The Principle of Bilateralism in the Statutory Reforms Following Constitutional Court Ruling: STC 31/2010. Desire and Reality

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Preliminary Considerations

In the wake of events in Catalonia, the various processes of statutory reform that have taken place in Spain in recent years have focused particular attention on regulating institutional relations between Autonomous Communities. Accordingly, it can be stated that including legal sections specifically devoted to said question in the revised basic institutional norms of the Autonomies, in which the various spatial expressions of autonomous community relations are set out,[1] emerges as one of the main features[2] characterising the major changes to the content concerning relations. In this vein, we should remember that, although institutional relations do not figure in the list of necessary contents that Article 147.2 of the Spanish Constitution (SC) assigns to the statutory norm, such relations' direct link to self-government entirely justifies their inclusion in the basic institutional norm of the Autonomous Community.[3] What needs to be clarified, therefore, is not the question of whether they should be included in the statute but rather the constitutional limits to which they should be subject.

In this unprecedented statutory context dominated by the emergence of regulation addressing the previously referred to matter of institutional relations, the present study seeks to explore the key role that the principle of bilateralism plays

[1] In the first-generation Statutes, regulation of autonomous community relations with other entities was restricted to those of a horizontal nature: that is to say, to those with other autonomous bodies. Leaving aside said area, however, the general guideline places us in a regulatory context dominated by the absence of statutory references to other spatial expressions regarding relations.

[2] García Morales (2009), p. 363.

[3] Albertí Rovira (2006), p. 716.

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in the New Statute of Autonomy of Catalonia vis-à-vis vertical cooperation. Likewise, as the institutional forum that plays the leading role[4] through which said principle is channelled (defining itself as a "general and permanent framework for relations" between the governments of the Autonomous Community of Catalonia and central power), special attention is given to the role assigned to the Generalitat-State Bilateral Commission [Article 182, Statute of Autonomy of Catalonia (SAC)].

In this respect, it should be highlighted that both the firm commitment of the reformed Catalan Statute in favour of this principle and its expression in regulatory terms through the previously mentioned Commission,[5] as well as the assessment that in terms of constitutionality it has merited from the Constitutional Court in its groundbreaking Ruling 31/2010, emerge as fundamental analytical referents for our proposed task and provide the framework within which the interpretative dialectic that determines its effective configuration is incorporated. Indeed, only by starting from the interplay between the normative information present in the statutory provisions and the Constitutional Court's interpretation of this is it possible to obtain the full picture of how bilateralism should be understood in our legal code.

Nevertheless, in order to obtain a contextualised picture of the innovations that are concurring at the present time, we deem it essential to apply a diachronic methodological approach that, as a starting point, draws on the concept of bilateralism as it was initially set out in the statute (Thesis: Where have we come from?) and demonstrating its characteristic outlines. Such a genealogical analysis is a key to undertaking an accurate appraisal and, likewise, an effective comparison with the defining features adopted by bilateralism in statutory reform (Antithesis: Where were we heading?), enabling us to understand the changes that have taken place. The finishing point of our analytical journey is inevitably dominated by the interpretation that Constitutional Court Ruling 31/2010 has made of the said principle (Synthesis: Where do we stand now?). Such a comparison will, by way of a conclusion, allow us to determine how much actually remains of the reformed

[4] Regulatory expression of bilateralism, however, is not confined solely to the previously cited Commission. Adopting a clearly specific genetic code from a material point of view, the Generalitat-State Joint Commission for Economic and Fiscal Affairs (Article 210.1, SAC) assumes significant competences in the field of Autonomous Community financing, forming a privileged forum for dialogue and harmonisation with central power.

[5] A further point to remember is that the underlying tone of the Catalan commitment to bilateralism was adopted by the reformed text of the Statute of Andalusia as regards its expression in regulatory terms, a Bilateral Commission being set up between the Andalusian Government and the State with a list of functions that was practically identical to its counterpart in Catalonia. Nevertheless, compared to the concept of the relations with the State envisaged under Article 3.1, SAC (The Generalitat's relations with the State are founded on the principle of mutual institutional loyalty and are governed by the principle of autonomy, bilateralism, and multilateralism), the Andalusian norm (Article 219.1, Statute of Autonomy of Andalusia) introduced significant differences, stipulating that said Autonomous Community's relations with the State were to be conducted "within the framework of the principle of solidarity" and based on "collaboration, cooperation, loyalty and mutual help".

SAC's keen desire[6] to place bilateralism in the front line of the region's relations with the State.

Bilateralism in the Early Stages of Autonomy (Thesis: Where Have We Come From?)

