The swing of intergovernmental relations concerning environmental matters through the (un)balanced doctrines of the Constitutional Courts in Spain and in Italy

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ABSTRACT In terms of quantitative data, the Spanish Constitutional Court has, in forty years of activity (1980-2019), issued 141 judgements on environmental competences, spanning the most diverse areas this topic can cover. Within the same timeframe, the Italian Constitutional Court has issued 400 judgments on the same topic. It is self-explanatory that the Spanish and Italian Constitutional Courts' role goes beyond the function of *finium regundorum* among territorial entities. Through the analysis of additional qualitative data, this article demonstrates how constitutional judgements not only regulate intergovernmental relations within specific environmental cases, but also help to shape a different institutional balance, by either exacerbating or diminishing divisive tendencies between the centre and the periphery. This fact is signalled in many ways in the case law of the Spanish and Italian Courts, from the criteria and doctrines selected to decide cases (that define relation parameters and limits between central and local authorities), to individual prominent decisions, which can dramatically alter the already sensitive interactions between State and Autonomous Communities, and between State and Regions.

KEYWORDS constitutional disputes; intergovernmental relations; multilevel environmental governance; Constitutional Courts; centralization trend; unity and asymmetry; intergovernmental cooperation.

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1. Introduction

Within compound legal systems, intergovernmental disputes are physiological, as a direct consequence of the division of powers between different layers of government.

However, the allocation of competences included in constitutional catalogues generates even higher levels of intergovernmental disputes on those public policies — such as the environment — that are intrinsically multilevel, transversal and complex.

In cases where strong cooperation mechanisms between State and sub-national entities are not foreseen in the Constitutional provisions nor effectively deployed, as in Spain or Italy, there is a tendency to prefer constitutional challenges before the Constitutional Courts rather than institutional negotiations in political fora.[1] Thus, the role of Constitutional Courts is likely to be pre-eminent regarding the concrete exercise of environment-related competences.

Looking at some quantitative data,[2] the Spanish Constitutional Court has, in forty years of activity (1980-2019), issued 141 judgements on environmental competences, spanning the most diverse areas this topic can cover. Within

1. On this topic, see more recently: Alberton, "La praxis de las relaciones intergubernamentales en España".

2. The quantitative and qualitative data were collected using keywords as preliminary filters (i.e. for Spain: "medio ambiente", "protección del medio ambiente", "ambiental", "competencia en materia ambiental", "artículo 45", "artículo 148.1.9", "artículo 149.1.23"; for Italy: "ambiente", "competenza ambientale", "tutela ambiente", "protezione ambiente", "materia ambiente", "art. 117") from the official databases of the Spanish and Italian Constitutional Courts (respectively: https://hj.tribunalconstitucional.es/es; https://www.cortecostituzionale.it) and from the Spanish Official State Gazette (*Boletín Oficial del Estado*). A cross-examination of these data was conducted against the available annual reports of the Constitutional Courts (respectively: "Memorias" and "Relazioni annuali sulla giurisprudenza costituzionale") and against other annual reports of national jurisprudence (i.e. "Observatorio de Políticas Ambientales", edited by López Ramón, and "Jurisprudencia constitucional en materia de protección del medio ambiente", in *Revista Catalana de Dret Ambiental*; "Annual Reports on Constitutional Jurisprudence" edited by Issirfa-CNR). Among all relevant rulings on environmental issues, only "Recursos de inconstitucionalidad interpuestos por el Estado contra leyes de las comunidades autónomas", "recursos de inconstitucionalidad interpuestos por las comunidades autónomas contra leyes del Estado", "conflictos positivos de competencia promovidos por el Estado" and "conflictos positivos de competencia promovidos por las comunidades autónomas" for the Spanish case, and "ricorsi in via principale" and "conflitti

the same timeframe (1980-2019), the Italian Constitutional Court has issued 400 judgements on the same topic. It is self-explanatory that the Spanish and Italian Constitutional Courts' role goes beyond the function of *finium regundorum* among territorial entities.

Through the analysis of additional qualitative data,[3] the following paragraphs demonstrate how constitutional judgements not only regulate intergovernmental relations within specific environmental cases, but also help to shape a different institutional balance, by either exacerbating or diminishing divisive tendencies between the centre and the periphery. This fact is signalled in many ways in the case law of the Spanish and Italian Courts, from the criteria and doctrines selected to decide cases (that define relation parameters and limits between central and local authorities), to individual prominent decisions, which can dramatically alter the already sensitive interactions between State and Autonomous Communities, and between State and Regions.[4]

2. Constitutional environmental case law in Spain

2.1. Some preliminary data on environmental disputes

Considering the first forty years of the Spanish Constitutional Court's activity, environmental issues are among the most conflictive, reaching a total of 200 appeals (including those regarding the unconstitutionality of laws or acts having the force of law, and conflicts of powers).

If we review the trends in the last twenty years[5] of case law concerning disputes between the State and the Autonomous Communities, it is clear that while the

di attribuzione" for the Italian case, were selected, as the focus of this research is on intergovernmental relations.

3. See previous footnote on the methodology used for data selection.

4. See, for example, judgement no. 31/2010 on the Statute of Catalonia.

5. Appeals per year are the following: 48 (2000), 38 (2001), 65 (2002), 56 (2003), 59 (2004), 21 (2005), 26 (2006), 31 (2007), 34 (2008), 19 (2009), 33 (2010), 38 (2011), 41 (2012), 77 (2013), 58 (2014), 40 (2015), 42 (2016), 43 (2017), 8 (2018), 27 (2019). See the Annual reports (https://www.tribunalconstitucional.es/en/memorias) and *Boletines de documentación* (https://www.tribunalconstitucional.es/es/jurisprudencia/Paginas/BD.aspx) of the Constitutional Court.

overall number of yearly disputes has not changed in an appreciable manner, the number of cases in the environmental field has undergone a slight increase. The data show that, of the total number of cases brought before the Court, 55% took place in the years 1980–1999 and 45% between 2000 and 2019. However, when considering environment-related cases only, 42% of them were resolved before 2000, while the remaining 58% occurred after 2000.

Within the 2000–2019 timeframe, environmental disputes are fairly evenly distributed (on average, 5 appeals per year), although there are some notable increases in specific years (*infra*).

When examining the type of appealing authority and the type of dispute brought before the Court (table 1), the State usually appeals against laws (or acts with the same legal force) of the Autonomous Communities; it rarely raises conflicts of powers (in forty years, only four cases of this type were raised by the State). On the other hand, the Autonomous Communities have promoted more conflicts of powers against the State. Appeals against the unconstitutionality of State laws have been numerous, especially between 1986 and 1990, and between 2001 and 2015.

Table 1. Types of dispute per years (1980-2019)

Type of dispute /Year	1980-1985	1986-1990	1991-1995	1996-2000	2001-2005	2006-2010	2011-2015	2016-2019
Appeals brought by State	5	5	6	4	6	6	11	17
Appeals brought by ACs	5	15	3	6	14	13	10	1
Disputes promoted by State	1	0	2	0	0	1	0	0
Disputes promoted by ACs	0	21	3	8	5	6	10	4
Total	**11**	**41**	**14**	**18**	**25**	**26**	**31**	**22**

Source: Own elaboration.

Constant sources of dispute are protected areas, biodiversity and forests. Other fields, such as water, land planning and energy,[6] are also highly contraversial, since they involve different powers belonging to both the State and the Autonomous Communities. However, these disputes are concentrated in specific time periods (*infra*). Quantitative analysis shows that, wherever

6. See: Jaria Manzano, "Jurisprudencia constitucional en materia de protección del medio ambiente", 21 ss.; Valencia Martín, "Las competencias ejecutivas en materia energético ambiental", 199-228.

the management of environmental resources is shared by different powers, cooperation proves difficult.

In addition, other factors (both internal and external to the Spanish system) may exacerbate intergovernmental tensions. The main internal factors concern the reform of the Statutes of the Autonomous Communities, including new competences such as the development of detailed rules, the power to introduce higher standards of environmental protection and executive powers. The enactment of State legislation which impacts on the extent of the Autonomous Communities' action is also highly contentious.[7]

The most relevant external factor observed is the transposition of European Union law in the national legal system, especially in some fields (e.g. protection and management of water resources,[8] protected areas and biodiversity,[9] carbon capture and storage).[10] Through the implementation of European Union environmental law, the State tends to absorb more powers to the detriment of Autonomous Communities,[11] thus causing their claims.

The 2008 economic crisis also affected the level of intergovernmental disputes: the State extended its action by re-centralizing environmental competences normally shared with or attributed to the Autonomous Communities;[12] moreover, state economic development interests prevailed over (local) environmental protection instances.[13]

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7. For example, laws no. 2/2013, 22/1988, 4/1989, 41/1997, 40/2010.

8. Judgements no: 247/2007, 30/2011, 32/2011, 110/2011, 149/2011, 149/2012; 195/2012, 237/2012, 239/2012, 240/2012, 19/2013, 36/2013, 51/2013, 64/2013, 13/2015, 116/2017. For a comment on the transposition of Directive 2000/60 in Spain see: Fanlo Loras, "Planificación hidrológica en España". See also: Embid Irujo, "El segundo ciclo de Planificación Hidrológica".

9. For example, law no. 42/2007. See judgements no.: 69/2013, 87/2013, 138/2013. For a comment see: Lazcano Brotóns, "La transposición de la normativa comunitaria", 178-79.

10. Judgement no. 165/2016. For a comment on law no. 40/2010 see: Caro-Patón, "Problemas competenciales derivados de la Ley 40/2010", 1-29.

11. See on this topic: Nogueira López, "La transposición de Directivas ambientales", 281-344; López Ramón, "Observatorio de Políticas ambientales".

12. See: Casado Casado, *La recentralización de competencias en materia de protección del medio ambiente*.

13. Jaria Manzano, "Constitución, desarrollo y medio ambiente en un contexto de crisis", 1-46. On the regression of national environmental law see: Nogueira López, "Pack premium o pack básico".

All these factors have contributed and continue to contribute to altering the intergovernmental power balance on the environment. However, the final decision on the allocation of powers between the State and the Autonomous Communities is made through the doctrines and the criteria elaborated by the Constitutional Court (*infra*).

