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Between justice and politics: the role of the Spanish Constitutional Court in the state of autonomies

Jean-Baptiste Harguindéguy ^a, Gonzalo Sola Rodríguez^b and José Cruz Díaz^c

ABSTRACT

This study focuses on the role of the Spanish Constitutional Court in the state of autonomies between 1980 and 2014. It questions the evolution of the court in two fields. First, it demonstrates that the court profoundly shaped the contours of the devolution process through a dynamic of ‘judicialization’. Second, this research analyzes the politicization process of constitutional justice by territorial actors. This dynamic led to the quasi-paralysis of the court from 2008 to 2012 through the ruling of the reform of the Catalan statute. This paper concludes the court can be best interpreted as a ‘trustee’ aspiring to remain an independent arbiter within a framework lacking alternative fora for regulating intergovernmental relations.

KEYWORDS

territory; Spain; Constitutional Court; devolution; Catalonia; federalism; conflict; intergovernmental relations

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INTRODUCTION

In recent years, the decisions adopted by the Spanish Constitutional Court (*Tribunal Constitucional*) in the field of centre–periphery relations have provoked significant popular reactions – especially in Catalonia. For instance, on 9 July 2010, thousands of people demonstrated in Barcelona against the ruling of the court concerning the new statute of Catalonia (Lázaro, 2010). Those massive rallies demonstrated that the court was a central actor in the territorial politics in Spain. However, they also indicated that a significant part of the Catalan population considered the court to be an institution driven by political interests that favour centralism. Consequently, those two readings seem to contradict the official vision of the court as an impartial guardian of the Constitution.

Drawing on the recent literature about the role(s) of constitutional courts in multilayered countries, this paper addresses the question of what the current role of the Spanish Constitutional Court is with respect to the ‘state of autonomies’ (Aroney & Kincaid, 2017). In order to address this question, this paper focuses on the two constitutive dimensions of the court’s role (Ferejohn, 2002). On the one hand, the court can be considered as a policy-shaper of the laws adopted by the executive and the legislature in the field of territorial governance; this evolution is part of a process

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of judicialization of territorial politics. On the other hand, the role of the court must be understood in the broader context of the political pressures exerted by state-wide political parties on judges, that is, the dynamic of the politicization of constitutional justice.

The study of constitutional courts in federal and decentralized countries constitutes a consolidated strand in the literature on comparative federalism. This issue has been explored extensively in Germany through the study of the Federal Constitutional Court (Benz, 2017), in Australia with the High Court (Chordia & Lynch, 2014), and in Canada (Schertzer, 2013) and the United States with their respective supreme courts (Banks & Blakeman, 2012). In Spain, the nexus between the Constitutional Court and territorial politics has caught the attention of public law specialists since its creation (Alonso García, 1984; Borrajo Iniesta, 2004; García de Enterría, 1982), but it has been relatively ignored by political scientists.

This literature gap has been partially filled by a set of recent studies. On the one hand, some authors have focused on the drivers of the intergovernmental litigations handled by the court. Sala (2010, 2014) demonstrated that regional and central governments modified their strategy of litigation according to the composition of the court or their past successes in a given policy area. Sala concluded that the central government was favoured by the rulings of the constitutional judges when it tackled an area where it had won in the past, and when the justices were known for their lack of regional sensibility (Sala, 2011). From a more institutionalist perspective, Harguindéguy, Rodríguez, and Sánchez (2017) have shown the importance of parliamentarian equilibriums for explaining the rise of intergovernmental conflicts before the Constitutional Court.

On the other hand, some scholars have attempted to identify the variables explaining the court's decisions on a series of issues since the late 1980s (del Castillo, 1987). Drawing on agency theory, Garoupa, Gómez-Pomar, and Grembi (2013) argued that the court's preferences could be framed neither as the pure application of the law nor as the simple result of pressures exerted by political parties on the justices. Other elements such as peer pressure, the search for consensus and the aim to increase the legitimacy of the court mattered in the decision-making process. In the same vein, López Laborda, Rodrigo, and Sanz Arcega (2016) aimed to identify the drivers of the Constitutional Court's decisions on conflicts of competence opposing the Spanish central government and the autonomous communities. They concluded that the Constitutional Court was not a simple instrument used by the central government against the Spanish regions.

All these studies have helped to shed a light on the evolution of constitutional justice in the field of territorial governance in Spain, but they also had some limitations. From a methodological viewpoint, the quantitative treatment of centre-periphery litigations says little about the importance of some of them. For instance, the conflict over the 2006 regional statute of Catalonia was far more relevant for territorial governance than the 2016 controversy concerning the competence over bullfighting shows. Consequently, a more qualitative and fine-grained view is needed to understand the ambivalent role of the court within the state of autonomies, and its importance in the Spanish devolution process. The central hypothesis of this paper is that judicialization and politicization affect all the constitutional courts operating in federal states; but in Spain those dynamics have led to an institutional deadlock.

In order to provide such a perspective, this study was conducted from March 2015 to June 2016. First, it consisted of collecting the academic publications and official reports dealing with the Constitutional Court in order to elaborate descriptive statistics about the main trends of constitutional justice in Spain from 1980 to 2014. A series of 30 interviews were then undertaken with civil servants (constitutional judges and members of the Ministry of Finance and Public Administration – Ministerio de Hacienda y Administraciones Públicas or MINHAP), politicians (at the state and regional levels), and experts (academic experts and journalists). Those interviews lasted between 40 and 60 min and focused on the role of the Constitutional Court, its problems of politicization, the impact of its rulings and the behaviour of political actors.

The paper is structured as follows. The next section centres on the creation of the Constitutional Court and its specific role within the Spanish quasi-federal system. The third and fourth sections tackle the processes of judicialization and politicization of Spanish territorial politics. Finally, the question of how federal issues affect the court is addressed in the conclusion.

