Alberto López-Basaguren
Leire Escajedo San-Epifanio *Editors*

The Ways of Federalism in Western Countries and the Horizons of Territorial Autonomy in Spain

Volume 1

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Alberto López-Basaguren • Leire Escajedo San Epifanio
Editors

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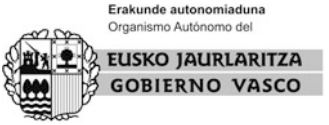

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Foreword

It is my pleasure to introduce a publication that involves the participation of an important group of acknowledged specialists in federal studies from various countries, and many of the most acclaimed specialists on the Spanish autonomous system. The functioning of federal systems and the challenges they face is the common object of reflection; however, in this context, reflections upon the horizons of territorial autonomy in Spain occupy a relevant field. I trust—and hope—that these reflections will transcend academic frontiers and contribute towards improving our political organisation, helping to reinforce peaceful coexistence.

In the case of Spain, this publication appears at a critical moment. We have already seen over thirty years of development of the system of territorial autonomy. Very few years in comparison with the long life of the federal systems that should act as a reference for us; but many in the context of our political history. Never so much as now have we been in a position to build a stable democratic system, comparable with the best democratic systems in our environment, and, above all, destined to last beyond the generation that created it. We must be aware of both circumstances at the same time. Both should spur us on to persevering in eliminating the flaws we perceive in the development of our political system, without jeopardising it in the name of a purely idealised better future, disconnected from reality.

The long life of the most solvent federal systems in our environment should serve as an example for us to follow; it must show us that a long continued existence in conditions of democratic stability is a very achievable goal. And their experience should help us find the best path for our future to be equally promising. However, we must never forget that, unfortunately, as a country we have been incapable of conserving the best political systems, when we have been able to create them. Our history demands of us restraint, prudence, in order to preserve what we have already achieved. However, we cannot be paralysed by our obsession with the past. We must also look to the future so we may, whilst maintaining our system of political coexistence, revitalise its virtues and seek to reduce its shortcomings.

The construction of the Territorial Autonomy in Spain was very successful. However, at the end of the 1970s, it was not clear which would be the path to

follow. More than thirty years of life of the Autonomous Communities have considerably clarified the picture; although, at the same time, they have presented us with other problems. At the point on the road where we find ourselves, there is a growing conviction that the Spanish system of autonomy represents a peculiar form of federal system; and this is also the opinion of acknowledged experts in federalism from various other countries.

There is no doubt, given the process experienced, that our system has important specific characteristics. However, so has each federal system, as has each political system. Some of these unique features must be preserved because they are directly connected with our reality. And we cannot forget that, if we wish to be successful, we must find a solution to our own problems. In these conditions, we need to stop being a kind of embarrassed federal system, which does not dare to acknowledge and proclaim its own nature. This is not merely a question of coherence but of interest and practicality. We must be capable of improving our system of territorial autonomy, tackling the functional problems that arise; and we must be capable of doing this in the best possible way.

In this task we have two options: to think that we are unique and embark alone upon a journey of uncertainty, or to assume without complexes or false obsessions of difference our place, our fellow travellers, our friends, learning, benefitting from the experience of systems that have demonstrated a proven capacity to survive over time, thanks to their ability to provide suitable answers to the problems they have faced. On this journey, our references can be none other than the federal systems of our legal-political environment, because our problems are the same as their problems and our system responds to the same assumptions and has the same objective: the recognition of internal diversity as fundamental to the stability and strength of the democratic system.

Recent years have seen the development of a process of radical reform of the Statutes of Autonomy, which has opened a new phase in the development of the State of the autonomies. The Catalan reform, with the approval of a new Statute in 2006, has been, without any doubt, the driving force behind this process. For various reasons, this phase of development of the autonomous system has left unresolved most of the objectives of the reform. And Euskadi, the Basque Country, decided to remain on the sidelines, directing its energies towards the purely idealised objectives of a section of the nationalist population, rather than contributing to resolve the real and practical problems posed by our political system. They expected us to forget the here and now, forgetting our own history and the very shaping of Basque society, for the sake of a supposed political paradise that exists only in the minds of a group of the converted. The development of this new phase of the evolution of the autonomous system, with its triumphs and its failures, must help us to draw lessons that will enable us to face the future in a better position and with greater chances of success. Looking to the past to learn for the future.

The approval of the new Statutes of Autonomy and the decisions of the Constitutional Court with regard to these have not ended any process. The process of development, of evolution of the State of autonomies remains open; the evolution

of political systems is, to a greater or lesser extent, a permanently open process. However, not in order to periodically turn everything upside down.

The soundest political systems are those that, having successfully established their foundations, are reinforced by their maintenance of a continuous process of improvement. We succeeded in 1978 and 1979 when we approved, respectively, the Constitution and the Statute of Autonomy. However, we have to persevere in order to continually improve its performance, providing solutions for the problems that arise and eliminating the flaws that become apparent. In this task, we should look no further than towards the federal countries of our environment. And amongst them, those that have evinced over a lengthy history their capacity to respond to the demands of their own country. In this task, Euskadi has a special interest in contributing towards finding the most fruitful path in the development of our system of territorial autonomy.

Euskadi has unique characteristics, some of them particularly relevant. And we want a federal system that will integrate, incorporate, and protect them, as the Spanish Constitution has. However, unlike those who believe that Euskadi should follow a route that ignores the evolution of the Spanish system, we are convinced that a politically solvent future for Euskadi can only be achieved, today, within a solid federal system in Spain. We would like to contribute with our effort towards the optimum evolution of the Spanish autonomous system, above all else, because this is in our own interest. And at the same time, we want to ensure that in this development the unique character of Euskadi is preserved. And we believe that the best way to do this is from within, fully involving ourselves in the process, instead of standing to one side, without the sensation of participating in the system. We require the trust of others. We seek loyalty towards ourselves via our loyalty towards others. Because we are all sailing in the same boat; and its future affects us all equally.

Idoia Mendia
Minister for Justice and Public Administration,
Basque Government

Acknowledgments

The origins of this publication are to be found in the concern over the developmental crisis that affects the Spanish system of territorial autonomy and the conviction that its evolution should be along the paths being followed by more established and consolidated federal systems. Comparative studies have a long tradition. However, it was a question of crossing the border of the accumulation of analyses of different legal-political systems in an attempt to promote what Sujit Choudhry has called *The Migration of Constitutional Ideas* (Cambridge University Press, 2006).

The Spanish system has its roots in the formal rejection of federalism, which was formalised in the Constitution of 1931 (Second Republic). However, its evolution after the approval of the first Statutes of autonomy in 1979, following the approval of the Constitution of 1978, has transformed it profoundly and has situated it within the sphere of federal systems. At a point marked by the failure, since the Constitutional Court Ruling of June 28, 2010, of the attempts at reform represented by the new Statute of autonomy of Catalonia (2006), it is more necessary than ever to look at systems that, in spite of the differences and peculiarities particular to each one, respond to the same basic circumstances. This similar nature renders easier, without a doubt, the *migration of constitutional ideas* between them; and makes more necessary the *dialogical* method advocated by Choudhry. In the case of the Spanish system, which is in need of reinforcement, this contrast is more essential than in systems with a tradition that has endowed them with greater solidity.

With this idea in mind, in October 2011, Bilbao hosted, at the University of the Basque Country (UPV/EHU), a Conference about the paths of federalism and the horizons of territorial autonomy in Spain. It was attended by a group of specialists in federalism from different countries around the world and by specialists in the Spanish system of territorial autonomy. It sought to open a line of work where analysis of the problems facing the Spanish system might be performed in the context of neighbouring federal systems, in the light of their experience.

The conference addressed a wide range of themes for reflection, which embraced the most important problems currently posed in Spain, especially, the separation of powers, intergovernmental relations, and the management of diversity. It involved specialists from different countries analysing the current situation and the

challenges faced by their respective political systems in these spheres; and Spanish specialists doing the same with regard to the Spanish system of territorial autonomy.

The academic encounter was very well received by scholars—*seniors* and juniors—from a large number of countries and universities. Along with the plenary contributions, the most exciting moments of the meeting took place during the presentations of their contributions by the *junior scholars*, to whom the organisers are particularly grateful. This publication is a compilation of the works presented there.

The Bilbao Conference and this publication form part of the activities of the Research Project "Federal System between Integration of Diversity and Stability," financed by the Ministry of Science and Research—now Ministry of Economy and Competitiveness—(ref. DER 2010-20850) and the Research Group of the Basque University System IT509-10 (Directorate of Scientific Policy. Department of Education, Universities and Research of the Basque Government).

The Bilbao meeting—and this publication—have been possible, thanks to the enthusiastic support of the Department of Justice and Public Administration of the Basque Government—and its Head, the Minister Idoia Mendia—and of the Basque Institute of Public Administration (IVAP)—and its Director, Encar Etxazarra and her colleagues. Furthermore, we have enjoyed the support of the Ministry of Science and Research of the Government of Spain, the Department of Education, Universities and Research of the Basque Government, of the Vice-Rectorate of Research of the University of the Basque University (UPV/EHU), and of the Manuel Giménez Abad Foundation. The organisers would like to thank them all. And, in particular, we would like to express our acknowledgments to the members of the Scientific Committee, who ensured the quality of the contributions presented.

Alberto López-Basaguren

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Part I
General Overview. Federal Challenges in the Era of Globalization

Opening Pandora's Box: Process and Paradox in the Federalism of Political Identity

Michael Burgess

Introduction: The Twentieth Century as the Short Century

The Berlin Wall fell in November 1989 signalling the end of the Cold War and ushering in—or so it seemed—a new dawn in both European and world politics. The implications of its impact were as colossal as they were many-sided and two decades later, we are still trying to come to terms with what happened. However, if the consequences of rediscovering Europe were undoubtedly extensive, the subsequent impact of the implosion of the Soviet Union in December 1991 to reveal 'Mother Russia' guaranteed that we were also witnessing a seismic shift in the tectonic plates of world politics. The former was very much a European affair, while the latter—marking the end of bipolarity—was of global significance. In a short book titled *Age of Extremes*: *The Short Twentieth Century* (1914–1991), which appeared in 1994, Eric Hobsbawm chose to reconfigure this century largely in terms of a Marxist ideological unity stretching from the Russian Revolution in 1917 to the collapse of the Soviet Union in 1991 and to see in it a distinct historical epoch, and an experiment that had run its course (Hobsbawm 1994).

The post-1991 interaction between European and world politics has been complex and complicated, and we are still too close to these events to appreciate and understand fully the precise nature of their contemporary significance. What we know remains fragmentary and still lacks a sense of ordered interpretation. The so-called 'stable disorder' of world politics can have little real meaning until or unless we can have some further distance from these events and circumstances. However, it is precisely this sense of the unknown that forms the inescapable background context for our subject here. Scholars in history, political science, economics, sociology, and constitutional law are confronted with a series of dilemmas when

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it comes to addressing many of the implications of the events identified above. Practice has in so many respects outstripped theory. We are left with very few familiar signposts to guide us or footsteps for us to follow. There are no doubt historical continuities but they have nonetheless to jostle for position in our evolving explanations of the implications of what happened two decades ago. Continuity and change remain in perpetual relations of both complexity and simplicity spawning both highly sophisticated alongside elementary understandings and interpretations of what is now so often referred to as the 'post-Cold War era', a phrase whose accuracy tells us very little at all about where we are now. However, it is precisely at this difficult intellectual destination that we must situate the subject of process and paradox in the federalism of political identity. This refers to the resurgence of the federal idea as one important outcome of this convulsive period of contemporary history. For the moment, we will leave aside the reasons for the remarkable rekindling of this particular form of human association and look briefly at the empirical evidence for this claim.

The Resurgence of the Federal Idea

In retrospect, the immediate aftermath of the end of the Cold War witnessed an astonishing revival of not just a novel federal discourse in domestic and international politics but also an unprecedented appearance of what I have called the 'new federal models'. The evidence for this is incontestable. Belgium crossed its Rubicon in 1993 followed by the Russian Federation in the same year, while European integration entered a dramatic new phase with the ratification of the Treaty of European Union (TEU), widely known as the Maastricht Treaty, which arguably set the European project on a federal trajectory. The European idea was always a federal idea.

In 1994, Argentina adopted its new constitution that looked to federal values and principles, while in the same year, South Africa produced its first provisional constitution that also incorporated these notions in an attempt to reach a political consensus on how to recognise difference and diversity in its post-Apartheid age. In 1995, Ethiopia and Bosnia and Herzegovina (BiH) were reconfigured as new federal models, the former in order to hold together a multiethnic—some might say a multinational—society and the latter in order to create an oasis of post-conflict political stability based upon a veritable kaleidoscope of territorial, religious, multi-lingual, and multinational properties in a new state diarchy. In 1996, the new Constitution of South Africa was formally ratified and introduced its novel 'spheres of governance' displaying evident federal elements, while in 1999, Nigeria formally adopted its sixth constitution since it gained independence in 1960 and correspondingly reintroduced civilian government in another federal model that has so far stood the test of time. Thus, collectively, Belgium, the Russian Federation,

European Union, Argentina, Ethiopia, Bosnia and Herzegovina, South Africa, and Nigeria strongly suggest evidence of a resurgence of the federal idea in the decade of the 1990s in world politics.

However, the narrative does not end here. In Spain, Italy, and the United Kingdom (UK), as formally non-federal states, there have been significant movements in the same direction. Clearly, the point of departure is crucial. From the perspective of two parliamentary monarchies in Spain and the UK, and what we might describe as a 'regional' state in Italy, there has been a gradual but an indisputable devolution of powers and competences to legitimate sub-state political authorities that could be construed as movement in a federal direction—even if the ultimate goal is not a new federation. Some scholars prefer to see in these three cases a process of *federalising* or *federalisation* that suggests a slow, piecemeal, incremental but ultimately inexorable movement toward some sort of federal or quasi-federal destination. For those who remain anxious about the federal prescription, this approach to understanding what is happening might be seen in terms—to paraphrase a description once used to simplify neo-functionalism in European integration theory—of 'federalism without tears!' For once again, the practice—federal practices—seems to have outstripped the constitutional theory. In such circumstances, we seem to be able to see federalism everywhere.

The notion of federalisation as *process* was first introduced into federal theory—or what passes for it—by Carl Joachim Friedrich whose devotion to it derived from his obsession with Johannes Althusius, the late sixteenth and early seventeenth century German Calvinist Magistrate—and now widely regarded as the father of the Continental European federal tradition—whose principal concern was the construction of political communities, characteristically from the bottom upwards rather than the typical top-down centralist hierarchical perspective. Unfortunately, Friedrich's consistent attempt throughout his academic career to utilise the concept of process as a way to capture the dynamics of *becoming federal* contained too many ambiguities and vague generalisations to constitute, on its own, a convincing theory of federalism, although its conceptual utility might need to be reassessed and reappraised in the light of our new federal models (see Burgess 2012).

Before we conclude this section on the empirical evidence for the resurgence of the federal idea in the late-twentieth century, it is important for us to mention the fifth Annan Plan of the United Nations (UN) as a federal plan for Cyprus (2004) and to add both Iraq (2005) and Nepal (2007) to our growing list of new federal models, while also keeping an eye on both Pakistan and Somalia, and perhaps even Afghanistan in the future however unlikely it seems at the moment. If we now take stock of this list, we can see that there is an extremely impressive body of evidence suggesting that *something is happening* to the federal idea in the new twenty-first century that began in 1991. Let us probe a little further into this body of evidence. Let us venture into the new world of difference and diversity.

The New World of Difference and Diversity

It is clear that in the post-Cold War and post-9/11 era, the twenty-first century has just woken up to a new age of danger and uncertainty unprecedented in its ubiquity. It is an unstable cocktail of possibilities and probabilities. However, these dangers and uncertainties are not confined solely to military and security definitions of reality, nor are they necessarily to do with threats of terrorism, drug- and human-trafficking, AIDS, and illegal immigration. Instead, they are rooted in social realities that have always been immanent in the modern state but have often lain dormant or passive for many years. The new millennium has coincided with the unleashing of powerful forces of cultural-ideological differentiation that have acquired a dramatic political salience across the world and can no longer be complacently ignored, suppressed or violently eradicated. From Indonesia and Sri Lanka to Nigeria and the Sudan, from Cyprus and Russia to Iraq and Somalia, we are witness to the politics of identity: the struggle for new forms of self-determination, tolerance, and civil and human rights and freedoms. We have entered a new era of constitutional and political minoritarianism. Turkish Cypriots in Cyprus, Tamils in Sri Lanka, Chechens in Russia, Kurds in Iraq, and until 2011 Darfur in the Sudan, and many other minority identities have formally joined the chorus of voices clamouring for official recognition and formal accommodation in the polity.

Today, we are confronted by an increasing number of states whose societies display all the indelible features of multiculturalism, multilingualism, and multi-nationalism. It is true that many of these contemporary trends and developments are not novel; they have been evident for decades and some for much longer. However, this imperative of social differentiation has recently been accelerated and accentuated in certain parts of the world. Its contemporary political significance has been underlined by the widespread media coverage that has successfully linked it to Western values, interests, and preconceptions of conflict management. Arising out of this new world of difference and diversity has been both the intellectual and practical political impetus to address this remarkable concatenation of events, trends, and developments so that new questions are posed and old ones reformulated in new circumstances.

One question that has emerged and is quite striking in this context is the following: ‘What has changed about the world of states that has served to increase the contemporary significance of the federal idea?’ The following four reasons, which are interrelated in a complex fashion, offer us some clues toward an explanation:

- A reassertion of the politics of difference and self-determination, especially but not solely in central and Eastern Europe and increasingly in the states of the Middle East, for example, the cyclical efforts to address the Israeli–Palestinian conflict.
- A new international emphasis upon the legitimacy and recognition of social differentiation and heterogeneity, even within Islam, that strongly suggests a

need for constitutional and political accommodation, for example, the Sunni and Shiite Muslims in Iraq.
- The recognition of human rights and freedoms and the morality of United Nations (UN) humanitarian intervention in the internal affairs of independent sovereign states, especially those deemed to be 'failed' states. This includes the collective rights of whole communities, for example, Dafur in the Sudan and the self-determination of Kosovo.
- The spread of new democratisation processes, partly triggered by the US invasion of Iraq, in the Middle East, e.g. Lebanon, Tunisia, Egypt, Bahrain, Yemen, Libya, Syria, and even in Saudi Arabia. However, the likelihood of these cases ushering in a new age of liberal democracy must be considered with a great deal of caution in countries with little or no culture and experience of democratic values.

These discernible contemporary trends and developments prompt those of us interested in the practical relevance of federalism in the world today to reflect upon this new political recognition of difference, diversity, and democratisation. It also impels us once again to think carefully about the nature of conflict, the meaning of diversity, and the sort of unity that can be forged from what are usually unpromising circumstances. Context, it is often said, is everything but the links of similarity between the events and circumstances identified here in Europe, Africa, and the Middle East suggest that something is happening which, at the very least, has revived an international federal discourse. Consequently, there is now a real need to rethink and reassess some of our basic conceptual categories in the light of comparative perspectives.

The Federal Character of Political Identity

In each of the new federal models identified above—whether formally federal or formally non-federal—we can see with remarkable clarity that all of them exhibit a distinct tendency to utilise some aspects of *federal practice*. Whether or not the creation of a new federal model has emerged as the result of a 'constitutional moment' (albeit an 'imposed' moment) with little or no democratic political culture, as was the case with Bosnia and Herzegovina, or has for a long time been in the making as symptomatic of an incremental federalising process in an established liberal democracy, as in Belgium, the reconstruction and reconfiguration of an existing state into a more 'federal-type' arrangement (including consociational mechanisms, procedures, and practices) there is something in the nature of the federal idea that makes it in many important respects ubiquitous.

If it is true, as Murray Forsyth once wrote, that 'with sufficient effort we can find federalism everywhere', this tells us something about the innate flexibility and malleability of the federal idea in its seemingly infinite capacity to adapt and adjust to different circumstances (Forsyth 1981). Its chameleon-like ability to blend into a

variety of different social contexts and political cultures in different parts of the world strongly suggests that it somehow reaches down into the very core of human existence. In short, it endures precisely because it is deeply rooted in fundamental human values and principles of political organisation—with the way that we organise human relations. Althusius, as we have already observed, construed this idea as 'political' in terms of community-building, ever upwards and onwards in ascending fashion from the bottom to the top of the polity.

However, I think that it is important for us to pause for a moment to reflect upon what, at least on the surface, is an existential question. If the federal idea is essentially an organising principle, it is used in unending fashion to organise and reorganise human beings in both their individual and collective capacities so that we are able to live together in political communities that furnish the dual basis of cooperation and self-determination: of the sort of unity and autonomy that led Daniel Elazar to refer to 'self-rule and shared rule' (Elazar 1987). In other words, the federal idea becomes an idea that is indissolubly connected to who and what we are (or who we think we are or even who we would like to be). This conveys the sense of dynamic change, that is, we evolve as human beings always in the process of becoming. In a nutshell, it is part and parcel of our political identity. It provides the answer to the question 'Who am I' and 'What is my political identity in terms of both my individual and collective capacities?' However, it also underlines the fluidity, plurality, and complexity of political identity.

If this reasoning is right, the notion of political identity—of who I am in the polity or political community—is in a state of constant flux. Without wanting to address the complex issue of identity-formation here, it is important for us, at this juncture, to emphasise the essentially *moral* character of the federal idea. It is moral in the sense of its conception of the polity as being grounded in a distinctive set of values and principles that collectively provide the basis for human beings to live together peacefully in their difference and diversity. Difference, we are reminded, produces federalism. There is no time or space to include a detailed survey of these values and principles here but let us nonetheless identify the basic values, as we can see them: human dignity, liberty, equality (of citizens, including 'the Other'), diversity, tolerance, and political empathy. From the presence and interaction of these *federal values*, we can derive a set of *federal principles* that could include, *inter alia,* terms such as partnership, bargain, agreement, contract, and compact in what the leading Canadian political theorist, Charles Taylor, has called 'the politics of recognition' and has spawned an assortment of words, phrases, and shorthand definitions of federalism, such as self-rule and shared rule, *Bundestreue* (including comity and loyalty), reciprocity, and internal self-determination (Taylor 1992). These federal values and principles are intimately and intricately bound up with each other. Often invisible, they work together toward the creation of a federal polity that functions in a particular way to forge a compound identity comprising a variety of constituent identities that some Spanish scholars, such as Ferran Requejo, have called *plurinational* or multinational value pluralism (Requejo 2005). This seeks to capture and convey the complexity of political identity that—like federalism itself—has many subtle meanings and emphases.

At its core, then, political identity has a federal character. Whether or not it has dual, triple or multiple dimensions matters less here than the fact that it has a moral basis to it in terms of how we live together, associate, and engage in political community-building.

Federalism and Liberal Democracy

None of these things, it has to be said, can flourish and develop in anything other than a liberal democratic state. Federal values and principles in any case correspond to and inhere in liberal democracy and are—at least theoretically—mutually reinforcing. To speak of a military federation, as William Riker did in 1987, or to seek to fuse together the authoritarian character of a dictatorship with the federal idea, as the military strove to do for long periods in Nigeria, is frankly absurd (see Burgess 2008). It vitiates the federal idea at its very source. Consequently, it stretches credulity to claim that the Soviet Union, Czechoslovakia, and Yugoslavia were examples of 'failed' federations for the simple reason that they were never federal states in the first place. The argument for this lies in the fact that the values and principles we have just identified cannot produce genuine freedom, autonomy, and internal self-determination other than what is at the behest of the central political authority. And if they contained federal elements to any extent, in embracing the outward constitutional and institutional features common to federations, they were in reality led by single party dictatorships that controlled, or sought to control, all the lines of political communication in the state. They were, in short, impostors.

This is not to say that all past and present federations will necessarily meet the conceptual and theoretical requirements of *federal democracy*; we would have a hard time in attempting to justify the claim that all of the new federal models, especially those in Russia, Ethiopia, Bosnia and Herzegovina, and Iraq are fully functioning federal democracies, but in this they are certainly not alone if we reflect upon the flawed democratic practices in the established federal systems in Malaysia (1963) and India (1950), and this is in any case hardly surprising if we also consider their recent historical legacies, which are living legacies that retain a contemporary significance. Indeed, it might be that the introduction of liberal democracy—with all of its conventional features including the rule of law, constitutional principles, human rights and freedoms, and capitalist market economics—and the process of democratisation are more important in such cases than the focus upon federalism.

And here lies the main problem that is likely to determine success and failure in these new models. Is it possible to construct and sustain new federations that at the outset lack a democratic political culture? What are the theoretical and empirical implications of this recent phenomenon whereby the federal idea is introduced in a set of circumstances that are not or do not appear to be conducive to its practical success? Historical experience suggests that among the so-called pre-conditions of classic federal state formation and the subsequent processes of (multi)nation and

state building there have been present in the social reality of difference a series of factors—such as territorial contiguity, congruent social and political values and institutions, and shared goals—that are nonetheless common to each federal experiment. However, our new federal models do not in general possess these preconditions. Indeed, they each have an authoritarian military heritage that does not seem to furnish the basis for creating and sustaining a viable federal political community. There is little or no democratic experience. Democratic values are therefore extremely shallow. In short, there is no democratic political culture wherein the federal idea can flourish.

If this historical logic is broadly correct, it will be necessary to reverse history and—having created a federal constitution—seek first to *create* a democratic political culture where the construction of a federation can be firmly cemented. The practical implication for the new federal models in Bosnia and Herzegovina and Iraq, then, is that democratic values and practices via the *process of political socialisation* will have to be introduced over a long period of time if they are ultimately to become self-sustaining. The public policy consequences are therefore self-evident. The agents of this socialisation will be education policy, media competition and institutionalised democratic practices designed to channel and canalise conflict in peaceful, non-violent pathways. In turn, one conceptual implication of this novel phenomenon is the revival of both *political socialisation* and *political culture* as useful instruments of empirical and normative descriptive analysis. We have already begun to witness an increase in references to these terms in the emerging literature on contemporary federal models. Their resurgent conceptual utility derives directly from the practical realities of our new federal models.

To summarise this section, it is important to consider that the peculiar context wherein the new federal models are located can produce an interesting paradox: federation is both the means and the end of democratisation just as democratisation is a necessary instrument of a self-sustaining federalism. They are, in short, mutually reinforcing influences.

Process and Paradox in the Federalism of Political Identity

If we return to look at the federal character of political identity in terms of our new federal models, what does it tell us about both the practical possibilities and limitations of contemporary federalism? As we will see, the post-Cold War context of these models ensured that they would emerge out of and alongside the larger process of democratisation or, to be more specific, that the federal idea would facilitate this process. Therefore, it is appropriate to revisit the approach to federalism that we have called *federalisation*.

The notion of *process* in political science denotes a continuous, indeed an endless, dynamic of change. In federal studies, as we have already seen, it is associated with the theoretical approach of Carl Friedrich. His desire to escape

from what he saw as the constitutional and legalistic character of federalism that lent the impression of a static conception of this subject prompted him to seek a different way of understanding it. Instead of the conventional idea of the word 'federal' being handcuffed to the notion of the state—the federation or federal state—he wanted to expand its meaning in order to detect other forms and manifestations of the federal idea. Clearly, he believed that there was more to the federal idea than just the federal state and in this particular respect he has been followed by both Daniel Elazar and Ronald Watts (see Elazar 1987; Watts 2008). In consequence, he sought to identify different states and political systems on a spectrum or continuum of federalism that he could locate appropriately in terms of their level and scope of *federalisation*. This enabled him to bridge the gap between the domestic state level and the international level of political authority, thus equating the *constitution* as the language of the state with the *treaty* as the language of international relations. Both in his view constituted federalisation.

Leaving aside the conceptual flaws and ambiguities inherent in this approach to understanding federalism as a continuous process of federalisation, Friedrich's conception did nonetheless have the merit of conveying the essentially dynamic nature of federalism. Moreover, in introducing the idea that the subject extended beyond the state to include what he called *international federalism,* he clearly foreshadowed the later contributions of both Elazar and Watts to federal theory in the extent to which he included federal *arrangements* and *relationships* that existed independently of the formal state structure. In the 1960s, it was and remained a highly idiosyncratic, not to say eccentric, way of looking at the world of states and non-state actors although Friedrich had been developing this concept of federalisation since at least 1950.

How and why would Friedrich's process approach to federalism—his notion of federalisation—be reassessed and restored as a conceptually useful way of explaining the emergence of the new federal models? On what grounds can we utilise it in order to come to terms with contemporary change?

In a sense, we have already underlined the basis for this application of old wine in new bottles. The post-Cold War world has changed to such an extent that we find most of the classic theories of federal state formation and their subsequent maintenance simply redundant. They do not help us to understand and explain the appearance of the new federal models so that this would seem to be another example—such as that of the EU—of the practice having outstripped the theory. Just as the EU works in practice but not in theory, so the new federal models exist collectively as a contemporary reality that has no apparent theoretical basis.

However, there is another aspect to this notion of federalisation that is worth more than a moment's reflection. There are good reasons to construe what has been happening in three of our new federal models as the process of federalisation: Belgium, Bosnia and Herzegovina, and the EU. In the first case, it took Belgium approximately a quarter of a century before it crossed the constitutional Rubicon from a decentralised parliamentary monarchy to a formally full-fledged federation. Meanwhile, the period 1995–2012 in the evolution of Bosnia and Herzegovina has clearly been a process of incremental federalisation in terms of its post-civil war

reconciliation and reconstruction. It is now a unique federal diarchy comprising one unitary constituent unit—the Republic of Serbia—and the federation of Bosnia and Herzegovina with ten constituent cantons. The latter is, in other words, a federation within a larger overarching dual or binary federation. Finally, the EU has always been the current institutional expression of a long process of European integration that can be accurately construed as a piecemeal, incremental process of federalisation. In these three cases, Friedrich's notion of federalisation would seem to be the most helpful conceptual approach to understanding what is or has been happening both within and without the state in Europe.

There is further empirical evidence that might justify our resort to the concept of federalisation and support Elazar's claim that it is the federal relationships that are important rather than their formal incorporation in a written constitution. It is clear from our introductory section that there has also been a significant contemporary trend toward federalisation in three formally non-federal states in Europe. Vernon Bogdanor identified the process during the late 1990s of what he called 'federal devolution' in the United Kingdom (Bogdanor 2009). This is sometimes described as territorial decentralisation or constitutional sub-national autonomy, within formally non-federal states in Europe and its relevance to both Italy and Spain is incontestable. What the use of these terms and phrases indicates is an effort to avoid the (understandable) assumption that there is a federal teleology in these states and that their evolution is necessarily toward a federal destination as a terminal end-point.

However, how can we really know if this is what is happening in Spain? While the application of the federalisation concept to Spain still leaves the door to formal federation open, it does not necessarily imply that it is in any sense inevitable. The pace and scope of territorial decentralisation during the last 30 years is certainly movement in a federal direction, especially if both senate and fiscal reform are introduced in the future to accompany the existing evolution of bilateral intergovernmental relations and the further enhancement of the Autonomous Communities (ACs) in terms of their informal horizontal cooperation and powers. Small wonder that many scholars of constitutional law and politics refer to contemporary Spain as a 'federation in disguise' or 'a federation in the making'. It is hard to resist the temptation to classify it in conventional terms, even if the prefix *quasi-federal* is preferred.

However, this temptation must be resisted for the simple reason that Spain is not and may never be formally a federation consecrated by a written constitution. What matters is how its political system works in practice. Not for the first time do we witness the chasm between constitutional theory and practice. Friedrich, Elazar, and Watts would find a happy consensus in the conclusion that the current Spanish federal model is just that: a peculiarly Spanish invention. And if, like Italy and the UK, it remains difficult to classify Spain according to our conventional understanding of federal states, this suggests that we must rethink and reconceptualise our classificatory categories rather than try to squeeze this new federal model into some kind of outdated conceptual framework. From the perspective of federal theory,

then, Spain is another of these new evolving federal models that is compelling us to seek a new classification.

Turning to the related question of paradox in the federalism of political identity, the similarities in the social cleavage structure in these new federal models is quite striking but for different reasons. One of the major features common to them all is the visceral nature of their cultural–ideological diversities. All of them are characterised to some degree and in different ways as combinations of multi-ethnicity, multi-nationalism, multiculturalism, multi-religiosity, and multilingualism. So the hallmark of federalism as the institutionalisation of political identity in these federal models is primarily to do with ethnic, national, religious, and language issues that are notoriously difficult for all political systems (not just those that are federal) to process. This is because they are in many ways non-bargainable public policy questions that often involve zero-sum conflicts and this is precisely where we can locate one of the several paradoxes in federal studies.

The paradox in relation to the federalism of political identity is the following: why do state builders consciously construct federal communities on the foundations of difference and diversity that will be predictably difficult to manage and inherently unstable at the outset? Indeed, why would anybody seek deliberately to build a new state on social cleavages with political salience that will constitute major fault-lines in the polity and be a constant source of conflict and division that is likely to constitute an obstacle to the unity and integration of the state? Put in plain language, it seems like this is literally asking for trouble. Wrapped inside this paradox is of course a real conundrum for political scientists, namely, do these new federal models sustain and aggravate conflicts that already existed or are they actually responsible for creating them? In turn, do they create the conditions for secession in the future? However, this question is a subject for a different paper.

Conclusion: Opening Pandora's Box?

If we look back at this short survey that has as its main focus the emergence of new federal models after the end of the Cold War, it does seem to call not only for new empirical and theoretical perspectives having significant implications for comparative federalism, but also for a root and branch revision of classic federal theory to accommodate theoretical pluralism. This can be formulated from a synthesis of the old theories—taking from them what is relevant to the new age of federalism—to produce a revisionist theory with much greater explanatory capacity than existing approaches.

The role and scope of federalism in the world of the new millennium must be synchronised with its novel hopes, fears, and expectations. This presents fresh challenges to the federal idea and means that its innate flexibility, built upon core values and principles, is likely to be tested in new ways that will serve further to provoke our imagination in constitutional and institutional design, decision-making processes, and conflict management procedures. New federal experiments will

emerge as structural responses to new problems and they are just as likely to furnish the basis of innovation and exploration as the current federal models surveyed here today.

Consequently, if these new federal models tell us anything, it is surely that the danger of opening Pandora's Box to risk letting out all of the ills of mankind to flourish and produce chaos, can only be judged according to the viability of the alternatives to the federal idea.

Notes and References

E. Hobsbawm, Age of Extremes: The Short Twentieth Century, 1914-1991, (London: Michael Joseph, 1994)

See M. Burgess, In Search of the Federal Spirit: New Empirical and Theoretical Perspectives in Comparative Federalism, (Oxford: OUP, 2012)

M. Forsyth, Unions of States: The Theory and Practice of Confederation, (Leicester: Leicester University Press, 1981)

D.J. Elazar, Exploring Federalism, (Tuscaloosa, AL: University of Alabama Press, 1987)

C. Taylor, Multiculturalism and "The Politics of Recognition": An Essay, (Princeton: Princeton University Press, 1992)

F. Requejo, Multinational Federalism and Value Pluralism, (London: Routledge, 2005)

Burgess, In Search of the Federal Spirit, (Oxford: OUP, 2012)

Elazar, Exploring Federalism, (Tuscaloosa, AL: University of Alabama Press, 1987)

R.L. Watts, Comparing Federal Systems, (London: McGill-Queen's University Press, 2008) 3rd edition

V. Bogdanor, The New British Constitution, (Oxford: Hart Publishing, 2009)

Contradiction and Crisis in the Federal Idea

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The methodological use of contradiction may be extrapolated and applied to the study of a large number of phenomena, institutions, and even concepts, particularly those that follow a historical line. In principle, therefore, there is nothing particularly unusual about employing this method with federalism. However, what is specific to this case is that the various aspects of the historical study and development of federalism herein dealt with—the theoretical/political, constitutional, and socio-economic or territorial perspective—occur contradictorily and also with an added peculiarity: the elements of the contradiction that occur in the different areas addressed end up proving consistent and uncontradictory, ultimately offering a plausible explanation for what appears to be a sustained crisis of federalism. Thus, the contradiction disappears even though contradiction has contributed to explaining its content.

One might even say that contradiction has penetrated federal analysis to such an extent that it is to be found in the approaches from which it has been addressed. On the one hand, it is almost unanimously held that the study of federalism must be empirical and casuistic, and that this approach reveals such a variety of forms that they destroy the category, in practical terms making it unusable (so, in effect, echoing the title of the procedures of the conference to mark the fiftieth anniversary of the Italian constitution (A. Pace), one might ask "Quale, dei tanti federalismi?"). However, at the same time, they are different forms of a single type, manifestations of the same phenomenon, expressions of a single term used by all. Therefore, it necessarily refers back to a shared referential whole; a categorisation is needed that will serve for all empirical manifestations (though one can still ask in some bewilderment "How should we think of federalism?", as Duso and Escalone do in their book). This is the basis of O. Beaud's proposal, with its concept of the *federation*.

All of this would seem to indicate that there is a need for a certain reconstruction of the two aspects, a sort of synthesis by way of that dual mechanism that always

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runs through scientific thinking: beginning from the empirical reality to progress, from there to the theory, and then once more to check it against the reality. This is a problem of what one might call federal epistemology and we shall not touch on it here. However central the issue may be, the fact is that it has arisen incidentally while we were trying to achieve the much more modest objective proposed here. That is, to observe the singularity and importance of the contradiction in those three perspectives of federal dynamics we have alluded to—the political, constitutional, and socio-economic or territorial theory—and thence to draw certain hypotheses or make some final notes on the constitutional order.

We shall address the issue in the following order: the theoretical/political perspective, the constitutional perspective, and the territorial or socio-economic perspective.

The Theoretical/Political Perspective

The first thing we should mention, given both the shortage of references to this content and—more particularly—the contrary developments to be found in federal literature, is the vast ideological charge initially contained in the federal concept. This is as simple and evident as the initial basic historical supposition: that the federal idea was born in Europe in open opposition, in clear confrontation, to the unitary state; that it represents a radically contrary option and, consequently, that it is associated with a complex content, antithetical to that represented by the unitary state.

However, as we have already seen, historical experience shows that from the earliest origins there is no homogenous content because the attack on the unitary state comes from two opposing (and contradictory) fronts. Hence, the theoretical sources of the federal idea are also contradictory:

1. One of these fronts has emerged from rationalist sources and since the enlightenment has been associated either with liberalism (in that federalism represents new forms of division of power and, therefore, brings new guarantees and spaces for freedom) or with democracy (that, under Rousseau's influence, is considered to be more viable in smaller territories) or to different approaches of economic reformism (from utopian socialism to anarchism), thus, acquiring that content that set federalism up as a global alternative to the existing order operated through the unitary state [Spanish federalism is a prototype (see "Federalismo Español", by the late Professor Gumersindo Trujillo), which formed the basis for all subsequent studies on the subject]. It won the support of the peripheral bourgeoisie for its anti-centralist proposals and from the working classes for its reforming economic proposals; a contradiction, again, which would end up exploding: fear and vested interests would eventually push the bourgeoisie towards a proto- and finally a clearly nationalist stance, while a mistrust of the bourgeoisie and their own interests would eventually push the working class towards more clearly "pro-worker" parties.

   Although this framework is specifically European, it shares some basic elements with federalisms from very different areas, including US varieties;

although Jefferson's notion of federalism called for democracy through the empowerment of local authorities in a way that Hamilton's did not, both theorists presented it as an alternative to the political order of the metropolis. From there on, it related to European federalism in one very significant aspect. We have already seen that federalism in Europe arose in opposition and as an alternative to the unitary state. Yet, the unitary state emerged in Europe in the form of what is known as the modern state, centralising power through the monarchy, in such a way that it is structurally a monarchical state. This is not the place to discuss the process by which this occurred but in support of this claim, it is worth recalling that that modern state, despite its name, was the feudal order's last mechanism of defence (although contradictorily, it ultimately created the conditions for it to be superseded and for capitalism to develop): the nobility ceded its power to the monarch—thus concentrating it—in exchange for a defence of the aristocratic system and their status (a theoretical expression of this pact between nobility and monarchy can be found in Bodin's six-volume Republique). In other words, as we have seen, monarchy and the unitary state are historically inseparable.

Thus, the unitary state/federalism antithesis is also the monarchy/federalism antithesis. Or to put it another way, the federalism-republic association is the diametrically opposite correspondence to that of unitary state/monarchy and so federalism soon armed itself with a whole arsenal of practice and theory that would shake the historico-mythical foundations of monarchy. From a practical (historico-concrete) perspective, federalist parties will be republican; the triumph of the republic will always be seen as a road to federalism and federal constitutional projects will always be republican. From a theoretical perspective, these circumstances can be seen to be no more than a projection of radically opposing principles: while the monarchy is an undisputed and dogmatic given, federalism is a construct; in other words, we have irrationalism as a monarchic supposition versus rationalism as a federal supposition. We shall return to this link between federalism and the republic about which, surprisingly, little of significance has been specifically written amongst either federalist or republican sectors.

2. In contrast to this first theoretical source of the federal idea, there is, as we have said, another, which from the outset lacked any uniform content. This is the source arising out of irrationalism. It includes various forms that have their origins in German historicism or in traditionalisms (French, Spanish, etc.). They are linked to (organicistic) conceptions more typical of the old mediaeval expressions (Althusius) and in any case, they represent—to different extents—a complete reaction against the processes of modernisation towards which—despite everything—the unitary state led.

These two theoretical sources are also to be found in that most important category for federal development, the nation, derived on the one hand from the rationalism underpinning French revolutionarianism, for example, in Sieyès's view of the materially-based nation or the consent-based nation running through to Renan, and on the other from irrationalist sources, i.e. the essentialist or

metaphysical conception of the national entity. From here, the development and importance of the concept of the nation is developed on the basis of its political/institutional contents, the nation-sovereignty-state association and its material contents: the association between nation and class (although this relationship has since been fragmented and the nation has become linked to other interests, especially since decolonisation and the emergence of anti-imperialist national liberation movements).

However, what is important to note is that the federalism-nation association (as a way of expressing the plurinational) is another concept that contributes to completing the federal conception and charging it with ideological/political significance.

This said, what has made the subsequent development of this theoretical area contradictory is that there has been a complex, persistent (and unquestionably dominant) trend presenting federalism in neutral terms, i.e. stripping it of all that ideological political content with which it was configured from the outset.

This has been pursued in the following ways:

1. There has been an attempt to place pure historical facticity at centre stage, practically to the exclusion of all else, in the most empirical and casuistic sense of the federal phenomenon, interpreting it only as an interim solution to a complex set of problems. This creates so many cases, suppositions, and degrees that the category is practically nullified, in a situation wherein all things may be classed as federal.
2. The second way is to view the federal question as being exclusively organisational. In this approach, federalism must be studied from the perspective of organisation theory as a mere organisational technique. Thus, the federal option should be exclusively derived from the advantages offered by its organisational characters.
3. There has been an attempt to unbundle the federal issue from all political or socio-economic questions, not only in the implicit form contained in the previous (strictly organisational) consideration but explicitly and directly through formulations such as those that emphasise the importance of managing to get rid of "differences" and achieve homogenisation in all orders as the most appropriate framework for federal development.
4. Finally, the emphasis and theoretical and technical reconstruction of regionalism stresses the same aims in a more or less direct manner, elevating it to such an extent that it ends up blurring the distinctions between regionalism and federalism, and in any event, de-ideologising the issue, making it no more than a cultural phenomenon.

All of these trends come together in the general path that is now leading towards general de-politicisation; and one should not forget that de-politicising means de-conflictualising.

These approaches spark new contradictions, as we can see in the European sphere. Although at a domestic level the individual states fall into the aforementioned patterns, when it comes to European integration they cling to the opposite (ideological and political) positions; it is clear to see (and clearly stated) that the

Member States are the "lords of the treaties", and by extension, of the European Union itself.

Constitutional Perspective

One might quite easily argue that the public arena arises from, and in accordance with, the private arena and that this occurs specifically in the area of law where the private arena takes on some significance. This is the case, for example, with Roman law. The entire Roman legal edifice arose out of the power and rights concentrated in the hands of the *pater familias*, in what was known as *manus*. This encompassed both power over things, *dominium* and power over people, *potestas*, later to be projected in the area of public power by way of *imperium* and *autoritas*. It involved a shift from *ius* to *lex*, whose first modern and complex manifestation was the German dogma of public law formed initially using categories taken from private law (one need only think of the implication from this point of view of concepts such as legal capacity, right holder, subjective public law, legal personality, etc.).

Specifically in the area of constitutional law, it is also very significant that one of the central categories of private law has been used to explain, support, and symbolise the political order—the contract. And it has played this explanatory role throughout the great historical periods. In the middle ages, the political order was explained through the *pactum subiectionis* and in the broad period encompassing both the transition to capitalism and the first or liberal capitalism, the political legal order was also explained in terms of a pact, even in such diverse formulae as those of Hobbes and Rousseau. Finally, in the case of monopolistic capitalism with the emergence of the social state, the idea of the contract or class pact was once again used to explain the make-up—and thus, the constitutionalism—of the social state. The category of the contract, or pact, has proved capable of encompassing different contents in different modes of production. Moreover, it has been able to integrate progress in the political order, insofar as it has also had the virtue of being ever more progressively inclusive.

Further proof of the singularity of the category is that it serves to explain not only unitary state order, but also a more complex political legal order whose most sophisticated form is the federal. From the very first formulations (the most commonly cited example is Proudhon), the notion of the pact lay at the basis of the federation, which is indeed, what the term means (one should not ignore the opposing thesis, most categorically stated by Carl Schmitt, based on the unity of the people and its constituent decision, which excludes any idea of a pact, but this stance lies outside the scope of federal theory).

Consequently, in federalism as in any contract, the decisive feature—and initially, the only feature—are the parts. It is the parts that define the whole, and not the whole that defines the parts, as happens in the unitary state. Hence, insofar as federalism is an agreement, it is a relationship between parts. And the federal constitution—which is not the same as the federal pact—expresses and guarantees

this agreement, this relationship. And from here too, the federal state derives its special constitutional nature. It is worth noting that it is really the only state or legal-political arrangement that is necessarily constitutional. It is the constitutional state par excellence; the unitary state could exist without a formal constitution, but the federal state cannot. It needs the written documentation and all the added guarantees for protection and respect of the pact. This is projected in the basic characteristics of federal constitutionalism. Since they have already been discussed at this congress, there is no need to dwell on them here, but they may be summarised as follows:

1. In Kelsen's formulation, under federal constitutionalism the essential or total constitution is that part of the federal constitution that regulates the relations (distribution of powers) between the parts—i.e. between the states.
2. In particular, the minimum required of a federal constitution is that it guarantees the member states their legal political existence as (federal) states.

Therefore, federal constitutionalism provides the most outstanding and significant institutional guarantee of constitutional law.

This constitutional guarantee must therefore comprise, at minimum, two elements:

1. The autonomy to exist as states, which implies, on the one hand, legal political capacity (i.e., constituent state power) and on the other, economic capacity.
2. Proper organisation of the protagonistic participation of the states in the construction of the federal order. This is manifested at two levels:

    a. At a constitutional level through the participation of the member states as the constituent federal power to frame and approve the federal constitution and as a reforming power to reform it.
    b. At a sub-constitutional level, through participation in the ordinary formation and functioning of federal will, via various forms of intervention in the different federal powers. This intervention may take place in the executive (possible participation in selecting anything from senior tribunals to the make-up of other bodies or the appointment of civil servants), in the legislature (federal bicameralism is the only undisputed element from strictly democratic positions in the theory of parliamentarianism) or the judiciary (different forms of participation in the configuration of judicial bodies and particularly the highest federal court).

These principles (autonomy and participation) are not, of course, isolated from one another: they are inter-related and mutually conditioning to the point that a greater availability of powers (in relationship to the former) may not be particularly important if the decisions—particularly the basic ones—of co-participation are properly configured.

Our aim is not to list the already well-known basic elements of federal constitutionalism but merely to highlight the fact that that constitutionalism is

founded—inevitably, given its purpose—on the participation of the parties in the constitutional pact.

Here, one might go off on a short tangent to confirm what used to be said from the theoretical/political perspective about the relationship between federalism and the republic. This is shown to be proved, from our constitutional perspective, especially in negative terms—i.e. given the incompatibility of federal constitution and monarchy: initially and in general terms, because if constitutionalism now represents the political legal expression of rationality based on the assumption that reason and only reason is capable of building, *a priori*, a system of social organisation, in the case of federalism, this is accentuated by the need for it to be constitutionally configured since, as we have said, the state itself is necessarily constitutional. Moreover, though, this constitutionalism is configured solely and exclusively on the basis of the parts' being the constituent power. Therefore, it excludes any element that is alien to it or has no fundament or origin in it, such as monarchy. And finally, if there is one thing that is in principle incompatible with the federal constitutional construction, it is the symbolic protagonism of the idea of centre always involved in a monarchy.

Returning to our central discussion, what we want to highlight is that in the federal constitutional order, the decisive and relevant element is the parts, in that they comprise and determine the whole. And it is precisely in this point that the contradiction arises in this constitutional perspective we have been examining from the position of federal development: in contrast to the protagonism of the parts (i.e. decentralisation)—that basic element of federalism—the path actually taken has been to try to stress the importance of the whole over the parts, i.e. to emphasise the centre and centralisation.

The arguments used have always lain outside the federal logic. They relate to a revaluation of the idea of "order", associated with the dominant existence of a centre as opposed to the supposed disorder of pluricentrism; the systemic rationality induced by the centre, as opposed to the irrationalism where the decentralising dynamic leads. Consequently, efficiency is used as an argument of necessary pragmatism; federalism, it is claimed, has a great capacity to legitimise decisions but very little to make them.

Another significant factor, and one that completes the contradictory nature of this path, is that this centralising tendency has been developed along more or less *de facto*, or at least, infra-constitutional, lines, lying—as we have said—outside the federal logic. Remember the jurisprudential road of implicit powers in the USA, so alien to the federal spirit, and in economic terms, the mechanisms of conditional subsidy as the main sources for financing the states. In Germany, until the most recent reforms (whose impact in any case is along the lines we have seen), the path has consisted of the various formulae for comparative federalism, through inter-executive relations. The predominance of these *de facto* or sub-constitutional lines contrasts, therefore, with the idea that the federal state is the most properly and formally constitutional of all states.

Finally, one should note the consistency of the centralised processes; processes that are followed in the constitutional order by those of de-nationalisation and

de-politicisation previously noted in the theoretical/political order, but which, nonetheless have been made compatible and even reinforced by underlying processes of unitary neo-nationalism with strong ideological and political charges.

Material or Territorial Perspective

Here, the point of view changes; it might even be said to be almost inverted. It is not the federal idea that appears centre stage; instead, the focus is on the territory in material terms, in order to note its effects on the federal idea. It may be the structural perspective that completes the previous ones.

This means arguing that the methodology of using the mode of production to analyse social articulation can also be applied to the territory, which means taking the territory to have a different consideration in the different modes of production.

This is exactly what actually happens in reality. In pre-capitalism (i.e. in pre-capitalist modes of production) the territory can be said to be a given. It is dependent and conditional on traditions and way of life (hence, the differences between territories), but it maintains the function deriving from that character, which makes it appear imprecise, open, and continuous. This is what we might term the naturalness of the territory or territory as nature.

However, in capitalism, the territory is no longer a given element but a produced one, as a requirement for being appropriated. In capitalism, as we know, production is precisely appropriation. So now, the defining aspects are production and appropriation. And consequently, the territory becomes fixed instead of imprecise; closed instead of open and non-continuous instead of continuous. This is also why, in contrast to the previous naturalness of the territory or the territory as nature, we now get the historicity of the territory or the territory as history, i.e. the territorialisation of history; and the possibility also emerges of the nationalisation of the territory and of the territory as an element of nationalisation.

The current phase of capitalism, economic globalisation, viewed as a specific strategy of accumulation, also involves a specific form of appropriation of the territory. This specificity is what current theorisation seeks to express through the concept of "scale". Scale is described as being the scenario wherein both discursively and materially the socio-spatial relations of power are fought out, negotiated, agreed, and regulated. This scale, this scenario, is the result of the new social tensions and struggles from whose specificity also comes the specific form of appropriation. And hence, it becomes a methodological principle because in the theoretical analyses on the territory, the precedent is not going to be the territory itself; rather, the first thing that needs to be analysed is precisely the process by virtue of which the scales are determined and configured, so that in logical terms, the territory is not the antecedent but the consequent.

On this basis, the framework wherein the process of capitalist globalisation is now being developed with respect to the territory might be described as follows:

Firstly, with regard to the above point, the significant thing is that current processes of globalisation are taking place not only through multiple scales but (in that the territory is the consequent) the scale is now "mobile", diverse, and volatile as opposed to the previous fixed and unique scale of the national state. Therefore, what disappears is the common reference—constant, privileged, and even venerated as untouchable as the first character and expression of sovereignty. It is succeeded by that process of struggles and tensions to determine what the corresponding scale is in each case. The scale, then, is the result of the prior tensions and processes.

One ends up, therefore, with the absolutisation of none of the scales and, thus, with the relativisation of everything. This removes what was previously seen as a characteristic of the previous phase of capitalism: the territorialisation of history and in general and (theoretically) preferential terms, the nationalisation of the territory. And hence from comes an erosion of the basic suppositions that the idea of the nation was configured.

It is therefore felt that economic globalisation must be seen as a conditioning factor; for although not all elements or institutions have a global nature or translation, they must take the global as their ultimate horizon. In this regard and based on our previous argument, globalisation represents a specific form of appropriation of the territory by capital. Initially, at this point which may be seen as the abstract moment of capital and the free development of the law of value, it leads it to materialise the neo-liberal proposal, so that capital flows freely both in time and in space, requiring a specific type of legal protection (to which we shall return later) and also the transformation of basic elements of the previous political order such as sovereignty, starting from what is now beginning to be called flexible or functional sovereignty to the processes indicated which are prior, determining or in any case, conditioning factors.

In any case, it is now important to note the complexity of the relationship between capitalist globalisation and the territory. On the one hand, we are witnessing a certain de-territorialisation of capital in that there is an emergence of what Guattari has called integrated capitalism, in reference to the existence of a series of dominant global centres of capital with no special relationship with any one country, state or nation, which form a relatively independent network. At the same time, the territory as an area of capitalist exploitation has been exhausted, so that capitalism is to some extent surrounded and must achieve through intensity what it can no longer get by expansion. This has led to the transformation of the markets with the introduction of major mechanisms of artificiality and other conditioning factors that should not be ignored in any analysis.

One should add too, that cyberspace offers both a mechanism for escaping the territorial limits towards a "functional space" and a medium for connecting territories and local areas in new ways.

And together with this moving scale of lack of territorial definition, one nonetheless sees the need for another territorial scale defined or fixed depending on certain tasks.

Here, one would have to include two forces or trends that, although both prefer to defend that scale, differ in their significance and their nature. On the one hand, globalisation and the global free market can generally be said to defend dominant interests. Weaker economies tend to protect themselves against it, because it leads to their subordination abroad and to distorting effects at home, as we shall see. As a result, they establish a defensive space (whether or not they are, despite all their efforts, "dominated" and forced to integrate, as happens in many economies not only in Africa and Latin America but even Europe). And on the other hand, we have what it represents *vis-à-vis* what used to be called the abstract moment, the concrete moment of concrete capitals, that need to establish themselves in a similarly concrete space as a condition for recovery ranging from questions related to the workforce to institutional questions, such as security, the efficiency of public administrations, and infrastructures. These trends, particularly the latter, lead us to consider the importance and the role now played for certain tasks by that fixed scale that is the state.

Initially, there was some confusion as to the state's role in the new phase of globalisation, in terms of supra-statehood or internationalisation. The confusion arises from the fact that there has been a loss of what might be called the absolutisation of the state (and a progressive relativisation of it), to conditioning factors, interests, determinations that are external and removed from it, with new characters and to a historically new extent; yet, this ***relativisation*** should not be confused with a loss of importance; on the contrary. In effect, one might argue that insofar as globalisation has determined the relativisation of the state, in the same measure (that measures the intensity and need of the relationship) the state and its role have been shown to be decisively important and to have been revalued as necessary actors and collaborators of that globalisation.

Initially, the state continues, in the present historical period, to play the traditional role of cohesion of a society divided into classes and run through by new fractures and conflicts. This includes the residual remains of what used to be called the social state (one would have to add here that in the latest theories on the social state, there is an increasing trend to argue that it is structurally necessary to integrate it into capitalism, at least in some of its manifestations, such as those related both to legitimation and its nature as a relative engine of capitalism in aspects comprising what Esping-Andersen calls the social investment state). And together with that function, there are tasks such as those related to the necessary inter-relation of the national economy with the global market, with implications for what might be called the crisis of the frontier idea; the elimination, among others, of the controls on financial or trading circuits; the adaptation of internal policies to achieve convergence with the surroundings as well as the overcoming of existing rigidity and facilitating, more or less formally, the transfer of powers to the exterior, removing it from internal control.

However, in addition, I believe we need to stress three other functions in particular:

1. The first is the role being played by the state in the current economic crisis; because it is a global crisis, what we are seeing is the failure of the institutions of globalisation. As we know, globalisation has a relatively un-defined institutionhood, but it is wide enough to have been able to come up with a very different response to that currently on offer. The International Monetary Fund, the World Bank, the G-7, G-9 and G-20 and other charity organisations have to date displayed an inactivity and inefficiency that have made the state the protagonist. Where the actual centres of decision-making may be quite a different matter, but the fact is that it has been the state, with its resources and its policies, that has come out in defence of the domestic situation. This means that the state, naturally, has been charged with a function that has been shown to be absolutely fundamental and will ultimately be the conveyor belt carrying the cost of the crisis from capital to labour. From this point of view, we can see that the state is absolutely fundamental in overcoming the economic crisis.
2. The second function is the new role of the state in the financialisation of the economy. As is well known, financialisation of the economy is the important step from productive capitalism to one that, unlike the traditional configuration of the law of value based on accumulated labour, is no longer profit-based but revenue-based. From this perspective, the state plays the basic role of social control over the population, guiding its behaviour and consumption to such an extent that what Foucault called bio-power or bio-politics is being transferred to this new role of the state in the financialisation of the economy characteristic of today's capitalism.
3. And thirdly, the state is beginning to play a major role in what is known as cognitive capitalism (covering all matters relating to the knowledge economy). This post-Fordist state is being configured as a competitive state wherein a whole series of actions and interventions are concentrated in order to create the right conditions and to influence practically all the variables in this economy, in order to contribute to competitiveness in a global market.

All the above triggers two types of dynamic that are of interest to us here: a socio-political dynamic and another more specifically constitutional one.

