Horizontal Cooperation: Unfinished Business for the Spanish Autonomic State Framework

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Introduction

Leaving to one side the controversy as to whether Spain's regional state system, the *estado autonómico*, constitutes a federal state or not (in light of the clear confluence between federalisms and regionalisms in devising organisational formulae that are so similar that it is difficult to distinguish between them), a study of the federal model is essential in order to address the problems of the Spanish *autonomic*[1] state. It is not, therefore, our intention to establish the differences between classic federalism and other forms of decentralised state. Moreover, we need to recognise that there are several variants of federalism. What we are interested in examining here is the distinction between two essential models: dual and cooperative federalism.

Classic federalism (*dual federalism*) involves a rigid vertical separation of powers. Underlying it is a political philosophy of "sealed compartments". There are two clearly delimited fields of action without any type of link between them: the central government and the state governments. Cooperative federalism (*new federalism*), on the other hand, seeks to overcome the formal and absolute separation of competences, avoiding focusing its attention on the constitutional division of authority between the central government and state governments and highlighting instead the interdependence that exists and the mutual influence that each tier of government is capable of exercising over the other. In short, dual federalism is

[1] Translator's Note: In order to avoid confusion of terminology, throughout the text, *autonómico* has been translated as "autonomic" (rather than regional) when it refers to the framework of devolution but as "regional" when it refers to the specific administrations of the various autonomous communities. Hence, "autonomic state" (*estado autonómico*) but regional parliament (*parlamento autonómico*).

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based on the idea of independence and cooperative federalism is based on that of interdependence.

This cooperative federalism has two essential manifestations: (a) a vertical dimension: cooperative vertical federalism; this formula involves the system of relations that can occur between the federal state, on the one hand, and the member states, on the other; this system can be institutionalised, even constitutionalised, or can lack formal legal supports and be based on mere political praxis and (b) a horizontal dimension: cooperative horizontal federalism. This formula refers to the system of relations that occurs between member states. The essential issue for this system lies in whether the federal power can intervene in this system or not, and, if so, what degree of intervention it should exercise. As a general rule, it is usually accepted that the federal government assumes the role of guarantor of this type of relation. Here, too, we can distinguish between informal and institutionalised relations.

The common opinion is that dual federalism constitutes the first moment in the evolutionary process of the federal state. In both the USA and in the Federal Republic of Germany (to cite two paradigmatic cases), the techniques of cooperative federalism prevail over the philosophy of dual federalism because the former responds to current issues better than the latter. The cooperative federalism operating in Germany and the United States is characterised by the cross-over of the competences of the central and territorial authorities, leading federation and states *increasingly to act in a joint fashion* by way of agreements in which they design a model of common action, which will later be executed by acts of the federation or of the states depending on the ownership of the specific competence being exercised in each case. The advantages of cooperative federalism for the functioning of any composite state are clear.

From this perspective, the legal and political instruments through which cooperative federalism is structured can and must be seen as guarantors of territorial pluralism. Unfortunately, this view is not shared by those who have simply identified cooperation with centralisation. Correcting this mistake requires us to examine the relationship between the principle of cooperation and the principle of autonomy.

The progressive penetration of the central power to be observed in all composite states is a logical response to the successive transferral to the area of general interest of questions that were previously strictly regional or local. In recent years, many issues have drawn intense public scrutiny (environment, energy, food), causing them to emerge out of the sphere of local interest (at which the few public decisions required were taken) to become part of the general interest. The transition from the liberal state to the social state has undoubtedly reinforced central power. However, this phenomenon has not been accompanied by an exclusive appropriation on the part of the central authorities of all competences related to the aforementioned problems, yet it has made it necessary for them to participate in resolving them. Otherwise, the requirements of the general interest will not be satisfied. It is they that demand co-operation.

There are essentially three reasons cooperation and autonomy should not be viewed as being in opposition to one another:

a) Firstly, because this is a false opposition since co-operation arises simply from the need to articulate the exercise of the powers and make the distribution of competences operative. In this sense, autonomy is the first presupposition of cooperation;
b) Secondly, because autonomy, as the Spanish Constitutional Court has repeatedly ruled, can only be explained in the context of unity and unity requires participation by the central authorities in resolving problems of general interest; when a problem becomes general, the intervention of the central power is inevitable.
c) Thirdly—and this is the most important reason autonomy and cooperation should not be viewed as incompatible—*because co-operation strengthens autonomy and on many occasions enables regional authorities*[2] *to continue to have responsibilities in areas in which they would otherwise be deprived*.