More data reveals specific trends of intergovernmental relations. For instance, some Autonomous Communities are more prone to promoting constitutional challenges than others: Catalonia *in primis* with 2 appeals against the State law's constitutionality and 7 conflicts of powers in 1981-2000, followed by 10 appeals and 11 conflicts of powers after 2000. Then, in turn: Andalusia (14), Aragon (12), the Canary Islands (9), Galicia and the Basque Country (6 each).[14]

The State has challenged Autonomous Communities' laws as follows: against Catalonia (10 appeals, of which 8 in the last twenty years), the Canary Islands (7), Castilla-La Mancha (7), the Basque Country (5), Galicia (4) and the Balearic Islands (4).[15]

Some Autonomous Communities show more propensity to bring constitutional cases before the Court than others, mostly due to historic reasons and to a strong "culture of autonomy".[16] In this regard, the Constitutional Court's judgements may exacerbate this tendency and influence future development of intergovernmental relations. It is therefore of utmost importance to analyse the criteria and reasoning of the Constitutional Court in environmental disputes.

2.2. The criteria and methods for constitutional ruling on environmental matters: the Spanish case

From the analysis of 141 environmental judgements issued in the last forty years, it seems that the Constitutional Court adopts a different set of criteria

14. Followed by: Balearic Islands (4), Cantabria (4), Castilla-La Mancha, Castilla y León, Valencian Community, La Rioja and Extremadura (3 each) and Madrid (1).

15. Castilla y León, Andalusia, Cantabria, Aragon, Murcia and Navarra (3 each), Valencian Community, La Rioja, Madrid, Extremadura and Asturias (2 each).

16. Toniatti, *La cultura dell'autonomia.*

to adjudicate the controversy, also depending on whom appeals (the State or the Autonomous Communities), with few exceptions.[17]

In order to highlight the different reasoning of the Court, the decisions are examined in two groups: cases brought by the Autonomous Communities, and cases brought by the State.

First group: environmental cases brought by the Autonomous Communities.

The Constitutional Court rules on these disputes by first distinguishing and interpreting the concepts of basic legislation ("legislación básica"),[18] of development legislation ("desarrollo"), of additional legislation ("adicionales de protección") and of executive powers ("competencias ejecutivas") included in the 1978 Constitution (art. 148.1.9 and 149.1.23 of the Constitution) and in the Statutes of Autonomy.[19]

When looking at the forty years of environmental case law considered, the criteria setting the boundaries of the State basic legislation (and, conversely defining the Autonomous Communities' scope for legislative and administrative powers) can be identified over three distinct phases.

During the first phase, marked by decision no. 227/1988 on water catchments,[20] the Court justifies State detailed legislation, which guarantees an adequate standard of protection in all Autonomous Communities' territories.[21]

This interpretation is confirmed in judgement no. 149/1991, according to which the State may restrict the Autonomous Communities' legislative powers to a very narrow scope in the environmental field.

17. For example, in cases of environmental impact assessment and strategic environmental assessment (*infra*).

18. For a comment see: Jiménez Campo, "¿Qué es lo básico?", 39-92; Álvarez Conde, "La legislación básica del Estado".

19. See on the division of environmental powers: Fernández Salmerón - Soro Mateo, "La articulación del ordenamiento jurídico ambiental".

20. See: González Pascual, "Las competencias estatutarias sobre aguas", 1-11. See also: Tornos Mas, "La sentencia del Tribunal Constitucional 247/2007", 79-105.

21. However, a few exceptions to this trend exist. See judgement no. 170/1989.

This doctrine is overcome by decision no. 102/1995 on protected areas, which inaugurates a second phase of constitutional doctrine. Here the Court elaborates substantial and formal principles (further developed in subsequent judgements),[22] thus confining the State's basic legislation: basic legislation shall be enacted as a law or an act having the force of law (formal criterion). In addition, the content of basic legislation shall be: "básico incorpora la acepción de fundamento o apoyo principal de algo, con vocación por la esencia, no de lo fenoménico o circunstancial, cuya finalidad consiste en asegurar, en aras de intereses generales superiores a los de las Comunidades Autónomas, un común denominador normativo y, en la materia que nos ocupa, el encuadramiento de una política global del medio ambiente, haciendo viable la solidaridad colectiva y garantizando su disfrute por todos, así como el correlativo deber de conservación en régimen de igualdad" (art. 45 [of the Constitution]).[23]

While developing this concept of legislation "básica"[24] in decision no. 194/2004 on protected natural areas, the Court further adds "común denominador normativo necesario para asegurar la unidad fundamental […], a partir del cual pueda cada Comunidad, en defensa de su propio interés, introducir las peculiaridades que estime convenientes dentro del marco competencial que en la materia correspondiente le asigne su Estatuto".[25]

Accordingly, there seem to be two directions in which the Autonomous Communities can act.[26] First, within the limits of their Statutes, the Autonomous Communities can complete State basic legislation. The latter should not be too detailed and thus hinder implementation and specification by the Autonomous Communities.[27] Second, in compliance with the provisions of art. 149.1.23 of the Constitution, Autonomous Communities can improve State

22. See judgements no. 194/2004, 101/2005, 104/2013, 174/2013, 161/2014, 45/2015, 118/2017.

23. Judgement no. 102/1995 (*Fundamento Jurídico* 8).

24. Judgement no. 194/2004 (*Fundamento Jurídico* 7).

25. The determination of what can be considered "básico" is functional to limit State powers and preserve those pertaining to the Autonomous Communities. This determination is therefore entrusted to the Constitutional Court, since if the State itself could establish limits to its own powers, there would be a high risk of the State appropriating functions which should be reserved to the Communities. See judgement no. 194/2004 (*Fundamento Jurídico* 10).

26. See: Jaria Manzano, "Problemas competenciales fundamentales en materia de protección del medio ambiente", 6. See also judgement no. 170/1989 (*Fundamento Jurídico* 2).

27. Judgement no. 102/1995 (*Fundamento Jurídico* 9).

basic legislation by introducing higher standards of protection (e.g. stricter sanctions)[28] as "normas adicionales de protección".[29]

Decisions no. 102/1995 and no. 194/2004 are also relevant as they assert that the State can, in exceptional circumstances, enact administrative acts or regulations, usually reserved to the Autonomous Communities.[30] This exceptional power shall be specific and concrete, targeted towards the implementation of precise measures. Any broad-spectrum action by the State is illegitimate, since it invades the Autonomous Communities' prerogative.[31]

This doctrine is upheld and developed by subsequent judgements.[32] However, a few decisions have opted for diverging interpretations on the subject. A notable case in this regard is decision no. 31/2010 on the Statute of Catalonia, according to which the use of administrative acts or regulations by the State, even in the environmental field, shall not be exceptional.[33]

In any event, the vast majority of environmental decisions is consistent with that of 102/1995, wherein the State shall adopt executive acts only under specific circumstances: i) the intervention spans across the borders of different Autonomous Communities; ii) it is not possible to establish cooperation or coordination mechanisms due to the level of harmonization required;[34] iii) it is necessary to impose conditions on the action of the Autonomous Communities

28. See also judgement no. 90/2000 (*Fundamento Jurídico* 3).

29. The Constitutional Court has not clarified the difference between "desarrollo" and "adicionales". In judgement no. 64/1984, the Court explicitly refers to both legislative categories, while in judgement no. 149/1991 "desarrollo" is interpreted in terms of introducing stricter rules. A doctrine more in favor of the Autonomous Communities seems to start from judgement no. 102/1995. See: Martín Mateo, "La configuración del Derecho ambiental por la STC 102/1995", 57. See also: Fernández Salmerón, and Soro Mateo, "La articulación del ordenamiento jurídico ambiental", 77-78.

30. Judgement no. 102/1995 (*Fundamento Jurídico* 8). See also judgements no. 194/2004 (*Fundamento Jurídico* 7), 141/2016 and 118/2017.

31. Judgement no. 194/2004 (*Fundamento Jurídico* 7).

32. Judgements no. 53/2017, 118/2017 and 109/2017.

33. Judgement no. 31/2010 alters the criteria elaborated under judgement no. 102/95. Spanish scholars were critical against this decision. See: Albertí Rovira, "El Estado de las Autonomías después de la Sentencia del Tribunal Constitucional". See also the articles included in the monographic issue of *El Cronista del Estado Social y Democrático de Derecho*, 15, 2010 dedicated to "El Tribunal Constitucional y el Estatut".

34. Judgements no. 141/2016 and 118/2017.

in order to prevent negative consequences.[35] Additionally, the State must prove that the administrative functions cannot be carried out by the Autonomous Communities through cooperation and coordination mechanisms.[36]

In these environmental decisions, intergovernmental collaboration is acknowledged by the Court as a key factor in balancing central and local instances, with an important *caveat*.

First, coordination entails that: i) the respective powers are defined between the Autonomous Communities[37] and the State; ii) the function is of a general type; iii) the authority in a higher hierarchical position (i.e. the State) shall coordinate.[38] However, coordination does not confer additional or complementary powers to the State,[39] since this would alter the division of powers[40] established by the Constitution.

Second, the cooperation principle (implied in the Constitution)[41] ensures that the principles of unity and of autonomy remain compatible with one another.[42] Like coordination, cooperation requires the allocation of powers to remain unchanged. However, while coordination is prompted by the State, cooperation cannot be coerced: while coordination is inherently tied to the notion of imposition, cooperation is by nature an expression of free will by the participants, as it is a relation *inter pares*.[43] This means that cooperation

35. Judgements no. 5/2016, 141/2014 and 69/2013.

36. Judgements no. 138/2009, 38/2012 and 113/2013, 163/2013, 52/2013 and 113/2013.

37. See judgement no. 32/1983 "la competencia de coordinación general presupone lógicamente que hay algo que debe ser coordinado, esto es, presupone la existencia de competencias de las Comunidades Autónomas… competencias que el Estado, al coordinarlas, debe obviamente respetar".

38. Judgement no. 32/1983 "la competencia estatal de coordinación general significa no sólo que hay que coordinar las partes o subsistemas… sino que esa coordinación general le corresponde hacerla al Estado".

39. Judgement no. 194/2004. See also judgements no. 32/1983, 104/1988, 27/1987, 227/1988, 214/1989, 118/1996 and 101/2005.

40. Judgement no. 194/2004 (*Fundamento Jurídico* 8), quoting judgement no. 32/1983.

41. Judgement no. 194/2004 (*Fundamento Jurídico* 9) referring to judgement no. 18/1982, (*Fundamento Jurídico* 14).

42. Judgements no. 214/1989, (*Fundamento Jurídico* 20), and 194/2004 (*Fundamento Jurídico* 9).

43. Contrary, see judgement no. 31/2010 which affirms the superiority of State over ACs.

mechanisms can be set up as general options by the parties, although no specific procedures can be prescribed by one party alone.[44]

In a complex system of division of powers such as Spain, where the majority of powers are shared, cooperation should, in theory, play a central role in settling potential interferences and overlap.[45] Nonetheless, the Court's subsequent decisions highlight the fact that such a cooperative process between the State and Autonomous Communities rarely takes place in practice.