With regard to the socio-political dynamic, it is important to stress that these tasks of the state and the measures they involve, in terms of consistency and homogeneity, promote a necessary configuration of a centre. They thus tend towards a greater or lesser centralisation of the territorial organisation but always with a preference for the whole over the parts. And at the same time, in the opposite direction, (again we see the contradictions) decentralised trends are emerging. In abstract terms, they can all be said to relate to an accentuation of the processes of unequal development. More specifically, one may distinguish firstly those trends that are generated within the states as a consequence of neo-liberalism and deregulatory practises. Not only can they erode social cohesion negatively and passively, they can also positively and actively activate movements either of in-solidarity on the part of rich areas towards poor areas or of rejection and protest in poor areas towards rich areas, using phenomena of internal nationalism of one kind

or another. Secondly, there are others generated from outside, in that internal disarticulation may be accentuated by external induction, as a consequence of globalisation, in what is viewed as a typical inter-relation of scales, by creating specific relations with different internal local or regional areas. (This is what is sometimes known by the Japanese term "flying geese"; i.e. the coexistence of globalisation with an ever increasing number of re-feudalisation processes).

Both types are a response to the execution of free market suppositions, i.e. they translate territorial inequality before the market.

We could extend our analysis to show how these two major contrasting trends translate from a perspective of conflict and from the configuration of the historical subject. However, we shall merely note that this analysis also involves elements of contradiction. Although the centralised trends and centralisation itself might seem capable of leading to greater unification of interests and demands, and might thus open the way to a crisis of legitimation, a greater strengthening of social opposition with a subsequent strengthening and extension of the conflict and as a result the development of an antagonism or a binary dialectic in the most traditional sense of class conflict, practice shows that—in some cases, at least—the large-scale emergence and advance of social movements, still characteristic of today's conflict development, has arisen most in decentralised or federal states. It stands at the foreground of any analysis of the German example—although it has been argued that the German Green party has ended up becoming the "liberal party on bicycles", with humorous references to the *Golden Greens*, i.e. followers of Joschka Fischer who appears to have been a fortunate negotiator when it came to the economic possibilities of environmentalism. It can also be seen in the case of the USA, where the existence of federalism might also be said to have facilitated to some extent, rather than prevented, the emergence of the social movements that have intensified in recent times. It is also clear that this is the trend of the future, i.e. the creation of what Holloway has called "crack capitalism" and that it coincides with other theories that suggest that the new historical subject is not going to be antagonistic, configured, and unitary but fragmented and multiple. The thrust will be to establish a series of processes that, it seems, will not tend towards convergence but towards a certain simultaneity; to transform society without needing to obtain power, even distancing themselves from it. Given the increasingly evident characteristics of the function of the state, it is no longer seen as a mechanism of transformation. The state is taken to be a lost cause and these new social movements and the new "historical subject" seek to distance themselves from it. Therefore, the important thing is considered not to create parties or stand in elections, but to create (de-mercantilised) spaces on the fringes and progressively to take over the social space.

As for the constitutional dynamic that was also said to generate the new function of the state, it appears to lead to a constitutional erosion, a crisis of constitutionality, and, perhaps more profoundly, even to a process of deconstitutionalisation. We draw this (clearly radical) conclusion from the two following considerations:

Firstly, because all those functions and tasks of the state are proof of the importance and depth acquired by what has today become a common venue (economic reason prevails over political reason); because the state, the

constitutional state, was the specific place of politics. It is precisely the abdication by the state of that function and its move towards strictly economic functions that reveals the political emptying of the constitutional state. This marks a radical inversion of constitutional suppositions, it is true. If constitutionalism as the law of values, and the constitutionalism of the social state, meant anything, it was the subordination of the economy to politics. From this perspective, the whole new constitutional form of social state, the inclusion of socio-economic contents in the constitution was all intended precisely for this purpose: to subordinate the economy to politics; to subordinate the means to the ends. The constitutionalism of the social state was precisely this, the dominion of ends over means; and consequently, the constitution was the predominance of values over the material mechanisms used to achieve them, and the decision was a political decision and, consequently, democratic and participative. There can be little doubt that the terms have been inverted and continue to be inverted both domestically and in the European Union. Some of us had already raised criticisms in this regard in the past. In recent times, however, and especially since the pact of competitiveness, the situation appears eminently clear. Yet, there has been an inversion of the terms of what we—and some theorists—had considered to be a fundamental element in the process of Europeanisation: the process of constitutionalisation of Europe and the Europeanisation of the states. Things are moving in a diametrically opposite direction, towards the deconstitutionalisation of Europe and the Europeanisation of this deconstitutionalisation in the states. The most recent constitutional reform in Spain is precisely a consecration of this process. The implementation of this constitutional reform is not actually reforming the constitution. If, as we have already seen, the constitutions of the social state are characterised precisely by a primacy of ends over means, the subordination of the economy to politics, then insofar as the constitutional reform prioritises the economy, then it is not reforming the constitution but breaking it up. Starting from this juncture, other elements of the constitution governing the social state are affected. If policies have to be submitted to these criteria of deficit and debt repayment, if everything is decided on the basis of those basic elements, what does pluralism mean? Indeed, what sense is there in the substantial elements of democracy that should promote purely political aspects over more profoundly socio-economic ones? From this perspective, one can see that there has been a profound erosion of the basic constitutional suppositions, including that new constituent power that has transformed the constitution of the social state into a neo-liberal one.

However, it also important to note that the process of constitutional erosion is occurring in the area of forms. Heretofore, it was both a constitutional and a legal supposition that law corresponded to territory. Yet, globalisation and the characteristics we have already discussed with regard to the state's functions and its role indicate that this correspondence does not exist. This has a general significance for the configuration of the state governed by the rule of law which, as we know, was adapted to a whole series of elements and principles that are now being ignored in the process of legal globalisation. This process lacks not only the basic democratic element of the law, but also the technical element, rationalisation,

which fell within the general concept of the legal systems (that included everything from legal theory to the spatial validity of the rules and all the other specific criteria for their configuration, such as the principle of hierarchy, the principle of competence, the principle of unity, the principle of consistency, etc. as well, of course, as the process of construction and configuration of the public area with certain well-defined sources that have now become private, since legal globalisation also, to a large extent, means the privatisation of the law). If this is the case with the law in general, we can see where it all leads when it comes to constitutional law in particular, characterised as it is by a much greater process of formalisation. Above all, it is important to highlight one phenomenon that is of particular relevance: heretofore, there could be said to have been a territorial correspondence between the formal constitution and the material constitution, but that correspondence has now evaporated. The validity of the formal constitution continues to refer to a territory, but the elements that make up the material constitution have been deterritorialised; they are external and moreover, they are changing. This is true of both material conditions or elements and of subjectivities. Consequently, the capital/labour relationship as a feature of the material constitution is also being deconstructed. Thus, it is an element that certainly impedes labour being configured as a legal/political subject, as was the case in the previous constitutionalism; now, much of the subjectivity of labour is neither stable, homogenous, nor internal, and as a result its configuration as a legal-political subject has become very complicated. In addition, some of the legal weapons labour could call on to defend itself, such as citizenship, are becoming precisely a contrary legal weapon. This lack of correlation between the formal constitution and the material constitution, in conjunction with the transformation or breaking-up of constitutions reflected in the primacy of economics over politics, should lead us to consider that the current constitutionalism has little to do with the constitutionalism we know. We need to renew the constitutional approaches and integrate them into a new constitutionalism that befits the real situation; there is a need for a belligerent, critical constitutionalism. If this is true, then this erosion of both the content and the form of the constitution will have even more impact on such an important aspect for federalism as its constitutional configuration. And so this crisis, erosion or deconstitutionalisation, also poses a risk for the federal constitutional arrangement, a system that is so formalised and so territorially linked.

From Competitive Federalism to Global Market Federalism

Miguel Ángel García Herrera and Gonzalo Maestro Buelga

Introduction: Institutional Method and Transnational Power

The current economic and social crisis—which is now showing signs of becoming an institutional crisis—calls for a review of the concepts used to analyse previous historical periods wherein the development and practice of certain institutional techniques of relationship between territorial powers have prevailed.

There are some inherent contradictions in this statement. On the one hand, the persistence, and even worsening, of the crisis prevents a sufficient degree of consolidation from being achieved. On the other hand, we need to face up to the events and identify the trends that took hold in the final decades of the twentieth century and during the first years of the twenty-first century.

At the end of the day, progress is achieved by keeping sight of the reference of the past, with which we need to enter into a tense and complex dialogue. At the same time, new challenges are never tackled with the tools of the past but with new ad hoc approaches developed to adapt to new conditions. It is within this troubled and contradictory context that the debate must take place on the territorial distribution between the different institutional levels.

This starting point calls for certain conceptual and methodological considerations that mean reviewing some of the premises that have underpinned federal theory to date. This is necessary in order to lay the foundations for identifying the main trends behind legislative reactions to the dismantling of the master walls built up in the twentieth century—at least as a provisional approximation, pending less turbulent times.

It is worth noting the shrewd observations made some years ago by noted Italian jurist Antonio La Pergola, who said that any understanding of federalism would be

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incomplete if it lays too much stress on technical and institutional aspects. This does not mean that we should downplay an analysis of the techniques linking the holders of constitutionally delimited powers, which needed to be examined in rigorous legal detail. However, we must first offset such studies with other references that will provide us with a more illuminating interpretation.

The transition from dualist to cooperative federalism derives not from a refinement of the legal techniques of constitutional structuring but from the political impetus of the New Deal. It was not an attempt to undermine the federal model but to harness its potential to maintain the separation and accentuate a collaboration that would promote cooperation between the different levels of power. As the author stresses, economic necessities forced the superimposition of functional units on territorial powers. The desire to overcome the economic crisis called for an abandonment of the abstentionist approach, led to public intervention in the economy and called for new forms of relationship between powers. This means that an institutional approach is more productive when it is tied into a more general concept that takes stock of the historical period of constitutionalism to which it belongs.[1]

Some years later, Lucio Levi echoed a major debate in Europe, lasting over several decades, which sought to emphasise the limitations of the institutional approach and the need to extend the perspective of federalist analysis. In this, his approach was similar to that of the writers responsible for some of the most outstanding efforts to sustain the federal idea in the difficult times of the European inter-war dictatorships (such as Roselli); those who sought to rejuvenate the theory (Friedrich and Elazar); others who turned federal theory into an institutional banner (Spinelli) and those who have devised a global federal future, such as Reves, Clarck, Sohn and Kelsen.[2] An awareness of the limitations of the institutional approach makes it necessary to highlight the ways wherein federalism has adapted to change.

There is an attempt to offset the limitations of the approach by framing federal techniques within the form of state. Taking state identity into account makes sense of the territorial distribution of power: which powers are distributed and why; which powers are reserved to the central authorities and which are allocated to member states; which public tasks are allocated to the institutional levels and which formulas of integration and conflict are covered. These questions pertaining to the construction of the federation can be answered in greater depth when they are analysed in the light of the contents of the form of state.

However, this approach is less helpful when it takes the "values" of the form of state as its reference.[3] It is necessary to focus on the relations between politics and the economy as a relevant constitutional decision that identifies interests, relates

[1] La Pergola (1994), pp. 277 et seq.

[2] Levi (2002), pp. 107 et seq.

[3] Bognetti (1991), UTET, Turin, p. 275.

them, and defines public mediations.[4] In this way, the vague dialectic between unity and diversity, so common in federal analysis, takes on a different meaning. A tension emerges that is not limited to cultural, social or identitary aspects, but which clarifies the contradiction intrinsic to social reproduction, the distribution of the economic product, the materialisation of social rights. The partial and instrumental nature of federal technique is completed with the global notion of the form of state that in turn receives from the federal input a precise instruction on the different institutional levels' responsibility in performing public tasks.

However, in our times, this fruitful marriage can prove insufficient for an understanding of the distribution and exercise of power. Although this is not the place for a detailed analysis of the crisis of the state and its supposed decline, we must inevitably touch on this situation briefly.

It would be questionable to recover the theme of the crisis of sovereignty as a reference for analysing the current distribution of power. We need to rid ourselves of outmoded concepts and concentrate on the transformation of state power, which suffers internally from external conditioning and at the same time experiences the capacity to project itself in a transnational sphere.

On this occasion, we only need look at the joint inter-state exercise of public powers to deal with the economic, social, and environmental problems, etc., which are impossible to resolve in an isolated state perspective. The pooling of internal supremacy and the relaxation of that independence that characterised the old system of sovereignty entails state integration into structures that should reconcile the tension between preserving the state's identity and incorporating it into the college of state powers that adopt consensual agreements for preference. Altogether, the new situation is difficult to reconcile with the monolithism of the federal state that views the exercise of power from an introspective perspective.

Federalism should no longer be identified with state ordinance, now that the forms of expression and exercise of power have been enriched. An analysis of the federal order is incomplete if it is limited to a study of the internal distribution of the powers, which is no more than a partial and insufficient expression of the reality of power. Maintaining an institutional mind-set means relinquishing the ability to understand the truth of power.

The chronic and pertinacious distance between the theory and practice of federalism is manifested in new nuances. The heterogeneity of manifestations of federalism and the emergence of other forms of territorial distribution of power are causing problems for interpretative constructions that have proved incapable of taking account of this federal heterogeneity.[5]

Federal theory must, then, address the new distribution of power and the inescapable consequences for the internal order of integrating the state into transnational structures. Otherwise, it would have to renounce any analysis of the inter-

[4] On the relevance of structuring public and private interests, see Luciani (2011).

[5] Santamaria De Paredes (2003), pp. 138 et seq.

relation of the institutional levels in the plurality of forms manifested, for the sake of institutional formalism.

Friedrich's construction of the federal process as an open arrangement with which to address the integration of state federalism into the order arising from globalisation continues to be useful.[6] For an understanding of the conditions of reproduction that emerged in the last third of the twentieth century, it is of prime importance to supersede the identification between federal state and federalism, which derives from political reasons—the consolidation of the federal model par excellence from its confederal matrix—and theoretical reasons—a vision wherein empirical and dogmatic reasoning converge. A federal essentialism that prioritises an institutional ontology obsessed with the dialectic between federal primacy and state participation is scarcely workable. The instrumental nature of federalism can be recovered when it is confronted with an enriching complexity, making it necessary to shed essentialist residue.

Friedrich's contribution provides a launch pad for integrating the manifestations of power because it ignores sovereignty and statehood to focus its attention "on the specific plane of the processes of transformation of relations between institutional levels and their determining causes."[7]

However, the convergence of the fin-de-siècle transformations and the eruption of the economic and sovereign debt crisis make it necessary to extend our understanding of the new institutional structuring. The exercise of power is ostensibly shifted away from the state, in a dynamic that abduces its autonomy and inspires the creation of forms of articulation.

There is a proliferation of institutional and factual centres issuing decisions of varying legal value but with an unquestionable capacity to condition.

This structuring affects the function of states forced to practise a direct form of collective exercise of power and an indirect form, since other subjects are involved whose regulatory bases and economic resources are established by the states. This hidden power manifests itself, for example, in the IMF and the ECB, whose independence of management lies, ultimately, in the consent and in the basic decisions that it is up to the states to adopt.

Another notable consequence is the recognition of the process of legislative deformalisation and degradation. In the federal tradition, one must inevitably refer to the constitutional accord. However, the rigour of the constitutional form yields to the demands of economic exchange in a context of imbalance between the economic and political spheres. The asymmetry between political and economic power is translated into a law that has arisen outside the democratic institutional channels. Pragmatism encourages a regulation without constitutional rank that calls into question the requirement for the federal accord.

Consequently, out of the convergence of historical and institutional vectors arises the bisector that is the manifestation of the new challenge of federal theory.

[6] Friedrich (1968), p. 8.

[7] Pierini (2003), p. 19.

We need to interpret the classic distinction between dual, cooperative, and competitive federalism from the perspective of the form of state and replace it with the federalism of the liberal state of industrial capitalism, the federalism of the social state of Fordist capitalism and the federalism of the crisis of the social state of financialised capitalism. To this, we should add the specifics required by the current crisis in the neo-liberal model. In other words, we are faced with the twin task of understanding the distribution of power in the new capitalist order and the consequences arising from the crisis of neo-liberal postulates and policies.

This situation is already leading to a dislocation in institutional relations. The present moment is dominated, especially in Europe, by a need to rebuild the production process, afflicted by the problems facing the financial system and doubts over sovereign debt. And the issues faced by the financial system are a manifestation of the difficulties of the capitalist system itself in organising its own reproduction in a context of systemic and civilisatory crisis with growing problems of redistribution of wealth and environmental sustainability.

Any observer can see a process of centralisation of powers that calls into question the constitutional previsions of the state. The elevation of decision-making towards political centres, as seen in the Franco-German dualism, or the protagonism of the G-20, translates into a need to extend fiscal and budgetary union in the European Union or the reinforcement of the IMF as an agent of the states as a group. From these initiatives will emerge the pillars of what will be an adjustment of federal technique to the needs to rebuild financialised capitalism.

In synthesis, the federal debate will be played out in a context characterised by a) the displacement of the nuclear centre from the states to the institutional forms of collective exercise of power and the subsequent centralisation of decision making, b) replacement of the constitutional base with legal rules and agreements between the state subjects, and c) instrumental adaptation of federalism to the needs for a solution of the crisis of financialised capitalism.

The Limits of Competitive Federalism

Competitive federalism is a theoretical proposition devised in the second half of the last century. It encompasses both the ideas of Tiebout[8] and formulations linked to the transformations in relations between the state and the market that were consolidated in the 1990s.[9] We also need to assess the review made from the late 1970s in the economic literature of the fiscal crisis of the state and public spending on social welfare.[10]

[8] Tiebout (1956), pp. 416–424.

[9] Dye (1991).

[10] Salmon (1978), pp. 24–43; Breton (1987), pp. 263–329.

This theoretical construction is basically economic, at least in the configuration of its essential elements. At its essential core, it consists of proposing competition between the horizontal and vertical tiers of the territorial organisation of the state, between the federation and the confederated member states, and between the members states themselves. Regardless of the fact that competitive federalism is offered as a suggestion, given its associations with the recovery of the liberal proposals on the minimum state and the grounding of public decisions on the logic of market workings,[11] as an ideological proposal, it has been associated with an extension of the neo-liberal paradigm.[12] This can be seen by the chronological correspondence between the theoretical consolidation of the proposal and the hegemony of the neo-liberal project. It is hardly surprising that "analyses" of the effectiveness of inter-territorial competition defended in competitive federalism conclude with a criticism of the social state and its intervention in economic and social life. The contrast between the models is evident: cooperative federalism linked to the social state versus competitive federalism linked to the crisis of the social state.

The elaborations of the early theorists of competitive federalism focused especially on the competition between sub-state entities in their horizontal relations. They also retrieved the logic of dual federalism by recovering the conflict in vertical relations,[13] with a view to restricting federal power. However, their analyses involve certain ideal conditions of competition that are unreal; the application of sanctions is scarcely viable in situations such as the European Union and they are incapable of describing the political structuring of the state at the end of the twentieth century.

This is reflected in the reworkings of Tiebout's model. Vertical competition is also constructed in an ideal scenario of equivalence of powers between the different levels, within a framework of strong autonomy amongst them.[14] This all serves to expose the substantial ideological dimension behind the competitive federalism proposal.

Its main problem lies in the fact that it ignores the transformations taking place in the transition of the social state to the form of market-state. The vertical relationship of powers changed after 1929, when the crisis sanctioned the end of market autonomy As a result, the inter-relation between cooperative and competitive dynamics was inevitable in inter-territorial relations. Although the theory of competitive federalism insists on the thesis of a break, it cannot be denied that territorial cooperation survives. There is, then, a coexistence between continuity and break.

However, it is worth emphasising the essence of federalism as a mechanism for distributing power. In the early moments of its American genesis, dual federalism was seen as a limited technique for limiting state power that complemented and

[11] Buchanan (1995–1996), pp. 259–268.

[12] Pierini (1999), pp. 1410–1428.

[13] Corwin (1964), p. 148.

[14] Baldi (2009), pp. 95–126.

reinforced the principle of the separation of powers. "This 'dualist' interpretation of the federal principle was based on a minimalist conception of the role of federal government, which act as a guarantee of a civil society separated from state apparatus, anchored in the principle of liberty and formal equality."[15] The territorial distribution of power was functional to the guarantee of social and market autonomy in the liberal conception.

This perspective of dual federalism has been taken up by competitive federalism. Its analyses are intended to claim that competition is a requirement for the effective operation of state power to introduce an idealised market model as a parameter for evaluating state action.[16] The purpose is to recover federalism as an instrument of control of state power and as a technique for the distribution of power. What, then, is the limit of the theory of competitive federalism that makes it necessary to review the debate on federalism under the present circumstances? The basic problem is that competitive federalism is a discourse on the distribution of state power and, as such, insufficient.

The organisation of power in the world of globalised markets has substantially mutated over the last three decades, adopting a limited conception of state power. Three proposals have been put forward in opposition to the economic constitutionalism of the social state. The first follows the logic of the competitive federalism discourse: the tension between the unitary power of intervention and the sub-state territorial powers. The second consists of the appearance of transnational powers operating as authorities that condition public power, be it unitary or decentralised. The third involves the emergence of private powers competing with the public power, as protagonists of the global rebuilding of power. Together, they represent a challenge to the federal discourse.

Globalisation theory has been conscious of the complexity of this articulation and has sought to tackle its difficulty using formulae such as glocalisation. This is an attempt to express the interconnection between the two trends that are a manifestation of the transformation of the form of state: "The emergence of regional and local economies within some national economies (...) whether such re-emergence is part of the overall globalisation process (...) All these changes have their own material and/or strategic basis and thus contribute to the complex ongoing re-articulation of global-regional-national-local economies."[17]

The reflection that enables it to embrace this apparently contradictory dynamic is re-territorialisation, or the spatial re-ordering of power arising from the conclusion of the historical cycle of Fordist capitalism. Thus, an intensification in local-federal pressures should be understood within a globalising strategy as functional to the emergence of the market-state. The complexity of globalisation has rightly been stressed,[18] since it involves a process of re-territorialisation of economic relations

[15] Pierini (1999), op. cit.

[16] Buchanan (1995–1996), op. cit.

[17] Jessop (2002), p. 182.

[18] Jessop.

that simultaneously affects the state and global sphere, because from both dynamics it seeks to limit the public power's capacity for economic intervention and subordinate it to the requirements of the accumulation process of financial capitalism.[19] Naturally, this spatial reorganisation leads to an intensification of economic competition both within the state and in the global space. The association between competitive federalism and inter-territorial competition for the capture of capital[20] enables the federal proposals to be placed in a wider context, since the two are convergent strategies.

Let us now return to the interpretation of federalism as a form of distribution of power. Clearly, the political and spatial reorganisation involved in glocalisation also represents a new reorganisation of power wherein apparently divergent, but actually convergent, trends coexist. The contextual framework of the discussion on federalism must be the reorganisation of power, consummated in accordance with glocal logic and which now entails an interaction between different levels of power. And these powers are diverse, since not only institutional but also para-institutional and private subjects are all found within the new distribution.

Therefore, the fundamental limit of the proposal of competitive federalism is its essentially state dimension and the ideal and artificial scenarios of the configuration of power in competition.

From this perspective, it is difficult to understand the effect on sub-state powers in the global space of private powers and their dynamic of hierarchisation, since it cannot correspond to the competitive mechanisms devised in federal theorisation. It is hardly surprising that interpretations of the new challenges of federalism are beginning to emerge stressing, precisely, the context wherein it has to be placed. Transnational federalism[21] tries to make up for this deficiency by placing the debate on federalism within a new contextual framework. Delbrück seeks to understand the new organisation of power arising out of economic relations developed at the end of the last century. The small volume of literature on transnational federalism uses federal ideology to build a conceptual framework wherein to contextualise the emergence—as a phenomenon related to globalisation—of a host of different players exercising public authority at different levels.

From a federal perspective, he addresses the new distribution of power generated in the global context. It transcends the interpretations that want to see trends towards federalisation in globalisation dissociating federalism from state: "A concept of transnational federalism that is not state-centered could serve as a structural-functional framework and in legal terms as a constitutional basis for the vertical and horizontal cooperation of the various actors exercising public authority beyond the states for the common good."[22] Delbrück seeks to differentiate it from the practise he calls *multilayering*, a concept close to multi-level governance, although the

[19] Brenner (2003).

[20] Dye (1991), op. cit.

[21] Delbrück (2004), pp. 31 et seq.

[22] Delbrück (2004), op. cit.

construction is more ambitious. It is also close to the perspective of the proposals of legal cosmopolitanism in the way cooperation is conceive of between the actors converging in this new map of global power and preferred spaces of action.

We are specifically interested in taking the elements of Delbrück's proposal that underline federalism's dimension as the distribution of power and the impossibility of containing this new reality within the framework of competitive state federalism.

What does this perspective contribute? As a description, it better matches the reality. It appeals to federalism as a technique of distribution of power, but it operates in a different context to that wherein federal theory was developed. It allows an understanding of recent phenomena that have been fostered by the crisis and new developments in the area of competitive federalism.

We are witnessing the erosion of local power, previously a strong player in the vertical competition of competitive federalism, apparently opening up a new area of conflict in our unstable "autonomic" model. Supranational, extra-state, and private power operate with a disciplinary function, which was less obvious in the phase prior to the crisis when the demand for rationalising intervention was less evident. Now, the new function of these powers emerges: the function of discipline. The imposition of parameters of recovery and reinforcement that guarantee the survival of the accumulation mode of financial capitalism has restructured the vertical relationship between the powers, avoiding paths of distortion that would compromise the continuity of the model imposed since the 1990s. The discipline of local powers is both a premise with which to avoid the distortions of territorial competence and a catalyst for the erosion of local subjects that are now subalterns in the global system. Transnational federalism corrects competitive federalism by reconstructing the vertical relationship of power through an affirmation of the disciplinary function as a guarantee of capital accumulation.

Forms of Transnational Power

The distribution of the power of globalisation incorporates the characteristics of the federal form because it preserves the two defining moments: diversity and unity.[23] These features correspond to the requirement for capital accumulation at moments of emergency: competition and discipline. The first moment expresses the tension between emerging levels of power on the global stage; it refers to the relations between state and sub-state powers and is functional to the consolidation of the anti-interventionist paradigm and to the affirmation of the centrality of the market. The second moment, discipline, represents unity, internal planning, the hierarchisation of the microcosm of power that forms globalisation. Despite the apparent destructuring

[23] Delbrück (2004), op. cit.

and its fluid nature, a unified and disciplinary instance is constructed that is capable of safeguarding the consistency of the "model" and the requirements of accumulation.

Global Power

The first theorisations on global power are based on two relevant concepts: empire and triadisation (or trilateralism). These interpretations are different to the internationalist logic because they draw a complex map, with various but interdependent players, and a hierarchical structure that expresses the unity and consistency of the global power and its subordination to the extension of the unconditioned market.

The form of global power still centres on the state since the hegemony of the "imperial state" identifies the constellation of global power and becomes the unitary instance of the project of financial capitalism. For its part, triadisation offers a structure based on the distribution of influence in the global market. Power is formed within the regional area (triad) and is founded on relations of internal hegemony. Triadisation's inability to explain the new formation of global power explains its development and the fact that it is interpreted as a spatial rescaling of the power imposed by globalisation.

The concept of "transtriadisation"[24] is a reaction to these limits, establishing an interconnection between triads and incorporating the aforementioned features in the formation of global power. The relationship between the triads is transferred by competence/unity duality and expresses both the conflict in the distribution of influence on the global market and a moment of unity in its extension, functioning, and centrality.

It is certainly true that the foundations of these theories have been eroded and their capacity to explain the new articulation of power has been diminished. The state hegemony wherein the two were based has waned and it lacks the vigour it enjoyed in the 1990s. New inter-state relations no longer match the outmoded organisation of power seen in the early years of globalisation theory. However, as an antecedent that conceived the overcoming power of the state sphere and as a carrier of the dual logic of difference and unity, it deserves to be revisited in the debate on global market federalism.

The most finely honed formula on the form of global power is to be found in the work of Negri and Hardt. They defined the new structure of power as a constellation made up of very different public and private, state and international forces. In this complex system of global power, a conglomerate of subjects are at work, interacting with coadjutant functions that tend to create both the legal conditions of legitimation and the real structure of control. In this network, international organisations, nation states, and the economic power represented by the large grid-shaped global corporation all coexist. Despite the apparent dispersion, it is a

[24] Jessop (2004), pp. 25–48.

global power with a relatively ordered structure organised in hierarchical circles. The new structure of power is pyramidal in form and may be divided into three tiers.[25] In the first tier, at the pinnacle, there is "one superpower, the United States, that holds hegemony over the global use of force,"[26] although within this tier, the pinnacle broadens slightly, to make room for "a group of nation states [which] control the primary global monetary instruments."[27] On the second tier stand the nation states that are not members of the pyramidal summit, together with the new economic power "structured primarily by the networks that transnational capitalist corporations have extended throughout the world market,"[28] acting under the stewardship of the first tier. Finally, the third tier consists of groups representing popular interests, filters, and mechanisms of representation that allow controlled inclusion of the multitude into the system.[29] However, this structure forms a single power, functionalised to the extension of the global market and it assurance, a power that "overdetermines them all [and] structures them in a unitary way."[30]

While these formulations, devised in 1997, need updating, we believed that this view of the structure of global power is still useful. The relativisation and limitation of the United States' global power was subsequently recognised by Negri. The appearance in this debate of the concept of a "global constitution" conceptually opens the reflection on power up to a diverse discourse, which is of interest to the discussion on federalism. Negri's concept of the "global constitution" incorporates a tension between institutional-territorial delocalisation and the organisation of dispersed powers, among others the economic-private and the para-institutional: "The process of imperial constitution is already underway. That is the limit faced by the instruments of global capital that are already working effectively."[31] This formula evokes the need to regulate the relationship of these powers, which although materially structured, are juridically unstructured. The global constitution represents a demand for the juridification of the constellation of coexistent powers in the new scenario. This demand derives from needs that are contradictory, but nonetheless evident in the crisis. On the one hand, there is the need to rationalise the intervention of the powers in the economic area, for example, the proposal made a year ago by Gordon Brown to establish a global constitution to regulate the financial system; and, at the same time, the incorporation of elements of social sustainability which the global constitution should incorporate. In short, it is worth preserving *Empire*'s notion of the legal reorganisation of global power, which necessarily influences the territorial relationship and the established internal hierarchy, contributing to the creation of unity by the new power.

[25] Negri and Hardt (2000), p. 309.
[26] Negri and Hardt, op. cit., p. 309.
[27] Negri and Hardt, op. cit., p. 310.
[28] Negri and Hardt, op. cit., p. 310.
[29] Negri and Hardt, op. cit., p. 310.
[30] Negri and Hardt, op. cit., p. 309.
[31] Negri and Zolo (2003), p. 14.

It is true that its approximations have been affected by the erosion of US military power, a consequence of the exercise of its role as a global policeman and its economic hegemony. This requires an organisation of power that is linked less to the concept of state hegemony and the notion of empire, in turn complicating the relationship between the dispersed powers that combine in the global world.

Despite this dispersed and apparently de-structured scenario, the discussion on the global constitution has now reached a certain degree of consolidation. There are two lines of debate: the first is linked to the legal cosmopolitanism that, on the basis of the dynamic of globalisation, stresses the need to fill the space of control and participation in the new open sphere. The basic area of discussion consists of the fundamental rights and their integration into the global scenario wherein the proposal for a global constitution plays a central role.[32] The second, based on a description of the constellation of powers emerging in the new scenario, seeks to understand the consequences of affirming the new order and introduces the demands for legislative regulation and regulation of relations in the microcosm of global power. Unquestionably, the latter, which stands at a remove from the voluntarism of the first, is more useful for analysing how to integrate the discussion on federalism into the distribution of the power.

One interesting approach is that of Sabino Cassese.[33] Cassese identifies some of the features of that constellation of emerging global powers, which we shall use as the basis for further discussion. The idea of global constitution is obviously seen as an incipient process from which to debate on the prevailing trends in the organisation of power. At the same time, the references to global democracy and the legitimation of global powers denote an ethical dimension that is not always compatible with the logic of global power.

The first element worth stressing and which represents a common point in this reflection is the description of global power. It is seen as a microcosm of private, para-public, public, state, supra-state, international, territorial, and global entities. This diverse nature makes it impossible to establish levels and to structure their interaction. Theories on multi-level constitutionalism and its governance are insufficient to explain the set of relations established within this microcosm.

The second feature is that the prevailing inter-relation established in global power is predominantly horizontal. Although there are vertical relations, the prevailing relationship of the forces of global power is horizontal. This is the reason for the repeated affirmation, common to the literature, that global power is not structured hierarchically.

The third feature refers to the juridical organisation of the global order which is said to lack a body of general rules regulating its relations and guaranteeing the effectiveness of its intervention.

The global legal order is considered to be expressed by means of a juxtaposition of different orders, predominantly sectoral. The difficulty entailed in this thesis is to

[32] Ferrajoli (2011), pp. 519–526.

[33] Cassese (2006).

locate the moment of the unity of global power. The apparent paradox consists of intuiting a global logic but presenting it as dispersed. Despite this, there are mechanisms of affirmation of unity in the global order. The sectoral juridical orders, especially the most important ones, impose a logic of unity. Likewise, the mechanisms of horizontal and vertical inter-relation help define the consistency of global power. However, this recognition does not succeed in overcoming the weak construction of the unity of global power.

Global Governance

Possibly the most common discussion, albeit indirect, on global power, is the debate on "global governance" as an exercise of power in globalisation. An examination of global governance reveals the mechanisms of unity and discipline established in the fragmented magma of power in globalisation.

The two initial claims of the discourse analysis on governance are, firstly, that governance entails a radical change in the conception of politics and, secondly, that it should be interpreted as a process of privatisation of political decision-making.

Breaking with the political paradigm established during the twentieth century, governance entails the disappearance of the supports and legitimations of public power and its decisions, at least as they are configured in post-war democratic constitutionalism: "the shift to a postmodern global governance has been fully achieved. This shift, moreover, has been of such intensity as to dissolve not only the 'modern' but also its memory, and to destroy every legal and political dispositive of twentieth century 'social democracy.'"[34] This metamorphosis has put an end to the conflictive construction of law.[35] The political and social project of democratic constitutionalism which emerged in the construction of the social state, based on the integration of conflict, has been definitively annulled and the weak subject of the conflict expelled. Governance involves introducing a political logic that is radically at odds with the previous one, dissociated from the bases of legitimation on which the workings of power were built.

This consideration of governance goes beyond a mere reference to territoriality and globalisation. Despite the attempts to disguise the means of dissolution of politics revealed by the new exercise of power, and to present governance as a kind of surpassing of an authoritarian logic of politics, to be replaced by social permeability, the fact is that governance expresses this dissolution of politics linked to democratic constitutionalism: "the term governance has been used as a kind of catch-all to refer to any strategy, tactic, process, procedure or programme to control, regulate, model, dominate or exercise authority in a given nation, organization or locality. In general, "good governance" is seen when the political

[34] Negri (2005), pp. 27–46.

[35] Negri (2005), op. cit.

strategies seek to reduce as far as possible the role of the state, to promote non-governing mechanisms of regulation (. . .) to introduce a new public "management", to change the role of politics in the management of social security and economic questions."[36]

The second statement defines governance as a strategy of privatisation of politics. The literature establishes a relationship between the idea of governance and the process of privatising political decision-making.[37] The elements characterising the new forms of governance are: its tendency to evade legal ties and the privatisation that expresses the integration of private subjects into the decision-making process.

If we trace back these characteristics, we find a path that, in the European case, began with "comitology", the OMC (Open Method of Coordination) and governance, and continued with other mechanisms such as the new conception of harmonisation that adopted formulae from "private transnationalism."[38]

These formulations are inspired by Teubner's analyses of the crisis in interventionist and reflexive law.[39] This author also highlights the logic of privatising politics to be found in the elevation of governance as a proposal for restructuring politics. The interaction of social systems in the context of globalisation intensifies the destructive dynamic of the economic system and affects the construction of political rationality and its legitimising principles: "These problems are caused by the working of functional systems that are fragmented and operationally closed in their expansionist zeal within a global society."[40]

The invasive capacity of the market reorganises the decision-making process and introduces radical changes in politics. Although the construction of the new emerging order—*Societal constitutionalism*[41]—is not interpreted in this way, there is a clear influence from private powers in the organisation of the global power and in the scenario of the new stateless order. What characterises global governance is the emergence of private powers onto the political stage, their capacity to condition the decision and to colonise the public sphere. From this perspective, he postulates the need to reformulate concepts, which were until now essential in constructing the legitimation of political power, "the expressions 'polity', 'governing' and 'representation' may not be understood in the narrow sense of an institutionalised political system."[42] In this way, private powers are included within the new global power and acquire a decision-making capacity that translates into the privatisation of politics. The emergence of private powers in global constitutionalism is the distinctive feature

[36] Ciccarelli (2008), pp. 1–29.
[37] Joerges (2008).
[38] Joerges, op. cit.
[39] Teubner (1983), pp. 239 et seq.
[40] Teubner.
[41] Teubner (2004), pp. 3–28.
[42] Teubner (2009).

of global governance.[43] This privatisation of power in the new order also means the introduction of a new hierarchy among the players making up the new global power. Global governance introduces strong new powers in counterpoint to the political-institutional order.[44]

Another two features of global governance should also be mentioned. The first involves the legitimacy of the new powers, and the second is the complex relationship they establish with the law and territorial-global interaction.

The first issue should be considered in two dimensions: on the one hand, the disconnection of the powers emerging onto the global stage with the law and, on the other, the destruction of any democratic tie, even formal, wherein they operate. The legal disconnect of global powers means an unbinding from the law,[45] its alegal nature that involves the absence of control mechanisms. The resistance to regulation is associated with an affirmation of the centrality of the market as an unchecked area of distribution of economic action. Ferrajoli's classification of economic powers as "wild powers"[46] touches on this aspect that radically affects the absence of legitimation. Similarly, the complex relationship between law and global power has been analysed from the perspective of American Critical Legal Studies, stressing its characteristic indetermination, fragmentation, and resistance to legal control and regulation as prerequisite of its nature as a global power. This fragmentation of the law corresponds, in Negri's words, to a constituent excess,[47] in other words, to the crisis of the very idea of order and mechanisms of absorption-exclusion of labour in the post-Fordist model of accumulation. The fight against the power of global capital includes reactions that are not only fragmented but also alegal, linked to the preservation of accumulation. Global power as an alegal power which is expressed in the emergence of the global market as a strong and ordering power in the constellation/dispersion of powers of the new global order.

The alegality of the powers of the new global governance corresponds to its absence of legitimation. The radical disconnect with the democratic principle is considered to be a genetic feature of governance, "One can therefore well understand the so-called democratic deficit which the European community has been unable to make good, which spectacularly affects the WTO and any international authority upon which operation of the global market depends: it is by no means just an isolated incident along the way, a defect for which a quick fix is bound to be found; on the contrary, it is an "elemento progettuale", without which the project would be unviable."[48] An attempt has been made to justify theoretically the contradiction between legitimation, responsibility, democratic principle, and global powers with an exercise that is difficult to sustain. The argument that transcendental

[43] Teubner (2002), pp. 311–331.
[44] Negri (2005), op. cit.
[45] Joerges (2008).
[46] Ferrajoli (2011b).
[47] Negri (2008).
[48] Bin, pp. 157–170.

decisions for the population as a whole should be removed from the majority principle, justified on the grounds of technical effectiveness,[49] is inadmissible. The appeal to the technical criterion, as a form of legitimation that conserves the effectiveness of intervention, reflects an affirmation of the autonomy of the economic system and the absence of any conditioning of a market that must be kept out of the political dynamic. The proliferation of organisms integrated into the constellation of global power with the capacity to impose transcendental decisions in the name of technical demands expresses this dissociation of control and the replacement of legal planning with a technical decision that underpins the legitimacy of its autonomy and legitimacy. This discourse depends on the inconditionability of the market and the imposition of mechanisms that articulate a process of accumulation in the state-market model, at a remove from the democratic decision.

The other characteristic of global governance is its conception of power as a form of vertical desegregation and its partial dissociation from the state form. Global governance entails the emergence of non-territorial a-state powers. The theoretical interpretation of global governance stresses its characteristic a-stateness and the non-hierarchical form of global power. Governance, as a mechanism that shows a high degree of hybridisation of power, is configured as a microcosm of public bodies wherein states coexist with other private and para-institutional subjects bound to the workings of the global market. The affirmation of the hybrid form of global governance and its a-stateness translates into the creation of decision-making centres outside the state space, on the legitimation of power and the political sphere are constructed. The absence of hierarchy is more apparent than real.

The Structure of Global Governance

A useful description of the structure of global governance is given by Kazancigil[50] who distinguishes between the inter-state area and the public transnational area.

In the first of these areas, the essential actors are the states and next to them stand the inter-governmental organisations, created and controlled by the states themselves. What characterises this space is the inequality and asymmetry of power deployed by these players. Although the situation is in flux, the hegemony expresses the capacity to influence the distribution of the global market and to guarantee its workings externally. The transition of the interpretations on the Empire to the emergence of a certain multilaterality shows how fluid this area is. The uncertainty lies in the way wherein the functions of guaranteeing global order and distributing the market's power are articulated.

[49] Majone (2003), pp. 3–38.

[50] Kazancigil (2010), pp. 174–181.

Inter-governmental organisations cannot be separated from the states as essential players in this space; although they contribute to the workings of the global market, they are at the same time transmitters of state interests. They operate in a large number of fields, but the essential one is the economic one characterised by a strong internal asymmetry. Internal power is an expression of fluctuations in the fight for inter-state hegemony. The rules of international law are the legal framework of action of the inter-state space. Areas juridically governed by international rules coexist alongside areas of a more political inclination. The weakness of this legal framework and its strong dependency on state influence disqualifies it from forming the vehicle for the construction of the global constitution, although it is the most articulated area.

At the same time, international organisations (IOs) operate with a dual, apparently contradictory, nature, both as entities in which inter-governmental disputes are settled and as agents with pretensions of neutrality, legitimated by the technical logic underpinning their decisions. The key IOs in this area are the economic organisations that arouse out the Bretton Woods agreements (IMF and World Bank). It is in them that this double dimension is most clearly expressed. The supposed technical legitimacy of their functioning has favoured the extension of the global market, by imposing the economic thinking that has sustained the construction of the global market. From this perspective, the full scope of their role in global governance needs to be appreciated, resulting from their capacity to over-determine state political decisions from the technical logic derived from the requirements of global accumulation. This scenario is completed with the consolidation of forms of new intergovernmentality, open to the expression of fluctuations fighting for hegemony. This is the case of the "G groups", the latest manifestation of which—in keeping with the erosion of American leadership and the emergence of new state players—is the "G-20". These state groupings stand halfway between the two aforementioned players.

In this interpretation, the transnational public space is built on a voluntarism that makes it possible to highlight the role of players linked to altruism and to legal cosmopolitism and that of social movements that have emerged out of the response to economic globalisation.[51] Although this is clearly not a global political area, its radical contradiction with democracy means that the public sphere is excluded from its configuration. The transnational space, therefore, is represented essentially by the global economic powers and its most visible expressions are the transnational enterprises, the large economic, financial and commercial corporations. These companies constitute the strong global power capable of determining the decisions of other players in the two levels described. They are, in the radical sense of the expression, an autonomous power, which follows its own logic and constitutes the heart of the global market. They express the metaphor of global capital and condition the magma, the diverse constellation of the players of global governance.

[51] See Various Authors, *Governance, società civile e movimenti sociale. Rivendicare il commune*, Ediesse, Roma, 2009.

Their regulatory power in the global order is considerable and it perverts any pretension of global ordering of power. The "lex mercatoria" emerges as the autonomous constitution of the market, subordinating the global order in its entirety. It is the area of opacity and lack of control wherein the problems of legitimation are expressed with extreme radicalness.

Multi-Level Governance

The last of the attempts at an approximation to global power takes the form of the multi-level governance proposal. This interpretation contains no essential novelties in its characterisation of global power, but it adapts a different perspective of analysis in certain aspects.

The origins of the theory of multi-level governance lie in discussions on the structuring of the different forces of public power in the European Union, primarily in the consequences that these relations have for the very concept of constitution. The notion of "multi-level constitution"[52] is applied to the concept of governance, allowing the contents we set out in our initial construction to be used.

Despite the apparent success of this theory and its extrapolation to the global order, some authors[53] have questioned the usefulness of this construction for a comprehension of global power. The global order cannot be understood by ordering the power in levels and the inter-relations between them. "The global legal order does not take precedence over that of the state, as if it were some other state. These are not two levels, because there is strong inequality and fragmentation, because the states are not the only subjects [and] because no level of government manages to maintain a monopoly with its constituent parts."[54] In short, the multi-level structure is a simplified description of the system of power. The significance of state participation in supranational institutionalisation and its shaping capacity calls into question the validity of this proposal for analysing global power.

However, some of the considerations of this theory are close in their discourse to that of global governance. Although the reflection on multi-level governance owes much to studies on regional integration, particularly in the EU, it nonetheless contains some interesting suggestions.

The very concept of "multi-level governance", or at least some of its formulations, opens up the definition of the players significantly: "Multi-Level Governance" (MLG) can be defined as an arrangement for making binding decisions that engages a multiplicity of politically independent but otherwise interdependent actors—private and public—at different levels of territorial

[52] Pernice (1999), pp. 703 et seq. Also Pernice (2000). More recently, Pernice (2009), pp. 349 et seq.

[53] Cassese (2006), op. cit, pp. 11–16.

[54] Cassese, op. cit. *ult*., pp. 15–16.

aggregation in more-or-less continuous negotiation/deliberation/ implementation, and that does not assign exclusive policy competence or assert a stable hierarchy of political authority to any of these levels.[55] Schmitter's definition is more complex, stressing the hybrid nature of the set of the players in multi-level governance. In this proposal, therefore, the mixed public-private nature manages to relativise the institutional weight and the territorial reference in the levels of power.

Moreover, one of the common features commonly highlighted in multi-level governance is the absence of a hierarchy between and within the various levels. Although this is possibly one of the weaker aspects of this proposal, its defenders accept forms of ordering that guarantee the consistency, rationality, and unity of the system, defined as functional supremacy.[56] In any case, this coexistence of players hinders the formal expression of the ordering of power. However, the clarification of relations within it makes it possible to order public-private interaction and interaction between the levels. Some discussions of the mutations in the system of sources in multi-level constitutionalism[57] suggest the replacement of a formal perspective with a material one, due to "the importance inconsistency of forms", "the impossibility of understanding the essence of inter-regulatory "multilivello" relations in the formal-abstract plane, making it necessary to shift the objective to the substantial plane."[58]

As a result, there has been a tendency to stress that the extension of the scale of economic and political activity brings about changes in the relationship and ordering among the players mobilising at these levels.[59] The osmosis between public and private, which makes it necessary to transcend their boundaries, imposes a material vision of power that escapes the formal institutional definition of relations established among the players and levels.

However, this evolution in the decision-making processes is not a natural dynamic that is spontaneously imposed in globalisation, but a conscious redefinition of power: "these dynamics do not occur automatically, but are driven by the agency of actors that find in the redefinition/blurring of these levels a way to strengthen their own position."[60]

From this perspective, it is important to note the strategy of reorganisation of power to be found in multi-level governance:[61] a way of evading the requirements of democratic legitimation of power by forwarding decision-making to supra-state authorities or global economic areas capable of imposing an order gestated in

[55] Schmitter (2003), pp. 45–74.
[56] Pernice (2002), pp. 511–529.
[57] Ruggeri (2011), pp. 16–55.
[58] Ruggeri (2011), op. cit.
[59] Piattoni (2009).
[60] Piattoni (2009), op. cit.
[61] Bucci (2008).

irresponsible opacity. This is the significance of the institutional engineering of global governance.[62]

By drawing a link between the new forms of organisation of power and the requirements of global economic integration and its regional mechanism of integration, we can understand the unitary and consistent reordering in terms of the needs of the global market, i.e. it allows us to understand better these processes and their common essence.

Global Market Federalism

Global Market Federalism as Transnational Federalism

It is difficult to define the features that characterise global market federalism. Global power might be classed as a "liquid" reality, with blurred contours, a strong tendency to evade legal control, aconstitutional inclination, partly as an expression of its disconnect from the state framework, and with a relevant presence of private and semi-institutionalised powers. The ordering of territorial authorities and their interaction with extra-territorial powers is a complex one, but it is the framework of reference that defines the new federal experience.

The need to transcend the state in an approximation to the new moment of the federal process is not a new one. Integral federalism also adopts the term global and together with its extension towards the social dynamic in its wider sense, includes a political proposal to transcend the state.[63] This perspective has influenced European and world federalist movements,[64] but it follows the lines of a utopian-political voluntarism unconnected to the transformations registered by the new federal moment.

Another line of thought, in principle unconnected to federalism, but which addresses the necessary correction of the distribution of the global power and the transfer to the global area of the democratic imperative is legal cosmopolitism. It is a response to globalisation and to the phenomena of political opacity and alegality. It stresses rights, democracy, and the control of global powers.

Despite their propositive side, reacting to the emergence of the ademocratic global power, these proposals incorporate territorial inter-relation, at its different levels, and its relationship with the forms of global organisation.[65] The definition of the concurrent centres in the construction of cosmopolitan democracy also situates

[62] Bucci, *Idem.*

[63] See *El federalismo global* (Cesar Diaz-carrera edit.), Unión Editorial, Madrid 1989.

[64] Pinder, "Federalismo mundial y federación europea", in *El federalismo global*, op. cit. pp. 267–278.

[65] Archibugi (2011), pp. 375–394.

the areas of relationship within global market federalism. Sub-state, state, inter-state, regional, and global areas[66] also define the profiles in the new federal stage. Singularising the inter-state area, although problematic and resistant to democracy, is relevant in defining global market federalism. The inter-state dimension frames the practices of inter-governmentality that take place within international organisations, which are organised at a remove from the democratic principle. Interestingly, its ademocratic nature is a requisite of its function: evading the problems of legitimation of politics as expressed by the requirements of the accumulation model of global financial capitalism. The avoidance of democratic control over decision-making, the removal from democratic debate of strategic decisions on the shoring up of the model build a relationship between state and sub-state authority and entities characterised by inter-governmentality wherein one may draw a distinction between the moment of (inter-governmental) decision-making and the moment of application, the transfer to the area of political construction of (state) consensus, which needs to be separated in this form of distribution of power. It is at this phase of globalisation that the unanswerable paradox is revealed that states are the essential globalised agents and it is they that articulate the process of exporting decision-making to the extra-state levels. This contradiction can be resolved if one takes into account the fact that one of the functions of the state is, precisely, to extend the global market.

Whatever the role played by inter-governmental entities in the new federalism—an issue we shall return to—it is important to stress that the distribution of power in the heart of the federal process transcends the state framework. Likewise, federalism, as a form of organisation of power, is no longer developed solely within the interior of the state.

A relativisation of the relationship between federalism and state becomes necessary. This disconnect has occurred in the area of the projects and in the voluntarism of political action. European and global federalist movements currently base their proposals precisely on the democratic requirements that entail transcending the state form and replacing it with political federalism. The aim now is to build a theory of the federal model that will assume the organisation of power imposed by globalisation and the crisis. If the form and organisation of power becomes complicated, if the state dimension is absorbed and it is integrated into the global context, with the inclusion of new subjects that determine political decisions, the framework of definition of federalism does not end with the state. This approximation goes beyond the rhetoric on the difficulty of constructing a global theory of federalism[67] transferring it to the scenario of organisation of power. Otherwise, the institutional description of distribution of power would be sterile, since it would ignore its transformations and conditioning factors. The review by a section of the literature of the link between federalism and statehood and the reference to the new form of structuring of power[68] confirm the progression of the thesis that sees

[66] Archibugi (2011), op. cit.

[67] Gamper (2005), pp. 1297–1318.

[68] Delbrück (2004), op. cit.

federalism in the global context as a premise of its redefinition. This redefinition must go beyond merely recognising the context and its influence and its impact on the federal state. The characterisation of the federal state based on the new reality must also go beyond the distinction between federal state and federal systems,[69] with which the appearance of extra-state structures of a proto-federal nature is verified. The extra-state and transnational dimension of federalism makes it necessary to distinguish between two levels, global and regional. For the case of the EU, however, one may use the term supranational because of the high degree of institutional formalisation and capacity for absorption of national levels. Certainly, this consideration is unconnected to the interpretations and proposals on the EU as a federalising experience, a question which we shall not address here.

Global Federalism as Market Federalism

From its birth, federalism was linked to the market and was considered as the institutional form of organisation of power that was best suited to the requirements of the economy. Several authors touch on the symbiosis of political-constitutional and economic theory, highlighting the congruence between Smith's interpretation of the market and the reflections on power of the federalist.[70]

Hayek reinforces this association in subsequent developments.[71] The theorisation of competitive federalism examines this relationship in greater depth, turning federalism into the most appropriate institutional framework of the market. Its operations assume market logic by establishing the competition between the levels of territorial power, limiting state power and containing economic intervention. Therefore, competitive federalism is a theorisation of market federalism. It is hardly surprising that it was in this theoretical framework that the term itself was first coined.[72] Market federalism fosters the development of a structure of power in competition that imposes the limited and de-naturalised action of the public powers and favours the workings and autonomy of the market.

Federalist theory is enriched with the following contents: a) guaranteeing a common market is the responsibility of the federal power, which must avoid the introduction of obstacles to its operation by the federated powers; b) "hard budget constraint",[73] i.e. jurisdictional restriction over monetary matters and credit and financial limitations to favour horizontal competition; c) a limitation on economic intervention by the central power as a consequence of the limited powers of the

[69] Gamper (2005), op. cit.

[70] Bish (1987), pp. 377–396.

[71] Hayek (1948), pp. 255 et seq.

[72] Weingast (1995).

[73] Weingast (1995, op. cit.

federation within the framework of the model of dual federalism and the need to concur with the federated powers.

One feature of this interpretation that is worth noting, beyond the criticisms levelled against competitive federalism, is that in its approach to federalism greater weight is given to a real *de facto*, view of economic needs, than to an institutional *de jure* reality, allowing other elements apart from merely constitutional ones to be included.[74] It places the market in the central position of its deliberations, from which its draws the requirements of federalism that favour economic activity. Market federalism as a centrality of the unconditional market that issues institutional prescriptions on the distribution, organisation, and workings of power. From this perspective, transferring market federalism to the global context merely entails an exercise in continuity as claimed by the very context of market operation and organisation. This proposal has been viewed as a hypothesis in some literature and classed as the only federal proposal possible in the European Union.[75] Extrapolating market federalism to the global context (global market federalism) means giving the market a central place in the distribution of power, capable of conditioning the activity of the different territorial levels which have to adapt their decisions to market requirements. Not only does it place the federal moment in a different territorial context, but in this it also redesigns the organisation of power in two senses. On the one hand, in keeping with the proposals of market federalism, it configures limited public power at state and sub-national levels, preventing any conditioning intervention in the market; and on the other hand, it introduces new extra-territorial powers, which not only go beyond the confines of the state, but are positioned as centres of power that subordinate the federal structure, and it configures a hierarchy within them that not only favours the powers that express the logic of the global market, but also subordinates the territorial powers to their requirements and limits their autonomy. From this perspective, global market federalism exceeds the requirements of the competitively-inspired market federalism. "It can be seen that the current EU is already an example of 'market-preserving' federalism, although its policies of positive integration somewhat beyond this model."[76]

Global Market Federalism as Hybrid Federalism

The term "hybrid federalism" refers to extra-state powers, different in nature to the classic public power, which take the form of institutional inter-governmental entities (World Trade Organisation, etc.), informal inter-governmental entities

[74] Rose and Rose-Ackerman (1997), pp. 1521–1572.

[75] Majone (2002), pp. 21–99.

[76] Majone, op. cit., p. 82.

(represented by the "G groups" whose latest manifestation is the "G 20") and organisations of a private nature.[77]

The first group offer a connection to the state, insofar as they formally emanate from it. Given their configuration and the state determination of their composition, they can be characterised as an extension of the states. However, their action places them in a different plane, because the logic of their action is global and, the specific conflict with state interests is therefore possible. They make a relevant contribution to legitimising the policies imposed by the accumulation model of market state financial capitalism. Their actions are reinforced by the decisions based on a supposed technical logic that cushions the problems of political legitimation of the decision-making system of global market federalism. Therefore, they should be considered as specific actors forming an authority in the new morphology of global federalism.

Another characteristic of these new forms of power is their alegality and their rejection of political control and legal regulation, consistent with their function in the new design. Informal inter-governmental entities are accompanied by formally technical entities, which represent technical state organisms endowed with a level of autonomy. Although they operate through forms close to *soft law* (recommendations and the configuration of standards of action), they form political decision-making authorities of unquestionable importance, with the capacity to impose discipline at state levels.

The best-known example of these bodies may be the BCBS (*Basel Committee on Banking Supervision*), comprised of representatives of G-10 central banks (two more, including Spain, have now been added) and regulatory bodies when this function is not performed by the central banks. The Basel III agreements clearly show how these extra-state entities, global in nature, have been endorsed as alegal disciplinary authorities integrated into the system of global power distribution.

However, the manifestation of the hybrid character of the power of global market federalism is represented by private power, a metaphor of the global market. Its singularity is its capacity to infiltrate the formal network of power in global federalism and its specific and autonomous structuring, with extremely flexible forms. Hence, the difficulty of identifying these bodies, submitting them to discipline, and legalising them. In many cases, they participate alongside inter-governmental entities, acting as technically-expressed interests, thus legitimating their presence. In others, they are more diffuse, acting as coalitions of interests in the form of lobbies, but they are no less effective.

This new form of power can be classed as liquid, fluid, federalism both because of the deformation of the forms of power and the flexibility of its procedures. The influence of large corporations, capable of forming an autonomous regulatory area in competition with the state, exemplifies this metaphor of global capital as the new

[77] Delbrück (2004), op. cit.

subject of power, which redesigns federal power by configuring it as a mosaic, as molecular federalism.[78]

As we have already stated, the problem of these hybrid forms of power is their capacity to evade the rules, to escape legal conditioning and its discipline. Indeed, the reaction by authorities to these forms of power is to make them subject to the law, to argue the need to build a constitutional-material level of discipline of the private capable of restoring the democratic logic of action of power in the global world.[79]

The legal fragmentation of global market federalism should not obscure the emergence of a new model for the organisation of power, ordering relations between the global, regional, state, and sub-state levels. It is true that in this new federal space juridified state and sub-national areas coexist, regulating their relations constitutionally, with alegal spaces wherein factual mechanisms of power prevail that prove genuinely effective and interact with the juridified political structures. This combination of constitutional and atypical powers in the new federal moment poses the twin problem of their theoretical understanding and their legal and democratic transformation. However, their insufficient regulation should not prevent them from being recognised as a new phase of federalism.