By way of a premise, it is essential to remember that, as a channel for two-way relations between State and Autonomous Community, bilateralism is in no way an innovation that is attributable to recent statutory reforms. On the contrary, since Spain's early involvement in autonomy, said principle has been evident in a wide range of areas through Cross-party Commissions on Transfer of Competences[7] and has emerged as an intrinsic feature of the incipient Autonomous State.[8] The introduction of self-government in the Autonomous Communities in Spain entailed a complex process of transfer of competences from the central State to the new peripheral territorial structures, a process that has basically followed a dual, equal path taken by the two leading parties: the State and each Autonomous Community considered separately.[9]

As regards the activities carried out by said commissions, these mainly involve having been assigned legislative power in the matter of transfer of competences, their decisions being taken as binding.[10] This is clearly evidenced by the fact that the State's power in this regard was restricted to formalising such agreements, the Council of Ministers approving them as Royal Decrees without being able to introduce changes in their content. Thus, in material terms, these were norms that were agreed on and were the result of bilateral agreements and the assertion of diversity.[11]

Once this initial and essential phase of the autonomic process had concluded, the preference for said relational mechanism did not disappear but remained part of

[6] Cruz Villalón (2006), p. 84, refers to the presence in the text of the new Catalan Statute of an "unmistakeable spirit of bilateralism as a strategic criterion for relations with the State".

[7] In this respect, the provision contained in Article 147.2 d) of the Spanish Constitution should be placed first, indicating as "necessary" content of the Statute of Autonomy not only "the competences assumed within the framework established in the Constitution" but also (with regard to our argument) "the rules for transferring the services corresponding to said competences". Thus, be it only tacitly, it is in the constitutional provision itself where the existence and justification of this expression of bilateralism is anchored.

[8] Aja Fernández (2003), p. 215.

[9] Said commissions were set up in all the Autonomous Communities, thereby leading to a spread of bilateralism that, in the words of Corretja et al. (2011), p. 32, gave rise to a situation of "multi-bilateralism".

[10] It should be recalled that Constitutional Court Ruling 76/1983, Legal basis 28, expressly underlines the existence of a "competence reserve" in favour of said commissions.

[11] Corretja et al. (2011), p. 31, *op. cit.*

vertical cooperation in the Spanish autonomic system, undergoing deep-rooted changes that mainly involved adopting renewed functions. Compared to the previous stage, this was reflected in a more low-key approach in legal terms, countered by increased cooperation. Indeed, although once matters related to the transfer of services from centralised power to the autonomies had been dealt with, and the sectorial conferences (multilateral forums of an intergovernmental nature) had taken centre stage in the vertical relations, at the same time it could also be seen that bilateralism and its new organic bodies (the Bilateral Cooperation Commissions)[12] asserted not only a determined desire to survive but also a considerable ability to adapt to the new context. However, in this new stage in the development of autonomies, the Commissions were now stripped of their former capacity to regulate over Autonomous Community matters and took on a role that was conceived in general terms[13] and based on political cooperation and the prevention of conflicts.

In this regard, although these commissions were not standardised until the approval of Law 4/1999, through which Law 30/1992 governing the legal system for public administration and common administrative procedure (Article 5[14]) was reformed, it should be stressed that said authorities did enjoy explicit political support, thanks to the Autonomous Pacts endorsed by the two main national parties (PSOE and PP) in 1992. By formulating bilateralism as a complement to multilateral cooperation relations, said Commissions are also perceived as "the most effective means for continuous exchange of information, negotiations and agreements in order to respond to needs resulting from geographical, cultural and linguistic peculiarities, or from the statutory content of each Autonomous

[12] Ridaura Martínez (2009), p. 106, reminds us of the chronology in the process of creating said Commissions: the series commenced in 1983 with the creation of the Cooperation Board of the Autonomous Community of Navarre. By 1987, those corresponding to Catalonia, Galicia, the Basque Country, and Andalusia had already been set up. In 1988, the Commissions corresponding to the Regions of Murcia and La Rioja held their first meetings. Those corresponding to the Balearic Islands (1989), the Canary Islands and Aragon (1990), Cantabria (1991), Castilla-Leon and Extremadura (1992), Asturias (1993), Castilla-La Mancha (1996), the Valencian Community and Madrid (2000) were subsequently constituted. Those corresponding to the cities of Ceuta and Melilla held their constituent meetings in 1995.

[13] García Morales (2009), p. 369, *op. cit*., interprets this intense generalist character, which is typical of Bilateral Commissions, as reflecting their nature as "non-specific platforms".

[14] Section 1 of said precept establishes the generic foundation for two-way collaboration when stating that "The General Administration of the State and the Administration of the Autonomous Communities can create organisations for cooperation between both of a bilateral or multilateral composition, of a general or sectorial scope, in those subject-matters where an interrelation of competences exists, exercising coordination and cooperation, as may be required". Section 2 confers explicit approval of Bilateral Commissions, outlining their main defining features as (a) non-specific nature or general character ("cooperation bodies … of the general sphere"), (b) intergovernmental nature ("members of the Government, in representation of the General Administration of the State and members of the Government Council, in representation of the respective Autonomous Community"), (c) voluntary constitution and power of self-regulation ("its creation is carried out by agreement which determines the essential elements of its rules").