Without recourse to the principle of cooperation and the different techniques whereby it is manifested, the process of centralisation required by the necessary increase in state intervention would have resulted in a notable loss of power for the regional authorities. The shift to the field of general interest of previously local problems could have resulted in the central authority's assuming a monopoly over political decision-making on these issues. What has prevented this from happening has been the implementation of cooperative techniques. These techniques exclude unilateral decision-making and allow responsibility for the regional authorities to be extended to fields that would otherwise be monopolised by the central power. In some cases, certain cooperative techniques are even used directly by the regional bodies to agree joint actions that prevent intervention by the central power. Horizontal co-operation—one of the two manifestations of cooperative federalism referred to in Article 145 of the Spanish constitution—can even end up preventing certain issues from being taken from the regional sphere; were it not for the actions undertaken in the exercise of that inter-regional cooperation, such issues would pass to the sphere of action of the central power.

In short, the principle of cooperation turns the general interest into an object of the concurrent attention of all levels of power. This means that more than one theoretical principle is needed by any composite state—and in the case that concerns us, by the autonomic state.

The essential instruments through which the horizontal and vertical dimensions of cooperative federalism are structured are sector conferences [*conferencias sectoriales*] and conventions on cooperation. Whereas the former have no express basis in the constitution, the same is not true of horizontal agreements, which are expressly provided for in Article 145. The purpose of this paper is to analyse their legal regulation and put forward some proposals for reform.

[2] See Translator's Note 1 above.

Regulation of Horizontal Cooperation in the Constitution and in the Statutes of Autonomy

Any analysis of the legal framework of inter-regional conventions and agreements on cooperation must necessarily start from Article 145 of the constitution. The unfortunate wording of this article is an indication of the mistrust with which the framers of the constitution—the constituent assembly—always viewed horizontal co-operation between autonomous communities.

The definitive wording was adopted by the joint committee of the congress and senate. Article 145 reads as follows:[3] "(1) Under no circumstances shall the federation of Autonomous Communities be allowed. (2) The Statutes [of Autonomy] may provide for the circumstances, requirements and terms under which the Autonomous Communities may enter into conventions [*convenios*][4] amongst themselves for management and the rendering of services in matters pertaining to them, as well as the nature and effects of the consequent communication to the Cortes Generales. In all other cases, cooperation agreements [*acuerdos de cooperación*] between the Autonomous Communities shall require the authorisation of the Cortes Generales".

Thus, two types of inter-regional agreements are allowed for: *convenios* [conventions] and *acuerdos de cooperación* [cooperation agreements], the difference being that the former do not require authorisation from the Cortes Generales and the latter do. The only material difference is that the former must involve the "management and rendering of services in matters pertaining to them". This does not clarify matters very much. In practice, the fact is that Article 145 does not allow us to determine what type of cooperative actions should be considered conventions and what should be considered agreements or, to put it another way, what we should understand by "management and rendering of services in matters pertaining to them". This is an issue of capital importance since on this distinction hinges the requirement of approval from the central parliament.

This failure adequately to address certain technical/legal aspects of one of the main instruments for achieving the techniques of cooperation is censurable. The reasons for this insufficiency and for this constitutional vagueness can be found in the proceedings for the sessions dealing with this precept. In the constitutional debates, an erroneous belief prevailed that any type of cooperation between the regions necessarily involved centrifugal tendencies, thus ignoring the important integrating function that such cooperation played.

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[3] Translator's Note: There are a number of different "official" translations of the Spanish Constitution. I have used that provided by the Tribunal Constitucional, available at http://www.tribunalconstitucional.es/es/constitucion/Paginas/ConstitucionIngles.aspx.

[4] Translator's Note: The two Spanish terms, "convenio" and "acuerdo", whose precise distinction is discussed here, are generally both translated in English as "agreement". To avoid confusion, I have used the alternative translation "convention" for "convenio", limiting "agreement" exclusively to "acuerdo".

Technically speaking, the wording of Article 145.2 is flawed in that it does not allow us to differentiate between conventions and cooperation agreements. Nonetheless, it allows that shortfall to be resolved by leaving it up to the statutes of autonomy to regulate the circumstances, requirements, and terms under which autonomous communities may reach agreements [*convenios*] amongst themselves, as well as the nature and effects of the consequent communication to the Cortes Generales.