Competitive Federalism and Global Market Federalism: The Erosion of Sub-State Powers

Global market federalism characteristically entails an attenuation of the vertical and horizontal competition to be found in competitive federalism and the consequent erosion of sub-state power.

Corrections have been made to market federalism to relativise the competition between the central power and the federated powers; these changes are necessary in order to guarantee the market-preserving functions attributed to the federal power.[80] The debate on the level of autonomy and the competition between powers in market federalism[81] is open and allows introduction into the model of a necessary dimension of discipline in stewarding the market in federalism.

Beyond these considerations, what it is important to note in this theoretical construction of global market federalism is that the crisis has accentuated the moment of control, discipline, and the limitation of competition in order to guarantee the market, making it necessary to review the model of competitive federalism itself.

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[78] Snyder (2007), pp. 419 et seq.

[79] Teubner (2002).

[80] Rodden and Wibbels (2002), pp. 494–529. Also, Rose and Rose-Ackerman (1997), op. cit.

[81] Wibbels, pp. 475–507.

For its part, global market federalism incorporates a rationalisation of the action of the federal powers that consists of adapting it to the needs of financial capital accumulation, particularly demanding in the current crisis. When discipline is introduced into global federalism, it takes on features of its own, incorporating new relations between the territorial levels of power. The discipline function corresponds to the extra-state tier. Subsequently, the control function of the infra-state powers and the limitation of the competition between them are allocated to state levels.

This thesis is convincingly confirmed within the European Union. Whereas in community legislation the supranational level disciplines and reorganises the relations of power, it is up to the state order to impose the mechanisms of power and macroeconomic stability established in the treaties. Constitutional and legal reforms, together with *de facto* pressures, alter the relations of power in compound states.

At a recent meeting on the impact of the crisis in federal systems, these features were acknowledged in most of the addresses.

The radical impact on revenue in the case of the United States has led to a reinforcement of federal power and an erosion of federated powers.[82] In the case of EU member states, there can be no question as to the discipline and impact of the relationship between the powers and their limitation. For example, in Spain the crisis has led to a greater centralisation of power. In both the first and the second phase of the crisis, the lead role in anti-crisis policies was transferred to the state, which acted by introducing a logic of control that limited the power of the autonomous communities. Constitutional reform and the impositions of deficit control policies illustrate these transformations, although there has been no formal change in the law covering the allocation of powers.[83] German federalism is affected in similar terms.[84]

These references are intended solely as evidence to back our statements. In any case, one can see the emergence of tendencies that should encourage the preparation of theory on the new phase in federalism.

Conclusions

Our references to methodological and material developments in the analysis of federalism suggest that we are in the vortex of a transformation that will affect, inter alia, the institutional forms of relationship of territorial power. Inevitably, the economic crisis is leading to a questioning of the mechanisms by which the institutional levels that have directed and managed politics in their territorial

[82] Kincaid (2010) and Tarr (2010).

[83] Viver (2010).

[84] Faber (2010).

areas are structured. The centralising tendencies of the homogenising ideals of the social state were replaced with the territorial strengthening of regional powers, which were invited to compete with each other and to foster the best conditions for economic investment. This weakening of central power was accompanied by a neo-liberal offensive against public intervention and the gradual replacement of public financing by private borrowing. The economic euphoria, theoretically grounded on the notion of market self-control and the "Great Moderation" deriving from the apparent concurrence of growth and contained inflation, boosted revenue capacity and made it easier to keep social benefits in check. As a result, recent Spanish statutory reform saw the emergence of a desire for greater regional power, boosted by the availability of economic resources and a desire to take over benefit control, in order to bolster the relationship between the regional power and society.

The economic crisis has put paid to this approach and the harsh reality of the political and economic scenario has taken hold. We are now seeing the failings of the regional authority's management and the budgetary difficulties they face in managing the powers assumed in the boom years. In the absence of an alternative to correct the neo-liberal drift, there has been an attempt to correct the failure of financialised capitalism from the capitalist logic itself, by imposing fiscal and employment measures and institutional reforms none of which affect the contradictions intrinsic to the contemporary mode of capitalist production.

In this context, it has to be accepted that we are moving into uncharted waters, seeing the beginning of a process wherein we can only make out some new features that will bring about certain changes whose precision and stability have yet to become clear. The economic proposal used to fine-tune the current guidelines for the working of financialised capitalism will also be decisive. For all of these reasons, we feel that instead of setting out conclusions, we need to formulate a programme and some working hypotheses that will help establish the significance of the changes in institutional mechanisms, in other words, to investigate the morphology of power and its manifestations.

On this basis, we propose the following essential pillars for a debate adapted to the current metamorphosis of federalism:

1. The central axis of the analysis of federalism is the distribution of power. We therefore conceive of federalism as a formula for the organisation and distribution of territorial power. Therefore, the focus of attention must include the mutation of power on the global stage, since federalism is deployed in a very different stage to that wherein it arose.
2. A study of the federal model cannot be limited merely to an examination of the distribution and conflict of powers, since it must maintain a link with the way politics and economy are ordered. The starting point consists of the form of state, providing the framework of relations between power and society. Whereas federalism has been constructed in a way that is consistent with the form of state, the material changes on the horizon will lead to an articulated construction of territorial power that is functional to the new priorities imposed by hegemonic interests. The evolution of federalism can only be understood in terms of the

evolution in the forms of state wherein the federal variants have emerged. In this regard, it is worth remembering the correlation between the liberal state and dual federalism, the social state and cooperative federalism, the crisis of the social state and competitive federalism, and the connection between the market state and the incipient global market federalism. Therefore, it remains to be seen what form will be taken by the material constitution that requires the paths of consensus or imposition, the asymmetric integration of the general interest and private interest, the horizontal and vertical relationship of the territorial powers, and what doses of participation or direction are decided upon.

In the current climate of economic uncertainty and political indecision, the choice has been for strong centralisation focusing on the financial area. Capitalism's skill in ridding itself of its responsibility and transforming the financial and private debt crisis into a crisis of public finances has fostered a legislation of control at both an EU and a state level. The establishment of the parameter of deficit control significantly reduces regional political autonomy and sovereign state political decision-making. The fight is no longer for the ownership and exercise of power but for the definition of the economic resources that will drastically condition the exercise of power. If it prospers, without social resistance, this proposal will have consummated another section of neo-liberal pretensions to restrict the public sphere and to shore up the dictates of the market. As we have suggested, following the failure of capitalism based on speculation and private debt, it has become a priority to rebuild the accumulation process in a way that seeks fiscal discipline, restructuring of the financial services sector, and a reduction in the provisions of the embers of the social state.

Over the coming years, we shall see the state of relations between the territorial powers and whether the contents of political autonomy are maintained, the techniques of control and leadership, the effectiveness of any possible sanctions, whether or not constitutional pluralism is superseded by hierarchy, the imposition of the inter-governmental directory in the community area, the abandonment of the European social model, and the decline of territorial political decision-making. In short, then, we shall see the translation in institutional relations of the dilemma of capital which has to be tackled: the reaffirmation of democratic governance of the economy or the continuance of the operating rules of financialised capitalism and the transformation of democratic governments into committees, managing the globalised financial interests.

3. Another relevant aspect is an extension in federal power and the need to get beyond the relationship between federal state and federalism. It cannot be denied that federal theory has been essentially constructed by and for the state, as an introspective interpretation of the structuring of internal power. Yet, if we are to understand the forms and current dimension of power, we cannot restrict ourselves to the limits of the state or reduce the extension to the atypical forms found in the European Union. It is essential to include the development of power of recent decades. It is common to state that the states in isolation are already incapable of tackling the complexity of the outstanding problems. The proposed openness requires an analysis of the nature of power in its global manifestation

and a discussion of the spontaneous forms of shared exercise of sovereign power created through organisations comprising key states.

In the structuring of the power, one should not ignore the workings of institutions created by the states to manage social and economic spheres that are intended to operate technically, although the measure and sense of their power is determined, and in this case modified, by their creators. It is they that are currently entrusted with capital tasks as relevant as reform of the financial system, for example. The decisions become binding; they are assumed by private groups and they condition the political bodies of the state.

Therefore, in addition to the task of understanding the reorganisation of power in the sovereign debt crisis, we also have the task of analysing the forms wherein power is structured beyond constitutional accords. It will be of prime importance in this effort to address the way the dynamic of transformation and the forms of integration are unified in consistency with the dominant interests. This is the inescapable interpretation of the insoluble tension between the contradiction of interests and the attempts to impose a conscious direction that will order the process of reproduction.

In any case, the state survives as a space for structuring power wherein its distribution is materialised in consonance with the functions attributed to it within the framework of the conception and exercise of globalised power.

4. The general perspective of power and the integration within it of the federal moment raise another issue: regulation. In classical theory, the federal pact was expressed in the constitutional order and the federal state was inconceivable without its constitutional foundations. Understanding the reality of global power means going beyond the constitutional base that formed the foundations of the federal structure and understanding the legal forms that currently regulate the structuring of power. It is equally necessary to integrate the theoretical moves to extend constitutionalism beyond the state, with a view to introducing new techniques of interest-participation such as governance, in order to view attempts at unification of power as conscious directional paths. Political power lies in multiple centres and adopts organisational forms that are a long way from the legal purity of the federal constitutional accord. However, this heterogeneity conditions federal power in the dual sense that it is exercised collegiately and irradiated outwards, and that it has to take on the decisions adopted externally.

   Within the global framework, the constitutional moment is not present. Absent too is the logic of the pact and of consensus because the structure of power is conditioned by the requirements of the global market. The forms of juridification are flexible and atypical and evade the formal requirements of constitutionalism. The new requirement consists of updating the constitutional debate and verifying its survival in times of globalisation.
5. We, thus, deduce a theoretical proposal that seeks to explain the form adopted by federal power within the framework of the set of factors that coexist in this stage of crisis. In our opinion, the global market federalism syntagm expresses the territorial organisation of power dependent on the validity of financialised capitalism.

Many theoretical requirements arise from this thesis. The purpose is to merge the contemporary phenomenon of the integrated structuring of power in multiples that encompass the state and global level with the economy/politics relationship that characterises market primacy. From this premise springs the complex need to monitor both the organisation of decision-making centres for the political and economic integration of power and the way the contradictions of financialised capitalism and its impact on relations of territorial power are addressed. This suggestion stresses the protagonism of the dialectic between the two spheres on whose development the historical form adopted by global market federalism will depend.

References

A. LA PERGOLA, *Los nuevos senderos del federalismo*, Centro de Estudios Constitucionales, Madrid, 1994, p. 277 et seq

L. Levi, *Il pensiero federalista*, Laterza, Bari, 2002, p. 107 et seq

G. BOGNETTI, "Federalismo", in *Digesto delle Discipline Pubblicistiche*, Vol. VI, 1991, UTET, Turin, p. 275

M. LUCIANI, " Unità nazionale e struttura economica. La prospettiva della Costituzione repubblicana", La produzione della richezza nazionale", in http://www.associazionedeicostituzionalisti.it , 2011

J.A. SANTAMARIA DE PAREDES, "La naturaleza jurídica del Estado autonómico", in J. RODRÍGUEZ-ARANA and P. GARCÍA, *Curso de Derecho Público de las Comunidades Autónomas*, Montecorvo, Madrid, 2003, pp. 138 et seq

C.J. FRIEDRICH, *Trends of Federalism in Theory and Practice,* , Frederick A. Praeger Publishers, New York 1968, pp. 8

A. PIERINI, *Federalismo e Welfare State nell'esperienza giuridica degli Stati Uniti*, G. Giappichelli, Turin, 2003, p. 19

C. TIEBOUT, "A Pure Theory of Local Expenditures", in *Journal of Political Economy*, 1956, No. 64, pp. 416-424

T. R. DYE, *American Federalism: Competition among Governments*, Lexington Books, Lexington MA, 1991

P. SALMON, "Decentralization as an Incentive Scheme", in *Oxford Review of Economic Policy*, 1978, Vol. 3, No. 2, pp. 24-43

A. BRETON. "Towards a Theory of Competitive Federalism", in *European Journal of Political Economy*, 1987, No. 3, pp. 263-329

J. M. BUCHANAN, "Federalism and Individual Sovereignty", in *Cato Journal*, 1995-6, No. 2-3, pp. 259-68

A. PIERINI, "Il federalismo competitivo: un approccio neoliberista all'analisi dei processi di federalizzazione", in *Diritto Pubblico Comparato ed Europeo*, 1999, No. 4, pp. 1410-28

E.S. CORWIN, "The Passing of Dual Federalism", in *American Constitutional History*, Harper Torchbooks, New York, 1964, pp. 148

B. BALDI, "Il federalismo competitivo: L'Italia in prospettiva comparata", in *Teoria Politica*, 2009, No. 2, pp. 95-126

B. JESSOP, *The Future of the Capitalist State, Cambridge University Press, Cambridge, 2002, p. 182*

B. JESSOP, "The Spatiotemporal Dynamics of Capital and its Globalization – and how they Challenge State Power and Democracy", Department of Sociology, Lancaster University. *http://www.comp.lancs.ac.uk/sociology/soc132rj.pdf*, 2010

N. BRENNER, "Glocalization as a State Spatial Strategy: Urban Entrepreneurialism and the New Politics of Uneven Development in Western Europe", in (Various Authors), *Remaking the Global Economy*, Sage Publication, Londres, 2003
J. DELBRÜCK, "Transnational Federalism: Problems and Prospects of Allocating Public Authority Beyond the State", in *Indiana Journal of Global Legal Studies*, 2004, No. 53, Vol. II, pp. 31 et seq
B. JESSOP, "La economía política de la escala y la construcción de las regiones transfronterizas" [The Political Economy of Scale and the Construction of Crossborder Microregions], in *Eure*, 2004, No. 89, pp. 25-48
A. NEGRI and M. HARDT, *Empire,* Cambridge, Cambridge University Press, 2000, pp. 309
A. NEGRI and D. ZOLO, "Dialogo su impero", in *Cinque lezioni su impero e dintorni,* Raffaello Cortina Edt., Milan 2003, pp. 14
L. FERRAJOLI, "Entrevista (M. Barberis)", *Il Mulino*, 2011, No. 3. pp. 519-526
S. CASSESE, *Oltre lo Stato. Verso una costituzione globale*?, Ed. Scientifica, 2006, Napoli
A. NEGRI, "Postmodern Global Governance and the Critical Legal Project", in *Law and Critique*, 2005, No. 16, pp. 27-46
R. CICCARELLI, "Riformulare la libertà política nell'analisi della governamentalità", in *European Journal of Legal Studies*, 2008, No. 3, pp. 1-29
C. JOERGES, "Integration through De-legalisation? An Irritated Heckler", in *European Journal of Legal Studies*, 2008, No. 3
G. TEUBNER, "Substantive and Reflexive Elements in Modern law", in *Law and Society Review*, 1983, No. 2, pp. 239 et seq
G. TEUBNER, "Giustizia nell'era del capitalismo globale", in *European Journal of Legal Studies*, Vol. 1, n. 3, 2008, pp. 1-8
G. TEUBNER, "Societal Constitutionalism: Alternatives to State-Centred Constitutional Theory?", in *Constitutionalism and Transnational Governance*, Hart, Oxford, 2004, pp. 3-28
G. TEUBNER, "The Corporate Codes of Multinationals: Company Constitutions beyond Corporate Governance and Co-Determination", in *Conflict of Law and Law of Conflict in Europe and Beyond: Patterns of Supranational and Transnational Juridification*, Hart, Oxford, 2009
G. TEUBNER, "Hybrid Laws: Constitutionalizing Private Governance Networks", in *Legality and community,* Berkeley Public Policy Press, 2002, pp. 311-31
L. FERRAJOLI, *Poteri selvaggi. La crisi della democrazia italiana,* Laterza, Roma-Bari, 2011
A. NEGRI, "La filosofia del diritto contro le sovranità: nuove eccedenze, vecchie frammentazione", in *European Journal of Legal Studies*, 2008, No. 3
R. BIN, "Ordine giuridico e ordine politico nel diritto costituzionale globale", in P. CARTA and F. CORTESE (a cura di), *Ordine giuridico e ordine politico:esperienze lessico e prospettive*, Cedam, Padova, 2008, pp. 157-170
G. MAJONE, Deficit democratico, istituzioni non-maggioritarie ed il paradosso dell'integrazione europea", in *Stato e Mercato*, 2003, No. 67, pp. 3-38
A. KAZANCIGIL, *La gouvernance pour ou contre le politique?,* Arman Colin, Paris, 2010, pp. 174-81
I. PERNICE, "Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?", in *Common Market Law Review*, 1999, No. 36, pp. 703 et seq
I. PERNICE "De la Constitution composée de l'Europe", in *Revue Trimestrielle de Droit Europé enne,* 2000, No. 36, pp. 623 et seq
I. PERNICE "The Treaty of Lisbon: Multilevel Constitutionalism in Action", in *The Columbia Journal of European Law,* 2009, No. 3, p. 349 et seq
p. SCHMITTER, "Neo-neo-functionalism", in *European Integration Theory*, Oxford University Press., Oxford, 2003, pp. 45-74
I. PERNICE, "Multilevel Constitutionalism in the European Union", in *European Law Review*, 2002, No. 27, pp. 511-529

A.RUGGERI, "Dinamiche della normazione e valori, nella prospettiva di una ricomposizione "multinivello" del sistema delle fonti", in G. D'INAZIO (a cura di), *Multilevel constitucionalism tra integrazione europea e riforme degli ordinamenti decentrati*, Giuffrè, Milan, 2011, pp. 16-55

S. PIATTONI, "Multilevel Governance in the EU, Does it Work?", in *Globalization and Politics: a Conference in Honor of Suzanne Berger*, MIT, 8-9 May 2009

G. BUCCI, "La sovranitá popolare nella trapola delle reti multilevel", in *Costituzionalismo.it*, No. 1, 2008

D. ARCHIBUGI, "Cosmopolitismo. Teoria e prassi della democrazia nell'età globale", in *Democrazia. Storia e teoria di un'esperienza filosofica e politica*, Il Mulino, Bolonia, 2011, pp. 375-94

A. GAMPER, "A Global Theory of Federalism: the Nature and Challenges of a Federal State", in *German Law Journal*, 2005, No. 10, pp. 1297-1318

R.L. BISH, "Federalism: a Market Economic Perspective", in *Cato Journal*, 1987, Vol. 7, No. 2, pp. 377-396

F. HAYEK, "The Economic Conditions of Interstate Federalism", in *Individualism and Economic Order*, 1948, University of Chicago Press, pp. 255 et seq

B. WEINGAST, "The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development", in *Journal of law, economics and organization*, 1995, Vol. 11, No. 1, pp

J. ROSE and S. ROSE-ACKERMAN, "Does Federalism Preserve Markets", in *Virginia Law Review*, 1997, Vol. 83, pp. 1521-72

G. MAJONE, "Integración económica internacional, autonomía nacional, democracia transnacional: ¿una trinidad imposible?", in *Revista Mexicana de Ciencias Políticas y Sociales*, 2002, No. 184, pp. 21-99

D.V. SNYDER, "Molecular Federalism and the Structure of Private Lawmaking", in *Indiana Journal of Global Legal Studies*, 2007, Vol. 14, pp. 419 et seq

J. RODDEN and E. WIBBELS, "Beyond the Fiction of Federalism Macroeconomic Management in Multitiered Systems", in *World Politics* , 2002, No. 54, pp. 494-529. Also, J. ROSE and S. ROSE-ACKERMAN, "Does Federalism Preserve Markets", op. cit

E. WIBBELS, "Bailouts, Budget Constraints, and Leviathans: Comparative Federalism and Lessons from the Early United States", in *Comparative Political Studies*, Vol. 36, 5, June 2003, pp. 475-507

J. KINCAID, "The Impact of the Global Financial Crisis on American Federalism" Annual Meeting of the International Association of Centers for Federal Studies, September 2010

G.A. TARR, "The Recession: a View from the American States", *Annual Meeting of the International Association of Centers for Federal Studies* , September 2010

C. VIVER, "Impact of the Financial Crisis on the Territorial Power Structure in Spain", *Annual Meeting of the International Association of Centers for Federal Studies*, September 2010

G. FABER, "Impacts of the Global Financial Crisis in a Federation: Evidence *from* Germany", *Annual Meeting of the International Association of Centers!!! for Federal Studies*, September 2010

Multilevel Constitutionalism and Federalism: Reflections upon the Congress on "The Path to Federalism in the State of Autonomies"

Teresa Freixes

There is nothing new about making a connection between federalism and the different tiers of competence typical of complex legal–political organisations. Currently, it is no longer possible to approach a legal theme without taking into account the different levels of legal systems that may influence the object of analysis. In fact, in many countries, most legal institutions are regulated by more than one system. Globalisation, reinforcing both bilateral and multilateral International Law, European integration, the unleashing of processes of redefinition of competences in sub-state bodies, born of the need to better tackle policies that profoundly impact the lives of citizens, have made it necessary to address the study of institutions, rights, bodies, guarantees, etc., not only in classical unitary legal systems, characteristic of the nation-state, but also at other levels, depending upon the degree of internationalisation or regionalisation of the area under study and upon the level of legal integration resulting from these processes.

One phenomenon that needs highlighting within this field is the increasing tendency to consider that the basic rules that regulate these relations between systems are all functionally constitutional, despite the fact that many of them do not actually or formally constitute a constitution. A lot has been written about the constitutional value of EU Treaties,[1] especially following the attempt to pass the Treaty establishing a European Constitution that finally led to the adoption of

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[1] Along these lines Freixes and Remotti (2002). Also, following the Treaty of Lisbon, Freixes (2010).

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the Treaty of Lisbon, into which have been incorporated the vast majority of the regulations contained in the failed European Constitution.[2] Although the Treaty of Lisbon itself is not formally a constitution, in practice it fulfils this function, as it is a rule which is the equivalent of Kelsen's basic norm[3] or Hart's fundamental rule[4] within the sphere of the European Union. The Treaty of Lisbon fulfils the function of a constitution because it is the basis for the remainder of the European Laws and connects the legal systems of the EU Member States, all of them under the supervision of a kind of "control of constitutionality" performed by the Court of Justice of the European Union, which ensures the primacy of EU Law.

The division of competences within federal and regional states or the Spanish autonomous State is also defined within a framework of constitutional norms, of first or second degree. The constitutions of states, as primary or first-degree constitutional norms, define the general framework of this division, which is organised into the various secondary constitutional, quasiconstitutional, derivative constitutional or second-degree constitutional laws, such as the constitutions of the German *länder* and the statutes of the Italian regions or the Spanish autonomous communities. We would point out here that the interpretation, in Spain, for example, of the statutes of autonomy as laws with constitutional value has been generalised for some time now.[5] The constitutional description of the statutes as "fundamental institutional norms" of the autonomous communities (Art. 147.1 Spanish Constitution) with a constitutionally established minimum content (Art. 147.2 Spanish Constitution), with a process of approval and reform with particular characteristics and their integration within the so-called "constitutional corpus"[6] by constitutional jurisprudence, is justification for many legal writers of the fact that they are considered to be second-grade constitutional rules, inevitably subject, nonetheless, to the Constitution.[7]

However, the concept of multilevel constitutionalism is still seldom employed in Spanish legal literature, a consequence both of it being relatively new and of the lack of undisputed acceptance of different levels in formally or functionally constitutional norms. Among politologists, the homonymous concept of *multilevel*

[2] See the monograph "Unión Europea" coordinated by Gil-Robles (2008).

[3] Kelsen (1933).

[4] Hart (1963).

[5] Ruipérez uses the Italian concept of *Costituzione in senso sostanciale* to CONFER constitutional value upon the statutes of autonomy. See Ruipérez (1994). Rubio Llorente also attributes constitutional value to the statutes of autonomy, employing the term "secondary constitutional law". See Rubio Llorente (1993).

[6] Concept devised by the Constitutional Court in the ruling on the LOAPA (Basic Law for the Harmonisation of the Autonomous Process), wherein it establishes the block and judges the contested law in accordance with this interpretative criteria, declaring large portion of the said law unconstitutional. STC 76/1983, August 5.

[7] For Otto, the set of norms integrated within the block of constitutionality (including the statutes of autonomy) fulfil in our system the function that in the federal states corresponds to the Federal Constitution. See, Otto (1988).

governance, directly inspired by the White Paper on European Governance, quickly established itself as a paradigm for the analysis of public policies.[8] However, in the field of legal science, on the other hand, multilevel constitutionalism was forged, not without difficulty, between legal theorists and European constitutionalists, when the increasingly stronger interaction between EU Law and the law of the Member States (regional level included) gave rise to new connections between the different regulatory levels.

How has this process evolved? It should be noted that with the reinforcement of European integration and the consolidation of the primacy of EU Law, traditional national identities felt threatened, on the one hand, by the supranational because constitutional competences were transferred to supranational organisations. Meanwhile, in various states of the European Union itself, the processes of concession of competences to sub-national bodies and increasing decentralisation have generated conceptual, organisational, and functional crises, which the gradual legislative harmonisation implemented by the Union strives to overcome via the introduction of various instruments of coordination and collaboration, typical of complex organisations and, it must also be said, by means of techniques typical of federalism, which systematically employs the distribution of functions and competences at different levels, basically at state level and federal level.

The process itself of European integration is a reflection of the federative principle, based upon the principles of attribution, competence, and subsidiarity. Principle of attribution, because the Union possesses the competences attributed to it by the Member States and these alone. Principle of competence, because there is a need to distinguish between competences of the Union and competences of the Member States, be they exclusive to the Union or to the states, shared or concurrent or complementary and mutually supportive. Principle of subsidiarity, because the efficiency required by the federative technique demands that the level of competences closest to the people, with the greatest chances of success, be able to perform a specific function, and be directly and primarily responsible for exercising this competence. Federalism, then, takes the form of an exercise of competences established at different levels and has taken on a life of its own in the gradual configuration of the European Union.

From this perspective, so-called multilevel constitutionalism may be conceived as an "autonomous" paradigm within the framework of the process of European integration,[9] aimed at explaining this legal complexity, applicable to systems

[8] The bibliography that incorporates *multilevel governance* as a parameter for analysis is enormous. In Spain, this concept has frequently been employed to analyse multilevel political relations in the European framework.

[9] EU Law, especially that based on the Court of Justice jurisprudence, has created numerous "autonomous" concepts, particular to European integration, which are making necessary a reconsideration of the Theory of Law. These are new legal phenomena or an adaptation of classical concepts to the new legal realities. Examples of these can be found in Subject C-540/09, *Skandinaviska Enskilda Banken AB Monsgrupp v. Skatteverket*. A work of analysis of autonomous concepts in EU jurisprudence: Weiler, et al. (2003).

integrated by subsystems[10] that, in constitutionalism, may link up with federalism[11] and with systematic interpretation.[12] Indeed, the notion of the process of European integration as a federative process is not new, but was originally formulated both within the political framework by the European federalists and in EU legal theory.[13] From this perspective, although the European Union is not a federal state, the design and functioning of its institutions and bodies, and the Union's relationship with its Member States cannot properly be understood without knowledge of this tendency towards federalism.[14]

Indeed, this process of integration has led us to reconsider many concepts, be it by reinterpreting those that already exist or integrating new institutions into legal dogma.[15] An analysis that was not strictly formal, taking into account these new considerations, would fit perfectly within the conception of the order as a system composed of legal institutions, integrated within this system as a result of the evolution of social needs and maybe transformed without becoming denatured nor petrified, as was pointed out by, amongst others, Santi Romano, Hauriou, Häberle or Mackormick.[16]

From this standpoint, the different levels of the system, resulting from the process of European integration, have redimensioned classical institutions, such as parliaments, wherein the sovereign people, through democratically elected representatives, were the sole custodians of the Law (with a capital "L") that they alone could pass, turning them into institutions that share this legislative capacity with other legislative assemblies. This is the case in the European sphere (the European Parliament is co-legislator along with the Council), or in the regional

[10] See the theory of systems and their interdependence in Luhmann (2006).

[11] In this respect, we agree with Bermann (1994).

[12] Based on Kelsenian formalism but introducing criteria of material legitimacy in norms, especially in those of a constitutional nature, we regard as applicable in this respect the arguments of Wroblewski (1985).

[13] The Congress of The Hague (1948) already affirmed the need to create a federal Europe. The Resolution of the Political Commission of the Congress leaves no room for doubt. It was a question of transferring sovereignty to pave the way for a Union or Federation, open to all the democratic nations of Europe that would commit to respecting a Charter of Human Rights. The idea also includes convening a European Assembly, elected by the parliaments of the participating nations, which would recommend the appropriate measures in order to gradually establish a federal Europe. Also proposed was the creation of a Court of Justice, wherein citizens might apply, which would have the power to sanction violations of people's rights. Also mentioned was the objective of guaranteeing the security of countries via a Federation that is independent of any power and which would not represent a threat to any nation. *La documentation française. Notes et études documentaires*, n° 1081, 26 February 1949, p. 9.

[14] See Freixes (2010), quoted, pp. 40–53.

[15] The non-petrification of legal institutions and, on the other hand, the creation of new ones when altering them might well lead to not identifying them, had already been advocated by Romano (1917 and 1918).

[16] See, on this subject, the following works: Romano (1917 and 1918), quoted in the previous note. Hauriou (1925), Häberle (1997), and MacCormick and Weinbergen (1986).

sphere (regions with constitutionally recognised legislative competences, which are often shared with state competences over specific areas). It may even occur that, in many areas, only the conjunction of the three legislative levels (European, state, regional) provides the appropriate legislation for the regulation of a particular issue. Thus, a basic legal institution, as any right or obligation, may be affected nowadays by regulations in the European, state or regional sphere, which confer in an integrated manner a global configuration upon the different elements of which it is comprised (ownership, exercise, etc.).

This multilevel constitutionalism may also be approached via the connections, produced via renvois, between different legal subsystems, presided over by European Union Law as the prevailing system. However, there is also an integration of international law within internal law, the latter formed in turn, in the Member States, by a double level of legislation, born of the distribution of competences between institutions at state and regional level. For example, the Treaty on European Union refers to the Geneva Convention with regard to refugees in order to clarify which of their rights must be officially recognised;[17] it also refers to common constitutional traditions[18] and the European Convention on Human Rights,[19] as well as the European Social Charter[20] and considers that the Charter of Fundamental Rights of the European Union has the legal status of Treaty.[21] In this way, when the different parliamentary levels (European Parliament, national parliaments and regional parliaments with legislative competences) have to legislate, according to their respective sphere of competence, on some of the elements of the right to exile or refuge, they will have to take into account the different levels of protection obtained by the law in question in the different systems that regulate it. Furthermore, bearing in mind that Art. 53 of the Charter of Fundamental Rights contains an interpretative clause that prescribes the application of the highest standard, it imposes the need to find the specific legislative formula that best responds to the legislative demands of such a multilevel legal integration. The different parliamentary levels will have to, then, collaborate in the production of legislation. However, they will be unable to do this in any way as, within the framework of the European Union, the multilevel concept impregnates, in every case, vertical (hierarchy), horizontal (competence) and reticular (collaboration and subsidiarity) legal relations. In similar manner, when in a specific case, the judge encounters a case in which two or more legislative levels merge, he must analyse the confluent laws in the specific case and decide upon the level of protection applicable, taking into account the rule of Art. 53 of the Charter of Fundamental Rights, with all the renvois produced by this article and the ponderation necessary

[17] Art. 78 TFEU.

[18] Art. 6.3 TEU.

[19] Art. 6.3 TEU. Art. 6.2 TEU states that the Union must adhere to the European Convention on Human Rights.

[20] Art. 151 TFEU.

[21] Art. 6.1 TEU.

in order to determine the level of protection to be granted to the specific law applicable to the case in question.

Ingolf Pernice[22] highlighted this multilevel, in all its complexity, within the framework of the debate with Dieter Grimm[23] and Jurgen Habermas[24] when discussing, during the work of the Convention towards the future of Europe, whether Europe needed a Constitution or not. For Pernice, the formal Constitution was unnecessary because there already existed in Europe a multilevel constitution formed by the constitutions of the Member States and the "constitutional corpus" integrated by the EU Treaties. However, prior to this debate, the Treaty of Amsterdam, by incorporating the Protocol regarding the principle of subsidiarity and proportionality, formalised a multinivel between the European Union, the Member States, the regions (*länder*, autonomous communities...) and local collectives. And the EU Court of Justice also coined the concept of "formal constitution of the Union" integrated, at EU legal level, by Treaties as primary law,[25] given that they contain the basic elements of every constitution, which are, from the famous French declaration of 1789, the organisations of bodies and institutions and the recognition and guarantee of rights.[26]

In the same way, certain approaches to multilevel constitutionalism were apparent in diverse writings on the topic,[27] wherein one could detect the presence of realities such as federal, regional, or, in the case of Spain, autonomous states; in other words, states in which regions have legislative competences deriving from their own Constitution, enabler of the existence of basic institutional rules of a regional order (Constitutions of the *länder*, Statutes of Autonomy, etc.) had to coordinate their legislative competence within the framework of the internal implementation of EU laws.[28]

Moreover, it is also necessary to illustrate that multilevel constitutionalism had also advanced to the heart of the European legal debate with the appearance of the White Paper on European Governance. Indeed, the White Paper begins as follows:

> Today, political leaders throughout Europe are facing a real paradox. On the one hand, Europeans want them to find solutions to the major problems confronting our societies. On the other hand, people increasingly distrust institutions and politics or are simply not interested in them.[29]

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[22] Pernice (2004).

[23] Grimm (1995).

[24] Habermas (1995).

[25] For all, the Ruling of 23 April, 1986. Subject 294/83 "The Greens" (rec., p. 1339).

[26] Indeed, Art. 16 of the revolutionary Constitution states that the society which has neither division of powers nor guarantee of rights has no Constitution.

[27] Works such as that coordinated by Bilancia and De Marco (2004). Also in Policastro (2004). These publications have had a significant impact upon the debate regarding multilevel constitutionalism, extending it to the new EU Member States resulting from the enlargements of 2004 and 2007, and to Japan. In the USA, Weiler also reflected this debate, as can be seen in the work coordinated along with Wind (2004).

[28] For the case of Spain, see Freixes (2006).

[29] *European Governance. A White Paper*. European Commission. Brussels, 25.7.2001. COM (2001) 428 end.

Having acknowledged this considerable problem, still unresolved, the White Paper proposed, amongst others, discussion over how to achieve better policies, better regulations, and better results; how to clarify the functioning of the Union, establish a European partnership at different levels and introduce instruments to enable the participation of territories with specific characteristics and of local collectives.[30]

Thus, bearing in mind that the articulation of this multinivel is motivated by both ideological (need to increase legitimacy in decision-making) and functional reasons (achieve greater efficiency in EU politics/policies) during the debates prompted by the White Paper on European Governance and in connection with the establishment of the Convention that prepared the project for a European Constitution, it was considered necessary to involve, in the definition of Community policies, the political agents competent to develop them.[31] In this sense, the then President of the European Commission (Romano Prodi) declared that "The European Union has much to learn from the 'democracy of proximity' in order to improve communication and political practice", whilst pointing out that, "The regulating principles in the exercise of the Union's competences are the principles of subsidiarity and proportionality, which translate in the political sphere the concept of the added value of European action, wholly preserving the competences of the states, the regions and the local institutions who continue to be the principal interlocutors of the citizens of Europe", although he acknowledged, at the same time, that, "the ultimate expression of the principle of subsidiarity demands that the European Union should not interfere in relations between the states and their regions and, even more importantly, not attempt to regulate these relations in a uniform manner on a European level."[32]

Meanwhile, in some national debates, there was also insistence upon the need for an adequate presence of the regions in the reforms demanded by the process of European integration. Thus, in Germany, it was noted that decisions taken on a national scale were preceded by consultations with the *länder* and the municipalities, and regretted that this was not the case in the European context. And let us not forget the "identitary" debates that take place in different states of the Union, centrifuging, or at least attempting to, the instruments of cohesion or relationship with state institutions. This restricted point of view ignores all the rationality and effectiveness that federalism and multilevel constitutionalism can contribute towards finding appropriate answers.

Why such insistence upon improved representativity of the regions in the decision-making process of the European Union? Crucial in this regard, I believe, was the fact that the White Paper on European Governance contained articulate suggestions that proved decisive in reinforcing pre-existing demands, as well as the constant position-taking of the sub-state entities present within the territory of the

[30] Freixes.

[31] See this process in Freixes (2005).

[32] Prodi (2011).

Union. Thus, in the White Paper, it was observed that the way the Union functioned did not permit sufficient interaction at multiple levels within a partnership, wherein national governments fully involved regions and cities in the definition of European policies and it was claimed that each State should provide suitable mechanisms in order to organise wide consultation with regard to the analysis and putting into practice of European decisions and policies including a territorial dimension. The White Paper also proposed, as an appropriate modus operandi in this respect, the conclusion of "contracts for objectives" between Member States, regions and local collectives and the European Commission, which would be designated the specific actions that each of these decision-making levels should perform. Such strategies, it should be pointed out, are typical of co-operative federalism in the most classical sense of the term.

It should also be noted that, during the preparation of the *non nata* European Constitution, in the contributions sent by various civil society organisations to the Forum for debate *Futurum*, set up for this purpose on Internet,[33] various sub-state entities (regional or local) referred to the role that regional and local entities had to play within the framework of the new European Union.[34] Many of them demanded recognition of the right of citizens to local democracy, integration within the Treaty of the Charter of the Council of Europe on local autonomy, and the close involvement of regional and local authorities in all stages of the EU legislative process. Also indicated was the need to clearly recognise the "four levels of government: European, national, regional and local" and to establish an "effective system of control of subsidiarity (both ex ante and ex post)". Other proposals referred to the "need to pay greater heed to the financial consequences for sub-state entities of decisions taken on a European scale", to "regions with legislative competences enjoying legal standing before the Court of Justice", to a "specific acknowledgement in the Treaty" of these and to the "right to participate in meetings of the COSAC". Mention was likewise made of the idea of "creating regional unions which might act together within the EU as a whole".

With this in mind, one appreciates the need to further explore not only the formal structures of relationship between legal systems but also inter-institutional connections resulting from functional necessities,[35] both from organic or functional perspectives and due to the need to increase the legitimacy of the complex legal systems. When states can no longer act in isolation in the international arena, when legal relationships overlap and intertwine within the European or internal ambit, the Law, when all is said and done, must respond to criteria of interpretation which provide systematic and pertinent answers, offer a solution to loopholes or antimonies, and, in essence, clarify the framework for action of the authorities

[33] Still accessible today on Internet, at the website of the European Parliament: http://collections.europarchive.org/ea/20050224203342/europa.eu.int/constitution/futurum/index_es.htm.

[34] For a detailed analysis of the treatment given to the regions in this process, see Freixes (2005). Quoted.

[35] Freixes (2006).

and of citizens in the complex societies of today. In this case, with regard to the different existing parliamentary levels, European, national, and regional, particular importance is assumed by the Treaty of Lisbon,[36] which is, in this sense, direct heir of the text included in the failed European Constitution, largely taking into account the requests made to the Convention regarding the future of Europe.

According to the provisions of the Treaty of Lisbon, the Protocol of subsidiarity and proportionality and the Protocol regarding national parliaments have the effect of a Treaty.[37] This means that, to the first regulations arising from these, with regard to both relations between parliaments and with respect to subsidiarity, should be added, as a legislative complement, what is quoted in the aforementioned protocols. Thus, the provisions of the Treaty of the European Union with respect to the contribution of national parliaments to the correct functioning of the Union,[38] which includes the task of ensuring compliance with the principle of subsidiarity[39] and interparliamentary cooperation,[40] should be complemented by the aforementioned protocols. In this context, the Protocols regarding national parliaments and regarding subsidiarity are norms with the effect of hard law.[41] The Protocols incorporate, amongst others, the instrument known as "early warning", which establishes a time-frame of eight weeks for national parliaments (with the participation, when appropriate, of the parliaments of the regions with legislative competences) to issue a reasoned report, which may result in the return of a EU legislative proposal to the European Commission (which must send draft proposals prior to their final adoption) in the event of 1/3 of the votes cast by the states being in favour of the return of the project to the Commission (equivalent to a kind of veto). The EU Member States have had to introduce these provisions into their legal system, sometimes via constitutional reform (for example, the case of France), on other occasions via laws attributing competence to issue these reports to Commissions for European Affairs or similar (as has been the case with Spain) or, also, reforming parliamentary regulations (as in the German Bundesrat).

Certainly, the implementation of the contents of the Treaty of Lisbon is not an easy task, nor has it met with unanimous approval. Formally, on paper, it greatly reinforces collaborative legislation between the different parliamentary levels, which seems not greatly to differ from the partnership on different levels requested in the conclusions of the White Paper on European Governance. One could even argue that it is possible to increase the legitimacy of the laws resulting from this

[36] Reaffirming multilevel constitutionalism after the Treaty of Lisbon, see Pernice (2009).

[37] Art. 51 TEU status that the Protocols and Annexes of the Treaties form an integral part of the same.

[38] All of them are regulated in Art. 12 TEU.

[39] Art. 12.b TEU.

[40] Art. 12.f TEU.

[41] Art. 51 of the Treaty of the European Union (Lisbon) states precisely that "The Protocols and Annexes of the Treaties form an integral part of the same".

process, be they European laws–as the parliamentary bodies of the states may have presented, if they existed, their objections–or rules for the transposition or internal implementation of directives or decisions, as in the latter case the internal legislation includes the rules which were elaborated on a European level with the participation of the Member States. The same may be said in the case wherein such legislative collaboration is not necessary and it is simply a question of executing European policies, given that there has been some kind of participation in the European legislation where they are based.

However, despite these arguments, it is also worth noting that the procedure implemented with the "early warning", on the one hand, constitutes a backward step in the process of European integration, making it possible for the Union's policies to be blocked at a national level by internal legislative organs, alleging non-fulfilment of the principle of subsidiarity;[42] on the other hand, in states with regions with legislative competences, especially in our own, it is difficult to establish efficient participatory mechanisms between the national parliament and regional parliaments, although it could be facilitated via the establishment, with constitutional loyalty, of techniques deriving from cooperative federalism that can facilitate such legislative collaboration.

Moreover, in the Treaty of Lisbon, a procedure of reinforced control is also created for the control of subsidiarity, given that, taking into account the reports mentioned, even in the absence of any veto, if 55% of the members of the Council of the Union or the majority of the European Parliament oppose the proposal in the belief that it is contrary to the principle de subsidiarity, the said proposal ceases to be viable.[43]

In addition, the Committee of the Regions, as well as the Member States, may lodge an appeal before the EU Court of Justice to control the effectiveness of a principle, provided it had mandatorily expressed its opinion (in other words, a mandatory though not binding opinion) in the process of elaborating the European law in question.[44]

The application of these provisions necessarily involves the design and setting-up of legal–political instruments of collaboration at different levels between regional parliaments, national parliaments, and the European Parliament, as well as between the work groups formed at different levels in the regional, national and

[42] One of the arguments employed in federalist spheres was that the introduction of the "early warning", strengthening the role of national parliaments, recalled the old Parliamentary Assembly, formed by representatives of the parliaments of the Member States that had no legislative capacity and predecessor of the European Parliament, until the introduction of the election of the latter via universal suffrage. Certainly, if national parliaments frequently used the power to veto legislative initiatives of the European Union, the role of the European Parliament as potential co-legislator and, above all, of the European Commission as depositary of legislative initiative, could be compromised.

[43] Art. 7.3.b) of Protocol n°2, on the application of the principles of subsidiarity and proportionality.

[44] Art. 8 of Protocol n°2, on the application of the principles of subsidiarity and proportionality.

European executive powers. Also obligatory is that, in the exercise of the judicial function, the judge takes into account the connections between orders, renvois, and the applicable standards, to perform a correct interpretation in the context of the current complex legal system. As a consequence, the EU Member States must introduce these instruments into their legal systems.

In truth, this is the history of the process of European integration upon which we embarked in the 1980s. Adding to the complexity of our internal legal system are the consequences of our integration within the Council of Europe and the European Union. This evolutionary process runs the risk of being watered down or failing, if emotions triumph over reason. Recent examples, of various types, and past experience, both in the European sphere and our own internal sphere, also varied, show us that small steps are often more effective than leaps forward. The process of European integration is an example of small steps. Small steps, accompanied by large projects, some of which have been successful, and others we have had no choice but to scrap because they were impossible or failed to generate sufficient public comprehension to legitimate their implementation. The progress made appears imperceptibe to us when analysed on the ground. But looking back, half a century or so later, we see that, for all the problems, of lack of precision or of resistance, of lack of powerful leadership or of the excessive role played by some, the "experiment" seems to have been worth the trouble. Above all, because we do not know what would have been the result of the centrifugation sought by some.

Therefore, there is a need for a more profound reflection via this multilevel constitutionalism that draws on federative sources. This is what I have tried to illustrate in my talk. I hope, if I have not convinced you, that at least I have given you some food for thought. Thank you very much.

References

Bermann, G. "Taking Subsidiarity Seriously: Federalism in the European Community and the United States". *Columbia Law Review*, 94(2), 1994

Bilancia, P. and De Marco, E. *La tutela multilevello dei Diritti*, Giuffrè Editore, Milano 2004 (with the participation of, amongst others, T. Freixes, G. Zagrebelsjy, A. Barbera, V. Onida, F. Pizzetti)

Freixes, T. "El futuro de Europa y la "Gobernanza" Europea". Contribution to the White Paper on European Governance, 2002. http://ec.europa.eu/governance/contrib_ied_es.pdf

Freixes, T. "Constitucionalismo multinivel y principios fundacionales de los ordenamientos supranacionales: el caso de España", in P. Bilancia (Ed.) *Federalismi e integrazioni sopranazionali nell'arena della globalizzazione: Unione Europea e Mercosur a confronto*, Giuffrè Editore, Milano, 2006

Freixes, T. "Constitucionalismo multinivel y principios fundacionales de los ordenamientos supranacionales: el caso de España". In P. Bilancia (Ed.) *Federalismi e integrazioni sopranazionali nell'arena della globalizzazione: Unione Europea e Mercosur*. Giuffrè Editore, Milano, 2006

Freixes, T. "Estados, regiones y Constitución europea". In Balado, M. *La España de las Autonomías. Reflexiones 25 años después*. Ed. Bosch, 2005, pp. 961–965

Freixes, T. *El legado de Jean Monnet*. Reial Academia de Doctors. Barcelona. 2010, pp.72–77

Freixes, T. and Remotti, J.C. *El futuro de Europa: Constitución y derechos fundamentales*. Jointly edited by the universities of Valencia, UNED and Santiago de Compostela and the European Institute of Law. Minim, Valencia, 2002
Gil-Robles, J.M. *Revista de las Cortes Generales*. New monograph, 70, 71 and 72, First, second and third quarters 2007. Madrid, 2008
Grimm, D. "Does Europe Need a Constitution?" *European law journal: Review of European law in context*, 1(3), 1995
Häberle, P. *La Libertad Fundamental en el Estado Constitucional*. Pontificia Universidad Católica del Perú, 1997
Habermas, J. "Remarks on Dieter Grimm's "Does Europe Need a Constitution?"". *European law journal: Review of European law in context*, 1(3), 1995
Hart, H. L. A. *Law, liberty and morality*. Stanford University Press, 1963
Hauriou, M. "La Théorie de L'institution et de la Fondation. Essai de vitalisme social". *Cahiers de la Nouvelle Journée* (4), 1925
Kelsen, H. *Teoría pura del Derecho*. Revista de Derecho Privado, Madrid, 1933
Luhmann, N. *El derecho de la sociedad*. Herder, 2006
MacCormick, N. Weinbergen, O. *Law as Institutional Fact. New Approaches to Legal Positivism*. Reidel, Dordrecht, 1986
Pernice, I. *Fondements du droit constitutionnel européen*. Pédone, coll. «cours et travaux», 2004
Pernice, I. "The Treaty of Lisbon: Multilevel Constitutionalism in Action". *Columbia Journal of European Law*, vol. 15, n° 3, 2009
Policastro, P. *Challenges of Multi-Level Constitutionalism* (ed. con J. Nergelius y K. Urata), Polpress, Kraków, 2004
Prodi, R. *Speech before the European Parliament*, September 4, 2011
Romano, S. "L'ordinamento giuridico". *Anali delle Universita Toscane*, 1917 e 1918
Rubio Llorente, F. *La forma del poder*. Centro de Estudios Constitucionales, Madrid, 1993, pp.114-115
Ruipérez, J. *La protección constitucional de la autonomía*. Tecnos, Madrid, 1994, p. 223
Ver, Otto, I. *de Derecho Constitucional. Sistema de fuentes*. Ariel, Barcelona, 1988, p. 258
Weiler, J.H.H. Bogdandy, A.von and Mayer, F. *The European Constitution and the Courts. Adjudicating European constitutional law in a multilevel system*. Ney Cork University Scholl of Law and Max Plank Institute for Comparative Public Law and International Law, 2003
Wind, M. *European Constitutionalism Beyond the State*. Cambridge, 2004
Wroblewski, J. *Constitución y teoría general de la interpretación jurídica*. Civitas, Madrid, 1985

Constitutional Courts in Federated States and Entities

Dian Schefold

Introduction

The following remarks were prepared to introduce the presentation of the distribution of powers in the German and the Swiss federal systems. As the German speaker could not present his contribution, I had to fill the gap giving a short presentation of the German constitutional situation, and thus to renounce on my planned introduction. Nevertheless, as the German contribution maybe read in this volume,[1] it seems useful to me to present my prepared introduction regarding the situation of constitutional courts of federated entities (Cantons, Länder, regions, autonomous communities) in federal and regional states, because it appears as a characteristic and a typical problem of the two-level system.

The Principle of Constitutional Autonomy of Member States

Germany and Switzerland are classical examples of federal states in Europe. Regional states normally regulate the regions, their powers and their organisation by the central states constitution and legislation. This is not necessarily so. On the one hand, regions and autonomous communities may have more or less constitutional autonomy also, such as in Italy and in Spain. On the other hand, even in federal states it may happen that the central states constitution regulates the organisation of the federated entities.[2]

[1] See the contribution of Rudolf Hrbek, p. (Rudolf Hrbek, In search of a proper federal balance between the two orders of government: The case of German federalismo, vol. I., Chapter 10).

[2] Classical actual example is Belgium.

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However, normally, the continental federalism in Europe is based on the given existence of the federated entities as states. They exist even before the forming of the Federation. Therefore, they have their own regulation of organisation, a real constitutional system. Certainly, the Federation claims some competences and diminishes, in that way, the powers of the member states. The Federation may even impose some conditions for the structure of the member states, to guarantee a minimum of homogeneity.[3] However, within this framework, every member state (the Cantons or Länder) remains for itself within its constitutional system. Developments in this direction may occur in regionalised states as well.[4]

Constitutional Jurisdiction as Consequence

With the constitutional development after World War II, the problem of constitutional jurisdiction has become essential.

This is obvious, after the phenomena developed between the wars, e.g. in Austria, Czechoslovakia, and Germany, in the *constitutionalisation* of Austria, Italy, Germany, then France and later Spain, Portugal, and Greece. After the 1989 changes in Eastern Europe, the solution of constitutional courts was generally chosen therein as well.

If the constitutional state needs a constitutional court, it is consequent to create an organ of this kind in member states with constitutional autonomy as well. These member states, also, have a constitutional order that needs protection. Conflicts in this field have to be decided. Therefore, it seems consequent that autonomous regions or communities with developed constitutional autonomy, such as Catalonia in Spain, have a tendency to create their own constitutional courts.

Certainly, such constitutional jurisdiction can be exercised by the *central state and its judiciary power*. This has an old tradition in Switzerland, based on the jurisdiction of the federal court on constitutional plaints of the citizens, and with a judicial system that does not need specialised constitutional courts. In a comparable way, there have been created powers of decision of federal courts in Germany as well: violations of rights and other conflicts in the federated states may need solutions and thus decisions by a central court. First tendencies in that direction, influenced by ancient traditions of imperial supreme courts,[5] were articulated in a

[3] See Art. 28 of the German Basic Law (BL), Art. 51 of the Swiss Federal Constitution (FC).

[4] See, for the beginning of this discussion in Italy, the comparative research organised by the Istituto di Studi sulle Regioni "Massimo Severo Giannini", La potestà statutaria regionale nella riforma della costituzione, Milano 2001, where I have described the German situation (p. 175 ff.) and given a first idea of the problems discussed in this paper (p. 307 f.).

[5] The Reichskammergericht and the Reichshofrat, courts of the Sacred Roman Empire of German Nation after the end of the fifteenth century, could decide questions of the constitutional systems as well.

law of the German Confederation of 12 June 1834,[6] and then elaborated in the Constitution of the German Empire of 29 March 1849, which provided for an Imperial Court that, besides powers in field of civil and criminal law, had the function to guarantee the federal order on the federal, the federal—states and the interior of the states' levels.[7] The following constitutional models more or less fulfilled this purpose,[8] and the Basic Law transfers to the Federal Constitutional Court, besides its power to maintain the federal order,[9] on the one hand, a subsidiary power to decide on constitutional conflicts in the Länder,[10] on the other hand, a power of these Länder to delegate their constitutional conflicts to the Federal Constitutional Court.[11] It has been emphasised that it is just this combination of the rule of law and federalism that underlines the need for a constitutional court, in Italy and in Spain, such as that of Germany.[12]

However, besides that, the *federated states* themselves have an interest to resolve such conflicts within their own powers. Therefore, first forms of *constitutional courts* have existed in German federated states from the early nineteenth century.[13] After the second World War, all the German Länder have created their own constitutional courts. Some of them are older than the Federal Constitutional Court and have influenced its creation as models,[14] others were created according to the federal regulation. After the reunification, the new East German Länder have followed these examples as well, and finally, in 2008, even Schleswig-Holstein, where until then the Federal Constitutional Court had exercised this function, has created its own constitutional court. All these courts exist besides and independently of the Federal Constitutional Court.[15]

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[6] See Articles 3–14 of the 60 articles (Die Sechzig Artikel) of 12 June 1834, published by Huber (1978).

[7] See the Constitution (Verfassung des Deutschen Reichs) of 28 March 1849, §§ 125/126, with an extensive catalogue of powers, esp. § 126 d), f), k) for conflicts in the single States.

[8] While the imperial constitution of 1871 (Article 76.2) provided only for a subsidiary power of the Bundesrat (a political organ), Article 19 of the Weimar constitution installed a constitutional court of the Reich (Reichsstaatsgerichtshof) that developed a rich jurisprudence.

[9] Esp. Article 93.1 nr. 3 and the first 2 possibilities mentioned in Article 93.1 nr. 4 BL.

[10] Article 93.1 nr. 4, third case; see as well Article 93.1 nr. 4b BL.

[11] Article 99 BL, however, is now without practical relevance because all the Länder have now their constitutional courts.

[12] See the study of D'Orlando (2006).

[13] Examples: Bavaria, Württenberg, then Saxony, and others.

[14] Very important has been and is the Constitutional Court of Bavaria, working since 1947, see the two volumes with writings for the 25th and the 50th anniversary: Bayerischer Verfassungsgerichtshof (1972) and Bayerischer Verfassungsgerichtshof (1997); for the recent developments see Huber (2008).

[15] A good survey maybe found in Pestalozza (2009); former editions (e.g. 7th ed., 2001) contain the laws on the constitutional courts of the Länder as well. The most recent law (10-1-2008, before, the Federal Constitutional Court had to decide) is of Schleswig-Holstein. The classical work on the constitutional courts of the Länder is edited by Chr. Starck/Klaus Stern, Landesverfassungsgerichtsbarkeit, 3 vols., Baden-Baden 1983. For the recent developments, see Bartlsperger (2008) and

Therefore, one may ask whether, with the development of constitutional jurisdiction, solutions of this kind should not be regarded as a "Way of Federalism" for other federal states. One could think, insofar, of Spain and other federal or regional states with developed constitutional autonomy of the federated entities. The example of the Statute of Catalonia of 2006 appears consequent under this perspective. In this consequence the judgment regarding the Statute of the Spanish Tribunal constitucional,[16] which will reserve the constitutional jurisdiction as a part of the judicial power to the central state, weakens decisively the constitutional autonomy of the autonomous communities.

Doubts Regarding Constitutional Courts of Federated Entities

Nevertheless, a nearer examination produces objections against the opportunity of constitutional courts in federated entities.

In the German constitutional history, the member states' constitutional courts were—not exclusively, but often—instruments to control and *limit democratic-parliamentary influence* and to protect the constitutional monarchy. Certainly, the possibility to control and to judge unconstitutional behaviour of ministers could be a support of the rule of law and of parliamentary-democratic governance; therefore, it was intended by liberal constitutional reforms since the Congress of Vienna of 1815, and the lack of this possibility, above all in Prussia, was a sign of the prevalence of the monarchic-military authority.[17] However, to maintain the monarchic order in the member states, the German confederation used the restriction of liberal-democratic demands on legal plaints as well. The central power and especially the collaboration of the monarchic systems in Germany were highly interested in maintaining the order in the member states, and its constitutional jurisdiction with the mentioned control of the member states through it might appear as an instrument to that purpose.[18] Although this objection is no longer valid in democratic systems, it still remains that a juridification of political conflicts through constitutional courts can weaken the democratic decision making.

Herdegen (2008). For a presentation in Italian, with wide citation of the recent doctrine, see Daniela Poli (2012) (in course of publication); and the actual survey elaborated by the same author in: Calamo Specchia (2011).

[16] Tribunal Constitucional, judgment 31/2010, see for the following Biagi (2011).

[17] For the Prussian constitutional conflict of the 1860s, I have documented this situation: Schefold (1981).

[18] See, Articles 52–62 of the Final Act of Vienna (Wiener Schlussakte) of 15 May 1820, esp. Articles 3–14 of the 60 Articles (Die Sechzig Artikel) of 12 June 1834, (supra, note 6); for a general treatment of the problematic Huber (1975), Verfassungsgerichtsbarkeit in den deutschen Ländern in der Tradition der deutschen Staatsgerichtsbarkeit, in: Starck/Stern (eds.), Landesverfassungsgerichtsbarkeit, vol. 1, (supra, note 15), p. 25 ff. (esp. 50 f.).

