Constitutional Court Judgement 30/2011, of 16 March 2011 (Unofficial translation)

The Constitutional Court, in full bench, composed of the Honour Judges Mr. Pascual Sala Sánchez, as President, Mr. Eugeni Gay Montalvo, Mr. Javier Delgado Barrio, Ms. Elisa Pérez Vera, Mr. Ramón Rodríguez Arribas, Mr. Manuel Aragón Reyes, Mr. Pablo Pérez Tremps, Mr. Francisco José Hernando Santiago, Ms. Adela Asua Batarrita, Mr. Luis Ignacio Ortega Álvarez and Mr. Francisco Pérez de los Cobos Orihuel, has pronounced

IN THE NAME OF THE KING

the following

J U D G E M E N T

In the action of unconstitutionality No. 5120-2007, brought by the Governing Council of the Junta de Extremadura against Articles 43, 50.1 a), 50.2 and 51 of the Organic Law 2/2007, dated 19th March, reforming the Statute of Autonomy for Andalusia. The State Lawyer, the Parliament of Andalusia and the Government of Andalusia have been parties to the proceedings. The judgement has been drawn up by Judge Javier Delgado Barrio and expresses the opinion of the Court.

II. Grounds

1. The main, and practically only, purpose of this action of unconstitutionality is to bring a challenge against Article 51 of the Organic Law 2/2007, of 19 March, reforming the Statute of Autonomy of Andalusia (in Spanish: *Estatuto de Autonomía para Andalucía*, hereinafter EAAnd), on the grounds that the competences attributed therein to the Autonomous Region of Andalusia over the basin of the River Guadalquivir breach, in the opinion of the Governing Council of the Junta de Extremadura (regional government), those competences reserved to the State in Article 149.1.22 of the Spanish Constitution (in Spanish: *Constitución Española*, hereinafter, CE). A formal challenge is also brought against Articles 43, 50.1 a) and 50.2 of the Organic Law, but as the parties to these proceedings, and even the petitioning Government coincide in noting, these provisions are challenged insofar as their systematic interpretation in relation to Article 51 EAAnd would imply, by referral, the same defect of unconstitutionality as the challenged article.

The wording of Article 51 EAAnd is as follows:

> "The Autonomous Community of Andalusia has exclusive jurisdiction over the waters of the Guadalquivir basin that pass through its territory and that do not affect any other Autonomous Community, without prejudice to the general planning of the hydrological cycle, the basic rules on environmental protection, hydraulic public works of general interest and the provisions of Article 149.1.22 of the Constitution."

The Junta de Extremadura opposes, in essence, the constitutionality of this provision on the grounds that, being a supra-community river basin, the Autonomous Community of Andalusia cannot assume exclusive jurisdiction in its Statute of Autonomy over the waters of the basin the Guadalquivir that pass through its territory, since this would conflict with Article 149.1.22 CE, which reserves jurisdiction identified pursuant to a territorial criteria as belonging to the State, that today, and under the state water law, manifests itself, with the endorsement of constitutional case law, in the criterion that a natural river basin is a unit of management in the domain of water policy. By attributing jurisdiction to the Autonomous Community that are constitutionally reserved for the State, the challenged provision also infringes, in the opinion of the petitioners, Article 147.2 d) CE, which provides that the Statutes of Autonomy must contain the "powers assumed within the framework established by the Constitution." With respect to this second alleged constitutional violation, it is necessary to agree with the position defended by the State Lawyer, for whom any potential infringement of Article 147.2 d) CE could only be reflected, derived or consequential from a breach of Article 149.1.22 CE in that it lacks autonomy from that provision.

The State Lawyer offers an interpretation of the challenged provision that is in accordance with the Constitution, in the sense of understanding that the Autonomous Community of Andalusia is not attributed "exclusive jurisdiction" over the waters of the Guadalquivir basin that pass through Andalusian territory, but the provision merely states that the Autonomous Community has a series of "exclusive powers" over such waters, i.e., only certain competences (albeit of an exclusive nature), but not all possible competences and respects, therefore, those exclusively reserved to the State under 149.1.22 CE.

Finally, both the Parliament and Government of Andalusia challenge, on the one hand, the lack of legal standing of the petitioning Government, and on the other hand, unreservedly defend the constitutionality of Article 51 EAAnd, claiming that the *Cortes Generales* (National Legislative branch in Spain) can modify the configuration of the water Laws while respecting the principles that seek to safeguard the same river basin through the system of indivisible resource management, which in the opinion of both regional bodies is amply guaranteed with all the caveats and conditions specified in Article 51 EAAnd itself.

2. Before considering its merits, it is necessary to determine whether, contrary to what is claimed by the Parliament and Government of Andalusia, the petitioning Government of Extremadura has the legal standing required for bringing this action of unconstitutionality. The Governing Council of the Junta de Extremadura justifies this legal standing on two grounds: first, the supra-regional nature of the Guadalquivir basin, comprising eighteen municipalities of the province of Badajoz within its area; and the other, the harm caused by the challenged provisions to the autonomy of the Autonomous Community of Extremadura. These two factors are sufficient grounds, in its opinion, to recognise the necessary legal standing to bring this action, even under the narrowest possible interpretation of Article 32 Organic Law of the Constitutional Court (*Ley*

Orgánica del Tribunal Constitucional, hereinafter LOTC), which furthermore is not, nor has it been for some time, the interpretation accepted by constitutional jurisprudence.

