EUROPEAN PUBLIC LAW

Published by:
Kluwer Law International
PO Box 316
2400 AH Alphen aan den Rijn
The Netherlands
Website: www.kluwerlaw.com

Sold and distributed in North, Central and South America by:
Aspen Publishers, Inc.
7201 McKinney Circle
Frederick, MD 21704
United States of America
Email: customer.service@aspenpublishers.com

Sold and distributed in all other countries by:
Turpin Distribution Services Ltd.
Stratton Business Park
Pegasus Drive, Biggleswade
Bedfordshire SG18 8TQ
United Kingdom
Email: kluwerlaw@turpin-distribution.com

European Public Law is published quarterly (March, June, September and December).

This journal is also available on line at www.kluwerlawonline.com. Sample copies and other information are available at www.kluwerlaw.com. For further information please contact our sales department at +31 172 641562 or at sales@kluwerlaw.com. For Marketing Opportunities please contact marketing@kluwerlaw.com

Online subscription prices (2014): EUR 495/USD 660/GBP 364 (covers two concurrent users).
Print subscription prices, including postage (2014): EUR 534/USD 714/GBP 394.

European Public Law is indexed/abstracted in the *European Legal Journals Index*.

Printed on acid-free paper.
ISSN 1354-3725

Printed and Bound by CPI Group (UK) Ltd, Croydon, CR0 4YY.

The Implementation of the Water Framework Directive and Territorial Disputes in Spanish Law

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1 INTRODUCTION[1]: IS IT SO DIFFICULT?

The implementation of the Water Framework Directive of 2000 is not proving easy for Spain. Despite a long experience in river management based on basins and water planning, our country experiences a considerable delay in its implementation.

In principle, the difficulty in implementation of the Directive (WFD) is not surprising. The WFD has a remarkable technical complexity and prescribes ambitious goals. But apart from these drawbacks common to all states, there is an additional factor. The Spanish government is strongly decentralized. Still, this should not be important, since the water management based on basin districts is traditional in our law.

Spain has around twenty-five river basins, out of which six are international, sharing water courses with France to the northeast and Portugal to the east. The deadline for publishing River Basin Management Plans was 22 December 2009. Nevertheless, up to now only six management Plans has been adopted.[2] All of them are regional. As we will explain, the adoption of River Basin Management Plans of the main Spanish rivers is a responsibility of State Authorities.

Given the considerable delay that Spain accumulates in the transposition of the WFD, the European Court of Justice has stated on two occasions that the

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1 This paper was presented at 10th European Conference 'EUROPE INBO 2012' on the Implementation of the Water Framework Directive, organized by the European Group of Basin Organizations EUROPE-INBO, Istanbul – Turkey – 17 to 19 Oct. 2012.

This work has received research support from the Spanish Ministry of Science and Innovation (der 2010-21 430) for the project entitled 'The impact of climate change on European water policy, transportation and energy and their impact on the Spanish legal system'.

2 Catalonia (Decree 188/2010, of 23 Nov.), Andalusia Mediterranean Basins (Royal Decree 1331/2012 of 14 Sep.), Tinto-Odiel-Piedras (Royal Decree 1329/2012 of 14 Sep.), Guadalete-Barbate, (Royal Decree 1330/2012 of 14 Sep.) Galicia-Costa (Royal Decree 1332/2012 of 14 Sep.).

Gallego, Isabel, Garrido, Nuria, & Delgado, Francisco. 'The Implementation of the Water Framework Directive and Territorial Disputes in Spanish Law' *European Public Law* 19, no. 4 (2013): 675–686.

Kingdom of Spain has failed in its legal duties. First, the judgment of 7 May 2009 declared that Spain had not designated on time competent authorities in certain basins.

Most recently, the judgment of 4 October 2012 (C 403/11) declared that, to date 22 December 2009, Spain had approved only a few River Basin Plans that do not reach most of the territory of the country. Spain's defence to justify the delay in the implementation of the WFD is based, among other arguments, on the complexity of the Spanish competence system.

The Court rejected this argument because, as we all know, the national law cannot be an excuse to evade the European Law. We think also that our system is not more difficult than other decentralized countries. In our view, the main problem is the incapacity of Spanish politics and authorities to assume their own responsibilities in an equitable, participative, and co-operative way, as established by law.