THE RELEVANCE OF THE COURT FOR TERRITORIAL ISSUES

A Spanish adaptation of the Kelsenian model

After 40 years of Francoism, the rise of decentralization and the absence of a constitutional regulation of this process quickly converted the Spanish Constitutional Court into a pivotal actor in intergovernmental relations. Drawing on the Kelsenian tradition, Spanish constitutionalists adopted a model of concentrated judicial review: the *Tribunal* represents the highest body in the field of constitutional law and it is independent from judicial power.¹ It holds a monopoly on the interpretation of the Constitution, and its decisions cannot be appealed. This court is ruled by constitutional articles 159–165 and by the 3 October 1979 Organic Law (*Ley Orgánica del Tribunal Constitucional* – LOTC) (Elvira Perales, 2013).

The Constitutional Court includes 12 justices. All must be experienced jurists. The justices are elected for a single nine-year mandate, and four of them are replaced every three years. Four candidates are proposed by the Congress (by a majority of three-fifths); four are proposed by the Senate (also by a majority of three-fifths) among the candidates presented by the regional parliaments; two candidates are proposed by the Cabinet; and two are proposed by a majority of three-fifths of the General Council of Judicial Power [GCPJ] (Consejo General del Poder Judicial). The president sets the agenda of the court and has the last word in the case of a tie. At least eight judges have to be present on the court for a decision to be reached (LOTC, 1979).

An important difference separates Spain from France and Italy (Sala, 2010). Actually – just as in Germany and Belgium – the access to the Constitutional Court is open to a wide range of plaintiffs in Spain. Ordinary judges, the ombudsman, regional parliaments, the state legislatures (50 deputies or senators), central and regional governments, and even individuals (through the *amparo* procedure) can initiate the constitutional review procedure. According to Section 161.2 of the Constitution, regional acts are suspended *ex lege*, when challenged by state's government. The obligation to send a request (*requerimiento*) before challenging a state regulation is compulsory for regional governments and optional for the state government in the cases of a conflict of powers and devolved issues (but not in the case of a complaint of unconstitutionality).

There are two basic proceedings for centre–periphery litigations in Spain: the *recursos de inconstitucionalidad* (complaints of unconstitutionality) and the *conflictos de competencias* (conflicts of competences). The former occurs when a regional or central administration challenges a law because it believes that the act is not consistent with the rules established by the Constitution. The latter happens when regional and central administrations contest the sharing of powers in a given policy area. Theoretically, regional and central executives can be involved in other types of litigation, such as the infrequent negative conflicts of competences (*conflictos negativos de competencias*) or the prior review of constitutionality (*control previo de constitucionalidad*) that disappeared in 1985 (Fernández Farreres, 2005).²

An ordinary court for territorial issues?

The Constitutional Court was initially conceived by constitutionalists as the last step for regulating intergovernmental conflicts. Alternative institutions were supposed to prevent the rise of territorial litigations through institutional arrangements. Nevertheless, since the beginning of democracy, the *Tribunal* is used as an ordinary court of last resort for channelling centre–periphery

tensions (Gordillo Pérez, 2007). The central position of the court in the field of territorial governance relies on four related dynamics.

First, Agranoff and Ramos Gallarin (1997) showed that intergovernmental relations in Spain were mostly vertical; that is, they principally focused on the central Cabinet and its regional counterparts as the main actors of the territorial system. Consequently, ‘Horizontal relations among regional governments are practically non-existent’ (interview with a top-level civil servant, Madrid, October 2015). According to Arbós Marín, Colino, García Morales, and Parrado (2009), this configuration can be best explained by the lack of autonomy of Spanish regions in the field of transregional projects. Alternatively, other authors (de Pedro Bonet, 2011) stress the lack of political will of regional executives.

Likewise, Spanish intergovernmental relations are also predominantly bilateral. Despite the creation of sectorial conferences (*conferencias sectoriales*) in 1983 – and the conference of presidents in 2004 – these meetings between central and regional ministers still lack a real power of decision-making. Moreover, sectorial conferences are convened by the central state’s representatives and can only adopt symbolic agreements with no binding effects. This explains the survival of a series of two-sided administrative mechanisms, such as the bilateral conferences, especially when the collaborating tiers are governed by the same political party (León & Ferrín Pereira, 2011).

Intergovernmental relations in Spain also suffer from a lack of institutionalization (Aja & Colino, 2014). The most visible aspect is the lack of a federal senate, as is found in Germany. The current Spanish upper house (*Senado*) faces two limitations for channelling territorial interests. The first problem is related to its composition, since the *Senado* mostly consists of representatives elected by the provinces (Castellà Andreu, 2006). Nevertheless, some senators are elected instead by alternative constituencies such as autonomous cities (Ceuta and Melilla) and autonomous communities. The second main limitation is the absence of any real veto power, since the *Senado* cannot block bills proposed by the Congress (*Congreso*) and Cabinet for more than two months. For these reasons, the Congress has become the central forum for intergovernmental negotiations between state- and region-wide parties (Harguindéguy, Coller, & Cole, 2017).

Lastly, according to several authors, the consolidation of the Constitutional Court in Spain was favoured by the lacunae of the 1978 Constitution (Aragón Reyes, 1986; Fernández Farreres, 2005; García de Enterría, 1982). Given the complex bargaining between political forces after the death of Franco, this text states general principles of territorial organization – and, more specifically, a large number of competencies shared between the regions and the central state – but it also leaves considerable room for interpretation to the political actors. Consequently, constitutional judges are frequently asked to make certain legal aspects clear through their decisions (Aja, 1989). The initial ambiguity explains the relevance of the Constitutional Court in relation to the whole process of decentralization in Spain, as will be demonstrated in the next section.

THE FORCED JUDICIALIZATION OF TERRITORIAL POLITICS

The regulation of intergovernmental conflicts

Judicialization has been defined by Hirschl (2011, p. 121) as ‘the reliance on courts and judicial means for addressing core moral predicaments, public policy questions, and political controversies’. As such, the judicialization of territorial politics is not something specific to Spain; it also affects other countries such as Colombia and Brazil (Ferreira do Vale, 2013), or the United States (Somin, 2017).³

The central position of the Constitutional Court can be assessed from a quantitative viewpoint. The MAP-LEXTER data set includes the complete litigation between autonomous communities and the central government between 1980 and 2014 ($N = 1624$).⁴ The examination of this data set demonstrates that the Constitutional Court has been a relevant player in the field of territorial

governance since the very beginning of the state of autonomies. Once again, it must be stressed that the court is used as an ordinary mechanism of intergovernmental regulation.