However, this is an objection against every constitutional jurisdiction, not against its introduction on federated entities level.[19]

For the actual situation in the German Länder, the concrete problem is based on the relatively small importance and the very *limited number of classical constitutional conflicts* on the Land level. Certainly, there are some cases, and sometimes important ones. However, normally, especially in the smaller Länder, there are rare, usually less than ten a year.[20] Therefore, it is normal that the constitutional court judges exercise their function not as full job, but besides other (mostly juridical) functions. Obviously, this situation is not helpful for the development of a continuous constitutional jurisprudence, although examples prove that it is possible to develop a judicial culture in the constitutional jurisprudence of a single Land.[21] Notwithstanding the formal independence of the constitutional courts in the Länder, the constitutional jurisprudence is largely determined by that of the Federal Constitutional Court, and the cases of conflicts between the latter and the constitutional courts of the Länder are quite rare.[22] This seems an argument in favour of the decision of all the relevant cases by a central constitutional court.

Therefore, it seems reasonable to confer to the constitutional courts of the Länder the *control of constitutionality of the Land laws with the Land constitution* as well. This has been the solution chosen by Article 100.1 BL in 1949. In fact, the question of violation of a Land constitution is different from the unconstitutionality regarding the Basic Law.[23] If, e.g. constitutional rules on the legislative procedure of the Land have been violated, it seems convincing that a judicial authority of the Land has to decide. In that sense, the Statute of Catalonia has established for cases of this kind a solution influenced by the French Conseil Constitutionnel.[24] However, in most cases the question of violation of fundamental rights or of basic principles of the rule of law prevails. In these questions, the Länder constitutions often contain guarantees that could be invoked. Especially for fundamental rights, the Basic Law (Article 142) maintains the validity and applicability of guarantees regulated in Länder constitutions, as far as these do not contradict the federal law. Hence, in many cases a judge who states the unconstitutionality of a law of the Land has the choice either to submit it to the Federal Constitutional Court, or to the Constitutional Court of the Land. However, in practice, the importance of the fundamental rights guaranteed by the Basic Law prevails: there is the large jurisprudence of the Federal Constitutional Court, and in cases of doubt, this will give

[19] See STC 31/2010, nr. 32 and the summary given by Biagi (2011) (supra, note 16).

[20] Example: for Bremen, a Land with nearly 700,000 inhabitants where the Constitutional Court is essentially competent for the classical constitutional controversies, Rinken (1994), mentions for the 43 years between 1950 and 1993 only 47 judgments. For the following development, interesting is the point of view of the President of the Federal Constitutional Court, Vosskuhle (2011).

[21] Recent example: Bürgerschaft (2011), with an interesting discussion of the development of the jurisprudence.

[22] See Article 100.3 BL—a situation in practice not frequent.

[23] See Vosskuhle, l.c., p. 225 ff.

[24] See Biagi (2011) (supra, note 16).

the key to decide critical questions that, in case of conflict, nonetheless have to be submitted to the Federal Constitutional Court.[25] Therefore, judges normally apply the Basic Law-guarantees and submit cases of unconstitutionality to the Federal Constitutional Court, even in the existence of corresponding guarantees in the Land constitution, and the importance of the judicial review on the constitutionality by the Länder constitutional courts is not widely extended.

This situation seems to be quite different from the Spanish and, to a certain extent, the Italian situation, where the definition of powers of the autonomous communities or regions largely depends on the autonomous statutes. Obviously, the interpretation of rules of this kind is a question of essential interest of the central state and cannot, thus, be monopolised by an autonomous regional jurisdiction, but has to be conferred to the central constitutional court.

To the mentioned situation in Germany corresponds that the most important instrument of constitutional jurisdiction—over 90 % of the cases—are the *constitutional complaints (Verfassungsbeschwerde) for violation of fundamental rights*. In fact, from 1951, this has been the essential element of the German system, although the problem of constitutional complaints had been, originally, very controversial, and the instrument, first regulated only by law, was guaranteed in the Basic Law only in 1969.[26] However, for the protection of fundamental rights, it has always been the judgment on constitutional complaints that has developed the system of guarantees, and one of the main problems was and is the enormous number of complaints that have to be decided, which makes it hard to choose the really important problems.

Therefore, it may seem an obvious thought to have a plurality of judicial authorities deciding on constitutional complaints: a devolution to the constitutional courts of the Länder could appear as an alternative.[27] In fact, there is a tradition of constitutional complaints especially in Bavaria, and before the enactment of the Basic Law, post-war Bavaria had, according to the 1946 constitution, a constitutional court with the power to decide on constitutional complaints for the violation of fundamental rights.[28] Influenced either by this or by the federal model, about half of the Länder—with an evident increase after 1989—nowadays provide for the possibility of constitutional complaints to their constitutional courts. Could this situation not help to manage the huge number of cases? The Federal Constitutional

[25] See Article 100.3 BL—a practically rare (important example: BVerfGE 36,342, underlining the constitutional autonomy of the Länder) used possibility, but nonetheless shows the prevalence of the Federal Constitutional Court.

[26] Originally §§ 90 ff. of the law on the Court (BVerfGG), since 1969 Article 93.1 nr. 4a BL. See for the problematic Schefold (2006).

[27] See the arguments referred by Rinken (2000).

[28] Articles 66, 98 phr. 4, 120 of the Bavarian Constitution of 1946, the complaints against laws for violation of fundamental rights are even possible without a concrete individual violation. See above, note 14.

Court, in an important judgment,[29] has underlined the possibility of the protection of fundamental rights by the constitutional courts of the Länder.

However, while constitutional jurisdiction in the Länder is a theme of their self-organisation and thus a power of the Länder, the regulation of the other—civil, criminal, administrative—court procedures is a power of the Federation. Therefore, one may ask whether the Constitutional Court of the Land can admit constitutional complaints in cases regulated by the federal laws in question. The Federal Constitutional Court has approved such constitutional complaints for cases decided by a judicial authority of the Land (not a federal one), if the decision violates a procedural right of a party to the process guaranteed in the Constitution of the Land. However, in all cases where a federal Court has been involved, and in all cases not regarding procedural rights, the constitutional complaint to the Constitutional Court of the Land is not possible. Thus, the field of constitutional complaints in the Länder remains narrow. Constitutional jurisdiction is not a uniform protection of rights distributed on the Federation and the Länder, but on the one hand, an autonomous power of the Länder limited—extensively—by the federal powers, on the other hand, a protection of the rights according to the Basic Law, belonging exclusively to the federal regulation of procedure and the constitutional control by the Federal Constitutional Court.

Finally, the question of constitutional jurisdiction has to be seen in the *European perspective*. This is important in relation to the Luxemburg Court of the European Union and to the Strasbourg Court for the protection of Human Rights. Both operate, although in different contexts, as constitutional courts, which result to similar problems as between the constitutional courts on national level with those of federated entities.[30] However, the difficulties are even bigger on account of the different proveniences of the jurisdictions. There are no constitutional or legal instruments to harmonise the activities of courts based on the Treaty on the European Union, on the European Convention for the Protection of Human Rights—in the framework of the Council of Europe—and the national constitutional courts, so that a de facto-cooperation is the only possible way to resolve differences of jurisprudence.[31] The problem is especially difficult when it regards not only conflicts between territorial unities (states, regions, etc.) and the conformity of legal regulations with the international rules (such as the Treaty of the European Union and the European Convention on Human Rights), but the concrete application of rights on singular cases. Here, the problems of decision of the case according to different sources of rights, but always with the same object, lead to real conflicts. The differences between the decision of the relation between freedom of

[29] BVerfGE 96,345 (one of the rare cases of the procedure, according Article 100.3 BL).

[30] See Vosskuhle (2011) (supra, note 20), p. 215 ff.—Good presentation of these problems in Rolla (2010), where, in a contribution on "Convergenze e divergenzetra le corti europee e le corti tedesche in tema d'interpretazione dei diritti fondamentali" (p. 189 ff.) I have tried to explain the German problems.

[31] See Nunner (2009) and Vosskuhle (2010) speaks of "Der europäische Verfassungsgerichtsverbund" (the european union of constitutional courts).

the press (and of speech) and the rights on privacy in the jurisprudence of the ECHR and the German Federal Constitutional Court, in the concrete application on the cases of Caroline of Monaco/Hannover,[32] are characteristic.

Taking into account these problems, it does not seem useful to enlarge them by a third level of constitutional jurisdiction. Especially in systems that know constitutional complaints, the problems of the two-level federated state—Federation, combined with the complaint to the ECHR, lead to a multiplicity of judicial remedies that can hardly be justified: after the judicial protection in the national court system, there are, according to the German experience, good reasons to add a constitutional complaint. However, then, the importance of the complaint to the ECHR either loses a lot of its importance or produces conflicts such as the above-mentioned. If that has to be accepted, for the reason of the utility of a European protection of rights, it nevertheless should not be enlarged by a second level of national constitutional complaints.

Conclusion

In a multilevel system of political organisation, the constitutional autonomy of every level appears perhaps not as the only possible or necessary, but as a consequent solution. Taking it seriously, the creation of own constitutional courts for the federated entities or states is, as a principle, justified. The constitutional courts of the German Länder are, insofar, an interesting and stimulating example, and the experiment of the Statute of Catalonia merits attention, although the criticism of the Spanish Tribunal Constitucional.

Nevertheless, a nearer research proves the difficulties created by such member states constitutional courts. From the points of view of practical importance, harmonisation of constitutional jurisprudence and of possible conflicts, as well between member states' and central constitutional courts as between judicial system and the constitutional courts of the member states, the practicability of two-level constitutional courts in a federal state appears doubtful. The difficulties are augmented by the constitutional elements of European jurisdiction, which appears as an additional third level.

Therefore, the phenomena of the constitutional courts of the German Länder merit attention. They demonstrate a historical development of federalism and a culture of constitutionalism on two levels. However, as a general solution, they are to be recommended only by taking account of the specific situation, especially for Spain of the asymmetric federalism with mutual respect of the state's and the

[32] See BVerfGE 101,361; then the judgment of the ECHR of 24-6-2004—59320/00 (in German in Neue Juristische Wochenschrift 2004, p. 2647 ff.); then BVerfGE 120,180; see Schefold, in: Rolla, l.c., p. 198 ff.—A similar conflict has raised on the preventive detention, see BVerfGE 109,133 ff. and 128,326 ff., with the criticism of the judgment of the ECHR of 17-12-2009—19359/04 (in German in Neue Juristische Wochenschrift 2010, p. 2495 ff.).

autonomous communities' powers; constitutional law is not a product for exportation. Nevertheless, the importance of member states' constitutional questions underline the necessity to give to the central state's constitutional jurisprudence a legitimacy by the federated powers as well. In that sense, the ways of federalism do not necessarily need to a multiplication of constitutional courts, but to their position as neutral bodies between central and federated powers.

References

Bartlsperger, R., Das Verfassungsrecht der Länder, in: Isensee/Kirchhof (eds.), Handbuch des Staatsrechts, 3rd ed., vol. 6, Heidelberg 2008, § 128 p. 231 fp.

Bayerischer Verfassungsgerichtshof (ed.), Verfassung als Verantwortung und Verpflichtung, Stuttgart 1997.

Bayerischer Verfassungsgerichtshof (ed.), Verfassung und Verfassungsrechtsprechung, München 1972.

Biagi, F. Estatut de Catalunya e la crisi di legittimazione del Tribunal constitucional, Quaderni Costituzionali 2011, p. 63 fp.

Bremische Bürgerschaft (ed.), Staatsgerichtshof der Freien Hansestadt Bremen. Amtswechsel: Auf Prof. Dr. Alfred Rinken folgt Ilsemarie Meyer, Bremen 2011.

Calamo Specchia, M. (ed.), Le Corti Costituzionali, Torino 2011.

D'Orlando, E., La funzione arbitrale della corte costituzionale tra Stato centrale e governi periferici, 2a ed. Bologna 2006.

Herdegen, M., Strukturen und Institute des Verfassungsrechts der Länder, in: Isensee/Kirchhof (eds.), Handbuch des Staatsrechts, 3rd ed., vol. 6, Heidelberg 2008, § 129 p. 271 fp.

Hoke, R., Verfassungsgerichtsbarkeit in den deutschen Ländern in der Tradition der deutschen Staatsgerichtsbarkeit, in: Starck/Stern (eds.), vol. 1, p. 25 fp.

Huber, E. R., Deutsche Verfassungsgeschichte seit 1789, vol. 1, 2nd ed. Stuttgart 1975.

Huber, E. R. (ed.), Dokumente zur deutschen Verfassungsgeschichte seit 1789, vol.1, 3rd ed. Stuttgart 1978.

Huber, K. Grundfragen der Bayerischen Verfassungsgerichtsbarkeit, in: Bayerische Verwaltungsblätter 2008, p. 65 fp.

Nunner, M. Kooperation internationaler Gerichte, Tübingen 2009.

Pestalozza, C. (ed.), Verfassungen der deutschen Bundesländer, 9th ed. München 2009.

Poli, M. D. Bundesverfassungsgericht e Landesverfassungsgerichte, un modello policentrico di giustizia costituzionale, Milano 2012.

Rinken, A., Die Rechtsprechung des Staatsgerichtshofs der Freien Hansestadt Bremen, in: Jahrbuch des Öffentlichen Rechts 42, 1994, p. 325 fp.

Rinken, A., Landesverfassungsgerichtsbarkeit im Bundesstaat, in: Norddeutsche Zeitschrift für Öffentliches Recht 2000, p. 89 fp.

Rolla, G. (ed.), Il sistema europeo di protezione dei diritti fondamentali e i rapporti tra le giurisdizioni, Milano 2010.

Schefold, D. Verfassung als Kompromiss? in: Zeitschrift für Neuere Rechtsgeschichte 1981, p. 137 fp.

Schefold, D., Funzione, contenuto e limiti delle costituzioni dei Länder in Germania, in: La potestà statutaria regionale nella riforma della costituzione, Milano 2001, p. 175 fp., 307 fp.

Schefold, D., Corte costituzionale e sistema costituzionale in Germania, in: Giornale di Storia costituzionale n. 11/I, 2006, p. 209 fp.

Schefold, D., Convergenze e divergenze tra le corti europee e le corti tedesche in tema d'interpretazione dei diritti fondamentali, in: Rolla (ed.), p. 189 fp.

Starck, C./ Stern, K. (eds.), Landesverfassungsgerichtsbarkeit, 3 vols., Baden-Baden 1983.
Vosskuhle, A., Der europäische Verfassungsgerichtsverbund, in: Neue Zeitschrift für Verwaltungsrecht 2010, p. 1 fp.
Vosskuhle, A. Die Landesverfassungsgerichtsbarkeit im föderalen und europäischen Verfassungsgerichtsverbund, in: Jahrbuch des Öffentlichen Rechts 59, 2011, p. 215 fp.

Beyond Institutional Design: The Political Culture of Federalism (A Normative Approach)

Ramón Máiz

Federalism requires mutuality, not command, multiple rather than single causation, a sharing instead of a monopoly of power.

Aaron Wildavsky (1976)

Federalism is not just a form of government; it is a method for solving problems, a way of life.

Vincent Ostrom (1991)

Endogenous Federal Institutions and Federal Political Culture

The implications of federalism reach beyond a particular institutional design, or interactive set of actors and institutions that articulate *decentralization* in decision-making and *accommodation* of ethnic or national diversity, to include *interpretation* or *a federal vision* of politics. This somewhat neglected interpretative dimension of federalism, the complex "way of life" (Ostrom 1991) that it advocates and its specific manner of providing political meaning requires fresh attention.

Recent developments in the comparative study of federalism, namely the positive political economy approach and neo-institutionalism, have provided a very solid body of work on institutions (second territorial chambers, judicial power, constitutional courts) as well as fiscal matters, elections, party systems, and other key dimensions of federations. These new studies have moved the subject beyond the abstract normative discussion on the advantages and disadvantages of federations to more precisely address the specific incentives of the various institutional designs and

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contexts. However, this neo-institutionalist approach focuses primarily on strategic interactions between political parties and institutions and tends to marginalize the essential dimension of the cultural interpretation of federalism. Leaving behind the now trivial statements that "institutions matter" and "federal institutions play a causal role in explaining outcomes", it is important to note that federal institutions are *endogenous* (Rodden 2006): an effect and product of various social, political, and cultural contextual factors *beyond design*. It is significant that a portion of the most recent positive literature, including the *theory of self-sustainable federal institutions* (Filippov et al. 2004), turns a blind eye to the decisive, normative, and empirical questions that cultural pluralism and multi-nationality raise for federations. This does not pose a problem for the positive political economy or rational choice perspective *per se*, as other authors clearly show (Laitin and Fearon 1996; Laitin and Weingast 2006; Bakke and Wibbels 2006; Treisman 2007), but it marginalizes cultural aspects of the behavior of institutions and actors by favoring strategic rationality and the maximization of interests.

The production of meaning, beliefs and values, habits and dispositions, are all undeniably relevant political factors in a reciprocal relationship with actions and institutions. Tocqueville considered it unfeasible to apply U.S. federalism to countries lacking the enabling factor of a federal culture. William Riker (1964: p. 111) concluded from his review of federalism in the U.S. that "the fundamental feature . . . standing behind these institutions is the popular sentiment of loyalty to different levels of government, which sentiment serves as channel for development for centralizing or peripheralizing institutions." Moreover, Bevir and Rhodes (2006) noted that a variety of political beliefs and values are holistic: they only acquire meaning within a broader landscape of principles, dispositions, and orientations. It is impossible to understand even federal actions and political institutions from the sole perspective of their necessary but insufficient *game interests*; leaving aside the ideas and emotions that inspire them.

Federalism requires a self-sustainable and robust institutional design (a federation), a complex, decentralized party system, and a *set of attitudes and values*: a shared political understanding that provides civic support for the system. In other words, *federalism* cannot be reduced to the mechanics of the *federation* (Burgess 2006: p. 47). It involves a program or set of ideas, a substantive political vision, a common cultural capital that defines and when necessary condemns deviant behaviors; constituting for each country *appropriate or permissible federal behavior* at the various levels of government. This federal perspective is articulated in three tightly-interwoven normative spheres: (1) a *political theory* rooted in an extensive federal-republican tradition; (2) an ideology linked to a *political movement*; and (3) the empirical-normative aspect of a *shared federal political culture*, which we shall examine here.

All of this has been too easily ignored in recent comparative or neo-institutional political economy studies, which have overcome the classical normative rhetoric of "benevolent despots" (Oates), "voting with the feet" (Tiebout) or the new "Leviathan" (Hayek, Buchanan) and focus exclusively on the interplay between actors and institutions. Many authors have insisted on the need to compensate for the notorious deficit in updated normative theories of federalism, in regards to the idea of the

State as well as the Nation (LaSelva 1996; Burgess 2006; Norman 2006; Gagnon 2009, 2011; Máiz 2011, 2012). This study argues and explores aspects of the vital but neglected political-cultural dimension from a normative theory perspective that is not entirely lacking in suggestions for empirical research.

It is striking to contrast the hundreds of studies about institutional, constitutional, fiscal, stasiological, or electoral aspects of federalism with the handful of studies regarding its *cognitive and attitudinal interpretative support structure*. Among these few are the works of Kincaid and Cole (2004, 2011), who in a comparative analysis of Canada, Mexico, and the U.S. pointed out the tight correlation between the degree of political decentralization and the presence of a federal culture among citizens. Fafard et al. (2010) took an additional step "inside the box" by analyzing how the normative dimensions of federalism are manifest in the nature and insubstantiality of federal political culture in Canada. For Spain, Martínez-Herrera (2005, 2010) highlights the centrality of attitudinal over cognitive mechanisms and the internalization of norms and values that reinforce sophisticated citizen interaction with multi-level decision-making and participation contexts.

Federalism is again at the forefront of the international political agenda concerning Iraq, India, Spain, Belgium, and even Canada or the European Union. It is more necessary than ever to leave behind ambiguities and answer specific questions regarding *what kind of federalism should be offered* in each context, given the many different possibilities (Burgess 2005; Watts 2008). Perhaps the time has come to remember that federalism is something more than a set of institutions and actors: *it is also a normative ideal*, "a federal creed" (Grodzins 1966: p. 314) and *a set of beliefs*, *values*, *attitudes, and civic dispositions*. The consolidation and development of federalism requires a *federal thinking*, a distinct way of conceptualizing shared and horizontal power (Elazar 1987: p. 192). Thus, the classical empirical-normative dimensions of federalism (Watts and Blindenbacher 2003) should be extended and articulated into a coherent whole composed of (1) a multi-level government guaranteed by institutional safeguards; (2) a constitution and the rule of law at all levels; (3) a decentralized party system; (4) experimentation and differentiation of public policies; and (5) a federal political culture that guarantees popular control based on agreements, negotiation, reciprocity, and mutual respect. This federal political culture among citizens should include both (a) the capacity for adequate attribution of responsibilities between different levels of government (*who does what*): in other words, agreement on the limits of what is tolerated in the actions at different decision-making levels and acceptance of experimentation and differentiation of public policies (Fafard et al. 2010; Schneider et al. 2011); as well as (b) tolerance and respect for cultural, linguistic, and national pluralism and accommodation of superimposed identities and loyalties (Kincaid and Cole 2011).

An examination of the more recent albeit classical literature on this reveals that the cultural dimension composes a basic axis of the federal model. A federation requires a federal political culture, which is distinct from a unitary political culture (Duchacek 1970: p. 343). A federal culture consists of a set of values and approaches to the system that vary according to the degree of federalism in each country, as Livingston (1968) suggested based on Almond and Verba. Elazar (1987:

p. 78) holds that "in many respects, the viability of the federal system is directly related to the degree to which federalism has been internalized culturally." Wildavsky (1998: p. 40) summed it up nicely: "Federalism... cannot sustain itself without the underlying support of political culture."

Philosopher John Searle recently remarked on how political realities ("institutional" realities in his words) such as states and nations are only constituted, maintained, and developed when they are *recognized and accepted* by the citizens. In fact, they only exist when there is a shared belief in them. As *deontic powers* (which provide reasons for action that are independent from our desires), their very existence depends on their being commonly accepted. From an ontological perspective, political realities are linguistically constituted and cannot exist without their own language. Thus, the dimension of *meaning* is politically crucial (Searle 2010). Providing meaning is very much within the field of culture: it involves the extension of values and attitudes, vocabularies, metaphors, and narratives that build and/or reinforce institutions. Just as a democracy cannot exist without democrats—citizens infused with civic culture—federalism cannot develop without a solid federative culture. Stepping outside the strictly cognitive dimension, the individual internalized dispositions that connect citizens with political and social structures suggest the necessity of a *federative habitus* among citizens (Bourdieu 1975). In sum, these "shared understandings and skills" (Ostrom 1991: p. 247) constitute the *moral psychology of federalism*, an indispensible, attitudinal, and cognitive *self-enforcing* cultural mechanism for federal institutions (Weinstock 2005).

In spite of the scarce research in this field and the obvious difficulties in making the concept operational, which we shall see is due more to normative than empirical issues, there is reasonable evidence in the literature to support the *hypothesis of federal culture*. It suggests that a federation coexisting with a unitary or centralist citizen culture is condemned to chronic instability, institutional degradation or even failure. "No federal system works well unless you build up a supportive political culture" (Watts 2008).

However, it would be a mistake to consider attention to the cultural dimension of federalism as a "culturalist bias" that is alternative or even contrary to new positive political economy studies and neo-institutionalism. On the contrary, from Riker (1964) to Ostrom (1991) to Weingast (1995a, b, 2005), loyalty to the various levels of government, and not just to the federation or the States, is considered crucial to the stability of federal systems. Specifically, citizens must share a similar perspective regarding the transgression of power—whether *encroachment* by the union, or *shirking* by the states. This catalyst activates the mechanism of democratic and federal reaction by the citizenry and shifts the "federal problem" from institutions to beliefs. "The question then becomes... what combination of beliefs about the nature of transgressions can be supported in equilibrium? . . .and which equilibrium will occur depends on the diversity of beliefs about transgressions and about citizen duties. . .Indeed, we can suggest which equilibrium will result if we know the pattern of beliefs in a society" (Weingast 1995a: p. 14). In sum, a key *self-enforcing mechanism* (Weingast and Figueiredo 2005) for the proper functioning of federal systems is for the citizenry to embrace a "shared belief system" (Weingast

1995b: p. 456) regarding what constitutes intolerable excess by the various levels of government in the fulfillment of their competencies.

In the *Federalist Papers* 51, Madison identified citizen judgment as the main mechanism for federal control: "A dependence on the people is, no doubt, the primary control on the government". The fully institutional controls of the Constitution, the separation of powers and the judicial branch were considered as "auxiliary precautions". Over time, his conviction became even stronger: "Public opinion sets bounds to every government" (Madison 1791 (1999)).

Effective popular control depends on the existence of "shared understandings" (Ostrom), a "shared belief system" (Weingast) or "preconceptions partagées" (Watts), that establish the threshold for what would be considered opportunism or exceeding the limits at different levels of government, based on a generalized citizen perception of the attributions and responsibilities of each level. Thus, "agreement on a threshold" (Bednar 2009) of what is federally tolerable is a subproduct of the identification of citizens with the federation as a whole and not with the federal government or state governments separately (Cairns 1999). Consequently, "popular safeguards—made possible through a consensus one might call federal culture—are a means to preventing socially harmful adjustments. . . Development of a federal culture, where popular safeguards may be activated, transforms the federal state into a federal nation" (Bednar 2009: p. 191).

The Federal Principle and the Quest for Meaning

In *The Federal Principle* (1978), Rufus Davis highlighted how the particular normative density of the *provision of meaning* in federalism was derived from the foundational idea of *covenant*. We should highlight that if political culture is a set of unconscious or practical *values*, *beliefs, and attitudes (tastes*, *habits*, *dispositions*, *capacities)* that are shared by the citizens and provide political meaning to institutions and actions, then the decisive conscious dimension of *the political ideal*, or the "federal creed", which is closely connected with the cultural dimension, is fundamental to the world of meaning in federalism. In other words, federalism is understood as "the recommendation and (sometimes) the active promotion of support of federation" (Burgess 2006: p. 2). Politics is an unending struggle for the hegemony of one vision of society over others and the federalist agenda constitutes a fundamental factor in at least two ways: (1) it provides a *criterion for normative judgment*, a specific ideological position from which to evaluate and critique reality; and (2) it also provides a *horizon of expectations*, a ranking of objectives and the strategies and processes to be followed in order to achieve them.

However, if federalism is an ideal, a set of values and attitudes or *an ideology and a political movement* from a perspective of political action and mobilization, then a shared federal political culture among citizens becomes both the source and interactive result of a *normative political theory*. It establishes values and attitudes

that are congruent with a federal culture and the provision of coherence, articulating and transferring them from political opinions to systematic propositions that are internally consistent and allow an objective verifiable discussion. It is a mistake to separate *political ideology and theory* because the former often constitutes the vehicle for normative reflection (Freeden 1996). It is equally a mistake to separate the other two interpretative dimensions of politics: it is hardly possible for citizens to have a shared federal political culture without an ideology that infuses a movement, extends federal beliefs and values to the broader citizenry and clearly competes in the public sphere with other political agendas such as state or anti-state nationalisms. Without this, there is no chance of a federation in the mid-range: federal culture is not an automatic reflection of federal institutions and must be cultivated and promoted in its full normative density among the citizens. "The federal polity relies on certain shared preconceptions, values, beliefs and interests that as a whole pre-suppose policies of recognition, cooperation, compromise and accommodation. The federal polity thus extracts the essence of the notions of human dignity, tolerance, respect, reciprocity and consent" (Michael Burgess 2006).

Federal culture is the empirical-normative axis of this treatment, and requires at least two initial comments regarding the concept of "political culture". First, as a common identity forged by a "shared belief system" (Weingast) and "preconceptions partagées" (Watts), federal political culture goes beyond Almond and Verba's classical definition of "the pattern of individual attitudes and orientations towards politics among members of a political system" (Almond and Verba 1966: p. 23). The concept of political culture should be extended to the set of inter-subjective semiotic practices (Wedeen 2002: p. 713) that provide meaning as an emerging property that is anchored in political meaning. Beyond "civic culture", political culture can be seen as a complex set of narratives, interpretations, metaphors, myths, and symbols that link political beliefs with action, giving meaning to the entire political world with its institutions and behaviors. Political culture is thus a web of significance, a set of "public and shared meanings" and not merely a "collection of discrete traits whose integration is presumed" (Ross 2009: p. 137). In addition to values and attitudes, political culture should be understood to include narratives, discourses, interpretations, and visions of the world that configure shared identities. As such, political culture shows a decisive multiple efficacy (Ross 2009) in the construction of the complex, symbolic, multi-level, and *inclusive symbolic landscape* of federalism. It is founded on self-rule plus shared rule and the conciliation of unity with diversity, by (1) framing the political context, (2) linking individual and collective identities, (3) defining borders and the patterns of interaction among groups, (4) providing interpretative criteria for the actions and motives of others, and (5) offering resources and repertoires for organization and mobilization.

A certain element of confusion must be cleared up when defining a shared federal political culture, which in no way implies overestimating consensus and forgetting the inescapable dimension of conflict and political pluralism. We find that "meanings are open to various and changing interpretations, while also

sometimes appearing to be overly coherent, fixed or inevitable ... attention to dynamism, risk, misunderstandings, ambiguity and historical encounter calls for an analysis of the effects of semiotic practices" (Wedeen 2002: p. 722). By expanding the concept of political culture, we extend the research agenda for federal political culture beyond quantitative studies that explore individual attitudes and pre-dispositions such as appropriate attribution of responsibilities in multi-level governments, distribution of power between different governments, tolerance towards linguistic pluralism, etc. (Kincaid and Cole 2011). New research areas must be incorporated to include myths, symbols, metaphors, rhetoric, rituals, and narratives as well as their role in configuring a landscape of self-government with shared government and of overlapping collective identities.

In this sense, the concept of "culture as an equilibrium" proposed by Laitin and Weingast shows its full analytical capacity for describing how the consensus that is crystallized in culturally constructed loyalties to the federation as a whole facilitates the popular control of federalism. The possibility of positive and negative incentives generating clear expectations and foreseeable behavior, along with the possibility of sanctions for unilateral failure to comply with the pact and the production of a collective identity based on cooperative, tolerant, and mutually respectful us/them distinctions ties in perfectly with a concept of culture that is elaborated from a nucleus of "common knowledge". This provides "an equilibrium in a well-defined set of circumstances in which members of a cultural group, through shared symbols, ritual practices, and high levels of interaction, are able to condition their behavior on common knowledge beliefs about the behavior of all members of the group" (Laitin and Weingast 2006: p. 16).

Stepping again "outside the box" of classical empirical studies in political science, political culture consists of a set of values and knowledge that are not only *cognitive* but also *affective and emotional* (Wedeen 2002; Ross 2009): citizen *attitudes* and pre-dispositions that reinforce and give feedback to the political system. The federal political culture is no exception to this. These dispositions, preferences and reinforcing habits, or more precisely, this *attitudinal support* for federalism provides something indispensible for developing, implementing and reforming institutions, but also for the political community itself, the entire citizenry. In other words, attitudinal support supplies a favorable disposition, specific capacities, loyalty, and *affective connections*.

Before addressing federal values, we must briefly pause to examine this last *affective-attitudinal dimension* of the moral psychology of federalism. The dominant neo-institutional and rational choice analyses (including the "limited rationality" approach), which unilaterally emphasize *interests and strategic rationality* in the empirically-oriented positive theory of federalism, pay scant attention to the normative dimension of values, principles, and ideals or to the specific emotions of federalism. Thus, a hyper-rationalist view of politics and federalism is taken as undisputed evidence for an institutional design of positive and negative incentives over which actors clash, armed with strategies of maximization of self-interest.

However, modern neuroscience, cognitive psychology, and linguistics have conclusively demonstrated the centrality of emotions to understanding, decision-

making processes, and politics in its broadest sense (Máiz 2011) and emphasize the critical role of certain neuronal circuits known as mirror neurons. Narratives become decisive because they explain events and define the limits of identities in emotionally significant ways for the actors. Thus, emotions—of empathy or resentment, for example—that activate the various narratives become the explanatory mechanism in the micro–macro connection of collective action (Petersen 2002). Leaving behind all anthropological optimism and heeding the echo of the *Federalist Papers*, *51*, "if men were angels…", yet an innate disposition towards coexistence, cooperation and community has *also* been found in human beings (Damasio 2005). Lakoff (2008: p. 118) wrote that "we are born to empathy and cooperation". When the us/them relationship is based on the natural disposition towards *empathy*, then relations of competition, self-interest, and mutual distrust no longer dominate as self-evident and indisputable elements of society, and a new possibility emerges: *the political construction of trust*. This is not exclusively institutional because it involves collective actors (political parties) as well as citizens in a political culture of shared reciprocity. It is important to highlight the affective contribution of federalism: it institutionally and culturally fosters "moral sentiments" of empathy and solidarity, extending them beyond the limitations of internal groups to ever larger circles of humanity. In any federation, an indispensible complement to shared loyalty at both the union and state levels of government is the "positive identification of citizens with each other as valued members of the same civil community." Here, "citizenship reinforces empathy and sustains solidarity by officially defining who is eligible to be 'one of us'" (Cairns 1999: p. 4).

As a political culture of reciprocity that is not only calculating and partisan but also symmetrical and *conditionally altruist*, based on trust and mutual solidarity, federalism offers itself as an alternative to the cultivation of closed and exclusive national identities that encourage destructive passions such as hatred, resentment, and anger. The very essence of the federal republican tradition resides in postulating a politics based on empathy, co-responsibility, and empowering of the federal entities as an alternative to conservative politics founded on *hierarchical authority*, discipline, and verticality. Benveniste (1969: p. 119) long ago pointed out the etymological root of federalism as deriving from the notion of agreement between equals, which in turn implies a vocabulary of sharing between *pact (foedus)* and *trust (fides)*. The *empathetic* centrality of the federal agenda is inscribed in its very origins, and as such is ultimately irreducible to explanation or interpretation strictly in terms of strategic rationality and interests.

Federalism derives its attitudinal support from democracy, which is founded on the will for agreement and the idea of *shared power and reciprocal trust*. From Althusius to Montesquieu (with his "république fédérative" as a "societé de sociétés" in Book IX of *L'Esprit des Lois*) to Madison, the psycho-social and ethical-political core of federalism continues to be the coexistence of several states within one state (the union) and of several communities within a broader political community. In other words, federalism considers the pluralist model of *mutuality*, coexistence, cooperation, empathy, and trust to be psychologically and ethically-politically superior to the unitarian, coercive, and hierarchical model

of a nation-state that is internally exclusive and externally competitive or even openly militarized. In federalism, superimposed loyalties and identities link citizens to political power both as separate individuals and as members of communities and nations.

The false belief that political passions are the exclusive realm of nationalisms must be laid to rest. Passions are present in all political movements, each of which fosters a set of specific and inseparable *reasons and emotions*. *Federal political passions* cultivate civic attitudes of empathy, mutual respect, and fraternal solidarity. This dimension of *federal political emotions* is neither removed from nor opposed to the rationality of collective interests, but rather complements and re-channels them. It is founded on the natural human capacity to forge common ground based on *mutual* respect and loyalty; a constitutive reciprocity that makes federal loyalty irreducible to centralizing formulations of *Bundestreue* or "loyalty to the political community" flowing vertically and uni-directionally from the federated units towards the union.

This key emotive aspect, this psycho-affective tissue of federalism must not be forgotten in the hyper-rationalist approach lest we risk completely amputating the empathetic dimension of the federal vision itself. We now know that the dispassionate view of the political mind is indefensible because the "political brain is an emotional brain" (Westen 2007: p. 12), and that emotions are decisive for cognitive evaluation. They constitute one of the basic human capacities and are decisively "ethical and sociopolitical" (Nussbaum 2001: p. 149). Ignoring the emotive dimension of the political production of trust by institutions, actors, and political culture implies abandoning an essential aspect of the very *interpretative frame* of the democratic-federal tradition. Without frames or specific vocabulary it is difficult, if not impossible, to speak and even think politically. George Lakoff, a well-known cognitive linguist, was insightful in this: "it is decisive to recognize when the interpretative frames for important convictions have been lost in the public conscience and when we lack the necessary words. Our task then is to build that frame and assign names in order to be able to speak of the problem openly" (Lakoff 2008: p. 133).

Shared Understandings of Federalism

The very rich, axiological, and cognitive dimension of federal political culture, the values and unique perspective it defends, lead us to revisit a classical concept of political science. We can speak of a specific *mobilization of bias* (Schattscheider 1960) in a federalist key, or a *federal bias* (Wildavsky), that emphasizes the decisive function of *values* in politics, in contrast with unilateral attention to *interests*. Mobilization of this federal bias postulates values that are very distinct from those of a centralist version of politics or unitary nation-state. The first of these values is clearly *shared power*, which inherently implies overcoming the idea, image or metaphor of *sovereignty*.

From Althussius to Kant to Cattaneo to Spinelli, the federal tradition originated and was carried forward historically as an *ideal of peace* among peoples ("perpetual peace" according Kant's federalist writings). Its two tightly-intertwined key tenets can be described as (1) going beyond the mere absence of war to a just political order involving respect, equality, and the coexistence of different peoples; and (2) completely relinquishing a sovereign solution, a chimerical and ultimately authoritarian "World State" and seeking instead to construct a "free republic of federated peoples" or a "federation of peoples". In the same theoretical-political movement to reject the sovereign model of a World State, Kant establishes the cultural, religious, and linguistic diversity of humanity as the foundation of the "federation of peoples" (Máiz 2012: p. 263).

Friedrich (1968) pointed out in a classical study that federal political culture leaves aside the vocabulary of sovereignty, which focuses on the necessary existence of a single, originating, and monopolizing center of political power. In contrast, the federal approach of shared power is *poly-centric*, a thoroughly multicentric system of government composed of various spheres of decision-making and control. It is more than just multi-level because there are no higher and lower orders. The federal culture replaces the vertical, hierarchical, pyramidal view of the state with more *horizontal*, diverse, and autonomous spheres of *competencies* that are coordinated (federated) for the exercise of political power.

From Sovereignty to Multi-Centric Governance

It is important to draw attention to the idea that *federal political culture is intransitive*, which brings out a fundamental conceptual difference between federalism and sovereignty. The vocabulary of sovereignty is indebted to a *transitive* view of political power that assumes an ultimate, original, external, superior, and pre-eminent source over other subordinate entities. Federalism, in contrast, articulates an *intransitive* understanding of shared power between the union and the states, between the various decision making and power spheres and the respective citizens, which is *derived from* and inherently *limited by* a constitution and by competencies.

The federal culture is anti-Weberian in its *non-hierarchical coordination*, as opposed to "command and control" from a supposedly superior center. The political culture of federalism assumes that the dimensions of many issues in a globalized world go beyond pre-established and exclusive borders of competencies and seeks to ensure effective, inter-competency solutions that avoid recourse to re-centralization (Bolleyer and Börzel 2010: p. 231).

The federal political-legal culture is one of a *constitutional state with no sovereign*, which assumes that power is distributed in several spheres and limited under a constitution of the federation and the constitutions of the member states. The principle of *competency*, which replaces that of *hierarchy*, leaves no place for any unlimited or original power of the union or the member states. This again

connects the cultural dimension of federalism with normative theory: in contrast with a *unitary* (*demos*) constituent power possessing a single constitution, federalism offers the pluralist (*demoi)* theory of popular sovereignty. Nicolaidis calls this *Demoicracy*, a perspective that involves *composite*, *complex* constituent power(s), and constitution(s). It creates a new vocabulary: composite constitution, multi-level constitution, *Verfassungsverbund*, etc. By postulating shared and derived powers, federalism acknowledges the presence of *plural and shared constituent power* between several (co)constituent subjects: the people of the federation and the singular peoples of each community or federated state.

Federal political culture is horizontal. To the horizontal separation of powers between the legislative, judicial, and executive branches, a federal union provides an additional *horizontal* separation of constituent and constituted powers, making it a "state" of states. Elazar (1987: p. 37) proposed the image of a *matrix* for thinking about federalism outside the classical vertical structure of a hierarchical pyramid of powers.

Here again, the federal culture "produces things with words". Performative language cooperates in building a series of democratizing, complex scenarios of self-government involving superimposed and multi-level citizen loyalties that require the political wealth of party sub-systems for articulating differentiated preferences. It even envisions the possibility of varying intensities of citizen preferences, based on their participation in general, regional or local elections. In sum, it houses the concept of multiple "democracy laboratories", with greater and more diversified capacity for problem solving, experimentation and innovation, along with additional incentives for mobilization and action. Because it is politically decentralized, the language of federalism must be capable of autonomous adaptation to the uncertainty, changing contexts and new conditions of contemporary society.

In the best republican tradition, an essential feature of federal political culture is the greater political inclusion of groups and territories in decision-making processes. Federalism offers a discourse of accessibility to diverse scenarios of political participation. It also tends towards more complex and effective accountability both in public policies and in institutional solutions to issues of citizen equality and well-being.

A federal political culture is by definition *adaptive*, indebted to the principle of agreements between communities for achieving common projects in the midst of rapidly changing citizen preferences and socio-economic contexts. So it can never be culturally represented as an institutionally crystallized and permanent *structure*. Rather, an open *process* is the outcome that corresponds to the combination of limited and shared power, multi-centric governance, and pacts. The attitudes and values of the federal political culture sustain the necessary but insufficient interpretative conditions for a contingent and indeterminate *process of federalization*. It is in essence an agreement and interaction between institutional actors, and as such can never be "closed". Successive states of equilibrium result from the benefits of self-government and the challenges of changing internal and external contexts.

Elazar very appropriately describes federalism as a "*permanent* seminar on governance."

The federal political culture is clearly distinguished from a unitary centralist culture in its *articulation of self-government and shared government*. The essence of federalism lies beyond unilateralism (in favor of the union or the member states) in the conciliation of the deepest capacity for political autonomy with the greatest participative inclusion in a shared project of common government. This gives rise to the *unstable equilibrium* of federalism, which requires both institutional or party-system solutions and the support of a shared federal political culture among citizens. The attitudes and values of the federal culture reinforce the dual federal dilemma: (1) how to keep the central government from undermining federalism through encroachment on the *self-government* of the federated states; and (2) how to avoid destabilization of the federation by the federated states through disloyalty, opportunism, and non-cooperation in *shared governance*.

The federal political culture remains aloof from the vocabulary of the nation-state or of nationalism against the nation-state, both of which have inherited the same underlying *monist and state-centric* assumptions. The federal perspective perceives the principle of nationalities as a smaller-scale, mimetic reproduction of the uniform, centralizing processes proposed and executed under the driving principles of the nation-state. Even the vocabulary of self-determination, when interpreted as a *unilateral* decision, has a residual place in the moral psychology of federalism, which drinks from the well of beliefs and attitudes that place highest value on political bilateral/multilateral coexistence and mutual respect.

So the federal culture clothes itself with a project of shared diversity, a common project to create a "state of states" that ultimately overcomes the traditional, *monist* logic of the nation-state (Karmis and Maclure 2001; Gagnon 2011; Máiz 2012). This multi-centric culture of shared power spills over state "dams" and flows towards supra-state spheres. It also flows towards local spheres because federalism is *municipalist* by vocation and tradition, in contrast with neo-centralist state or anti-state nationalism. The strongest normative impulse of political Europeanism was and is federalist.

This multi-level, bottom-up, "smaller is better" aspect that starts with the spheres closest to the citizen is central to the federal culture and ideal. Wildavsky (1998: p. 17) actually considers *the federal bias* ("a bias towards federalism") to be *the* bias, the quintessential federal normative assumption. In the classic words of Sundquist and Davis, federal politics consists of "deferring increasingly to local judgments" (Sundquist and Davis 1969: p. 250).

This leads us to a possible understanding of federalism as *governance*. Ultimately, as Beaud (2007) pointed out, federalism is a radical departure from the hierarchical state-centric approach. *Thinking federally* implies an interpretation of democratic politics that is open to decision-making interdependence between governments and a broader constellation of public and private actors. Rather than control or coercion from a higher command center, it involves thinking in terms of *non-hierarchical coordination* and attention to *increasingly complex contexts* of decision-making and objectives in a globalized world. It also requires a perspective

that values *processes* over structures, ongoing adaptation of roles and responsibilities between government spheres in response to changing circumstances and new citizen preferences. In sum, federal thinking abandons an elitist and technocratic logic of public *management* to embrace a broadly inclusive, deliberative, democratic logic of *politics* wherein public and private actors participate.

The ambivalent, complex and also enlightening concept of *multi-centric governance* coincides with the federal political culture and has been addressed by several authors (Nicolaidis and Howse 2001; Bolleyer and Börzel 2010; Clarke 2010). Literature on governance emphasizes several features that serve as bridges to the political culture of federalism, some of which are obvious and others problematic. These features include: *multiplicity of public and private actors* involved in decision-making processes at different levels; *interdependence* of actors, resources, and decisions; the imperative of *coordination* rather than control for achieving common objectives; *horizontality* rather than hierarchy; permanent *learning* processes and re-formulation of problems with a better understanding of complex, fragmented, inter-dependent, and risky contexts; processes of interactive negotiation and decision making; *formal and informal political production of trust*; similar results from different processes; connections between *formal and informal processes*; an appreciation of *power as* allowing multiple winners *via a positive sum* rather than seeing power as a zero sum (winner/loser) equation; shared leadership and respect for self-government, or *a non-hierarchical coordination of leadership* rather than domination or control; and the construction of *networks* of public and private actors on various scales and levels.

Federalism was historically born to reinforce rather than weaken the government of the federated units and has always been concerned with emerging processes of re-centralization. Federalism must never lose sight of its founding principles, which involve the representative, deliberative, and participative aspects of republican democracy: namely guaranteed and substantive self-government for the member states, strong citizenry, and political control (including *accountability* and *responsiveness*). Therefore, the convergence of the political cultures of federalism and governance displays some clear limitations. This can be seen in the blurring of borders between what is public and what is private and the consequent privatization of public decision-making and resources, which is characteristic of a now frequent neo-liberal understanding of governance. It is also evident in: an undisguised tendency towards hyper-consensualism in the idea of governance, which excludes conflict and covers over the political tension between choices; the weakening of political responsibility for decisions and public policies (the central weakness of all multi-centric government involves *who* is responsible for *what* and how to control it); the weakening of democratic representation and deliberation mechanisms and actors; or information asymmetries and subsequent problems with legitimation.

It is difficult to address these questions by equating the political cultures of governance and federalism. Perhaps it would be more effective to address them as an updated response to the question with which we began: what kind of federalism are we referring to? This would require a re-examination of federalism that retains

the axis of its normative tradition, but re-interprets it in light of the current trend towards new patterns of horizontal government. In this sense, governance with its rhetorical images of networks, coordination, and new and shared types of leadership can provide great assistance in renovating federalism and articulating a new federal vision capable of addressing the challenges of the twenty-first century. We now know that metaphors, along with interpretative frames and rhetoric, are a fundamental element of the conflict between alternative political ideals and vocabularies (Lakoff and Johnson 1980; Lakoff 2008). With this knowledge comes the need to move beyond such outdated metaphors as Grodzins' "cakes" (is federalism more like a *marble cake* or the ordered hierarchy of a *layer cake?*); or Elazar's (1994) "mosaic" of relatively isolated communities; or Taylor's (1992) description of "separate" communities in the theory of multiculturalism.

While remaining attentive to the precautions and limitations mentioned, the metaphors of governance can shed new light on the multi-centric and reticular aspects of federalism, which are not limited to state contexts. The political-cultural tradition of federalism speaks of plural empowerment or *proactive subsidiarity*, which can apply to local and neo-municipalist contexts as well as networks of cities, supra-state, European or inter-regional spheres (especially border regions).

A Non-nationalist Idea of Nation

The federal political culture values and reinforces citizen attitudes, fostering self- and shared government as well as cultural and national *unity in diversity*. The federal political culture involves a vocabulary and perspective of the *idea of nation* that is distant from nationalism. Similarly, and just as radically, federalism overcomes the vocabulary of sovereignty and state centrism, generating diverse decision-making centers and shared powers. Its political culture possesses a pluralist identity component that includes the nation as a core and unrenouncable dimension of its program. Federalism also proposes an interpretative frame that radically departs from the nineteenth century *state equals nation* equation wherein it is implicitly or explicitly assumed that each State must have only one Nation or that each Nation in this inexorable logic must possess its own independent State.

In terms of political capacities, *the federal political culture is a culture that empowers citizens for a plurality of narratives and interpretations*. Cognitively, federalism argues both pluralistically and/or pluri-nationally for the ultimate ethical-political superiority of accommodating. Beyond its tactical use as a "stage" or "phase", and more than just "pacifying", accommodating involves consensus around a common project of coexistence, and the mutually beneficial cultural-political and economic enriching of several nations within a single political unit. Federalism also overcomes community *monism* and recognizes the profound moral significance of the national identities that provide a cultural context by which citizens access and participate in politics. This supplies an alternative of accommodation and recognition, in contrast with the theses and languages of

communitarianism or nationalism (exclusion by an us/them dialectic, unilateral right to self-determination, secession).

By postulating "unity in diversity" with a perspective and language that is distant from state or anti-state nationalisms, plurinational federalism can provide a sphere for negotiation and pacts with multiple winners (understood here as recipients of material, political, cultural or moral benefits). This sphere of coexistence is much more attractive than monist federalism, confederation or secession that can be more costly, conflictive, impoverishing or simply unfeasible in cultural, political, social, and economic terms.

The federal culture democratically socializes citizens in a pluralism of identity, culture, and territory as an unavoidable *fact* and a true ethical-political *value*. It is a living, collective trust and heritage in progress that requires building and defining by everyone, more than the mere preserving of something handed down. The culture of federalism starts with the assumption that *diversity unites and differences bring together*, interpreted through the lenses of tolerance, empathy, and mutual recognition.

Plurinational federalist culture does not use a vocabulary of *authenticity*, purity, and faithfulness to a tradition; it does not rely on a defensive reification of identities into a single orthodox narrative, nor does it forge them as essentialist, closed, and exclusive. It does not isolate different communities and in sum *does not carry forward a mosaic-like multi-communitarianism.* Rather, it articulates multiple narratives as democratic processes of participation, internal diversity, and deliberation that have been re-oriented to avoid eroding their differences while facilitating multiple memberships and making them compatible and super-imposable. Federalism does not contemplate the sacralization of historically given identities that were permanently crystallized at a point in the past. Its normative axis is not reduced to passive recognition of an organic, cultural or historic base for its constitutive units. Rather, it builds on external *and internal* pluralism in each community, focusing on the production and extension of values that comprehend a vision in flux, to establish democratically generated collective identities based on pluralism, respect, trust, and deliberation. In sum, the federal political culture provides understanding that reaches beyond statist and nationalist monism; it values and democratizes nation-building processes in the difficult but very attractive shared diversity of a community of communities, a nation of nations.

Biomimesis and Equality

Precisely because federalism postulates a complex synthesis of shared and self-government as well as unity in diversity, it does not eradicate the inevitable political dimension of *conflict,* nor does it cling to angelical belief in a reconciled, tension-free society or earthly "communion of the saints." Federalism creates an agonistic culture that Ricoeur referred to as a *conflictive consensus.* "Federalism is about conflict . . . Federalism is also about cooperation, that is, the terms and conditions

under which conflict is limited" (Wildavsky 1998: p. 17). In fact, federalism entirely departs from the nineteenth century metaphor of *organic nationalism*, the exorbitant demand that society be conceived as a perfectly sutured and coherent organic totality. The federal ideal instead might be considered along the lines of a *political ecosystem*: a plural "union" wherein heterogeneous and even partially contradictory elements coexist in unstable but mutually beneficial and enriching equilibrium. The history of federalist vocabulary hearkens back to ancient natural philosophy rooted in the "foedera natura" of Lucretius in *De Rerum Natura*.

Along these lines, biology and the theory of evolution provide very useful heuristic models for re-formulating the federal hypothesis. The perspective of *biomimesis* ("nature knows best"), replaces the obsolete, mechanical, classical enlightenment imagery of "mechanisms", "checks", and "balances"; offering instead new images of federative institutional development inspired by nature: symbiosis, endosymbiosis, colony, diversification, and cooperation between various organisms (Benyus 2002). It is not by chance that ecological political theory—which has always been rather decentralized and multi-level—and students of environmental public policies have in their most recent works rejected a "command and control" perspective for one of multi-centric and network governance. Ecology has abandoned some initial centralist and authoritarian temptations regarding a world government that would manage risk. Each of these currents has gone on to defend new forms of decentralization and federalism that are better adapted to complex scenarios and diverse spatial configurations, ranging from the local sphere to integration of public policies to long-term thinking and cultural pluralism (Benson and Jordan 2008; O'Riordan 2009; Adger et al. 2009). In climate change policies, for example, the emphasis has shifted away from inefficient top-down models for addressing global warming (Kyoto) and efforts are now based more on a multi-scalar perspective that adapts to varying and specific risks in diverse communities and from these local and regional basis constructs a "global federalism of climate policy" (Prins and Rainer 2007). This creates a promising but little-explored nexus between federalist political culture and the new environmental culture of decentralized management and multi-level sustainability.

Finally, the feature of *equality* in federal political culture is often overlooked in the literature or even portrayed as incompatible with federalism. There is a common interpretation that considers federalism to be in direct conflict with the welfare state, with equality, and with re-distribution. In this line of thinking: (a) federalism distracts from and complicates the pursuit of distribution and equality objectives; or (b) federalism debilitates national trust and solidarity, which is the basis for the solidarity between various communities; or (c) federalism mistakenly "acculturates" the material issues of economic and class inequality. New empirical evidence now seriously questions these assumptions by demonstrating how plurinational federalism does not erode welfare states but helps diminish differences between communities. There is no negative correlation between cultural heterogeneity and re-distribution, which has been found to depend on other factors (Banting and Kymlicka 2006). The same can be said for decentralization and equality of income (Beramendi 2003).

Even in the sphere of beliefs and attitudes that we are addressing here, it is important to highlight the centrality of equality as a value in the program and political culture of federalism. The federal political culture is one of shared diversity and, though federalism and uniformity are mutually exclusive, federalism defends a common project of coexistence that requires *equality*, *cohesion,* and *solidarity*. Thus, federalism defends self-government, difference, plurality of responses, and policies of differentiated preferences and contexts. Moreover, inter-territorial solidarity is based on an empathy that generates common bonds and an equitable community of communities. The *re-distribution* of economic resources is a basic element in re-negotiating the equilibrium and common commitment that sustains the federation, which in turn facilitates the development of self-government and cohesion according to universal criteria of solidarity between different communities. As a community of communities and not just a poli-centric political system (sometimes erroneously referred to as a "state of states"), federalism defends the core values of equality, solidarity, and a steadfast egalitarian vocation between territories as foundational to an equitative collective project. Since it is founded on political diversity, federal equality is an *equality of opportunities*, *not results* (Wildavsky 1998). There is a pertinent, substantive connection between this egalitarian dimension of federal political culture and the recent debates of contemporary normative theory regarding the equality of *what* (resources, opportunities, capacities) (Sen 2009).

Federative equality is an initial equality of access to resources, an equality of opportunities that make possible the liberty, self-government, and empowerment of diverse communities. It also maintains full demands for *accountability* derived from the autonomous decisions, management, and public policies of each decision-making center. However, there is a minimum threshold of resources below which it is impossible to exercise the *collective capacity for self-government* that solidarity would require, regardless of the initial responsibilities defined in the autonomous policies.

The federal value of inter-territorial solidarity implies both sufficient finances for the exercise of self-government and equal fiscal co-responsibility vis-à-vis the citizens. Federalism characteristically offers co-responsibility between equality and solidarity on the one hand and empathy, respect, and mutual trust on the other. Thus, the federation reinforces freedom through collective self-government, social equality, cohesion and the welfare state.

What has thus far been analyzed is inscribed in the republican-democratic tradition of self-government that is indebted to the idea of plural fraternity and solidarity and inseparably linked to equality. There are evident elective affinities between the federal ideal and a socialism for multinational societies that is able to meet the challenges of twenty-first century.

Conclusion

A robust federation requires (1) a sustainable institutional design that avoids transgression of federal power by encroachment on the states and transgression of the states on the federation by shirking, (2) decentralized party systems that allow territorially diverse aggregation of preferences, and (3) a solid federative political culture that is shared by the citizens. This cultural dimension ("shared understandings", "shared belief system") constitutes a fundamental, reinforcing, and supportive mechanism without which federations cannot endure or evolve in changing scenarios. This "supportive political culture" undergirds the "popular safeguard" of the citizens, based on accepted tolerable limits and the expectations of reasonable citizen and government behaviors at different levels.

The attitudinal dimension of federal political culture includes specific emotional aspects of empathy and solidarity, habits and capacity for tolerance, mutual respect, and reciprocity. These are very distinct from classical authoritarian and centralistic passions such as fear and submission. The federal political culture also includes a cognitive aspect of distinct beliefs and values (shared and self-government, unity in diversity, equality, negotiation, and pacts) that distances it from the unitary political culture of sovereignty based on vertical hierarchy and monist political power.

The active presence of federal values and emotions, of the interpretative frame and symbolic federal landscape in the public sphere, requires explicit cultivation and promotion; they are not established or naturally perpetuated as a mere by-product of formal federal institutions. In sum, the federation as system needs the driving energy of federalism as political movement. There is an internal and normative-conceptual connection between the sustainability of federal institutions and leadership, between organizational work and the explicit and identifiable repertoire found in the mobilization of federalist movements and ideologies. This federal culture and ideal requires interaction with a normative political theory of federalism that encourages federalist opinions, beliefs, and narratives in coherent and systematic (and debatable) propositions. This improves the arguments and reasons that can provide guidance in evaluating and designing alternative institutions defined by autonomy, pluralism, and equality. Nevertheless, normative elaboration should always take place in close contact with empirical and comparative political science research and the positive political economy theory of federalism.

References

Adger, N. Lorenzoni, I. O'Brien, K. (2009) *Adapting to Climate Change*, Cambridge: CUP.

Almond & Verba (1966) *The Civic Culture* Princeton: Princeton U. Press

Bakke, K. & Wibbels, E. (2006) "Diversity, Disparity, And Civil Conflict in federal States" *World Politics* 59, 1–50.

Banting, K. & Kymlicka, W. (2006) *Multiculturalism and The Welfare State. Recognition and Redistribution in Contemporary Democracies*, Oxford: Oxford U. Press.