While the State Lawyer has not raised any objection to the standing of the petitioning Government, the Parliament and Government of Andalusia argue that even using a more flexible interpretation of Article 32 LOTC it is not possible to recognise the legal standing of the Government of Extremadura to challenge, in the terms argued, Organic Law 2/2007, of 19 March. This is because firstly, the petitioning Government has not sufficiently substantiated the existence of concrete and effective harm to its own competences; and, secondly, because the wording of the challenged provisions excludes any possible impact on the scope of autonomy of other Autonomous Communities. Ultimately, the Governing Council of the Junta de Extremadura brought this action in defence of the competences of the State *as per* Article 149.1.22 CE thus seeking with its claim to objectively clarify the legislation irrespective of any connection with an own autonomous interests, which is far removed from the broadest sense of Article 32.2 LOTC, whose jurisprudential relaxation has not gone so far as to confound it with Article 32.1 LOTC.

3. The objection raised by the Parliament and Government of Andalusia cannot be admitted. Accordingly, and as both institutions do not cease to admit, the legal standing of the Governing Council of the Junta de Extremadura cannot be denied standing to bring an action challenging the constitutionality of a Statute of Autonomy —State Law, under Article 147.3 CE and Articles 27.2 a) and 32.1 LOTC— against which, moreover, in terms which we will further discuss below, the petitioner denounces an impact on the scope of its constitutionally guaranteed autonomy. This is clear from this court's interpretation of Article 32.2 LOTC, according to which "the scope of interest of the Autonomous Community that justifies its legal standing is not identified with the defence of its jurisdiction [Judgments of the Constitutional Court (in Spanish, Sentencia(s) del Tribunal Constitucional, SSTC hereinafter) 84/1982, 26/1987 and 74/1987], since neither can the action for unconstitutionality be equated with a conflict of jurisdiction, owing to its nature as a tool for objectively clarifying the legislation, nor can the 'scope of self-government' in Article 32.2 LOTC be identified with the range of statutory competences", having concluded that "such legal term refers more broadly, to the institutional position occupied by the Autonomous Communities in the legislation, i.e., the set of competences and powers and also the guarantees, constitutional and statutory, that preserve such autonomous status [STC 56/1990, Ground (in Spanish, fundamento jurídico, FJ hereinafter) 3]" (STC 28/1991, of 14 February, FJ 3).

In the terms of STC 48/2003, of 12 March, repeated in STC 247/2007, of 12 December, FJ 2 a), although initially "this Court interpreted the restriction of Article 32.2 LOTC in a strictly jurisdictional sense (see STC 25/1981, of 14 July), ... very soon —with STC 84/1982, of 23 December— there began a line of case-law that progressively relaxed this criterion, to the extent that, today, it can be said that the material conditions for the legal standing of Autonomous Communities to challenge State laws are a true exception. In the words of STC 199/1987, of 16 December, 'the legal standing of Autonomous

Communities to bring an action of unconstitutionality is not at the service of the jurisdiction infringed, but rather serves to clarify the Legal System and, in this sense, ... it extends to all those cases in which there is a point of material connection between state law and the scope of autonomous competence, which, in turn, cannot be interpreted restrictively' (Ground 1)" (STC 48/2003 of 12 March, FJ 1).

In this case, the objective interest in clarifying the legislation is compounded by the institutional interest of the Governing Council of the Junta de Extremadura in the defence of its scope of self-government, which, in its opinion, has been harmed by the challenged provisions that affect the water laws of a river basin that includes eighteen municipalities from its own territory. This fact alone is already ample proof of the existence of a relevant material connection between the challenged Statute of Autonomy and the scope of jurisdiction of the Autonomous Community of Extremadura, which is sufficient *per se* to recognise the legal standing of the Governing Council of the Junta de Extremadura under Article 162.1 a) CE, since it is obvious that the scope of jurisdiction of that Autonomous Community includes the management of the interests of those municipalities in Extremadura bordering on waters over which the Autonomous Community of Andalusia could not have exclusive jurisdiction pursuant to the territorial criterion making such jurisdiction constitutionally unavailable to the Statute of Autonomy of Andalusia .

Indeed, the claim does not argue that the Autonomous Community of Extremadura should hold such jurisdiction which in its opinion belongs to the State. This does not mean, however, that the Governing Council of the Junta de Extremadura is bringing a claim in defence of a competence belonging to a third party, but, more precisely, it is defending an order of distribution of competences which, in its opinion, submits the waters of a river basin belonging to eighteen municipalities of Extremadura to the exclusive jurisdiction of the Central Government, thus excluding the possibility that any Autonomous Community, including that of Extremadura, could also hold jurisdiction over these waters. The legitimate interest of the Autonomous Community of Extremadura is not in question in that, since it cannot have exclusive jurisdiction over the laws of those waters, neither should the Autonomous Community of Andalusia, and instead only the Central Government may adopt the territorial criteria governing the water laws, and if appropriate, subsequently grant powers to the Autonomous Community of Extremadura allowing it to exercise competences which primarily belong to the State.