First, it can be observed that autonomous communities adopted proactive behaviour, since they litigated twice as many times as the central government (66.5% and 33.5%, respectively).⁵ The data also show that the litigants tended to use the actions of unconstitutionality and the conflicts of competences in equal proportion (51.5% and 48.5%, respectively). Nevertheless, only 65% of the total litigations handled by the court produced a ruling. The remaining 35% were annulled by the court or withdrawn by the plaintiffs (Table 1).

Second, it appears from the percentage of victories for each side that the court favours the central state. From 1980 to 2014, the central state won 71.5% of its claims, while regional actors only achieved victory in 59% of cases. However, these data hide a two-step evolution. As shown in Figure 1, the Constitutional Court did not favour any litigant from 1980 to 2002, since the regions and the central state won alternately. However, the court clearly ruled in favour of central ministries from 2003 to 2014, and it can be observed that from 2004 to 2010 the central state won 100% of its claims.

Third, the MAP-LEXTER data set puts to the fore the relevance of some policy areas of contention for the autonomous communities, such as agriculture, the economy or industry. Actually, the conflicts dealing with the division of fiscal incomes from gambling or the management of rivers are frequent. As previously stated, shared competences such as 'agriculture, food and environment' or 'economy and competitiveness' cause a higher number of conflicts than 'defence' and 'foreign affairs and cooperation' which are entirely controlled by the central government. As stressed by an academic expert interviewed in Madrid in October 2015: 'the fuzzy sharing of competences established by articles 148 and 149 in the 1978 Constitution favours this kind of opposition' (Figure 2).

Table 1. Profile of intergovernmental litigations, 1980–2014.

		<i>N</i>	%
Types	<i>Recursos</i>	840	51.5
	<i>Conflictos</i>	784	48.5
	Total	1624	100
Plaintiffs ^a	Central state	542	33.5
	Autonomous communities	1082	66.5
	Total	1624	100
Resolutions	Accepted or resolved	1051	65
	Withdrawn or rejected	573	35
	Total	1624	100
Litigations ^b	Won by the central state (out of the total state litigations)	231	71.5
	Filed by the central state and resolved by the court	323	100
	Won by autonomous communities (out of the total state litigations)	430	59
	Filed by autonomous communities and resolved by the court	728	100
	Total of won litigations (state plus autonomous communities)	661	62.9
	Total filed litigations and resolved by the court	1051	100

Notes: ^aThis item comprises the main plaintiff leading a complaint.

^bThis item comprises the whole court's decisions in which central and regional government are involved as single or joint plaintiffs.

Sources: MINHAP (2015) and authors' own elaboration.

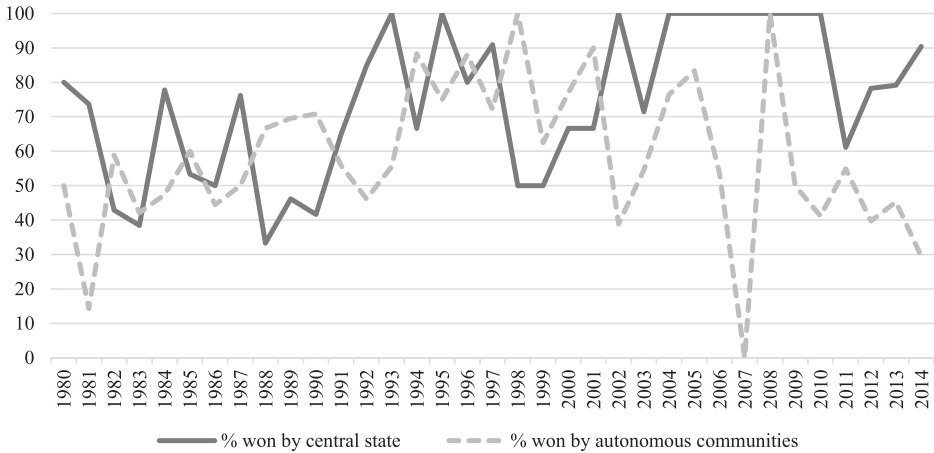


Figure 1. Evolution of won litigations (%), 1980–2014.
Source: MINHAP (2015).

Fourth, the data show that intergovernmental conflicts followed a cyclical dynamic between 1980 and 2014. Obviously, those cycles of contention are difficult to synthesize because of the various issues tackled by the Constitutional Court. Nevertheless, certain trends can be observed (Aragón Reyes, 2006). According to one of the interviewed justices (Barcelona, November 2015): ‘the first period (1980–91) corresponds to the launching of the state of autonomies. Regional governments had to find their place in this brand new territorial model. This caused several conflicts’. Later: ‘The adoption of the Second Autonomous Pacts in 1992 softened the situation temporarily, but the alternation of majorities produced new conflicts of competences during the second part because of the renegotiation of autonomous statutes (1992–2008)’. Finally: ‘the budgetary cuts and the absolute majority of Conservatives left no choice to the regional governments who decided to defend their self-competences before the Constitutional Court’ (Figure 3).

Last, the MAP-LEXTER data set reveals that the levels of intergovernmental contention differed greatly from one region to the other. At the top of the ranking, Catalonia accumulates 33.2%

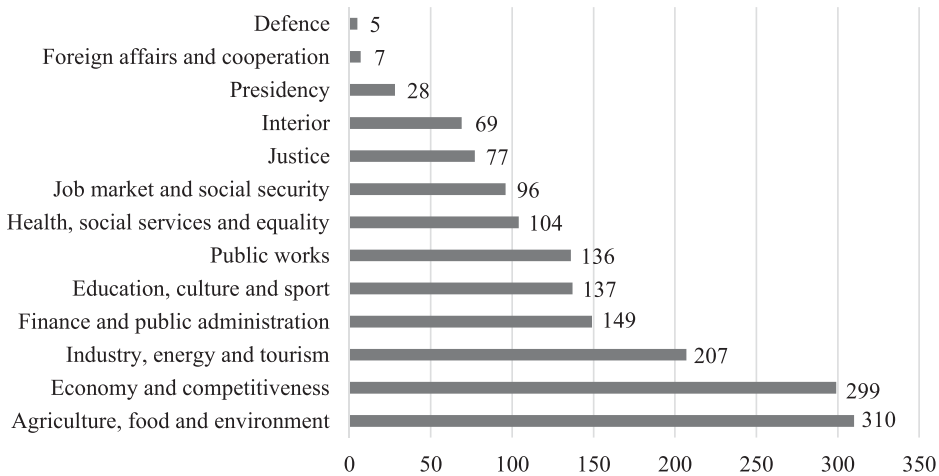


Figure 2. Ranking of intergovernmental conflicts by policy sectors, 1980–2014.
Source: MINHAP (2015).