Beaud, O. (2007) *Théorie de la Fédération*, Paris: PUF.
Bednar, J. (2009) *The Robust federation: principles of design*, New York: CUP.
Benson, D. & Jordan, A. (2008) "Understanding task allocation in the European Union: exploring the value of federal theory" *Journal of European Public Policy* 15: 1–20.
Benveniste, É. (1969) *Vocabulaire des Institutions Indo-européennes*, Paris: Minuit.
Benyus, J.M. (2002) *Biomimicry. Innovation inspired by Nature*, New York: Harper.
Beramendi, P. (2003) *Decentralization and Income Inequality*, Madrid: CEACS.
Bevir, M. & Rhodes, R.A.W. (2006) "Defending interpretation", *European Political Science* 5, 69–83.
Bolleyer, N. & Börzel, T. (2010) "Non-hierarchical policy coordination in multilevel systems" *European Political Science Review* 2: 2, 157–185.
Bourdieu, P. (1975) *La Distinction. Critique social du jugement*, Paris: Minuit.
Burgess, M. (2005) *Comparative Federalism*, New York: Routledge.
Burgess, M. (2006) "Gestionar la diversitat als estats federals: enfocaments conceptuals I perspectives comparatives" in Gagnon, A. (ed) *El federalisme Canadenc contemporani*, Barcelona: IEA.
Cairns, A. (1999) "Introduction" in Cairns, A. et alia (eds) *Citizenship, Diversity, and Pluralism. Canadian and comparative perspectives*, Montréal: McGill-Queen's U. Press.
Clarke, S. (2010) "*Thinking federally* from a Governance Perspective" in M. Pagano & R. Leonardi *The Dynamics of federalism*, London: Palgrave.
Damasio, A. (2005) *En busca de Spinoza*, Barcelona: Crítica.
Davis, S. Rufus (1978) *The federal Principle. A Journey Through Time in Quest of meaning*, Berkeley: California U. Press.
Duchacek, I. (1970) *Comparative federalism*, New York: Holt.
Elazar, D.J. (1987) *Exploring Federalism*, Tuscaloosa: Alabama U. Press.
Elazar, D. (1994) *The American Mosaic: the Impact of Space, Time and Culture on American Politics*, Boulder: Westview Press.
Fafard, P. Rocher, F. Côté, C. (2010) "The Presence (or Lack Thereof) of a Federal Culture in Canada: The Views of Canadians" *Regional and federal Studies* 20,1, 19–43.
Filippov, M. Ordeshook, P. Shvetsova, O. (2004) *Designing Federalism: A Theory of Self-Sustainable Federal Institutions*, New York: CUP.
Freeden, M. (1996) *Ideologies and Political Theory*, Oxford: Clarendon Press.
Friedrich, C.J. (1968) *Trends of Federalism in Theory and Practice*, New York: Praeger.
Gagnon, A. (2009) *Máis Aló da Nación Unificadora: en defensa do federalismo multinacional*, Santiago de Compostela: Instituto Ramón Piñeiro.
Gagnon, A. (2011) *L'Age des Incertitudes. Essays sur le fédéralisme et la diversité nationale*, Quebec: Presses de L'Université Laval.
Grodzins, M. (1966) *The American System*, Chicago: McNally.
Karmis, D. & Maclure, J. (2001) "Two Escape Routes from the Paradigm of Monistic Authenticity: Post-Imperial and Federal Perspectives on Plural and Complex Societies" *Ethnic and Racial Studies* 24,3, 361–385.
Kincaid, J. Cole, R. (2011) "Citizen Attitudes toward Issues of Federalism in Canada, Mexico and the United States" in *Publius* 41,1 53–75.
Kincaid, J., Cole, R. (2004) "Public Opinion on Federalism and Federal Political Culture in Canada, Mexico, and the United States" *Publius* 34:3 3, 201–221.
Laitin, D. & Fearon, J. (1996) "Explaining Inter-ethnic cooperation" *American Political Science Review* 90,4, 715–35.
Laitin, D. & Weingast, B. (2006) "An Equilibrium Alternative to the Study of Culture" *The Good Society* 15,1, 15–21.
Lakoff, G. (2008) *The Political Mind*, New York: Viking.
Lakoff, G. & Johnson, M. (1980) *Metaphors We Live By*, Chicago: Chicago U. Press.
LaSelva, S.V. (1996) *The Moral Foundations of Canadian Federalism*, Montreal: McGill-Queen's University Press.

Madison, J. (1999) *Writings*, New York: Library of America.
Máiz, R, (2011) "The Political Mind and Its Other: Rethinking the Non-Place for Passions in Modern Political Theory" in M. Engelken et al. *Politics and Emotions*, Wiesbaden: VS Verlag pp. 29–73.
Máiz, R. (2012) *The Inner Frontier*, Bruxelles: Peter Lang.
Martínez-Herrera, E. (2005) *The Effects of Political Decentralization on Support for Political Communities*, PhD Dissertation Florence: EUI.
Martínez-Herrera, E. (2010) "Federalism and Ethnic Conflict Management. Rival Hypotheses, the Attitudinal Missing Link and Comparative Evidence". Erk, J. & Swenden, W. *New Directions in Federalism Studies*, London: Routledge 141–156.
Nicolaidis, K. & Howse, R. (2001) *The Federal Vision*, Oxford: OUP.
Norman, W. (2006) *Negotiating Nationalism: Nation-building, Federalism, and Secession in the Multinational State*, Oxford: Oxford U. Press.
Nussbaum, M. (2001) *Upheavals of Thought* New York: Cambridge U. Press
O'Riordan, T. (2009) "Reflections on the pathways to sustainability" in Adger, N. & Jordan, A. *Governing Sustainability*, Cambridge: CUP: 307–329.
Ostrom, V. (1991) *American Federalism: Constituting a Self-Governing Society*, San Francisco: ICS.
Petersen, R. (2002) *Understanding Ethnic Violence*, Cambridge: CUP.
Prins, G & Rainer, S. (2007) *The Wrong Trousers: Radically Rethinking Climate Policy* London: LSE (MacKinder Centre).
Riker, W. (1964) *Federalism: Origin, Operation, Significance,* Boston: Little Brown.
Rodden, J. (2006) *Hamilton's Paradox: The Promise and Peril of Fiscal Federalism*, New York: CUP.
Ross, M.H. (2009) "Culture in Comparative Political Analysis" in Lichbach. M. & Zuckerman, A. *Comparative Politics: Rationality, Culture and Structure*, New York: CUP.
Schattschneider, E. E. (1960) *The Semi-sovereign People*, New York: Holt.
Schneider, S. Jacoby, W. Lewis, D. (2011) "Public Opinion Toward Intergovernmental Policy Responsibilities" *Publius* 41,1, 1–31.
Searle, J. (2010) *Making the Social World*, Oxford: Oxford U. Press.
Sen, A. (2009) *The Idea of Justice*, New York: Allen Lane.
Sunquist, J.L. & Davis, D. (1969) *Making Federalism Work*, Washington: Brookings Inst.
Taylor, C. (1992) *Rapprocher les solitudes: écrits sur le fédéralisme et le nationalisme au Canada*, Montréal: Presses de l'Université Laval.
Treisman, D. (2007) *The Architecture Of Government: Rethinking Political Decentralization*, Cambridge: University Press.
Watts, A. (2008) *Comparing Federal Systems*, Montreal: McGill-Queen's U. Press.
Watts, A. & Blindenbacher, R. (2003) "Federalism in a changing world: a framework" in Blindenbacher, R. & Koller, A. *Federalism in a Changing World*, Montreal: McGill U. Press.
Wedeen, L. (2002) "Conceptualizing Culture: Possibilities for Political Science" *American Political Science Review* 96,4 713–728.
Weingast, B. (1995a) "The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development" in *The Journal of Law, Economics and Organization* 11,1,1–32.
Weingast, B. (1995b) "A Rational Choice perspective on the Role of Ideas: Shared Belief Systems and State Sovereignty in International Cooperation" in *Politics and Society* 23,4, 449–464.
Weingast, B. & De Figueiredo, R. (2005) "Self- Enforcing federalism" *Journal of Law, Economics, and Organization* 21,1, 103–135.
Weinstock, D. (2005) "The Moral Psychology of federalism" in Gaudreault, J. & Gélinas, F. *Le fédéralisme dans tous ses états. Gouvernance, identité, méthologie* Bruxelles: Bruylant.
Westen, D. (2007) *The Political Brain* New York: Public Affairs
Wildavsky, A. (1998) "Federalism Means Inequality: Political Geometry, Political Sociology, and Political Culture" in Schleicher, D. & Swedlow, D. (eds.) *Federalism and Political Culture: Aaron Wildavsky*, New Brunswick: Transaction Books.

Balancing Self-Rule and Shared-Rule: Sources of Tensions and Political Responses in Contemporary Political Systems

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Federalism is a compromise between shared-rule and self-rule. As such, federal systems are rarely free of tensions since they involve an often delicate balancing act between 'territorial integration' and autonomy. This paper identifies and discusses three important sources of tensions stemming from the friction between shared-rule and self-rule elements in contemporary federal systems. A first source of tension are claims for recognition, often involving references to a right to self-determination, which are typically met with some resistance from the central state. We look at the case of Canada to illuminate both the problems and the possibilities raised by these types of claims. A second source of tension is the territorial redistribution of financial resources, either through centrally funded programs or through schemes of equalization. Here, we discuss the dynamics involved in the politics of social security in Belgium and in the politics of equalization in Australia and Canada. A third source of tension revolves around claims from constituent units to have a voice internationally and to play a role in the definition of the state's international position on matter where they are domestically competent, which are met by state responses exhibiting varying degrees of accommodation. In this context, we discuss the cases of Belgium, Canada, the United States, and Germany.

The paper is divided into three sections. It begins with a discussion of recognition and self-determination issues. The second section focuses on territorial fiscal redistribution. The third section examines the issue of constituent units and foreign affairs. Finally, the conclusion provides a comparative perspective of these three sources of tension in contemporary federal systems as examined in selected federations with the Autonomous Community of the Basque Country in the context of the Spanish Estado de la Autonomías.

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Recognition and Self-Determination

The literature on federalism makes a distinction between multinational federations, where a significant segment of the population does not identify with the nation projected by the central state, and mononational federations, where the state-projected nation is unproblematic (Gagnon and Tully 2001). As opposed to mononational federations, multinational federations very often have to respond to claims for the recognition of collective differences. A part of such claims for recognition simply involves an acknowledgement that a community, distinct from the one typically promoted by the state, exists. More than only speaking to the mere existence of a group, the politics of group recognition also involves a statement about self-determination.

The multinational character of a federal system very often translates into the action of a nationalist movement seeking autonomy within, or independence from, the state. At the center of contemporary nationalism is a very strong ideational core: the principle of self-determination. The idea that nations have an inherent right to determine their own future is closely linked to liberal freedom and is a notion constitutive of modern politics. As a doctrine, self-determination was formulated in the era of European Enlightenment, but reached its zenith when world leaders invoked it as they sought to re-arrange the international order following WWI. Since then, the idea of self-determination has been central to many momentous political processes, from decolonization in the 1960s to the dismantlement of the Soviet Union and the Eastern Bloc in the early 1990s. All these instances of major political transformations enacted in the name of self-determination have produced a 'demonstration effect' (Connor 1973) whereby groups seeking change in their status within, or their relationship with, the state can refer to historical and contemporary cases to provide legitimacy to their claims. They also benefited from a decline in the prestige of so-called great European nations that have been associated with colonialism, and more recently, with the failure of their integration policies.

The centrality of self-determination in contemporary politics is also the result of its presence in international law. From this legal perspective, self-determination does not entail a right to secession in cases where states are liberal, democratic, and provide guarantees for minority rights. Still, the connection between self-determination and the nation gains from the sense, often exploited by nationalist political leaders, that international law validates it. This provides a powerful incentive for territorial groups within a state to self-identify as a nation. It is, after all, politically more seductive to be a nation than, for example, a region. The principle of self-determination stimulates the constitution of nations and provides legitimacy to nationalist claims. From a rhetorical perspective, nationalist leaders have little to lose by invoking this right. However, they can expect that state leaders will challenge their claims by using a contradictory tenet of international law that is also constitutive of modern politics, state territorial integrity. As the notion of self-determination enters and then permeates the political debate, it is often confronted by constitutional law. In this context, courts sometimes attempt to

mediate between seemingly antithetical principles, or simply re-affirm the primacy of territorial integrity over self-determination (Tierney 2004; pp. 247–284). Of course, this last strategy never effectively diminishes the mobilizing power of the idea of self-determination.

Most multinational federal systems where there are claims for recognition also face the politics of self-determination. In Canada, references to self-determination have also been central to sovereignist politics insofar as they represent for *Parti qué bécois* (PQ) leaders a way to portray independence as a natural outcome for Québec. From the sovereignist perspective, self-determination is not only a principle of international law, but it is also a right. Beyond specific positions on the future of Quebec, the province's political and intellectual class is virtually unanimous in accepting the idea that the principle of self-determination gives Quebeckers the option to decide to secede from Canada. Therefore, the idea of self-determination keeps the secessionist option legitimate even at times when it is not politically palatable. Moreover, contrary to the case of Spain, claims for self-determination have been largely accepted by the Canadian government, which has twice participated in referendums on sovereignty by promoting the advantages for Quebeckers of staying Canadian, and by the Supreme Court of Canada, which issued, in 1998, a *Secession Reference* that became the core of a federal legislation setting parameters for the potential secession of Quebec, the *Clarity Act*. The Clarity Act has been criticized by many in Quebec for undermining the principle of self-determination by seemingly awarding the federal government a right to judge of the clarity of the referendum question and to evaluate the majority needed to achieve secession (Rocher and Verrelli 2003). This being said, however, self-determination has been recognized as a democratic principle by the most important Canadian institutions, and the associated Court reference and legislation represents the canvass for the secessionist challenge to Canadian federalism. Interestingly, this acknowledgement of a right to self-determination predates any formal recognition of Quebec as a nation within Canada, which came in the form of a parliamentary motion in 2006 but does not yet have a constitutional form.

Some federal systems recognize minority populations a right to self-determination that extends to secession; this is the case for Ethiopia as well as St-Kitts and Nevis. In most cases, though, if self-determination is recognized at all, it is carefully circumscribed. In Nepal, where a federal system is built from the remains of an absolutist monarchy and where impoverished and excluded populations who now self-identify as Aboriginal seek the recognition of a right to self-determination coherent with the International Labour Organization's convention no. 169, there is now a broad agreement that the constitutionalization of a right to self-determination will be accompanied by a clause stating that this right does not extend to secession.

Territorial Redistribution

Federal systems redistribute money territorially and such redistribution is often a source of important tensions, in both multinational and mononational systems. However, these are often strongest in multinational federal systems since state-wide national ties may not be strong enough to mitigate the discontent of the territorially-anchored groups whose members, or leaders, feel that they either give too much or do not receive enough. Two types of territorial redistribution schemes can be particularly controversial in contemporary federal systems: implicit redistribution through state-wide national social programs and explicit redistribution through equalization programs.

In multinational states, the formal solidarity of citizenship, as expressed by the welfare state, is rarely congruent with sub-state nationalism's sense of cultural and linguistic solidarity. In other words, a member of a community that considers itself a nation distinct from the one projected by the central state usually gives priority to this sub-state national bond and considers redistribution to the 'other' an injustice. Nationalist movements are likely to seek the partial congruence between their national community and economic solidarity, or at least to proceed gradually toward their full coincidence, by attempting to de-centralize elements of social policy.

This is exactly what is happening in Belgium with Flemish nationalism. Parallel to its traditional focus on language, a major concern of Flemish nationalists is the financial implications of the territorial dimension of social policy. Understanding this concern requires some historical perspective. The structural background for the connection between Flemish nationalism and social policy is the relative economic decline of Wallonia after WWII. For over a century, Wallonia had been the economic engine of the country because of steel and coal industries resulting from precocious industrialization. Flanders, for its part, remained more rural and less prosperous. By the 1950s, the situation was changing to the point where, somewhere between 1965 and 1970, Flanders caught up with, and overtook, Wallonia economically according to virtually all indicators.

The first signs that Flemish nationalism was going to make the territorial dimension of social policy a political issue were a series of studies in the 1980s, most frequently commissioned by Flemish organizations and conducted by Flemish academics, detailing the financial flux between Flanders and Wallonia stemming from Social Security. The main Flemish argument in the debate over the 'federalization' (decentralization) of social security stems from the most basic conclusion of all studies conducted on the territorial dimension of Social Security: there are implicit financial transfers from Flanders to Wallonia inherent to its mechanisms. This argument operates a subtle slip from an interpersonal conception of solidarity to an inter-community view. It highlights that territorial transfers occur in virtually all components of Social Security: health care; unemployment; work-related and disability benefits; pensions; and family allowances. Flanders is on the positive end of Social Security transfers only when it comes to early retirement benefits.

To mobilize popular opinion in support of the federalization of Social Security, Flemish nationalists have constructed a specific discourse that frames the economic figures related to transfers. At the centre of this discourse is the idea that Walloons willingly overuse Social Security benefits or, alternatively, that their culture leads them to do so (Orsini 2004). To make the consequences of the financial transfers striking, the nationalist slogan has been that every Flemish family pays for a new car for every Walloon family every year.

Over the last several years, the federalization of Social Security has triggered political crises insofar as the gulf between the two communities on this issue is rendering government formation extremely difficult. Francophones view the continuation of a centralized social security system as the last meaningful operationalization of a Belgian political community whereas many Flemings see its decentralization as the next logical step in the progression towards a more autonomous Flanders.

Another financial source of tension in federal systems are schemes of horizontal fiscal redistribution, often called 'equalization programs.' Canada's equalization program presents an apparent paradox. On the one hand, equalization is a core component of federalism aimed at giving concrete meaning to the notions of social citizenship, territorial solidarity, and even national unity. It has been called 'the bottom line component of Canadian fiscal federalism' and an 'essential glue' for Canada. Ever since 1957, the federal government makes equalization payments to provinces whose fiscal capacity (i.e. the ability to raise revenues as measured by an examination of a number of different tax bases) fall below a certain average. The federal government's commitment to equalization, as well as the general objective of the program, is even enshrined in the country's constitution. On the other hand, equalization has generated various forms of provincial complaints, sometimes to the point of creating severe conflict between the federal government and various provincial governments. Alberta, a province rich in natural resources which has not qualified for payments since the 1960s, has long expressed dissatisfaction with the amounts of money distributed through the equalization program (for 2010–2011 $16 billion). Other provinces have been critical too. For example, when the Conservative government of Prime Minister Stephen Harper decided to implement the recommendations of an Expert Panel (*Expert Panel on Equalization and Territorial Financing Formula*) that had been tasked with making recommendations on the equalization program, including the 50 % inclusion of revenue from natural resources and a cap that would ensure that equalization payments to a province would stop at the point where its fiscal capacity would exceed that of the 'poorest' non-recipient province, Premiers of Newfoundland, Nova Scotia, and Saskatchewan were completely unafraid to take on the federal government publicly and to accuse it of a serious sleight. As a response to the news that the report's key recommendations would be implemented, Newfoundland Premier Danny Williams took out a full-page ad in the national newspaper *Globe & Mail* to denounce the Canadian Prime Minister.

In other federal systems, these types of programs generate far less tension. This is the case for Australia. Australia has an even longer history of formal horizontal

fiscal equalization than Canada. In 1933, a specialized agency operating at arm's length from the Commonwealth Government, the Commonwealth Grants Commission (CGC), was created to de-politicize a process that had seen much dispute emerge from the allocation of special grants to certain states. From its creation to 1982, the CGC provided advice to the Commonwealth Government on the payment of special grants to claimant states (at least one of Western Australia, Tasmania, South Australia, and Queensland every year), which were equalized to an average of New South Wales and Victoria. By the early 1980s, Commonwealth and state governments agreed that a proportion of income tax revenue would be shared among the states to equalize their financial capacities. The CGC was then tasked with assessing the financial situation of all states. Like under the previous special grant model and contrary to the situation prevailing in Canada, the CGC did not only measure state fiscal capacity (the revenue side) but also their service needs (the expenditure side). Major factors affecting the assessment of states' needs include indigeneity, population dispersion, age, and fluency in English. In 2000, the Commonwealth Government responded to states' demand for an equalization pool that would grow with the economy and instituted a Goods and Services Tax (GST), to be collected by the Commonwealth Government but whose proceeds would be distributed to states. Part of the money is redistributed to the states on a per capita basis but the rest is used to equalize. From 1933 to approximately 1945, claimant states, especially Tasmania, expressed frustration and sometimes hostility towards the CGC. After 1945, Tasmanian hostility towards the CGC rapidly disappeared and the equalization system functioned without much protest from the state.

Although the difference may in part be the product of the multinational nature of Canada and the mononational character of Australia, the governing structures of equalization and the nature of federal systems also condition intergovernmental relations around equalization programs. Equalization models where the program is administered by an arms-length agency (such as Australia's) serve to depoliticize the process of fiscal capacity determination, or at least provide the appearance that this process is essentially technocratic and therefore void of political consideration. Our comparison also suggests that constituent units with a strong fiscal and constitutional basis (such as Canadian provinces) are more likely to challenge the federal government over equalization payments than those in a weaker position (such as Australian states), which might only be able to take shots at each other.

Federalism and Foreign Relations

Foreign relations have traditionally been the reserved domain of central governments. Yet, the gradual transformation of world politics from a dominant focus on war and peace to the much more complex agenda of today has led to regional governments taking an interest in global affairs. The emergence of this link between the regional and the global has been most significant for federal systems since they feature constituent units, with constitutionally-protected powers, making

policy in a wide array of fields that have been touched in one way or another by global processes.

The transformation in world politics has had two consequences for federal states. The first is that constituent unit governments have shown increased interest in the international positions articulated by their state on issues that are internally their constitutional responsibility, including when it comes to negotiating and signing treaties. The second is that many constituent unit governments have sought to 'go abroad,' that is, to develop international relations through, for example, the establishment of offices in other countries. Federal systems have been unevenly affected by the blending of the regional and the global. Four factors condition the extent to which constituent unit governments seek to shape their state's positions internationally and to 'go abroad,' and therefore, the nature of central-regional tensions over foreign affairs: the regional context; the structure of society and, most crucially, constitutional rules and political dynamics. The extent to which foreign affairs have generated intergovernmental relations has varied from one federal system to another.

In Canada, courts have been instrumental in specifying the constitutional setting for foreign relations, at least with respect to the implementation of treaties. The 1937 *Labour Conventions* case produced a judgement finding that treaty implementation was tied to the constitutional division of powers between federal and provincial governments. As such, provincial legislation is necessary to implement an international treaty signed by Canada in a provincial area of jurisdiction. Québec's politicians typically argue that the constitutional division of power should apply not only to treaty implementation, but also to their negotiation and even their signing, but this argument is rejected by most constitutional experts.

Provincial governments have sought greater input into the forging a Canadian position internationally, including treaty signing, when it comes to matters that fall within their domestic jurisdiction. The crafting and implementation of foreign relations in Canada are not guided by comprehensive political arrangements between the federal and provincial governments insofar as there is not one intergovernmental forum specifically dedicated to international relations. Consultation surrounding the implementation of treaties or the definition of Canadian positions on matters of provincial jurisdiction takes place within sectoral intergovernmental forums.

When it comes to the foreign relations of provinces, Québec clearly stands out for the extent and the scope of its action as well as for the resources allocated to it by the provincial government. Québec has signed several hundred international agreements since 1964 with both states and regional governments from every continent, and it has international representation in more than 25 countries. Institutionally, Québec's international activities are crafted and supervised by a government department dedicated to international relations, the *Ministère des relations internationales* (MRI), which had a budget of $95,217,018. Next to Québec, Alberta is the most active province internationally. Its foreign relations center strong bilateral relationships with close to a half-dozen American states and the presence of an Alberta office in Washington, D.C.

The federal government alone is empowered to sign and implement treaties in the United States. The constitutional basis for this is rock solid: Article 1 (8) of the constitution gives to Congress exclusive power to regulate commerce with foreign countries and declare war while Article 1 (10) declares the supremacy of federal over state laws. Hence, legislation to implement treaties comes from the federal government and, as is the case in Australia, this legislation poses all kinds of limits on what states can do. Trade treaties, for example, often restrict the type of environmental regulation and labour legislation that can be enacted by states.

States have not been vocal about being consulted prior to the United States signing a treaty on matters that fall within their jurisdiction. This is hardly surprising since the network of intergovernmental relations is very thin in the United States; states just do not have a forum to engage with the federal government. Nevertheless, states are involved in federal policy-making through their Senators. When it comes to foreign policy, the Senate is particularly powerful and Senators can refuse to support ratification of a treaty if they think it could harm their state. There are other reasons why states do not claim greater input into American foreign policy-making on issues that affect them. One is that American federalism is strongly hierarchical, with the federal government viewed by U.S. citizens as their primary government. Another is that most American politicians are highly sensitive to the status of the United States as a superpower and would be loath to be seen as weakening their country on the international stage by questioning any part of its foreign policy. Ultimately, courts protect this coherence of American foreign policy. For example, a 1996 Massachusetts law limiting procurement access to companies doing business in Burma was declared unconstitutional since the United States already had economic sanctions against that country.

Many American states have developed a foreign presence in recent decades, primarily by establishing trade offices abroad. Since the objective behind the development of states' foreign relations is essentially economic (seeking foreign investment and promoting exports), the federal government has viewed this exercise as benign when assessing its impact on federalism. Similarly, the federal government has not looked to prevent states from interacting with bordering Canadian provinces or Mexican states.

Contrary to American states, German länder have the constitutional right to sign a treaty with a foreign state about matters where they have internal jurisdiction, although this requires the consent of the federal government (Article 32, paragraph 3 of the Basic Law). Länder have legislative powers over few policy fields (primarily education, language, culture, and policing) so treaty-signing opportunities are not very common. Länder also have the constitutional right to be 'consulted in a timely fashion' before the federal government signs a treaty that could affect them (Article 32, paragraph 3 of the Basic Law). This constitutional framework leaves two questions unanswered: can the federal government sign a treaty on matters under länder jurisdiction and are the länder then required to implement them?

Federal and länder governments have decided not to seek constitutional clarity on these issues, but rather to follow cooperation guidelines set in a 1957

intergovernmental agreement. According to this agreement, the federal gives the länder a chance to raise their concerns at the earliest opportunity when treaties with foreign states are being negotiated. This system has worked smoothly for two main reasons. The first is that the whole of German federalism is grounded in the constitutional principle of 'federal loyalty' (*Bundestreue*), whereby each level of government is bound to consider the other when conducting its own affairs. In other words, there is a genuinely cooperative federalism in Germany that is quite different from Canada's competitive federalism or Australian centralizing federalism. The second is that the agreement on the intergovernmental relations of foreign relations is not the only channel for the länder to speak to Germany's foreign affairs. The German upper house (*Bundesrat*), which provides representation for the länder in federal institutions, needs to give its assent for Germany to sign an international treaty.

German länder are quite active internationally. Their treaty-making power forms part of the basis for this international activity. Since 1949, the länder have signed approximately 150 treaties with foreign states (with 5 out of 16 länder signing the bulk of them). These treaties typically dealt with practical problems (roads, nature conservation, etc...) and were not seen as contradicting the national interest so they easily received the blessing of the federal government. Still, the länder find this process tedious and tend to settle for a 'joint declaration' or 'memorandum of understanding' with a foreign government; these tools, which are not legally binding and do not require the assent of the federal government, form the core of the länder's international activity.

Belgium is peculiar among federal states because its constituent units have the power to sign international treaties in fields where they are internally competent without the federal government having a right to review. When it comes to signing treaties in these fields, the only limitation for Regions and Communities is that they do not contradict the broad orientations of previous treaties signed by the federal government. The exceptional nature of the Belgian model when it comes to foreign relations is the direct product of the contemporary political dynamic of the country itself. Flemish parties are continuously seeking greater decentralization of the country and, because Flemings form a majority within the country, they can typically have their way against Francophones, who prefer the status-quo. Belgian federalism was designed to hold the country together in the face of Flemish claims for more autonomy.

Although unusual, the decentralization of foreign relations has worked well. As a result of the exclusive and watertight division of power in Belgian federalism, many treaty signings do not require consultation between the governments. In instances when international negotiations focus on fields where more than one of Belgium's government is constitutionally empowered to act (for example, the environment or trade), consensus between all of the executives involved is necessary for Belgium to go forward. In other words, each executive has a veto power. In practice, this veto is virtually never formally used.

Since they have constitutional autonomy to develop international relations in matters where they have internal jurisdiction, Belgian Regions and Communities

are very active internationally. They have distinct international relations departments, significant budgets (especially Flanders, the wealthiest region), and a well-developed representation abroad (Flanders has representatives in 9 foreign countries while Wallonia/French-speaking Community has representatives in more than 20). In all of these respects, Belgium's Regions and Communities are only rivalled by Quebec.

The issue of foreign affairs has proven more central in multinational federal systems such as Canada and Belgium than in mononational federations such as the United States and Australia. This is in large part because of the link between nationalism and the projection of group identity and interests onto the international sphere: the politics of distinctiveness within domestic politics typically finds its echo in foreign affairs. It is also the consequence of a stronger, deeper federal culture found in these states, and in some mononational federal systems such as Germany whereby the argument of prolonging the domestic responsibilities of constituent units to the 'international' has quite a bit of credibility.

Conclusion

These various experiences of federal countries around issues of recognition/self-determination, territorial redistribution, and foreign relations can inspire some reflections on the Spanish Estado de las Autonomías and its relationship with the Autonomous Community of the Basque Country.

The Basque country enjoys some form of recognition in Spanish politics and the country's constitutional framework as a historical nationality. The contentious issue here is more the notion of self-determination. The power of the idea of self-determination is clearly visible in the politics of Basque nationalism. In 1978, Basque nationalists considered the proposed Spanish constitution inadequate because it did not recognize a right to self-determination for the Basques and they advocated a 'no' or abstention vote in the referendum on the document. Consequently, the constitution of democratic Spain lacks legitimacy in the Basque Country. Ever since, the central claim of (moderate) Basque nationalism has been for the Spanish state to recognize a right of self-determination to the Basques, leaving open-ended the exact nature of future institutional arrangements. This logic was at the centre of the proposal put forward by Basque president Juan José Ibarretxe, of the *Partido nacionalista vasco* (PNV), for a re-structuring of the relationship between the Basque Country and Spain. Indeed, the so-called plan Ibarretxe that was first presented in 2003 and endorsed by the Basque Parliament in 2004, while somewhat vague on specifics, rested on the idea that the Basques want to renegotiate sovereignty and their partnership with Spain (Lecours 2007). Spanish politicians have always reacted negatively to any reference to self-determination. Although no specific status or outcome is made explicit by the PNV as it speaks of self-determination, Spanish parties understand it to mean independence and react by stressing Spain's territorial integrity. This position is fairly conventional when it

comes to states worldwide but somewhat rigid in comparison to many other federal states such as Canada, Belgium, Ethiopia, and even a decentralized but formally unitary state such as the United Kingdom. Spain does not have a strong or long federal tradition so it is extremely unlikely that it will ever view its ACs as having any type of sovereignty in the formal sense and therefore be ready to contemplate recognizing a right to self-determination that would extend to secession.

On the issue of territorial redistribution, the Basque Country is in an exceptional situation in comparison to constituent units of other federal states because of its foral status. The ability of the AC of the Basque Country to levy its own taxes reduces the likelihood and intensity of intergovernmental conflict around the territorial redistribution of financial resources that we often find when a wealthier community features a strong nationalist movement.

When it comes to foreign affairs, the Basque Country is in a fairly habitual situation for a constituent unit of a federal state. Such units typically have some political and, to an extent, constitutional leeway to develop an international personality, but the scope and status of this international action is usually ill-defined and requires continual political negotiation. This is how it works in Canada, and even in mononational federations such as the United States, Australia, and Germany. Only Belgium has more formalized arrangements.

In sum, the Spanish Estado de la Autonomías and its relationship with the AC of the Basque Country is fairly exceptional for its rigidity when it comes to the issue of self-determination and for its flexibility when it comes to fiscal autonomy. On foreign relations, the position of the Basque Country within the Spanish arrangement is typical of other constituent units of federal systems.

References

Connor, W. (1973) The Politics of Ethnonationalism, Journal of International Affairs, 27, pp. 1–21.

Gagnon, A-G. and J. Tully (Eds) (2001) Multinational Democracies (Cambridge: Cambridge University Press).

Lecours, A. (2007) Basque Nationalism and the Spanish State (Reno: University of Nevada).

Orsini, K. (2004) La défédéralisation des soins de santé: Existe-t-il un consensus dans les revendications flamandes?, Reflets et perspectives, 43.

Rocher, F. and N. Verrelli, (2003), Questioning Constitutional Democracy in Canada: From the Canadian Supreme Court Reference on Secession to the Clarity Act, in: A. G. Gagnon, M. Guibernau and F. Rocher (Eds) The Conditions of Diversity in Multinational Democracies, pp. 207–240 (Montréal: IRPP and McGill-Queen's University Press).

Tierney, S. (2004) Constitutional Law and National Pluralism (Oxford: Oxford University Press).

A Federalist's Defence of Decentralization

Ian Peach

Introduction

The degree of centralization or decentralization of authority that is appropriate in a federal state is a perennial question of federal governance. Some will say that decentralization is an evil, leading to the balkanization of the country and destruction of the ties that bind a state together as a political community. It may be, rather, that the real evil is in a federal government not understanding that effective federal states are built on a foundation of mutual respect among equal partners. Thus, in the absence of a federal commitment to use its policy tools carefully, one can reasonably conclude that the "evil" of decentralization is by far the lesser, compared to the evil of federal unilateralism.

Some also argue that decentralization is a strategy to weaken government and clear the way for market liberalism, but decentralization can make for more effective government, government that can resurrect respect for the public sector as a tool of the public interest among citizens, especially in a diverse, multinational state like Canada. Federalism and intergovernmental relations have the capacity to provide good, effective government in the public interest and there is value in having a federal government play a role in making public policy in Canada, as long as the extent and limit of that role is properly understood and respected. The challenges are to determine when and how the federal government could better exercise its powers to contribute more effectively to solving public policy problems and how to balance the decentralization of authority with strong norms of intergovernmental coordination, to ensure collective national policy goals can be achieved.

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The Federal Spending Power and the Federal Role in National Policy-Making

The key tool that the federal government in Canada has used over the decades since World War II to insert itself into areas of provincial jurisdiction and thereby direct the course of social policy in Canada is the federal spending power, particularly in the form of conditional grants to the provinces. This power is likely grounded in the power of the federal government to raise revenues through taxation and make payments out of the Consolidated Revenue Fund. The Judicial Committee of the Privy Council first recognized the existence of the federal spending power in 1937, in the *Unemployment Insurance Reference* (*Attorney General of Canada* 1937). However, there has been little litigation on the scope and validity of the federal spending power, as the federal government was able to convince provinces and territories to accept conditional transfers to help pay the costs of the new social programs that were being established with the growth of the welfare state.[1]

Despite the lack of litigation on the federal spending power, scholars have questioned the validity of the federal spending power, with Andrew Petter referring to it as a "myth" (Petter 1989). Also, there have been regular efforts on the part of the provinces in the intergovernmental arena to constrain the federal spending power, by requiring the federal government to compensate provinces that do not participate in a shared-cost program for the costs of running their own programs or making the use of the federal spending power subject to co-decision. While these proposals were originally spearheaded by Quebec, which has sought to limit federal intrusions into their jurisdiction since before the Quiet Revolution of the 1960s, other provinces also came to support the limitation of the federal spending power over the years, whether by constitutional amendment or administrative arrangement, as they became concerned about the perverse effects on provincial policy decisions of federal intervention.

The Arguments for Decentralization

One must ask why the issue of limiting the use of the federal spending power in areas of provincial jurisdiction has had such staying power on the intergovernmental agenda. The obvious answer is that the exercise of federal authority in areas that the Constitution assigns to provinces, when uninvited by provinces and not subject to provincial concurrence, offends a variety of rationales for having a federal system in the first place. One classically liberal articulation of the purpose of a

[1] See *Winterhaven Stables* v. *Canada* (1988), 53 DLR (4th) 413 (Alta. CA) and *Reference re. Canada Assistance Plan*, [1991] 2 SCR 525, both of which upheld the constitutional validity of federal conditional transfers, so long as the conditions do not amount to direct regulation of areas of provincial jurisdiction by the federal government.

federal state can be traced back to Madison's *Federalist No. 51*. In Madison's theory, federalism helps to secure liberal freedoms by dividing power between different orders of government, representing different groups, thereby preventing any single ruler or majority from exercising complete power in a despotic fashion (Madison 1788). Clearly, if a federal government can use its fiscal capacity and spending authority to act in any area of jurisdiction according to its own interests, it can undermine this purpose of federalism by securing to itself a substantial scope of authority to act despotically or at least with insensitivity to important local interests within the state.

A second purpose of federalism is of greater relevance to Canada and other multinational states; by providing distinct political communities (and in the case of Quebec and other national minorities, distinct linguistic and cultural communities) the exclusive authority to act in areas that are important to securing the continuing distinctiveness of those communities, federalism provides an important protection for the multinational character of the broader political community. It is clear from the debates at the conferences that preceded Confederation in 1867 that this was a central purpose of establishing Canada as a federal state. Sir George-Etienne Cartier provided a cogent articulation of this point in the Canadian Legislative Assembly in 1865. He stated:

> What was the best and most practicable mode of bringing the provinces together so that particular rights and interests should be properly guarded and protected? No other scheme presented itself but the federation system. . . . Some parties . . . pretended that it was impossible to carry out federation, on account of the differences of races and religions. Those who took this view of the question were in error. It was just the reverse. It was precisely on account of the variety of races, local interests, etc., that the federation system ought to be resorted to and would be found to work well. (Ajzenstat et al. 2003, p. 285)

Indeed, a federation was not the arrangement preferred by the British Colonial Office; the Colonial Secretary, Edward Cardwell, stated that "we all agree in favouring a complete fusion, not a federation" and "What we wish is a central and strong Government, as distinguished from a number of small states united by a feeble bond" (Browne 2009, pp. 166–167). Yet the British government also recognized the necessity of having a federal system in Canada, with Cardwell informing Governor-General Monck of Canada that,

> Her Majesty's Government have given . . . to the Resolutions of the [Quebec] Conference [on the federation of the British North American colonies] their most deliberate consideration. They have regarded them. . . as having been designed . . . to establish as complete and perfect an [sic] union of the whole into one Government, as the circumstances of the case and a due consideration of existing interests would admit. They accept them, therefore, as being. . . the best framework of a measure to be passed by the Imperial Parliament for attaining that most desirable result. (Browne 2009, p. 169)

If a federal government is able to use its spending power to intervene to replace provincial policy choices in areas of provincial jurisdiction with its policy choices, it risks undermining this important protection for sub-state communities. This concern over a lack of respect for the desire of sub-state communities to act in ways that protect their distinctiveness has been at the core of Quebec's opposition

to the unilateral use of the federal spending power to centralize policy-making in Canada, as Facal has noted (Facal 2005, pp. 9–16). As Kennett has observed, the case for national principles or standards is in dynamic tension with the values of diversity and pluralism that provide the basic rationale for federal, rather than unitary, government; this cannot simply be glossed over by supporters of centralization and national standards (Kennett 1998, p. 7).

While this is a strong and important claim, there is a third rationale for federalism, one based on governing more intelligently, and therefore effectively, by being honest about where the knowledge necessary to respond effectively to public policy problems lies. The principle that guides this approach to federalism is subsidiarity. Commonly used in debates about the allocation of authority within the European Union but rarely discussed in Canada, the principle of subsidiarity states that governmental authority should be exercised by the smallest, most local unit of government that is capable of exercising that authority effectively; authority should also only be exercised by a larger unit of government to the extent necessary to achieve its objectives.[2]

Subsidiarity shows a preference for local decision-making because of the value of local knowledge in understanding and defining a problem, the responsiveness of governments that are close to an issue and therefore have a more direct and clear understanding of the preferences of citizens, and the degree of creativity that can be applied to solving a problem when those who share in the lived reality of that problem work together to create solutions. In addition, local experimentation in attempting to solve social problems has a lower cost than a large, national-scale experiment, so the state should have a higher tolerance for the risk inherent in experimentation. This would be especially true if the costs of experimentation could be dispersed, through financial support from the federal government, in recognition of the value to society as a whole of encouraging local experimentation.

Public policy problems, even if they are common to a number of political communities, manifest themselves differently in different environments; as such, the most effective solution to a problem may well vary depending on local circumstances. In a country as large and diverse as Canada, not to mention one as culturally, politically and legalistically pluralist as Canada, imagining that a single, national program will provide the most effective solution to any problem that requires the active intervention of public officials seems hopelessly naïve. Far more common in Canada is the circumstance wherein federal insistence on creating one national program to address all manifestations of a problem throughout the country serves to impede progress, create intergovernmental tension, and undermine the capacity and effectiveness of those closest to a public policy problem to address that problem.

[2] See Hueglin (2007) for a full discussion of the sources and uses in the European Union of the principle of subsidiarity.

The Federal Government as Facilitator and Catalyst

However, this argument for decentralization does not mean that the federal government should have no role in the implementation of national policy, merely that it needs to recognize the limits of its abilities if it is to make valuable contributions to national policy-making. The federal government has played a valuable role in extending good policy ideas that have been developed within provinces across the country. However, what the federal government is not skilled at is actually designing and delivering programs that require a dispersed service delivery infrastructure and face-to-face interaction between service providers and individuals in need of a service. These tend to be the sorts of programs that require flexibility in design and delivery to adapt to local circumstances, local capacities, and local knowledge, something the federal government tends to lack.

Thus, the appropriate federal role in national policy should be to follow provincial and territorial leadership in their areas of jurisdiction by facilitating policy experimentation within provinces and territories, for example by sharing the risk inherent in experimentation, and acting as the catalyst to assist in the adoption or adaptation by other provinces and territories of innovations that have been shown to be effective. Of course, this means that the federal government needs to commit itself to acting through intergovernmental mechanisms to ensure provincial and territorial concurrence before it acts in areas of provincial jurisdiction, rather than acting unilaterally. If the federal government were to function in this manner, it could add significant value to the policy process nationally, by supporting policy innovation and the spread and adaptation of good policy ideas without interfering in policy design and experimentation.

Two examples of occasions when the federal government has effectively played this role should help to illustrate the point. The first is the classic Canadian social policy success story, that of the adoption of Medicare. Public hospital and medical insurance was originally experimented with in Saskatchewan, with hospital insurance being adopted in the province in 1947 and medical insurance being adopted in 1962 (Archer 1985, p. 11). In both cases, only after an insurance system was implemented in Saskatchewan and some other provinces did the federal government become involved in facilitating the adoption of comparable programs nationally, through the use of its spending power (Commission on the Future of Health Care in Canada 2002, p. 4). While federal fiscal support is critical to the financing of public health insurance in Canada, and the federal government uses its spending power to ensure some degree of comparability in the availability of hospital and physician services across the country, the federal government is not involved in providing, or even regulating, the actual delivery of hospital and health services in the provinces and territories. The reality in Canada is that we do not have a single public health care system, but 13 health care systems, administered by provinces and territories, that are broadly comparable, but not identical, in their provision of hospital and physician services from public funds.

The federal government played a similar facilitative role in the development of the National Child Benefit in the 1990s. In that case, the federal government decided to use the tax system to deliver a new Canada Child Tax Benefit (Warriner and Peach 2007, pp. 78–79). Because this federal transfer would lead to an increase in the income of poor families, it would generate savings for the provinces and territories in their social welfare costs. Through intergovernmental negotiation, it was agreed that the provinces and territories would reinvest these savings in other programs to assist in reducing child poverty (Warriner and Peach 2007, p. 79). What particular programs the provinces and territories chose to invest the savings in was up to them but the provinces and territories committed to reporting to the Ministerial Council on Social Policy Renewal on the programs where they reinvested their savings (Warriner and Peach 2007, p. 91). As with Medicare, this process did not result in a single National Child Benefit scheme identical across the country, but a scheme with a nationally administered core (the Canada Child Tax Benefit) and a variety of provincial and territorial initiatives designed to address the implications of child poverty in their jurisdictions in ways that were considered the most effective for those jurisdictions.

Focusing on Objectives

There are several useful lessons in the experience of developing the National Child Benefit, in particular. Certainly, it demonstrates that intergovernmental mechanisms can sometimes be effective instruments of national policy. Another lesson is that one way for the federal government to help manage intergovernmental coordination more effectively without returning to unilateral program definition is to focus on negotiating a common set of objectives that governments will seek to achieve for citizens and arrangements to report on the achievement of those objectives to citizens in a meaningful way.

It has become conventional wisdom in the public management literature that citizens are focused on results and expect their governments to focus on achieving outcomes of importance to society as well. Bardach has described the central message of the "new public management" literature as the need to manage for results (Bardach 1998, p. 5). Similarly, Perri 6 et al. have commented that, "The first job of government is not to administer transactions, but to solve problems" (Perri 6 et al. 1999, p. 15). If the public management literature recommends a focus on results and outcomes for individual governments acting on their own in their areas of jurisdiction, logic dictates that governments acting in concert through intergovernmental mechanisms should also focus on outcome objectives.

This is not a recipe for complete decentralization as much as a recipe for the more effective use of the mechanisms of intergovernmental relations in Canada to make truly national, rather than merely federal, policy. The national objectives would be the result of intergovernmental consultation and negotiation, but they must actually serve to set the direction of policy in the provinces and territories.

Enforcement of these national objectives could be done through the use of the federal spending power, if agreed upon in the intergovernmental negotiations, public reporting on compliance with the terms of the intergovernmental agreement, as with the National Child Benefit arrangement, or through a formalized intergovernmental dispute avoidance and resolution process, as was negotiated by the federal, provincial, and territorial governments for the interpretation and enforcement of the *Canada Health Act* in 2002 (Health Canada 2007, pp. 259–264). The federal role in this model would be, at most, a fall-back in the face of the non-compliance of a province or territory with its intergovernmental commitments (Kennett 1998, p. 50). Such a role could also provide provinces and territories with the incentives to cooperate, rather than trigger a return to the "bad old days" of federal enforcement (Kennett 1998, pp. 50–51).

The focus on accomplishing a set of tangible objectives that would translate into improved outcomes for citizens on things that matter to them is the least that citizens have a right to expect from their governments. This approach should also serve the goal of fostering the mobility of citizens, whether by including a commitment to a mobility principle as one of the objectives of the program or simply by securing a degree of comparability in programs across the country through the other objectives. In either case, the details of program design could vary from jurisdiction to jurisdiction and provinces and territories could take advantage of the knowledge gained through the experience of other jurisdictions in refining their own policies over time.

Replacing Federal Unilateralism with Effective Use of the Mechanisms of Intergovernmental Relations

I have spoken repeatedly of the need to replace unilateral federal action with intergovernmental coordination. However, this is not a naïve appeal; I certainly recognize that policy-making through intergovernmental agreement has its challenges. As Kennett has noted, "the development and enforcement of national principles or standards through interprovincial or federal-provincial mechanisms represents a significant collective action problem, particularly if the threat of unilateral federal action is withdrawn" (Kennett 1998, p. 4).

Still, it is not as if Canada is bereft of experience in intergovernmental policy-making or the mechanisms to manage intergovernmental coordination. A colleague in a provincial government has recently made the effort to determine exactly how many intergovernmental meetings take place in Canada in a year; the result was the discovery that there were over 800 multilateral meetings, across government departments and at all levels, in the year 2006–2007. Governments have standing committees of Ministers in virtually all areas of government and the experience of the Ministerial Council on Social Policy Renewal in the 1990s demonstrates that governments can establish effective structures when they conclude that they need to

advance a significant reform agenda. The problem is that we have not used what we have at our disposal as effectively as we could or structured those mechanisms in a way that maximizes their utility; governments seem to have fallen into the habit of relying on the federal government to establish national policies, as much as they complain about federal unilateralism. Some of the existing mechanisms of intergovernmental coordination, such as the Council of the Federation, could become valuable tools to improve intergovernmental policy-making and constrain federal unilateralism.

The Council of the Federation, which was established by the Premiers in 2003 (Council of the Federation 2003), could be made more effective as an intergovernmental policy-making body with a few critical reforms. One of the most important reforms would be to invite the Prime Minister to participate. Provinces and territories have long sought federal agreement to establish annual First Ministers Conferences as a way to improve intergovernmental coordination; having established the Council of the Federation, inviting the Prime Minister to participate would seem to be an ideal way to achieve this goal. The Council should also make it a priority to reach out and communicate with Canadians about national policy issues, to end the federal government's monopoly on speaking for Canada; connecting to Canadians and demonstrating policy leadership is an important consideration in attempting to assert leadership. It could use this consultation to define a new approach to intergovernmental policy-making and the legitimate roles and responsibilities of the federal and provincial/territorial orders of government.

To be an effective vehicle for managing a decentralization agenda and replacing federal unilateralism, the Council of the Federation also needs to revise its procedures in two critical ways. While the Council should seek to achieve as broad a consensus as possible among the participating governments on the matters on its agenda, it would be useful to establish a rule that the federal government can support the extension of policy innovations to other provinces and territories through the use of its spending power if, for example, the governments of two-thirds of the provinces and territories with at least 50 % of the population concur. With a provision to allow opting out of a national program with compensation for those jurisdictions that address shared national objectives through their program, this "minimum viable coalition" approach, as Kennett calls it, could allow for relatively rapid progress, in cooperation with the federal government if necessary, by those who seek it and the development of the sorts of asymmetries required to secure Quebec's concurrence to national programs and objectives (Kennett 1998, p. 53).

In addition, the Council needs the capacity to resolve disputes about the interpretation of agreements it reaches and enforce its agreements if intergovernmental mechanisms are to replace federal enforcement of national policy through the use of conditional grants. However, Kennett has noted that it may be more fruitful and realistic to consider how intergovernmental institutions can alter the incentives that determine how provincial and territorial governments treat their intergovernmental obligations, rather than seeking hard enforcement mechanisms to make intergovernmental agreements binding (Kennett 1998, p. 44). Essentially, this was what was

done in the cases of the National Child Benefit and the *Canada Health Act* dispute avoidance and resolution process. With reforms along these lines, the Council of the Federation could become the centerpiece of a new, intergovernmental approach to national policy-making that would better respect our constitutional division of powers.

Canadian governments have at their disposal a wide variety of intergovernmental mechanisms to support a decentralized, yet coordinated, approach to national policy-making. They can also draw on international experience, from both federal states such as Australia and regional intergovernmental arrangements such as the European Union. However, governments must first accept that effective collective action is a requirement if they are to put an end to federal unilateralism. Uncoordinated decentralization is simply not a realistic option in modern Canada as Canadians will insist on a level of program comparability that supports the mobility of persons; this is an unavoidable reality.

Conclusion

The federal government has played, and can continue to play, a useful role in the development of national policies, but it needs to understand the limits of its role and abilities. The federal government is at its best when it facilitates policy innovation at the provincial and territorial level and helps to extend innovations that have been proven effective to other provinces and territories, but at its worst when it seeks to lead policy development by unilaterally dictating the details of policies designed in Ottawa, requiring them to be implemented across the country, and enforcing their terms through conditional grants. Such behaviour both undermines our constitutional structure and makes for ineffective policy because it fails to recognize the valuable role that local knowledge plays in policy design and implementation.

Rather than either relying on federal unilateralism to make national policy or abandoning national policy entirely, Canadian governments can make policy through intergovernmental consultation and coordination. They already have at their disposal a wide variety of mechanisms to assist them in that task. While intergovernmental policy-making is not without its challenges, as is the case with any collective action exercise, Canadian governments have demonstrated in the past that they can undertake meaningful policy reforms through intergovernmental mechanisms.

Thus, decentralization need not mean balkanization of the country and the end of national policy, as some have suggested. Neither is radical decentralization needed in Canada. There is a purpose in having a country and the opportunities that Canada has brought to its citizens have, in many ways, made the country the envy of many nations. Yet, equally important is the fact that Canada is a federal country; we need to respect the reasons we are a federal country when we act at the national level if we are to retain the loyalty of all citizens. Too often, the federal fact of Canada has been more "honoured in the breach than in the observance" by federal governments.

Decentralization with effective intergovernmental coordination will allow us to realize the benefits of national policy without abandoning our commitment to the federal division of powers.

References

Ajzenstat, Janet, Romney, Paul, Gentles, Ian, and Gairdner, William D. (eds.) (2003). Canada's Founding Debates University of Toronto Press, Toronto, Canada, 502 pp.

Archer, John H. (1985). Saskatchewan: A Political History. Canadian Parliamentary Review 8:7–12.

Attorney General of Canada v. *Attorney General of Ontario*, [1937] AC 355.

Bardach, Eugene (1998). Getting Agencies to Work Together: the Practice and Theory of Managerial Craftsmanship. Brookings Institution Press, Washington, USA, 348 pp.

Browne, G.P. (ed.) (2009). Documents on the Confederation of British North America. McGill-Queen's University Press, Montreal and Kingston, Canada, 377 pp.

Commission on the Future of Health Care in Canada (2002). Building on Values: The Future of Health Care in Canada. Commission on the Future of Health Care in Canada, Ottawa, Canada, 356 pp.

Council of the Federation (2003). Council of the Federation Founding Agreement, December 5, 2003. Available at http://www.councilofthefederation.ca/pdfs/COF_agreement.pdf.

Facal, Joseph (2005). Social Policy and Intergovernmental Relations in Canada: Understanding the Failure of SUFA from a Quebec Perspective. SIPP Public Policy Paper No. 32. Sakatchewan Institute of Public Policy, Regina, Canada, 21 pp.

Health Canada (2007). Canada Health Act Annual Report 2006–2007. Health Canada, Ottawa, Canada, 268 pp.

Kennett, Steven (1998). Securing the Social Union: A Commentary on the Decentralized Approach. Institute of Intergovernmental Relations, Kingston, Canada, 74 pp.

Madison, James. The Federalist No. 51: The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments. Independent Journal, February 6, 1788.

Perri 6, Leat, Diana, Seltzer, Kimberly, and Stoker, Gerry (1999). Governing in the Round: Strategies for Holistic Government. Demos, London, United Kingdom, 96 pp.

Petter, Andrew (1989). Federalism and the Myth of the Federal Spending Power. Canadian Bar Review 68: 448–479.

Warriner, William E. and Peach, Ian (2007). Canadian Social Policy Renewal, 1994–2000. Fernwood Publishing, Halifax, Canada, 192 pp.

Thomas O. Hueglin, "The Principle of Subsidiarity: Tradition – Practice – Relevance" in Peach, ed., *Constructing Tomorrow's Federalism: New Perspectives on Canadian Governance* (Winnipeg: University of Manitoba Press, 2007)

Democracy-Coated Authoritarianism: How Federalism May Act as a Cover for Undemocratic Governments

J. Castro-Rea

Introduction

Over the past decades, federalism has aroused a great deal of enthusiasm among scholars and practitioners concerned about the ways of accommodating diverse identities within a single sovereign state. The success of democratic federal systems has confirmed, to the eyes of those scholars and practitioners alike, that federalism really works, produces positive governance outcomes, and its value is universally applicable.

This paper aims at striking a more somber note, attempting to identify the circumstances where federal practice has had negative effects. More specifically, I will address the instances where the practice of governmental autonomy facilitated by federalism turns out to be detrimental to democracy and good governance.

Perhaps the reflection in that sense originated in the nineteenth century, with the ideas and activities of John C. Calhoun, and the dire consequences of his legacy. Calhoun (1782–1850) was a politician from South Carolina, United States, who occupied influential positions such as Vice-President, Secretary of War, Secretary of State, and Senator. However, he is known above all for his strong, uncompromising defence of absolute state rights *vis-à-vis* the federal government. He tirelessly argued that the latter was a creation of previously existing self-governing communities, reconfigured as the states of the union, and should therefore be subject to them rather than the opposite (Calhoun 1831). According to Calhoun, state rights were so absolute that they may even justify extreme policies, such as slavery and, if need be, secession from the union. Even though Calhoun passed away a full decade before the beginning of hostilities, his ideas and political activity

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are rightfully seen as inspiration for the eleven Southern states'—Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, and Virginia—intransigent stand that would lead to their temporary secession from the US federal union and, ultimately, to the US Civil War (1861–1865). Even if the Southern states were ultimately defeated, they still appealed to Calhoun's ideas to justify segregationist policies (called "Jim Crow laws" in US political jargon) for roughly 90 years, from 1877 onwards.

Of course, Calhoun and his aftermath—slavery, secession, the Civil War, and segregation—are extreme examples of the potential negative consequences of unlimited powers granted to the states within a federal polity. Common negative consequences are breaches to basic democratic principles and practices, such as free and fair elections, freedom of speech and organization, accountability of public officials, and the rule of law. And they are only possible in a democratic state, thanks to federalism.

Most existing literature dealing with sub-national authoritarianism is framed within transition to democracy theories. The main reason is the interest of researchers to understand why some regions resist the successful democratization of national politics; an interest clearly motivated by the urge to offer advice on how to make those regions work in sync with the newly democratized state. However, the view that this paper adopts is that authoritarian enclaves (Mickey 2008) exist not only in a situation of transition to democracy (Gibson 2005: p. 104). They may rather survive, emerge, and even thrive within emerging (Snyder 1999) and even established democracies. In order to do so, the main tool that they resort to is the political and policy mechanisms that federalism usually makes available to them: government autonomy, fiscal sustainability, constitutional protection from federal intrusion, independent party systems, and so on.

Studies addressing the democratic quality of a state fail to recognize regional disparities because they focus on the sovereign state (national) level and neglect lower orders of government. Thus, they fall into what Rokkan (1970) calls a "whole nation bias." Sartori (1976) also acknowledged this failure when he explained what he calls the "unit jump fallacy": "A sub-state, i.e., a member of a federal state, is made equal to a sovereign state." The assumption follows that the federal state prevails over the sub-states, and will enforce violations to democracy found therein, fully willingly and endowed with the necessary capacity to fulfill this task. This assumption, it turns out, is not always matched with reality in many historical periods and geographical settings.

This way, breaches to democratic principles and practices are frequently found in federal units within otherwise democratic countries. This creates a "regime juxtaposition", wherein two levels of government with jurisdiction over the same territory operate with different rules and expectations as far as democracy is concerned (Gibson 2005: p. 103). Federalism may allow for disparities in the quality of democracy that is practiced within the territory of the same national state. Contrary to the common assumptions discussed above, these breaches are found not only in Global South or post-socialist countries, they are indeed also found in established democracies. Examples of authoritarian enclaves within

democratic countries abound. Simply as an illustration, we may identify the following: the US Southern states when segregation of non-White populations was legal (1877–1960s), Québec, Canada, under Maurice Duplessis (1936–1939 and 1944–1959), Oaxaca, México, under PRI governments (esp. 2000–2010), and Santiago del Estero, Argentina, under Carlos Juárez's regime (1949–2005).

Our case study will be the province of Alberta, Canada, which has been governed by the so-called Progressive Conservative Party from 1971 to the present, 40 years without interruption.