The Government of Andalusia has argued, in particular, that the legitimate interest of the petitioning autonomous Government is only based on territorial criteria that correspond to the criteria of the ordinary state legislator. However, a central issue that must be resolved in these proceedings is precisely whether such criteria may or may not be modified by a Statute of Autonomy, so that ultimately, the objections opposing the legal standing of the Governing Council of the Junta de Extremadura are more concerned with the allegations of unconstitutionality in the action brought than with its legal standing *per se*. This is also the case with the objection to the legal standing of the petitioning

Government based on the objective impossibility of any harm to its scope of competence arising from the content of Article 51 EAAnd itself.

4. This Court must, therefore, rule out the procedural obstacle argued by the Parliament and the Government of Andalusia and proceed to analyse the reasons expressed by the petitioner to challenge the constitutionality of Article 51 EAAnd. In order to precisely define the substantive issue raised in this constitutional proceeding it is necessary to bear in mind two considerations, pertaining, respectively, to the scope and content of our judgement.

First, by attributing the disputed competence to the Autonomous Community of Andalusia through the reform of its Statute of Autonomy, the issue of the constitutionality of Article 51 EAAnd refers to whether or not this competence is reserved exclusively to the State under Article 149.1.22 CE, since only in the event of a negative answer could such competence, in the terms of Article 149.3 CE, "pertain to the Autonomous Communities, according to their respective Statutes of Autonomy", so that, in response to the subject of the challenge, the question of constitutionality and the limits of the possible attribution of competences by regulations other than the Statute of Autonomy referred to Article 51 EAAnd is therefore outside the scope of our judgement.

Secondly, the challenged provision must be analysed from two perspectives. On one hand, we must verify whether Article 51 EAAnd infringes Article 149.1.22 CE for material or substantive reasons, i.e., in response to the content of the regulation included therein. On the other hand, we must also verify whether this regulation is constitutionally permissible through the type of law containing it, in such a way that if the answer is negative, the challenged provision would incur in an unconstitutionality of a formal nature, to the extent that this consideration would be derived from the nullity of the type of law employed based on the legal formalisation of the challenged decision.

The review of the possible unconstitutionality of Article 51 EAAnd for material reasons, underlying the approach of the action brought by the Governing Council of the Junta de Extremadura and that has also been introduced into the debate by the Parliament and the Government of Andalusia, must precede the formal control of the constitutionality of the aforementioned provision since this issue affects the exclusive jurisdiction of the State *as per* Article 149.1.22 CE, concerning a natural resource that is of such essential vital, social and economic importance as water. It must be remembered that "the Constitution, which does establish matters of state jurisdiction, does not directly specify the content or scope either of the materials or the material functions to which it applies, nor does it contain explicit rules of interpretation that immediately allow such content or scope to be specified, which, ultimately, can only be expressed by the Constitutional Court" (STC 247/2007, of 12 December, FJ 7) and also that "the Statute of Autonomy, insofar as it is a regulation approved by the National Legislative, can perform its function of attributing jurisdiction to the Autonomous Community, with the consequent distinction between state and autonomous powers, focusing on the scope of the former", although "it is obvious that this possible statutory regulation may under no circumstances violate the

framework of Article 149.1 CE, distorting the content that is specific to each matter and permitting its recognisability as an institution. What is important in this respect is that the Statute of Autonomy, as a regulation of limited territorial effectiveness, when it must occasionally specify the scope of matters pertaining to the jurisdiction of the state, must do it so in order to provide a more specific definition of the powers corresponding to the Autonomous Community and that, by doing so, it must not prevent the full deployment of the functions pertaining to the central state, as regulated in Article 149.1 CE in question. Only if these requirements are met, will such an approach be consistent with the Constitution ... in any case, only this Court has the power to decide, as the supreme interpreter of the Constitution, if the Statutes of Autonomy have incurred some defect of unconstitutionality, either for exceeding the margin of interpretation of the Constitution in which they can legitimately intervene, or for any other reason" (STC 247/2007, FJ 10).

Consequently, it is unavoidable that this Court rules on the content and scope of the exclusive state jurisdiction in water related matters established by Article 149.1.22 CE and the impact that the assumption of autonomous competences contained in Article 51 EAAnd has on the scope of said state jurisdiction.

5. Having established the foregoing premise, we must now go on to examine whether Article 51 EAAnd infringes Article 149.1.22 CE for material or substantive reasons, i.e., with regard to the contents of the regulation it incorporates, for which we must begin with the doctrine established in STC 227/1988, of 29 November (reiterated in 161 SSTC/1996 of 27 October, and 118/1998, of 4 June), in which this Court ruled on the constitutionality of the principle of unity in the management of river basins as a criterion of territorial demarcation employed by Law 29/1985 of 2 August, of Waters, in order to define the scope of Article 149.1.22 CE, a criteria that is upheld in the prevailing Waters Law (revised text approved by Royal Legislative Decree 1/2001, of 20 July, amended by Law 62/2003, of 30 December, which defines "river basin", coinciding with the provisions of Article 2 of Directive 2000/60/EC of 23 October 2000, the European Parliament and of the Council, establishing a framework for Community action in the field of water policy (as amended by Directive 2008/32/EC of 11 March 2008, of the European Parliament and the Council), as "the area of land from which all surface run-off flows through a sequence of streams, rivers and, possibly, lakes into the sea at a single river mouth, estuary or delta". In this regard, surface freshwater as well as renewable flows of groundwater, to the extent that they flow into the natural catchment network of a river basin, belong to that basin and are thereby all integrated in the hydrological cycle (Article 1.3 of the Waters Law). Moreover, to the concept of river basin we must add that of "river basin district", defined as "the area of land and sea, made up of one or more neighbouring river basins together with the transitional waters, groundwater and coastal waters associated with these basins" (Article 16 *bis* of the Waters Law, as amended by Law 62/2003, of 30 December, which also incorporates the definition contained in Article 2.15 of Directive 2000/60/EC).

