The Present and Future Nature of Intergovernmental Relations: A Comparative Vision of the Model in the USA and in Spain

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Introduction

Intergovernmental relations of co-operation exist as an inherent part of every system of political decentralisation. Even in those systems traditionally referred to as dual federalism, the essence of which is a radical separation of competences and functions between the different levels in such a way that each level of government manages its laws via its own administration. To this model corresponds the federal model of the USA, where "paradoxically" intergovernmental relations have been developing since the nineteenth century, as evidenced by Elazar in 1962.[1]

This experience in intergovernmental relations of other federal systems much older than ours will be of great help to us in order to understand the nature of relations of co-operation within the framework of our Autonomous State and to analyse the opportunities that these relations may generate in the future.

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[1] Elazar (1962). The construction of this theory is fundamentally based upon two other works: Corwin (1950, pp. 1–24), which employs the term "co-operative federalism" and Grodzins (1966).

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How Did Relations of Co-operation Contribute to the Origins of Our Autonomous State?

Intergovernmental relations in Spain were originally strengthened as a result of the process of transfer of competences, and the objective of their—essentially—financial content is the transfer to the AC of most of the resources required in order to exercise their competences.[2] This is explained by the fact that the political priority in our Autonomous State was the devolution of numerous areas to the AC, whilst the transfer of tax revenues was slower and more limited. IGRs have been employed as a means of maintaining the financial insufficiency of the AC. Indeed, more than a third of the agreements concluded between the State and the AC have been in Social Services, a competence transferred exclusively to the AC, and have basically consisted of establishing the State's contribution to the AC.[3]

Absolutely essential to this end was the recognition by constitutional case law of the scope of state expenditure beyond its competences, and given that this was a question of compensating for an autonomous financial insufficiency, the State ought not to attempt to influence the exercise of the said autonomous competence, denying that autonomous consent legitimised an encroachment of competences on the part of the State. This was decreed by STC 13/1992 of February 6.

> One might think that the State can hardly damage the political and financial autonomy of the Communities when the latter are under no circumstances obliged to accept the subsidy established in the General State Budgets for actions to promote areas or services that are exclusively of their own competence. Thus, the Autonomous Community would always be able to avoid the damage to its political autonomy or encroachment of competences rejecting the subsidy as formulated in the General State Budgets, and if it accepts it of its own free will, agreeing to the conditions and form of the subsidy, this eliminates the basis for any protest regarding competence in this sense, as this would be tantamount to being in conflict with its own acts. However, reasoning of this type would be constitutionally unacceptable because autonomy and one's own competences are unavailable to both the State and the Autonomous Communities and because, as was stated in STC 201/1988, legal basis 4, the financial autonomy of the Autonomous Communities recognised in articles 156.1 of the Constitution and 1.1 of the LOFCA requires the full availability of financial means in order to exercise, without undue conditions and to their full extent, the relevant competences and, in particular, those configured as exclusive (FJ 7).

This sentence denies that autonomous consent may legitimise state encroachment of competences, employing two basic arguments: the unavailability of the autonomy and of the competences themselves and—I believe this to be

[2] Vid. Cicuéndez Santamaría/Ramos Gallarín (2006) and Cicuéndez Santamaría (2006).

[3] García Morales (2004, pp. 71 and 72), which indicates that during 2003, 35 % of the total number of agreements dealt with social services, 258 agreements in total. In 2005, the number of agreements in social services was 252 out of 580, in other words, over 43 %, in García Morales (2006a, p. 83). This trend continues in 2006, with 287 agreements in social services (García Morales (2007, pp. 86–87) and in 2007 (García Morales 2008, p. 179). *Vid*. also García Morales (2006b, p. 26).

fundamental—the need for financial sufficiency for the exercise of one's own competences.

Based specifically on the doctrine of our TC, provisions are approved with reference to reinforcement activities during the final process of statutory reforms (*vid*. art. 114 EAC).

The Current Objective of Intergovernmental Relations in Spain: State Influence on Autonomous Policies

During the last decade in particular, in Spain we have witnessed a gradual process of financial decentralisation. The fact that today the financing the autonomous regions is effected largely via wholly or partially assigned taxes, with regulatory capacity included, means that the resources available to the Autonomous Community depend, to a great extent, upon the fiscal capacity of the Autonomous Community itself. Therefore, on the issue of whether the ACs possess sufficient resources for the exercise of their competences, what could be said is that what the ACs do have today are sufficient funding mechanisms to freely decide whether or not to accept a conditional subsidy from the State.