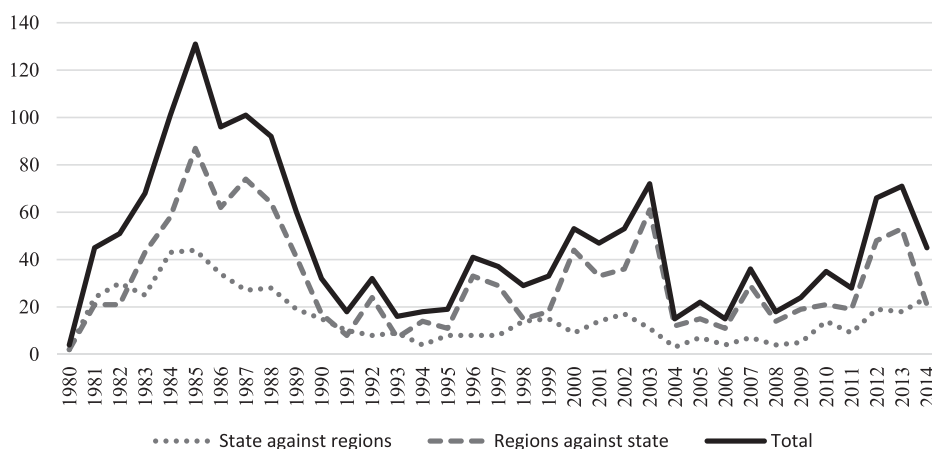


Figure 3. Evolution of intergovernmental conflicts, 1980–2014.

Source: MINHAP (2015).

of all litigations, followed by a group of front runners constituted by the Basque Country (16.9%), Galicia (7.9%) and Andalusia (7.7%).⁶ The rest of the regions represent between 0.8% and 5.4% of the total challenges. To put it another way, the autonomous communities ruled by article 151 (i.e., those that benefitted from an advanced statute of autonomy before the others) are more conflictive than the rest (Table 2).

Table 2. Ranking of intergovernmental conflicts by regions, 1980–2014.

	Total number of conflicts	Percentage of conflicts of the total	Annual average
Catalonia	539	33.2	15.9
Basque Country	275	16.9	8.1
Galicia	129	7.9	3.8
Andalusia	125	7.7	3.7
Canary Islands	88	5.4	2.6
Aragon	70	4.3	2.1
Navarre	57	3.5	1.7
Castilla-La Mancha	50	3.1	1.5
Balears	49	3	1.4
Valencia	47	2.9	1.4
Extremadura	45	2.8	1.3
Asturias	35	2.2	1
Madrid	31	1.9	0.9
Cantabria	30	1.8	0.9
Castille and Leon	27	1.7	0.8
Rioja	14	0.9	0.4
Murcia	13	0.8	0.4
Total	1624	100	47.8

Source: MINHAP (2015).

Shaping territorial issues through the constitutional review

Beyond the quantitative perspective, the Spanish territorial system has been profoundly shaped by the jurisprudence of the Constitutional Court. In 1978, the complex process of the adoption of the Constitution allowed a text to be produced with solid statements (e.g., articles about political and civil liberties) along with vague principles (e.g., those dealing with the federal organization of the state). Consequently, the court has been frequently asked to clarify some aspects of the Constitution. Though it is impossible to summarize the whole constitutional jurisprudence in territorial politics, it is important to stress the main areas of contention that have caught the attention of justices (Tribunal Constitucional, 2016).

First, the court made an effort to clarify the Spanish legal order with respect to regional legislation. Indeed, it affirmed that regional autonomy and sovereignty were two different concepts (ruling 4/1981). It also proclaimed the unity of the legal order (ruling 4/1982) and that regional autonomy was political, not administrative (ruling 25/1985). Therefore, Spanish autonomous communities' historical rights were guaranteed within the framework of the 1978 Constitution (ruling 76/1988). By the same token, the court insisted on the constitutional exigence of solidarity and loyalty between territorial actors (ruling 64/1990) (Aragón Reyes, 2006).

Second, the prevalence of state legislation was then counterbalanced by the fundamental ruling on the *Ley Orgánica de Armonización del Proceso Autonómico* (LOAPA, or Organic Law for Harmonizing the Autonomous Process). In 1981, the Union of the Democratic Centre, along with the Socialist Party, signed the first pact of autonomy and aimed to re-equilibrate the competences between Spanish regions. That decision was contested by the Basque and Catalan governments, who defended their right to establish their own regional legal orders. Through ruling 76/1983, the constitutional justices finally forbade the central legislative from modifying the sharing of power established by the Constitution and the regional statutes of autonomy (since both constitute the so-called 'bloc of constitutionality') through a simple law. By doing so, this ruling preserved the distinction between constituted and constituent powers and guaranteed autonomy to the regions (reaffirmed by ruling 137/1986) (Fernández Farreres, 2005).

Third, the sharing of policy areas between central and regional administrations has been more complicated to define because of the vague division established by the Constitution. According to the court, the central state does not have a monopoly on shared competences; it has, rather, the role of policy-framer (ruling 173/1998). More than a strict relationship of prevalence, state institutions are supposed to collaborate with autonomous communities in order to ensure the good operation of public services (ruling 81/1997). One of the last developments in this field has been the reactivation of the debate about the legitimacy of the central government imposing European regulations concerning budget stability on autonomous communities after the 2008 financial crisis. Though the court recognized the autonomy of regions in their own areas of competence vis-à-vis the European legislation (ruling 252/1988), it also gave the power to the central government to check the compliance of those norms (ruling 252/1988). This statement had been put forth previously in 2001 (ruling 62/2001) to guarantee the budgetary equilibrium of public accounts and had been reaffirmed in 2011 (ruling 134/2011) (de la Quadra-Salcedo Janini, 2013).