By attributing to the Autonomous Community of Andalusia the exclusive jurisdiction over the waters of the Guadalquivir basin, being as this is an inter-regional river basin, Article 51 EAAnd departs from the principles established in Article 149.1.22

CE and the criteria used by the Waters Law (revised text approved by Royal Legislative Decree 1/2001, of 20 July, amended by Law 62/2003, of 30 December) establishing the State's jurisdiction over territorial delimitation contained in said constitutional provision ("waters [that] flow through more than one Autonomous Community"). And the statutory provision attributes this jurisdiction with a criterion ("waters of the Guadalquivir basin that pass through its territory and do not affect another Autonomous Community") that leads us to understand that it embraces a fragmented water management model within the same inter-regional river basin, pursuant to which a portion of the waters of the Guadalquivir basin fall within the exclusive jurisdiction of the Autonomous Community of Andalusia and another portion of the waters of that same inter-regional basin would fall under the exclusive jurisdiction of the State.

At this point we must recur to the criteria established in the aforementioned STC 227/1988, of 29 November, in which the Court made some considerations that are appropriate to recall:

a) First, it is "necessary to start, above all, with the specific constitutional references with regard to 'waters' that are contained in Articles 148.1.10 and149.1.22 of the Constitution. Under the first of these requirements, the Autonomous Communities may assume competences over 'planning, construction and exploitation of hydraulic projects, canals and irrigation of benefit to the Autonomous Community' in question; in accordance with the second provision, the State has exclusive jurisdiction over the 'legislation, regulation and concession of hydraulic resources and development when the waters flow through more than one Autonomous Community'. The two provisions do not coincide, either from the point of view of the subject-matter defined, or with regard to the criteria used to delineate the powers of the State and those of the Autonomous Community over the subject-matter, which, in the first case, is the interest of the Autonomous Community, and in the second, the territory through which the waters flow." (FJ 13).

b) Secondly, in STC 227/1988, the Court upheld the "constitutionality of using the Waters Law as a territorial criteria for the exercise of the competences of the State with regard to continental waters of a river basin extending beyond an Autonomous Community", since "when the Constitution uses the term 'waters that flow', it does not necessarily consider isolated currents or courses, let alone does it oblige the jurisdiction to be split over different sections of the same river course. Rather, it is fair and reasonable to assume, as so does the challenged Law, that to delimit the exclusive jurisdiction of the State, the constitutional provision allows us to refer to the entire water network of each basin, which through main and subordinate streams, cross the territorial limits of an Autonomous Community. This is not contradicted by the fact that the Constitution and the Statutes of Autonomy have not explicitly sanctioned the structural concept of the river basin, since in no case could this omission be attributed to the intention of the legislators to implicitly exclude it, a conclusion that cannot be drawn, on the contrary, from the parliamentary antecedents." (FJ 15).

c) Third, while it is certain that in STC 227/1988 this Court stated that "as a whole the provisions included in the 'constitutional bloc' applicable to water can give rise to more than one interpretation, without stretching the concepts used in these provisions and always within constitutional limits", it also immediately warned, however, that "in the performance of the interpretative task of the rules of competence established in the Constitution and the Statutes of Autonomy, and as required by the criterion unity of the Constitution, requiring each of its rules to be given stronger legislative power, this Court must also consider all the constitutional principles of a material nature that pertain, directly or indirectly, to the planning and management of natural resources that are as important as water, principles that, in summary, can be encapsulated in the constitutional mandate which requires all public authorities to ensure the 'rational use of all natural resources' (Article 45.2 of the Constitution). Therefore, among the various possible interpretations of the rules of distribution of powers, this Court can only reasonably support those interpretations that enable it to fulfil that mandate and achieve the objectives of protecting and improving the quality of life and the protection and restoration of the environment to which the mandate is inseparably linked." (FJ 13).

d) As a corollary to the above, in the aforementioned STC 227/1988, this Court made a clarification that is now revealed to be of the utmost importance, by stating that the "expression 'waters that flow through more than one Autonomous Community' is a constitutional concept the meaning of which must be explained on the basis of logical and technical criteria and experience. From the point of view of the logic of management, it does not seem reasonable to isolate the legal regime and the management of the waters of each river course and its tributaries in response to the geographical confines of each Autonomous Community, since it is evident that the uses and developments that take place in the territory of one Community will condition the possibilities of using the flows of the same rivers, major and minor, when they cross the territory of other Communities or flow into inter-regional rivers. This conditioning, moreover, not only occurs upstream to the detriment of the territories through which a current flows into the sea, but also downstream, to the possible detriment of the territories where the flow originates or passes, since the concession of a flow in any case implies a respect for existing rights, so that the uses conceded downstream or at the end of a course or can impede or harm the right of use of the waters in upper stretches. By contrast, the criterion of the river basin as a management unit allows for the balanced management of water resources that comprise the basin, in response to all the interests concerned, that when the basin extends to the territory of more than one Autonomous Communities, are manifestly of supra-community interest. From a technical standpoint, it is also clear that the waters in a same basin form an integrated whole that must be managed in a uniform manner... This has been shown from international experience on the subject ... The experience of managing these resources in our country, structured around the unit of each river basin, since the adoption of a global water policy concept, leads to the same conclusion." (FJ 15).