The aim of this paper is to explain the institutional framework of water law in Spain, regarding the Constitution of 1978 and the leading cases decided by the constitutional and the Supreme Courts. From a theoretical point of view, it should not delay the implementation of the WFD. However its application has generated since the beginning territorial disputes that have complicated the implementation of WFD.[3]

2 THE CRITERIA FOR DISTRIBUTION OF TERRITORIAL POWERS ESTABLISHED IN THE SPANISH CONSTITUTION

Since the adoption of the Constitution in 1978, Spain is a highly decentralized country. The territorial power is distributed mainly between the State Authorities and the Regions, so called 'Comunidades Autónomas'.

The Spanish Constitution designed the decentralization regime in a very flexible way. The Constitution merely sets the table of exclusive policies of the State, those that which could not be undertaken by regional powers in any case. Putting these aside, Regions could establish their specific policies in their Statute of Autonomy.[4]

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[3] In addition, a suit brought on 29 Mar. 2012 (Case C-151/12) is pending at the European Court of Justice. The Commission submits that the Kingdom of Spain has incorrectly transposed the provisions of Directive 2000/60/EC referred to its application, inasmuch as the Spanish legislation applies only to interregional river basins in Spain (whose waters flow through more than one Autonomous Community). Consequently, those provisions have not been transposed into Spanish law as regards intraregional river basins (whose waters flow through only one Autonomous Community). In our opinion, the Commission opinion is not right.

[4] The Statutes of Autonomy are the main law for the regions, under the Spanish Constitution.

In the area in which we are concerned, Article 149.1.22 SC establishes that:

> The State has exclusive jurisdiction on legislation, regulation and concession of hydraulic resources when the waters flow through more than one region.

For its part, in their Statutes of Autonomy, regions have assumed jurisdiction on legislation, regulation and concession of hydraulic resources when the waters flow within their own region. And the following matters as well: 'Planning, construction, and exploitation of hydraulic installations, channels, and irrigation of regional interest; mineral and thermal waters.'

We can suggest that in Spanish geography most important watersheds are interregional, i.e. State responsibility: the Miño, the Duero, Tajo, Guadiana, Guadalquivir, Segura, Júcar, Ebro, and others. The reader can see it in the maps.

The description of the specific criteria concerning the distribution of powers on water would be incomplete without mentioning that, in turn, water is the indispensable input for many public policies in which both the State and the Regions have responsibilities.

Therefore, it should be noted that Regions have many policies (agriculture, land use, environment, water supply, industry, tourism, etc.) that should be respected by the State water policy. In other words, these policies should permit Regions to influence the State legislation for the use and protection of water resources. These policies are limited by the fact that the most important powers of management and resource management belong to the State.

More specification is needed. Even if water is a State public good, in the Judgment 227/1988 (FJ 14) the Constitutional Court has said:

> rules that distribute powers between the State and Regions on public goods do not necessarily prejudice the right of ownership or those applicable to it, and which are, in principle, separable from public ownership of property and the exercise of public powers that use it as a natural support.

The decentralization introduced by the Constitution of 1978 has allowed the new regional authorities assume responsibility on waters that fully flow through their own territories All Statutes of Autonomy assumed the maximum powers that the Constitution allowed. So, prior State powers on intraregional basins have already been transferred to the Regions regardless of the flow.[5] However, at present, there

[5] Without being exhaustive, the Regions have implemented this policy enacting those regulations: Canary Act 12/1990 of 26 Jul., on the legal regime of the water of these islands and Canary Decrees 319/1996, 82/1999, 81/1999, 166/2001 and 167/2001, which pass the water plans for any Canary island; Catalonian Legislative Decree 3/2003 of 4 Nov., the revised text of the water legislation; Basque Act 1/2006, of 23 June, about water and Basque Decree 33/2003, which regulates the planning making for intraregional Basque basins, as amended by Decree 222/2007; Galician Law 8/1993 of 2 June, which regulates its water administration; Andalusia Act 3/2004, which created the

are still autonomous regions like Valencia or Murcia, who resist assuming their responsibilities, leading to disputes between these and neighbouring communities.

Furthermore, in 2006 a process of statutory reforms was initiated. The new Statutes of Autonomy have tried to strengthen the regional powers in basin management. But some of its provisions, as we'll point out, have recently been overruled by the Constitutional Court.