In these later judgements, which can be ascribed to the third phase of environmental jurisprudence, initiated after the 2008 economic crisis (*infra*), the State is rarely asked by the Court to justify why coordination and cooperation mechanisms are not activated.[46] The burden of proof on the State is not mentioned or scrutinised by the Court as it is in previous decisions.[47]

Especially after the economic crisis, the State's intervention is repeatedly considered exceptional (i.e. legitimate), even when it is not according to the criteria elaborated in previous decisions, by a weaker reference to those same criteria limiting State powers.[48] In this regard, some scholars observe a silent return (even if sometimes textually remarked upon)[49] to the original stance expressed in decision no. 149/1991, which justified strong limitations to the Autonomous Communities' powers.[50]

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44. Judgement no. 194/2004 (*Fundamento Jurídico* 9).

45. See, *ex multis*: Arbós Marín, *et al.,* "Las relaciones intergubernamentales en el estado autonómico"; Carranza, "Las oportunidades del principio de cooperación"; Colino Cámara, "Las relaciones intergubernamentales en España"; García Morales, "La colaboración a examen"; Máiz Suárez, *et al.,* "La federalización del Estado de las Autonomías"; Pérez Gabaldón, "Los problemas competenciales en materia medioambiental"; Ruiz González, "La cooperación intergubernamental en el Estado autonómico"; Tajadura Tejada, "Federalismo cooperativo y Conferencias Sectoriales".

46. Judgements no. 113/2013, 163/2013, 62/2018 and 64/2018.

47. Judgement no. 165/2016, (*Fundamento Jurídico* 10-12). See also judgements no. 182/2016 and 190/2016.

48. For an in-depth analysis of these cases see: Casado Casado, *La recentralización de competencias en materia de protección del medio ambiente*.

49. Judgements no. 6/2016 and 28/2016.

50. See: Valencia Martín, "Jurisprudencia constitucional: Reforma de la Ley de Costas", 393.

Additionally, this trend legitimizes a broadening of the concept of basic legislation, as the Court argues: "no siendo lo detallado o concreto el elemento primero y esencial para calificar esta regulación como básica, sino su finalidad tuitiva" or that "no vacía de contenido la competencia de la Comunidad Autónoma, cuya regulación puede incidir sobre los restantes métodos […] bien estableciendo nuevas prohibiciones o limitaciones para reforzar la acción protectora de la norma básica estatal, que en este caso opera como norma de mínimos". In another case, with an instrumental reference to European Union law, the Court states that "tampoco resulta irrelevante el régimen comunitario de tales prohibiciones y, sobre todo, su finalidad, del todo afín a la legislación básica de protección del medio ambiente para cuya aprobación está habilitado el Estado" (ex art. 149.1.23 [of the Constitution]).[51] The same reasoning is repeated in other decisions, which add that "en materia de medio ambiente el deber estatal de dejar un margen de desarrollo de la legislación básica por la normativa autonómica es menor que en otros ámbitos".[52]

In other cases, the Court identifies the basic character of legislation through substantial explanations,[53] or by deciding that the "básico" character of legislation does not imply a uniform and homogeneous action across the entire national territory.[54]

Finally, two specific environmental topics, i.e. environmental impact assessment[55] and air quality,[56] which are among the core sub-topics of European Union environmental law, are placed by the Court under a different umbrella, thus justifying State intervention. In fact, the Court asserts "el mero dato de que la Directiva europea que ha sido traspuesta en el ordenamiento español por la Ley impugnada fluya de la competencia de la Unión sobre el medio ambiente no significa, sin más, que la norma española que la traspone deba encuadrarse en un título competencial similar".[57]

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51. Judgement no. 69/2013 (*Fundamento Jurídico* 6).

52. Judgement no. 138/2013 (*Fundamento Jurídico* 4), referring to previous judgement no. 69/2013 (*Fundamento Jurídico* 8).

53. Judgement no. 102/2013 (*Fundamento Jurídico* 10).

54. Judgement no. 146/2013 (*Fundamento Jurídico* 4).

55. This doctrine has been heavily contested both by constitutional Judges (i.e. "votos particulares") and by scholars. *Ex multis*: Jaria Manzano, "Problemas competenciales fundamentales en materia de protección del medio ambiente", 30.

56. Judgement no. 53/2016.

57. Judgement no. 165/2016 (*Fundamento Jurídico* 6).

The above-mentioned criteria and reasoning (*amplius* under the second group of decisions) show how over the years the Court has flexibly interpreted the division of powers among State and Autonomous Communities, even introducing political preferences not always in line with Constitutional provisions and previous Court doctrine. For these reasons it has been contested by some constitutional Judges as "no ortodoxa".[58]

Second group: environmental cases brought by the State.

The disputes initiated by the State are (and increasingly over recent years) characterised by high confrontationality, as the analysis of the following constitutional decisions reveals. Moreover, the analysis of this second group of cases shows the existing tension between the State and Autonomous Communities (with a specific reference to Catalonia) toward a radically different approach to economic development.

Since the criteria used by the Constitutional Court to solve these controversies are extremely ambiguous, and sometimes not even explicitly stated (contrarily to the cases examined in the first group), only decisions on highly contentious topics are summarised here in order to reconstruct the *ratio decidendi* more clearly and assess the potential impact of these rulings on intergovernmental relations.

The most relevant disputes, in terms of conflicting interests and contrasting models (i.e. economic development vs. environmental protection), can be grouped by the following topics: "fracking" (i.e. hydraulic fracturing for the extraction of fossil fuels), limits to infrastructure and commercial settlements, climate change, environmental impact assessment, protected areas and contaminated soil, environmental taxes.

The first topic, hydraulic fracturing, is at the centre of intense legislative action by some Autonomous Communities (i.e. Cantabria, La Rioja, Navarra, Catalonia, Basque Country and Castilla-La Mancha) aimed at restricting or prohibiting these activities. Once the Autonomous Communities' laws are challenged before the Constitutional Court, the vast majority are declared

58. See "votos particulares" of Judges *doña* Adela Asua Batarrita and *don* Fernando Valdés Dal-Ré (judgement no. 53/2016).

unconstitutional, either completely or partially[59] (with the only exception of the law of Castilla-La Mancha).[60]

Concisely, the Autonomous Communities defend their power to introduce stricter standards of protection in comparison to those prescribed by State laws, in line with the precautionary principle[61] (applicable to environment and to public health). Conversely, the State claims to be the only political unit entitled to adopt basic legislation on mining and energy (art. 149.1.25 of the Constitution) and on coordination of the general planning of economic activities (art. 149.1.13 of the Constitution); moreover, the State claims to have meanwhile enacted a specific provision which allows hydraulic fracturing after a positive environmental impact assessment.[62]

The preliminary identification of the subject by the Court implies a recognition of the competence entitlement, i.e. which level of government is legitimated to legislate. Therefore, in these cases, the identification of the relevant power (i.e. energy) orients the decision in favour of the central government.[63]

In a second group of controversies, the Court addresses national economic interests conflicting with the Autonomous Communities' environmental

59. Judgements no. 106/2014 (Cantabria), 134/2014 (La Rioja); 208/2014 (Navarra); 73/2016 (Catalonia), 8/2018 (Basque Countries). For a comment see: Embid Irujo - Embid Tello, "Fracturación hidráulica"; Valencia Martín, "Jurisprudencia constitucional: el año del 'fracking'"; López Ramón, "En la polémica del 'Fracking'".

60. Law declared constitutional by the Court (judgement no. 65/2018) in light of the following reasoning: "ni contiene una prohibición legal expresa de esta técnica de carácter absoluto ni incondicionado como en el caso de las SSTC 106/2014; 134/2014 y 208/2014), ni efectúa tampoco una remisión incondicionada o en blanco a la Administración para que regule su posible uso (reformas de las leyes del suelo de Cataluña y País Vasco declaradas inconstitucionales en las SSTC 73/2016 y 8/2018…contiene en definitiva una norma novedosa y no examinada hasta la fecha, consistente en habilitar a la Administración autonómica para que ésta efectúe un 'zonificación' del territorio de la Comunidad Autónoma y delimite áreas donde la técnica del fracking quede excluida, restringida o permitida en atención a los criterios que la ley señala y que, a diferencia de lo acontecido en las reformas de las leyes del suelo de Cataluña y País Vasco anuladas antes aludidas SSTC 73/2016 y 8/2018, no incluyen una referencia final a cualquier ámbito competencial de la Comunidad Autónoma" *(Fundamento Jurídico 4).*

61. Judgement no. 106/2014, *Antecedentes* 1 y 8, (*Fundamento Jurídico* 7).

62. Art. 9.5 of Law no. 17/2013.

63. Judgement no. 106/2014 (*Fundamento Jurídico* 3).

protection interests. In these cases, it uses different criteria related to the distribution of powers, and entailing a choice on the preferred territorial, economic and political model (with a *ratio* not always in line with that adopted in similar challenges promoted by the Autonomous Communities). For example, decision no. 157/2016 declares as unconstitutional the limits imposed by Catalonia (on the basis of its powers in the fields of urban planning, land and environmental protection) to the settlement freedom of commercial infrastructures[64] granted by the basic law of the State. In this case, the Court preliminarily establishes whether such restrictions are "razones imperiosas de interés general exigidas por la normativa básica estatal para que pueda establecerse una restricción al principio de libertad de establecimiento".[65] According to the Court, Catalonia has not sufficiently proved the existence of "razones justificativas", of "explicaciones" and of "datos suficientes" and, therefore, "las consideraciones sobre los daños al entorno urbano y al medio ambiente que se efectúan […] se formulan de modo abstracto". Moreover, Catalonia does not prove that the same environmental objectives could not be reached via less restrictive measures.[66] This accurate and detailed review of Catalonia's restrictive measures undertaken by the Court is even criticised internally by some Judges[67] as "estrictamente política". Indeed, the Court opts for an urban development model (based on the idea of "compact city") which is far beyond its interpretative role. Thus, this extremely political decision introduces "mayor inseguridad jurídica sobre el ejercicio de las competencias autonómicas en esta materia" and "no se sabe a ciencia cierta qué tipo de datos serán idóneos y suficientes, a juicio de la mayoría del Tribunal Constitucional, para satisfacer la especial exigencia de precisión que se deduce de la legislación básica estatal".[68]

With a similar reasoning, decision no. 209/2015 declares the unconstitutionality of some provisions on the touristic requalification of the Canary Islands (law no. 2/2013). The limits introduced to the authorisation of new hotels and other tourist facilities "persiguen la sostenibilidad del modelo

64. Law no. 7/2014 which modifies law no. 1/2009 "de ordenación de los equipamientos comerciales".

65. Judgement no. 157/2016 (*Fundamento Jurídico* 8-9).

66. *Ibidem* (*Fundamento Jurídico* 9).

