of international law, such as the conclusion of treaties (*ius contrahendi*) and the foreign representation of the State (*ius legationis*), as well as the creation of international obligations and the State's international liability (SSTC 137/1987, 153/1989 and 80/1993)" (STC 165/1994, Ground 5). The matter is not unclear and involves powers on which the Constitutional Court has pronounced itself; rather, it constitutes the essential core of this exclusive and totally defined competence, consisting of characteristics matters of international law, for which Autonomous Communities are not competent. Only the State is competent to designate national prevention mechanisms, as foreseen in the Protocol, and to decide whether one or several mechanisms will exist. An Autonomous Community's designation of a prevention mechanism breaches this State power and the state rules designating the mechanism. This designation of a national prevention mechanism is not covered by any competences either —as claimed by the Counsellor of the Catalonian Parliament— foreseen in Article 196.4 EAC,

which are merely cited to, as no competence title is enshrined further to which the State's exclusive competence, contained in Article 149.1.3 CE, may be fragmented; rather, a consequence and logically correlated effect of this state exclusivity is to establish a duty for the *Generalitat*: specifically, "to adopt the necessary measures" in order to ensure the execution of any obligations derived from international treaties and conventions, ratified by Spain or binding the State in the scope of its competences.

In turn, the theory that, once the mechanism is "designated" by an Autonomous Community, it is the State, as an international subject, which should "communicate" the designation to the competent United Nations body, mistakenly presumes that the Autonomous Community is able to impose international obligations on the State which, in this case, would consist of communicating the competent international body of designation of the body by the Autonomous Community and, consequently, the State would be liable for the operation of a mechanism it did not designate. We need to insist on the fact that there are international law matters reserved to the State, which limit any activity with international projection that Autonomous Communities may carry out; one of these limits is that the activity of Autonomous Communities cannot generate the State's liability vis-à-vis foreign States or inter or supra-national organizations: "In light of the scope of the State's exclusive competence, the possibility of Autonomous Communities carrying out activities with an impact abroad should be interpreted as limited to those which, being necessary or at least appropriate, for the exercise of their competences, do not involve a *ius contrahendi*, do not generate immediate and actual obligations vis-à-vis public foreign powers, do not affect the State's foreign policy and do not render it liable vis-à-vis foreign States or inter or supra-national organizations" (STC 165/1994, of 26 May, Ground 6).

As a result of the foregoing, we should declare the unconstitutionality of Articles 1.b), 68.1 and 2, 71.d), 74 and 75 of Catalonian Parliament Law 24/2009, insofar as: i) Articles 1.b) and 68.1 attribute to the *Síndic de Greuges* the status as a Catalonian authority under the framework of the Optional Protocol of the United Nations Convention against torture; ii) Articles 68.2 and 71.d) entrust the *Síndic de Greuges* with competences and duties derived from the said Protocol; iii) Article 69.2 is aimed at articulating collaboration with the State, in order for the *Síndic de Greuges* to be able to fulfil "the duties inherent thereto as a Catalonian Authority", in "State-owned" institutions where persons are deprived of freedom, iv) Article 74 sets the obligation to provide a "monographic report" on any actions taken as a Catalonian

authority bound by said Protocol; and, finally, v) Article 75 designates the *Síndic de Greuges* as the entity collaborating with the Deputy Committee for the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment which, as indicated by Article 2 of the Protocol, carries out its task further to the United Nations Charter and holds relations with the "Party States". The regulation contained in these provisions infringes the State's exclusive competence in international relations, foreseen in Article 149.1.3 CE; furthermore, in the case of Article 69.2, the Ombudsman's exclusive competence is also breached, in relation to the General State Administration in Catalonia, pursuant to Article 54 CE.