3 THE WATER ACT OF 1985: THE BASIN AS THE AXIS FOR THE DIVISION OF POWERS

We have already noted that according to the Spanish Constitution, 'waters that flow through more than one region' are under State jurisdiction.

The constitutional approach could be understood in different ways, but the Water Act of 1985 specified it by attributing to State authorities the management of river basins flowing trough more than one region. In this regard, it established that 'watershed means the territory in which the waters flow to the sea through a network of secondary channels that converge into a single main channel. The river basin is considered indivisible, as the unit of resource management'.

This interpretation was subject to a constitutional claim brought by the Basque Country, which sought to manage the rivers that flowed entirely through its territory. Instead of taking into account the full territory of the river basins, the Basque Government proposed to divide them considering the tributary rivers. According to this understanding, Regions could manage in some cases the tributaries of the main rivers.

The important Constitutional Court judgment 227/1988, November 27, dismissed the appeal, confirming the adequacy of the territorial criterion 'watershed' for logical, technical, and experiential reasons, nationally and internationally.

In any case, the Water Act tried to find a satisfactory joint between the policies assumed by Regions (agriculture, land use, environment, etc.) and State powers in the field of planning and management of water resources. To do this, the Act opened to the Regions the so called 'Confederaciones Hidrográficas' (specialized agencies charged to management of watersheds). In that way, they are seated on the boards and committees of theses State agencies and can participate in decision-making.

Andalusian Water Agency and Decree 357/2009, which established the territory of intraregional basin districts located in Andalusia, and Andalusia Act 9/2010, of 30 Jul. of Water.

4 THE INCLUSION OF REGIONAL BASINS IN SOME STATE WATER PLANS

Developing the Water Act of 1985, the Government approved the territorial boundaries of State basin Agencies (Confederaciones Hidrográficas) and State water plans (RD 650/1987, May 8). In this decree, some areas of planning were delineated by drawing two points on the sea coast and including all basins among them. For example, it established that the territory of the Northern Basin included the watersheds of all rivers flowing into the Atlantic Ocean from the mouth of the river Eo to the border with France, including that river. Taken literally, the precept included the basins that ran entirely through the Basque Country.

The Basque Government filed a claim against this provision and the Constitutional Court, in its judgment 227/1988, determined that the paragraphs of RD 650/1987 which do not distinguish between intra and interregional basins can only be understood in accordance with the block of constitutionality if interpreted in the sense that the geographical areas defined in the same do not include in any case the Basque intraregional basins.

Despite this ruling, the State Government did not reform the RD 650/1987. Thus some Water Plans were approved in 1998 regardless of constitutional limit. And the Supreme Court, in its Judgment of 20 November 2004, had to annul the Júcar Water Plan that regulated aspects of Valencian intraregional basins. The Judgment further stated that the paragraph of RD 650/87, which establishes the territorial area of the Júcar Water Plan could only be constitutional if excluding the internal waters of two Regions: the Valencian Community and Castilla-La Mancha.

5 THE TRANSPOSITION OF THE CONCEPT OF 'RIVER BASIN DISTRICT'

The transposition of the Water Framework Directive forced the introduction of the concept of river basin district under Spanish law. According to Article 16*bis* of the Consolidated Water Act of 2001:

> River basin district means the land and sea area consisting of one or more neighboring river basins and transitional waters, groundwater and coastal basins associated with these.
> The river basin district as the main unit for management of river basins, is the spatial domain to which they apply the rules of protection of water referred to in this Act without prejudice of the specific marine environmental protection that the State may set.

At the time the question arose of whether within a single district inter and intraregional basins could be included. Given the clarity of the CCJ 227/1988 and the SCJ 20 November 2004, the RD 125/2007, of 2 February, which establishes

the territorial area of the river basin districts of State responsibility, excluded the intraregional basins.

In addition, the RD 125/2007 assigned provisionally the management of regional basins still not transferred as follows:

> The delimitation of the territory of the river basin districts comprising intraregional basins whose functions and services has not still been transferred shall be reviewed immediately after such transfer takes place.
> While such pending revision occurs, those intraregional basins not transferred will remain temporarily attached to the river basin district [Confederación Hidrográfica] whose territory they belong today.

Against this Royal Decree two suits were filed that have already been resolved by the Supreme Court. However, the situation created by these two statements is unsatisfactory because they contain contradictory rulings, even if coming from the same court.