If the **current objective** of IGRs in Spain were to compensate for the financial insufficiency of the autonomies, the trend would clearly have been towards their reduction, in parallel with the reduction in financial transfers from the State to the AC. Paradoxically, the number of agreements between the State and the AC, just like the amount of transfers from the State, has gradually increased.[4]

The process of financial decentralisation and the parallel increase in the number of intergovernmental agreements and state transfers rule out any notion today that these seek to make up for the financial insufficiency of the autonomous regions. What else could be the justification for IGRs and, in particular, the financial transfers resulting from these in federal models where the objective is not to compensate for financial insufficiency? In short, in a context of financial autonomy, what might be the objective of these transfers from the Centre to the autonomous regions?

If we take as a model the first of the Federal States, the USA, a model of so-called dual federalism, we can see that in the nineteenth century, it was already developing intergovernmental relations between the Federation and the member States. These relations were and still are based upon financial concessions from the Federation to the States (the *grants-in-aid*, technically termed "federal intergovernmental transfers").[5] However, the aim of these financial concessions was not to

[4] *Vid. Informe sobre los Convenios de colaboración Estado-CCAA suscritos durante 2009*, p. 23: http://www.mpt.gob.es/dms/es/publicaciones/centro_de_publicaciones_de_la_sgt/Periodicas/parrafo/0111116/text_es_files/Informe-convenios-Estado-CCAA-2009-INTERNET.pdf.

[5] Elazar (1962). For the concept of grants-in-aid and specific cases of the development of intergovernmental relations in the USA during the nineteenth century, see Sáenz Royo (2011, p. 3) et seq.

make up for a financial insufficiency of the States, as State revenues were dependent upon their own fiscal capacity upon adopting the principles of a multiple fiscal system or system of separation. The purpose of these financial concessions and, in essence, of intergovernmental relations between the Federation and the States is that the States, in the exercise of their competences, observe federally established priorities. With the adoption of the Sixteenth Amendment in 1913, granting federal government the right to tax incomes, financial concessions from the federation to the States increased,[6] and so, in parallel fashion, did conditions imposed by the Federation in intergovernmental relations, as well as its capacity to influence state politics.[7]

Meanwhile, in Spanish political practice, there have been a multitude of agreements related to questions of autonomous competence directed towards financing measures considered by the State to be of national interest and, thus, associated with conditional subsidies. Amongst these are the agreements regarding the National Plan for Transition to Digital Terrestrial Television (TDT), the Development of the Advanced Plan for the Information Society, those related to hydrologic and forest restoration, those directed towards funding for books and teaching materials during compulsory education, those concerned with the development of incentive programmes for research activity, or those that finance programmes aimed at specific collectives, such as dependent persons, young people, women, female victims of gender violence, immigrants, unaccompanied immigrant minors, etc.[8]

For this reason, in Spain, as in the USA and in comparative law in general, the present nature of relations of co-operation between the State and the CA is, by and large, the orientation and promotion from the centre of specific autonomous policies. A good example of this is the ever-increasing demand for co-financing by the CA.[9] In return, the CA receive funds without having to raise their taxes.

Ultimately, it is neither a peculiarity of our Autonomous State for intergovernmental relations to be closely connected with conditional subsidies nor for them to direct, to a great extent, the exercise of autonomous policies.

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[6] On the increase of *grants*, see Dilger (2000, pp. 98–107) and Vines (1976, pp. 3–48).

[7] Zimmerman (2001, p. 20).

[8] *Informe sobre los convenios de colaboración Estado-Comunidades Autónomas suscritos durante 2009,* p. 14 *in* http://www.mpt.gob.es/publicaciones/centro_de_publicaciones_de_la_sgt/Periodicas/parrafo/0111116/text_es_files/file/Informe_convenios_Estado-CCAA_2009-INTERNET.pdf.

[9] Specifically, of the 1,059 agreements signed in 2009, in 542 cases, i.e., 51 %, there is an autonomous financial contribution: *Informe sobre los Convenios de colaboración Estado-CCAA suscritos durante 2009, p. 17:* http://www.mpt.gob.es/dms/es/publicaciones/centro_de_publicaciones_de_la_sgt/Periodicas/parrafo/0111116/text_es_files/Informe-convenios-Estado-CCAA-2009-INTERNET.pdf.