Community". It is clear, therefore, that the predominant feature in this concept of bilateralism is its necessary link to the specific and singular realities that, as such, require particular treatment in a framework that is suited to channelling such demands.

The low-key nature that, in practice, the tasks undertaken by the various Bilateral Commissions evidenced[15] was to change substantially following reform of the Organic Law of the Constitutional Court in 2000 (Organic Law 1/2000). It should be remembered that, by virtue of the new section 2 of Article 33 of Constitutional Court Organic Law,[16] said authorities assumed the role of determinant arbitrators vis-à-vis conflicts that arose subsequent to the approval of laws or norms that enjoyed the status of Law. In this regard, extending the deadline for lodging an appeal of unconstitutionality was envisaged (from 3 months in general terms, it was extended to a maximum of nine), provided the corresponding Bilateral Commission adopted an agreement to initiate negotiations regarding the interpretation of the norm that was subject to dispute.[17]

Quite a different (and certainly not irrelevant) matter concerns instances in which, should intergovernmental dialogue lead to an agreement indicating the need to modify any legal precept (assuming the commitment to revise the content), its effectiveness must perforce be subordinate to the receptive will manifested by the corresponding assembly vis-à-vis the legislative initiative presented by the Government in question. Assuming the constitutionality of the norm that is the subject of dissent, cases in which agreements reached in the Bilateral Commission and that concern future regulatory implementation, the content of which the

[15] García Morales (2009), p. 368, *op. cit.*, draws attention to the fact that these commissions "have proved far less important than multilateral mechanisms, to the point that they have been symbolic in many cases".

[16] "Notwithstanding the stipulations set out in the previous section, the President of the Government, together with the official executive bodies of the Autonomous Communities, may lodge an appeal of unconstitutionality within a period of 9 months against laws, provisions or acts which have the status of Law, in regard to which, and in an effort to avoid said appeal from being lodged, the following requirements are met:

a. That the Bilateral Cooperation Commission involving the General Administration and State and the respective Autonomous Community meet, either of the two authorities having the power to request said meeting be convened.
b. That an agreement be adopted by the above-mentioned Bilateral Commission concerning the commencement of negotiations to solve discrepancies. Should it prove necessary, a requirement may be put forward for the regulatory text to be changed. Such an agreement may or may not call for the norm to be suspended should the appeal be lodged within the period stipulated in the present section.
c. That the Constitutional Court be notified of the agreement by the above-mentioned bodies within a period of 3 months subsequent to the Law, provision, or act which has the status of Law being published in the *Official State Bulletin* and in the *Official Gazette* of the corresponding Autonomous Community".

[17] For comprehensive information regarding the activities undertaken in this area by the various Bilateral Commissions, see García Morales (2009), pp. 386–389, *op. cit.*

exercise of executive power must assume,[18] appear to be less problematic. Without obviating such difficulties, the fundamental idea to highlight is that by exercising this faculty, the Bilateral Commissions assume an important role in such an important field as that of the creation of norms.

Bilateralism in Statutory Reform (Antithesis: Where Were We Heading?)

Having established bilateralism as a principle and described the areas in which it has operated throughout the long experience of constructing and establishing the Autonomous State, it is evident that the changes in nuance set out under statutory reforms should be embraced not in the field of *ex novo* creation but, on the contrary, in that of the assumption of a renewed functionality. In this respect, the intention of statutory reformers is not confined to ratifying the previous model but goes further and evidences a keen desire for change. It is not, therefore, a question of changing bilateralism so that it remains the same.[19] The "strong winds of change in bilateralism"[20] that impregnate the reform of the SAC reflect nothing more than the determined expression of a will to introduce fundamental changes in said principle, leading it to establish a new *modus operandi* in relations between Autonomous Community and State. An unmistakeable pointer in this respect is the tendency towards asymmetry that the multilateralism-bilateralism binomial displays: an asymmetrical relation that is manifested in an unbalanced relation of forces that is committed to strengthening bilateral rather than multilateral channels. All of this takes place in a constitutional context dominated by the absence of normative precautions in this regard and in which the statutory norm arrogates a regulatory prominence that, strictly speaking, should not correspond to it.[21]

The content of Article 3.1 of the SAC clearly evidences the reinforcing approach when, in the task of delimiting the political framework of the relations between the Generalitat (after stating that these "are founded on the principle of mutual institutional loyalty"), it stipulates that "they are governed by the general principle according to which the Generalitat is a State, by the principle of autonomy, bilateralism and multilateralism". Against such a background of relational frameworks, bilateralism would tend to operate as the rule, while multilateralism

[18] A detailed reflection regarding the problem posed in the text can be found in González Beilfuss (2008), p. 33.

[19] París Domenech (2006), p. 399 expressly states that "the SAC seeks to go beyond the framework of relations which has naturally been established".