e) As a result of the above, in STC 227/1988, FJ 15, this Court rejected the idea of fragmenting the river basin as advocated by the Basque Government in its challenge of Waters Law 29/1985, of 2 August, consolidated in the prevailing Waters Law (revised text

approved by Royal Legislative Decree 1/2001, of 20 July), by attempting to introduce the concept of "specific river course" to claim the autonomous community's competence over "rivers or streams that flow entirely through the territory of one Autonomous Community, and flow entirely into another river or in a lake or the sea", and even the concept of "final stretch", in reference to rivers that flow through more than one Autonomous Community, in the sense that "where a river ends it [the Community] should have jurisdiction over the final stretch, from where it enters its territory, since in that case the use that is made of the flow only affects the interests of that Autonomous Community."

f) In addition, in STC 227/1988, FJ 16, we warned that "groundwater flows, as they converge into the network of channels of a river basin ... belong to that basin and are thus integrated in the water cycle", hence, "once the constitutionality of the river basin approach has been admitted, in accordance with the provisions of Article 149.1.22 of the Constitution, there is no doubt that the same criterion of territorial delimitation of competences can be applied to groundwater, provided these are renewable waters that are integrated into a network of channels converging in the basin itself, and the references to groundwater that are contained in the Statute of Autonomy should therefore be interpreted in this way."

6. Our starting point necessarily consists in the fundamental considerations of STC 227/1988, ratified by SSTC 161/1996, of 17 October and 11/1998, of 13 January, which now lead us to conclude that although the river basin approach is not the only constitutionally viable approach in the context of Article 149.1.22 CE, we must state that the National Legislative cannot specify the jurisdiction of the State in this matter by fragmenting the management of the inter-regional waters of each river course and its tributaries.

Indeed, as the Court noted in the aforementioned STC 227/1988, a systematic interpretation of Article 149.1.22 CE in relation to Article 45.2 CE that calls for the "rational use of natural resources", led us to hold that "among the various possible interpretations of the rules of distribution of competences, this Court can only reasonably support those that enable it to fulfil that mandate" adding that "it does not seem reasonable to isolate the legal regime and the management of the waters of each river course and its tributaries in response to the geographical boundaries of each Autonomous Community, since it is evident that the uses and developments that take place in the territory of one Community will condition the possibilities of using the flows of those same rivers, major and minor, when they cross the territory of other Communities or flow into inter-regional rivers", while "by contrast, the criterion of the river basin as a management unit allows for the balanced management of water resources that comprise the basin, in response to all the interests concerned, that when the basin extends to the territory of more than one Autonomous Communities, are manifestly of supra-regional interest" so that "it is also clear that the waters in a same basin form an integrated whole that must be managed in a uniform manner." (STC 227/1988, FJ 15).

In short, we must conclude that all these matters, which enclose a "manifestly supra-regional" interest, "must be managed in a uniform manner", which excludes the constitutional viability of partitioning the "legal regime and the management of the waters of each river course and its tributaries in response to the geographical watershed of each Autonomous Community" (STC 227/1988, of 29 November FJ 15).

Pursuant to the foregoing, Article 51 EAAnd must be deemed unconstitutional and void because, by partitioning the legal system and the management of the waters belonging to the same supra-regional river basin, such is the case of the Guadalquivir, the provision infringes Article 149.1.22 CE.

This reasoning regarding the unconstitutionality of a substantive nature incurred by the challenged provision of the Statute of Autonomy of Andalusia would be already sufficient to admit the challenge and hand down the subsequent declaration of unconstitutionality and nullity of Article 51 EAAnd. However, the unique position pertaining to the Statute of Autonomy in the configuration of the State of the Autonomies (SSTC 247/2007, FJ 5, and 31/2010, of 28 June, FJ 4) as well as the essential vital, social and economic importance of water (STC 227/1988, FFJJ 6 and 20), a natural resource that is the subject-matter of Article 149.1.22 CE, justify and make it advisable to extend our judgement to an analysis of the formal constitutionality of the challenged statutory provision, thereby giving an explicit reply to the accusation of unconstitutionality brought in this regard by the petitioning regional Government.

7. As regards this second point, in fact, the subject of debate is strictly limited to elucidating the constitutional legitimacy of allowing the approach of Article 149.1.22 CE "waters [that] flow through more than one Autonomous Community" to be defined by a Statute of Autonomy.

At the origin of this controversy is the different response given by the parties to these constitutional proceedings with regard to the formal capacity of the Statute Autonomy, as regulatory body, to define the territorial criteria employed in Article149.1.22 CE for a particular Autonomous Community, going against the rule established by the state legislator with jurisdiction over water as provided in Article 16 of the Waters Law: firstly, the Governing Council of the Junta de Extremadura denies this possibility and therefore demands the declaration of unconstitutionality of Article 51 EAAnd; secondly, the Parliament and Government of Andalusia reply in the affirmative to this question and plead, therefore, for the motion to be dismissed; and finally State Lawyer admits that the statutory regulation fails to sufficiently establish a criterion that differs from that established in the Waters Law, while proposing an interpretation of the contested provision that, in his opinion, would allow it to be compatible with the Constitution.