Why Do Federally-Sanctioned Authoritarian Enclaves Exist

The available literature identifies a number of factors that may contribute to the emergence and permanence of authoritarian enclaves within otherwise internationally recognized democratic federal systems. We adopt here Mickey's definition of authoritarian enclaves: "...areas—usually states or provinces in a federal polity—in democratic polities marked by the absence, or unreliability, of the components of democracy" (2008: p. 146). We may identify the following among the most important of those factors:

1. Overrepresentation of rural ridings within federal units' legislatures, combined with a firm grip of the incumbent government over those ridings. This pattern is ubiquitous, an almost universal feature of authoritarian enclaves. For different reasons—stronger dependence on government resources and services, voter isolation, proneness to abuse, etc.—voters in rural ridings are generally easier to manipulate than urban voters. Additionally, rural ridings usually benefit from structural malapportionment (Rodden 2007; Mickey 2008: p. 149). In order for this strategy to be successful, regional authoritarian leaders need to artificially bring down the political importance of cities, while neutralizing or at least dampening the effectiveness of their criticism to the status quo.
2. Resort to clientelism, understood as the exercise of mutually beneficial hierarchical relations between public office holders (patrons) and actual or potential beneficiaries (clients) of government services, resources (legal or not) and other largesses paid with public funds. In exchange for government-supplied benefits, clients support incumbent governments unconditionally, with either votes, legitimacy, absence of criticism, or a combination of the above. Clientelism is a key component of what Gibson (2005: p. 108) calls "boundary control", whereby incumbent regional governments attempt to maximize their influence over local politics and deprive the opposition of opportunities to organize credible alternatives, including access to national support. When exacerbated, clientelism limits or destroys civil society independent organization and freedom of the press, two pillars of authentic democratic governance.
3. The continued exercise of regional predominance allows incumbent elites and parties to gradually reorganize institutions in a way that they will serve the

purposes of preserving incumbent elites' predominance. Institutions such as electoral systems (enfranchisement, rules for voting, riding boundaries, party organization rules), prerogatives and powers of the local executive and legislatures, a deferent judiciary, control of municipal politics all favor stability over change, thus helping the preservation of authoritarian ruling elites over time. For that reason, authoritarian enclaves are difficult to eliminate, that process usually requires the intervention of external agents in order to be successful (Mickey 2008: p. 146).

4. Regional predominance usually takes the form of regional single- or at least hegemonic-party system, usually creating true "party states", or conflations of state institutions and the dominant party (Mickey 2008: p. 146). It is essential for the survival of authoritarian enclaves within democracies to pretend they play by the rules of democratic governance, so they must hold elections on a regular basis. However, those elections are biased, they are consistently won by the only existing or at least overwhelmingly predominant political alternative, either with "party machines", with the application of skewed electoral rules or through outright manipulation of these rules. As a result, opposition parties have a hard time developing and thriving in an environment that is hostile to political dissent. Lacking meaningful political choices, citizens gradually shy away from the ballot box, resulting in extremely low voter turnout rates.
5. The importance of the authoritarian enclave for country-wide balance of power or regional stability. Regional elites may provide crucial supplies of voters and legislators to form governing coalitions, thus shielding themselves from federal intervention that would be politically too costly from the federal government perspective (Mickey 2008: p. 146).
6. Subnational authoritarian enclaves must also be effective players in the federal arena, both institutional and partisan, if they are to be successful (Gibson 2005: p. 110; Mickey 2008: pp. 147–148). Their presence may be low-key and defensive, protecting the enclave from any federal intrusion, or prominent and aggressive, seeking to enhance the region's influence over the whole country politics. The latter is of course a risky game from the authoritarian enclave perspective, as it may only expose the region's democratic flaws and open it to criticism and eventual intervention.
7. Authoritarian enclaves' rulers must also be able to control or even direct their region's linkages with the federal government. This way, they may be able to dictate the terms under which their sub-state relates to the whole country, thus enhancing their general influence and preserving their leverage at the local level.

Case Study: The Province of Alberta, Canada

Alberta is a Western Canadian province established on September 1, 1905. It sits on an area of 661,848 km^2—comparable to the size of Afghanistan—and had an estimated population of 3.7 million as of 2010. Alberta's economy is one of the

strongest in Canada, supported by the burgeoning oil industry and, to a lesser extent, by agriculture and technology.

Oil production is, no doubt, the province's most important economic activity and most distinctive feature. Alberta is the largest producer of conventional crude oil, synthetic crude, natural gas, and gas products in the country. Alberta is the world's second largest exporter of natural gas and the fourth largest producer. In one extraction site alone, the Athabasca oil sands, estimated unconventional oil reserves approximately equal the conventional oil reserves of the rest of the world, estimated to be 1.6 trillion barrels (254 km^3). Oil extraction from the oil sands in the past would yield little profit or even a loss. However, the oil price increases since 2003 have made it more than profitable to extract this oil. The proximity of this source to the largest energy market in the world, the United States, underline its strategic importance (Lamphier 2011); a reality that was not ignored in President Barack Obama's recent announcement of his country's energy strategy (White House 2010).

Largely as a result of its oil wealth, Alberta's per capita GDP in 2007, at C$74,825—sitting between Luxembourg's and Bermuda's, third and fourth richest countries in per capita terms—, was by far the highest of any province in Canada. This was 61% higher than the Canadian average of C$46,441 and more than twice that of some of that country's Atlantic provinces.

However, arguably until quite recently, the province's economic power was not matched with its political influence. Because of its low share of the Canadian population, slightly above 10%, only 28 out of 308 Members of the Canadian Parliament are elected in Alberta. This disparity is even more apparent when considering the Senate, where only 6 out of 105 seats are assigned to Alberta. This situation, resulting from the relatively late creation of the province within the Canadian federation and its relative economic unimportance before oil was discovered in 1947, has been the source of great frustration within the province. Historians and political scientists commonly refer to this frustration as "Western alienation"; an idiosyncratic syndrome that has become over time a permanent fixture of the province's political culture.

Regarding provincial politics, Alberta also shows peculiar patterns. It has commonly been asserted that Albertans do not elect governments, they anoint dynasties. Four consecutive parties have been hegemonic for extended periods: the Liberal Party (1905–1921), United Farmers of Alberta (1921–1935), Social Credit (1935–1971), and Progressive Conservative Party (1971–present). From 1921, the following pattern has been basically followed: a new populist, protest party is brought to government through landslide elections, and stays in power for extended periods. . .until a new upstart party is able to debunk it. Incumbent parties gradually drift from their initial strident populism to mild authoritarianism, making use of and even manipulating the tools that Canadian federalism puts at their disposal. Elections are framed as plebiscites, where the incumbent government seeks the renewed confidence of the voters to lead the province for another four years, essentially unmatched by opposition parties and with very limited input from civil society.

The Alberta case confirms most features of the authoritarian enclave profile presented above. Let us make it very clear to the reader: the province is not comparable to other dictatorial, arbitrary rule authoritarian enclaves, as rule of law prevails with an independent judiciary, human rights are respected, there is neither systematic discrimination against any given group nor use of violence to enforce the government's will. Freedom of the press does exist in Alberta, mostly thanks to Canada's country-wide, oligopolystic media structure. Nonetheless, most features of authoritarian enclaves listed above are practiced in the province on a regular basis, to the point where one author describes the provincial situation as "political monopoly" (Neitsch 2011). Additionally, other empirical elements and political practices cement Alberta's authoritarianism. Their discussion may be a contribution to a broader comparative understanding of the subnational authoritarianism phenomenon.

First, let us have a look to how Alberta complies with most traditional features of authoritarian enclaves:

1. Overrepresentation of rural ridings does occur in Alberta, combined with a firm grip of the incumbent government over those ridings. As of August 2011, the Progressive Conservative Party controlled 67 out of a total of 83 provincial ridings. All of the 16 opposition ridings are located in urban areas (cities of Calgary, Edmonton, and Lethbridge) except for two, where former Conservatives defected to the newly created Wildrose Alliance party after they were elected.
2. The government exercises its control over rural ridings by manipulating the ridings' dependence on government resources and services for agricultural production, such as insurance and marketing of agricultural products. Government services in Alberta's rural areas are allocated via clientelistic mechanisms, tying the delivery of those services to party loyalty. In exchange for government-supplied benefits, rural dwellers support incumbent governments unconditionally, with either votes, legitimacy, absence of criticism, or a combination of the above. Opposition parties are unable to offer comparable incentives, so it becomes rational from the agricultural producers perspective to endlessly support incumbent governments. Civil society groups in rural Alberta became reluctant to speak out against government out of fear of retaliation.
3. Rural civil society autonomous organization has been neutralized through legislation, systematically reducing the scope of intervention of those organizations on behalf of agricultural producers. The Conservative government deliberately challenged the efforts of independent civil society organizations—in particular, Unifarm—and the political opposition through direct and indirect means in order to monopolize political agency in rural areas (Neitsch 2011: pp. 14–18).
4. Over time, successive hegemonic parties in Alberta have reorganized provincial institutions in a way that they serve the purposes of preserving their political predominance. Rural ridings benefit from structural malapportionment. Municipal politics is dependent on the rules established by provincial hegemonic parties, largely thanks to Canada's constitutional dependency of municipalities from the provincial government. Based on its consistent majorities within the

legislature, a prerequisite to form governments according to Canada's parliamentary system, the provincial executive has given to itself prerogatives and powers that constrain the ability of the opposition to have any significant influence over its decisions. This way, we confirmed in Alberta the existence of a "party state" as in other standard authoritarian enclaves.

5. A hegemonic-party system prevails in Alberta. Because the province is part of a democratic federation, the hegemonic party must play by the rules of democratic governance, and hold elections on a regular basis. However, those elections are held in an uneven playing field, with heavy biases in favour of the incumbent party introduced by clientelism, malapportionment and overrepresentation of rural ridings. The Conservatives constructed an electoral boundary system that works in their favour, which ranks among the world's worst in terms of electoral malapportionment and other competition biases. As a consequence, the hegemonic party consistently wins the elections; thereby acquiring the tools to further consolidate the machine that keeps it in place. During the provincial elections held on March 3, 2008, only 41% of the province's 2,252,104 eligible voters cast ballots, a record low for the province (CBC 2008). Only 501,063 citizens actually voted Conservative, a figure that barely represents 22 % of total eligible voters. Yet, the hegemonic Conservative party was able to retain 72 out of 83 legislative seats. This combination of electoral bias and low voter turnout clearly favours the hegemonic party.
6. Despite its chronic under-representation at the federal level, Alberta is important for Canada's balance of power and regional stability. This is especially true since 2006, when the Conservative Party of Canada was able to form a government—albeit a minority one until 2011—supported on the solid vote of Western provinces, Alberta among them. This province provides a steady supply of Conservative voters and elected members of parliament, thus shielding itself from federal intrusion or criticism.
7. Over time, Alberta has become an increasingly effective player in the federal arena. If in the past its presence was mostly defensive, protecting the province from federal intrusion, over the past 25 years it has become increasingly prominent and aggressive, seeking to enhance the region's influence over federal politics. A watershed event in this development was the creation of the Reform Party in 1987, a federal protest party based on Canada's Western provinces, whose stronghold is Alberta. Under the rallying cry "The West wants in", the Reform Party was able to politically capitalize on Western alienation. Renaming itself Canadian Alliance in 2000, the party gradually built electoral momentum. In 2003, in an attempt to unify the conservative vote, it merged with a Progressive Conservative federal party in trouble, thus creating the current Conservative Party of Canada. The bet was successful, and the unified right was able to form a minority government in 2006, which became a majority in the May 2011 elections. Indicative of Alberta's influence through this process is the fact that the parliamentary riding of Canada's current Prime Minister, Stephen Harper, is Calgary Southwest, Alberta. Besides, all of Alberta's 28 federal parliamentary seats except one are Conservative.

Alberta's MPs strong presence within the Conservative caucus has indeed given the province a new voice in Ottawa. In other words, the West *did* get in. This is not to say that Alberta dictates the federal agenda, it can rather be said that the federal government has to some extent taken for granted and neglected the Western "safe" ridings at the time of delivering government largesse. However, this new conservative federal dominance has been good news for the provincial government. Even though there is no formal or organizational link between the federal Conservative party and its Albertan counterpart, provincial affinity with federal policies enhances the respect that Alberta can command for its own way of governance. In this respect, federalism is key. Alberta is one of the Canadian provinces that firmly rejects federal intrusion in its own affairs.

Beyond the standard features of authoritarian enclaves, the Alberta case is interesting for comparative purposes because it shows that some authoritarianism-enabling factors may not be essential for the survival of all enclaves, while there are other circumstances under which authoritarian enclaves thrive. In other words, the study of the Alberta case allows us to add new elements to the list of factors that make authoritarian enclaves possible. Among these elements we may identify the following:

a. A sizable pool of natural resources, which make the province not only self-reliant but also important for the Canadian economy as a whole and for the viability of federal redistribution programs (transfer payments from wealthier to poorer provinces). Thus, Alberta shows that a province may preserve an authoritarian enclave not only when it is politically important for the federal government, but also when it is *economically* important. Alberta has an economic weight that is crucial to Ottawa; therefore, local authoritarian elites are left alone provided they keep delivering good economic returns. This importance was only enhanced during recent years, when conflict in the Middle East made access to hydrocarbons very uncertain and expensive, and from October 2008, when recession kicked in, accompanied by soaring oil prices. Alberta's well-off situation confirms that authoritarian enclaves may appear and survive not only in a country's backwaters, marginalized from general development, but also right within areas of wealth and privilege. Enclave authoritarianism is enhanced by the individualism and self-sufficiency that economic prosperity brings, a sort of "comfort and indifference" syndrome that makes the average Albertan voter defiant to Canadian country-wide political preferences and values. Moreover, it reinforces the trend to a lower voter turnout, way below the 61.1% Canadian average.
b. The government adopted a state-centric policy approach that largely excluded the role of independent producers from developing grain and agricultural marketing policies. Provincial Conservatives favoured energy and cattle interests. The regulation of provincial petroleum development violated the surface rights, or land-related economic rights, of agricultural producers (Neitsch 2011: pp. 161–162). The provincial government is above all accountable to the oil industry, putting at their disposal generous tax and royalty policies. The result is that taxes and royalties paid by private oil companies operating in Alberta are among

the lowest in the world. Additionally, the Alberta government actively campaigns to defend these companies' environmental record, currently under heavy criticism for their contribution to global warming (Greenpeace 2011). Critics affirm that the best public relations agency the oil industry has is the provincial government itself. Moreover, the provincial government applies lax regulations to protect the environment from the effects of oil production.

c. A parochial political culture prevailing among its voting population, resulting from a historical sense of frustration about the federal government ("Western alienation"). These feelings may be tapped and even exacerbated by the provincial authoritarian leadership to ensure its continued support at the polls.

Conclusions: Beyond the Traditional Democracy-Authoritarianism Divide

The Canadian province of Alberta is an interesting case study for comparative politics for several reasons. First, this case study illustrates how federalism may become an institutional device that, among others, can be manipulated to favour authoritarian deviations from the democratic norm. Secondly, it confirms that breaches to democratic principles are found even within countries that lecture the rest of the world on exemplary democratic standards. Moreover, it confirms that studies of democracy and authoritarianism must be truly comparative if they want to enhance their explanatory power, that is, they have to include comparative politics studies produced to explain both Global North and Global South political realities.

Overall, the Alberta case study shows us that the line dividing democracy and authoritarianism is not as clear cut as traditional political science would have us believe. Federalism contributes to making this line even more blurred.

References

Calhoun, J. C. (1831). "On the relation which the states and general government bear to each other (the Fort Hill address)" In Karmis, D. and Norman, W., *Theories of federalism: a reader,* Houndmills: Palgrave Macmillan, 2005. pp. 135–145.

CBC (2008) "Low voter turnout in Alberta election being questioned". Available at http://www.cbc.ca/news/canada/edmonton/story/2008/03/05/edm-turnout.html

Gibson, E. L. (2005). "Boundary control. Subnational authoritarianism in democratic countries". *World Politics* 58 (1), October: 101–32.

Greenpeace (2011) "Stop the tar sand to curb Canada's growing greenhouse gas emissions". Available at http://www.greenpeace.org/canada/en/campaigns/tarsands/

Lamphier, G. (2011). "Oilsands enter spotlight as U.S. searches for secure energy". *Edmonton Journal,* September 11.

Mickey, R. W. (2008). “The beginning of the end for authoritarian rule in America [sic]: Smith v. Allwright and the abolition of the white primary in the Deep South, 1944–1948”. *Studies in American political development*, 22, Fall: 143–82.

Neitsch, A. T., (2011). “Political monopoly: a study of the Progressive Conservative Association in rural Alberta 1971–1996”. PhD dissertation, School of Political Studies, University of Ottawa.

Rokkan, Stein (1970). *Citizens, elections, parties. Approaches to the comparative study of the processes of development*. David McKay: New York.

Rodden, J. (2007). “Political geography and electoral rules: why single-member districts are bad for the left”, presentation at the University of Alberta, Department of Economics, March 14; 34 pp. + figures.

Sartori, G. (1976). *Parties and party systems. Vol. 1: a framework for analysis*. Cambridge University Press: Cambridge.

Snyder, R. (1999). “After the state withdraws: neoliberalism and subnational authoritarian regimes in Mexico” In Cornelius, W. A. et al. (eds) *Subnational politics and democratization in Mexico*. UCSD-Center for US-Mexico Studies: La Jolla, pp. 295–341.

White House (2010). “Obama Administration Announces Comprehensive Strategy for Energy Security”. Available at: http://www.whitehouse.gov/the-press-office/obama-administration-announces-comprehensive-strategy-energy-security

The Challenges of the Federative Principle in the Twenty-First Century

X. Díez de Urdanivia

Introduction

As a result of the quantitative and qualitative expansion of social, political, economic and cultural systems to a global dimension, there has been an undeniable power-shift and an obvious lack of a normative system at that level of social and even political aggregation.

In order to fulfill this gap and to face the new characteristics in the system, I do not hesitate in affirming that the federal technique has been successfully probed on similar situations and has demonstrated its capability to provide ways of effective solutions to equilibrate the strong and complex forces implied in any federal organization. Furthermore, I sustain that federal principles could be an efficient way to establish a solid platform to build a new legal system according to the needs in the globalized world. A federal structure could be the key to replace the lost order.

This paper aims to present, succinctly by necessity, a perspective where the basic principles of federal model allow to develop a technique suitable to deal with that challenge, and do it successfully.

The "federal system", disregarding their contemporary applications in integration and organization of complex states, could be used to provide political order and legal structure to the world actual necessities nowadays.

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The Globalization as Socio-Political System

The so-called globalization is more than a postmodern expression of capitalist expansion trends. It is a whole transformation of global society, the birth of a new general way to interact as a worldwide community. It is, in synthesis, a new consciousness of belonging to a society that has transcended all predictable boundaries.

Within this context, there is enough evidence to confirm the existence of a global political system, with its own profile, other than the traditional system with their own geopolitical organization divided in independent States.

The new world appears with a new face that offers, mainly, a decay of sovereign powers and wherein, consequently, they have displaced from the state (its traditional holder since renaissance times) to some few new global power centers.

It is convenient now to recall what David Easton said about the proper way to study a political system: consider it as a behavioral, open to its own systemic environment and, consequently, susceptible to a reciprocal influence from and to that context, even if it is possible to distinguish among them.

Due to that property, the variations produced in internal processes and structures of a political system maybe interpreted by its members as a constructive effort to regulate inner or out coming tensions. A political system is also capable to endure a tension, depending on the information and other influences working as a feedback to the actors and the decision makers (Easton 1996).

At a global level, there is a first perfectly observable tension between the traditional function of state's sovereignty and the existence of new centers of global power, which clearly exceed the states capacity to confront those tasks.

In the contemporary conception, sovereignty is indissolubly linked to a geographically-bounded system—the state territory—with a social and axiological base that upholds the legal system that is specifically based on an inexcusable democratic structure. Today, sovereignty is unavoidably constrained to the territory where a state is reputed sovereign.

That power may also ultimately be justified if, and only if, it reaches a reasonable degree of effectiveness in the State's role of ensuring public interest, consisting in the preservation of peace and order on equal basis, freedom, and civil rights.

On an external perspective, this function must watch over the interests of the state itself, and its nationals interacting into the international community, activity that requires a combination of platforms among states in the international community in order to have an optimum achievement of state's main purpose, which is to guarantee the fundamental rights, in terms of substantial equality and general effectiveness.

That is, in general terms, the hegemonic paradigm during the past three and a half centuries has been acceptable, while the basis of socio-political and legal systemic differentiation was based on the traditional territorial division of the states. However, facing the new world circumstances, it seems impossible to maintain.

The new global dynamics determines the fact that all social flows trends vigorously to overcome all such barriers, surpassing all possibility of control by the states, even when they associate to try it, because, indeed, the international community has been built by states in exercise of its own sovereignty and is consequently deeply affected by their inherent power crisis.

The "State of Nature" at a Global Level

As it happened during the hypothetical "state of nature", the global social system is close to become a "no man's land", where the "law of strongest" will rule. In fact, the absence of a proper and adequate global law system has resulted to a conspicuous dominance of "market" as the fundamental rule all over the world, prevailing on and covering almost any human activity on the worldwide spectrum.

The place of legitimate power, represented until now by state sovereignty, has been occupied by market, which has been gradually imposing the standards of its own logic, distorting the right conception of freedom based legitimacy, which needs to be bounded in order to establish a balanced system that requires reciprocal limits on freedom of trade, that it only finds an acceptable basis within the just law, which is lacking in the world's social system.

After the World War II, but particularly after the end of the so called Cold War—one of the strongest social and political effects of globalization—appears a phenomenon in an unprecedented scale: the emergence of "centrifugal" forces. These forces are based on the ancient national identities that have led the fragmentation of former states, while experiment as well "centripetal" forces that intended to aim certain grade of integration—not "merging"—that permits a most efficient way to confront common problems and challenges, yet maintain its own identity, as occurs in federal systems and is somehow perceptible in the European Union nowadays.

That is a circumstance that Neil S. MacCormick clearly perceives when he alludes to the national diversity, unfortunately adverse as evidently happened in the former Yugoslavia, but also in other European states such as Spain, Belgium, and the United Kingdom itself, where there is a coexistence of different nations within a single sovereign state, whose identities emerge naturally and strive to exercise the determination this author mentions. Many other states could be added to that list, such as Canada in North America, India, China and Pakistan in Asia, and some other in Africa and Oceania (MacCormick 2001).

MacCormick sustains, and I agree without any hesitation, that "the end of the sovereign state creates an opportunity for rethinking the issues surrounding national identity." It is true, as he holds that "the nation as cultural, or linguistic, or historical, or even ethnic community is not coextensive of the (former) sovereign state, the traditional 'nation state' [. . .] The suppression of national individualities is wrong in itself and almost inevitably a cause of bitterness and strife" (MacCormick 2001, p. 135).

Concomitantly, if the idea of a legal order is acceptable, "then it is capable of generalization and extension what is sometimes called the 'regional' level within Europe, although many people in some of the so-called regions find it important to characterize their own region and others as 'nations'... In that context, the best democracy—and the best interpretation of popular sovereignty is one that insists on levels of democracy appropriate to levels of decision-making" (MacCormick 2001, p. 135).

He thinks that the decease of sovereignty, in its classical sense, really opens up opportunities for subsidiarity and democracy, which he considers essentially inseparable and complementary principles, in a way that suggests a radical opposition to any form of monolithic democracy.

What MacCormick calls juridical pluralism, and I would call diverse and complex juridical system, is in his concept a main cause of the transverse transition to "post-sovereignty", and it does not imply the disappearance of those powers formerly assigned to sovereign states. They have not disappeared at this moment, but they are no longer exercisable by a unique structure and no longer based on a single juridical framework. They still exist, but they have been parcelled out or diluted in a new form of attribution and exercise.

Under these conditions, it is valid to ask what is the best location for some determined powers, given the general interest, and to what extent they should be locally attributed, depending on the local knowledge and local ways of understanding the circumstances, preferably to other wider extensions.

On this same line of thinking, it is opportune to recall the opinion expressed by the German Constitutional Court, in regard to democracy, which in its opinion requires a shared sense of belongingness to an entity expressed through common things, such as press and other media, parties and political discussion, which find a most natural way to exist in local or "national" communities.

The thesis enunciated by MacCormick leads, in my opinion, to advance the need to think the democratic institutions and structures from the basic systemic levels and, starting from them, upgrade in aggregation up to the global level, avoiding all rigidities and absolute theoretical categories, which usually drive into dead ends.

I furthermore sustain that State is now, as a historical phenomenon, suffering from structural crisis, but it is still called to play a different yet relevant role in the re-establishment of world's lost normative order, on basis of a new model of systemic integration that allows a global agreement that provides the means to reach a legitimate, organized, and legally structured world system capable of maintaining the course of all dynamic social stream without bursting its natural banks.

The Basic Principles of Federal System and Its Integrative Function

The federal system is, as it has been advanced, a technique to solve problems of political integration and constitutionally organized complex sovereign polities.

It was refined, systematized, and modernized during the historical process of integrating the thirteen American former colonies of Great Britain, but it still offers ways to provide effectiveness in solving integration problems, even so if they refer to supranational entities, such as European Union.

It is important to set that the main issue is not administrative in nature, but political and constitutional. Naturally, the integration of sovereign entities faces with the derivate problems of powers distribution. However, it does not signify that federalism is a technique to share out legal faculties among territorial entities, but one that has to do with integration of communities—sovereign communities.

It seems appropriate at this point to bring up the approach of Karl Friedrich, a dynamic vision of federal system that involves a constant tension, from birth and throughout its existence, between two forces operating in each one of them: one tending to concentrate power—centripetal—and one that tends to decentralize it—therefore, called centrifugal—keeping or returning it to the states, according to Antonio La Pergola reference (La Pérgola 1994).

For instance, in the constitutional process of the United States of America, the pre-existence of thirteen colonies moved towards unification because the circumstances required it, the centripetal force was predominant, while in Canada, where a single colony was disbanded, the prevalent was the centrifuge. This feature will be crucial for power distribution schemes, as discussed below.

As the United States of America sets out the predominant federal model, the contemporary paradigm principles can be summarized as follows:

a) The so-called "Supremacy Clause", which means that the federal Constitution occupies the highest-ranking normative scale of a given legal system. It is usually—and from my point of view, inappropriately—known in the United States of America as "National Supremacy", pursuant to a doctrine established by the Supreme Court of Justice.
b) The principle of "Express and Remain Powers", which means that the Union government will only hold those powers expressly given to it by the federal Constitution. Meanwhile, those that are not granted to it remain into each state's internal sphere when the movement is from "periphery" to "center" (as in the U.S.), or vice-versa, when the movement is in the opposite direction (as in Canada).
c) The "Comity Clauses", which refers to reciprocity among all members of federation and is divided into two different aspects: the "Full Faith and Credit Clause", which means that all official acts of each state shall be recognized as valid by all other members of the federation; the other is the "Privileges and Immunities Clause", by which states undertake to accord to all citizens of the Union the same rights they accord to their own.

It is essential to emphasize an issue that is often overlooked and has therefore become a source of misunderstanding and confusion. It is common to overlook that the federal model implies three different yet complementary legal systems: one that pertains to pre-existing state (their internal rules); the other that corresponds to the new order of government created to address common issues (entrusted to the

government of the Union); and, finally, a system that properly should be called *general*, established in the new constitutional order, which includes itself and two others.

Unfortunately, the confusion derived from such equivocated point of view has led to the idea that identifies federalism and decentralization. Therefore, it is necessary to distinguish between both schemes.

We have left settled the coexistence of those contradictory forces in any federal polity, because they are inherent to federal system: the "centripetal" and the "centrifugal". Because of these, there will always be a trend towards concentration of power in central government that will probably meet resistance from outlying entities, in the same way that any attempt to maintain or increase the powers of the states will be resisted by the central government. This is a "competitive" tension that will always exist and is precisely in its balance that lies the key to a virtuous existence of the system.

The specific circumstances of time and place are vital to define the orientation of that dynamic, but usually the accumulation of power tends to focus on the federal government, in the consequent detriment of the sovereign capacity of federated entities, propitiating very intense central hegemonies.

When that happens, it should distend the energy that produces the excess of centripetal force, and then it will have to start a movement of devolution, which might suggest the idea of decentralization, but I do not think it is enough to authorize the identification between the federal technique and a simple form of distribution of powers as decentralization is.

Even in the case that a specific federal polity arises from a previously unified entity—as it happened in Canada—giving the appearance of being a measure of decentralization, but it is not, strictly speaking.

It can even happen that federalization is employed as a political instrument of domination—as it sometimes happened between the Roman conquests on some of the conquered communities—or used that technique for administrative purposes at the international level—as it happened with some islands of the Antilles—but that does not alter the essential difference between both figures.

The federal technique is a concept of eminently legal nature and a necessarily constitutional rank; decentralization is, on the other hand, an administrative technique that is usually translated into processes, which should be legally supported, to allow the central body to transfer specific functions to specific bodies and organisms with specific legal capacity to act with relative autonomy in functional areas or territorial boundaries, with or without legal endowment of personality.

Decentralization presupposes that the functions being transferred pertain to a central agency, which is also empowered to make the transfer of certain powers, but that does not imply the lack of accountability concerning the transferred powers.

Strictly speaking, not even federalism coincides with a genuine political decentralization because it can also be given in central states, as happens in that organizational form called regional state—for instance, in Italy—because even so, there are main differences that cannot be overlooked because while in federalism the exercise of powers inherent to sovereignty is divided between

complementary but exclusive areas—each one organized starting at the traditional division proposed by of Montesquieu—in the case of mere decentralization, power remains concentrated in a single legislative and decision-making center.

That is the origin, often spiced up by private interests, of the attempts to identify the federal technique with decentralization, despite the fact that there are, as it has been shown, essential differences between both matters.

A Global Federation of Nations?

In the eighteenth century, Immanuel Kant wrote his essay *Perpetual Peace* wherein he advances an interesting idea: peace can be achieved, solid and lastingly, when nations—not the states—get together by integrating the world into a federation, not merging into an unattainable as well as undesirable worldwide state (Kant 1972).

In the same line, Habermas says that "nation-states should feel linked, through a process of political cooperation at the perceptible national level, to a community of states committed in cosmopolitan terms" (Habermas 2000), which, in my opinion, clearly expresses the essence of the federative principle.

Daniel Elazar, as far as he is concerned and with the lucid vision that is characteristic to him, affirms that one of the most promissory vehicles to order harmonically peoples' thinking, their cultures and institutions, is what he calls the federal idea (Elazar 1994).

The described method seems to be adequate to solve the problem of lawlessness characteristic of the global level, caused mainly by the absence of a unique center legally empowered to validly issue a legal system suitable to govern at that level of social aggregation.

Because the federative technique is a flexible and dynamic method of articulation, based on the idea of cooperation agreed, and because it has the primary objective of establishing mechanisms to improve the operation of complex social systems by providing a common framework where different autonomous entities join in a larger system to ensure common goals, I do not hesitate in affirming that it is a suitable technique to tackle the problem of global structure.

Within that scheme, the global society could be structured by a non-hierarchical and non-centralized legal and decision-making order, achieving a poly-centric organization capable of organically incorporating the required mechanisms of formation of a consistent political will, providing an elementary platform to legitimate public authorities' action, from local to global levels.

It is necessary, in order to build such global structure, to contemplate a basic platform of Human Rights, in terms of a generally accepted definition, which is actually on an evident path of construction all over the world with a very conspicuous strength, even with strong resistance from the centers of power, be they traditional or new.

On the other hand, it is impossible to overlook that one of the characteristics of globalized world is the revival of many nations and the emergence of many new

expressions of nationalism. Old and new ones are being formed due to the crisis of state power and because there are renewal trends all over the world trending to reestablish the lost order, that is what had been resting on the modern paradigm of so-called "Nation-State".

In such a context, it is almost natural that those old and new national communities struggle to acquire its own independence and, furthermore, defend its rights to independence and self-government. Thus, henceforth, it is not strange to see the emergence of new states, the division of existing and, above all, a new geopolitical configuration of the world with new protagonists in scene. The application of the federal principle could provide the proper legal structure to accommodate the global social streams, distinguishing all those political and legal systems.

It will always require effective civil society participation and the establishment of the necessary preventive and remedial legal mechanisms.

The approaches of Kant are visionaries and they take force in this day of trouble and global legal emptiness. It is not alien to him, firstly, the inconvenience of a world government. However, he found necessary the right of people based on a federation of free nations (and/or states), which is a very different perspective.

When he says that "every state can and must assert its own security by requiring others to enter with him to form a kind of constitution, like the political constitution, which guarantees the right of everyone" (Kant 1972), he is not proposing the creation of a global state, but enunciating the need to configure a system that leads to peace based on an enduring world order that can only be achieved through a pact between the states. The visionary *foedus pacificus* of Kant does not intend to undermine any of the states, but on the contrary, it maintains and ensures the freedom of every federated entity, without involving the submission of each other.

A rich experience in empirical confirmations of the ideal exposed by Kant is undoubtedly the European Union, which has become, at least, in a confederation of twenty-first century, which may well be in front of him, paradigmatic.

Furthermore, I think that the European Union is nothing more than a federation in the making, a true post-modern federation, which is called to be archetypal in the future world despite the setbacks suffered by the process since the French rejection to the alleged and—for me—rushed effort to strengthen the treaty of a Pan-European "constitution".

The old Kantian idea has taken on a new topicality. According to David Held,

> Networks of states, that is, regions, could in principle assume this form, on the one hand, while sub-national entities or transnational communities, organizations and agencies might do so, on the other. . ..*Sovereignty is an attribute of the basic democratic law, but it could entrenched and drawn upon in diverse self-regulating associations, from states to cities and corporations*. . .Cosmopolitan law demands the subordination of regional, national and local 'sovereignties' to an overarching legal framework, but within this framework associations may be self-governing at diverse levels. A new possibility is portended: the recovery of an intensive and participatory democracy at local levels as a complement to the public assemblies of the wider global order; that is, a political order of democratic associations, cities and nations as well of regions and global networks (HELD 1995, p. 234).

This is how I think the federal methodology, abstracting its substantial properties from any specific polity, could be a proper way to establish the global order as a system based on a diverse and overlapping power centers, within a framework of democratic law. This is, furthermore, its main challenge in the new millennium.

Conclusions

First, globalization, in fact, means the transition of social, economic, and political systems from local, national, and regional to a worldwide field.

Second, expansion demands a correlative response to provide the necessary legal structure in order to accommodate all political, legal, and cultural diversities within it.

Third, federalism is not an integration method restricted to states building in the traditional way. On the contrary, it is a suitable method to establish dynamic mechanisms of social and political integration based on the idea of cooperation agreed, whose objective is none other than to establish rules of operation in a complex community.

Last, the federal principle is an adequate means to get the concentric design of the supranational integration that global world requires, starting from the smaller nuclei of power and progressing in the aggregate to cover the global level.

References

Easton, D. (1996). *Esquema para el análisis político*. Buenos Aires: Amorrortu, 192 pp.
Elazar, D. J. (1994). *Federalism and the way to peace*. Ontario: Queen's Univesrity, 170 pp.
Habermas, J. (2000). *La Constelación Posnacional*. Barcelona: Paidós, 218 pp.
Held, D. (1995). *Democracy and the Global Order*. Stanford, Cal.: Stanford University Press, 324 pp.
Kant, M. (1972). *La paz perpetua*. México: Porrúa, 289 pp.
La Pérgola, A. (1994). *Los nuevos senderos del federalismo*. Madrid, CEPC, 210 pp.
MacCormick, N. S. (2001). *Questioning sovereignty. Law, state and nation in the european commonwealth*. Oxford: Oxford University Pess, 297 pp.

Global Federalism: A Solution for the Global Economic Crisis?

José Angel Camisón

Introduction: About the Constitutional Dimension of the Global Economic Crisis

We are going through a period of profound political change. As everybody knows, in every corner of the planet, we have already come into the era of globalization. This possibly means that we have the main opportunity to establish the global *liberté*, *egalité*, and *fraternité* but it is also the most important challenge for the coexistence that humankind has faced.[1]

However, globalization is not only a reality, it is also an ideology, as de CABO has said, an ideology that pursuits to free the economical power from the political

[1] Point. I.5 of the United Nation Millennium Declaration (2000): "We believe that the central challenge we face today is to ensure that globalization becomes a positive force for all the world's people. For while globalization offers great opportunities, at present its benefits are very unevenly shared, while its costs are unevenly distributed. We recognize that developing countries and countries with economies in transition face special difficulties in responding to this central challenge. Thus, only through broad and sustained efforts to create a shared future, based upon our common humanity in all its diversity, can globalization be made fully inclusive and equitable. These efforts must include policies and measures, at the global level, which correspond to the needs of developing countries and economies in transition and are formulated and implemented with their effective participation". Singer (2004).

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power.[2] To achieve this objective, the economical power has created, within the framework of globalization, a sort of economical globalfederalism following the neoliberalism postulates and using the federalist ideas. This globalfederalism is menacing the nation-state and its constitution. One of the features of globalization process is the progressive demise of the constitutional nation-state that is taking place nowadays.[3] The global economic crisis that we are now facing shows clearly that, in the era of globalization, the constitutional nation-state is no more than an efficient political structure capable of taking real care of its citizens and fulfils its missions and goals.[4] Furthermore, there is currently no constitutional nation-state that could be labelled as a real one because all nation-states in the world are not ruled by their respective formal constitutions... all of them are under the domination of a new kind of power: the global markets. Global markets have become the real dominant factor of power among all of the different factors of power that are acting in the era of globalization, such as citizenship, armies, the nation-state, religions, or even the people.[5]

We must also consider one premise, namely, that globalization has been mainly conducted by the superpower of the United States.[6] Hence, we can say that more

[2] de Cabo Martín (2010): "Lo real de la globalización-y aunque no se pueda reducir a ello, pero es el aspecto más decisivo y el que aquí ahora importa- en el sentido económico financiero, no es tanto la expansión del capitalismo, que siempre ha tenido en ello su expansión más profunda (que por otra parte es de 'subsistencia', pues, como es conocido, sólo puede subsistir 'acumulando', en su sentido más propio, es decir, creciendo económicamente de manera continuada) cuando el crecimiento exponencial (Sousa) de las interrelaciones transfronterizas, entre otras razones porque el poder político (estatal) lo permite y posibilita, de manera que también puede definirse la globalización como la liberación del Poder económico del Poder político, la Economía de la Política."

[3] Venter (2010): "From a legal, especially constitutional law point of view, globalization procedures serious challenge to conventional premises: the axiomatic notion of the nation-states as the cornerstone of the territorial sovereignty of almost 200 states of the world as it developed over centuries, is rapidly losing definition, the state´s perceived dominance as provider of the of the framework within law is made, administrated, adjudicated and enforced is increasingly being challenged (...)". de Vega García (1998): "(...) pero se trata de un Estado que sometido a presiones y embates de notable envergadura, ve por doquier disminuidos sus ámbitos de actuación y comprometidas las propias razones de su existencia" and pp. 15: "Nada tiene de particular que ante tan patéticas circunstancias, en las que el Estado se esfuma progresivamente, la sociedad civil se descompone y las ciudades ven eliminados los espacios públicos donde en nombre de la justicia pudieran formular sus reivindicaciones, surge la necesidad y se plantea el problema de cómo definir y donde situar nuevamente las viejas categorías del Estado."

[4] Prandini (2010): "We are witnessing a new beginning in the morphogenetic cycle, an we can see retrospectively that the state monopoly of the political governance in simply a relevant but historical incident of the ongoing process."

[5] Lassalle (1975): "Los factores reales de poder que rigen en el seno de cada sociedad son esa fuerza activa y eficaz que informa todas la leyes e instituciones jurídicas de la sociedad en cuestión, haciendo que no puedan ser, en sustancia, más que tal y como son."

[6] Huntington (2000): "At the top, of course, is the United States as the only super power with unchallenged preeminence in every domain of power: economic, military, diplomatic, ideological, technological and cultural. It is the only country with truly global interest extending to virtually every part of the World."

than a globalization process, we have been living in an "Americanization" process of the world.[7] This global-Americanization has been conducted by the ideas of US-neoliberalism postulates, and it can be described as a socializing process of the capitalism all over the planet.[8]

This paper analyses how federalism has been an instrument used by the global market to increase its power over the population. It also examines if federalism could be a key for the endeavours and challenges that the uncontrolled global market is putting on the table. Summing up, federalism has been a part of the problem of the global crisis, but could it be part of the solution?

Federalism: Part of the Problem that Could Be Part of the Solution?

Federalism, as a political way of state organization,[9] includes, *inter alia*, two important constitutional mainstream ideas. On the one hand, federalism has been used as a method to improve the efficacy within the federal nation-state because it is based and limited by the idea of subsidiarity. Only when the lower political organization of the state is not capable of effectually carrying out a task that the decision will be redirected to the higher level of the political organization of the state. And, on the other hand, federalism is a kind of organization that provides an instrument to control the power and to protect the minorities against the tyranny of the majorities inside a political community, as it was established and theorized by the US founding-fathers.[10] In this way, federalism attempts to guarantee the freedom and the liberty of the citizens of the state. However, in my point of view, these two constitutional characteristics of the federalist organization have been used and perverted by neoliberalism and capitalism in order to establish a kind of factual economical "globalfederalism" that breaks the tight and fruitfully existing relationship between constitution and federalism.

[7] Mongardini (2002): "Per sua natura la globalizzazione porta i segni delle economie e quindi delle culture più avanzate nel processo di globalizzazione. Per molti aspetti perciò, come nota Saskia Sasse, la globalizzazione diventa sinonimo di 'americanizzazione'. La rete globale della comunicazione dà sviluppo ad un processo per cui la cultura globale è improntata alla cultura degli State Uniti, la qual cosa fornisce un ottimo esempio di quella che é situazione di egemonia culturale. Anche organismi internazionali come il FMI o il WTO sono portatori di interessi e di visioni della realtà di impronta americana."

[8] de Cabo and Pissarello (2010).

[9] González Encinar (1985).

[10] Hamilton et al. (1889): "In a single republic, all the power surrendered by people is submitted to the administrations of a single government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the partition allotted to each subdivide among distinct and separate departments. Hence a double security arises to rights of people. The different governments will control each other at the same time that each will be controlled by itself."

As everybody knows, the economical organization of capitalism—the hegemonic economical ideology in the world—needs to reproduce itself *ad infinitum* in order to succeed. Following this idea, the US-neoliberal theories have utilized a sort of "economical federalism" as an instrument to extend capitalism to new spaces and markets, establishing mostly an economical factual "globalfederalism" on the basis of Washington consensus.[11] During the last two decades, we have witnessed how a new way of "globalfederalism" has been configured, following the principles of capitalism and neoliberalism theories. So, in the light of the apparent economical success obtained by the financial economy, the nation-states have renounced to keep their economical constitutions in force. In other words, the nation-states, especially those of Europe that have been configured as social states, have sacrificed their economical constitutions in order to articulate a substantial economical global constitution according to the needs of neoliberalism.

Step by step, nation-states have been renouncing to keep their markets and economies under control of their constitutions in order to converge into a global trade area as wide as the planet. In this sense, using the postulate of subsidiarity, the economical globalfederalism has extended itself on the basis of the idea that the wider and opener to all the market, the better it will work. Thus, nation-states have placed their factual economical constitution on a higher political level, the global one, as a result of the needs of capitalism and neoliberalism, because it seemed that the results of this wide global market would be better. However, the global economic and financial crisis that we are living nowadays is pointing out downright to the opposite. Therefore, in my point of view, the constitutional federalist idea of subsidiarity has been seriously perverted by the economical globalfederalism because this postulate has been used improperly. So the idea of the subsidiarity that usually guides the allocation of powers and competences inside the federal organization has been used as pattern to establish a global free trade area by globalfederalism, principally, for the "financial products" and the capitals, but not for persons or rights.[12]

In fact, this globalfederalism is not to improve the capabilities of a global political organization through the subsidiarity postulate. Far from this, the globalfederalism has corrupted the idea of subsidiarity by using it only as a vehicle to improve the global capitalism and not to promote global solutions for the global problems, such as the degradation of the environment or the need of supervision and control of the economical power.

The other postulate of the constitutional federalism that globalfederalism has seriously perverted is the idea of the federalism as a limit to the power. As we have

[11] Harmes (2006): "The neoliberal project for multilevel governance can be theorized as a self-conscious attempt to promote a form of "disembedded federalism" where the economy always operates at least one level above that of polity in order to create an exit option (. . .)"

[12] Balibar and Collins (2003): "Thus globalization tends to knock down frontiers with respect to goods and capital while at the same time erecting a whole system of barriers against the influx of a workforce and the 'right to flight' that migrants exercise in the face of misery, war, and dictatorial regimes in their countries of origin."

already blueprinted, the constitutional federalism implies that power can be better controlled when it is not only divided vertically but also horizontally. So, the federalism tries to ensure freedom and liberty for the citizens of the federal political organization.

Globalfederalism has also perverted this idea. The postulates of neoliberalism say that the presence of the state should be as minimal as possible. The less influence the state exerts, the better for the freedom and liberty of its people; the less the national authorities interfere in the economy, the better for the people and business. Globalfederalism has been constructed on this idea. Globalfederalism suggests that the people of the nation-states can be freer in the frame of the free world trade federalism. I mean that the globalfederalism is a perverted version of federalism that has been trying to show itself as a limit to the political control of the nation-states over the people. So, globalfederalism, as an expression of the neoliberalism postulates, wants us to think that the regulation of the economy or even any kind of intervention operated by the nation-states is an attack to the liberty of the people and a limit of the possibilities to prosper in the personal accumulation of the capital. In this way, globalfederalism presents itself as a limit to the nation-states power that ensures the liberty of the global people. However, this is also a sort of perversion of the constitutional federalism as a limit to the power because the global crisis proves that globalfederalism did not act, in fact, as a limit to the power but as political–economical organization that ensures the domination of the few over all the people of the globe. Globalfederalism does not really work as instrument to control the power because the global crisis shows that globalfederalism has been used by the economical power to avoid any kind of control and become the real and hegemonic power in the world.

In any case, this factual globalfederalism constitution is not really ruled by any written norm because the economical globalization, followed by the postulates of neoliberalism, has been configured by the idea of deregulation. The absence of written rules is in itself the main rule. Neoliberalism needs a world market without rules, so the nation-states have established a global economical federalism among them in order to establish this "unruled" global market on the basis of the absence of any regulation. It means, in fact, that the world becomes a unique supraeconomical area ruled by one unique rule, the rule of benefit. The new economical globalfederalism is shaped by this supraeconomical area and by the absence of regulation. In fact, there is an unwritten world constitution in *senso materiale* that configures a global economical federalism ruled by the neoliberalism postulates. Some scholars argue that this global economical federalism can by perfectly ruled by a governance system, which could be identified in several institutions such as the World Bank, the World Trade Organization or the International Monetary Fund or the G-Formations, but existing governance system cannot be labelled in any case as real government.

Furthermore, as we can see nowadays, the governance system that has crucially contributed to set up the "unruled" global market is not capable of governing it at all. And this fact is very paradoxical because we witness how the nation-states and their social and democratic constitutions are suffering from the consequences of the process of economical deconstitutionalization that they themselves are

legitimating. It is patently happening in Greece where the new global-federal economical order menaces to destroy the idea of nation-states. It can be sad, but it is true, as an unscrupulous garrulous broker has recently clearly expressed in the BBC, "the governments don't rule the world. Goldman Sachs rules the world."

One clear example of this new way of globalfederalism and its problems is the present situation of the European Union. EU has always been described as an example of federal organization from the very first steps of its existence.[13] Moreover, the DNA of the European integration process, included in the Schuman Declaration, is a federalist one.[14] And in the same way the German Constitutional Court has recently suggested in the Lisbon Judgment that the future of the European Union should be walking on through the federal paths.[15] However, far from being on the way to become a political integration organization, the European Union has been predominantly centered on the establishment of an economical federation among its member states.[16] This European economical federation is configured mainly by the European single market and by the common currency, the Euro. As Habermas has said, money conducts the European integration process, not political ideas.[17] So, the European federalism represents an example of the new economical globalfederalism and shows its features and bad arts. The original idea of the European integration process was to progressively establish a European federal state similar to the United States of America. And there is no doubt that one of the postulates of European integration process is the principle of subsidiarity that guides all functioning of the EU.[18] However, this principle has been predominantly used during the integration process in a perverted way. The subsidiarity has been used not to improve the whole functioning of the EU but to enhance the single market.

[13] Iglesias Buiges (1976).

[14] Declaration of 9 May 1951: "(. . .) The pooling of coal and steel production should immediately provide for the setting up of common foundations for economic development as a first step in the federation of Europe (. . .)".

[15] Häberle (2009).

[16] Negri (2005): "¿Dónde está la confianza en esa Europa Unida que debería haber tenido la capacidad de desarrollar un nuevo modelo de política económica y social y a la que, en virtud de su máxima potencia, habríamos empujado para presentarse como ejemplo para el resto del mundo? (. . .) Las reglas de la nueva justicia social y del mantenimiento y fortalecimiento del Estado del bienestar, el deseo de mostrar al mundo un modelo expansivo de desarrollo económico y, al mismo tiempo de fraternidad social. . ., pues bien, todo esto ha desaparecido del horizonte."

[17] Habermars (1994), "Die Güter-, Kapital und Arbeitsmärkte gehören einer eigener, von den Absichten der Subjekte unabhängigen Logik. Neben der Administrativen Macht, wie sie in den staatlichen Bükratien verkörpert ist, ist das Geld zu einem anonymen, über die Köpfe der Beteiligten hinweg wirksamen Medium der gesellschaftlichen Integration geworden."

[18] Art. 5 EU Treaty: "1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality. (. . .) 3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level."

On the other hand, the European federalism has recognized some liberties and freedoms to the European citizens, but these liberties and freedoms have been set up as economical ones, while political and social rights have been only recently and partially recognized in the Charter of Fundamental Rights of the European Union in 2009. These economical liberties and freedoms have been presented as a limit to the nation-states power in the frame of the economical European federalism. However, in fact, these liberties and freedoms have been used as an instrument to improve the benefit of multinational corporations and not as a mechanism to enhance the life conditions of the European citizens because it is clear that the European economical federalism has been so far quite more profitable for the great capitals and multinational companies than for the European citizens.

In summary, the globalfederalism, contrary to the postulates of constitutional federalism, does not establish a limit to the economical power but only to the political power. While the political power remains at the nation-state level, the economical power has built a higher level where it could be free of any control or supervision. Thus, if one of the mainstream ideas of the constitutional federalism was to serve as a barrier to stop the abuse of power, globalfederalism has established an uncontrolled area for the economical power to dominate all over the world with the only rule of benefit. The economical globalfederalism order was not configured to control the economical power but to free it from any kind of control by the nation-state. If one of the mainstream ideas of federalism was to serve in improving the capabilities of the state placing powers and duties on the political level that were capable of achieving better results, globalfederalism—at the light of the global economic crisis—has shown that it is unable to give solutions for the economic problems that globalfederalism itself has caused and it is still causing... because we must not forget that the previous comparable economic crisis of capitalism, the 1929 great crash,[19] was one of the causes of the WWII.

I would like to finish this section of the paper by talking about some little successes that globalfederalism has achieved during this time. This could be useful to reconsider nowadays to restore the postulates of constitutional federalism. I focus on the occasions that the nation-states of the world have really acted following the principles of constitutional federalism. For instance, agreements about forbidding CFCs gases to protect the ozone layer. In that occasion, the globalfederalism acted without perverting the postulates of the constitutional federalism. When the nation-states realized the need to act globally to resolve a critical environment problem of a global dimension that no nation-state alone could solve, and when they agreed to control and rule the CFCs gases emissions in order to save the right of the people to survive. That is only a little success of what we may expect and demand from globalfederalism instead of the way that it is acting when conducted mainly by neoliberalism postulates. Do we need a closer approach to the Armageddon to reach global agreements?

[19] Galbraith (1979).

Some Considerations and Conclusions: The Need of a New Global Constitutional Federalism

The main problem is that, so far, the new economical globalfederalism seems unable to transform itself into a political and democratic one. It is easy to accord that there will be no rules when this agreement appears to bring benefit for all, but it is quite more complicated to reach an agreement for a global constitution, even if this global constitution establishing a constitutional global federalism could be one of the best solutions to overcome the global economic crisis. The European Union, for example, has quite easily configured an economical federalism among its members states, whose features show explicitly that it is a sort of federalism useful to the neoliberalism postulates; but now it is hard and complicated to go on into a closer and deeper integration although it seems the best way to end the economic crisis.

Maybe at this point, it is a utopia to talk about the establishment of a global federalism conducted by the constitutional postulates, but I think that during the Middle Ages, it was also considered a utopia to talk about the existence of a democratic state, but nonetheless the democratic state came to life. I really think, like other researchers have already done,[20] that there is an urgent need to promote the idea of constitutionalization of the globalization, although we would probably need to wait for a long time until this global constitution could come into force. For instance, the idea of a union for the European continent has been proposed and debated by the scholars almost since the Middle Ages and it is only now that we have partially accomplished that idea. Why is it impossible to establish a global federal democratic constitution in a not distant future?

I really think that one of the best ways to improve this global federal and democratic constitution could be the true implementation of the two mainstream ideas of federalism that the economical global federalism had perverted. We must act globally, following the subsidiarity principle, to solve those problems that have global dimension, such as the economic or the environmental problems because it could be the only way to guarantee some human rights whose existence is globally menaced. Only by acting globally that some global powers, like the economical one, could be really controlled.

[20] Venter (2010), op. cit. pp. 21: "This is not utopian, quixotic vision, but is founded upon the moral responsibility of mankind to recognize within itself the need of for a universal legal imperative: the rule of law, justice and democracy should, according to Höffe be acknowledged as a global standard applicable to the future world order, which may be characterized by the notion of a subsidiary (in the sense of the concept of subsidiarity) and a federal World Republic".

References

Balibar, E. and Collins, F. (2003), Europe, an "Unimagined" Frontier of Democracy in Diacritics, Vol. 33, No. 3/4, New Coordinates: Spatial Mappings, National Trajectories (Autumn - Winter, 2003).

de Cabo Martín, C. (2010). Dialéctica del Sujeto, dialéctica de la Constitución, Trotta, Madrid, Spain.

de Cabo, A. and Pissarello, G. (Eds.), (2010), Constitucionalismo, mundialización y crisis del concepto de soberanía, Ed. Universidad de Alicante, Alicante, Spain.

González Encinar, J.J. (1985), El Estado Unitario-Federal, Ed. Tecnos, Madrid, Spain.

Galbraith, J.K. (1979), The Great Crash 1929, Ed. Houghton Mifflin Company, Boston, United States.

Häberle, P. (2009), La regresiva Sentencia Lisboa como Maatricht II anquilosada. In Revista Española de Derecho Constitucional Europeo, núm. 12, julio-diciembre 2009, pp. 404 and pp. 421.

Habermars, J. (1994), Faktizität und Geltung, Ed. Suhrkamp. Frankfut am Main, Germany.

Hamilton, A., Madison, J. y Jay, J. (1889), The Federalist, Ed. G.P. Putnam´s Sons, New York, United States.

Harmes, A. (2006), Neoliberalism and Multilevel Governance. In Review of International Political Economy, Vol. 13, No. 5 (Dec., 2006).

Huntington, S.P. (2000). Culture, power and democracy. In Platter F. and Smolar (Eds.) Globalization, power and democracy, Ed. Johns Hopkins University Press, Baltimore, United States.

Iglesias Buiges, J.L. (1976), "Federalismo y soberanía en la historia de la Unión Europea" in Revista de Instituciones Europeas, n° 3, pp. 657–667.

Lassalle, F. (1975). ¿Qué es una constitución?, Ediciones Siglo Veinte, Buenos Aires, Argentina.

Mongardini, C. (2002), Ripensare la democrazia. La politica in regime di massa, Ed. Franco Angeli, Milan, Italy.

Negri, A. (2005); Europa y el Imperio. Reflexiones sobre un proceso constituyente, Ed. Akal, Madrid, Spain.

Prandini. R. (2010). The morphogeneisis of constitutionalism. In P. Dobner and M. Loughlin (eds.). The twilight of Constitutionalism, Oxford University Press, Oxford, United Kingdom,

Singer, P. (2004). One World. The ethics of globalization, Yale University Press, Yale, United States.

United Nation Millennium Declaration (2000) Available at: http://www.un.org/millennium/declaration/ares552e.htm

de Vega García, P. (1998), Mundialización y Derecho Constitucional: una palingenesia de la realidad constitucional, Ed. Instituto de Estudios Constitucionales Carlos Restrepo Piedrahita, Bogotá, Colombia.

Venter, F. (2010), Global features of Constitutional Law, Ed. Wolf Legal Publishers, Potchefstroo, South Africa.

Defending the Federation: The Federal Challenge to National Defence Policy Making in Canada

Allan Craigie

Introduction: Canadian Security

At the time of writing, the final Canadian combat patrols in Afghanistan are being conducted, and the decision-making process for one of Canada's largest military procurement projects since the Second World War is underway. The North West Passage has opened up and the Arctic has the potential to become a major shipping route where unexploited resources abound. Despite Osama Bin Laden's death, the threat of international and cross border terror has potentially increased as Al-Qaeda may seek to retaliate against the United States and its allies. The global economy is in recession and the Libyan mission, led by a Canadian Air Force General, continues. In contrast to the Cold-War era when Canada, as a part of NATO, prepared for a conventional conflict in a European battle space, Canada's current security environment is in a state of flux.

The Cold War dictated that Canada must prepare for the greatest threat: strategic nuclear war (McDonough 2005: p. 254). The Soviet Union's collapse greatly reduced the threat of nuclear or global conventional war and freed up resources for contingencies requiring different responses and capabilities (McDonough 2005: p. 249; Bow 2008: p. 73). In the decade following the Cold War, Canada participated in over 70 overseas missions compared to 25 in the previous 40 years (Hartfiel 2010). This changing international environment has allowed for greater choice over the size and nature of Canada's military contributions in the wider world (McDonough 2005: p. 256).

This situation is not exclusive to Canada, many middle powers are in similar positions. What makes Canada unique is that it is one of the few, perhaps only, countries where decision making is so decentralized as to deny the federal

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government a monopoly in defining the national interest. The shift from a bi-polar to a multi/single polar international environment has created the opportunity for Canadian provinces to influence national defence.