First, the region of Castilla-La Mancha filed suit against the temporary attachment of Murcian intraregional basins to the Segura Basin District, understanding the State was invading the regional powers. The claim was dismissed by the SCJ of 22 September 2011, regarding the attachment as a provisional solution to avoid gaps in management. In addition, this judgment contains other interesting statements because, firstly, the Supreme Court states that Murcia has jurisdiction over intraregional basins. And finally, it establishes that a basin district is a new category, conceived as a management unit, which combines basins, without compromising their integrity.

Second, the Valencian Community sought the annulment of the provision that establishes the Júcar Basin District, arguing their intraregional are not included basins in this demarcation. To understand this claim it must be said than these basins have been traditionally managed by the State authorities (Confederación Hidrográfica del Júcar) and the Valencian Executive has no interest in exercising the powers conferred by its Statute of Autonomy. Nevertheless, the suit was upheld by the SCJ 27 September 2011, considering that the transposition of the Water Framework Directive may impose in this case that the State Basins District includes intraregional basins.

The grounds of the last judgment are weak, because under the principle of institutional neutrality, the European Union law does not alter the internal distribution of power of the Member States. So, the inclusion of Valencian river basins within the territory of a State District cannot be constitutional – as it was declared in SCJ of 20 October 2004 – because the Spanish Constitution has not changed at this point. An appeal against that Judgment has been filed before the Supreme Court to unify its doctrine, but it is still unresolved.

6 REGIONAL PARTICIPATION IN INTER-BASIN MANAGEMENT

One of the water management measures that poses greater territorial dispute in Spain is the approval of water transfers from one basin to another. In addition to other minor transfers, since the 70s there has been transfer from the Tajo to the Segura (a river basin located in Eastern Spain: the provinces of Alicante, Almería, and Murcia), to a maximum of 600 hm^3/year. However, this transfer was not considered sufficient to meet the needs of the area, and the parliament passed a so called National Water Plan in 2001 to transfer 1.050 hm^3/year from the Ebro to other Mediterranean basins (Cataluña, Valencian Comunity, Murcia, and Almería. The transfer was repealed three years later, before the works started.

The reforms of the Statutes of Autonomy approved since 2006 have contained different provisions regarding the possibility of new water transfers, some in favour and some opposed, depending on how every region is affected.

First, the new Statute of Autonomy of the Valencian Community (Ley Orgánica 1/2006, April 10) stated:

> It is the right of Valencian men and women to have sufficient supply of quality water. The right to redistribute the spare water of surplus basins is also recognized according to criteria of sustainability in accordance with the Constitution and State law. Valencian Citizens are entitled to a volume of quality water, safe enough to serve their consumption needs and to develop their economic and social activities in accordance with law.

Aragón and Castilla-La Mancha filed a suit against this provision, but they were dismissed by the Constitutional Court (judgments nº 247 and 249/2007) based on the following arguments. One, the right to water[6] is not a subjective public right. It should be understood as a guideline, objective or mandate for the Valencian government: not exercisable in trials. Two, the recognition of that right is constitutional because it does not bind the legislative branch of the State, who may exercise its water policy without conditions.

Faced with the proclamation of a right to the 'spare water', other Statutes of Autonomy have included 'defensive' measures against a possible transfer.

Firstly, the new Catalan Statute (Ley Orgánica 6/2006, 19 July) provides that:

> The Generalitat (Catalonian Government) should issue a mandatory report on any proposal involving diversion of water resources in their territory. (art. 117.4).

The Valencian Community and Popular Party (opposition at that time) filed suit against this provision, but the Constitutional Court also confirmed its constitutionality (Judgments nº 31 and 48/2010). Thus, the report to be issued by

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[6] On the right to water, see EMBID IRUJO a. (Dir.), *El derecho al agua,* Aranzadi, 2006; MÉNENDEZ REXACH A., 'El derecho al agua en la legislación española', *El derecho de aguas en clave europea* (Coord. J. Agudo), *La Ley,* 2010.

the Catalonian Government, although mandatory, is non-binding for the State, that is consistent with the participative principle which must govern relations between the State and the region. The Constitutional Court saw it as a reasonable mechanism for collaboration between the Regions and the State in a matter in which their policies and interests are affected and involved. Nevertheless, that report will not undermine the constitutional water powers of the State (149.1.22 ª EC), even in order to establish transfers between interregional basins.