The Constitution speaks of *convenios* for the "management and rendering of services in matters pertaining to them" and of other cooperation agreements. We should start by noting that this is not a distinction *imposed* by the Constitution itself, which limits itself to leaving the possibility open to the statutes of the various autonomous communities to differentiate between "conventions" and "agreements". In actual fact, the concept of "management and rendering of services in matters pertaining to them" is so broad that practically all agreements could, if the statutes so provided, be subsumed into it, thus obviating the need for authorisation from the Cortes. It is therefore up to the statutes to establish the distinction between the two. It is worth insisting on the importance of this distinction, which determines whether the intervention of the Cortes Generales takes the form of an authorisation or a mere communication.

However, as we shall see, far from clarifying the issue, the statutes have only served to further muddy the waters. This is a very serious failing since it shows that the framers of the statutes—like most of the framers of the constitution—were unaware of the importance of relations of horizontal cooperation. We shall first examine the way the different original statutes address the issue of horizontal cooperation. We shall then go on to examine the regulations established in autonomous communities that have enacted new statutes of autonomy as and from the eighth parliamentary session (2004–2008).

Two statutes of autonomy (those of Aragon and Andalusia) did not sufficiently develop Article 145 of the Constitution. The statute of Aragon contained only a short reference to the subject. Article 16, Section f) states that:

> It is also the competence of the Cortes of Aragon: f) To ratify any agreements and conventions of cooperation of which the autonomous community of Aragon is part.

The consequences of this insufficient regulation are abundantly clear. Article 145.2 of the Constitution designates *acuerdos* [agreements] as a residual category, i.e., it covers anything not defined as *convenios* by the statute. By failing to define *convenios*, therefore, the statute of Aragon, in practice determined that all interregional relations of Aragon must be categorised as *acuerdos*, requiring explicit authorisation from the Cortes Generales.

For its part, the statute of Andalusia establishes, in Article 72: 1:

> In the circumstances, conditions and requirements determined by the (regional) parliament, the autonomous community may enter into conventions with other autonomous communities for the management and joint rendering of services in matters pertaining to them.

The constitution leaves regulation of the conventions up to the statute, which in turn attributes this function to a regional law, in a clear example of transferral. The referral contained in the statutes could be considered to be a breach of Article 145.2 in that it illicitly de-constitutionalises the subject. However, it appears more logical to think that the Cortes's approval of the statute, by way of an organic law, implies that the Cortes have considered this remittal to be valid.

Having noted the shortfalls in the statutes of Aragon and Andalusia, let us now turn to the other statutes. We need to ascertain what is meant by "management and rendering of services in matters pertaining to them" since this is this the only datum provided by the Constitution to distinguish between agreements and conventions. We shall first analyse the meaning of the expression "management and rendering of services". Given that it will not provide us with any criterion of distinction, we shall seek such a distinction in the term *propios*.[5] We shall then go on to examine the scope given by the statutes to the term "communication", the second distinguishing feature of "conventions" as opposed to "agreements", since the latter do not have to be merely notified to but authorised by the Cortes Generales.

The purpose of the conventions may be the exercise of certain competences but never their ownership. This is merely a requirement of the reiterated principle of non-transferability of ownership [*indisponibilidad*] of the competences. This is the meaning of the term "management and rendering of services". However, this meaning is evidently of no use as a criterion for distinguishing between "conventions" and "agreements", given that the latter, which are also subject to the general principle of non-transferability of ownership of competences, must refer to the "management and rendering of services". In other words, the Cortes may never authorise an agreement that, in broad terms, does not involve management and rendering; if it does, it would be sanctioning a transferral of the ownership of the competences, an operation it is not entitled to perform as a constituted power.

In short, all matters falling within the competences of the autonomous communities may form the subject of an inter-regional convention. Any classification *ratione materiae* is therefore of no use.

The interpretation of the adjective *propios* [in matters pertaining to them] accompanying the aforementioned term has been widely debated.

It is important to stress that *propios* need not be identified with exclusive competences, for two reasons: firstly, because this criterion for distinction was expressly rejected during the framing of Article 145, and secondly, because given that, despite what is stated by many statutes, very few competences are "exclusive", this interpretation reduces the scope of cooperative activity of the autonomous communities.

Given that the constitution limits itself to requiring that the competences be *propias*, one should understand that *propias* includes not only exclusive but also

[5] Translator's Note: In the official translation of the Constitution, the term "propios" is rendered accurately but somewhat cumbersomely as "in matters pertaining to them". Given that the discussion here relates to the meaning of the Spanish term, I have mostly left the term untranslated.

shared or concurrent competences. Moreover, in its first ruling of 2 February 1981, the Constitutional Court distinguished between own competences and exclusive competences [*competencias propias* and *competencias exclusivas*].