Policy making in Canada is the result of complex intergovernmental relations. However, one of the few policy areas that would appear to be neatly compartmentalized is defence (Stone and Solomon 2005: p. 146). The federal government can make defence related financial decisions without touching upon provincial transfers or healthcare (Bow 2008: p. 79), absolving it of responsibility towards the provinces in this sphere. Defence policy making is an executive power that belongs to the federal cabinet, even MPs and Senators have very little input (Bland 2000), yet in the competition for resources, the Department of National Defence (DND) and the Canadian Forces (CF) compete with other government departments. In practice, it would appear that defence policy is not free of the pressures of federalism. Smith (2010) notes a relationship exists between the two, but scholars have yet to address it. This paper is the initial work of an exploratory project that addresses this important dynamic of federalism by asking the following question:

> Are national defence and security policies shaped by the political interaction between provincial and federal orders of government, and factors inherent in Canadian federalism—most notably regionalism, nationalism, and interprovincial competition for resources?

This paper provides an overview of how federalism shapes Canadian policy making followed by an exploration of how national and security interests are crafted in Canada. The National Shipbuilding Procurement Strategy (NSPS) is examined and the province of Nova Scotia (NS) is used as a test case for analysis of how the forces of Canadian federalism influence the procurement process.

Decision Making in Canada

As a multinational federation, Canada is one of the world's least centralized states. According to Banting (2008), federalism manifests in three distinct ways in Canada depending on the policy sphere, each model possesses its own rules on decision making and intergovernmental relations. Banting's models are used to examine the relationship between federalism and national defence. *Classical federalism* occurs when governments possess the jurisdictional and financial capacity for independent decision making, acting almost as unitary states. In *shared-cost federalism,* the federal government offers financial assistance for provincially run programs. Both orders of government retain decision making autonomy—the federal government decides what to spend its money on, regardless of jurisdiction, and imposes constraints. The provincial governments can choose whether to accept the funds or not. *Joint decision making federalism* is noted for its numerous veto points; before action is taken, agreement must be reached between the two orders of

government. In the case that federalism is not found to impact national defence, the classical model of federalism should be present.

Defining the National Interest

Debate surrounds Canada's ability to define its national interests. Bland (2000) states that national security is too important an issue to be left to party politics, that security is not a policy good like education or health care; it is a higher order concern. To promote Canada's interests, security must be decoupled from politics and broad consensus must be reached. Lagassé (2010) disagrees arguing that in democracies the politicization of security means governments are held accountable for defence. Even though defence is politicized, allowing governments to choose their security priorities, the room for maneuver may not be that great. Poggi (1990: p. 24) claims that the state is the highest order of legitimate power and is free to do as it chooses. Yet, maintaining territorial integrity is the primary purpose of any government as failure to do so would compromise the state's ability to provide other political goods, including democracy.

As Canada currently faces no external territorial threats, it has the freedom to define its own security interests. On the one hand, this increases the security options available for the state, yet on the other, it is a reality of Canada's geographic position that its primary foreign policy concern is maintaining an open border with the United States (Keeble 2005: p. 6; Bow 2008: p. 69). Though Canada is the United State's largest trading partner, Canadian trade accounts for only 2% of US GDP, whereas American trade counts for 30% of Canada's (Brooks 2006: p. 496). Anything that hinders the transport of goods over the US/Canada border would minimally affect the US economy, but it could ruin Canada's. In this sense, economic security is Canada's primary foreign security issue.

There is no universally accepted calculation to define the level of threat a state faces, nor how to adequately defend against it. As defence competes with other political goods, balance must be reached between resources directed towards security and other public goods, and the burden placed upon the Canadian tax base. In unitary states, the central government monopolizes security, yet both the Canadian and provincial governments possess democratic legitimacy, and neither trumps the other. As security is a primary political concern, the question of how security is practiced in states with multiple poles of legitimacy is of importance not only to students of federalism, but also to those involved in Canadian security. The Canadian constitution prescribes defense to the central government, yet the federal government uses its spending power to influence provincial spheres of jurisdiction (Telford 2003). Similar spending powers may be available to provincial governments as well, with provinces possessing the ability to spend in areas of federal jurisdiction. The most notable example is the provincial governments' use of resources to enter into foreign relations, otherwise known as para-diplomacy

(Lecours 2008). Consequently, provinces could marshal their resources, intentionally or not, to influence national security.

This paper examines a topical project in Canadian national defence, the building of $35 billion worth of ships over the next 30 years. The project involves both the Royal Canadian Navy (RCN) and the Canadian Coast Guard (CCG) and has been billed as Canada's largest naval procurement since the Second World War. An example of naval procurement from nearly 100 years ago clearly demonstrates provincial participation in national defence. Prior to the First World War, the Canadian West Coast was to be defended by the Empire of Japan as the Royal Navy concentrated on the Atlantic. The British Columbia government felt this action was insufficient defence against the German Imperial Navy and used provincial funds to covertly purchase two submarines from shipyards in Seattle. These became the first submarines in the Royal Canadian Navy (Sinton 2005).

Procurement as Defence

Defence policy involves more than deciding where and when to deploy the Canadian Forces (CF); much activity occurs prior to deployment. Bases and shipyards need to be built and maintained, equipment needs to be purchased, and personnel selected and trained. The CF's equipment helps determine where and in what numbers it can be deployed, the types of missions it can undertake, and the length of deployment that can be sustained. Procurement and infrastructure decisions made in one year can have multigenerational consequences. The Canada First Defence Strategy (CFDS) speaks to the importance of procurement with regard to the CF's operational ability. According to the CFDS

> [o]perational experience has demonstrated that the best way to give the Government maximum flexibility in countering the full spectrum of security challenges is to maintain balance across the four pillars upon which military capabilities are built – personnel, equipment, readiness and infrastructure. (Canada 2008: 14)

Procurement (the acquisition of equipment and associated infrastructure) is a key aspect of defence policy, and due to its long term nature is highly susceptible to politics (Plamondon 2010). Some equipment can be purchased quickly, for example, the Canadian purchase of the C-17 Globemaster aircraft, which gave the CF strategic airlift capabilities that it previously lacked. Despite the multibillion dollar price tag, the purchase was made in a relatively short timeframe because it was virtually an off-the-shelf purchase. Other aspects of military expenditure, such as the construction of custom made bases or warships, take a considerable amount of time and investment in local infrastructure.

Provincial governments have no ability to dictate CF training or deployment, but the dynamics of federalism can influence infrastructure and equipment. It is in these two pillars of national defence that one would expect to find the imprint of federalism. Equipment orders and infrastructure contribute enormously to

provincial economies, providing incentives for provincial involvement in these defence pillars. For example, prior to closing, Canadian Forces Base Summerside in Prince Edward Island was the province's second largest employer. Its closure mobilized public opinion across the province. According to Goren and Lackenbauer (2000), it united all the provincial political parties, unions, and chambers of commerce and led to the biggest demonstration in provincial history.

The NSPS has a dual mandate. The first, and most obvious, is providing ships for the CCG and the RCN, the other is increasing Canada's domestic defence procurement and manufacturing capabilities (Canada 2010b). The second point is significant because in the past Canada's lack of investment in the defence industry has led to difficulties regarding domestic procurement (Plamondon 2010).

The National Shipbuilding Procurement Strategy

On 3 June 2010, the Canadian government announced the NSPS, a plan to build $35 billion worth of ships over the next 20–30 years. These include Arctic/Offshore Patrol Vessels (for seaborne surveillance of Canada's waters, including the Arctic), Joint Support Ships (JSS, logistical support vessels which increase the time a naval task force can deploy without having to replenish at port), and Canadian Surface Combatants (to replace the frigates and destroyers of the RCN). The CCG components comprise offshore science and fisheries vessels that will contribute to Canadian security and sovereignty, especially in the Arctic. A cornerstone of the procurement process is the proposed ice-breaker the CCGS John G. Diefenbaker. As stated by Prime Minister Harper "When it launches for the first time into the frigid Canadian waters, the Diefenbaker, as it is almost certain to be nicknamed, will be a crowning achievement for our country" (CCG 2010). According to the CCG, this will be a Government of Canada asset, contributing to numerous departments. In addition, a smaller package of vessels is planned for both the RCN and the CCG (Canada 2010a).

The economic benefit to the cities and provinces where the contracts are awarded will be immense. To ensure fairness, Public Works and Government Services Canada (PWGSC) has divided the large ship projects into two packages to be awarded to two separate shipyards: the $25 billion Combat Vessels Package and the $8 billion Non-Combat Vessels Package (including the JSS). A $2 billion small ships package will be set aside for all other shipyards to compete for the ships individually. According to reports for the Greater Halifax Partnership, awarding the $25 billion package to NS will create an average of 8,400 jobs per year, peaking at 11,500. It will also generate $266 million in tax revenue for the federal, provincial and local governments, and increase the provincial GDP by almost $900 million. Overall, investor confidence in NS is predicted to increase, leading to an even greater investment in NS. Clear winners and losers will be created, and the possibility always exists that a province on the losing side will be perceived to have been discriminated against, creating problems for the Canadian federation.

As security is one good amongst many, the NSPS is influenced by various concerns, including the creation of long-term highly skilled jobs, the acquisition and exploitation of new technology, and investment in infrastructure to improve productivity and competitiveness (Canada 2011). The projects are subject to the Industrial and Regional Benefits (IRB) Policy, which ensures companies receiving the contracts spend an amount equal to the contract's worth in Canada over the contract's lifetime. IRBs contribute widely to the national economy, obliging "vendors and sub-contractors to purchase goods and services over and above what it would have bought from purchaser's economy" (Martin in Plamondon 9).

Provincial Actors and National Security

Using NS and the NSPS as its case, this paper examines the relevance of federalism to national security in three areas: government to government relations, provincial government influence on public opinion, and provincial government spending power. Competition for resources is expected within a single order of government, but a procurement of this size creates competition across multiple governments and governmental departments. Additionally, the competition cuts across salient cleavages in Canada: the national/linguistic divide (Quebec and Canada outside Quebec) and the economic divide ("have" and "have-not" provinces).

The NSPS states decisions will be merit-based. The Minister of Defence (a NS MP), agrees, he stated the decision "will not be affected by politics, political pressure, or advertising. This will ensure that our men and women in uniform are getting the absolute best ships possible" (Jackson 2011). Undoubtedly, the government is sensitive to the mishandling of the CF-18 maintenance contract in 1986 when a technically superior and cheaper bid (as judged by the government's own experts) from Winnipeg lost out to a bid from Montreal. The political ramifications were immense; they contributed to the collapse of the Progressive Conservative Party of Canada (Flannagan 2001) and the restructuring of the Canadian party system. Even though the federal government attempts to depoliticize the decision making process, provincial governments invest vast amounts of political capital to steer decisions towards their jurisdictions because the incentives are so great.

Government to Government Relations

Amongst the three provinces involved (British Columbia, Quebec, and Nova Scotia) losers will be created, and regardless of the decision being made on technical merit it will indeed have political ramifications. The behaviour of the NS government suggests it does not fully accept the decision will be non-political. This may be due to the nature of NS politics, which some argue maintains traditional patterns of patronage (Clancy, et al., 2000: p. 16). Yet, above and beyond

the style of politics, Plamondon (2010: p. 16) claims procurement is never decoupled from politics. NS Premier Darrell Dexter claimed the Minister of Defence was championing Halifax's bid at Cabinet, in effect acting as a regional minister (Bakvis 1991). Dexter stated:

> Every time I've spoken with him about it, he makes it clear he intends to be a strong advocate and voice for Irving Shipyards at the Federal Table... Like all big contracts, the ultimate accountability lies with the [federal] government and the cabinet. (in CBC News 2011)

Later the same day, the Premier emailed clarification on his statement. In his clarification, he noted that the federal government was committed to impartiality, and his "intent was to credit minister MacKay ... for that commitment." On the assumption that the Premier of NS believes that his province has the best bid, support for impartiality is implicit support for the provincial bid.

The interaction between the two orders of government flowed in both directions. For example, PWGSC gave briefings to delegations from NS (30 May 2011), Quebec (14 June 2011) and British Columbia (BC) (23 June 2011). As indicated on the PWGSC website, these briefings were practically identical for each government, but the fact that PWGSC involved the provinces in this way, suggests the recognition of provincial legitimacy within the process.

Public Opinion Campaigns

"We don't just build ships, we build icons" is one of the slogans used by the NS government and industry funded "Ships Start Here" campaign to advance NS's bid. The words appear above a picture of a dime, which bears the image of the iconic NS built ship the Bluenose. This is an example of a public relations campaign to influence the federal government alongside traditional executive federalism. This type of campaigning is not new to NS, in 2001 Premier John Hamm launched a Canada-wide "Campaign for Fairness" (Nova Scotia 2001). The Campaign was directed at both the federal and provincial governments to ensure federal compliance with the Canada-Nova Scotia Offshore Petroleum Resources Accord. It appealed to a sense of Canadian solidarity and national interest, noting "It is in Canada's national interest that provinces such as NS break the trend of dependency on federal transfers, and create sustainable economic improvement" (Nova Scotia 2001). Much like Hamm who attempted to ally himself with other Premiers, Dexter has secured the support of other Maritime Provinces for Nova Scotia's bid.

The "Ships Start Here" campaign is partially targeted at a wider Canadian public, and attempts to create an image of Halifax being the logical place for naval shipbuilding. It also appears to have a second (unspoken) purpose: to demonstrate to the people of Nova Scotia that the Nova Scotia government is engaging the federal government on their behalf. In this sense, the Nova Scotia government

seems to assume politics is involved in the process, and is using the informal tools of executive federalism to influence the outcome.

Provincial Spending Power

In addition to political pressure, provincial governments use their financial resources to support the bids made by companies within their province. The federal government's ability to spend in spheres of provincial jurisdiction is extremely controversial in Canada, especially in Quebec (Telford 2003). Yet, the provincial governments' ability to spend in areas of federal control has received very little attention. This may be due to the costly and visible nature of the provincial spheres of education and healthcare, the costs of which provincial governments are generally unable to meet without federal assistance. National defence, however, is a federal responsibility and the opportunity for provincial governments to spend in this field arises less frequently. However, it should be noted that the provinces do have power over the circumstances surrounding the federal activity. The competition between BC and NS has been widely reported including the lobbying efforts of their respective premiers and the financial backing made in support of the local bids. For example, British Columbia has offered $35 million in training and building tax credits for its shipyard, while the Irving Shipyard in Nova Scotia is using a $20 million provincial loan to improve its operations in support of the bid. The Nova Scotia government is also offering assistance with infrastructure and skills training (Journal-Pioneer 2011). While provincial governments may not be spending directly on defence, they are indirectly using their financial capabilities to influence the outcome of defence decision making.

Concluding Thoughts: Federalism and National Defence

If the federal government were the sole government involved in defence policy, one would expect this policy sphere to most closely resemble classical federalism. However, this project, though still in its initial stages, establishes that federalism does indeed influence national defence. As the CFDS indicates, the purchase and construction of military hardware is one of the pillars of national defence; this research shows that provincial governments are involved, ruling out the classical model of federalism regarding defence procurement. Yet what of the other two models?

With shared cost federalism, the provinces would use their resources in support of military procurement. Yet in this case, the provincial spending is an investment with an eye to massive future economic returns, not an attempt to "split the bill." The federal government is like a corporate entity looking to make a major investment and the three provinces are attempting to attract it. Though the provinces

engaged in the process as independent actors within the Canadian federation, they are not trying to engage the federal government as partners in defence.

Regarding joint-decision making federalism, it appears that neither the federal nor provincial governments acted unilaterally. However, the balance of power is overwhelmingly in the federal government's favour; the provinces have very limited influence over outcomes. The constitutional requirement for provincial involvement is nil, yet the federal government chose to engage the provinces. Since provincial governments have a democratic and legitimate relationship with their electorate (which they share with the federal government) they possess a legitimate democratic voice which they attempt to maximize, and it appears the democratic legitimacy of the provinces influenced this federal jurisdiction. If the Nova Scotia government *did not* attempt to influence the federal government's decision, their electors would most likely judge them to be negligent in protecting the provincial interest.

Contrary to what some may argue, national defence and security is influenced by the forces of federalism in Canada. Security is not the watertight compartment of classical federalism, yet it does not fit either shared-cost or joint-decision making federalism. These three models of federalism are refined. They possess rules and structure. The federalism of Canadian defence seems unrefined, or raw, when compared to Banting's concepts. Instead, the Canadian defence policy making process appears to be a manifestation of the unique social forces inherent in society that guide the way federalism is practiced (Watts 2008: pp. 19–23). As Nossal (2007) notes, some argue a state's external behaviour can be determined partly by internal social forces. Based on this initial exploration, it would appear that federalism may present a domestic influence on Canadian foreign and defence policy. This paper suggests that there is a relationship between Federalism and Canadian national defence, and that this relationship requires further academic investigation.

References

CBC News (2011) "Benefits of shipbuilding contract touted" 27 May

Journal-Pioneer (2011) "N.S. government says it will help Irving if it lands shipbuilding contract" 28 July

Bakvis, H. (1991) Regional Ministers: Power and Influence in the Canadian Cabinet. Toronto: University of Toronto Press

Banting, K. (2008) "The Three Federalisms" in Bakvis H. and Skogstad G. (ed) Canadian Federalism. Toronto: OUP

Bland, D. (2000) "Parliament's duty to defend Canada" Canadian Military Journal Winter 2000–1:35–43

Bow, B. (2008) "Parties and partisanship in Canadian defence policy" in International Journal Winter 2008–9: 67–88

Brooks, S. (2006) Canadian Democracy. 5E Toronto: OUP

Canada (2008) Canada First Defence Strategy. http://www.forces.gc.ca/site/pri/first-premier/index-eng.asp

Canada (2010a) "NSPS – Work Package for Small Vessels" http://www.tpsgc-pwgsc.gc.ca/app-acq/sam-mps/navires-vessels-eng.html
Canada (2010b) "Government of Canada announces National Shipbuilding Procurement Strategy" http://news.gc.ca/web/article-eng.do?crtr.sj1D=&mthd=advSrch&crtr.mnthndVl=12&nid= 537299
Canada (2011) "NSPS – Frequently Asked Questions" http://www.tpsgc-pwgsc.gc.ca/app-acq/sam-mps/faq-eng.html
Canadian Coast Guard (2010) The CCGS John G. Diefenbaker National Icebreaker Project http://www.ccg-gcc.gc.ca/e0010762
Clancy, P. Bickerton J., Haddow R. and Stewart I. (2000) "Political Reform and Political Change in NS" In Clancy, P. Bickerton J., Haddow R. and Stewart I. (eds) The Savage Years: The Perils of Reinventing Government in NS. Halifax: Formax Publishing Company Limited
Flannagan, T. (2001) "From Riel to Reform (And a Little Beyond): Politics in Western Canada" American Review of Canadian Studies 31(4) 623–638
Goren, L and Lackenbauer, P. W. (2000) "The comparative politics of military base closures" in Canadian-American Public Policy 43
Hartfiel, R.M. (2010) Planning without guidance: Canadian defence policy and planning, 1993–2004." In Canadian Public Administration 53(3) 323–349
Jackson, D (2011) MacKay: Lobbying won't lure ship work to Halifax" The Chronicle Herald Aug 16
Keeble, E. (2005) "Defining Canadian Security" in The American Review of Canadian Studies 35(1) 1–23
Lagassé, P. (2010) Accountability for National Defence. IRRPP Study no 4
Lecours, A. (2008) "Political Issues of Paradiplomacy: Lessons from the Developed World" Clingendael Discussion Papers in Diplomacy. The Hague, Clingendael Institute
McDonough, L. (2005) The Industrial Structure of National Defence and Transaction Costs" in Defence and Peace Economics 16(3) 247–262
Nossal, K.R. (2007[1983]) "Analyzing Domestic Sources of Canadian Foreign Policy" in Duane B. and Chrisopher J.K. eds Reading in Canadian Foreign Policy. Toronto: OUP
Nova Scotia (2001) "Campaign for Fairness" http://www.gov.ns.ca/fairness/
Plamondon, A. (2010) The Politics of Procurement. Vancouver: UBC Press
Poggi, G. (1990) The State: Its Nature, Development and Prospects. Cambridge: Polity Press
Sinton, S.J. (2005) "CC1 and CC2 —British Columbia's Submarine Fleet" CFB Esquimalt Naval & Military Museum online http://www.navalandmilitarymuseum.org/resource_pages/coastal_defence/subs.html
Smith, D. (2010) Federalism and the Constitution of Canada. Toronto: UofT Press
Stone, C. and Solomon B. (2005) "Canadian Defence Policy and Spending" in Defence and Peace Economics 16(3) 145–169: 146
Telford, H. (2003) "The Federal Spending Power in Canada: Nation-building or Nation-Destroying?" Publius. 33(1) 23–44
Watts, R.L. (2008) Comparing Federal Systems. 3E. Montreal: McGill-Queen's University Press

Some Questions Regarding Responsibility for Non-compliance with International Obligations in Federal States and in Spain

Roberto Uriarte Torrealday

In the field of international law, both as a result of the signing of international treaties and of the membership of international organisations, obligations arise non-compliance with which generates State responsibility. However, in federal or decentralised states in general, non-compliance with these obligations may not correspond to the federation or central bodies, as a consequence of this being a matter of "regional" or local competence.

This raises two questions. The first, how to guarantee effective compliance with obligations on the part of competent bodies. And the second, who is ultimately the target of the sanctions that may result from non-compliance. The federal states' answers to these questions differ. And they are also questions that generate significant conflicts of power and intense doctrinal debate.

This is the case of Spain, where positions vary, because the constitutional provisions are not very precise. This has forced the Constitutional Court into ruling on the issue, and its doctrine in this question has gradually changed. However, there are still important questions to resolve in this field. For this reason, and limiting ourselves to the sphere of the community obligations of the state, some advocate the drafting of a law that would regulate in a detailed manner the mechanisms for guaranteeing their fulfillment. Specifically, this is the recent stance of the Council of State which, requested by the government, has produced a report where it shows its support of such a law.

On the one hand, this work seeks to reflect upon some of these questions from a perspective of comparative law. And on the other, it considers some of the alternatives that might be drawn from the experience of other decentralised countries. And I believe that a suitable focus upon this theme needs to take into account its implications from the point of view of both international and constitutional law.

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On the basis of these considerations, particular attention will be given to the appropriateness of a specific law regulating the question to render effective the guarantee of compliance assigned by the constitution to the state.

Onership of the Obligation of Fulfillment of International Obligations

From a perspective of international law, it is clear that the state is responsible for compliance with its international obligations. And that from non-compliance with these through an unlawful act arises a responsibility of the State and an obligation to compensate for damage caused. Within Public International Law, this question has traditionally been regulated as customary law,[1] although it has attracted the attention of the International Law Commission, which has produced a draft on this subject.[2]

This obligation of compliance is a consequence of the principles of sovereignty and reciprocity that govern international law. It is impossible to understand international legal relations without a principle of responsibility of the subjects that act within it and that, basically, are the states.

Nevertheless, international law, as a consequence of that same principle of sovereignty where it is based, cannot interfere in internal issues such as those regarding which specific bodies should enforce international obligations or who is responsible for compensating for possible damages. So, in order to answer these questions, it is necessary to consider the internal legal order and in particular, the assignation of competences by constitutional Law.

This question poses problems in politically decentralised countries, which for the sake of simplicity we shall generically term "federal". Amongst these, the problem of international obligations and in general, of international relations, is a complex and never satisfactorily resolved problem, which is normally exacerbated by the lack of specific constitutional provisions.

Let us turn to the case of Spain: to which state organs corresponds the enforcement of international obligations? The Spanish Constitution establishes in Article 149.1. 3 that the State (i.e. the federation) has exclusive competence over international relations. And with specific reference to treaties of integration in supranatural organisations like the European Union, it also establishes in Article 93 that Parliament or the Government, as is the case, is responsible for guaranteeing compliance with these treaties and resolutions issued by international or supranational organisations in which the powers have been vested.

[1] Carrillo Salcedo (1994), p. 179.

[2] Draft articles on the State's responsibility for internationally illicit acts, adopted by the CDI in its 53rd session (A/56/10) and annexed by the AG in its Resolution 56/83, of December 12, 2001.

On the basis of the generic attribution of responsibility to the state by international law and the aforementioned precepts of the Spanish Constitution, some authors have defended the idea that compliance with international obligations corresponds to central government, with the autonomies unable to lay claim to any competence whatsoever. Other authors have opposed this interpretation, because in their opinion international relations cannot be regarded as an authorisation of competence or at least not as an authorisation of competence in an expansive sense, that is allowing central government to encroach upon autonomous competences.

In Spain, it is the Constitutional Court which has the last word in settling questions of competence, as the supreme interpreter of the constitution. Its position in this debate has passed through different phases. In its first years, it resorted to a generic criterion of "international relations" that allowed central power to invade originally autonomous competences under the pretext of an international obligation. Subsequently, this criterion was abandoned in favour of a more restrictive interpretation of the concept of "international relations." I use this term, because I believe that the forum wherein this work is directed absolves me from addressing in detail the debate over whether in our constitutional text these constitute a competence, a subject, a field, etc.; with their consequences.

What is worth underlining is that the high court rectified its original imprecise definitions of the term, restricting its contents not to any question that has been the focus of attention of an international treaty, given that, in theory, this could include any question,[3] but solely to questions that traditionally have shaped the sphere of international relations, such as treaties, peace and war, recognition of states, external representation, international responsibility, etc. Consequently, the court has expressly ruled out the interpretation according to which whenever treaties are applied, competence would correspond to central government because it is incompatible with the distribution of competences established by the Constitution and the Statutes of Autonomy.[4]

In summary, in Spain the fulfillment of international obligations may be condensed into the following aspects:

- The fulfillment of the obligation may correspond to the central or autonomous governments, depending upon which has competence in the field, in accordance with the distribution of competences by the constitutional block.
- The Constitution expressly reserves for central government those contents traditionally considered to be the core of international relations.
- Central government is charged with guaranteeing the fulfillment of international obligations.

[3] The TCE has clarified that it is not acceptable that any connection, however vague, with issues wherein other countries or foreign citizens are involved, necessarily implies that competence should be attributed to the rule "international relations", STC 153/1989, point 8.

[4] Point 8 of aforementioned STC 153/1989.

This guarantee of fulfillment should not be understood as an obligation of direct fulfillment by central government, as this would be incompatible with the aforementioned distribution of competences. In other words, its responsibility is not to fulfill, but to guarantee fulfillment.

In the absence of specific constitutional provisions, the Statute of Autonomy of the Basque Country introduced in its Article 20.3 an item that was later incorporated into other Statutes, according to which "the Basque Country will implement the treaties and agreements in all areas attributed to its competence in this Statute". However, although a particular autonomy lacks specific provisions in this regard, it is in possession of this competence, as this is an implicit power or a competence related to material jurisdiction according to the system of constitutional distribution; in other words, there exists no competence for the implementation of treaties.[5]

At the other end of the spectrum, with regard to the assignment to central government of the guarantee of fulfillment, although there is no specific constitutional provision, the result would be the same, as this is a requirement of Constitutional Law itself, which makes the state responsible for the fulfillment of international obligations, personifying this responsibility in its central bodies, which perform the external representation of the state before the international community. Because although a state might be federal, these are not grounds for alleging internal constitutional limitations in order to avoid the fulfillment of obligations resulting from treaties, neither are "federal clauses" usually admitted as a means of modifying these obligations.[6]

And the aforementioned criteria are applicable not only to the fulfillment of obligations resulting from treaties, but also those resulting from the membership of international organisations, as was made perfectly clear by the ECJ with regard to Community obligations, stating that "all that is imposed by the directives in this respect is that central Government be the sole interlocutor of the EEC in matters concerning the effective implementation of Community determinations [...] but this cannot be interpreted as the expression of an attribution of competence performed by the EEC in favour of a particular sector of the apparatus of its member States, but as a clarification that it is son the general or central bodies of those States that are ultimately responsible for the implementation of Community regulations..."[7] This principle of State responsibility, irrespective of the offending organ, had also traditionally been declared by the Court of Luxembourg.[8]

[5] Ruiz Robledo (2008), p. 491.

[6] Trone (2001), p. 20.

[7] STC 252/1988, December 20, point 4.

[8] "The responsibility of a member state in the event of non-compliance (Art. 169 TCE) is compromised irrespective of which is the state organ whose action or omission originates the infraction, even in the event of this being a constitutionally independent institution" TJCE, ruling 77/69, of May 5, 1970, Commission c. Belgium (ECR 237).

Mechanisms to Ensure Compliance

Contrary to what happen in some deventralised states, in Spain there is not a relationship of supra-subordination between the State and the Autonomous Communities,[9] as has been clearly established by the Constitutional Court, declaring the inadmissibility of generic controls by the state of the activity of the Autonomous Communities.[10] This does not mean, however, that there do not exist mechanisms of state reaction in the event of non-compliance by Autonomous Communities with international obligations. The CE provides ample control mechanisms over these, mechanisms that are in fact more efficient and incisive than those normally at the state's disposal in order to demand such compliance of other organs of the state itself.[11]

These mechanisms include the following:

– State competence regarding international relations: Article 149.1.3ª

The first mechanism at the State's disposal in order to guarantee fulfillment of international obligations is its own exclusive competence in this field, a competence that, as we have seen, does not encompass everything that from a sociological perspective might be termed international relations, but that should be interpreted in the strict sense as relations between international subjects which are governed by international Law, in other words, those areas traditionally regulated by general international law, such as those related to the *celebration* of treaties (ius contrahendi), and to the external representation of the state (ius legationis), as well as the creation of international obligations and the international responsibility of the state.[12]

It has already been noted that it is not possible to subsume within this exclusive competence of the state vis-à-vis international relations of a general character the fulfillment of international obligations. However, what could be subsumed is the guarantee of execution.[13]

– The use of transversal and basic authorisation of competences

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[9] Segado.

[10] "The existence of generic or indeterminate controls which imply hierarchic independence of Autonomous Communities from central State Administration is not in line with the principle of autonomy", STC 6/1982, point 7.

[11] Jauregui (1985), pp. 462–463.

[12] STC 165/1994, point 5.

[13] "...one may analyse the possibility of article 93 in connection with 149.1.3ª coming into to play when it is not a case of implementation of or compliance with Community law (or of international treaties or conventions), but of 'guarantee of compliance', when non-compliance has been verified, in the framework of international relations—ex declaration of responsibility—and taking into acount the factors which the CC itself has defined as 'fundamental nucleus' of international relations", Council of State report, December 15, 2010, p. 90.

Another of the mechanisms the state possesses in order to guarantee the execution of international obligations is the state competence to regulate the rules of certain matters provided for in Article 149.1 of the Constitution and in particular Section 13, which attributes to the state the rules and coordination of the general planning of economic activity. This right, on its own or together with other sections of the provision itself, is often invoked by the state in order to emit rules for transposition of community directives.

However, this state competence does not authorise invasion of the sphere of competences of Autonomous Communities. As the TCE has stated, the fact that the goal of European directives is that of homogenising, aligning or harmonising different regulations and ensuring that they are respected by all authorities and institutions, central and decentralised, of member states, and that they might even have a direct effect, does not mean that the state rules that adapt them to our system should necessarily be regarded as "basic",[14] only insofar as they tackle nuclear issues, without going too far.

In practice, however, it is evident that the state has tended to emit rules of transposition that encroach upon the sphere of competence of the Autonomous Communities. This is a tendency that a recent report by the Council of State has not only implicitly acknowledged, but which it has even considered relevant.[15] In an attempt to avoid some of the consequences of this "expansive tendency" of the central state in the incorporation of European Law,[16] recent statutory reforms have basically introduced two types of provision: on the one hand, those aimed at guaranteeing that state rules of transposition may only invade Autonomous competences when the European regulation itself so requires; and on the other, those that provide for direct regulation by Autonomies in the event of Community law having exhausted the sphere of basic regulation.

– The suppletory nature of State law: article 149.3

Another instrument provided for by the Spanish Constitution to guarantee the fulfillment of international obligations and, in particular, to avoid the consequences of regulatory inactivity on the part of the Autonomous Communities, is to be found in the suppletive character of state regulations in those areas where the Autonomies have competence but which have not been the object of a specific regulation or have been so in an insufficient manner. Nevertheless, the jurisprudence of the Constitutional Court has gradually been restricting the margin for use of this mechanism, considering that its functions, important during the first stages of the Autonomous

[14] STC 102/1995, fundamento 14.

[15] ". . .not disruptive, but reasonable and useful, is the maintenance of practice and uses by means of which the State plays a leading role in the task of transposition. . .", aforementioned Council of State report, p. 120.

[16] Azpitarte Sánchez (2009), p. 143.

State, have become more limited as the latter has established itself,[17] to the extent that for some authors suppletory law has only a transitory value.[18] In this sense, it has declared the nullity of the laws issued by the state with the sole aim of creating Suppletory law from that of the Autonomous Communities in areas exclusively of the competence of the latter, and even that neither in areas wherein the state possesses shared competences can it produce merely supletorias legal provisions.[19]

Although constitutional jurisprudence has ruled out *on a general basis* the creation "ex novo" by the State of these suppletory rules, which has been criticised by several doctrinal sectors for continuing the existence with suppletory sense even of preconstitutional laws petrified given the impossibility of their reform by the State,[20] it is unclear whether they can be used in the specific sphere of compliance with Community law. In this sense, *academic writing* is divided between those who do not consider this recourse to be appropriate and those who do, and within the latter, between those who regard it as appropriate even as a recourse prior to autonomous inactivity and those who only accept its use a posteriori. The debate has been fuelled by the fact that there exists a previous favourable ruling by the Constitutional Court,[21] which refers specifically to this area of Community law, although this is prior to other rulings that have proved definitive in the restriction of its use.

– Laws of Harmonisation: Article 150.3

In this respect, the Spanish Constitution contains the provision that the State should issue laws that harmonise autonomous regulations when so demanded by general interest, a requirement that must be established in each case by absolute majority of the Senate. As a result, "the State may pass laws that establish the necessary principles in order to harmonise the regulatory provisions of the Autonomous Communities, even in the case of areas attributed to the competence of the latter, when so required by general interest."

As the ECJ has made very clear, this is a regulation for closure of the system of distribution of competences, as it allows for, in exceptional cases where general interest is at stake, one of the bodies to encroach upon the area of competences generally assigned to the other. And constitutional jurisprudence itself clearly defined the requirements for its use, following the fundamental ruling 76/1983,[22] which specifically declares that the law of harmonisation "constitutes a regulation

[17] Academic writing is divided with regard to the breadth of recourse to this type of regulation, between those who argue that "once autonomous competence is exercised, the State should continue to issue rulings on the same question, though with merely suppletory value" (De Otto 1988, p. 283) and those who do not (Machado 1982, pp. 409–413).

[18] Herrarte (1991), pp. 80 and 81.

[19] Point 6 of the aforementioned ruling.

[20] Bielsa (2000), pp. 200–202.

[21] STC 79/1992, point 3.

[22] Concerning the draft Organic Law of Harmonisation of the Autonomous Process.

for closure of the system, applicable only in those instances when the state legislator does not have other constitutional channels for the exercise of legislative power, or these are insufficient in order to guarantee the harmony required by general interest." In summary, the condition of regulation of closure, the limitation of its contents to "principles", the need for interpretation of general interest by absolute majority of the Senate and the requirement that the State should not have at its disposal other powers are elements that preclude the standard use of this recourse.

– Article 155 of the Constitution

This is what in comparative law is known as a clause of federal intervention or federal coercion and is based on Art. 37 de la Ley Fundamental de Bonn. It provides for coercive intervention by the State against any Autonomy that puts the general interest at risk: "If an Autonomous Community does not fulfill the obligations imposed upon it by the Constitution or other laws, or acts in a way seriously prejudicing the general interests of Spain, the Government, after lodging a complaint with the President of the Autonomous Community and failing to receive satisfaction therefore, may, following approval granted by an absolute majority of the Senate, take the measures necessary in order to compel the latter forcibly to meet said obligations, or in order to protect the above-mentioned general interest."

If the laws of harmonisation constitute regulations of closure, Article 155 definitely constitutes a last resort, a control of an extraordinary[23] or exceptional[24] nature, as demonstrated by the fact that it has never been used. Some political and even doctrinal sector called for their use in the conflict generated by certain actions of the Basque Parliament.[25] Fortunately, the Government chose not to recur to this emergency measure and allowed the conflict to resolve itself via ordinary procedural channels. In fact, federal coercion fulfills its function without needing to be used, because the mere fact of its existence may serve as a shock absorber in potential conflicts.

Without going so far as intervention and always in the case of autonomous inactivity, it does appear that what would prove efficient is the more or less formal requirement that the autonomous government take action.[26]

– Procedures at the Constitutional Court

[23] STC 6/1982, point 7.

[24] STC 27/1987, point 9.

[25] Specifically, the non-cooperation of its government bodies in the dissolution of a parliamentary group with links to an illegal organisation, on the one hand; and the adoption of certain proposals related to the political status of the Basque Country, not easily assimilated by the constitution.

[26] The only occasion where the Government has seriously threatened an Autonomous Community with the application of Article 155 of the Constitution concerned the fulfillment of a Community obligation and dates from February 1989, when the government implemented in the Council of Ministers a request to the Canary Islands for the immediate application in this Autonomous Community of the tariff dismantling established by the Treaty of Accession to the European Community.

At the Constitutional Court there is the possibility, in the first place, of bringing an action of unconstitutionality, a mechanism that allows for control of autonomous legislation with the force of law. In our area of analysis and specifically in that of the adaptation of these laws to European ones, so that autonomous laws might be controlled via this channel, it is necessary for the incompatibility between both laws to be accompanied by an element of unconstitutionality, as the infringement of Community laws is not in itself an infringement of the constitution.

As a result, this measure does not serve to control laws that contradict aspects without constitutional relevance, or to control legislative omissions. It does serve, on the other hand, to control regional laws that indirecly contradict the constitutional block by not respecting the distribution of competences established by the latter. Specifically, it can be used against a regional law that contradicts both European legislation and the state framework law of transposition of the latter.

A second means of control before the Constitutional Court would be that of conflict of competences, although its scope would be limited, because it only refers to the provisions of the Autonomous Communities without force of law and requires that as well as infringing Community law, these should have been adopted in the absence of possession of the relevant competence. Also within this procedure would be también el conflicto negativo de comthe negative conflict of competences, which could be used to demand that the competent Autonomous Community issue the necessary regulation for the execution of the Community law.[27]

As an added element, the Government's challenges against provisions of the Autonomous Communities without force of law involve the immediate suspension of the latter for a period of up to 5 months, provided the challenge relates to questions of a constitutional nature and is based on reasons other than constitutional distribution. Thus, within our sphere of action, this option could be employed against provisions that infringe community legislation and also constitutional aspects that are not mere questions of competence.

– The contentious-administrative appeal

As the possibility does not exist in Spain of the State abrogating or revoking a regional act or provision if it considers that the latter fails to comply with a Community or international obligation, it normally appeals against the act in question through administrative channels, although this channel does not have the same value in the acse of an omission. Prior to lodging the appeal, the State may request of the Autonomous Community that it repeal the provision, abrogate or revoke the act, cease or modify its actual implementation or initiate the activity it is obliged to perform, as provided for by corresponding procedural law,[28] although

[27] "The Government will also be able to cite a negative conflict of competences when, having required of the supreme executive body of an Autonomous Community the exercise of the powers corresponding to the competence conferred upon the Community by its own statutes or an organic law of delegation or transfer, this petition is ignored..." (Art. 71 LOTC).

[28] Article 44 of Law 29/1998, of July 13, governing administrative jurisdiction.

naturally, the final decision remains a matter of regional competence. And when this request is not heeded, it can lodge the appeal and the administrative court will ultimately find in favour of or against the State.

In summary, all the above leads to the conclusion that the Spanish Constitution puts different kinds of instruments at the disposition of the State so that the latter may guarantee fulfillment of the international obligations entrusted to it by the Constitution.

Responsibility for Non-compliance: Possession of the Obligation to Pay Compensation

The signing of international treaties by the State, and in general, membership of the international community, on the one hand, of integration organisations, like the European Union, on the other, generate obligations for the State, which has to endure certain negative legal consequences associated with the infringement of these obligations. These consequences often take the form of an obligation to provide compensation or the payment of an economic sanction.

As the State is responsible in the international sphere, the onus is on its central organs to assume the obligation of payment. However, in federal states, non-compliance may or may not wholly correspond to central government. In this case, some countries provide for mechanisms for passing onto the peripheral authorities the cost arising from this non-compliance.

In some instances, these mechanisms have constitutional status, as is the case in Germany or Austria, where there are clauses that specifically regulate the impact of payment obligations imposed by the European Union. In the case of Germany, moreover, specific percentages are established of participation of the federation and the Lander in these obligations, providing for the partial responsibility of the federation even in the event of non-fulfillment not attributable to it, because in this case it is not considered diligently to have performed its duty of supervision and guarantee of fulfillment.

In the case of Spain, there are no specific constitutional provisions in this regard, although it is clear that, as a consequence of the framework described above, where the execution of international obligations always corresponds to whoever possesses ordinary competence in the field, the State may incur financial responsibilities before the community institutions as a result of irregularities or negligence arising the actions of the competent Autonomous Communities. And conversely, damage might be done to the Autonomous Communities as a result of non-compliance by the State,[29] although this is a question the study of which transcends the scope of this work.

[29] Gómez Puente (2004), pp. 780–799.

With regard to the eventual financial responsibilities arising from non-fulfillment, it seems clear that the fact that the State should respect an Autonomous Community's power of implementation, does not mean that the latter should escape sanction in the event of non-fulfillment of its obligations. As the Constitutional Court has indicated, although the responsibility ad extra of the State Administration does not justify the appropriation of a competence that does not correspond to it, neither does it prevent it from attributing ad intra, to the competent Autonomous Public Administrations, the appropriate responsibility in each case.[30] And this is because to the State corresponds the establishment of the systems of coordination and cooperation that help to prevent irregularities or failings in compliance with Community legislation, as well as systems of interadministrative compensation of the financial responsibility that might be generated for the State itself in the event of such irregularities or failings actually occurring and this being acknowledged by Community institutions.[31] In this sense, the TCE is in line with what had already been suggested by the Community Court of Justice, when indicating that in the member states of federal structure, reparation of damage done to individuals by laws of an internal nature contrary to Community law should not necessarily be assumed by the Federal State in order to comply with the Community obligations of the member State in question.[32]

However, to date, there has not been sufficient development of the channels where the State may demand compensation from the Autonomous Communities responsible for a breach of Community law,[33] although there are specific provisions in this regard in some recent laws of the ordinary type in areas of subsidies and the like.[34] In any case, these are ad hoc solutions, with no general law to regulate instances of State responsibility for non-compliance with Community law attributable to an Autonomous Community, nor the procedure to allocate this responsibility.[35]

Issues of Lege Ferenda

The Spanish Constitution lacks specific provisions with regard to the problem of non-fulfillment of international obligations. There only exists an ad extra responsibility that is attributed to the central institutions of the State and a series of general mechanisms to which these may recur to force Autonomous Communities to

[30] STC 79/1992, point 5.

[31] STC 148/1998, point 8.

[32] STJCE of June 1, 1999, Konle-Austria, C302/97, Rec. 1999, p. 1/3099, section 64.

[33] Cienfuegos (2007), p. 76.

[34] Such as Law 40/2001, Law 38/2003, etc.

[35] Cienfuegos (2007) cit., p. 79.

comply. Neither does the Constitution include specific provisions regarding the eventual impact of economic sanctions arising from non-compliance.

This has prompted a debate on the advisability of regulating this area on a general basis via a state law detailing the procedures available to the State to guarantee implementation and to pass onto the Autonomies the consequences of their non-compliance. In this context, in 2009 the Government instructed the Council of State to compile a report examining the existing mechanisms in the Spanish system, at both a constitutional and ordinary level, to guarantee compliance with European Union law and, when appropriate, determine and attribute responsibility to Autonomous Communities and other bodies in the event of non-compliance. The December 2010 report analyses the existing mechanisms and concludes by recommending that the Government prepare a Law to guarantee compliance with European Union law, based upon Art. 149.1.3 of the Constitution and that, in the opinion of the advisory body, does not necessarily have to be an organic law.

Is a specific law advisable, and what kind of law?

With regard to the basic problema that would make such a proposal recommendable, academic writers are divided. However, if we examine the practical significance of the question, the breadth of academic interest does not appear to be justified. Upon analysis of Community rulings related to non-fulfillment by the Kingdom of Spain of its obligations, one might conclude that non-compliance on the part of Autonomous Communities is neither *patológico ni supera al del Estado*.[36] The Council of State itself acknowledges that "in practice, the task of transposition is generally assumed by the State and does not usually arouse the opposition of Autonomous Communities. Various reasons explain this and, ultimately, express the conviction that the law as it stands, regardless of who is the author of the transposition and in view of the final formulation of many directives, will be the same."[37] In fact, until now, rather than a lack of State instruments to guarantee the transposition, there has been a risk of State interventionism, encroaching upon autonomous through an expansive use of competence over basic legislation and challenges with suspensive effect.

On the basis of this observation, it appears that the idea of creating a law of this type is less a reflection of needs born of practice, than of the fear of the instruments introducedby recent statutory reforms in an attempt to minimise the risk of State intervention.[38]

In any case, and independently of the reasons behind the initiative, can we consider a State law to be the appropriate instrument to achieve the objective of guaranteeing fulfillment of the State's international obligations and directing sanctions for non-compliance towards whoever is ultimately responsible? In my opinion, no. If thus far that objective has been achieved with relative ease and if the

[36] Azpitarte (2009), p. 140.

[37] Council of State report, cit., p. 113.

[38] Azpitarte (2009), cit., p. 142.

danger to be tackled is that resulting from the precautions introduced into some Statutes of Autonomy, it is hard to see the efficiency of an ordinary law compared with those of the Statutes. And if the goal is more modest and the intention is simply to clarify the panorama of eventual State mechanisms so they facilitate the consolidation of ceratin techniques,[39] the same objective can be attained without recourse to a law.

Meanwhile, it is worth bearing in mind that the issue we are addressing represents a meeting point between the two fundamental levels of distribution of power: one arising from the decentralisation of the State and the other from European integration. Indeed, some of the questions that this law would seek to regulate, as occurs with the economic distribution of sanctions resulting from non-compliance, since they clearly affect the system of distribution of competences and the system of autonomous financing, could not be addressed in an ordinary law, as the Council of State acknowledges.[40] In fact, as has already been mentioned, this question is the object of constitutional treatment in some member states, llegando with the fundamental law in Germany even including an itemised regulation of the distribution of penalties for non-fulfillment between the Federation and the states.

I believe that any *concreción* of this regime should be addressed in the context of a process of constitutional reform aimed at regulating the impact of European regulation upon the Statute of Autonomies. In the absence of this, I think that the most reasonable option in this regard is to abide by past, present, and future interpretations by the Constitutional Court.

References

Azpitarte Sánchez, M.: "El Estado Autonómico unitario y el informe del Consejo de Estado sobre la inserción del derecho europeo en el ordenamiento español", Revista d´Estudis Autonomics y Federals, nº 9, 2009, p. 143.

Carrillo Salcedo, J.A.: Curso de Derecho internacional público, Madrid, 1994, p. 179

Cienfuegos, M.: Comunidades Autónomas, Tribunales de la Unión Europea y responsabilidad por el incumplimiento autonómico del derecho comunitario. Reflexiones a partir de la práctica reciente, Revista d´Estudis Autonomics i Federals, 5, 2007, p. 76

De Otto, Derecho Constitucional (Sistema de fuentes), 2ª ed., Barcelona, 1988, p. 283

Fernández Segado, Las Comunidades autónomas ante las relaciones internacionales: un paradigma del dinamismo evolutivo del Estado autonómico español, 2006, http://www.bibliojuridica.org/libros/4/1640/12.pdf.

Gómez Puente, M.: Un apunte sobre la dimensión regional de la responsabilidad del estado por incumplimiento del derecho comunitario europeo, Report on the Autonomous Communities, 2004 , Barcelona, 2005, pp. 780–799

Jauregui, G.: "Estatuto de Autonomía del País Vasco y Relaciones Internacionales", en Revista de Estudios Políticos, n 46–47, 1985, pp. 462–463.

[39] Council Report, p. 311.

[40] Cit., p. 313.

Lasagabaster Herrarte: Los principios de supletoriedad y prevalencia del Derecho estatal respecto al Derecho autonómico, Madrid, 1991, pp. 80 and 81

Muñoz Machado, Derecho Público de las Comunidades Autónomas (I), Madrid, 1982, pp. 409 to 413

Ruiz Robledo, A.: "La acividad exterior de las Comunidades autónomas en el segundo Estado autonómico", Revista de Derecho Político, n 71-72, January-August 2008, p. 491

Tejedor Bielsa, La garantía constitucional de la unidad del ordenamiento en el Estado autonómico: competencia, prevalencia y supletoriedad, Madrid, 2000, pp. 200 to 202.

Trone, J.: "Federal constitutions and international relations", Queensland, 2001, p. 20

The Spanish Autonomous Model in Poland? The Political Concept of the Silesian Autonomy Movement

Małgorzata Myśliwiec

Introduction

Twenty years after the start of the Polish democratic transition, one of the most important problems is the question of creating more than one (central) political decision-making centre. The state decentralisation problem is still actively discussed because of this. After almost 50 years of so-called "democratic centralism," Polish citizens had to get used to the presence and activity of local government institutions. The regionalisation process has aroused special controversies in peripheral and trans-border regions (Szczepański 1997; Wanatowicz 2004; Wódz and Wódz 2006; Sekuła 2007). The source of these kinds of fears in Polish politics—the strength of regional decision-making centres—had already been seen during the late 1920s and 1930s of the twentieth century. This political thinking was also very strong during communist times.

This kind of discussion is especially important in Upper Silesia because this region had territorial autonomy between the First and the Second World Wars. Besides, after the last local elections, held on 21 November 2010, the Silesian Autonomy Movement (*Ruch Autonomii Śląska*—RAŚ) entered the regional legislative assembly (*Sejmik Województwa Śląskiego*) and obtained a single representative in the regional executive (*Zarząd Województwa Śląskiego*) for the first time in Polish history since 1989. For this reason, the subject of regional political representation purview and construction is discussed not only by the local intellectual elite, but also by central political representatives. One of this discussion's important matters was the recent political concept of the Silesian Autonomy Movement when the Polish Constitution Revision Project was presented. At the 7th Congress, held on 5 March 2011, the Silesian Autonomy Movement suggested that Poland should

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be transformed from a centralised state to an autonomous state. The decentralisation model was that adopted from Spanish constitutional solutions.

However, how important are problems such as the degree of state decentralisation or possibility of taking more political decisions at regional level for an average Polish citizen who lives in Upper Silesia? Together with another point: could social mobilisation bring up the regionalism problem so that it could be perceived as "the pressure from the bottom" and could cause the start of the central regionalisation process?

The Origin of the Actual Local Government Structure in Poland

On 3 May 1791, the Polish Parliament accepted the first constitution in the state's history. This way, Poland began its new and modern way of political and social development. However, unfortunately soon after this event, internal and external factors caused the state's loss of independence. Poles lost the chance to build and extend their own legal and political system model, together with that of state and local administration. However, this did not mean that they lost the chance to observe and participate in the legal and political systems of other European states. At the beginning of twentieth century, the example of Napoleonic France, together with Russia, Prussia, and Austria became important for the construction of Polish political and administrative structures. Hence, when Poland had its independence restored, the members of Parliament, responsible for creation of the new legal and political system, used other known models.

This was also the case in Polish territorial division. The democratic Constitution of 17 March 1921 contained the vast local government principle, which was supposed to open up the possibility of giving local government legislative capacity (Izdebski 2001: p. 108). However, it was only a democratic idea, which did not become political reality until the Second World War. The new state's post-invasive reality with its serious political, economical, and social problems stood in the way of this idea. Hence, during the 1920 and early 1930s, each of three previously annexed territories had its own local government structure. The so-called integrating law was adopted by the Polish Parliament on the 23 March 1933, when authoritarian tendencies were already being seen in Polish politics. Although the 1921 Constitution and the law dated 26 September 1922 announced the creation of local government at three levels, it never finally became a political reality. The political elite's fear—who governed during the mid-1930s—of possible domination of national minorities at voivodeship regional politics (in particular, in the eastern part of Poland) caused this third level of the local government idea to be abandoned (Izdebski 2001: p. 109). At the end of the 1930s, the trend to centralise state politics was already strong.

Only one Polish region was in a very different situation during the period between the two world wars: this was Silesia. Its history and events, which took

place between 1918 and 1921, forced Polish authorities to give this region legal and political autonomy.

Silesia was divided into many small duchies during the thirteenth and fourteenth centuries. In the fourteenth century, it came under Czech domination, and then in the sixteenth century became dependent on the Hapsburgian dynasty (Czapliński 2002: pp. 50–129).

In 1848, the Spring of Nations caused the appearance of Polish national postulates in Silesia. The most important of them was the question of the free use of Polish in schools, publication of legal acts in the Polish language, appointment of Polish-speaking civil servants or introducing Polish as an official language during court cases concerning Poles (Czapliński 2002: p. 282).

During the second half of the nineteenth century, Silesia underwent a very deep modernisation process. Upper Silesia underwent an industrialisation process, caused by the founding of many coal mines, iron-works, and factories for the chemical industry. In Lower Silesia, the textile industry was developed, as well as a traffic and building infrastructure.

Silesia's political situation changed after the First World War. The 1919 Treaty of Versailles took the plebiscite in Upper Silesia for granted. The question in dispute was whether this part of region should stay in defeated Germany or become a new part of the Polish independent state. The plebiscite took place on 20 March 1921, after the First (1919) and Second (1920) Silesian Insurrections. Every person who was born in Silesia had a right to vote, even if at the time he/she did not live in the disputed territory. For this reason, 192,000 emigrants who were mostly German took part in it. Finally, 1,190,637 votes were cast in the plebiscite in 1,573 communities. The electorate voted 40.3 % in favour of Poland and 59.4 % in favour of Germany. Although the final results in communities were not bad for Poland (the majority of participants in 674 communities voted to stay in Poland, and 624 in Germany), the threat of having to recognise German rights by the Upper Silesian territory forced the regional elite to begin the Third Silesian Insurrection on the night of the 2nd and 3rd day of May, 1921 (Czapliński 2002: p. 362).

In October 1921, the region was finally divided between Poland, which acquired 3,214 km^2, and Germany, which acquired 7,794 km^2. Although Germany obtained a larger part of the territory (71 %), Poland obtained the most industrial part.

The complicated situation after the First World War, with the Germans offering the region vast political and legal rights, forced Polish politicians to accept the idea of Silesian autonomy. Hence, even before the plebiscite date, on 15 July 1920, the Polish Parliament had accepted the Constitutional Law of Organic Statute for the Silesian Voivodship. This political offer was supposed to encourage Silesians to vote for their appurtenance to Poland. This law's *Vacatio legis* was supposed to last until Silesia was taken over by the Polish state. For this reason, we can talk about three different dates for this event: August 1920, when Poland took over Teschen Silesia, June 1922, after taking over Upper Silesia and 1938, when Poland took over the Trans-Olza River Silesia (Ciągwa 1988: p. 158).

The Constitutional Law established a unicameral regional Parliament, called the Silesian Sejm. It was elected with universal, direct, equal, secret, and proportional

elections every 5 years. The Silesian Sejm was endowed with vast legislative capacity. For instance, it could accept political organisation laws from Silesian authorities, the local government regime and regional administrative division, use of Polish and German as official languages, and had the police and gendarmerie organisation or upkeep of land roads. It was also responsible for the region's financial charges and could create regional administrative courts. The right to dissolve it before the end of cadence corresponded to the Polish President. There was also no *incompatibilitas* principal that made it possible to join the mandates of regional (Silesian) and state (Polish) Members of Parliament.

The executive power in Silesia was called the Voivodship Council and corresponded to the Silesian Voivode, who was appointed by Polish President to govern centrally, together with his deputy as well as five members, elected by the Silesian Sejm.

During Silesia's autonomous period, it also had its own treasury. The Constitutional Law regulated the financial relationship between the region and the Polish state. According to this legal act, Silesia had to pay a part of its income to the state treasury. An amount was fixed on the base of Tangenta—a special mathematical formula, which took into account the number of Polish and Silesian residents, as well as the general income of the Silesian and state treasury.

The Constitutional Law of the Organic Statute for the Silesian Voivodship was in force until 6 May 1945 when it was cancelled by the law accepted by the Communist State's National Council. The state's quick centralisation did not allow the autonomy idea to progress any further. Upper and Lower Silesia were then divided into three voivodships with their capitals in Wrocław, Opole and Katowice and became equal territorial division state units like all others parts of Poland. It is also worth highlighting that from 1950, Poland did not have a local government. All administrative structures were from the state administration with its typical vertical construction. It was called "democratic centralism" and helped communists to control every area of social life, effectively breaking local—both political and social—activity.

The idea of bringing back local government to Poland came about during the Round Table Talks of 1989 (Dudek 2005: pp. 32–42). It was recognised by the opposition as a *sine qua non* condition of Polish democratisation. However, at the inception of Polish transition, there was no clear idea about how the decentralisation process should be undertaken. Centralist factors were still strong inside the political establishment at the time. Finally, on 8 March 1990, the Polish Parliament accepted the local government law, which established only one level, set out by the communities. The Poles had to wait until 1998 for the next step to local government reconstruction. In that year, the rightist government of Jerzy Buzek proposed the reform, which wanted two other levels of local government to be created, bigger than the community poviats and regional voivodships (Dudek 2005: pp. 458–461).

Nowadays, the local Polish government is made up by three levels: communities (2,478), poviats (379), and voivodships (16). Each entity at the same local government level acts on the basis of the same law accepted by Polish Parliament and this can only be changed by central Parliament. Local representative powers, elected by

local territorial unit residents in democratic elections, do not have the legislative initiative that gives them the legal basis to act at a certain local government level. This model's acceptance means that central and executive legislatives are still the most important decision-making centres in Poland, even when referring to local government actions. It is therefore an example of territorial heteronomy. It means that all Polish local government bodies act according to the laws prepared and accepted beyond its legislative bodies.

However, this model does not allow for quick Polish regional development, because the social and economical reality in each particular case is very different. One parliamentary act does not take into account those differences. For this reason, at the beginning of twenty-first century, we have seen the autonomy and regionalism problem come up in Polish public discussion, particularly in Upper Silesia—the region that has a historical autonomous tradition. In this context, the political success of RAŚ—the movement that posits the territorial heteronomy change for autonomy—is not surprising.