An accessory consequence of the declared unconstitutionality of Article 74 of Law 24/2009, establishing the obligation to present "a monographic report" on any steps taken as a Catalonian Authority bound by said Protocol, is the need to declare the unconstitutionality of Article 77.5.c) of the Law, when it entitles the Advisory Council of the *Síndic de Greuges* to "be informed" of the said report "in order to be able to make observations"; this right is based on a report that is issued and presented by the *Síndic de Greuges* that has been declared unconstitutional. On the other hand, this declared unconstitutionality does not affect the *Síndic de Greuges*'s duty to "present to the Parliament each year" a report on the actions taken further to exercising its competences (Article 64.1 of Law 24/2009).

5. This said, the constitutional impropriety incurred by the legislator of the Autonomous Community when designating a national prevention mechanism does not inevitably render unconstitutional all of Title VIII of Law 24/2009; only if the entire content of this title were inseparably connected to this *ultra vires* conduct would it be inevitable to declare the unconstitutionality of all the precepts it contains.

In this way, the fact that only the State is competent to designate the national prevention mechanism established in the Protocol, and to decide whether one or several such mechanisms will exist, as part of the essential core of the exclusive competence in international relations referred to in Article 149.1.3 CE, is insufficient to examine the constitutionality of the other provisions of Title VIII of Law 24/2009.

Therefore, we have to insist on the fact that the functions assigned to the national prevention mechanism do not in any way prevent exercising the supervision powers entrusted to the *Síndic de Greuges*, "exclusively" but not "on an exclusive basis" (STC 31/2010, Ground

33), on the *Generalitat* Administration and the local Administration of Catalonia, specifically in relation to the prevention of torture, other cruel, inhuman or degrading treatment or punishment. Nor do the tasks entrusted to the national prevention mechanism prevent the Ombudsman, further to the powers inherent to its tasks, beyond its designation as a national mechanism to prevent torture, to be able to request the collaboration of the competent parliamentary Commissioner to ensure the effective execution of its dealings and to receive, as such or as the national mechanism designated, any complaints on the activity of the State Public Administration. This collaboration may materialize in agreements, to include the scope of action of the Public Administrations being supervised (Articles 2.2 and 3 of Law 36/1985, of 6 November, regulating relations between the Ombudsman as an institution and similar figures in various Autonomous Communities). The foregoing will also apply without prejudice to the tasks entrusted to the Public Prosecution Service, to which the *Síndic de Greuges* and the Ombudsman should report any "signs of the commission of criminal infractions" or "the existence of presumably criminal conduct or facts" (Articles 45 of Law 24/2009 and 25.1 of Organic Law 3/1981, of 6 April, of the Ombudsman, respectively.

Furthermore, for the purposes of examining the constitutionality of the provisions contained in Chapters II and III of Title VIII of Law 24/2009, respectively entitled "Work Team"·and "Advisory Councilof the *Síndic de Greuges* "for the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment", we need to recall that the Catalonian Parliament, within the area of its competences, by virtue of Article 79.4 EAC, is entitled to regulate "the organisation and attributions" of the *Síndic de Greuges* and that, in addition, the *Síndic de Greuges* "enjoys regulatory, organizational, functional and budgetary independence in accordance with the law".

At this point, based on the premises described, and insofar as only the State is exclusively competent to designate the National Mechanism, we hereby declare the unconstitutionality of the following terms: "Catalonian Authority", heading Chapter I of Title VIII; "as a Catalonian Authority", in Articles 69.1, 71 72.1, 73, 76.1, 77.1; "as a Catalonian Authority", Article 70; as they all identify, in each case where the term is used, the *Síndic de Greuges* as a national prevention mechanism, thereby incurring the *ultra vires* conduct explained above. This is the purpose of the expressions used, as derived from the Preamble of the Law, which aims at "endowing the *Síndic de Greuges* with status as a Catalonian Authority for the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or

Punishment, pursuant to the Optional Protocol of the United Nations Convention against torture and other cruel, inhuman or degrading treatment or punishment, adopted by the General Assembly of the United Nations by means of Resolution 57/199, of 18 December 2002, and ratified by Spain on 3 March 2006".