The Future Objective of Intergovernmental Relations in Spain: Regional Influence on State Decisions

Intergovernmental relations in federal models not only serve to influence from the centre towards the regions but also act as an instrument by means of which autonomous territories bring influence to bear upon State decisions. This goal of intergovernmental relations in Spain had previously been little in evidence, so a novelty in this respect was Law 39/2006, of April 14, on Promotion of Personal Autonomy and Care for Dependent People (LPPACDPP).[10]

Article 1.2 of the LPPACDPP establishes that the System for the Autonomy and Care of Dependent Adults will respond to coordinated and co-operative action by the Central Government Administration and the Autonomous Communities, which will contemplate measures in all the areas that affect people in a situation of dependency, with participation, when appropriate, of Local Institutions. In article 3 (ñ) also, co-operation features as one of the fundamental principles behind the law. The SACDA is thus configured as "a common ground for the collaboration and participation of the Public Administrations, in the exercise of their respective competences, on the subject of the promotion of personal autonomy and protection for dependent persons" (art. 6.1 LPPACDP).

The method of structuring this co-operation is through the Territorial Council of the System for the Autonomy and Care of Dependent Adults. According to Final Provision 2 of the LPPACDP, "Within the maximum timeframe of 3 months after the entry into force of this Act, the Territorial Council of the System for Autonomy and Care for Dependency regulated in article 8 shall be formed". Its effective establishment took place on January 22, 2007.

This is an organ of multilateral co-operation, similar to the classical Sectorial Conferences, with the participation of the State, the AC, and if appropriate, Local Institutions (article 12 LD) but with powers previously unknown within our Sectorial Conferences. This is now a question not only of agreeing upon criteria for the distribution of funds (which is included—article 8.2.a LPPACDP) but also of agreeing upon the content of the Royal Decrees and other provisions developed by the law and even informing the Government with regard to the minimum level of protection for which it is exclusively responsible. In this sense, the following are indicated as competences of the Territorial Council:

a. *Agreeing on the framework of inter-administrative cooperation for implementing the Act, as foreseen in article 10*;
b. *Establishing the criteria for determining the intensity of protection of the services foreseen in accordance with articles 10.3 and 15*;
c. *Agreeing on the conditions and amount of the financial benefits foreseen in article 20 and in the first additional provision*;

[10] On this subject, see also Sáenz Royo (2010, p. 372) et seq.

d. *Adopting the criteria for the beneficiary's participation in the cost of the services*;
e. *Agreeing on the scale referred to in article 27, with the basic criteria of the assessment procedure and of the characteristics of the assessment bodies*;
f. *Agreeing on joint plans, projects, and programmes, where applicable*;
g. *Adopting common criteria for action and assessment of the System*;
h. *Facilitating the availability of common documents, data, and statistics*;
i. *Establishing the coordination for the case of displaced dependent population*;
j. *Informing on the state implementing rules on the subject of dependency and, in particular, the rules foreseen in article 9.1*;
k. *Serving as a common ground for cooperation, communication, and information between public administrations (Art. 8. 2 LPPACDP).*

Thus, with the ratification of the LPPACDP, co-operation between the State and the CA is confirmed not only as a vehicle for financing the system—via the bilateral collaboration agreements with each Autonomous Community, article 10.4 LPPACDP, but also—and this is what is politically relevant—as a form of legislative development of the law by means of the agreements reached by the Territorial Council of the SACDA.

With the LPPACDP, the State opts to participate in a traditionally autonomous sphere by means of a **horizontal title**, but not to make extensive use of this horizontal title, unilaterally approving the implementing regulations of the law and using the collaboration agreements with the AC to involve and point autonomous policies in that direction via co-financing; instead of that, the central legislator indicates those areas where homogeneity is considered necessary (competences assigned to the Territorial Council), but the finalisation of this is left in the hands of the Territorial Council. Thus, the orientation of autonomous policies with regard to dependence in order to achieve a degree of homogeneity is not in the hands of the State but is decided multilaterally

a.1. *Composition of and decision taking within the Territorial Council*

The decision-making importance of the Territorial Council for the development of the whole System for the Autonomy and Care of Dependent Adults attributes particular relevance with regard to assessing the real contribution of each of the Administrations to the composition of the Council and its method of decision taking. This will reveal to us the degree of involvement of the AC in the definition of "supracommunity general interest".