67. See "votos particulares" of Judges *doña* Adela Asua Batarrita and *don* Fernando Valdés Dal-Ré (judgement no. 157/2016).

68. *Ibidem*.

turístico canario y por ello pretenden mantener una política de contención de un crecimiento desordenado incompatible con el medio ambiente y con la ordenación del territorio".[69] However, the Court contests that these limits are not sufficiently justified in terms of "razones medioambientales o urbanísticas".

A further source of clashes between State economic development models and the Autonomous Communities' territorial/environmental protection priorities is climate change and the related "energy transition".

In decision no. 87/2019, the Court assesses various provisions of the Catalan law on climate change (no. 16/2017), which "tienen una vocación transformadora del entero sistema industrial, económico y energético de Cataluña". According to the Court, since the law has been enacted by an Autonomous Community, the doctrine of decision no. 64/1982 (applied, amongst others, to decision no. 8/2018 on fracking) also applies to this case. Thus, the assessment of the constitutionality of the Autonomous Communities' powers must preliminarily ascertain "si aquélla es respetuosa con las bases estatales en materia" and "si no vulnera competencias estatales amparadas en otro título competencial". In this context, the extent of what is considered "básica" legislation is extremely wide, including "toda la legislación básica que a ella se refiere y no sólo por la relativa a la materia concreta sobre la que recaiga esa competencia".[70] Therefore, the Court continues "lo relevante no será tanto el engarce competencial de la ley autonómica en general o de cada precepto impugnado en particular como el carácter formal y materialmente básico de la legislación estatal de contraste citada en cada caso por el recurrente y la existencia de una 'contradicción efectiva e insalvable por vía interpretativa' entre esa normativa y el precepto en cada caso recurrido, pues de concurrir ambas condiciones habrá de declararse inconstitucional y nulo el precepto recurrido por infringir el orden constitucional de distribución de competencias de forma mediata o indirecta".[71]

69. Judgement no. 209/2016 (*Fundamento Jurídico* 5).

70. See judgements no. 64/1982 (*Fundamento Jurídico* 5) and 8/2018 (*Fundamento Jurídico* 4).

71. See previous judgements no. 137/2018 (*Fundamento Jurídico* 2) and 119/2018 (*Fundamento Jurídico* 2).

The Court thus concludes that the energy transition towards a completely renewable, denuclearised and decarbonised model, as promoted by the Catalan law, violates existing State basic laws, which are based on a completely different energy system, i.e. allowing the use of fossil fuels and nuclear power.[72]

A different group of decisions concerns environmental impact assessment. The doctrine on this topic is consistent with the first decision (no. 13/1998)[73] and is applied to cases brought by both the State and the Autonomous Communities. The Court holds that environmental impact assessment cannot be considered an environmental administrative act, since all activities subject to environmental impact assessment fall under specific rules of competences of the Constitution and the Statutes of Autonomy, which "son títulos que por su naturaleza y finalidad atraen a la de medio ambiente, cuyo carácter complejo y multidisciplinario afecta a los más variados sectores del ordenamiento".[74] Hence, projects and activities "attract" environmental impact assessment under their respective fields of competences (e.g. airports and ports, railways, internal waters, electrical infrastructure, public works of general interest, mines and energy, cultural heritage and public security) according to art. 149.1 of the Constitution and to the Autonomous Communities' Statutes. Two consequences are: i) the State "ejerce sus propias competencias sustantivas sobre la obra, la instalación o la actividad proyectada"; ii) if the project or activity is implemented in the territory of an Autonomous Community, the State must cooperate with the Autonomous Community and consult it throughout the environmental impact assessment procedure.[75] In this way, the Autonomous Community "tiene garantizada constitucionalmente una participación en la evaluación del impacto ambiental de los proyectos de competencia estatal que vayan a realizarse, total o parcialmente, sobre su territorio o que, más en general, puedan afectar a su medio ambiente".[76]

72. For an analysis of the law and of the judgement see: De la Varga Pastor "Estudio de la ley catalana 16/2017".

73. See Judgements no. 101/2006, 202/2013, 109/2017, 113/2019. See also cases challenged by ACs no. 149/2012, 34/2012, 1/2012, 111/2013, 104/2013, 80/2013, 59/2013, 13/2015, 53/2017.

74. Judgement no. 13/1998 (*Fundamento Jurídico* 7).

75. *Idem*, (*Fundamento Jurídico* 9-10).

76. *Idem*, (*Fundamento Jurídico* 11).

Despite the strong criticism received by scholars,[77] as well as by some Judges of the Court,[78] this doctrine is applied to all environmental impact assessment cases and extended to other topics, such as "Natura 2000" plans and projects,[79] public works of general interest,[80] plans on acoustic pollution[81] and plans for measures to minimise acoustic impacts.[82]

A third group of decisions concerns the protection of natural areas,[83] soil, and prevention of soil contamination.[84] These are controversies on "la concurrencia sobre un mismo espacio físico de competencias estatales, en materia de defensa nacional, y autonómicas, en materia de espacios naturales protegidos" and "suelos contaminados". The Court's decision on the constitutionality of the Autonomous Communities' laws enacted on the basis of powers of "desarrollo legislativo y ejecución de las normas básicas estatales en materia de medio ambiente", which limit some State activities concerning defence, is based on the choice of the power that is deemed prevalent in each case. Despite the fact that, in these cases, "las situaciones de concurrencia competencial sobre un mismo espacio físico no puede resolverse en términos de exclusión, […] han de resolverse acudiendo a técnicas de colaboración y concertación",[85] the implementation of the collaboration obligation is excluded. Cooperation and coordination mechanisms are simply not evaluated by the Court, as the challenged law is enacted by an Autonomous Community, not by the State. Thus, for dispute settlement, it is sufficient to "determinar cuál es el título

77. See: Fernández Salmerón, Soro Mateo, "La articulación del ordenamiento jurídico ambiental en el estado autonómico", 395-6.

78. See "votos particulares" of Judges *don* Pablo García Manzano, *don* Julio D. González Campos, *don* Pedro Cruz Villalón, *don* Carles Viver Pi- Sunyer and *don* Tomás S. Vives Antón, (judgement no. 13/1998). They affirm that the purpose of the evaluation "es el de prevenir daños al medio ambiente derivados de la obra o instalación", thus it is "una técnica o instrumento que se inscribe con propiedad en el ámbito específico del medio ambiente y, de modo más preciso, en el de su tutela o protección de carácter preventivo a nivel de proyectos de obras".

79. Established by "Habitat" Directive 92/43/EEC.

80. Judgement no. 202/2013.

81. Judgement no. 161/2014, quoting the doctrine of judgements no. 13/1998 and 245/2012.

82. Judgement no. 5/2013.

83. Judgements no. 82/2012, 154/2014 and 182/2014.

84. Judgement no. 192/2014.

85. Judgement no. 82/2012 (*Fundamento Jurídico* 3) and 154/2014 (*Fundamento Jurídico* 5).

prevalente en función del interés general concernido, que determinará la preferente aplicación de una competencia en detrimento de la otra".[86]

State competence prevails "en virtud de su carácter más específico" and on the basis of the consideration that the State "no puede verse privado del ejercicio de sus competencias exclusivas por la existencia de una competencia, aunque también sea exclusiva, de una Comunidad Autónoma".[87] On the other hand, "tal preferencia no deba ser entendida en términos absolutos si obedecen a objetos distintos y no interfieren o perturban el ejercicio de las competencias prevalentes". Despite the theoretical possibility of some Autonomous Communities' action, in the majority of cases, Autonomous Communities are not allowed to exert their prerogatives.

In other judgements, the Court applies mixed criteria to evaluate the constitutionality of the Autonomous Communities' laws (both "desarrollo" and "normas adicionales"), by combining a definition of basic legislation and the determination of the relevant prevailing power. Thus, the Court does not consider that the Autonomous Communities' laws introduce higher protection standards. Examples of this reasoning are identified in those controversies (e.g. on telecommunication infrastructures) where an "estrecho entrecruzamiento competencial que se produce entre un título competencial sectorial (telecomunicaciones) y títulos de carácter transversal u horizontal (ordenación del territorio, protección del medio ambiente), entrando también en juego otro título sectorial como es el de la sanidad"[88] is observed.

The Court first highlights the necessity to integrate the overlapping powers (of the State and of the Autonomous Communities) over the same physical space through coordination and cooperation mechanisms, and then, if collaboration is lacking or not feasible, to solve the controversy by applying the criterion of the prevalent field. In line with this second postulate, the Constitutional Court affirms that the State "tiene potestad para determinar, en materia de sanidad, los niveles tolerables de emisiones. Por tanto, las Comunidades Autónomas no pueden alterar esos estándares, ni imponer a

86. Judgement no. 82/2012 (*Fundamento Jurídico* 3).

87. Judgement no.82/2012 (*Fundamento Jurídico* 4).

88. Judgement no. 8/2012 (*Fundamento Jurídico* 3).

los operadores una obligación de incorporar nuevas tecnologías para lograr una minimización de las emisiones, no sólo porque ello resulte contrario a las bases establecidas por el Estado, sino también porque de esa forma se vulnerarían las competencias legítimas del Estado en materia de telecomunicaciones".[89]

The same logic is applied to other cases: i) the necessity to attempt forms of collaboration when respective powers overlap; ii) the criterion of prevalence of one power over another if there are not sufficient margins of collaboration; iii) the identification of potential residual areas of the Autonomous Communities' competences which do not interfere with the prevalent State powers.[90]

A final group of decisions concern the Autonomous Communities's power to introduce environmental taxes, in addition to State tax law, which cannot infringe the double taxation prohibition (art. 6.2 of the law on Autonomous Community financing).[91] Two main contrasting doctrines can be identified in the Constitutional case law of the last decade on this topic.