[20] See note 5.

[21] In this regard, we fully concur with the view of Cruz Villalón (2006), p. 84, *op. cit.*,: "The essential problem of this process is the *order of factors,* which is important since it is clear they should have begun with the Constitution and then continued with the Statutes".

would be seen as the exception: that is, as a secondary or residual channel of Autonomous Community relations with the State.[22] The constitutionality of conceiving institutional relations in such a manner has been questioned by the appeals lodged by the Partido Popular (PP), the Ombudsman, and the Regional Government of La Rioja, considering that this would confer on the Generalitat a status of equality with the State to the detriment of the other Autonomous Communities and that it would eventually generate asymmetries that were not acceptable under the constitutional text. It was left to the Constitutional Court to determine whether or not it agreed with such an interpretation of the statutory precept.

In this relational landscape dominated by the idea of duality, it is logical and inevitable that the Generalitat-State Bilateral Commission for Cooperation should assume the leading role, taking on an undoubted relevance and prominence, resulting from it being considered under Article 183.1 SAC as a "general and permanent framework for relations between the Governments of the Generalitat and the State for the following purposes:

a) The participation and collaboration of the Generalitat in exercising competences which affect the autonomy of Catalonia.
b) Exchanging information and establishing, when appropriate, collaboration mechanisms in the respective public policies and matters of common interest".

Compared to the previous stage, the interpretation of this first section heralds a major shift, displaying an "emphasis, ambition and detail in statutory regulation", which *per se* reflects a significant development.[23] From a strictly semantic point of view, although with an undoubted political intention, the change in name given to the participants involved in the forum referred to is striking, its previous administrative character (Article 5 of Law 4/1999 referred to representatives of the respective Administrations) now giving way to one that is essentially connected to the political sphere of executive power (governments).

As regards the main underlying issues that the commission addresses, fundamental change seems to be related to the fact that, whilst maintaining the criterion of "interrelation of competences" (sic: "competences that affect the autonomy of Catalonia"), not only are the traditional "functions of coordination and cooperation depending on each case in question" envisaged but also the power of the Autonomous Communities to participate. With this, said principle, which is set out in general terms under Article 174.3 SAC[24] and which is subject to subsequent

[22] This idea is not neutralised by resorting to the otherwise unquestionable argument that the Statute is not the ideal normative framework for regulating multilateralism, as it goes beyond its area of competences. The determinant point in this respect is that, beyond the literal tone of Article 3.1 SAC, a complete and systematic reading of the reformed basic institutional norm of Catalonia clearly shows an unequivocal preference for the bilateral option, a direct dialogue being established between central power and the Generalitat.

[23] Corretja, Vintró, Bernadí (2011), p. 36, *op. cit.*

[24] "In matters which affect its competences, the Generalitat participates in national decision-making institutions, organisations and procedures, in application of the stipulations set out in the present Statute and Laws".

specification throughout the statutory text,[25] is later reinforced, specified through mandates to the central legislator and thus emerging as a powerful instrument for penetrating central power, thereby opening up important areas for greater interrelation between the various levels of government.[26]

In this respect, where the Catalan text broke new ground was not so much in affirming the previously referred to power to participate, which, to all intents and purposes, already existed in our code at the legislative scale, but rather by actually including it in the highest level of regional legislation and redirecting it towards the bilateral framework. It was precisely these two aspects that gave rise to further reservations concerning the issue of constitutionality, the argument being that, should this be the case, the Generalitat would be given the power of co-decision in areas under State competence.

Having established the structural foundations on which the principle of bilateralism rests, the Statute subsequently sets out the functions attributed to the Commission ("to deliberate, make proposals and, where appropriate, to adopt agreements in the cases laid down" in the Statute), thanks to which the Statute begins to take shape and is able to engage in a number of activities linked to a wide range of areas, as reflected in Article 183.2 SAC:[27]

a. Drafting laws, particularly those affecting the distribution of competences between State and Generalitat;
b. Planning the general economic policy of the national government in all matters specifically affecting the interests and competences of the Generalitat and regarding the application and implementation of said policy;
c. Promoting appropriate measures to improve cooperation between State and Generalitat and to ensure a more effective exercise of the respective competences in areas of common interest;
d. Dealing with any conflicts that may arise between the two parts concerning competences and, where necessary, proposing measures to resolve them;
e. Evaluating the effectiveness of collaboration mechanisms established between State and Generalitat and proposing measures for the improvement thereof;

[25] Thus, the Generalitat's capacity to participate in appointing members of state organisations is envisaged. This is affirmed in relation to the General Council of the Judiciary and the Constitutional Court "in the terms which the laws establish or, where appropriate, the parliamentary code" (Article 180, SAC). A similar provision can be found in Article 182, devoted to the "appointment (by the Generalitat) of representatives in financial and social organisations". In such instances, Autonomous Community participation will also always be bound by "the terms set out in the relevant legislation".