The Catalan bone of contention

One of the most famous aspects of the jurisprudence of the Constitutional Court has been the set of decisions dealing with the right to self-determination of minorities. Despite the Catalan case that has recently occupied the attention of the media, the first antecedent was the Ibarretxe Plan (*Propuesta de Estatuto Político de la Comunidad de Euskadi*). In 2003, the Basque Parliament adopted a bill in order to convert the Basque Country into an associated state of Spain. After a series of harsh discussions with the Constitutional Court, the Basque regional law 9/2008 was

adopted to organize a referendum on the implementation of the plan. This project was immediately blocked by the constitutional judges through ruling 103/2008. The first ground in the Constitutional Court's ruling was that the so-called *consulta* was in reality a referendum, even though it was not called by that name, and that, under the Spanish system, the only referendums that are possible are those expressly established in the Constitution. Moreover, the court argued that, in addition, regional referendums needed to be authorized by the central government, according to article 149.1.32 of the Constitution (Aguado Renedo, 2011).

After this episode, the centre–periphery tensions moved to Catalonia.⁷ In September 2005, the party coalition that led the Catalan government (*Generalitat*) proposed to modify the 1979 statute adopted during the transition to democracy. After an internal debate between the three partners leading the Catalan executive (Party of Socialists of Catalonia, or *Partit del Socialistes de Catalunya*; Republican Left of Catalonia, or *Esquerra Republicana de Catalunya*; and Initiative for Catalonia, or *Iniciativa per Catalunya*), a first draft was sent to the Spanish *Cortes* (Parliament) in November 2005. The Congress and the Senate – both controlled by the PSOE (*Partido Socialista Obrero Español*, or Spanish Socialist Workers' Party) – ratified the new draft. The statute was finally approved through a referendum by 74% of Catalan voters (with a voter turnout of 49.41%) on 18 June 2006 (Keating & Wilson, 2009).

Nevertheless, on 31 July the PP (*Partido Popular*, or People's Party) challenged 128 of the 233 statute's articles before the Constitutional Court (case 8045-2006). This litigation was followed by six additional petitions formulated by the ombudsman and six regional governments (Aragon, Balears, Valencian Community, Murcia and La Rioja). After four years of controversies, the court published its decision on 28 June 2010 (ruling 31/2010). The constitutional justices accepted most of the original proposal, but 14 articles were declared unconstitutional and 23 articles and four provisions were reinterpreted. Those articles dealt with the concept of the Catalan nation, the fiscal relationship between Catalonia and Spain, the status of the Catalan language, and the nature of Spanish quasi-federalism. As expected, this decision was highly controversial, since the Constitutional Court was asked to set the limits of the decentralization policy (Colino, 2009).

Meanwhile, a mass demonstration was organized on 11 September 2012 by the Catalan National Assembly, a nationalist association promoting the independence of the region and its conversion into a new European state. A fortnight later, on 25 September, the president of the *Generalitat* called early regional elections, and on 27 September the main nationalist parties of Catalonia agreed to organize a referendum on self-determination. *Convergència i Unió* (Convergence and Union) and *Esquerra Republicana*, the main nationalist forces in parliament, won a majority in the Catalan government on 25 November and signed an agreement to organize a future consultation about the political future of Catalonia.

On 23 January 2013, the Catalan Parliament adopted a Declaration of Sovereignty and the Right to Decide (*Declaración de soberanía y del derecho a decidir*). This declaration was immediately suspended and declared void, but the court stated that the 'right to decide' should be resolved politically by amending the Constitution (ruling 42/2014). On 27 September 2014, the Catalan government adopted a decree for organizing an Alternative Consultation (*consulta alternativa*), since the concept of referendum was definitely banned for legal reasons. This consultation was suspended by the Constitutional Court on 13 October.

However, the Catalan government responded by planning another poll (now titled *Proceso participativo sobre el futuro político de Cataluña*, or Participative Process on the Political Future of Catalonia) on 9 November 2014. Once again, the court halted the procedure. On 11 June 2015, the whole Participative Process was declared unconstitutional by the court (ruling 31/2015) (Solozábal Echavarría, 2015). As will be stressed in the next section, those last constitutional developments in Catalonia constituted a breaking point for the Constitutional Court in terms of politicization and legitimacy.

TERRITORIAL POLITICS AS A SOURCE OF POLITICIZATION

From party selection to institutional blockage

According to Hein and Ewert's (2014, p. 38) definition, the term 'politicization' exclusively denotes 'direct and indirect influences on constitutional court decisions (i.e. the court in general, the trials, the judges, and the decision-making process)'. The scientific literature has demonstrated on several occasions that the politicization of constitutional courts was inevitable, and that the Spanish case was all but an exception (Miley, 2008). Although article 159.5 of the Constitution states that the 'members of the Constitutional Court must be independent', and article 22 of the LOCT affirms that constitutional judges should respect the principles of 'impartiality and dignity', control of the Constitutional Court represents a crucial issue for the political parties since they want to prevent their own policies from being vetoed.

As noted above, the selection of constitutional justices depends on four institutions: the Cabinet, the Congress, the Senate and the GCPJ. As in other countries, such as France, Germany or Italy, this rule logically supposes a certain level of control by the political parties over the composition of the court. The presence of the PP and the PSOE is particularly visible through their parliamentary majorities in the Parliament and the Cabinet. But the politicization of the GCPJ is also perceptible through 'the affiliation of its members to the main associations of justices: the progressive *Jueces para la Democracia*, the conservative *Asociación Profesional de la Magistratura* and the more neutral *Asociación Francisco de Vitoria*' (interview with a top-level civil servant, Madrid, October 2015).

Although the PP and the PSOE control the process of selection of constitutional justices, Basque and Catalan nationalist parties have had their say at certain points. The Basque Nationalist Party (*Partido Nacionalista Vasco*) and the Catalan nationalists of *Convergència i Unió* have sometimes participated in the choice of the justices appointed by the Congress (in 1992, 2010 or 2012, for instance, and always in collaboration with the PSOE). Moreover, the 2007 organic law modified the process of appointment of constitutional justices by the Senate. It allowed regional parliaments to propose two candidates each to the upper chamber (Sánchez Barriol, 2009).