The second example, the new Statute of Autonomy of Aragon (Ley Orgánica 5/2007, April 20) contains a provision aimed to prevent a possible transfer affecting water resources that this Region needs. According to the precept:

> Water planning will specify the assignments, investments and reserves for the fulfillment of the principle of priority in the use of water resources of the Ebro basin and the rights containing in Article 19 of this Statute, regarding the resolution of the Parliament of Aragon of 12/30/1992 that establishes a reserve of water for the exclusive use of the Aragones people of 6,550 hm^3. (Fifth Additional Paragraph).

The region of La Rioja filed suit against this article, but the Constitutional Court (judgment nº 110/2011) rejected the claim for the main reason that the set flow is not binding on the State. This flow orients and expresses only the Regional involvement in water planning.

In short, the constitutional doctrine has recognized that the regions can participate in decision-making of the State water policy, provided they do not determine its content.

7 THE ASPIRATIONS OF SOME REGIONS TO MANAGE INTERREGIONAL BASINS

Finally, the last territorial dispute has been raised by the aspirations of certain Regions to manage the part of interregional basins which flows through their territories.[7] They tried to overcome the watershed approach introduced by the Water Act, and to give a different interpretation to the notion 'waters that flow through more than one region' of Article 149.1.22. EC.

According to the new Statute of Autonomy of Andalusia (Ley Orgánica 2/2007), this region has exclusive jurisdiction over the waters of the Guadalquivir Basin that pass through its territory and do not affect other regions, subject to the overall planning of the hydrologic cycle, the basic rules on environmental

[7] For further studies on the subject, EMBID IRUJO (Dir.), *Agua y Territorio* (director A. Embid Irujo), Civitas, Madrid, 2007; FANLO LORAS A., *La unidad de gestión de las cuencas hidrográficas,* IEA, 2007, *Aguas y ordenación del territorio en el contexto de la reforma estatutaria,* Comares, Granda, 2010.

protection, hydraulic public works of general interest and the provisions of Article 149.1.22 of the Constitution.

Meanwhile, under the new Statute of Autonomy of Castilla y León (Ley Orgánica 14/2007):

1. Given the importance of the Duero Basin as a shaping element of the territory of Castilla y Leon, the Region assumes powers of legislative development and implementation of hydraulic resources of the waters of the Duero Basin which have their birth in Castilla y Leon and referral to Portugal without going through any other region.
3. The powers of the previous sections are assumed without prejudice of those reserved to the State by Article 149.1 of the Constitution and of water planning.
4. The Region has exclusive powers, when the waters flow entirely within the territory of Castilla y Leon, on projects, construction and exploitation of hydraulic installations, irrigation channels of regional interests; mineral, thermal and groundwaters, and management and concession of hydraulic resources.

The Region of Extremadura filed suit against both Statutes of Autonomy. The claims were upheld by the Constitutional Court in judgments nº 30/2011 and 32/2011. These judgments have reaffirmed the principle of unity of river basins, by affirming that interregional interests converge around the basin, which have to be managed uniformly. For this reason, the Court decided it is not constitutional to divide the legal system and the administration of each watercourse and its tributaries in attention to the geographical confines of each region.

Secondly, and this is especially relevant, the Constitutional Court considers the watershed as a unit that is not susceptible to fragmentation through Statutes of Autonomy, but that also cannot be fragmented by State acts. Now the supreme interpreter of the Constitution concludes that:

> although the watershed approach is not the only constitutionally viable [approach] in the context of art. 149.1.22 EC, it has to be declared that it is not given to the State legislation to specify the powers of the State in this area through a fragmentation of the management of interregional basins into each watercourse and its tributaries.[8]

In addition, the implementation of the territorial criteria contained in the Spanish Constitution (Article 149.1.22) different from this established in the Water Act:

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[8] So far, the Constitutional Court only had said that the interpretation of the Water Act was constitutional, However, it had not said that this legal approach was the only one adequate. Vide EMBID IRUJO A., 'Informe de España', en Embid Irujo (Dir.), *Gestión del agua y descentralización política,* Aranzadi, 2009, págs.261 y ss.

> never could yield a fragmenting understanding of the concept of watershed, with this or any other name.