8. We have already noted that Article 51 EAAnd, by attributing exclusive jurisdiction to the Autonomous Community of Andalusia over the waters of the Guadalquivir basin, considering that this is an inter-regional river basin, departs from the

criteria used by the Waters Law in the definition of the territorial criterion employed by Article 149.1.22 CE.

As for the relationship between the statutory regulations and the delimitation of the powers of the State *as per* Article 149.1 CE we must assume that if the former "contribute to shaping ... the scope of the rule-making powers of the State" it is only "to the extent that the powers of the State depend immediately on the content and scope of the existence and extent of the competences assumed by the Autonomous Communities in the extraordinarily flexible framework represented by the lower or minimum limits of Article 148 CE or otherwise, the upper or maximum limits of Article149 CE. This does not make the Statute of Autonomy, however, a rule that confers competences of the State" (STC 31/2010, of 18 June, FJ 5). Neither is the Statute of Autonomy a rule for exercising the competences of the State envisaged by Article 149.1 CE, so that, if it specifies the scope of these competences, its constitutionality must respect two limits: first, a positive one, in that said specification of scope is made "in order to provide a more specific definition of the autonomous competences corresponding" to state powers that may present problems of demarcation; and the second is negative, the statutory precision "must not prevent the full deployment of the functions pertaining to the competence of the state regulated in Article 149.1 CE in question. Only if these requirements are met, will such an approach be consistent with the Constitution" (STC 247/2007, FJ 10).

In this case it is clear that with the definition, contained in the Statute of Autonomy of Andalusia, of the territorial criterion determining the delimitation of the powers attributed to the State by Article 149.1.22 CE not only are competences being assumed that are beyond the scope mentioned above —Articles 148 and 149 CE *a contrario sensu*— but furthermore "the inherent functions" pertaining to the state are also seriously undermined, the *raison d'être* of which is none other, within the logic of the decentralised system that characterises the State of Autonomies, than to guarantee the ultimate unity of the body of law that provides a minimum regulatory common denominator in a matter, an essential presumption to avoid the diversification that is inherent in the principle of autonomy from incurring in contradictions of principle with the unity character of the State. This function of integration would be irreversibly harmed if the Statutes of Autonomy were constitutionally capable of imposing a criterion delimiting territorial jurisdiction with respect to powers and functions that, as is the case with the waters that run through several Autonomous Communities, must be applied to a supra-regional physical reality, which would become simply ungovernable if the criteria adopted in the Statutes of Autonomy of the Autonomous Communities concerned were incompatible or exclusive.

And such is the case with Article 51 EAAnd that, by attributing to the Autonomous Community of Andalusia exclusive jurisdiction over the waters of the Guadalquivir basin, even if such attribution seeks to limit itself to those waters "that pass through its territory and that do not affect any other Autonomous Community" and does so subject to the exceptions referred to below, it prevents the powers reserved to the State by Article

149.1.22 CE and exercised by it through state legislation on waters from deploying the function of integration and uniformity pertaining to the state.

In short, Article EAAnd does not pass the standard of constitutionality and infringes Article 149.1.22 CE on grounds of the formal inadequacy of the Statute of Autonomy for defining the territorial criterion for delimiting competences that this constitutional provision reserves to the State.

9. The conclusion we reach is not undermined by the allegations made by the Parliament and the Government of Andalusia on the suitability of the Statute of Autonomy of Andalusia to adopt a territorial delimitation formula that is different from the one embraced by the state legislator for water related matters.

First, from the perspective that concerns us here, it is irrelevant for the purposes of our analysis the fact that whether, as claimed by the Parliament of Andalusia, the constitutional principles concerning the planning and management of water resources, summarised in the mandate for the rational use of natural resources (Article 45.2 CE), can also be satisfied by various possible interpretations of the rules of distribution of powers. Aside from what has already been said, it is now important to specify that, even if this were true, any other eventual definition of the territorial criteria contained in Article 149.1.22 CE —that could never involve the idea of fragmenting the river basin by this or any other name used— could only come from a sole legislator, who will always be the state legislator on waters, since only from the exclusively supra-regional position of this legislator can the criterion be provided that is capable of disciplining rules of law governing a physical reality that is also supra-regional in nature.

Second, for the same reason neither can this Court accept the arguments of the Parliament of Andalusia concerning the unique nature of the Guadalquivir basin and the possibility that other regions may establish, by means of respective statutory provisions, the particularities that best meet their own interests, since these arguments forget the integration function corresponding to the exercise of the competence reserved to the State by Article 149.1.22 CE.

10. This argument is not accepted by the State Lawyer either, in whose opinion "Article 51 EAAnd encounters an absolute limit in the territorial criterion of Article 149.1.22 CE currently defined as the 'river basin criterion'." If, despite this discrepancy, the legal representative of the National Government coincides with the Parliament and the Government of Andalusia in the request for the petitioner's plea to be dismissed in these proceedings, it is because, in his opinion, Article 51 EAAnd supports an interpretation that is consistent with the Constitution.