Conservatives and progressives have run the court for 15 years each (Table 3) with variable degrees of politicization. For the first 30 years, pressure from political parties shaped the contours of Spanish constitutional justice without blocking its normal operations. Indeed, from 1980 to 1985, the Constitutional Court was controlled by a majority of conservative justices appointed by the *Unión del Centro Democrático* (Adolfo Suárez's political party). In 1986, the PSOE of Felipe González imposed the presence of progressive judges until 2000. In 2000, new appointments made by the PP Cabinet gave the majority to the conservatives until 2008.⁸ The degree of politicization increased dramatically during the second period (2008–14) when the opposition between the PP and the PSOE led to the paralysis of the court's activity until 2012, and then to a new conservative majority from 2012 to 2014. The politicization of the court with respect to the ruling about the statute of Catalonia damaged the reputation for impartiality of the court, as we will demonstrate below.

The Catalan statute and the delaying strategy

To a large extent, centre–periphery conflicts brought to the fore the connections between constitutional justice and political parties.⁹ From that perspective, the ruling on the 2006 statute of autonomy of Catalonia can be considered as a critical juncture in the history of the court. Like the rest of the Spanish autonomous communities, Catalonia is ruled by a specific statute that regulates its own political institutions along with its relationship to the Spanish central government. In 2006, the complaint of unconstitutionality adopted by the PP against the Catalan statute instigated an open crisis among the constitutional justices.

Table 3. Historical composition of the Spanish Constitutional Court, 1980–2014.

Year	Appointer	Days of delay in the appointment	Justices appointed by progressive parties ^a	Justices appointed by conservative parties	Justices appointed by consensus	Majority at the court	Spanish Cabinet	President of the court
1980	Congress,	0	4	8	0	Conservative	Conservative ^b	M. García Pelayo
1981	government and		4	8	0	Conservative	Conservative	
1982	GCPJ		4	8	0	Conservative	Conservative	
1983	Congress	77	3	9	0	Conservative	Progressive	
1984			3	9	0	Conservative	Progressive	
1985			3	9	0	Conservative	Progressive	
1986	Government and	0	8	4	0	Progressive	Progressive	F. Tomás y
1987	GCPJ		8	4	0	Progressive	Progressive	Valiente
1988			8	4	0	Progressive	Progressive	
1989	Senate	0	9	3	0	Progressive	Progressive	
1990			9	3	0	Progressive	Progressive	
1991			9	3	0	Progressive	Progressive	
1992	Congress	0	10	1	1	Progressive	Progressive	M. Rodríguez-
1993			10	1	1	Progressive	Progressive	Piñero Bravo-
1994			10	1	1	Progressive	Progressive	Ferrer

(Continued)

Table 3. Continued.

Year	Appointer	Days of delay in the appointment	Justices appointed by progressive parties ^a	Justices appointed by conservative parties	Justices appointed by consensus	Majority at the court	Spanish Cabinet	President of the court
1995	Government and	45	9	2	1	Progressive	Progressive	A. Rodríguez
1996	GCPJ		9	1	2	Progressive	Conservative	Bereijo
1997			9	1	2	Progressive	Conservative	
1998	Senate	293	6	4	2	Progressive	Conservative	
1999			6	4	2	Progressive	Conservative	P. Cruz Villalón
2000			6	4	2	Progressive	Conservative	
2001	Congress	194	4	6	2	Conservative	Conservative	
2002			4	6	2	Conservative	Conservative	M. Jiménez de
2003			4	6	2	Conservative	Conservative	Parga
2004	Government and	62	5	6	1	Conservative	Progressive	
2005	GCPJ		5	6	1	Conservative	Progressive	M. E. Casas
2006			5	6	1	Conservative	Progressive	Baamonde
2007	Senate	1120	5	6	1	Conservative	Progressive	
2008			5	5	1	Tie	Progressive	
2009			5	5	1	Tie	Progressive	
2010	Congress	619	5	5	1	Tie	Progressive	
2011			6	6	1	Tie	Progressive	P. Sala Sánchez
2012			7	7	0	Tie	Conservative	
2013	Government and	7	5	7	0	Conservative	Conservative	
2014	GCPJ		5	7	0	Conservative	Conservative	F. Pérez de los Cobos Orihuel

GCPJ, General Council of Judicial Power.

Notes: ^aDepends on the proposal by the People's Party (*Partido Popular* – PP) and the Spanish Socialist Workers' Party (*Partido Socialista Obrero Español* – PSOE) through the Congress, the Senate and the Cabinet.

^bDepends on the timing of appointment, during the first or the last six months of the year.

Sources: Sánchez Cuenca (2011) and authors' own elaboration.

Two territorial conceptions clashed. On the one hand, the PP aimed to limit the self-governing capacity of the regions in the name of the unity of the Spanish nation. Moreover, after its electoral defeat of 2004, the PP did not want to lose its grip on the Constitutional Court – the last vestige of conservative representation within the state’s institutions. On the other hand, the PSOE accepted the aspirations of the Catalan government within the limits of the 1978 Constitution, because of the crucial importance of Catalan voters in supporting the socialist majority in the Congress. These political tensions became clearly visible through the delays in appointing constitutional judges and the ‘war of recusals’ between ideological blocks.

With respect to the delays, from 2007 to 2012, the PP and the PSOE proved unable to reach any agreement about the candidates for the Constitutional Court. In December 2007, the mandate of four constitutional judges was up, but the PP and the PSOE’s senators mutually blocked the candidatures of the four new aspirants. The four outgoing justices divided into three conservative and one progressive judges and the PSOE could have appointed two progressive judges leading to a progressive majority at the court. The PP refused those nominations for three years but the senators finally reached a consensus in the autumn of 2010 (after the death of judge García Calvo on 18 May 2008, which re-established the tie between conservatives and progressives). At the same time, the Congress had to appoint three other judges whose mandate would be up in November 2010. Despite the prohibition of article 159.3 of the Constitution, two-thirds of the court would have been replaced at once.