In reality and given that all the interpretations are possible and valid, one needs to refer once more to the provisions of the statutes of autonomy. Here, the various solutions adopted can basically be grouped into two blocks:

a) On the one hand, those that consider that the term *propias* refers in all cases to "exclusive competences of the autonomous communities covered by the convention": statutes of Catalonia (Article 27.1), Galicia (Article 35.1), Asturias (Article 21), Valencia (Article 42), Castile-La Mancha (Article 40), Canary Islands (Article 38), Extremadura (Article 14), and Castile-Leon (Article 30);
b) On the other hand, those that establish the possibility of entering into conventions on "the management and rendering of services in matters pertaining to their competence": statutes of Cantabria (Article 30), La Rioja (Article 15), Murcia (Article 19), Balearic Islands (Article 17), and Madrid (Article 14).

All of these arrangements are constitutional; however, the decision on which to adopt has important practical consequences, in that it determines whether the capacity of the autonomous communities to enter into conventions without the need for authorisation from the Cortes is limited. However, obvious this may seem, it was overlooked by the framers of the various statutes. If *propios* is taken to be a synonym of "exclusive competences", all conventions on matters that are not part of an exclusive competence, i.e., the majority, will be considered to be "cooperation agreements" and will therefore require the prior authorisation of the Cortes. On the contrary, a broad interpretation of the term *propios* allows a greater number of inter-regional agreements to be included in the category of conventions, therefore making any authorisation from the Cortes unnecessary.

The purpose, in short, was to take advantage of a constitutional referral to the statutes made in terms so broad that it is difficult to imagine that cooperation agreements could be entered into that do not fit into the category of "conventions". Incomprehensibly, however, many statutes failed to see the issue in these terms.

The failings in the statutes also extend to the definition of the concept of "communication" to the Cortes Generales.

Just as Article 145.2 leaves it up to the statutes to establish the "circumstances, requirements and terms" under which the autonomous communities may enter into conventions for the management and rendering of services in matters pertaining to them, this precept also leaves it up to the statutes to regulate the "character and effects of the corresponding communication to the Cortes Generales".

The statutes can regulate, therefore, the nature and effects of the communication, but necessarily have to retain the regime of communication, deemed to consist of advising another authority of certain facts.

The "communication" can take the form of a simple notification. What it can never become is a request for an explicit authorisation from the central parliament, since that would involve departing from the framework of what is to be understood by "communication".

As in the case of the interpretation of the term *propios*, the issue is dealt with in many ways in the various statutes. It is worth noting from the outset that many statutes have denaturalised the "communication", providing the Cortes with real decision-making powers as to the nature of the act.

The various statutes of autonomy may be divided into two main groups, by distinguishing between two different types of "communication":

a) On the one hand, the statute of Valencia, for all types of convention, and the statutes of the Basque Country, only for conventions with historical territories,[6] and of Navarra (LORAFNA), only for conventions with adjoining territories, limit themselves to giving a period for the entry into force of the convention in order for the Cortes Generales to be made aware of its implementation within that time. Only in these three circumstances is a real "communication" *per se* provided for. This is the legal regime that most closely matches the requirements of the constitution.
b) All other statutes (except for the statute of Aragon, which does not regulate the issue), i.e., Catalonia, Cantabria, Canary Islands, Navarra (with the exception set out above), Balearic Islands, Murcia, the Basque Country (with the exception set out above), Galicia, Asturias, Castile La Mancha, Extremadura, Madrid, Castile-Leon, Andalusia, and La Rioja, essentially relinquish to the Cortes the faculty to classify the text as an agreement or as a convention.

From the above, we can draw the following conclusion: statutes in which the communication simply produces a *vacatio legis* as to the validity of the convention are the exception. In the immense majority of cases, the effect of this communication is to authorise the Cortes in the event of "manifest misgivings" to ensure that any "convention" be processed as an "agreement". Thus, in most of the cases, there occurs a relinquishment of the statutory ownership to the Cortes Generales, meaning that in practice the central parliament is entrusted with classifying each specific case as one of the two types. This allows for an additional control by the Cortes over the autonomous communities that is not provided for in the Constitution. In accordance with Article 145.2 of the Constitution, one may argue that the Cortes can in no way "reclassify" the convention. The only admissible form of control of the constitutionality of the convention is that provided for in Article 162 of the Constitution and performed by the Constitutional Court. However, most of the statutes of autonomy, paradoxically, have not interpreted it in this way.

In short, in the light of the cooperative exercise of the regional competences, it is difficult to understand why it is necessary to establish additional systems of control that do not exist when the autonomous communities exercise those same competences in isolation.