The first, and most recent reasoning (already elaborated in previous decisions)[92] is included in decision no. 74/2016, assessing Catalan law (no. 12/2014) on taxes on emissions in the atmosphere, and on energy production from nuclear power plants. The unconstitutionality of the Autonomous Communities' law is determined on the basis of a "mechanical" comparison between the State's and the Autonomous Communities' tax provisions.[93] The second doctrine, recalled by dissenting Judges[94] and by some other specific judge-

89. Judgement no. 8/2012 (*Fundamento Jurídico* 6).

90. Judgement no. 8/2016 (*Fundamento Jurídico* 3, *Fundamento Jurídico* 7), which applies the criterion of "preferente aplicación de una competencia en detrimento de la otra" by quoting judgements no. 82/2012 (*Fundamento Jurídico* 3) and 154/2014 (*Fundamento Jurídico* 5).

91. *Ley Orgánica* no. 8/1980 "de Financiación de las Comunidades Autónomas" (LOFCA), as modified in particular by law no. 3/2009.

92. See judgements no. 196/2012, 110/2014, 22/2015, 60/2013, 179/2006.

93. Judgement no. 74/2016, quoting judgements no.122/2012, 210/2012, 30/2015, 107/2015, 108/2015, 111/2015 and 202/2015.

94. See "voto particular" of Judge *don* Juan Antonio Xiol Ríos (Judgement no. 74/2016): "Un, a mi juicio, mecánico y acrítico análisis comparativo entre los tributos, al que antes me he referido, ha llevado a la opinión mayoritaria en la que se sustenta la Sentencia a concluir que

ments,[95] argues in favour of the Autonomous Communities' taxes which include "finalidades extrafiscales". This Court holds that such taxes do not represent a duplication of State taxes, since the latter pursue more strictly fiscal objectives,[96] while the Autonomous Communities' taxes are mainly focused on environmental protection purposes.

Although the role of the Court is to settle intergovernmental disputes, environmental judgements, increasingly in the last decade, have instead become an additional significant source of intergovernmental tension.

This aspect is signalled by the Judges themselves (through the so-called "votos particulares"). They criticise the criteria and the doctrines used by the Court in ruling, which are not linear, sometime even "apodictic"[97] or surprising in terms of the position upheld, and generally not consistent with similar (even contemporaneous) cases. Moreover, in some key judgements (e.g. on fracking), the Court does not offer any explicit criteria which can prevent other Autonomous Communities from adopting laws not in line with the Court's doctrine. This uncertainty flows into new intergovernmental tensions.

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el impuesto estatal y el autonómico son equivalentes [...] Las dos finalidades extrafiscales a las que responde prevalentemente el tributo autonómico impugnado son las medioambientales y las relativas a protección civil, que supone el ejercicio de competencias autonómicas concurrentes con las estatales. [...] Pero sí me parece pertinente mencionar la especial incidencia que tiene la generación de energía eléctrica de origen nuclear en la Comunidad Autónoma de Cataluña a los efectos de ponderar adecuadamente el ejercicio de su poder tributario para la consecución de determinados fines extrafiscales medioambientales y de protección civil vinculados a esta actividad. En efecto, en la actualidad existen en España 6 centrales nucleares, dos de ellas con dos reactores, lo que supone un total de 8 reactores nucleares de producción eléctrica. Tres de esos reactores están en la Comunidad Autónoma de Cataluña, concentrados en la provincia de Tarragona, lo que implica que el 37,5 por 100 de los reactores de toda España están en el territorio de esta Comunidad Autónoma. Esa cifra aumenta al 40 por 100 si el análisis se hace tomando en consideración la potencia eléctrica. Como gustaba decir a juristas clásicos intentando superar concepciones formalistas, *res ipsa loquitur*: los hechos hablan por sí mismos".

95. First introduced under Judgement no. 456/2007.

96. Judgements no. 197/2012, 208/2012, 85/2013, 96/2013 and 200/2013.

97. In this sense the Judge *doña* Adela Asua Batarrita ("voto particular", judgement no. 165/2016).

3. Constitutional environmental case law in Italy

3.1. Some preliminary data on environmental disputes

A brief explanatory introduction is needed before illustrating the Italian quantitative data. The Italian Constitution, up to the reform of 2001, does not include any references to the environment, either in terms of value or as a matter of competences allocated to governmental levels. Against this background, legislative and executive functions have been shared between State and Regions on the basis of a State framework – Region detailed legislation, with the Constitutional Court encouraging cooperation between government levels and allocating powers by balancing unity and asymmetry case by case. After the constitutional reform of 2001, the revised text of Art. 117 (117.2 letter s)) vests exclusive legislative and regulatory competence with regard to the "protection of the environment and the ecosystem" in the State. Some other legislative powers related to the environment (e.g. land-use planning; energy; enhancement of cultural and environmental assets) are vested in the Regions, except for the determination of fundamental principles, which are established by State legislation. Finally, Regions have legislative competences in all fields that are not expressly attributed to the State (e.g. agriculture, mining). Moreover, administrative functions are vested in local entities, Regions or the State, pursuant to the principles of subsidiarity, differentiation and proportionality, in order to ensure uniform implementation (art. 118.1 of the Constitution).

This radical shift of competence allocation has initially caused disorientation in Regions, leading to a stark increase in challenges before the Constitutional Court.[98] Additionally, the lack of strong cooperative mechanisms apt to include regional interests in the national decision-making process has funnelled all disputes before the Constitutional Court.

98. Authoritative scholars note that constitutional disputes (*giudizi in via principale)* have increased since 2001 from an initial 6% to 46% in 2013. See Mangiameli, "Titolo V- Il nuovo art. 117". See also: Mangiameli, "Il Titolo V della Costituzione alla luce della giurisprudenza costituzionale"; Caretti - Boncinelli, "La tutela dell'ambiente negli sviluppi della giurisprudenza costituzionale".

Considering a timeframe of forty years (1980–2019),[99] compared to the total number of challenges brought before the Court (7908), the environmental field has proven to be one of the most contentious for intergovernmental relations, with 400 decisions.[100]

A net reduction in the overall number of cases is noted in the last twenty years.[101] Conversely, the controversies on environmental matters have grown exponentially over the same period. This quantitative data is even more relevant when considering that the division of powers preceding the 2001 reform has only generated 134 decisions, while judgements on the new division of powers amount to 266. Additionally, post-reform decisions only cover a seventeen-year period, as the first decision in this group is held in 2002 (no. 407/2002). By contrast, pre-reform decisions span a period of twenty-three years, four more than the first group of decisions.[102]

In the post-reform period (2002-2019), environmental disputes vary to some extent, showing significant increases in some years[103] (*infra*). Moreover, a significant increase in the number of challenges is observed, especially from 2009, when the Court starts ruling on legislative decree no. 152/2006 (*infra*).

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99. Data available up to 2019 (included). Only decisions concerning disputes between State and Regions (including Autonomous Provinces of Trento and Bolzano) are counted, as the focus of this research is on intergovernmental relations (i.e. "giudizi di legittimità delle leggi costituzionali in via principale" and "conflitti di attribuzione").

100. See annual Reports of the Constitutional Court (2008-2019) available at: (https://www.cortecostituzionale.it/jsp/consulta/documentazione/statistiche.do); in addition, see annual databases of the Constitutional Court for previous years.

101. Total decisions per year (including environmental ones): 204 (2019), 186 (2018), 188 (2017), 179 (2016), 168 (2015), 187 (2014), 208 (2013), 183 (2012), 166 (2011), 210 (2010), 162 (2009), 183 (2008), 172 (2007), 187 (2006), 198 (2005), 167 (2004), 134 (2003), 135 (2002), 126 (2001), 194 (2000), 160 (1999), 174 (1998), 242 (1997), 234 (1996), 308 (1995), 286 (1994), 294 (1993), 267 (1992), 259 (1991), 241 (1990), 222 (1989), 459 (1988), 239 (1987), 162 (1986), 179 (1985), 121 (1984), 134 (1983), 155 (1982), 118 (1981), 117 (1980).

102. Judgements per year are as follows: 24 (2019), 16 (2018), 21 (2017), 13 (2016), 18 (2015), 13 (2014), 21 (2013), 20 (2012), 18 (2011), 22 (2010), 24 (2009), 13 (2008), 4 (2007), 12 (2006), 9 (2005), 6 (2004), 10 (2003), 4 (2002, 2 before the reform, 2 after reform), 5 (2001), 9 (2000), 8 (1999), 6 (1998), 3 (1997), 6 (1996), 10 (1995), 10 (1994), 4 (1993), 8 (1992), 14 (1991), 8 (1990), 3 (1989), 18 (1988), 8 (1987), 3 (1986), 5 (1985), 1 (1984), 2 (1983), 0 (1982), 0 (1981), 1 (1980).

103. See also the annual Reports on Constitutional Jurisprudence edited by Issirfa-CNR (available online at: http://www.issirfa.cnr.it/relazione-giurisprudenza-costituzionale.html).

When analysing who brings the case before the Court (table 2 below), the State clearly prevails after the 2001 constitutional reform. In the last decade, the State has almost completely monopolised environmental appeals. Conversely, Regions (both ordinary and autonomous,[104] including Autonomous Provinces) have lodged more appeals against the constitutionality of State law in the first decade after the reform, but have dramatically reduced their initiative in the past decade.

Table 2. Types of dispute by years (1980-2019)

Decisions /Year	1980-1985	1986-1990	1991-1995	1996-2000	2001-2005	2006-2010	2011-2015	2016-2019
Promoted by the State	0	5	7	10	18	51	83	64
Promoted by ordinary Regions	6	21	23	14	13	22	5	7
Promoted by Autonomous Regions and Provinces	6	22	19	9	8	11	2	4
Total	**12**	**48**	**49**	**33**	**39**	**84**	**90**	**75**

Source: Own elaboration.

The most contentious topics are water, protected areas and biodiversity, waste, environmental impact assessment and strategic environmental assessment, hunting, mining, land and urban planning, energy, air quality, and river basin districts.

The quantitative analysis also highlights that conflicts are especially exacerbated by certain factors, both internal and external to the Italian legal system. Among the internal factors, two are especially influential: i) regional laws and Autonomous Statutes granting environment -related functions to Regions and Autonomous Provinces; ii) the adoption of State law, such as legislative decree no. 152/2006 (the so-called "Environmental Code"),[105] which has dramatically increased intergovernmental tensions by shifting many environmental functions from Regions to the State in several sectors. The decree has been criticised early on before adoption in the "Conferenza Unificata"[106] (a permanent forum

104. Autonomous Regions are the following: Trentino Alto Adige, Friuli Venezia Giulia, Aosta Valley, Sardinia and Sicily. Autonomous Provinces are the following: Trento and Bolzano/Bozen.