In September 2010, the PP and PSOE members of the Congress (along with the Catalan nationalist party Convergence and Union) found an arrangement for appointing four new justices. They also introduced an amendment to shorten the mandate of one-third of the judges in order to avoid the overlapping of replacements in the future. However, the agreement failed in the end. During her farewell ceremony, the President of the Constitutional Court, María Emilia Casas Baamonde, spoke in harsh terms against the politicization of the court by stressing ‘a serious unfulfilment of the Constitution [that is] detrimental to Spanish democracy’. In the summer of 2010, the outgoing justices were finally replaced by two progressive and two conservative candidates by the Congress, after a struggle that had lasted for a year and a half.

The recusals’ war

The political struggle between the PP and the PSOE for control over the Constitutional Court also took on other forms through the so-called ‘recusals’ war (Lázaro, 2008). From 2006 to 2010, political parties aimed to influence the composition of the court in order to promote their own visions of Spain. It is worth noting that in 2006, the court faced the particular situation of there being an ideological tie, with six conservative judges and six progressive judges with respect to territorial politics. However, the progressive profile of the president, Baamonde, gave an advantage to the pro-Catalan statute bloc.

In Spain, the legal bases for disqualifying a constitutional judge are almost the same as for ordinary judges and are regulated by article 219 of the organic law 6/1985. Nevertheless, given the specific nature of the Constitutional Court, the recusal of its justices must be decided in the last instance by the court itself. The PP aimed to neutralize progressive justices in order to veto the Catalan statute reform, while the PSOE and Catalan parties tried to disqualify the judges with a conservative profile for avoiding such a blockage. As stressed by a public law specialist interviewed in Barcelona in November 2015: ‘The objective was the disqualification of constitutional justices and/or their mere abstention during the preliminary process of examination, since the affected judges cannot participate in the debate about their own recusation.’

The struggle started on 2 November 2005: the PP intended to recuse judge Pablo Pérez Tremps, but the Constitutional Court dismissed this request. The pro-Catalan statute forces counterattacked on 11 October 2006, when the Catalan Cabinet and the Catalan Parliament

tried to disqualify judge Roberto García-Calvo y Montiel for his involvement in a previous judgement against the Catalan government. This recusation was also rejected by the court.

On 2 November 2006, the PP parliamentary group aimed to recuse the president of the Constitutional Court, Baamonde. The PP deputies argued that her husband (Jesús Leguina Villa, professor of public law) had previously published a series of articles dealing with the reform of the Catalan statute. Those claims were dismissed by the court. However, on 5 February 2007, the Constitutional Court finally accepted the new request of the PP deputies against Tremps. The plaintiffs argued that this justice (formerly a professor of public law) was not impartial since he had previously written a chapter in a book about the reform of the Catalan statute published by the Catalan Institut d'Estudis Autònoms. Given the presence of some of Tremps' arguments in the report sent by the Institut to the Catalan Parliament, the Constitutional Court finally accepted this motion for disqualification (with five dissenting votes). The tie was broken in favour of the conservatives (six against five).

On 7 March 2007, the Catalan government requested judge Jorge Rodríguez-Zapata Pérez be recused. According to the claimant, this judge had previously written a report for the academic organization *Fundación Carles Pi i Sunyer* where he tackled some points of future reform. Nevertheless, the court unanimously decided to reject the petition. In turn, on 19 October 2007, the Spanish government, led by the PSOE, solicited the recusals of García-Calvo y Montiel and Rodríguez-Zapata Pérez for their criticisms of the reform of the LOTC. The court held that those judges were not impartial and the recusals were accepted. The new balance of power favoured the interests of the progressive justices (five against four). The PP members of the Congress followed the same strategy on 26 October 2007 by negating the impartiality of Pascual Sala Sánchez, Tremps and Manuel Aragón, for expressing their opinions about the reform in a professional meeting. Despite the rejection of the recusation, the remaining constitutional justices recognized that the acceptance of this challenge would have paralyzed the court because of the lack of a legal quorum of eight judges.

One might think that this series of disqualifications was only an isolated episode linked to the reform of the statute of Catalonia. Nevertheless, this process is not over and it should be considered to be part of the current political relationship between the centre and the peripheries in Spain. In the words of one of the Catalan senators interviewed in October 2015 in Madrid: 'the Pandora's box is open'. Indeed, in 2013, the revelation of the affiliation of the former president of the court – Francisco Pérez de los Cobos – with the PP between 1996 and 2007 provoked a certain malaise in public opinion. The Parliament of Catalonia used this information to have him recused.

However, while article 159.4 of the Constitution forbids constitutional justices from exerting 'managerial functions in a political party or labour union [...]', Pérez de los Cobos argued that his status as a former simple militant was not incompatible with his position as a judge (Fabra, 2013). More recently, in October 2014, Catalan deputies sought to have recused at least three constitutional judges (Pérez de los Cobos, Pedro González-Trevijano and Enrique López) for previously having expressed a negative opinion about law 10/2014 adopted by the Catalan Parliament.¹⁰ The complaint was rejected, but it shows how the political parties intend to use the institutional weaknesses of the court for their own purposes (Matia Portilla, 2014).¹¹

CONCLUSIONS

This study has focused on the role of the Spanish Constitutional Court in the state of autonomies from 1980 to 2014. The dynamic of decentralization in Spain provoked the rise of two main tiers of power: central and regional governments. This particular design favoured the consolidation of a federal-like constitutional court: the *Tribunal Constitucional*. Taking those structural elements into

consideration, this paper analyzed the two sides of the nexus between constitutional justice and the state of autonomies. As stated in the introduction, it was hypothesized that the judicialization and politicization dynamics – present in all federations’ supreme courts – went so far in Spain that they led to the blockage of the Constitutional Court.

On the one hand, this investigation demonstrated that the vague principles defined by the 1978 Constitution needed to be redefined by the justices. This is why the Constitutional Court profoundly shaped the contours of the devolution process in Spain through a dynamic of ‘judicialization’ of territorial politics. The analysis of the volume of litigations handled by the constitutional justices shows the relevance of this institution in managing regional conflicts since its inception. The study particularly emphasized the pivotal role of the court in managing the tensions between Catalonia and the central government in the field of shared competences between central and regional executives (such as agriculture, economy or tourism). The examination of the judicial review of the court then put to the fore its role in structuring the development of the state of autonomies (through the LOAPA case and the statute of Catalonia ruling, for instance).