By establishing that additional control by the Cortes, the statutes have entirely vitiated the regime of the "communication" and have practically unified the

[6] Translator's Note: The three component territories or provinces of the autonomous community of the Basque Country are governed by a special regime. These are the "historical territories".

instruments of "convention" and "agreement". The statutory regulations restrict the faculties of the autonomous communities in a way that is difficult to reconcile with the spirit and letter of Article 145.2. The purpose of the regime of "communication" of "conventions", as opposed to "authorisation" of "agreements", was to establish an inter-regional field of activity outside the control of the Cortes Generales. As we have seen, however, the statutes of autonomy have renounced this field of regional cooperative activity.

One final problem related to the issues under discussion is to determine what happens when a convention is entered into between two communities that provide for a different regime of intervention by the Cortes. In such cases, the only possible solution would appear to be to apply the more restrictive statutory regime. In other words, if one community interprets *propio* as meaning "exclusive" and another interprets it as "not unrelated", it shall be necessary to consider that a convention is not possible and that an agreement of cooperation is needed. Likewise, if a community establishes a regime of authentic "communication" and another allows the Cortes to reclassify the convention as an agreement, the latter will have to be considered to be possible.

To address this, in the last section of this paper we advocate a reform that would establish a homogenous regulation of these instruments in the body of constitutional law. Given that leaving this regulation up to the statutes cannot guarantee the necessary uniformity, it should instead be left to a General Organic Law of Cooperation. Moreover, to settle any dogmatic debate as to its legitimacy, the wisest course of action would be to include an explicit reference to it in the text of the constitution itself.

The competence to approve inter-regional conventions and agreements is a matter of the internal organisation of each autonomous community. The issue of the definitive approval of the convention by the organ of government or by the legislative assembly of the autonomous community depends entirely on the statutory regulation of the issue, by virtue of the remission made under Article 145.2.

Examining the way that the issue is dealt with in the statutes, the first thing that strikes one is that the statutes of Galicia, Extremadura, and the Basque Country contain no rule whatsoever in this regard. The statute of Andalusia has no such rule either, although Article 72 states that the regulation is to be made by means of an act of the Andalusian Parliament. The other regulations can be classified into three blocks:

a) The most intense intervention by the legislative assembly in this area is provided for in the statute of La Rioja, Article 17. The parliament is responsible not only for approving but also for authorising the regional government to enter into any convention or agreement.
b) On the other hand, the statutes of Catalonia (Article 27), Cantabria (Article 9.1.d), Valencia (Article 42), Castile-La Mancha (Article 9.2), the Canary Islands (Article 38), and the Balearic Islands (Article 17) simply establish that their respective parliaments should approve the conventions and agreements. Similarly, the statutes of Aragon (Article 16 f. Madrid (Article 14, Paragraphs 13 and 14)

and Castile-Leon (Article 14, Paragraphs 13 and 14) attribute to the parliament the faculty of "ratifying" the conventions and agreements.

c) Finally, the statutes of Asturias (Article 24.7), Murcia (Article 23.7), and Navarra (Article 26 b, relating exclusively to the conventions, not to the agreements, although the rules of the regional parliament [*parlamento foral*] have unified the regime of the two) contain a different formula. In general terms, they establish the need for prior authorisation from the regional legislative assemblies for entering into agreements and conventions. However, they do not establish who is responsible for approving them.

If we examine how approval of the cooperative instruments is regulated in the different statutes of autonomy, we see that the great majority (the Basque Country, Catalonia, Galicia, Asturias, Cantabria, Murcia, Castile-Leon, Castile-La Mancha, Canary Islands, Balearic Islands, Extremadura, Madrid and Ceuta, and Melilla) address the issue not as if dealing with a form of exercise of their own competences but as if it were a substantive competence of its own that requires a specific regulation.

The fact of having adopted this material approach to cooperation (as if drawing up conventions were a substantive competence), rather than a merely formal one, has led to an extraordinary complication of the issue. It would have been possible simply to have done without regulation of the "approval" of the conventions, given that the logic of the system would in itself have attributed this competence: wherever the isolated exercise of the competence corresponds to the government, it is the government that approves it; wherever the individual exercise of the competence corresponds to parliament, it is the parliament that approves it. This continues to be perfectly valid as a criterion for interpretation and a subsidiary of the statutory regulations.