Likewise, insofar as Article 72.2 allows the *Síndic de Greuges*, in its task as "Catalonian Authority for the prevention of torture and other cruel, inhuman or degrading treatment or punishment", to access "the data of medical records only insofar as related to the functions performed in the matter", such article is hereby declared unconstitutional, as it is solely aimed at granting powers to the *Síndic de Greuges* that are exclusively bound to its task as a national prevention mechanism and, consequently, inseparably linked to the foregoing *ultra vires* conduct.

6. At the same time, after declaring the unconstitutionality of Article 69.2 of Law 24/2009, due to overlooking not only the State's exclusive competence in international relations further to Article 149.1.3 CE, but also the exclusive supervision competence entrusted to the Ombudsman over the General State Administration, the logical consequence is to consider that the reference thereto made in Article 72.1, when stating that the *Síndic de Greuges* "has access to information on the number and location of the places referred to in Article 69, on the number of persons deprived of freedom, on the treatment given to these persons and on the conditions of their detention or imprisonment", should be deemed as referring to Article 69.1, consequently excluding access to any information that may affect State-owned places. In this regard, we have reiterated that the supervision competence entrusted to the *Síndic de Greuges* is "exclusively" limited, albeit not on in an excluding manner, to the *Generalitat* Administration and to the Catalonian Local Administration, without affecting the General State Administration.

If we apply the aforementioned constitutionality parameters, and after removing the terms "as a Catalonian Authority", as unconstitutional, included in Article 71 of Law 24/2009, the powers attributed thereunder to the *Síndic de Greuges* in a), b) and c), consisting of visiting places where persons are deprived of freedom, to make recommendations to the competent authorities and to make proposals an observations about Draft Bills, as well as the reference contained in Article 73.1 of said Law "on the premises deemed appropriate in those places where persons are deprived of freedom", should be deemed as exclusively referring to places

owned by the *Generalitat* Administration and the local Catalonian Administration, authorities of such Administrations and, ultimately to Draft Bills of the Catalonian Parliament.

Finally, we would like to point out that Article 73.2, when establishing the possibility of the *Síndic de Greuges* holding interviews, obtaining the doctor's opinion, insofar as such functions may be deemed as severed from the duties assigned as a Catalonian Authority, as part of the supervision tasks of the *Síndic de Greuges* referred to, does not entail any unconstitutionality whatsoever. The foregoing is likewise affirmed in relation to Article 76 and 77, after clearing the terms "as a Catalonian Authority", as unconstitutional, contained in Articles 76.1 and 77.1, and declaring the unconstitutionality of Article 77.5.c), insofar as they respectively configure the creation, composition, selection of members and functions of the "Work Team" and "Advisory Council" of the *Síndic de Greuges* to prevent torture and other cruel, inhuman or degrading treatment or punishment. Thus, we have affirmed that the Catalonian Parliament, in the scope of its competences, by virtue of Act 79.4 EAC, is entrusted to regulating "the organization and attributions" of the *Síndic de Greuges* and, furthermore, that the *Síndic de Greuges* "enjoys regulatory, organizational, functional and budgetary independence in accordance with the law" when exercising its competences.

RULING

For all of the above, the Constitutional Court, BY THE AUTHORITY CONFERRED BY THE CONSTITUTION OF THE SPANISH NATION,

Has decided

To partly uphold the unconstitutionality appeal lodged by the Ombudsman against Catalonian Parliament Law 24/2009, of 23 December, of the *Síndic de Greuges* and, consequently, to declare that:

1. The following are not unconstitutional, interpreted in the terms expressed in Ground Three above: Articles 3.1; 26.b) ("the local Administration") and c) ("or the local Administration") and Article 78, as well as Articles 71.a), b) and c), 72.1 and 73.1, as long as they are interpreted as foreseen in Ground Six above.

2. The following are unconstitutional and, consequently, rendered null and void: Articles 1.b), 68.1 and 2, 69.2, 71.d), 72.2, 74, 75, 77.5.c) and the "Catalonian Authority" terms, heading Chapter I of Title VIII, "as a Catalonian Authority" in Articles 69.1, 71, 72.1, 73, 76.1, 77.1 and "further to its status as a Catalonian Authority" in Article 70.

May this Judgment be published in the "Official State Gazette".

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