On the other hand, this research aimed to investigate the other side of the coin, that is, the series of pressures exerted by territorial actors on the Constitutional Court. Of course, the politicization of constitutional justice is not a specifically Spanish phenomenon. However, in Spain, this dynamic led to the quasi-paralysis of the Constitutional Court from 2008 to 2012. This institutional crisis had to do with the judgement handed down concerning the reform of the Catalan statute (2006–10). The verdict of the court was going to influence deeply the future development of the state of autonomies, and political parties did their best to break the tie between the conservative and progressive constitutional judges. During that period, the PP and the PSOE (along with Catalan parties) tried to delay the appointment procedure of justices in the Senate and the Congress. Additionally, political parties started to challenge the impartiality of constitutional justices through the so-called ‘war of recusations’.

Therefore, how does one define the role played by the court in territorial politics? Since the 1990s, many scholars have sought to understand the evolution of constitutional justice within a single theoretical framework. One of the dominant schools of thought since the 1990s – the ‘principal-agent’ approach of delegation – defined non-majoritarian institutions (such as international organizations or national regulatory agencies) as actors exercising a public authority without having been elected by the people (Epstein & O’Halloran, 1999). This means those ‘agents’ realize their functions under the indirect orders of their ‘principals’. Nevertheless, in accordance with Stone Sweet (2002), we assume that the case of the Spanish Constitutional Court is slightly different, since the principle of separation of powers theoretically guarantees the independence of the judiciary vis-à-vis the executive and legislative branches. Drawing on the work of Majone (2001), Stone Sweet (2002, p. 77) prefers to describe this role as: ‘[a] model of trusteeship in which “relational contracting” and “imperfect commitment” lead political rulers to delegate broad “fiduciary” powers to a particular kind of agent – a trustee – and then to guarantee that trustee’s independence’.

To conclude, the study of the role of the *Tribunal Constitucional* in territorial politics – now understood as a trustee – is of great interest for understanding the contemporary dynamics of the Spanish state of autonomies. As shown previously, the court’s decisions do not completely depend on party preferences and its politicization has more to do with external forces than with the aim of its members. As demonstrated by the running battles concerning the statute of Catalonia, the *Tribunal Constitucional* has been used by political forces as a way to transform political issues into judicial issues (and delaying or vetoing the decisions of the opposition) (De Miguel Barcena, 2012). The Constitutional Court aspires (or should aspire) to remain a judicial arbiter, but political actors constantly force it to take sides. This evolution demonstrates – once again – the need to reform the mechanisms of intergovernmental relations in Spain in order to provide alternative political arenas of negotiation to political forces.

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NOTES

1. A Tribunal de Garantías Constitucionales (Court for Constitutional Guarantees) was created in September 1933 under the Second Republic (Bassols Coma, 2010).
2. This type of action was re-established in 2015, although only with regard to Statutes of Autonomy or Territory Acts and no longer with regard to Organic Laws.
3. The political role of the Constitutional Court became particularly evident when the former president of the court, Francisco Tomás y Valiente, was murdered by the Basque terrorist group ETA (Euskadi ta Askatasuna, meaning Basque Country and Freedom) on 14 February 1996.
4. MAP-LEXTER is produced by the MINHAP, the Constitutional Court and the *Boletín Oficial del Estado* (the equivalent of the British Hansard).
5. There are two basic judicial proceedings for centre–periphery litigations in Spain: the *recursos de inconstitucionalidad* (complaints of unconstitutionality) and the *conflictos de competencias* (conflicts of competences). The former occurs when a regional or central administration challenges a law because it believes that the act is not consistent with the principles of the Constitution. The latter happens when regional and central administrations contest the sharing of power in a given policy area. Theoretically, regional and central executives can be involved in other types of litigation, such as the infrequent negative conflicts of competences (*conflictos negativos de competencias*) or the prior review of constitutionality (*control previo de constitucionalidad*) that ended in 1985 (Fernández Farreres, 2005).
6. A former Basque senator interviewed in Seville (February 2016) added that the Basque executive stopped challenging all the regulations adopted by central government in 1991: ‘we understood that the Constitutional Court was a simple third chamber controlled by the PP and the PSOE. This is why we decided to adopt a more selective judicial strategy’.
7. With the exceptions of the Basque and Catalan statutes, the wave of reform of regional statutes in 2000 did not provoke any crises in Aragon, Cantabria, Castilla-La Mancha, Balears, Murcia, Madrid, Extremadura and Navarre. Such statutory reforms were necessary to adapt the legal frameworks of these regions after 25 years of decentralization (Casanas Adam, 2017).
8. In 2004, Premier Aznar decided to wait until after the general elections to appoint new conservative judges. Nevertheless, the PSOE finally won the elections and reduced the gap between conservative and progressive justices by appointing two new progressive members.
9. Actually, certain previous events had marked the increasing politicization of the Constitutional Court. For instance, in 1998, the Senate took nine months to reach agreement on appointing its candidates to the court. As another example, in 2003, the president of the court, Manuel Jiménez de Parga, surprised the Spanish political

milieu with a statement denying the existence of ‘historical nationalities’ (namely, the Basque and Catalan communities). This discourse contrasted with the traditional discretion of the previous presidents of the court. To a certain extent, this evolution has been analyzed as a side effect of the progressive polarization of the Spanish political system (Gunther & Montero, 2012).

10. The case of López is a good illustration of the interaction between justice and politics. Between 2007 and 2013, this judge was repeatedly proposed by the PP as a candidate for the Constitutional Court. In 2013, the Conservative government finally appointed López, but the new court judge remained under fire from the other political parties, who criticized his participation in some 50 events organized by the PP’s Fundación para el Análisis y los Estudios Sociales.

11. Interestingly, the Gabinet d’Estudis Socials i Opinió Pública (GESOP) demonstrated in 2010 that 63.8% of Spanish citizens considered the tribunal was not an independent institution vis-à-vis political parties. In Catalonia, this percentage arose to 70% (GESOP, 2010).

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