105. Among others, see judgements no. 225/2009, 232/2009, 246/2009, 247/2009.

106. See opinion of the "Conferenza unificata" of 19 july 2006 "Parere sullo schema di decreto legislativo modificativo del decreto legislativo 3 aprile 2006, n. 152".

between State, Regions, Autonomous Provinces, Provinces and Municipalities).[107] The criticism is both over the methods used for its approval (not in line with the principle of "loyal cooperation" between the State and other government authorities, as the Regions were given some ten days to provide opinions on hundreds of new articles), and because it deferred the determination of specific details to ministerial decrees (approved with delays or not approved at all). The considerable increase in appeals promoted by almost all Regions and Autonomous Provinces against this decree is therefore self-explanatory.

Among external factors, European Union law implementation is perhaps the most influential, especially on some specific topics such as protected areas and species,[108] environmental impact assessment[109] and strategic environmental assessment,[110] water protection and hydrographic district.[111] In this regard, even the Constitutional Court observes that European Union law implementation is interpreted by the State as a *passe-partout* to limit the sub-national entities' powers.[112] Another factor that has undoubtedly aggravated intergovernmental disputes is the economic crisis after 2008: ever since, as already

107. Set up by Legislative Decree no. 281/1997. The "Conferenza Unificata", in addition to the State-Region Conference, allows the consultative participation of territorial entities in the definition of political strategies in areas of common interest, including environmental matters. See for an overview on the system: Ruggiu, "Il Sistema delle conferenze ed il ruolo istituzionale delle Regioni nelle decisioni statali". See also on the principle of cooperation: Mancini, "La resistibile ascesa, l'inesorabile declino e l'auspicabile rilancio del principio di leale collaborazione".

108. The most recent example is offered by judgement no. 215/2019 on law no. 9/2018 of Trento Autonomous Province (implementing art. 16 of directive 92/43/EEC) and law no. 11/2018 of Bolzano/Bozen Autonomous Province (implementing art. 16 of directive 92/43/EEC). See also judgements no. 425/1999 and no. 169/1999.

109. For instance, against legislative decree no. 104/2017 implementing directive no. 2014/52/UE (8 Regions and 2 Autonomous Provinces appeal). See judgement no. 198/2018. See also judgements no. 173/1998 and 210/1987.

110. See judgement no. 398/2006. The Court rules in favour of Friuli Venezia Giulia, implementing the strategic environmental assessment directive.

111. See judgement no. 232/2009, where the President of the Cabinet affirms: "la ristrutturazione dei distretti idrografici sarebbe stata compiuta nell'osservanza dell'art. 1, comma 8, lettera e), della legge di delega, allo scopo di dare attuazione all'art. 3, comma 1, della direttiva 23 ottobre 2000, n. 2000/60/CE (Direttiva del Parlamento europeo e del Consiglio che istituisce un quadro per l'azione comunitaria in materia di acque)".

112. See judgement no. 425/1999 (The Court asserts: "l'esecuzione comunitaria non è un passe-partout che consente allo Stato di vincolare le autonomie regionali e provinciali senza rispettare i principi della propria attività normativa").

noted for Spain, the State has increased centralization tendencies, extending both legislative and executive powers. The growing number of State appeals before the Constitutional Court from 2009 onwards is an additional sign of this re-centralization trend. In 2010–2019, the State has promoted 166 appeals, while all Regions together only 23.

Finally, as in Spain, in Italy some Regions are more active than others in challenging the State before the Court: *in primis* the Autonomous Province of Trento (42), followed by Tuscany (36), Emilia-Romagna (34), Lombardy (32), the Autonomous Province of Bolzano (31), Veneto (27) and Liguria (22).[113] Conversely, the State shows a higher propensity to challenge those Regions and Autonomous Provinces that are more active in filing appeals before the Court, with some exceptions as follows: Veneto (20), Liguria (19), Campania (19), Abruzzo (16), Autonomous Province of Bolzano (16), Friuli Venezia Giulia (15), Puglia (14), Basilicata (11), Piedmont (12),[114] Sardinia (11), Lombardy (11), Marche (11), Aosta Valley (9) Autonomous Province of Trento (10), Sicily (8).

This preliminary overview of quantitative data sheds some light on the role played by the Constitutional Court in defining State-Region areas of intervention. However, the examination of criteria and doctrines elaborated by the Court over the years clearly shows how these intergovernmental balances have been re-shaped.

3.2. The criteria and methods for constitutional ruling on environmental matters: the Italian case

As mentioned, the role of the Italian Constitutional Court has been fundamental in shaping centre-periphery relationship dynamics that were initially not defined by the Constitution.

Both before and after the 2001 reform, the Constitutional Court has been the true *deus ex machina* which redefines the weight of each government

113. Other Regions have filed less than twenty appeals: Apulia (19), Piedmont (16), Aosta Valley (16), Umbria (15), Calabria (15), Marche (15), Friuli Venezia Giulia (11), Sardinia (11), Campania (11), Abruzzo (9), Basilicata (9), Molise (4), Lazio (3) and Sicily (3).

114. Followed by these ordinary Regions: Umbria (9), Tuscany (8), Calabria (7), Lazio (5), Molise (4), Emilia-Romagna (4).

level in the implementation of environmental actions through compression or expansion of respective powers.

In particular, before the 2001 reform, the Court's doctrine on environmental matters can be summarised[115] by the following principles: i) the necessary involvement of all government levels,[116] ii) legislative and administrative competences shared between the State and Regions on the basis of unity and asymmetry (with a stronger accent on uniformity needs),[117] iii) an obligation to cooperate with the territorial level which holds concurrent competences, especially in cases where some regional functions shall be exerted by the State.[118]

In the awakening after the 2001 Constitutional reform, the Court initially attempted to preserve the *status quo* of environmental power allocation as evolved over the years.

The Court continues to interpret the protection of the environment as a matter shared between State and Regions by referring to concepts such as "transversal matter", "non-matter", "target-matter", "value-matter" "non-technical matter",[119] which emphasises the potential for both State and Region interventions: "non tutti gli ambiti materiali specificati nel secondo comma dell'art. 117 possono, in quanto tali, configurarsi come 'materie' in senso stretto, poiché, in alcuni casi, si tratta più esattamente di competenze del legislatore statale idonee ad investire una pluralità di materie". The State

115. See more extensively on the doctrine developed before 2001: Mangiameli, "L'"ambiente" nel riparto di competenza tra Stato e Regioni (dalla configurazione di una materia, all'assetto di un difficile modello)"; Michetti, "La tutela dell'ambiente nella giurisprudenza della Corte costituzionale"; Cecchetti, "La materia "tutela dell'ambiente e dell'ecosistema" nella giurisprudenza costituzionale: lo stato dell'arte e i nodi ancora irrisolti"; Caravita, "Diritto dell'ambiente".

116. See, *ex multis*, judgements no. 183/1987, 558/1988,

117. See for example judgements no. 356/1994, 323/1998, 382/1999.

118. See judgements no. 219/1984, 359/1985 and 151/1986, 344/1987, 1031/1988, 341/1996, 437/2000.

119. "Materia trasversale, materia non materia, materia-obiettivo, materia-valore". See, *ex multis*: judgements no. 407/2002, 222/2003, 259/2004, 62/2005, 108/2005, 135/2005, 246/2006. For a comment, see: Ferrara, "La 'materia ambiente' nel testo di riforma del titolo V"; Porena, "L'ambiente come 'materia' nella recente giurisprudenza della Corte costituzionale"; Sciarra, "La 'trasversalità' della tutela dell'ambiente".

competence, as intersecting other interests and competences "non esclude affatto la possibilità che leggi regionali, emanate nell'esercizio della potestà concorrente di cui all'art. 117.3 Cost., o di quella 'residuale' di cui all'art. 117.4, possano assumere fra i propri scopi anche finalità di tutela ambientale".[120]

The Court interprets the intentions of the constitutional legislator as reserving the power to set general (minimum) uniform standards for the State, not excluding Regions from other legislative powers,[121] also with regard to environmental protection. Therefore, according to the Court, "si può ritenere che riguardo alla protezione dell'ambiente non si sia sostanzialmente inteso eliminare la preesistente pluralità di titoli di legittimazione per interventi regionali diretti a soddisfare contestualmente, nell'ambito delle proprie competenze, ulteriori esigenze rispetto a quelle di carattere unitario definite dallo Stato".[122] Environmental protection under the new art. 117.2, letter s), of the Constitution is still interpreted in continuity with previous jurisprudence, as a sort of shared task between the State and Regions.[123]

However, already in this initial phase, the Court contradicts its doctrine by referring in a few cases to the "equilibrium point" criterion, later developed in more decisions: "la fissazione a livello nazionale dei valori-soglia, non derogabili dalle regioni nemmeno in senso più restrittivo, rappresenta il punto di equilibrio fra le esigenze contrapposte".[124] By stating that Regions are not allowed to alter the standards set by the State, neither *in pejus* nor *in melius*, the Court indirectly prevents them from exerting any other environmental functions as the State law is an "unmodifiable limit": "esiste una legge quadro statale che detta una disciplina esaustiva della materia, attraverso la quale si

120. Judgements no. 336/2005.

121. See judgements no. 307/2003, 232/2005, 182 and 246 of 2006. Judgement no. 407/2002 affirms: "l'intento del legislatore è stato quello di riservare comunque allo Stato il potere di fissare standard di tutela uniformi sull'intero territorio nazionale, senza peraltro escludere in questo settore la competenza regionale alla cura di interessi funzionalmente collegati con quelli propriamente ambientali".

122. Judgement no. 407/2002.

123. See on this point Maddalena, "L'interpretazione dell'art. 117 e dell'art.118 della Costituzione".

124. In this regard, judgements no. 307/2003, 331/2003, 62/2005 where the Court affirms that the standards set by the State cannot be altered by Regions (not even *in melius*), as they represent the "equilibrium point" of different interests. For a comment see: Betzu, "L'ambiente nella sentenza della Corte costituzionale n. 62 del 2005".

persegue un equilibrio tra esigenze plurime […]. In questo contesto, interventi regionali (migliorativi) devono ritenersi […] incostituzionali, perché l'aggiunta si traduce in una alterazione, quindi, in una violazione, dell'equilibrio tracciato dalla legge statale".[125]

In cases where the Court finds an "inextricable intersection of competences", a third doctrine seems to emerge already in this initial phase, which admits the criterion of the "prevailing competence".[126] However, while the first two doctrines mentioned are based on the concepts of "differing interests/matters" pertaining to the State and the Regions, this third doctrine inaugurates a different interpretation of State-Region relations, based on the strict definition of competences.