In any event, the result has been an extraordinary reinforcement of the positions of autonomous parliaments in this area. This parliamentary control, which initially reinforces the democratic nature of the system, also has a less favourable dimension in that it introduces a degree of rigidity that is incompatible with the flexibility required of this type of instrument. In this regard, the doctrine stresses that the conventions must necessarily be instruments that are flexible in their action because of the very needs that they seek to satisfy. From this perspective, it is evident that some statutes have taken the requirements of parliamentary control too far. For all of these reasons, Article 145 has very seldom been put to use. The rigidity of the procedure for approving the conventions, combined with the regional governments' desire to avoid both parliamentary intervention and control by the central bodies of the state, has impeded the development of inter-regional relations and has transferred them from the area of juridified and formalised public relations towards that of informal and uninstitutionalised relations. The net result is that horizontal cooperation has been channelled through different mechanisms to those envisaged in Article 145.2 of the Constitution, essentially by means of queries, protocols, or informal agreements between the governments or the respective administrations.

From all of the above, we may conclude that there is clear room for improvement in the regulation of the conventions of cooperation. The defects we have discussed could have been remedied during the process of statutory reforms in the eighth session of parliament (2004–2008), but unfortunately, in practice, the chance was missed. An examination of the provisions of the six new statutes of autonomy dealing with this issue confirms that with a few meritorious exceptions, the framers did not pay the necessary attention to the matter. It is for this reason that I refer to horizontal cooperation in the title of this paper as "unfinished business".

A) Valencia. Article 59 of the new statute regulates the conventions of collaboration under the same terms as Article 42 of the 1982 statute. It thus continues to restrict the material area regarding which conventions can be entered into in matters over which the community has exclusive competence, and it requires that the conventions be approved by an absolute majority of the Parliament of Valencia.
B) Catalonia. The new statute devotes Article 178 to regulating the conventions and cooperation agreements with other communities. Firstly, it establishes certain contents of the conventions of cooperation: the creation of joint bodies and the establishment of joint projects, plans, and programmes. Secondly—and this should be judged as being positive—it regulates parliamentary intervention in the following terms: "Entry into conventions and agreements requires prior approval of Parliament only in cases that affect its legislative powers. In other cases, the Government shall inform Parliament of the signing of conventions and agreements within 1 month of the date of signature". This speeds up the procedure for signing up to this type of instrument. Thirdly, and this is less positive, it retains the Cortes Generales's power to reclassify the convention: "Collaboration conventions signed by the Generalitat with other autonomous communities shall be notified to the Cortes Generales and shall come into effect 60 days after notification, unless the Cortes Generales decide that these are to be classified as cooperation agreements requiring the prior authorisation referred to in Article 145.2 of the Constitution". In short, the statute of Catalonia rectifies the issue of intervention by the regional parliament, but incomprehensibly, it does not remove that reclassifying power of the Cortes that, as we have seen, is in no way imposed by the Constitution.
C) Balearic Islands. The conventions and cooperation agreements are regulated in Article 118 of the new statute. Two changes are made with regard to Article 17 of the first statute. According to the premises of this study, one may be viewed as positive and the other not. The first novelty is the omission of the intervention of Balearic parliament in the procedure. This will clearly help speed matters up, and in all cases, when the contents of the agreement requires that it be translated into a legal rule, the intervention of the parliament will continue to be obligatory. What the change means is that no decision is now required from the parliament in cases in which the validity of the convention requires only the approval of regulatory rules. The second change is that, in retaining the reclassificatory powers of the Cortes, the period required for entry into force

following communication to the Cortes is raised to 60 days. This increase benefits the Cortes but in no way favours the autonomous community.

D) Andalusia. The new statute simply reproduces the wording of Article 72 of the original statute, deficiencies and all. Firstly, the statute continues to leave regulation of the subject to an act of the parliament. Secondly, it expressly retains the Cortes' power of reclassification in Art. 226.2. The only new feature consists of the provision contained in Article 226.1 *in fine*, according to which power over "control and monitoring" of the conventions lies with the parliament of the autonomous community.

E) Aragon. Article 91 of the statute of Aragon includes some interesting amendments. Firstly, it attributes to the regional government the faculty to enter into conventions. This no longer requires the authorisation of the Aragon parliament; a mere communication of the convention in question is sufficient. Secondly, with regard to the effects of the communication to the Cortes, the statute indicates that it must be notified within a period of 1 month, but unlike others, it does not limit its validity to any period, from which we may deduce that the conventions take effect from the moment of their signing. Finally, the new statute leaves regulation of the legal procedure of the agreements to an act of the Aragon parliament. One may therefore conclude that some progress has been made in making the issue more flexible.