The Council is constituted by the Minister for Social Policies, the Government representatives in the AC, relevant authorities, and eleven representatives of the Central Government Administration. There is also participation with the right to vote of a representative of each of the autonomous Cities of Ceuta and Melilla, responsible for social issues, and of two representatives of Local Institutions, appointed by the Spanish Federation of Municipalities and Provinces. In total, there are 33 members, of whom 12 represent the State, 2 the local authorities, and

19 the CA and Autonomous Cities. This guarantees the majority of representatives of the Autonomous Communities required by article 8.1 LPPACDP.

The role of the AC is safeguarded in the call for the Plenary Session of the Council, at the request of the President or of one-third of the members or half of the AC. In the latter cases, reasons shall be given for the application, indicating the issue or issues to be considered (article 10.1 Regulation).

Agreements and proposals will be adopted via the approval of those present; failing this, adoption of agreements and proposals will be made by virtue of the majority vote of the representatives of the Central Government Administration and the majority of the Autonomous Communities (art. 12.2 Regulation). This guarantees that it is not sufficient for the Central Government Administration to add to its 12 votes 5 more from Local Institutions, Autonomous Cities, or CA in order to reach an agreement but that it is necessary for the majority of the AC to be in agreement. This is in contradiction with the doctrinal provisions according to which central government would preserve its leading role in the regulatory development of the system.[11]

a.2. *Binding effect of the agreements adopted by the Territorial Council*

One of the problems arising within the SACDA is the very fact that the regulatory development of the law is assigned to an organ of an operational character, given the voluntary nature and the lack of legal force of decisions taken by organs of this kind (STC 31/2010, FJ 112).

It is difficult to deny the legal force of decisions adopted within the Territorial Council and subsequently reflected in a state regulatory provision.

Nevertheless, according to the wording of the LPPACDP, not all the agreements adopted within the Territorial Council have to be reflected in a state regulatory provision. In fact, such important aspects as determining the beneficiary's financial circumstances and the criteria for his or her eligibility for benefiting from the System for the Autonomy and Care of Dependent Adults or the common accreditation criteria to guarantee the quality of centres and services within the System for the Autonomy and Care of Dependent Adults are not included in a Government-approved Royal Decree but are simply published by means of a Resolution issued by the Secretary of State for Social Policy, Families and Care for the Dependent and Disabled. The non-inclusion within legislation has led legal practitioners and literature to question the legal effectiveness of these agreements and the state legislator's reasons for establishing this differentiation depending upon the framework agreed within the Territorial Council. In fact, it has been claimed that Council agreements that do not require the incorporation of a government Royal Decree "will not be binding for the Autonomous Communities that have not expressed their agreement, so that these may depart from them", these agreements merely having

[11] Thus is indicated the likelihood that "the representation of the Central Administration in collaboration with that of the Autonomous Communities in which the party in power governs will, in fact, impose its criteria within the Council" (Pérez de Los Cobos (2007, p. 121).

the value of "recommendation".[12] To my mind, this is an incorrect interpretation, as competence in these matters is conferred upon the Territorial Council for the purposes of a homogenous development of the law and cannot be unknown to the AC.

In any case, in the event of the Autonomous Communities opposing the agreement reached within the Territorial Council and then raising problems when it comes to signing the corresponding bilateral Agreement, what appears unacceptable is the possibility of reaching a bilateral agreement that differs from the guidelines established at a multilateral level. Blocking the signature of a bilateral agreement would imply the State's commitment to only the minimum guaranteed level of financing, preventing execution of the loan facility in the Budgets intended for the financing of the bilateral agreement (Transitional Provision 1ª LPPACDP).

b. *The activities of the AC outside the co-operative framework*

Beyond their involvement and participation within the framework of the Territorial Council and, thus, in the legislative development of the LPPACDP, the work of the ACs is practically reduced to managing the system for dependency previously agreed upon in the Territorial Council and, when appropriate, the possible improvements that might be incorporated through their own Budgets (article 11 LPPACDP).