[26] Roig Molés (2006), p. 169, maintains that autonomic participation in decisional processes included in the state sphere is "an implicit element of our system".

[27] Other functions assigned to the Bilateral Commission concern the following matters: gaming and betting (Article 141.2, SAC) and infrastructures and equipment under State ownership in Catalonia (Article 149.2).

f. Proposing a list of national financial organisations, institutions, and public enterprises in which the Generalitat may appoint representatives, as well as forms of representation;
g. Monitoring European policy to ensure the effectiveness of the Generalitat's participation in European Union affairs;
h. Monitoring any foreign activity of the State that may affect the specific competences of the Generalitat;
i. Any matters of common interest that may be established by law or proposed by the parties.

Attention should be drawn to the fact that Sections a, b, and f, namely those provisions entailing greater functional innovation and enhancing regional powers vis-à-vis the central State, were challenged by the Constitutional Court, either directly, when pointing to the unconstitutionality of the Bilateral Commission's assumption of certain functions, or indirectly, when questioning the constitutional viability of the Generalitat's assumption of specific faculties set out under other Articles of the Statute, jurisdiction over which corresponds to the Bilateral Commission, according to Article 183.2 SAC.

To conclude our analysis of the statutory configuration of this body, reference should be made to the provision contained in the Second Additional Provision of the SAC, by virtue of which the Commission's position as the main forum for meetings between the Autonomous Communities and the State is strengthened. Indeed, said precept stipulates that "should the Statute establish that the position of the Generalitat is determinant when establishing an agreement with the national government and should the latter fail to take such a position into account, then the national government must provide sufficient justification before the Generalitat-State Bilateral Commission". The cases referred to by the norm envisage activities related to a wide range of matters:

1) Authorising new forms of betting and gaming at the State level (Article 141.2, SAC);
2) Determining the location of infrastructure and facilities under State ownership in Catalonia (Article 149.2, SAC);
3) Establishing the State's position with regard to European initiatives or proposals that affect its "exclusive competences" and determining whether "financial or administrative consequences of a special relevance to Catalonia" may derive from the latter.

In view of the intergovernmental disagreement arising out of national government discrepancy concerning the determinant position formulated by the Generalitat, the Commission emerges as the framework in which central power is obliged to justify its decision. Nevertheless, how such a duty should be fulfilled is left totally undecided by the Statute without, however, any legal consequences arising. Leaving for the following section an appraisal of what this provision merits from the Constitutional Court in terms of constitutionality, the key element that deserves to be highlighted is that, thanks to this obligation, establishing a channel of

communication between the two political authorities is not left to political fate or to the climate of collaboration prevailing at any given moment. From the standpoint of consolidating an environment of cooperation, such an obligation should be viewed in positive terms.

Constitutional Court Ruling 31/2010: Where Do We Stand? (Summary)

Having established the existential outlines of the principle of bilateralism and of the main forum on which it is based—the Generalitat-State Bilateral Commission—in the Statute of Catalonia, we now analyse the interpretation that the Constitutional Court has made thereof through Ruling 31/2010. As stated above, understanding the interpretative approach adopted by the Constitutional Court is essential towards determining the real image that both the previously mentioned principle and the areas in which it is applied have in our legal system. Comparing the norm and the interpretation thereof made by the Constitutional Court will provide us with a précis of the acceptable constitutional framework for dealing with the issues posited.

General Considerations Concerning the Principle of Bilateralism

Addressing the preliminary question of whether the Statute of Autonomy can regulate relations with the State, as a basis the Court claims that said regulatory framework is not "inappropriate" for such a purpose.[28] However, the regulatory capacity of said norm is confined to an eminently general structure, namely to setting out the principles that govern the previously mentioned vertical relations. In this sense, the Court is conclusive when highlighting that "beyond these principles, laying down any specific rules that govern such a system must respond to structural demands of a constitutional nature which, as with the principle of each Autonomous Community's cooperation with the State and of all Autonomous Communities' cooperation with one another, *can clearly only be derived from the Constitution itself*".[29] Therefore, a yardstick for assigning competences is being applied which leaves no room for doubt and which reserves a major role for the Constitution, reflected in its "laying down any specific rules" governing cooperation.[30] If such a criterion is applied, the room for manoeuvre left to the statute is clearly predetermined and must comply with constitutional provisions and, consequently, be confined to dealing with content of a general nature.

[28] Constitutional Court Ruling 31/2010, Legal basis 13.
[29] *Ibidem* (our italics).
[30] *Ibidem*.