For the State Lawyer the determining factor is that Article 51 EAAnd does not say that the Autonomous Community holds "exclusive jurisdiction" (*la competencia exclusiva* in Spanish) over the waters of the Guadalquivir basin which pass by Andalusian territory, but only that the powers enumerated in that provision appertain soley to the Autonomous

Community, i.e., they are "exclusive competences" (*competencias exclusivas*), contrary to the case of the waters that cross exclusively Andalusian territory, over which Article 50 EAAnd does claim "exclusive jurisdiction" in a number of categories that are defined in greater detail. In his view, the provision mentions a series of joint and indeterminate competences that furthermore, are limited by the exclusive State powers covered in Article 149.1.22 CE as they are currently materialised in the state Waters Law, i.e., by the river basin criterion. It should therefore be ruled out that the Autonomous Community intended to assume hydraulic competences *per se* over the water resources in the basin of the Guadalquivir (competences of Article 149.1.22 CE). Not only because Article 149.1.22 CE prevents this or because Parliament has introduced the reference to that constitutional provision, but also because such an interpretation, in addition to being unconstitutional, is incompatible with other provisions of the Statute of Autonomy of Andalusia, since it could not explain why Article 50.2 EAAnd limits itself to a modest participation in the management of "the usage of inter-regional water resources" including, without doubt, the Guadalquivir basin, and "in the terms provided in the legislation of the State", or why Article 57.1 EAAnd limits the autonomous jurisdiction over emissions to the inter-regional waters mentioned in Article 50.1 EAAnd.

According to this construction of the disputed provision proposed by the State Lawyer, the indeterminate exclusive competences of the Autonomous Community can only be those derived from either of the two following hypotheses. On one hand, considering the current Law these competences would be those that effectively concern, influence or affect waters flowing through the basin of the Guadalquivir within the boundaries of Andalusia and that are included in other provisions of the Statute of Autonomy, such as those of Articles 48.1 (agriculture), 56.5 (territorial planning and location of infrastructure and equipment), 56.7 (public works in the area of the Autonomous Community that are not declared of public interest), 57.1 c) (exclusive competence "without prejudice" over mountains, marshes, lagoons and aquatic ecosystems), 57.2 (river fishing) or others. On the other hand, if in the future the National Parliament opts for an alternative materialisation of the territorial criterion in Article 149.1.22 CE it is possible that the Autonomous Community of Andalusia could hold, in virtue of the provision challenged in these proceedings, exclusive hydraulic competences over some waters of the Guadalquivir basin, but not on the river basin itself.

11. We cannot share the approach proposed by the State Lawyer. Pursuant to our reiterated case-law, the admissibility of this understanding of the contested provision requires that the interpretation of compatibility with the Constitution must be effectively deduced from the challenged provision itself, without the need for this Court to reconstruct a rule against its obvious meaning and thus, creating a new rule to conclude that this reconstructed provision is the constitutionally compatible one, thereby conferring on the Constitutional Court a legislative function that does not pertain to it institutionally (SSTC 11/1981, of 8 April, FJ 4, 45/1989, of 20 February, FJ 11, 96/1996, of 30 May, FJ 22, 235/1999, of 20 December, FJ 13, 194/2000, of 19 July, FJ, 184/2003, of 23 October, FJ 7, and 235/2007, of 7 November, FJ 7, among many others).

Accordingly, the interpretation of compatibility advocated by the State Lawyer does not meet the assumptions indicated in our case-law. With regard to, firstly, the reduction in the scope of the Article 51 EAAnd as a mere summary of the competences that pertain to the Autonomous Community of Andalusia, the interpretation proposed by the State Lawyer is not constitutionally acceptable because it conflicts with the logical meaning that derives from the most obvious, literal and systematic understanding of the provision: if its content is simply a systematic summary of the powers that are already assumed in other provisions of the Statute of Autonomy, it makes no sense that if Article 51 EAAnd was just a summary or reference for other provisions, it was necessary to incorporate in its text the five caveats that it contains —(a) that the waters do not affect any other Autonomous Community, and "without prejudice" (b) to the general planning of the hydrological cycle, (c) to the basic rules on environmental protection, (d) to hydraulic works of general public interest (e) and to the provisions of 149.1.22 CE—. These caveats, furthermore, serve to emphasise that the subject-matter regulated in that statutory provision is part of a matter that is the exclusive competence of the State by virtue of the provisions of Article 149.1.22 CE.

What in fact happens is that Article 51 EAAnd accepts the concept of "river basin" and at the same time contradicts it, since, by the use of the clause "waters that pass by its territory and do not affect another Autonomous Community", it introduces a criterion that aims to fragment the uniform management of an inter-regional river basin, such is the case of the Guadalquivir, to assume competences over it that belong to the State as per Article 149.1.22 CE. We are not dealing, therefore, with the assumptions addressed by this Court in STC 31/2010 in relation to Article 117.1 of the Statute of Autonomy of Catalonia, which gives the Generalitat exclusive competence "in matters concerning water pertaining to intra-regional basins", or Article 117.3 of the Statute of Autonomy of Catalonia, to the extent that this provision contemplates only the participation of the Generalitat of Catalonia in the exercise of its competences in "hydrological planning" and "in the State bodies managing water resources and harnessing resources in inter-regional basins", the state-governed nature of which was, however, in no way altered by the statutory provision, nor was it the subject of debate.