In the end, it will be the AC who will determine the status of dependence by virtue of the place of residence of the applicant for the benefit, this recognition being valid throughout the national territory. It will also be the social services of the AC who will decide upon, following consultation with and taking into account the opinion of the beneficiary and, when appropriate, of his or her family or legal guardians, an Individual Care Programme (ICP) that will determine the modes of intervention that are most suitable to their needs from among the services and financial benefits established in the Law. Currently, as developed by Royal Decree 727/2007, the AC will also determine the intensity of the services, except in the case of home help (arts. 5–10), the system of compatibilities and compatibilities of the services (art. 11) and the criteria for accessing financial aid (art. 12), and the amount of benefits respecting the maximum figure established (for the year 2010, Royal Decree 374/2010 of March 26).

Meanwhile, the possibility of the AC funding improved care for dependent persons via their own Budgets has been specifically anticipated by the state legislator in paragraph 2 of article 11. This dispels any possible doubts regarding any autonomous intervention outside the State system of care for dependent persons; doubts that have arisen in connection with other areas of health care regulated by central government.[13]

[12] Roqueta Buj (2009, p. 87, 101).

[13] On this subject, Sáenz Royo (2009, p. 57) et seq.

Conclusion

In Spain, there is a fairly widely held perception that the relations of intergovernmental co-operation are not as they should be and that they constitute rather a form of State intervention in autonomous affairs. In this paper, I have attempted to demonstrate that vertical relations of intergovernmental co-operation in Spain largely served as a means by which the State financed the CA so that these might exercise the transferred competences. **This original picture** has changed as advances have been made in financial decentralisation. In a context like today's, with extensive financial decentralisation, financial transfers from the State via intergovernmental relations—which contrary to appearances may actually have increased—are aimed less at compensating for a financial insufficiency than towards directing and fomenting certain autonomous policies. The nature of these intergovernmental relations then is similar to that which has always characterised these relations in other countries like the USA and, therefore, is not unique to our Autonomous State.

With regard to the future, the relations of co-operation established between the State and the AC in the LPPACDP constitute a complete novelty within our history of autonomy in terms of the way in which each of the territorial administrations involved exercises its competences. Up until now, the different Territorial Administrations involved have basically striven to defend and establish their respective sphere of actions so as to exercise it unilaterally, something that, as we have seen, has proved particularly difficult and conflictive in the area of shared competences. The participation of the AC within the Territorial Council in determining the "basic conditions" for the care of dependent adults undoubtedly represents a qualitative step in the development of our Autonomous State and an attempt to reduce conflict not so much through legal channels (as has been attempted with the statutory reforms) as by political means.

While the intention deserves nothing but praise, there is no doubt that this route has been complex in its development and limited in terms of its efficiency, according to the *Informe sobre* "La participación de la Administración General del Estado en el sistema para la autonomía y atención a la dependencia", published by the Government of Spain/ministry of the Presidency, State Agency for the Assessment of Public Policy and Service Quality in 2009. This report indicates that even when the subjects that are competence of the Territorial Council "include such fundamental questions for the development of the SACDA as common criteria for the participation of beneficiaries in the cost of services (copayment), common accreditation criteria for centres or minimum objectives and contents for the necessary establishment of the information system, the Territorial Council has not regulated, or has done so with considerable delay, almost 2 years after the adoption of the law, many of these questions". Another criticism refers to the monitoring and analysis of the regional regulatory development performed by the State.[14]

[14] *Informe sobre* "La participación de la Administración General del Estado en el sistema para la autonomía y atención a la dependencia", Government of Spain/Ministry of the Presidency, State

The lack of efficiency, blocking, difficulty in decision-making, and the blurring of responsibilities are the main criticism of the SACDA and of co-operative federalism in general. In fact, these deficiencies have carried recent reforms of German co-operative federalism.[15]

Money is indeed in the very origins of intergovernmental relations in Spain, and without money it would be impossible to understand the present development of most of these relations in our country, where the State uses its spending power to shape autonomous policies. Today's debate revolves around determining whether it is appropriate for that directing of autonomous policies/politics to continue to occur unilaterally at the centre or in a concerted, multilateral manner. It is probable that a commitment to this co-operative federalism and greater decision-making capacity on behalf of the AC would inevitably lead to a reduction in state transfers and an increased financial commitment on the part of the AC: less state decision, less state financing. Is the State prepared? More importantly, are the ACs prepared?

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[15] Arroyo Gil (2009, pp. 88–92, 122–125) and Arroyo Gil (2010, p. 44).

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