F) Castile and Leon. The new statute of Castile and Leon incorporates a specific chapter (Heading IV, Chapter I) devoted to the autonomous community's relations with the state and with other communities. Article 30 of the initial statute phrased regulation of the conventions and cooperation agreements in very unfortunate terms. On the one hand, it restricted the scope of the conventions to subjects of the exclusive competence of the community, and on the other, it attributed to the Cortes the power to reclassify such conventions as agreements. The article was amended by Organic Law 4/1999 and became Article 38. This amendment notably disimproved the article; not only did it retain the two existing errors but it also added the requirement that all conventions must be approved by the parliament of Castile and Leon. The subject is regulated by Article 60 of the new statute. Incomprehensibly, it retains the requirement for approval by the regional parliament in all cases and the central parliament's power of reclassification. The only change that should be rated positively is the extension of the material scope of the conventions to encompass the management and rendering of services that are the competence of the autonomous community, removing the term "exclusive".

G) Conclusions. Based on this analysis of the regulation of cooperation that conventions contained in the six new statutes of autonomy, we can draw three partial conclusions and one general one. The first partial conclusion refers to approval of the conventions: Whereas Catalonia, Balearic Islands, and Aragon have made the procedure more flexible by making approval from the regional assemblies unnecessary, Valencia, Andalusia, and Castile-Leon retain that requirement. The second conclusion is that most of the statutes (Andalusia, Catalonia, Balearic Islands, and Castile-Leon) continue to confer on the Cortes

Generales the power to reclassify the conventions—a faculty that is no way required by the Spanish Constitution. Third—and this is indeed astonishing—one of the new statutes (Valencia) continues to limit the scope of the conventions to matters that are the exclusive competence of the autonomous community. Based on these three partial conclusions, we have to give a generally negative rating to the reforms studied in that they do not solve the problems we have discussed.

A Proposal for Reform of Horizontal Cooperation in the Body of Constitutional law

Some of the aspects of the Spanish state model that could be improved upon include excessive bilateralism in the construction of the autonomic state, the relative lack of participation of the autonomous communities in state decisions that largely affect them (such as European politics), excessive territorial conflict, and the practical non-existence of horizontal cooperation.

Over the preceding pages, we have sought to show some of the reasons for the last of these shortfalls: the practical absence of horizontal inter-governmental cooperation. However, the causes run deeper.

Sector Conferences [*conferencias sectoriales*]—undoubtedly the most representative institution of what we call cooperative federalism—have been exclusively devised as organs of vertical cooperation. This is logical insofar as they were created and are regulated by the state parliament. However, the autonomous communities have shown a surprising lack of initiative in establishing caucuses of horizontal cooperation, which could be achieved by creating conferences of regional ministers [*consejeros*] by convention.

Given that the subject has been inexplicably excluded from the agenda of the current debate on the development of the autonomic state, we should note that co-operation among the autonomous communities is fated to be one of the great axes of their development; to a certain extent, too, it will be the test that they will have to pass to prove their organisational maturity. Unfortunately, 30 years since the system was first established, this test of maturity is still a long way from being passed.

All of the above show that the principle of cooperation requires fresh impetus. In one of the best studies written on territorial reforms, the eminent professor of administrative law, Luis Ortega, accurately discusses the need to go beyond Heading VIII of the constitution as currently worded: "We must go from a Heading VIII governing the creation of the model to a Heading VIII that will address the working of the model". The principle of cooperation must have a central place in this new heading because the effective working of the State will only be achieved if mechanisms and procedures are designed that will channel co-operation between the different territorial authorities and in which there exists a real desire for cooperation between them.

The consolidation and fine-tuning of our autonomic state requires modernising reforms: "One of the keys to this necessary modernisation which is slowly being introduced—writes Prof. Ortega—is the prospect of a joint result of the action of all the political authorities involved in an issue. The social result of the public policies in a decentralised model is always the product of a plural action. For this reason, the new reform must essentially affect, not so much the body of the competences as the forms of this exercise of competences. The principles of a cooperative and solidarity-led way of acting must be instilled in the Constitution".[7]

From this point of view—and it is one that I fully share—the purpose of the necessary territorial reform (constitutional and statutory) should essentially be not so much to reopen the issue of the distribution of power through an increase in the competences of the territorial authorities at the expense of the central authorities (as occurred during the eighth session of parliament) but to develop the constitutional principle of cooperation, i.e., the creation and fine-tuning of instruments and procedures that serve as a channel for cooperative relations between the various territorial authorities. To put it more simply, the debate should centre not solely on the assumption of new competences but also, and primarily, on the form of exercising better the competences that are already held.