Analysing the statutory reference to the principle of bilateralism as the channel for the Generalitat's relation with the State, which, as Article 3.1 of the Statute of Catalonia sets out, does not exclude multilateral relations, the Constitutional Court states that it is "constitutionally acceptable (...) since it merely indicates that, because both are the 'Spanish State', the respective position will in each instance be imposed depending on what emerges from the constitutional system of distributing competencies".[31] Following on from its initial considerations, the Court goes on to give further reasoning, stressing that statutory bilateralism is posited "in terms of integration and not differentiation",[32] such that when it claims that "the Generalitat is the State" (Article 3.1 of the SAC) it is merely stating that the Generalitat as a unit or integrating part of the overall structure of the State has the capacity to undertake direct relations with the latter, whether it be the central State or the general State. No objection may be raised to the Constitutional Court's interpretation, which merely confines itself to evidencing a principle of regulatory preference that favours the Constitution and in which the scope of action corresponding to statutory norms must perforce accommodate itself.

Having come to this point, however, the Constitutional Court has not yet concluded its interpretation since, in an "unusual divergence",[33] it goes on to state that

1) Bilateralism cannot be understood "as expressing a relation between political bodies which are on an equal footing and are able to negotiate such a condition with one another, since (...) the State always holds a position of superiority over the Autonomous Communities (Constitutional Court Ruling 4/1981, Legal basis 3)".

   How inaccurate such an interpretation is has been highlighted by a number of scholars, who concur[34] in the belief that, within their respective areas of competences, relations between the various national and regional entities can in no way be governed by the principle of hierarchy but should rather be governed by the principle of competences. In such a relational context, therefore, there is no doubt that both entities are on an equal standing and not in a position of dominance and subordination.[35]

[31] *Ibidem*.

[32] *Ibidem*.

[33] Balaguer Callejón (2011), p. 461.

[34] Corretja, Vintró, Bernadí (2011), p. 3, *op. cit.*

[35] F. Balaguer Callejón (2011), pp. 462–463, *op. cit.*, draws attention to one key concept that the Court has overlooked in its approach, namely, "Superiority of the State over the Autonomous Communities is reflected in certain constitutional techniques, but may not be resorted to with regard to bilateral cooperation mechanisms, which must be based on a scrupulous respect for respective competences". For their part, Corretja, Vintró, Bernadí (2011), p. 4, *op. cit.* consider that the Constitutional Court's argument "reflects its mistrust of the principle of bilateralism and the possibility that such a principle may allow Catalonia to adopt a unique position within the State concerning a range of matters".

2) Said principle, "should only be considered within the sphere of relations between bodies as an expression of the general principle of cooperation, implicit in the territorial organisation of our State (Constitutional Court Ruling 194/2004, Legal basis 9)".

When making this second statement, the Court seems to be offering an indication of what its position will be vis-à-vis the scope of functions defined under a bilateral relation, restricting such a relation to what is solely of a cooperative nature. Such an interpretation thus already excludes the area of participation which, as already highlighted, has, thanks to statutory reform, come to form part of the list of powers that run along a dual track.

The Participative Aspect of Bilateral Relations

A General Approach

Even though, as we have just seen, the Ruling restricts the scope of bilateralism to tasks concerning cooperation, the provision regarding the Generalitat's involvement in national decision-making procedures "affecting its competences in application of the stipulations set out in the present Statute and Laws" (Article 174.3 SAC) was not ruled unconstitutional. The Constitutional Court's strategy concerning not only this general provision but also vis-à-vis the various specific expressions to emerge from it was to subject them to intense change. One key mechanism for achieving this is by systematically applying the interpretative guideline that refers to the preference of the constitutional framework as the legal system that is to regulate specific aspects of institutional relations and that condemns the Statutes to merely affirming the general principle. As a result of applying such an interpretative precept, the Court goes on to state that "the precept in question is sufficiently *general and unclear* to make it impossible to determine the meaning thereof unless it is through the link to the rules (...) to which the precise definition of each one of its terms refers".[36]

Together with this preliminary interpretation, it should not be forgotten that, since "the precept deals with organic and functional involvement in national matters", reference to the laws that such a precept has laid down should be understood as favouring those emanating from the State as the holder of the competences in question. Having established such premises, the immediate consequence is that statutory provisions "must perforce *leave untouched the control over any state competences involved as well as total freedom* which exercise thereof entails in the hands of national bodies and institutions".[37] In this way, both the content of Article 174.3 of the SAC and the remaining precepts in which this is specifically expressed with regard to particular national bodies and institutions are

[36] Constitutional Court Ruling 31/2010, Legal basis 111 (our italics).

