

PRIMACY OF THE NATIONAL LAW OVER THE REGIONAL LAW: WHAT IS NEW?

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The Judgment 102/2016, of 25 May 2016, of the Spanish Constitutional Court (Plenary Session), reaffirmed by the Judgment of 23 June 2016 (Section), confirms the non-implementation of a law of an autonomous community by a “primary legal operator” (new term in the field of constitutional law) on the grounds of contradiction with a national basic law. And all of this, according to a recovered state supremacy clause and to an admitted change in the Court’s case-law.

The previous statement must have aroused curiosity. Let us explain the singularities of the case in order to understand it better.

The contested decision is a Decree on the merger of municipalities adopted by the regional Government of Galicia. Article 32.1 of the Law 5/1997 on the Galician Local Administration demanded a majority with a higher threshold than the majority now laid down by Article 47.2 of the Spanish Law Regulating the Basis of the Local Government (as amended by Law 57/2003). Based on several relevant legal reports, the Court validates the majority laid down by the national law.

As regards the first singularity, the Galician law contained the qualified majority laid down by the original drafting of the national law. However, this national law was later reformed and the necessary majority reduced, but the regional law was not reformed accordingly. Secondly, the problem was mathematical as it concerned the percentages of the majorities. The legal operator had the perfect dichotomy before him: applying one option always entailed leaving the other one aside. The third singularity refers to the fact that the Constitutional Court had repeatedly declared as basic the national provision laying down these majorities and defined them as both the positive and negative limit, with respect not specifically to the merger but to the whole provision (see Judgment 33/1993, Legal Basis No. 3, confirmed by Judgments 331/1993, 66/2001 and 159/2012 of the Constitutional Court).

The situation to be evaluated in Judgment 102/2016 was the performance of the primary legal operator and the subsequent decision of the court analyzing the case. As will be mentioned later, the Constitutional Court considers that the Government of Galicia “was correct in their decision” and then refuses the action of unconstitutionality.

The Court (sitting in Plenary Session), adopting the role of the primary legal operator, considers that “primary legal operators, who are preferentially the addressees of the laws, necessarily need to leave aside one of the laws that are in conflict” given that “they are not entitled to bring an action of unconstitutionality [...]”. The Court also mentions the primacy clause of Article 149.3 of the Constitution, as suggested by the dissenting votes of previous case-law (see dissenting votes of Judgments 1/2003 and 66/2011).

A driving factor of the Judgment is the certainty that the regional legislator did not aim to contradict the national law but simply did not adapt to its reform. The Court understands the action of the regional legislator as an act of mimicry.

Another relevant question relates to the inadmissibility of the action of unconstitutionality. The Constitutional Court rejects the action considering that this would only be admissible had the operator doubted on the national law (which he indeed implemented) but not on the regional law: “we are being asked about the constitutionality of a provision that is not applicable to the case”.

The Judgment leaves several questions open. The first one relates to the scope of the Judgment itself: is this case-law limited to specific cases such as this one, or is the scope broader and covers more generally the supervening unconstitutionality in case of “leges repetitae”? Let us observe the textual reference to “one of the cases” of primacy. The second question is: is the primary legal operator the only one concerned by the possibility of non-implementation, or does it also concern the courts? The Legal Basis No. 2 states that it diverges from the previous case-law that focused on the non-implementation by the courts. The Legal Basis No. 3 adds that, although in our case the main subject is not a court, “it does not alter the substance of the problem posed” but makes the inconveniences of the previous case-law more visible. Last but not least, the Legal Basis No. 6 mentions that the rule of Article 149.3 of the Constitution is addressed at “legal operators without distinction” and that the action should be only brought if there are doubts about the subsequent national basic law.

Finally, we should mention the existence of dissenting votes in both Judgments; curiously enough, submitted by different judges (the total number of dissenting votes is also different).