All these criteria are further developed from 2007 onwards.

In decisions no. 367/2007 and 378/2007 the Court defines the environment as a "material and complex asset" [127] and as the object of uniform and standardised discipline which shall be enacted by the State only. In line with a new interpretation consistent with reformed Constitutional provisions, the Court affirms that the State is the only authority entitled to legislate and to enact regulations, and in addition it has jurisdiction over administrative functions concerning the protection of the environment, unless it specifically chooses to delegate or share the regulatory and administrative function with the Regions.

In subsequent decisions, the Court holds that the "transversal character" of environmental legislation (which is a "goal-oriented field") implies the prevalence of State legislation over Regional concurrent legislation in other fields (e.g. hunting, urban planning, etc.) when they intersect.[128] In the Court's reasoning, the unified discipline on the environment concerns a public interest of primary and absolute constitutional relevance which allows the State to prevail on Regional prerogatives. Thus, concurrent legislative acts

125. Judgement no. 331/2003.

126. See judgements no. 370/2003, 50 and 201 of 2005, 133 and 213 of 2006, 81/2007.

127. Judgements no. 367/2007, 378/2007, 431/2007. For a comment see: Maddalena, "L'interpretazione dell'art. 117 e dell'art. 118 della Costituzione".

128. Judgements no. 12, 30, 61, 164, 220, 225, 249, 315 of 2009. For a comment on this trend, see: Bin, "I criteri di individuazione delle materie".

by the Regions are illegitimate if they conflict with environmental State provisions.[129] The Court reinterprets the concept of "constitutional value" and "transversal interest" to assert the "prevalence of State interest on environmental protection". In addition, the State is legitimised to impinge on all Regional competences (both legislative and administrative) related to environmental protection.

In a different decision, the Court specifies how this reformed constitutional division of powers impacts the distribution of administrative powers.[130] Since the State is granted exclusive competence on environmental protection, it is not bound to any obligation of cooperation with other government levels. Environmental powers are "exclusive", not "shared"; thus the State shall adopt administrative acts and exert executive functions without including the Regions (as before) in the decision-making process.

Hence, while before 2007, the environment, in terms of "transversal matter", has justified the coexistence of State and regional powers, the latter interpretation of the same concept compresses the activity of Regions,[131] which becomes "recessive"[132] before State action. In addition, in these environmental decisions, intergovernmental collaboration is not scrutinised as a key factor in balancing central and local instances. Since the State is exclusively entitled to perform all functions with regard to environmental protection, there is no need to include other government levels.

Nonetheless, according to the Constitution and to the Statutes of Autonomy, Regions are entitled to exercise relevant concurrent and residual powers concerning the environment. Thus, the Court affirms that the Regions, by exerting their own prerogatives (in concurrent or residual competence fields), may adopt measures that have an indirect impact on the environment ensuring a higher standard of protection than State legislation.[133] However, the evaluation of higher standards of protection cannot be exercised auto-

129. Judgement no. 278/2012, quoting judgement no. 378/2007.

130. In this sense, judgement no. 225/09.

131. In this sense, judgements no. 378/2007, 104/2008, 25/2009, 61/2009, 9/2013, 278/2012, 198/2018. For a comment see: Benelli, "Separazione vs collaborazione".

132. See judgement no. 9/2013.

133. Judgements no. 67/2010, 145/2013, 246/2013, 199/2014, 66/2018 and 198/2018.

matically as "un mero automatismo o di una semplice sommatoria", as though it is possible to separate environmental protection from other constitutionally relevant interests. Rather, it must be carried out considering the *rationale* of State legislation and all the interests considered therein.[134] Thus, the Court must decide on this topic on a case-by-case basis.

In further decisions, the Court specifies that regional "norme di tutela ambientale più elevata" improving the protection level set by the State (as an indirect effect of regional prerogatives) are not considered legitimate where State law is interpreted as "unmodifiable", as it is already aimed at balancing different conflicting interests.[135] It is worth noting that in these cases the Court justifies an *ex ante* power of the State to balance different interests (i.e. competences). Thus, the State is the only arbiter when deciding the "equilibrium point" of State and regional powers.

However, in some rulings the Court applies the same criteria and asserts that higher protection standards set by Regions are legitimate as they pertain to regional concurrent competences and do not compromise the "punto di equilibrio tra esigenze contrapposte espressamente individuato dalla norma dello Stato".[136]

The same criteria and doctrines are applied to cases concerning Autonomous Regions and Provinces. As observed in the quantitative analysis, among the five Autonomous Regions,[137] the two Autonomous Provinces of Trento and Bolzano are particularly active in defending their Autonomous Statute

134. Judgements no. 147/2019 and 178/2019. The Court affirms: "La costante giurisprudenza di questa Corte, l'ambiente viene 'a funzionare come un limite alla disciplina che le Regioni e le Province autonome dettano in altre materie di loro competenza', salva la facoltà di queste ultime di adottare norme di tutela ambientale più elevata pur sempre nell'esercizio di competenze, previste dalla Costituzione, che concorrano con quella dell'ambiente (sentenze n. 198 e n. 66 del 2018, n. 199 del 2014; nello stesso senso, inoltre, sentenze n. 246 e n. 145 del 2013, n. 67 del 2010, n. 104 del 2008 e n. 378 del 2007); tuttavia la valutazione intorno alla previsione di standard ambientali più elevati non può essere realizzata nei termini di un mero automatismo o di una semplice sommatoria – quasi che fosse possibile frazionare la tutela ambientale dagli altri interessi costituzionalmente rilevanti – ma deve essere valutata alla luce della ratio sottesa all'intervento normativo e dell'assetto di interessi che lo Stato ha ritenuto di delineare nell'esercizio della sua competenza esclusiva".

135. See, for instance, judgement no. 178/2013.

136. Judgements no. 58/2013 and 145/2013.

137. Trentino Alto Adige, Friuli Venezia Giulia, Aosta Valley, Sardinia and Sicily.

prerogatives and challenge the State in several cases. Conversely, they are brought before the Court in many cases which, due to their relevance, affect other similar rulings.

Starting from 2007, the Court strongly criticises the position of the two Autonomous Provinces, which claim to have general powers on environmental matters thanks to their respective Statutes.[138] Contrary to this position, the Court affirms that the majority of the provisions invoked by the Provinces to legitimate their competence on environmental matters (e.g. hygiene, health) are not, in fact, relevant. Other provisions, such as those on landscape protection, hunting and fishing, parks for the protection of flora and fauna, forests, shall be considered as single aspects of environmental protection. Thus, it is not possible to derive a general competence on environmental issues from them.

The Court reiterates that the environment is not included in the Autonomous Statutes. Consequently, all matters that are not explicitly mentioned are considered to be part of the general powers of the State in the same field, which first and foremost includes the uniform standards of environmental protection, enacted through specific and mandatory rules applicable throughout the national territory.[139]

In other decisions, the Court asserts that the exclusive legislative powers of the Autonomous Provinces (e.g. on mining, thermal and mineral water, and peat bogs) find a limit in the exclusive power of the State to regulate the environment in its entirety. As the environment is a primary and absolute value, the Provinces are only legitimised to improve the standards of protection when this constitutes the exercise of their legislative power and does not negatively affect the balance of conflicting interests decided at State level.[140]

Moreover, in a case concerning a licence for hydropower plants, the Court confirms[141] that Autonomous Provinces are not allowed to adopt legislation

138. In this sense: judgements no. 378/2007, 62/2008, 104/2008 and 226/2009.

139. Judgement no. 387/2008.

140. Judgement no. 145/2013. See also, judgements no. 58/2013, 66/2012 and 225/2009.

141. Judgements no. 86/2014 declaring the unconstitutionality of art. 25.1 of law no. 20/2012 of Trento Autonomous Province.

in fields that the Constitution has reserved to the State. They may only implement higher standards of protection for constitutionally protected interests, to the extent that these are adopted within their own legislative powers. In matters such as waste,[142] mines, energy and geothermal resources,[143] which are included both within environmental protection and within the Autonomous sphere of competences, the Autonomous legislator can indeed exercise its powers, but only insofar as it does not alter the protection set by the State.

However, in specific cases,[144] the Court recognises that the Autonomous Provinces do have exclusive powers over parks and over the protection of flora and fauna, which entitle them, for instance, to implement the Birds and Habitat directives, and set specific protection measures, even if the State holds exclusive competence in the environmental field.

Wider margins for Autonomous Provinces' action seem to be guaranteed in the field of water supply regulation, which straddles the border between environmental and competition matters. Indeed, the Court[145] denies an appeal by the State on the power to determine criteria over the reimbursements of tariffs for water purification. In this regard, the Court recalls the doctrine already developed in another judgement[146] ruled before the 2001 constitutional reform. Although the decision seems to be an isolated case, as it differs from the doctrine developed after 2007, it admits that the 2001 reform does not reduce the autonomy of the Province. Therefore, the power to legislate on the water supply service is not replaced by the State's powers over environmental issues or over those relating to competition.

Apart from the few cases mentioned, the Court reiterates that the environment is part of the general powers of the State whenever not explicitly mentioned by Statutes of Autonomy.[147] Only the specific environmental interests explicitly mentioned therein can be the object of autonomous legislative and executive functions, as confirmed more recently in decision no. 215/2019.

142. Judgement no. 62/2008.

143. Judgement no. 112/2011.

144. In this sense judgement no. 215/2019.

145. Judegement no. 357/2010.

146. Judgement no. 412/1994.

147. Judgements no. 387/2008, 288/2012 and 151/2011.

The Court guarantees in principle the exercise of exclusive and concurrent powers expressly included in the Statutes of Autonomy, although autonomous prerogatives are restricted and compressed by limiting their range of action to the minimum.

4. The role of the Constitutional Courts in Spain and in Italy: some trends and implications

The judgements analysed in previous paragraphs are indicative of trends that have gained momentum, especially in the last decade, legitimising much wider margins of State action, and simultaneously reducing the Autonomous Communities' and the regions' spheres of intervention, both in Spain and in Italy.

The main drivers for such trajectories, which are identified in the previous paragraphs, may be summarised in the following six points.[148]

First: an increasingly extended interpretation of what can be defined as "State competence" (both in the legislative and the administrative sphere).