[37] *Ibidem* (our italics).

changed significantly since they are all stripped of the prescriptive value to regulate over any matters that concern key or programme-related content.[38]

Involvement in the Bilateral Commission

Analysis of participation based on the consideration of the Generalitat-State Bilateral Commission as the setting in which this was to be developed came through Legal basis 115 of the Ruling. Said Legal basis supports the constitutionality of the statutory definition as a "general and permanent framework for relations" between the two governments, although in order to achieve this, a profound reshaping of what interpretation should be made of said provision needed to be carried out. When undertaking this task, the Constitutional Court chose to adopt a negative or exclusionary approach since it set out said body's existential and functional guidelines based on the following observations: "it does not exclude other areas of relations, nor confers on said Commission any other function than that of voluntary cooperation in the area of the unalterable competences of the two governments".[39]

Such an approach should have been adopted as a basic criterion for rejecting the constitutionality of Article 183.1(a) of the SAC, which attributes to the Bilateral Commission "the participation and cooperation of the Generalitat in exercising the competences which affect the autonomy of Catalonia". However, this was not to be the case since, once again, the Court resorted to the previously applied criterion that this is "a faculty of political action which only entails commitment in the political sphere related to it and to which it is necessarily confined".[40] Contained within these limits, regional involvement and cooperation when exercising national competences "do not violate the Constitution, since they do not prevent or undermine the State's free and full exercise of its own competences".[41]

An identical conclusion is reached with regard to assigning to the Bilateral Commission the following powers contained in Article 183.2 of the SAC:

a) Draft laws that specifically affect the distribution of competences between State and Generalitat;
b) Plans for the national government's general economic policy in all matters that particularly affect the interests and competences of the Generalitat and concerning the application and implementation of said policy;

[38] One view that is openly critical in this regard is held by París Domenech (2006), p. 403, *op. cit.*, who states that the Constitutional Court's interpretation "strips of all content the idea of participation that is set out in the statutory text, it now being forced to depend on political will and not on the concept of the Autonomous State, and denies a practice which is widespread and already envisaged in various legal systems".

[39] Constitutional Court Ruling 31/2010, Legal basis 115.

[40] Constitutional Court Ruling 31/2010, Legal basis 115.

[41] *Ibidem*.

c) Proposals for any financial bodies or institutions and national public companies in which the Generalitat may appoint representatives, as well as the various forms that said representation may take.

In this regard, by applying the same well-worn argument, it reiterates that "any decisions or agreements which the Bilateral Commission may adopt, as a cooperation body" lack any binding force as such, since they may not "in any way prevent the free and full exercise by the State of its competences nor, as a result, replace, bind or annul the decisions which it is charged with adopting".[42] Special mention should be made of the provision contained in section a) of the precept analysed, which goes beyond the Commission's functional sphere by referring to the "legislative competences of the national parliament and the parliament of Catalonia".[43] The reason given by the Court is that because the matter concerns relations between governments, "the competences affected can only be, in a strict sense and in terms of voluntary cooperation, those which correspond to one executive power and to another", excluding those of a legislative nature, exercised by the national parliament and by the parliament of Catalonia, "bodies which are outside the Bilateral Commission".[44]

At this point, it should be stated that these arguments prove clearly questionable not only because they fail to take account of the literal tone of the precept analysed, since at no time is the Commission endowed with the faculty to exercise legislative functions concerning the draft laws in question, but also, and more importantly, because what seems to have been ignored is the fact that the legislative initiative that corresponds to the two executives—central and regional—emerges as a key government mechanism and thus falls within the sphere of their competences. In addition, it overlooks the main virtue that, thanks to the provision set out under Article 33.2 of the Organic Law on the Constitutional Court, has been put into practice by Bilateral Commissions, namely the task of preventing regulatory and legislative conflicts.[45]

The State's Duty to Provide Justification as Set Out in the Second Additional Provision

As the Constitutional Court itself highlights, challenging the Additional Provision—that "should the Statute set out that the position of the Generalitat is determinant when establishing an agreement with the national government and should the latter fail to take such a position into account, then it must provide

[42] Constitutional Court Ruling 31/2010, Legal basis 116.

[43] *Ibidem*.

[44] *Ibidem*.

[45] Corretja, Vintró, Bernadí (2011), p. 38 *op. cit*., level their criticism at the Constitutional Court, feeling that the arguments put forward evidence "echoes of the nineteenth century, far removed from the dynamics of parliamentary systems of government".

sufficient justification before the Generalitat-State Bilateral Commission"—is of a "clearly rhetorical nature"[46] since circumstances indicate that the challenge lodged "fails to indicate the constitutional precept being infringed".[47]

In light of such a pronouncement, it is clear throughout Legal basis 117 that the constitutionality of the obligation foreseen is in no doubt, although no material link on the part of the State may be assumed to exist,[48] "given the general terms of the provision challenged, as a cooperation mechanism in cases in which the interests of the Autonomous Community are or may be particularly affected, without the State in any way being bound by the decision which it must adopt when exercising its competences".[49] In light of such observations, the Constitutional Court concludes its reasoning by stating that the Statute is not "an inappropriate framework for envisaging such mechanisms in the general terms in which they are set out in the provision challenged".[50]