Secondly, with regard to the interpretation also put forward by the State Lawyer, whereby Article 51 EAAnd could be considered to be a clause extending the competences that was conditional on the possibility that in the future the National Parliament could implement a different materialisation of the constitutional concept "waters that flow through more than one Autonomous Community", to make it possible for the Autonomous Community of Andalusia to then assume, without prior reform of its Statute of Autonomy, exclusive jurisdiction over some of the waters of the Guadalquivir basin; we find that this interpretation of compatibility must be rejected owing to the apparent conflict with Article 149.1.22 CE, since, as noted in Ground 7 of this Judgement, the state legislator cannot redefine the exclusive competences of the State in relation to a supra-regional river basin, as is that of the Guadalquivir, through a fragmented understanding of the basin leading to "partitioning the legal regime and the management of the waters of each river course and

its tributaries in response to the geographical confines of each Autonomous Community" (STC 227/1988, FJ 15).

Meanwhile, according to the interpretation proposed by the State Lawyer, Article 51 EAAnd includes contents that are constitutionally reserved for different types of regulations, but it does so by conditioning its own effectiveness on the potential adoption of the relevant provision by the competent authority through the adequate regulatory procedure. Leaving aside other possible objections derived from the principle of legal certainty, together with the considerations of principle that would need to be warranted by such a technique of assumed jurisdiction outside the formal review process of the Statute of Autonomy, the constitutionality of the provision is excluded under the principle of competence itself, since the need to submit to the condition of prescription that it contains shows that the regulatory authority that issued this provision lacked the constitutional empowerment to do so.

As noted, the State, through the legislation, regulation and concession of water resources and uses, exercises the competence attributed to it by 149.1.22 CE with regard to "waters that flow through more than one Autonomous Community", which means that, through the regulatory and executive powers that such jurisdiction may contain, the uniform management is assured of a natural resource of such great transcendence to various material sectors and sub-sectors as is water. Hence this uniform management, which must be materialised by the State using various technical procedures, according to the concurrence of the different competences of the various Authorities involved, cannot be nullified by a provision such as Article 51 EAAnd, determining that the Autonomous Community of Andalusia can become, as a consequence of the type of competence assumed, the regulatory authority holding exclusive jurisdiction over the waters of the main course of the River Guadalquivir and its tributaries —or stretches thereof— that pass by the territory of Andalusia, separating said management function from that corresponding to the remaining stretches of river flowing into that river from the territory of another Autonomous Community.

In short, given the clear material and formal unconstitutionality of Article 51 EAAnd, we cannot accept the interpretation of Constitutional compatibility suggested by the State Lawyer. Therefore, the cited statutory provision must be declared contrary to Article 149.1.22 CE and, consequently, unconstitutional and void, because it establishes a fragmented criteria for managing an inter-regional river basin by assuming powers that pertain to the State, in addition to the fact that the Statute of Autonomy is formally inadequate for defining the territorial delimitation criterion of the competences reserved to the State by that constitutional provision.

12. The action of unconstitutionality is also brought against Article 43 EAAnd, based on the general discipline of the territorial scope and effects of the competences of the Autonomous Community of Andalusia. However, the challenge to this provision, as the parties to these proceedings agree, including the petitioner, is based on the relationship that the Government of Extremadura believes to exist between that general discipline and

the specific case of the territorial scope of the competence assumed in Article 51 EAAnd. Having established the unconstitutionality of the latter provision, the general regime of Article 43 EAAnd could never become applicable in the terms that could arise from the validity of Article 51 EAAnd, without it being necessary for the Court to rule on that common regime to the extent that its challenge has adhered to the procedures necessary to justify the action brought against Article 51 EAAnd.

Neither can the challenge against Article 50.1 a) EAAnd succeed, under the argument that, by not specifying that the powers referred to therein "only" apply to the waters flowing by Andalusian territory, the provision incurs in an ambiguity that is purposefully sought to accommodate conflicting interpretations, and therefore, contrary to the principle of legal certainty. Clearly, the declaration of unconstitutionality and invalidity of Articles 51 EAAnd, as an exception to Article 50 EAAnd, allows the latter to remain valid as a rule that does not uphold or allow any other territorial criteria than that of the waters that flow entirely within Andalusia.

Finally, in relation to Article 50.2 EAAnd the Governing Council of the Junta de Extremadura states that its constitutional doubts focus on the last paragraph of that provision, in that it attributes to the Autonomous Community of Andalusia policing powers over public domain water resources without making it clear what kind of river basin is being referred to. According to the petition, if these were inter-regional river basins, it would be constitutionally improper for the Statute to assume competences pertaining to the State (STC 161/1996, of 15 June). Indeed, for this reason, having declared Article 51 EAAnd to be unconstitutional, this interpretation cannot be made of Article 50.2 EAAnd. All this notwithstanding that, as alleged by the State Lawyer, nothing prevents the state water legislator from granting the Autonomous Communities functions or powers for "policing public domain waters" in inter-regional basins (STC 161/1996, of 17 October), or that, according to Article 17 d) of the Waters Law, the functions of the State in relation to public water include granting authorisations that may be processed by the Autonomous Communities.

R U L I N G

For all of the above, the Constitutional Court, BY THE AUTHORITY VESTED IN IT BY THE CONSTITUTION OF THE SPANISH NATION,

Has decided

To uphold in part this action of unconstitutionality and, accordingly:

1. Declare the unconstitutionality and invalidity of Article 51 of the Organic Law 2/2007, of 19 March, to reform the Statute of Autonomy for Andalusia.

2. To dismiss the action in all other respects.

Let this Judgement be published in the Official State Gazette.

This Judgement was handed down in Madrid, 16 March 2011