Finally, the:

> state legislation can not define the exclusive powers of the State in relation to a interregional watershed (…) through a fragmented understanding of the basin that leads to compartmentalization of the legal system and the administration of each watercourse and its tributaries in attention with the geographical confines of each Region (FJ 11, SCJ nº 30/2011).

Thirdly, the Constitutional Court does not approve the creation of an asymmetric system. If it were possible an eventual implementation of the territorial criteria contained in Article 149.1.22 SC different from that currently established in the Water Act, this approach:

> could only come from one legislature, which is always the State legislature on water, because it is the only one who has an interregional position that allows it to have a criteria to rule on a suprarregional physical reality.

As expressly stated by CCJ 227/1988, it is unthinkable that the Spanish Constitution has sought to give better treatment to coastal regions than to others, given that the uses that can be made in coastal communities strongly depend on the uses of upstream resources and vice versa.

As a conclusion, the Constitutional Court has assumed that the watershed is an indivisible unit. The fragmentation of the basin is not the appropriate mechanism to provide the regions a more important role in watershed management. Yet we must not forget that the Constitutional Court has not denied that the regions may have a role in the planning and management of resources of intercommunity basins, although:

> it is a responsibility of the state legislator to determine the degree of participation freely. Agencies and State institutions must exercise their powers with perfect freedom.

8 CONCLUSIONS

In Spain, the distribution of powers for water management between State and Regions is based on the watershed approach. This division depends on the interregional or intraregional extension of the river basin.

The more recent judgments of the Constitutional Court have confirmed that the watershed is not divisible, and this principle is an absolute limit for any reform of national legislation.

Under the principle of institutional neutrality, the WFD has not affected this institutional framework. Moreover, the criteria for distribution of powers are

entirely consistent with the European Union standard, which is also based on the recognition of the integrity of the watershed.

The disputes between State and Regions are the result of an unsatisfactory implementation of the decentralized and participatory management system created by the Water Act. This model should be more correctly implemented to facilitate an effective participation of Regions in the management of the State basins, respecting, in any case, the principle of unity of basin. Despite the fact that we are lawyers, we have to recommend, in a few words, more dialogue, and less litigation.

9 UPDATE

After the writing of this document, three important developments have occurred that deserve to be mentioned.

First, the new government of the nation has approved the Hydrological Plans of the Guadiana River Basin (the Spanish part of it) and the Guadalquivir River Basin (Royal Decrees 354 and 355, of May 17, 2013, respectively) and the draft of other pending plans.

Secondly, the criterion of the watershed to separate powers has been clearly reaffirmed in the CCJ 149/2012, of July 5, which dismisses the Andalusia suit against the transposition of the WFD made by Act 62/2003, of December 30. The Constitutional Court ruled that the internal basins of the Autonomous Communities cannot be included in the river basin districts of the State and expressly states that mixed river basins are not recognized in the Water Act, so that its creation in an executive regulation would violate the principle of hierarchy:

> [...] In fact, we cannot share the interpretation according to which article 16.Bis.5 of the Water Act allows the State to include in the same river basin district the interregional watersheds of State jurisdiction and the intraregional ones of Communities jurisdiction, because the truth is, if so, this should be reflected in the regulation of organizational aspects that the Act contemplates. That is, if the Legislator intended to enable the National Government to include in a same river basin district under state and under regional control it should have established some provision for the organization, management and planning in these mixed boundaries. However, it has not done so, but, on the contrary , it has simply regulated, on the one hand, the organization and functioning of the Confederaciones Hidrográficas -to be created in watersheds that exceed the territorial scope of an Autonomous Community (Article 21 of the revised water Act)- with responsibilities towards interregional basin districts and to established certain provisions regarding the organization and management of intraregional river basin districts, without, on the other hand, any provision of law which mentions or provides for the existence of mixed basin districts or legal basis exists - today with the current regulation- for its creation, apart , of course, from any agreements between the State and the Autonomous Communities.

Finally, the very recent RD 255/2013, of April 12, re-edits a Júcar District composed of all inter- and intra-regional watersheds between the Ebro river and the Segura river basins (i.e. between Catalonia and Murcia), which is both the scope of its future water plan and the Confederation Hidrográfica (state agency management).

This mixed composition is supposedly temporary but, as expected, against this Royal Decree several files have been reported before the Supreme Court by the Board of La Mancha Water Users and others, arguing that it violates the constitutional doctrine directly.