The Court adopted a similar criterion when discarding the constitutionality of the specific statutory provisions that particularly envisaged a national duty to provide justification, namely:

a) The preliminary report to be issued by the Generalitat for authorising new types of gaming and betting at a national scale (Article 141.2 of the SAC). It is felt that, since it is not binding, it "in no way affects the decision to be adopted by the State". As regards the obligation to provide justification should a different position to that of the Generalitat be held, this does not "interfere with national competence".[51]
b) The same conclusion is reached regarding the report issued by the Bilateral Commission to determine the location of nationally owned infrastructure and facilities in Catalonia (Article 149.2 of the SAC).[52] The fact that said report is not issued exclusively by the regional government but by the Commission does not alter the sense of the interpretation generally applied in other cases.
c) A more detailed argument is provided by the Court with regard to the provision contained in Article 186.3 of the SAC—national discrepancy concerning the position formulated by the Generalitat with regard to European initiatives that affect its exclusive competences and arising from which there may be financial

[46] F. Balaguer Callejón (2011), p. 464, *op. cit*., is critical of the position adopted by the Constitutional Court on this matter: "The statutory precept is so clear that it specifically contemplates the instance in which the State, as a result of not being bound by the decision it must adopt, opts to take the contrary position to that held by the Generalitat (which it could not do if it were bound). It is therefore difficult to understand why there is such insistence on repeating something which is so obvious".

[47] Constitutional Court Ruling 31/2010, Legal basis 117.

[48] Balaguer Callejón (2011), p. 463, *op. cit*.

[49] *Ibidem*.

[50] *Ibidem*.

[51] Constitutional Court Ruling 31/2010, Legal basis 86.

[52] Constitutional Court Ruling 31/2010, Legal basis 92.

or administrative implications. Indeed, rejecting a maximalist approach to the term "determinant", which would allow it to be considered equivalent to "binding", an alternative interpretation is proposed that would not affect the possibility that "the State might establish and assert its position should, this statutory provision having become generally established, two or more Autonomous Communities maintain differing positions".[53] The State's duty to provide justification is thus embraced within the concept of cooperation and is considered as a means to externalise discrepancy "in cases in which the competences and interests of the Autonomous Community are particularly affected".[54] Interpreted thus, the conclusion is that the Statute is not "an inappropriate framework" to describe the position of the Autonomous Community as determinant, provided the latter "does not refer to European initiatives of a general nature but only to those contained under Article 186.3 of the SAC".[55]

Final Thoughts: Desire and Reality

Having concluded the analysis of the regulatory framework that marks out bilateralism in the reformed SAC, as well as the interpretation thereof made through Constitutional Court Ruling 31/2010, some final thoughts concerning the current status of the question from an empirical standpoint need to be addressed. Legal commentators are faced with a series of unresolved issues that must be dealt with such as; what remains of statutory will, of that desire to open up new horizons to the principle of bilateralism? After the highest authority (the Constitutional Court) has applied its corrective filter to the Constitution, what is the reality now facing said principle of bilateralism? Bearing in mind the context that defines bilateralism, according to the Constitutional Court's interpretation, has the principle taken a step backwards vis-à-vis its original configuration? Are fresh winds blowing for bilateralism in our legal system?

An overall appraisal of the pronouncements contained in Constitutional Court Ruling 31/2010 in the matter of institutional relations with particular regard to the dual nature thereof clearly evidences the Constitutional Court's profound mistrust in the matter. This is clearly reflected in the Court's tendency to adopt interpretative criteria that seek to deactivate the regulatory mandate included in the statutory provisions analysed. As we have seen, acting in such a manner maintains constitutionality but at the expense of sacrificing the prescriptive nature of the rules over which control is exercised.

The positive consequences arising from the understandable interpretation of bilateralism as an integrating mechanism and not one that causes disruption are

[53] Constitutional Court Ruling 31/2010, Legal basis 120.
[54] *Ibidem*.
[55] *Ibidem*.

quickly overshadowed by declaring the State to be in a position of hierarchical superiority, ignoring the criterion of competence and immediately resulting in the Autonomous Communities being relegated to a position of subordination.

Despite the fact that most of the provisions challenged are expressed in general terms that leave central legislative power intact, and are therefore not unconstitutional, Autonomous Community power to take part in decision-making processes at a national scale is stripped of prescriptive content in light of the total freedom that national legislation has to act by applying its own criteria.

Finally, the renewed list of functions assigned by the Statute to the Bilateral Commission, the key institutional reference embracing the main expressions of the dual relationship between governments, has also been subject to a profound reinterpretation. The constitutionality of the provisions analysed is linked directly to an interpretation in which the core aspect is the voluntary nature of the functions set out. Strictly confined to inter-governmental relations, the effects relate to the area of political cooperation and coordination.

Corseted within these constitutional constraints, the potential of this predominantly consultative bilateralism remains undeniable. It should be remembered that formalised and institutionalised bilateralism is "easier to force"[56] and leads to a system that necessarily tends towards cooperation. Having established the required regulatory basis, however, we must remember that the success of institutional relations (of any kind) inevitably entails a spirit of cooperation in which political will emerges as an "essential structural requirement".[57]

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