As noted by authoritative scholars,[149] since the 2008 economic crisis, the Spanish constitutional rulings on environmental matters have been mostly decided in favour of the State, through a broad and flexible interpretation of basic legislation boundaries, including defining detailed provisions, and even administrative acts, as "básica". Moreover, in some cases, the Court's interpretation has had highly political connotations, in line with the Government position. In their view, which is supported by the present case study, this consistent alignment casts some doubts on the position of the Court as an impartial interpreter and guardian of the Constitution.[150]

148. More in-depth comparative analysis and conclusive reflections are included in the forthcoming study: M. Alberton, *Governance ambientale negli ordinamenti composti. Traiettorie italiane e spagnole*, ESI, Napoli, forthcoming).

149. See Casado Casado, "La recentralización de competencias en materia de protección del medio ambiente". See also: Nogueira López, "La transposición de Directivas ambientales en el Estado Autonómico; Valencia Martín, Jurisprudencia ambiental del Tribunal Constitucional".

150. See Jaria Manzano, "Constitución, desarrollo y medio ambiente en un contexto de crisis". See also: Martín Alonso, "Tribunal Constitucional i crisi de l'Estat de les autonomies".

Even the reference to the criteria initially elaborated to limit State action (as shown in the analysis of judgements no. 102/1995, 204/2004 et seq.) and to guarantee some Autonomous Communities' prerogatives has, over time, been instrumental to legitimise State intervention.[151]

The same story applies to the Italian case, where the interpretation of the "environmental protection" concept under art. 117.2 of the Constitution (through judgement 407/2002 et seq.) has been instrumental to first legitimise a shared State-Region intervention, and then (starting from judgements no. 367 and 378 of 2007) limit the competence in terms of State legislative and administrative exclusivity, while at the same time absorbing regional concurrent and residual powers related to the environment.

Second: lack of "programmatic" and reliable doctrines to orient future action of sub-national levels.

The Spanish Court's reasoning has been rather cumbersome and lacking criteria to orient future institutional behaviour, as noted for instance in the cases of "fracking". A clear hermeneutical and "programmatic" function of the Court would have proved especially useful in those decisions. As several Autonomous Communities share similar environmental problems, a clear initial doctrine of the Court would have likely prevented the adoption of other Autonomous Communities' unconstitutional laws. And, in turn, it would have avoided subsequent intergovernmental conflicts.

The same can be noted in the Italian judgements, where the Court decides whether a different standard of protection introduced by Regions is legitimate on a case-by-case basis, or where the Court randomly applies either the "prevailing matter" criterion or the "equilibrium point" doctrine, without clearly explaining this choice. This ambiguity on how constitutional decisions are reached causes confusion for Regions and Autonomous Provinces in terms of future intervention.

Third: restrictive or ambiguous criteria on sub-national legislative powers, introducing higher protection standards.

151. Criteria elaborated in judgement no. 102/1995 are used in favour of the State in the following cases no. 69/2013, 104/2013, 102/2013, 146/2013, 174/2013, 138/2013, 161/2014, 45/2015.

Ambiguity also emerges in the evaluation of "normas adicionales" (Spanish case) and "norme di tutela ambientale più elevata" (Italian case). In particular, the Spanish Court does not explain why the Autonomous Communities' action is not lawful when setting higher standards of protection (e.g. on environmental impact assessment), rather it simply affirms the incompatibility of the Autonomous Communities' economic development models with State laws (e.g. on fracking and climate change). Conversely, in other cases,[152] while evaluating the Autonomous Communities' powers of setting lower protection standards, the Court decides on their unconstitutionality. From the analysis of cases[153] where "normas adicionales" are invoked by the Autonomous Communities, one may even wonder whether such legislative option (guaranteed by both Constitution and Autonomous Statutes) exists in practice.

As observed in the Italian constitutional jurisprudence, the introduction of "norme di tutela ambientale più elevata" by Regions, adopted within their own legislative powers, is evaluated on a case-by-case basis, and is not automatically deemed legitimate.

"Normas adicionales" and interventions "in melius" may be considered instrumental to ensure asymmetry in sub-national territories, implementing a differentiation of environmental protection according to specific needs. However, the Spanish and Italian Constitutional Courts generally delegitimise them on the basis of several arguments, such as their incompatibility with the State's basic legislation in the same or other fields (Spanish case) or with the State's "equilibrium point" (Italian case), with no concrete power justifications or specific motivation. The Constitutional Courts' position on this legislative power of Autonomous Communities and Regions is completely ambiguous, not clarifying the constitutional boundaries which both Autonomous Communities and Regions should respect in adopting "normas adicionales" or "norme di tutela ambientale più elevata".

Fourth: exclusion of some environmental topics from the competence of sub-national levels.

152. Judgements no. 161/2019, 86/2019, 109/2017.

153. Judgements no. 209/2015, 214/2015, 260/2015, 235/2015, 113/2019, 8/2016, 8/2012, 109/2017 and 8/2018.

The extreme variability in the interpretation of legislative and executive attributions defined by the Constitution and by Statutes of Autonomy is further reflected in the criteria and doctrines used for settling disputes. In some cases (e.g. meteorology and environmental impact assessment), the Spanish Court, using a *fictio iuris*, includes a strictly environmental topic (air quality protection and the evaluation of negative impacts on the environment) in the realm of matters allocated differently between the State and the Autonomous Communities. Thus, through misleading interpretations "que no responden a su reconocimiento constitucional" or through the criterion of "competencias sustantivas", a different "distribución competencial que no tiene cabida en nuestro ordenamiento constitucional"[154] is reached. Moreover, in several environmental impact assessment cases, the Court's decision to vest an action "sustantiva" not only strongly alters institutional balance and power allocation between different territorial levels, but also introduces potential conflicts of interests. In fact, the State is thus entitled to the prerogative to carry out activities or exploit specific resources, as well as carry out the procedures aimed at evaluating the possible negative effects of the aforementioned activities. In addition, the duty to consult the affected Autonomous Community is not binding on the State, which in turn can ignore the negative opinion of the Autonomous Community and approve its own activity or project anyway.

Similarly, the Italian Court reiterates that the environment is not included in the Autonomous Statutes, even though some relevant environmental aspects, such as landscape protection, hunting and fishing, flora and fauna, forests, etc. are included in the Statutes. Consequently, all matters that are not explicitly mentioned therein are considered attracted to the general powers of the State in the same field, and those specifically mentioned are compressed to the minimum.

Fifth: "aprioristic" selection of the prevailing power.

In other cases, the Spanish and the Italian Courts preliminarily identify the main competence.[155] This "aprioristic" choice of the prevailing power without

154. See "votos particulares" (judgements no. 53/2016 and no. 13/1998).

155. See, for Spain: "votos particulares" of Judges *doña A*dela Asua Batarrita, *don* Fernando Valdés Dal-Ré and *don* Juan Antonio Xiol Ríos (judgement no. 106/2014). See, for Italy: judgements no. 370/2003, 50 and 201 of 2005, 133 and 213 of 2006, 81/2007.

considering and balancing all possible interfering competences "que sobre otras materias pueden corresponder a otra instancia territorial", excludes or marginalises other competences pertaining to sub-national levels. Thus, this method "abre un punto ciego, pues renuncia a reconocer la concurrencia o entrecruzamiento que se produce en el caso a examen"[156] and legitimises the State to impinge on all Regional competences (both legislative and administrative) related to environmental protection both in Spain and in Italy.

Sixth: weakening of intergovernmental cooperation. It is observed that both the Spanish and the Italian Court's doctrines seem to progressively reduce incentives for cooperation between governmental levels.

As noted for the Spanish case, especially in the last decade's judgements, the Court rarely asks the State to justify why collaboration mechanisms are not activated, and it does not mention or scrutinise the burden of proof on the State. In addition, since cooperation is based on two conditions, i.e. that the allocation of powers remains unchanged and that cooperation is not coerced by one party, the possibility of including it in legislative acts seems restricted in practice.

In the Italian case, before the 2001 reform, the Court constantly encouraged cooperation between government levels. However, after the reform, the Court has started to place less emphasis on the use of cooperation mechanisms and, conversely, to affirm that the State is not bound to any obligation of cooperation with other governmental levels when exerting environmental competences, as they pertain to its exclusive competence.

Among the implications of these Constitutional Court judgements, the reduction of intergovernmental cooperation incentives should not be underestimated. Both in the quantitative and in the qualitative analysis, it emerges how institutional cooperation on transversal functions, such as environmental ones, is particularly fragile.

In conclusion, as shown, the Spanish and the Italian Courts have negatively impacted on vertical asymmetry and have caused in both systems a "mayor

156. *Ibidem*.

inseguridad jurídica sobre el ejercicio de las competencias autonómicas en esta materia".[157]

Because of this uncertain and (State-) oriented interpretation, the Spanish and Italian Courts have become major players in the definition of centre-periphery relations. By ensuring on a case-by-case basis the prevalence of the State and by limiting the autonomy of sub-national government levels, they have *de facto* contributed to the alteration of the division of powers established in the Constitutions.[158]

As particularly evident in the Italian case, the interpretative action of the Constitutional Court in favour of the State has caused a dramatic decrease of appeals promoted by sub-national entities. However, this reduction does not reflect a net reduction in the total number of disputes, or better intergovernmental cooperation, or better environmental regulation. As noted previously, both in Italy and in Spain, the centralisation of environmental powers in many cases has been characterised by a contextual effect of lowering environmental protection in favour of economic development interests, as noted previously.

Both in Spain and in Italy, the weakening of the Autonomous Communities' and Regions' capacity and sphere of competences severely affects their innovative potential in promoting tailor-made solutions to local environmental problems. The "leap" towards differentiation that has always characterised the Spanish legal system in forty years of constitutional history seems to be reduced in environmental matters by the Constitutional Court. The same, although to a lesser extent, is observed in Italy where differentiated regionalism has been discouraged not only by the State, but also consistently by the Court, especially after 2007.

This trend of erosion of powers of Autonomous Communities and Regions has two main consequences: it flattens the asymmetrical drives to protect the environmental peculiarities of each territory, and simultaneously incentivises disaggregating forces which may impair the entire legal system.

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157. In this sense: Judges *doña* Adela Asua Batarrita and *don* Fernando Valdés Dal-R*é* (judgement no. 157/2016).

158. For Spain, see on this point the "votos particulares" of Judges *doña* Adela Asua Batarrita and *don* Juan Antonio Xiol Ríos (judgement no. 165/2016).

Both these effects drive the implementation of a multilevel environmental governance backwards, contrary to what the present times and circumstances would require.

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