That constitutional reform would enable a better legal manifestation of cooperative instruments such as the one discussed here. Without a proper constitutional design of a cooperative federal model, one may foresee serious problems in the working of the autonomic state.[8] I therefore think it is appropriate to conclude this paper by setting out the outlines of that design.

Horizontal co-operation is expressly provided for by the Constitution, but the regime very vaguely specified, including control by the Senate, and its formalisation through conventions in which the different statutes have generally included participation by the parliaments of their respective autonomous communities, suffers from excessive rigidity and dissuades the regional governments from taking this path.

Legal authorities are practically unanimous in recognising that the existing regulation of horizontal cooperation hinders the use of conventions and agreements as a medium for promoting and consolidating a cooperative autonomic state in Spain.

This shortfall and deficiency in constitutional regulation was rooted in political reasons. The constitutional assembly was haunted by the phantom of the "Catalan countries" and was on the verge of making any inter-regional convention dependent on authorisation under an organic law. The final formula could have determined a flexible solution, but, and this is the most surprising thing, the statutes—both the original ones and the new ones approved during the eighth session of parliament—reduced the scope of action of the respective communities by extending the possibilities of control by the Cortes and, in general, made the system more rigid.

[7] Ortega (2005), pp. 49–50.

[8] On the meaning and overall scope of that reform, see Tajadura Tejada (2010).

We believe it is clear that that it is essential to remove those elements that give the system this excessive rigidity—in other words, to make our model of horizontal cooperation more flexible—in order to promote smooth and flexible inter-regional relations, capable of tackling the challenges of the twenty-first century state. Regulation of the subject in the body of constitutional law must be made more flexible. This would require an amendment to Article 145 of the Constitution to this end. Any such amendment would contain three elements:

a) The amendment should consist of removing Section 1 from Article 145, given that it adds nothing to the implicit and explicit limits that the text of the Constitution imposes on cooperation: non-transferability of ownership of the competences themselves, respect for the internal balance of powers in each autonomous community, and principle of solidarity.
b) The distinction between conventions and agreements should be definitively removed; the distinction offers no benefits and many disadvantages. One could argue that it is necessary, since in certain circumstances it is advisable for the Cortes—through the mechanism of the authorisation—to exercise control over the cooperative activity of the autonomous communities. However, I believe that this additional control, intended to verify whether the aforementioned limits are being respected, is unnecessary.
   By removing Section 1 and doing away with the distinction between conventions and agreements, one might ask whether it ultimately makes any sense to retain the precept at all. The answer can be found at the beginning of this paper: An article of this kind avoids the disadvantages of having to seek an implicit constitutional basis for horizontal cooperation. It should therefore be retained.
c) The referral to the statutes should also be removed; if there is no possible distinction between conventions and agreements, it is no longer necessary. Moreover, in this paper we have explained the technical difficulties arising from varied regulation of the subject. Insofar as this is an instrument whose effectiveness and functionality requires a uniform regulation, it seems advisable to attribute it to an Organic Law of Cooperation, applying to all communities. Given that there has been discussion at times as to whether the Cortes are qualified to enact such a law, the purpose of introducing this referral is to settle that discussion. Consequently, the new wording of Article 145 of the Constitution might be as follows: "The autonomous communities may enter into conventions amongst themselves in order to co-operate in matters of common interest. An Organic Law of Cooperation shall establish the legal regime of the conventions".
d) This constitutional precept, which would replace Article 145, should be placed in the context of a new chapter of Heading VIII devoted expressly to the principle of cooperation, constitutionalising the basic instruments of cooperative federalism: the Conferences of Presidents, the Sectoral Conferences, and the vertical and horizontal conventions. The chapter in question would establish

the basic design thereof and would leave development of the regulations to the Organic Law of Cooperation.

Any objections that might be raised to the very existence of such a law, with the argument that regulation of the cooperative instruments should be a power of the statutes, would be groundless for two reasons: firstly, because in 30 years the framers of the statutes have failed to concern themselves with it—or when they have, it has been with the unfortunate results that we have set out here, and secondly, because the functionality of these instruments requires their uniform regulation. We have already seen the problems caused by the diversity of legal regimes on the conventions.

However, it is clear that this law must be the result of consensus among the political forces and between the state and the autonomous communities. Although I consider the proposed constitutional reform timely and I also believe it is advisable to enact a General Organic Law of Cooperation, I must recognise that they would be of little use if they are not a legal reflection of a political desire for cooperation.

References

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