The Political Ideas of the Silesian Autonomy Movement

The breakthrough in political thinking and discussion regarding state decentralisation took place after the last local elections, held in Poland on 21 November 2010. This was due to the Silesian Autonomy Movement's good results in joining the regional legislative assembly (*Sejmik Województwa Śląskiego*) with three seats and being able to become a part of the regional executive (*Zarząd Województwa Śląskiego*) for the first time in Polish history since 1989. This meant two important thresholds were crossed—representation and a majority—for the movement that backed state regionalisation, which caused many important Polish politicians to react quickly. The serious unease concerning the RAŚ' strengthening political position and its entry into a regional executive coalition were expressed, inter alia, by the Polish President Bronisław Komorowski, the President of the European Parliament Jerzy Buzek, and the leader of the Democratic Left Alliance Grzegorz Napieralski.

Therefore, the question is, what political ideas presented by RAŚ are so alarming for the central political elite?

The answer can be found in two documents, presented by the movement at its 7th Congress, held on 5 March 2011 in Katowice. The first is the Reform Project for the Polish Constitution dated 2 April 1997 and the second is the Silesian Statute of Autonomy Project.

We can find many references to the Spanish autonomous model in the Polish Constitution's Reform Project of 2 April 1997. The movement suggests the change of the contents of Article 3 that should—in their opinion—guarantee the state's unitary form, but at the same time respect the right to autonomy of all Polish historical regions: "The Constitution is based on the indissoluble unity of the Republic of Poland, the common and indivisible country of all its Citizens, and it

recognises and guarantees the right to territorial autonomy of the regions which make it up, and the solidarity amongst them all." This regulation's text is very similar to Article 2 of the 1978 Spanish Constitution.

In Article 237 of the Project, the movement put forward how to transform the unitary state to an autonomous state. To achieve this aim, all legislative assemblies of current voivodships (16) need to present their Statute of Autonomy projects to the central government within 2 years from the time the Constitution was adopted. The RAŚ project also allows the presentation of one joint project by two or more adjacent voivodships. In each case, it must establish the autonomous region's name according to its historical identity, its territory limits, the name and organisation of its government institutions, and the rights it enjoys according to the constitution. Because current borders of voivodships do not always line up with historical divisions for regions, RAŚ suggested that border poviats should be given the right to decide by referendum which autonomous region they would like to belong to. In order to preserve the state's unitary character, the final authorisation for the autonomous region's statute must be reserved for the Polish Parliament. For this reason, the draft statute must be drawn up by a legislative assembly (or assemblies) and sent to central Parliament for its enactment into law. Once the draft statute has been passed by Parliament, it should be remitted to the Constitutional Committee of Sejm who must examine it within 3 months with the cooperation and assistance of a delegation from the regional legislative assembly (or assemblies) that have proposed it, in order to decide in common agreement upon its definitive formulation. If such an agreement is reached, the resulting text should be submitted to a referendum by the electorate of the voivodship (or voivodships) that cover the territorial area proposed by the Statute. If the draft statute is approved in the voivodship by a majority of valid votes cast, it would be referred to the Polish Parliament. Both chambers, in plenary assembly, would decide upon the text by means of a ratification vote. Once the Statute was passed, the President of the Republic of Poland would sanction it and promulgate it as an organic law.

The concept of state territorial organisation—proposed by RAŚ—can be found in Chapter VII of the Reform Project of the Polish Constitution dated 2 April 1997. It declares that the state should be organised into communities, poviats, and autonomous voivodships. In Chapter VII, we can find the catalogue of competences that adhere exclusively to the state (Article 177) and that can be taken over by autonomous voivodships (Article 176), rules referring to relations between the state and future autonomous voivodships and the state's control system over its territorial administrative units. The regulation model proposed by RAŚ came from Articles of Section VIII of the 1978 Spanish Constitution.

The idea of how to construct the political regime of the future Silesian Autonomous Voivodship was presented by RAŚ in the new Silesian Statute of Autonomy Project. In this document, the movement suggested it should be based on the regional, bicameral Parliament, regional Government, and its own Treasury. The first chamber of the regional Parliament (*Sejm Śląski*) would be made up from 80 deputies, elected every 4 years by universal, equal, direct, and secret suffrage. It would then become the Silesian resident representation chamber. In turn, the

second chamber (*Senat Śląski*) would be made up from Silesian sub-region representatives, elected by Poviat Assemblies. Each sub-region would have at least two seats in the second chamber and those that have more than 400,000 inhabitants—four.

The Silesian Parliament would be given the powers to adopt regional laws. This way, the autonomous region would be able to take many important political decisions and claim responsibility for them. Introducing this solution would allow the present territorial heteronomy of regional self-government in Poland to be changed, where many important decisions could be adopted beyond local or regional political structures, for territorial autonomy. For this reason, RAŚ suggested that future autonomous regions should have the right to their own legislation.

RAŚ also suggested that the region should have its own executive, called the Silesian Government (*Rząd Śląski*). The Silesian Government's appointment mechanism was taken from the German federal model and is similar to the Polish procedure established by Articles 154 and 155 of the current Constitution. According to the new Silesian Statute of Autonomy project, the Silesian President of the Ministers must be elected by an absolute majority of *Sejm Śląski* members (the regional Parliament's first chamber) after being proposed by its Speaker (*Marszałek Sejmu Śląskiego*). If the Speaker's nominee is not elected, then *Sejm Śląski* may elect its own nominee by an absolute majority of its member votes within the following 14 days. If no one is elected within this period, the Speaker proposes the candidate for the President of Ministers again. In this case, the election only requires the simple majority vote of the members of the first chamber. If the person nominated by the Speaker receives the required majority, the Speaker must appoint him or her. But if he or she does not have a simple majority, the Speaker must call new elections for *Sejm Śląski*.

The future Silesian autonomy's pillar should be its own Treasury, just as occurred between the two world wars. RAŚ put forward the introduction of the Basque model for the relationship between future Silesian Autonomous Voivodship and the Polish state, based on a special Economic Agreement. Thus, the Silesian autonomous authorities would be able to formulate, regulate, and collect all the taxes falling within their jurisdiction and send the proper amount for all the State's economic and financial expenses.

In the Polish Constitution's Reform Project presented on 2 April 1997, RAŚ also suggested the introduction of new regulations to Chapter III of the Polish Constitution, which refers to the sources of law. The change of territorial heteronomy for autonomy required—in opinion of the movement's ideologists—endowing regional Parliament with the right to adopt regional laws. For this reason, RAŚ suggested that future autonomous regions should have the right to their own legislation.

The significant changes—in RAŚ' political thinking—would be introduced in relation to the two chambers of the Polish Parliament.

The Movement suggested the reduction of age of candidates for the first chamber's members (*Sejm*) from the current 21 years to 18.

However, the most important change proposal referred to the Parliament's second chamber, called Senat. In this case, the RAŚ political ideologists have chosen not the Spanish but the German second chamber—*Bundesrat*—as a model. In Article 100 of the Project, the movement suggested that members of Senat should not be elected by citizens, but delegated by the respective autonomous governments. Each autonomous region would be allocated at least three seats, and a maximum of six. Regions with a number of inhabitants lower than two million would have three seats, more than two million—four, more than six million—five, and more than seven million—six. The delegates to Senat from each autonomous region would be required to cast the region's votes in a single block. If the members of a delegation cast different votes, the respective state's entire vote would be invalid.

Furthermore, the project suggested in Article 117.6 and 117.7 that the state government should be obliged to present all its legislative initiatives first to the Senat. Only thereafter a proposal could be passed to Sejm—the first chamber. However, this rule would also commit the Senat: passing a proposal of the second chamber to Sejm would only be possible after receiving the state government's respective opinion.

In Article 121, RAŚ suggested that the Senat should have the right to a suspensive veto, which can be overridden by the law being passed again by Sejm. The project predicts two kinds of veto. If Senat should reject a law by simple majority, Sejm could adopt it again with a simple majority. However, if a law is vetoed in Senat with a majority of 2/3, it must be passed again in Sejm with a majority of 2/3.

Polish Citizen Opinion in Upper Silesia Regarding the Problem of Decentralisation

In February and March 2009, a pilot research trial was undertaken entitled "The political consciousness of Polish citizens in the Silesia Voivodship" (Myśliwiec and Słupik, 2009, unpublished data). The research was repeated in February and March 2010 (Myśliwiec and Słupik, 2010, unpublished data). The investigation's main aim was to get to know the opinion of the region's residents regarding the state's decentralisation process, regarding the idea of regionalisation and autonomy, and on the region's political representation.

The investigation was carried out in seven constituencies created by law for elections to the local government at voivodship level. There were 100 questionnaires undertaken in each of them, proportionally divided into poviats, which form constituencies. The research was carried out using the quantitative method with random trial selection. There was an admissible error of 3 %.

The Silesians were asked, inter alia, for the importance of the decentralisation problem. In 2009, 70 % of responding residents stated this was an important problem in Poland. In 2010, this result declined to 60 %, but still more than half

Table 1 Research results carried out in 2009: *How do you assess the decentralisation problem*

How do you assess the decentralisation problem	Answers (in percent)
Very important	31.8
Important	39
Not important	6.9
Not significant	2.7
I have no opinion	19.2

Source: Myśliwiec and Słupik (2009), unpublished data

Table 2 Research results carried out in 2010: *How do you assess the decentralisation problem*

How do you assess the decentralisation problem	Answers (in percent)
Very important	14.6
Important	45.4
Not important	8.8
Not significant	1.1
I have no opinion	30

Source: Myśliwiec and Słupik (2010), unpublished data

Table 3 Results of the pilot sample carried out in 2009: *The Polish decentralisation level assessed as*

The Polish decentralisation level assessed as	Answers (in percent)
Satisfactory	18.1
Insufficient	36.6
Worth discussing	22.6
I have no opinion	22.7

Source: Myśliwiec and Słupik (2009), unpublished data

Table 4 Results of the pilot sample carried out in 2010: *The Polish decentralisation level assessed as*

The Polish decentralisation level assessed as	Answers (in percent)
Satisfactory	24.1
Insufficient	23.2
Worth discussing	22.6
I have no opinion	30.1

Source: Myśliwiec and Słupik (2010), unpublished data

of the residents in the Silesian Voivodship considered this problem as important (Tables 1 and 2).

Silesian Voivodship residents were also asked to assess the Polish decentralisation level. In 2009, only 18.1 % considered it as *satisfactory*, 36.6 % thought it was *insufficient* and 22.6 % considered it as *worth discussing*. In 2010, almost a quarter (24.1 %) considered it as *satisfactory*, another quarter (23.2 %) thought it was *insufficient* and 22.6 % considered it as *worth discussing* (Tables 3 and 4).

Another question considered the Voivodship's residents opinion on Silesian status in the Polish state. Both in 2009 and 2010, the majority of residents

Table 5 Results of the pilot sample carried out in 2009: *In your opinion should the Upper Silesia territory be part of the Polish state*

In your opinion should the Upper Silesia territory be part of should the Polish state	Answers (in percent)
As up till now: a voivodeship within the unitary state	69.9
The only autonomous region in Poland	15.7
One of several autonomous regions in Poland	8.5
A state within the Polish federation	5.4
Something else	0.6

Source: Myśliwiec and Słupik (2009), unpublished data

Table 6 Results of the pilot sample carried out in 2010: *In your opinion should the Upper Silesia territory be part of the Polish state*

In your opinion should the Upper Silesia territory be part of the Polish state	Answers (in percent)
As up till now: a voivodeship within the unitary state	58
The only autonomous region in Poland	16.3
One of several autonomous regions in Poland	18.9
A state within the Polish federation	5.5
Something else	0.8

Source: Myśliwiec and Słupik (2010), unpublished data

considered the actual situation as the best (69.9 % and 58 %, respectively). About 15 % of respondents considered that Silesia should be the only Polish autonomous region in 2009 and 2010 (15.7 % and 16.3 %, respectively). This means that for a certain group of Silesians, the best decentralisation model is the historical model, when territorial autonomy was a legal privilege for only one Polish region.

However, the most interesting point is the increase in the number of respondents who considered that Silesia should be one of several autonomous regions in Poland. In 2009, only 8.5 % of respondents thought this and in 2010, this number had increased to 18.9 %. The frequent presence of RAŚ in regional and state-wide media, and its educational activity, could explain this phenomenon.

Research results pay attention to the fact that only 5.5 % of respondents support the idea of a federal state. This form of the state decentralisation is not particularly exposed in political party ideas or movements. Although RAŚ stresses that the regional state should only be an intermediate solution to reach the final aim, which is a federal state, for the moment, it backs the introduction in Poland of the Spanish decentralisation model.

The last interesting conclusion from the research is the response to the question of whether we can talk about separatist tendencies in Upper Silesia. There was not a question on Silesian independence on the inquiry form, but respondents had the possibility to answer that Silesia should be *something else* apart from a Polish state. However, nobody responded that Silesia should be an independent state. In this place, some respondents from Bielsko-Biała (a city in the south of the Voivodship) stressed that they would like it to be in a separate voivodship just as it was before the 1998 reform (Tables 5 and 6).

Conclusions

In 1990, after the start of the Polish democratic transition, local government became part of the state's political reality. Many Poles, particularly those born after the Second World War, had to learn how it worked and that more than one (central) political decision-making level could exist in a state.

In 1998, the Polish Parliament adopted two laws that created two other political decision-making levels: poviat and voivodship. However, they had only been present in social consciousness for 15 years. It is a short period of time to get used to them. Moreover, the local and regional media market in Poland was definitely weaker than the central market. For this reason, the level of interest in local and regional politics could be lower.

In this situation, political and social activity in Upper Silesia is particularly interesting. This region, which "had to forget" its past during communist times, had its tradition of autonomy. The passivity of the local establishment at the inception of the Polish transition did not allow for the introduction of political postulates concerning a wide Polish regionalisation programme into a central political agenda. However, at the beginning of the twenty-first century, the situation started to change. This was because of the modern social and political movements in the region, from young people who had a different vision of the Polish decentralisation act. The appearance of "the RAŚ generation" (Sekuła 2007) and its actions, together with the social support for these organisations, could help to start the new Polish regionalisation process.

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References

Legal Acts

Ustawa konstytucyjna z dnia 15 lipca 1920 r. zawierająca Statut Organiczny Województwa Śląskiego, Dziennik Ustaw 1920 nr 73, poz. 497;

Ustawa z dnia 17 marca 1921 roku - Konstytucja Rzeczypospolitej Polskiej, Dziennik Ustaw 1921 nr 44, poz. 267;

Ustawa z dnia 26 września 1922 r. o zasadach powszechnego samorządu wojewódzkiego, a w szczególności województwa lwowskiego, tarnopolskiego i stanisławowskiego, Dziennik Ustaw 1922 nr 90, poz. 829;

Ustawa z dnia 23 marca 1933 r. o częściowej zmianie ustroju samorządu terytorjalnego, Dziennik Ustaw 1933 nr 35, poz. 294;

Ustawa Konstytucyjna z dnia 6 maja 1945 r. o zniesieniu statutu organicznego województwa śląskiego, Dziennik Ustaw 1945 nr 17, poz. 92;
Ustawa dnia z 8 marca 1990 r. o samorządzie gminnym, Dziennik Ustaw 1990 nr 16, poz. 95;
Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 roku, Dziennik Ustaw 1997 nr 78, poz. 483;
Ustawa z dnia 5 czerwca 1998r. o samorządzie powiatowym, Dziennik Ustaw 1998 nr 91, poz. 578;
Ustawa z dnia 5 czerwca 1998r. o samorządzie wojewódzkim, Dziennik Ustaw 1998 nr 91, poz. 576;
http://autonomia.pl/n/konstytucja
http://autonomia.pl/n/statut-organiczny

Books

Ciągwa, J. (1988). Autonomia Śląska: (1922 – 1939). Muzeum Śląskie, Katowice, 21 pp.
Czapliński, M. (ed.) (2002). Historia Śląska. Wydawnictwo Uniwersytetu Wrocławskiego, Wrocław, 612 pp.
Dudek, A. (2005). Pierwsze lata III Rzeczypospolitej (1989–2001). Wydawnictwo Arcana Kraków, 522 pp.
Izdebski, H. (2001). Historia administracji. Liber, Warszawa, 274 pp.
Szczepański, M. (ed.) (1997). Ethnic Minorities and Ethnic Majority. Wydawnictwo Uniwersytetu Śląskiego, Katowice, 127 pp.
Sekuła, E.A. (2007). *Po co Ślązakom potrzebny jest naród? Niebezpieczne związki między autonomią a nacjonalizmem.* Wydawnictwa Akademickie i Profesjonalne, Warszawa 2009, 410 pp.
Wanatowicz, M.W. (2004). Od indyferentnej ludności do śląskiej narodowości? : postawy narodowe ludności autochtonicznej Górnego Śląska w latach 1945–2003 w świadomości społecznej. Wydawnictwo Uniwersytetu Śląskiego, Katowice, 241 pp.
Wódz, K., Wódz, J. (2006). Dimensions of Silesian Identity. Wydawnictwo Uniwersytetu Śląskiego, Katowice, 234 pp.

"Sustainable Differentiation": The Twenty-First Century Challenge to Decentralization (A Comparative Study of Italy and Spain, with Special Attention to Constitutional Case Law)

Sabrina Ragone

Introduction: The Current Phase of Decentralization in Italy and Spain

Comparative studies show that decentralization is one of the fields where the diffusion of models is constant and useful, as it concerns statutory law, case law, and more often legal doctrine. This phenomenon leads to imitation of solutions adopted in other legal systems, especially when there are parallel problems to face in similar contexts.

Both federal and regional States present a high degree of instability, because of the presence of diverse representative Institutions across the territory, whose ambition is usually to get more and more autonomy.

The methodological premise of this study is that the current situation of decentralization in Spain and Italy has now reached the same evolutionary level, if we divide the process into different phases.

The first stage in the development of a decentralized system always consists in the establishment of territorial entities; despite the time gap between the constitutional regulation of this aspect in the countries examined (Italy 1948; Spain 1978), the concrete enactment of autonomies began in the 1970s in both cases.

In Italy, the process initiated immediately for special regions (Sicily, Sardinia, Trentino-Alto Adige, and Valle d'Aosta already had their statute in 1948); in 1963, Friuli was created; but the real decentralization affecting the whole territory started later. In 1970, ordinary regions were established and through Decree n. 616 of 1977, the State delegated administrative functions to them.

In Spain, after the adoption of an open constitutional model, two statutes of autonomy were enacted quickly in 1979 (the Basque and the Catalan, both special

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or rapid regions), and then the Galician and the Andalusian. In 1981, the main parties agreed on the so-called *acuerdos autonómicos*, with the objective of achieving a higher homogeneity by applying to both kinds of autonomous communities ("rapid" and "slow") the institutional organization that had originally been provided for special autonomies. So at that point, within a few years or even months, all communities had a statute.

The second stage, in my opinion, is the arrangement of the institutions: it is not a totally static phase, because in that period the State pursues a balance between the central and the regional organs. Usually, the legal system settles, thanks to legislation and constitutional case law.

That is what happened in Italy: the Constitutional Court was fundamental in defining the competences and the general characteristics of the system, especially as regards the necessary coordination between the different levels. The national legislature also played a leading role in the distribution of functions and the identification of the instruments for the discharge of shared competences (for example, the State-Regions Permanent Conference was created). Then, two national acts adopted in 1997 (n. 59 and 127) led to the greatest administrative decentralization possible without a constitutional amendment. By the end of the 1990s, the system had become stable enough to be ready for substantial reforms.

The same can be said about the evolution shown by the Spanish territorial organization: at the end of the 1980s, the "slow" group was granted the right to the same level of autonomy as the special communities and so they started the process to reach this target. In 1992, another political agreement promoted a wider uniformity, which was achieved by the end of the century.

The following stage presents special challenges to the balance of the global State, with reference to the desire for differentiation, most of all in fundamental rights. This phase is the one that both cases analyzed are undergoing now.

In Italy, after the constitutional reforms were approved in 1999 and 2001, there has been a noticeable inclination towards differentiation. The new configuration of regional statutes presents two kinds of contents, compulsory and optional (Caretti 2006; Cermel 2003; Di Cosimo 2007): some critical questions have been raised by the former, but more by the latter (Ragone 2007: p. 98).

In fact, Article 123 of the Italian Constitution, as modified, assigns to ordinary regions competences relating to their form of government, basic principles of organization and functioning and other issues (Cuocolo 2003: p. 305; D'Alessandro 2008: p. 191; D'Atena 2000: p. 614). The lack of any clear delimitation of the necessary contents caused a series of new constitutional disputes about this problem (there was case law about the first generation of statutes: I would mention, for example, the decisions nn. 40/1972, 829/1988 and 921/1988). The solution had been that programmatic norms were lawful: the Constitutional Court argued that "potentially" regional legislators could select some targets and principles for the discharge of competences: those rules represented the main political objectives of every territory. And regional assemblies involved in the reforms of statutes after the amendments cited above, from 2001 onwards inserted a lot of principles and rights

(as if they were constituents; Groppi 2004: p. 2), provoking legal actions by the State.

The Spanish situation is similar, even if the phenomenon does not depend on any explicit revision: evident aspirations for autonomy emerged with the attempt to approve the so-called "Plan Ibarretxe" in the Basque community in 2003, since it was supposed to symbolize an agreement between the Region and the State, as if they were two sovereign entities. After the failure of this first effort, legal doctrine and politics focused on the Catalan case: in 2006, the statute was adopted and it represented a model for all the other communities.

In both cases, the judgements about the statutes were cardinal to understand the extent of the possible differentiation in a decentralized but not federal State. This issue is not only cultural or political, but also has a purely legal and constitutional dimension, since it is strictly connected to the scale of one of the most important constitutional principles: equality.

On many occasions politicians managed to sidestep finding a solution to this problem, while the Courts couldn't wait or delay their decisions. That is why an examination of case law is unavoidable in order to understand the "preliminary answer" to differentiation in Italy and Spain.

I will attempt here to underline similarities and discrepancies between the two cases, adopting a comparative perspective and showing the presence of imitations, both explicit and hidden.

The "Italian Solution": The Clauses About Rights and Principles Are Assigned a Political and Not a Legal Value

As was the case with the statutes adopted in the first wave, so also in the second the most negative opinions about them relate to the programmatic norms. Despite the advice of doctrine, every regional assembly has chosen different principles and rights in order to distinguish themselves from the other entities.

The Constitutional Court confirmed that these kinds of sources of law must violate neither the literal text of the Constitution, nor its "spirit" (decision n. 304/2002), since they must be in harmony with all its norms and principles (decision n. 196/2003). As a consequence, they must not contain norms that are contrary to any part of the Constitution, but at the same time drafters should avoid useless repetitions.

Despite this, the broad category of the principles has been interpreted in a variety of ways, including all manner of targets and objectives, to outline a sort of "form of region". Those principles attempt to reflect the specific needs of the particular community affected (Rossi 2005: p. 62): there are many references to regional identity and flags, coats of arms and symbols. In general, the most common principles are equality (formal and substantial, with special attention to particular groups such as the disabled, young or old people); subsidiarity; defense of the

environment and of the artistic patrimony. Often, there is an explicit mention of the protection of linguistic minorities and of support for peace and solidarity.

As far as fundamental rights are concerned, the question touches the very heart of the horizontal distribution of powers (Gambino 2002; Ruggeri 2011): in decentralized systems, the connection between national and local rights depends directly on the legal regulation of the form of State (Bifulco 2001: p. 1757). A possible opening can be found in Article 117 let. m, which devolves to the State the definition of the essential levels of performance as regards the civil and social rights that must be guaranteed across the whole territory (Luciani 2002): regions can regulate additional rights and add more warranties to the national ones.

On the other hand, many regulations simply repeat constitutional freedoms: for example the right to health, to work and to education, or freedom of religion. Among the participation rights, the most controversial concerns the extension of the vote to resident immigrants, established in two regions (Tuscany and Emilia-Romagna) and appealed to the Constitutional Court by the State. Special support is often offered to families, but some statutes added, to the traditional concept, assistance for different forms of family life (for example, the statutes of Tuscany, Art. 4.1, and Umbria, Art. 9.2): those norms have been judged in the decisions that I will examine in this section (Pegoraro and Ragone 2010: p. 114).

The most original rights mentioned are connected to housing, sport, music, and the condition of consumers, whose protection depends on political choices in favor of correct information, safety and quality of products, as well as plurality of choice. Another peculiar aspect regulated is the protection of animals, sometimes accompanied by references to them having real rights (Longo 2007: p. 233).

Going back to constitutional judgements, I would emphasize again that the position of the Court on programmatic norms in the statutes of the 1970s had led to the creation of a category of optional contents, i.e. the priorities of every region, if considered as a representative entity of the community and its interests and expectations. In addition to administrative and legislative instruments (limited to their territory), regions were allowed to pursue their aims through various other means, such as initiative, participation, and consultation. Their role justified taking a political stance with respect to issues affecting their populations, even if the problems arose in other parts of the country.

This doctrine was confirmed for the second generation of statutes, in spite of the changes: such norms could be adopted, whether they were linked to regional functions and political interests or not. However, the Court had cast doubt on their legal value since the first decision (n. 2/2004) and in the following ones (decisions n. 372, 378 and 379/2004) it confirmed the distinction between compulsory and optional contents. Decision n. 372 involved the statute of Tuscany, especially its Art. 3.6 about the target of conferring the vote on immigrants and Art. 4.1 let. h, which indicates assistance for different forms of family life as a priority; n. 378 was about the statute of Umbria (Art. 9.2) and in particular its regulation of family life; n. 379 concerned the article in the statute of Emilia-Romagna (2.1 let. f) that defined the vote for resident immigrants as a cardinal political goal.

The innovative aspect of those decisions was that the Court specified that the second kind of norms (optional) do not have any legal effect because they are expressions only of political sensibility. Their value, as a consequence, is only cultural or political, but not legal: and so the appeal of the government was rejected because the norms were considered lacking in any potential prejudicial capacity.

In spite of occupying the highest position among the regional sources of law (cleared in decision n. 304/2002), the judges stated that these norms cannot be compared to constitutional programmatic regulation, which fulfils a special function in steering the legislator towards specific objectives and in interpreting and completing the legal system.

Various matters arise from such a statement: first of all, regional programmatic norms have no legal value even if they have been inserted in a legal act (Anzon 2004: p. 4059); hence, the interpreters (but also ordinary citizens) are supposed to distinguish between rules with or without legal compulsoriness. Secondly, if there aren't any consequences, any target can be included in statutes—in my opinion, the reason why the appeal was rejected was precisely because those norms were globally consistent with the Constitution.

Another serious question is the absence of any distinction according to the subject and particularly to the legislative competence (a partially differentiated status seems to have been assigned exclusively to rights related to compulsory contents; see Flick 2009: p. 12): I guess that in regional matters it would be easier to use programmatic norms as an orientation when adopting acts that involve those areas.

The "Spanish Solution": The Clauses About Rights and Principles Are Freely Interpreted by the Constitutional Court

Even if the statutes of the first generation did not dedicate numerous norms to fundamental rights, some specific questions had been submitted to the Constitutional Court. In its opinion, they represent a common patrimony shared by all citizens individually and collectively (decision n. 25/1981) and the State holds the competence to establish their essential contents through organic regulation (decision n. 208/1999).

In the most recent phase of passing statutes, as I said in the introduction, legal doctrine and political debate have focused on the Catalan case, while less attention has been paid to the statute of the Valencian community adopted in 2006. Notwithstanding the scant attention, the decision of the Constitutional Court (n. 247/2007) regarding that act represented the beginning of the case law path that led to the first solution, as it went beyond the specific issue involved (the so called *derecho al agua*) to deal with theoretical problems and the essential constitutional principle of decentralization (i.e. a sort of right to self-government).

The appeal proposed against the Catalan statute—also approved in 2006—involved a wider range of issues, since the number of problematic norms was immensely higher (Solozábal Echevarría 2009: p. 181). The total absence of a previous national agreement on it and the evident ambitions reflected in that act caused serious political and social tension: it was inevitable that different institutions would contest the statute (first of all the popular party, but also the national ombudsman and other autonomous communities).

The most important decision, followed by others (for example n. 137 and 138/2010) that mainly refer to the doctrine established there, was n. 31/2010. Its potential significance was enormous (because the issues involved were crucial and numerous, as underlined by Tornos Mas 2010: p. 18; Viver Pi-Sunyer et al. 2010: p. 3), but some authors argue that the Court did not concentrate on those aspects that would have permitted the reconfiguration of the form of State after 30 years of practice (Tur Ausina and Álvarez Conde 2010: p. 38).

The main character of the sentence is interpretative, from a multiple perspective: in the first instance, the result is a sort of scaling down of the innovations of the statute, because the judges re-wrote many norms; thus, at the same time, they sent a message about the overall direction the Spanish decentralized system is taking.

This kind of judgement is different from the Italian judgement (where the petitions were not admitted because of the lack of potential prejudice due to the nature of the norms involved), but all the same many questions arise as a result of the Court's decision to make an interpretation instead of a declaration of unconstitutionality. The consequences will fall on all the subjects called to enforce the statute, and the most serious risk is that they ignore the exegesis offered by the Court (Blanco Valdés 2010: p. 4).

The decision examines various parts of the statute, but in this paper I will focus on the norms that aim to reflect specificities of the autonomous community, especially in fundamental rights.

Firstly, in the preamble and in the preliminary title there are references to national symbols and in general to the national connotation of the region and to the special position of the *Generalitat* in private law, languages, and culture. The Court, in spite of its previous doctrine about the nature of preambles, analyzed the preamble of the statute in order to diminish its interpretative value: in fact, even if a community is allowed to represent itself as a "national" group from an ideological, historical, and cultural point of view, the only nation officially recognized in the Constitution is Spain, as a sovereign country.

Secondly, a hotly debated topic was the preferential use of Catalan by the administration and the public means of communication: the Court examined several profiles (education; relation with administration and private entities. . .) and argued that this regulation infringed the co-official character of the languages of autonomous communities and established a re-interpretation. Despite their equality in many respects, the obligation to speak Catalan can't be compared to the duty of knowing Spanish (*castellano*), as the former consists in a peculiar condition related to specific fields where it is important to let citizens choose the language they use to interact with public powers.

Thirdly, fundamental rights and principles were contested because the government considered that they were competences of the State (Castellà Andreu 2010: p. 10): in particular, the issues were the secularity of public education and even more the right to a dignified death. The position of the Court was that those norms are not fundamental rights, while they bind exclusively the autonomous legislator within the limits of the matters devolved to its powers.

The Court argued that the statute had not created new fundamental rights in addition to the constitutional ones, since it was not a source that is qualified to affect the competences in this field. It overruled the distinction elaborated in decision n. 247/2007 between "competential rights" and "institutional rights" adopting a new perspective: the division between norms that imply a mandate for the legislator and proper subjective rights. The legal regulation of the two categories of norms is different: besides the rights, there are basic principles that can be converted into rights only after the legislator's intervention.

In general, it is possible for autonomous communities to regulate rights so long as they respect certain conditions, i.e. without infringing constitutional and international norms and without affecting matters not devolved to their competence.

Conclusions

The two cases examined above demonstrate the relevance of territorial differentiation from a political and not only a legal point of view: it is a very delicate question for the national legislator to tackle and even more so for the Constitutional Courts. This partially explains the choices that both Courts made: they tried to avoid declaring the unconstitutionality of norms (apart from marginal exceptions).

In both countries, even if the regulation is still formally in force, it has been completely distorted: in fact, the "solution" was to deactivate the significance of the statutes.

The mechanism used by the Italian Court was to divest some parts of the statutes of any legal value, while the Spanish Court interpreted the norms and gave them a different meaning. Probably the second method is preferable, because it favors a dialogue with political forces, but the result is also negative because the problems are only transferred from the judgement to the moment of the enforcement of the norms.

In addition to this aspect, no special relevance is given to the position of those sources of law, i.e. the highest level in the regional legal system, and particularly to the fact that they represent the criteria to verify the legitimacy of the other regional acts. The consequence is an evident challenge to the certainty of the law. We could add that in Italian and Spanish regions specific Councils have been created to evaluate whether regional acts respect the statutes: will they be allowed to consider as a parameter the norms involved in the constitutional judgements? And what will happen if they do?

In my opinion, it is vital to distinguish between national and regional legislative competences: this facet was studied in depth by the Spanish Court and not by the Italian Court (which could not since it did not analyze the substance of the question). Principles related to devolved matters could be useful for future development, if the region is allowed to regulate that field.

The last implication of this doctrine is that regional statutes are not constitutions: this is the extreme difference with respect to federal States and emerges most strongly in the regulation of rights. Actually, in a multi-level system, it would have been better to recognize a form of intervention to regions as regards rights, limiting it within the borders of their competences and the respect of higher norms. In this way, the State (and additionally the European Union law or international agreements in general) could regulate the essential contents of rights, but decentralized entities could implement them, offering a more effective protection.

Finally, I would argue that the first response to the desire for differentiation is not satisfactory, because the idea of coming to a compromise has led to a spurious solution. It will probably be necessary to reach a political and social balance before the Courts can make any profound contribution to the new phase of decentralization.

References

Anzon, A. (2004). La Corte condanna all'"inefficacia giuridica" le norme "programmatiche" degli statuti regionali ordinari. Giurisprudenza costituzionale: pp. 4057–4067.

Bifulco, R. (2001). Nuovi statuti regionali e ("nuovi") diritti regionali. Giurisprudenza costituzionale: pp. 1757–1763.

Blanco Valdés, R. L. (2010). El estatuto catalán y la sentencia de nunca acabar. Claves de razón práctica, n. 205: pp. 4–18.

Caretti, P. (ed.) (2006). Osservatorio sulle fonti 2005. I nuovi statuti regionali, Torino, Italy, 364 pp.

Castellà Andreu, J.M. (2010). La sentencia del Tribunal Constitucional 31/2010, sobre el estatuto de autonomía de Cataluña y su significado para el futuro del Estado autonómico. Available at: http://www.funciva.org.

Cermel, M. (ed.) (2003). La nuova stagione degli statuti regionali, Padova, Italy, 122 pp.

Cuocolo, F. (2003). La nuova potestà statutaria regionale. Quaderni costituzionali 2: pp. 295–317.

D'Alessandro, G. (2008). I nuovi statuti delle Regioni ordinarie, Padova, Italy, 374 pp.

D'Atena, A. (2000). La nuova autonomia statutaria delle Regioni. Rassegna parlamentare 3: pp. 599–622.

Di Cosimo, G. (2007). Statuti atto II – Le regioni e la nuova stagione statutaria, Macerata, Italy, 387 pp.

Flick, G.M. (2009). Nuovi diritti fondamentali e ruolo delle Regioni. Quaderni regionali 1: pp. 9–21.

Gambino, S. (2002). Regioni e diritti fondamentali. La riforma costituzionale italiana nell'ottica comparatistica. In S. Gambino (ed.) Il "nuovo" ordinamento regionale. Competenze e diritti. Confronti europei (Spagna, Germania, Regno Unito), Milano, Italy: pp. 3–75.

Groppi, T. (2004). I nuovi statuti delle Regioni dopo le sentenze 372, 378 e 379/2004 della Corte costituzionale. Available at: www.associazionedeicostituzionalisti.it.

Le istituzioni del federalismo (2008). Il "regionalismo differenziato" (special issue), n. 1.

Le istituzioni del federalismo (2011). La differenziazione regionale e i suoi limiti: un confronto tra Italia e Spagna (special issue), n. 1.

Longo, E. (2007). Regioni e diritti. La tutela dei diritti nelle leggi e negli statuti regionali, Macerata, Italy, 314 pp.

Luciani, M. (2002). I diritti costituzionali tra Stato e Regioni (a proposito dell'art. 117, comma 2, lett. m della Costituzione). Politica del diritto 3: pp. 345–359.

Pegoraro, L. and Ragone S. (2010). Los derechos regionales en el sistema constitucional italiano con especial referencia a su regulación estatutaria. In J.C. Gavara de Cara (ed.) Los derechos como principios objetivos en los Estados compuestos, Barcelona, Spain: pp. 89–120.

Ragone, S. (2007). Gli statuti regionali tra contenuti necessari e contenuti eventuali (con particolare riguardo alle problematiche della definizione della forma di governo e delle norme programmatiche). In E. Rossi (ed.) Le fonti del diritto nei nuovi statuti regionali, Padova, Italy: pp. 63–99.

Le Regioni (2005) Le norme programmatiche degli statuti dopo le sentenze della Corte costituzionale. Otto opinioni (special issue), n. 1–2.

Revista catalana de dret públic (2010). Especial Sentencia 31/2010 del Tribunal Constitucional, sobre el Estatuto de Autonomía de Cataluña de 2006 (special issue).

Rossi, E. (2005). Principi e diritti nei nuovi Statuti regionali. Rivista di Diritto costituzionale: pp. 51–96.

Ruggeri A. (2011). Unità-indivisibilità dell'ordinamento, autonomia regionale, tutela dei diritti fondamentali. Available at: www.giurcost.it.

Solozábal Echevarría, J.J. (2009). El estatuto de Cataluña ante el Tribunal Constitucional. Teoría y realidad constitucional, n. 24: pp. 173–190.

Teoría y Realidad Constitutional (2011). La STC 31/2010 sobre el Estatuto de Cataluña (special issue), n. 27.

Tornos Mas, J. (2010). El estatuto de autonomía de Cataluña, y el Estado autonómico, tras la sentencia del Tribunal constitucional 31/2010. El Cronista del Estado Social y Democrático de Derecho, n. 15: pp. 18–25.

Tur Ausina, R. and Álvarez Conde, E. (2010). Las Consecuencias Jurídicas de la Sentencia 31/2010, de 28 de junio del Tribunal Constitucional sobre el Estatuto de Cataluña. La Sentencia de la Perfecta Libertad, Cizur Menor, Spain, 345 pp.

Viver Pi-Sunyer, C., Bayona Rocamora, A. and Galofré i Crespi, J. (2010). Informe sobre la STC que resuelve el recurso de inconstitucionalidad presentado por 50 diputados y senadores del Partido popular contra el Estatuto de Autonomía de Cataluña. Available at: www10.gencat.cat.

Participation of the German Länder and Autonomous Communities in the European Union: A Comparative Analysis

Cristina Elías Méndez

Introduction

Participation of the regions in the European Union is a key element in the integration of the Federal States and in the process of European construction. It should be recalled that the process of European integration entails a transfer of competences to Europe that frequently affects the competences of the regions. In this work, we seek to analyse the ascendant phase: the creation of European Union Law. Germany, a benchmark Federal State and pioneer in the participation of the regions in Europe, displays a dynamic model of participation. The various constitutional reforms that have taken place in Germany in recent years have dealt with this topic, which highlights that the structure for participation of the Länder in the European Union is one of the challenges currently facing the German federal model. For its part, the Treaty of Lisbon has encouraged greater participation of national parliaments in the EU through the principle of subsidiarity. Constitutional reform of Article 23 of the Fundamental Law of Bonn, the Ruling of the Federal Constitutional Court regarding the Treaty of Lisbon (30 June 2009), and subsequent legislative reforms have strengthened participation of the German Parliament in the process of European integration. The *Bundesrat* and, through this Chamber, the *Länder* that comprise it, thus strengthen their role and functions *vis-à-vis* the European Union.

In Spain, the slow process of creating mechanisms for Autonomous Community participation in the European Union, based for a long time on political agreements, has been strengthened by the provisions included in the Statutes of Autonomy reformed in recent years. The possibility of Autonomous Community participation in the Spanish delegations before the European institutions; the duty of the

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Government to provide information to said Communities; the procedures for controlling the principles of subsidiarity and proportionality and the possibility of establishing offices in Brussels are included (among other gains) in the second-generation Statutes of Autonomy. In this respect, it is essential to bear in mind the constitutional analysis that the Constitutional Court has undertaken in its Ruling 31/2010.

In this work, we hope to provide an overview of the different participation mechanisms of the German Länder and the Autonomous Communities in the European Union as a way of evaluating both models and as a starting point for outlining proposals for improvement.

Germany

Types of Cooperation Between the Länder and the Federation in European Union Affairs

The most important channel of participation for the regions in the European Union continues to be cooperation with the central State, which can be explained by the difficulties in directly accessing the Union that the infra-state level continues to face.

The most significant feature that Germany offers in this regard—together with other countries such as Austria and Belgium—is the constitutionalisation of said process. The demands of the Länder have been put forward by Germany (a pioneer in this field) practically after the creation of the European Communities, with the approval of laws and political agreements, prominent among which is the Lindau Agreement (1957) between the Federal Government and the Länder, and which was reaffirmed in 1987.[1] This is accompanied by approval of cooperation laws between the Federation and the Länder in European Union affairs. Following ratification of the Treaty of Maastricht in 1992, said possibility of cooperation was finally constitutionalised through the so-called "EU" Article of the Fundamental Law of Bonn (FLB, previously Article 24, currently Article 23).

Article 23.2 of the current German Constitution envisages the general principle of participation of the Länder European Union matters ("In matters linked to the European Union, the Bundestag and the Länder participate through the Bundesrat"). Article 50, FLB, also envisages this participation: "The Länder will participate, through the Bundesrat, in the legislation and administration of the Federation and in European Union matters." To enable their contribution, the Constitution requires the Federal Government to inform both Chambers (Bundestag and Bundesrat) in detail and with as little delay as possible.

[1] Suscycka-Jasch and Jasch (2009), pp. 1215–1256.

To this are added two more provisions in the same vein: transfer of sovereignty rights to the European Union corresponding to the Federation requires the approval of the Bundesrat (Article 23.1, FLB). Further, as a general principle, the Bundesrat must participate in the formation of the will of the Federation should the latter have to participate in the corresponding measures at the national level or should the Länder be competent at the national level (Article 23.4, FLB).

Likewise, the Fundamental Law establishes a system of participation for the Länder structured in accordance with their level of competences regarding each subject matter (Article 23.5): at the first level of weakest cooperation, insofar as the interests of the Länder are affected in an area of competence exclusive to the Federation or insofar as the Federation has, in all other respects, the right to legislate, the Federal Government "will take into account" the position of the Bundesrat. At a second level, when the legislative competences of the Länder, the administrative organisation or its administrative procedures are seen to be affected, the point of view of the Bundesrat "will have to be taken into account (in said regard) determinatively in the formation of the will of the Federation," which should not be an obstacle for maintaining the responsibility of the Federation by the State as a whole. Federal Government approval is required for any question that may involve an increase in expenditure or a reduction of the Federation's revenue.

Direct Participation of the Länder in the European Union

The strategies for direct participation of the regions in the European Union affect the institutional architecture of the Union that has given rise, on the one hand, to the Committee of the Regions that, as a consultative and representational body of highly heterogeneous regions, enjoys only limited influence, having disappointed the expectations that it could have become a hypothetical territorial Chamber of the Union. Germany is represented in the Committee of the Regions by 24 members and 24 alternate members, 21 of which represent the 16 governments or regional parliaments, five representatives among the Länder rotating according to their population.

The offices or delegations of the regions before the European Union have also created a mechanism, promoted by the Länder or Autonomous Communities themselves, which has actually enabled the presence of the infra-state bodies in Brussels, in many cases creating an active source of information and transfer of interests towards the regions.[2]

An important path for participation in its day was the possibility opened up by the Single European Act of 1986 that enabled participation of regional representatives in consultative Committees of the Commission and Council.

[2] Castellà Andreu (2008), pp. 37–91 (75 onwards).

Approval of the European Union Treaty meant offering the possibility that regional Ministers could represent a member state in the Council. In Germany, Article 23.6 was modified to enable representation of the entire Federation by one representative of the Länder of a ministerial rank in questions which were the exclusive competence of the States and which affirmed: "when, in an essential issue, legislative competences exclusive to the States are affected (culture, education – except vocational training – tourism, organisation of the police as well as jurisdictional and administrative organisation), the Federation should entrust to a representative of the States, designated by the Bundesrat, exercise of the rights corresponding to the German Federal Republic as a Member State of the European Union. Exercising such rights will be performed with the participation and conformity of the Federal Government and must at all times safeguard the accountability of the Federation with regard to the State as a whole." In practice, the delegation was composed in this case of one representative from the Federation and another from a *Land* for negotiation in areas of exclusive competence of the States.

Constitutional reform of the federal model in 2006 brought about important changes in this respect. In general, clarification of the distribution of competences was sought,[3] also in relation to the European Union, a sphere where it was also hoped to attain effective German representation. To this effect, nevertheless, only a limited reform aimed at reducing the matters where the Länder could represent the Federation was achieved, centred on the so-called hard core of cultural sovereignty (school education, culture, and broadcasting), enabling in exchange a greater degree of involvement by the Länder, which assume representation of the Federation: "(6) When exclusive legislative competences of the Länder in the areas of school education, culture and broadcasting are fundamentally affected, exercising the rights which the German federal Republic enjoys as a Member State of the European Union should be transferred by the Federation to a representative of the Länder designated by the Bundesrat. Exercising said rights will be performed with the participation of the Federal Government and in accordance with it: Federation responsibility for the State as a whole will be maintained. (7) Regulating Sections 4 to 6 will be carried out via a law which requires the approval of the Bundesrat." Problems of constitutional legitimacy posed by the transfer of the decision to the representative of the Länder are compensated by reference to the participation of the Federal Government.[4]

[3] Elías Méndez (2006), pp. 223–254 (224) and González Pascual (2009), pp. 49–97 (63).

[4] Arroyo Gil (2009), p. 92 onwards.

Participation of the Länder *in the European Union Following the Treaty of Lisbon*

The Treaty of Lisbon meant a boost, albeit limited, to participation of the regions in Europe, especially the role that was envisaged for the regional parliaments as bodies for controlling the principle of subsidiarity.[5] Likewise, Lisbon strengthened the key role played by national parliaments that, in the case of the federalised States, means an opportunity for the participation of the regions by taking the territorial Chamber into greater consideration.[6]

We have already mentioned that in Germany, in accordance with Article 23.2 FLB, the Bundestag and Bundesrat participate in matters related to the European Union. Furthermore, a progressive strengthening of parliamentary participation in European Union issues has been internally carried out. We could cite some milestones in this process such as the 1993 agreement (reformed, 1998) between the Federal Government and the governments of the Länder in EU matters; the 1993 Law of Cooperation between the Federal Government and the Bundestag in EU matters and the agreement between the German Bundestag and the Federal Government concerning cooperation on European Union matters in accordance with Section 6 of the Law of Cooperation between the Federal Government and Bundestag on matters related to the European Union (September 2006), which served to strengthen the rights of the Bundestag to participate in European policy by extending the number of areas in which the Federal Government had to inform the Bundestag and establishing certain deadlines in this regard.

The Bundestag has a Commission for European Affairs (*Ausschuß Europäische Union* or *Ausschuß für die Angelegenheiten der Europäischen Union*). The Commission for European Union Affairs is one of the four commissions expressly envisaged in the German Constitution. Article 45 of the Fundamental Law establishes that such a commission should be constituted in each legislature, thus creating an institutional safeguard. Said Commission was introduced into the Constitution through constitutional reform of the FLB on 21 December 1992, although it had been created in 1991 as a standing commission. It comprises 35 members as well as 16 Members of the European Parliament who are entitled to attend and participate but not vote.[7]

The Commission for European Affairs was incorporated into the Regulations of the German Bundestag in 1994. The organisational changes were thus undertaken together with amendments of the parliamentary norm required to fulfil Article 23.2, first phase, of the Fundamental Law. All the Commissions of the Bundestag are responsible for deliberating on European matters within the framework of their areas of competences, although the Commission for European Union Affairs is the

[5] Martín y Pérez de Nanclares (2008) pp. 273–292 and Pérez González (2008), pp. 295–307, respectively.

[6] Camisón Yagüe (2010).

[7] Elías Méndez (2013).

central focus of the parliamentary decision process regarding European policy. The Bundestag can authorise the Commission for European Affairs to issue an opinion on said matters. Before taking a decision on legislative provisions of the European Union, the Federal Government must give the Bundestag the opportunity to express its opinion, being obliged to take into account the opinion of the Chamber in the negotiations (Article 23.3, FLB).

Thus, the Commission for European Union Affairs guarantees that the Bundestag can contribute to the decisions taken by the EU. As an interested party, it helps to formulate and implement German policy related to the European Union. It is responsible for fundamental issues related to European integration as well as cooperation with the European Parliament and with national Member State parliaments. The Commission can also establish direct dialogue with the European Parliament (as it is also composed of MEPs), which sets it apart from the other standing commissions of the Bundestag.

As regards the Bundesrat, we can distinguish the Commission for European Union Affairs (*Ausschuss für Fragen der Europäischen Union*) from the Chamber for European Affairs (*Europakammer*). The general legal basis of the Commission for European Union Affairs of the Bundesrat is Article 23 of the FLB and, specifically, Paragraph 45 of the Regulations of the Bundesrat. It is made up of a Minister from each of the 16 States. The Commission for European Union Affairs has a long tradition in the Bundesrat. In December 1957, it created a special commission: "The Common Market and free trade area" that in 1965 became a Standing Commission for affairs related to the European Community. The present name of the Commission derives from the moment the European Union Treaty (1993) came into force.

This Commission is responsible for examining all Council and European Commission documents which are important for the German Federal States. These documents include European Union draft legislation, especially regulations and directives, as well as communications and Green and White Papers. Said documents deal with subjects related to all the areas where the European Union can operate. The Commission for European Union Affairs generally examines the documents concerning the basis of the recommendations of the specialist Commissions. This examination is principally governed by considerations which derive from European Union policy and European integration. The Commission also considers whether there is sufficient legal foundation in European Law for the legislative projects and whether the principles of subsidiarity and proportionality have been respected. Another fundamental aspect in the examination of the Commission is whether the opinion of the Bundesrat regarding a specific matter should be given the maximum possible respect when it defines the Government position. With regard to the Law of Responsibility for Integration (*Integrationsverantwortungsgesetz)*, to which we will return later, the Commission also takes responsibility for observing whether the rights of the Bundesrat have been duly taken into account.

The Chamber for European Affairs is regulated in the Fundamental Law (Article 52.3.a). Each Länder appoints a member of the Bundesrat or other person to the Chamber and the members and representatives of the Federal Government can

participate in the deliberations. The mission of the Commission for European Affairs entails adopting decisions in specific cases instead of the Bundesrat. As a general rule, any decisions of the Bundesrat that have a legal impact beyond its remit must be taken by plenary assembly that meets 12 times a year in public sessions. Normally, this number of meetings offers an effective viable framework for addressing the legislative projects of the European Union. However, in exceptional cases, the Bundesrat may need to respond quickly. The Chamber for European Affairs was created to deal specifically with such contingencies and tackle issues that need to be examined confidentially, and its decisions are considered decisions of the whole Bundesrat. In general, the deliberations of the Chamber are public, except when it is dealing with a confidential matter. The Federal States have the same number of votes in the Chamber for European Affairs as in the plenary session, votes that the Länder can only cast *en bloc* and only when the representatives of the Länder are present. No delegation of votes is allowed.

The President of the Bundesrat assigns the matter in question to the Chamber for European Affairs if the latter is competent to deal with a specific matter, if it should be dealt with urgently or if it requires confidential deliberations. As its representative, the President of the Bundesrat can also assign the matter to the Chamber, whenever the President of the Commission for European Union Affairs agrees.

In sum, the Commission for European Union Affairs is, therefore, one of the standing parliamentary commissions of the Bundesrat whose role is to issue recommendations for the decisions that should be taken by said Chamber as a whole concerning matters related to the European Union. The Bundesrat also has its own Chamber for European Affairs. When an urgent decision regarding said issues is required, the Chamber for European Affairs, rather than the plenary session, takes decisions. In practice, the majority of members of the Commission and the Chamber are the same persons.

In 2008, in order to prepare the Fundamental Law of Bonn for ratification of the Lisbon Treaty, Articles 23, 45, and 93 were reformed, embracing the possibility of presenting a subsidiarity suit before the European Union Court of Justice on the part of the Bundestag and Bundesrat.[8] It was established that the said constitutional reform would come into effect at the same time as the Treaty of Lisbon became effective.

Because of the legislation which has been approved in Germany in relation to the process of ratifying the Lisbon Treaty and of the Ruling of the Federal Constitutional Court of 30 June 2009 regarding said Treaty, the norms that regulate parliamentary participation in European affairs have been reformed. In said Ruling, the High Court established the constitutionality of the Law of Ratification but the unconstitutionality of the accompanying Law for extending and strengthening the rights of the Bundestag and Bundesrat in affairs of the European Union[9] because it

[8] *Gesetz zur Änderung des Grundgesetzes (Artikel 23, 45 und 93),* BGBl. I 2008 S. 1926.

[9] *Gesetz über die Ausweitung und Stärkung der Rechte des Bundestages und des Bundesrates in Angelegenheiten der Europäischen Union, (Bundestagsdrucksache* 16/8489).

violated the democratic principle of Article 38 I, FLB with regard to Article 23 I, FLB, since it does not sufficiently guarantee the Bundestag and Bundesrat's right to participate in European legislative processes and to amend Treaties. Thus, reform of the said extension Law was undertaken, whose nucleus became the text of the Law of responsibility for integration (*Integrationsverantwortungsgesetz*) of 22 September 2009. The Law of responsibility for integration takes into account the legislature in the cases where, under the principle of single and restricted assignment of competences, reform of the Treaty can be carried out without following the ratification procedure.

As a consequence of the Lisbon Ruling, two laws on cooperation were also reformed in 2009[10]: the Law of Cooperation between the Federation and the Länder in EU affairs (Gesetz *über die Zusammenarbeit von Bund und Ländern in Angelegenheiten der Europäischen Union*) and the Law of Cooperation between the Federal Government and the German Bundestag in EU affairs (*Gesetz über die Zusammenarbeit von Bundesregierung und Deutschem Bundestag in Angelegenheiten der Europäischen Union*), both in 1993. These laws, which also form part of the current text of the Law for extending and strengthening the rights of the Bundestag and the Bundesrat, establish the obligations to information that falls to the Federal Government and the rights of the Bundestag and the Bundesrat to participate in deciding Germany's position when negotiating within the EU. The Law of extension thus lays out, among other aspects, Bundestag and Bundesrat involvement in any changes made to the original law that are not subject to the normal procedures of ratification and in any application of original law that might entail extending European Union competences, as well as the parliamentary stance. Regulation of the Bundestag has also been modified to regulate in detail, among other aspects, the procedure for reporting on any documents related to the European Union or the action of subsidiarity (§ 93).

The Bundestag exercises control over the principle of subsidiarity through its organisations (commissions, plenary session, parliaments, and parliamentary administration).[11] Fulfilment of the principle of subsidiarity is controlled by means of discussions in the competent commissions, exchanging oral and written information between the Government and the Bundestag, information that is notified to the plenary session so that an appropriate decision can be taken. Nevertheless, the Bundestag may delegate to the Commission for European Affairs the exercise of the recognised rights corresponding to the Chamber in this regard (Article 45, FLB). In this procedure, involvement of the regional parliaments is not envisaged but, as we shall see, is through the Bundesrat.

For its part, the Bundesrat is responsible for controlling all the legislative projects that affect the interests of the Länder, which is carried out by its own Commission for EU Affairs and by the Commissions involved. The Federal Government must promptly inform the Bundesrat of any EU legislative initiative that

[10] By law of 22 September 2009 (BGBl. I p. 3031).

[11] http://www.cosac.eu/en/info/earlywarning/countryspecific/Allemagne/bundestag/.

affects the interests of the Länder and which includes the obligation to appear before it. The deliberations of the Bundesrat usually take place in the Commission for EU Affairs based on the recommendations of the specific sectorial Commissions. The office of the Commission for EU Affairs then drafts a document which is debated in plenary session and a position is adopted. As already indicated, should it be urgent, the Chamber for European Affairs can be resorted to. The Federal Government must give the Bundesrat a reasonable period for it to deliver its opinion. We should remember that the new Law of responsibility for integration reinforces the obligations of the Federal Government to provide information to Parliament.

With respect to relations between the two Chambers, both of them directly receive the proposals of the European Commission and the documents that the competent federal ministry forwards to them. In principle, the Bundestag and Bundesrat work independently and are not obliged to communicate their respective positions or take the position of the other Chamber into account, although in practice this usually happens and is soon likely to be stipulated in legislation.

Spain

Types of Autonomous Community Cooperation with the Central State in European Union Affairs

With regard to Spain, the Conference for European Union Affairs (CARCE, in Spanish), created in 1988 as a Sectorial Conference for coordinating relations between the State and the Autonomous Communities, should be highlighted as a referential framework for cooperation between the Autonomous Communities and the central state. The Conference held its first meeting in 1989 and adopted its formal institutionalisation agreement in 1992.

The CARCE is composed of the Minister for Public Administration (and of the Secretaries of State for the European Union and Territorial Administrations) and of Regional Ministers of the Autonomous Communities responsible for community affairs. Its functions include coordinating participation of the Communities (for example, by transferring information or establishing procedures for conveying information from the Autonomous Communities to the State) and promoting and monitoring the different Sectorial Conferences on community policies that may affect autonomous competences.[12]

In 1994, the CARCE adopted the Agreement on Internal Participation of the Autonomous Communities in European community affairs through the Sectorial Conferences, implementing the so-called autonomic participation in the ascendant

[12] Sevilla Segura, Vidal Beltrán, Elías Méndez (2009), p. 148 onwards.

phase of the European process of integration, given that until then the Autonomous Communities had only participated in the descendant phase of the process. By enacting Law 2/1997, regulation of the CARCE achieved the status of law. Since 15 April 2010, this organisation has been called the Conference for EU Related Affairs (CARUE).

The Autonomous Communities' desire to participate in European Union decision-making processes has found a channel for development in the recent statutory reforms that have taken place in Spain since 2006. Thus, some second-generation Statutes include the right of the Communities to participate in forming the negotiating position of the Spanish State vis-à-vis the Union when it affects their interests or competences through bilateral or multilateral mechanisms (see, for example, Article 231 of the Statute of Andalusia). Likewise, the right of the Autonomous Communities is included to inform the State of any observations and proposals which they deem convenient with regard to initiatives, proposals, regulatory projects, and decisions being debated in the European Union as well as the right to be informed of said projects.

Direct Autonomous Community Participation in the European Union

Spain's participation in the Committee of the Regions is through 17 representatives from the Autonomous Communities, who are generally their respective Presidents and four Town Council representatives. In addition, the Spanish Autonomous Communities have had offices or delegations in Brussels since the 1980s, although their extension and consolidation had to await ratification by the Constitutional Court in Ruling 165/1994. They have subsequently been formally included in the Statutes in recent statutory reform.

In 1996, the Council for Autonomous Affairs was created within the Spanish Permanent Representation to the European Union (henceforth, REPER). In 1997, important agreements were adopted in the CARCE related to Autonomous Community participation in procedures before the Court of Justice of the European Communities and concerning the participation of the Autonomous Communities in the Committees of the European Commission. In the period 1999–2002, participation of the Autonomous Communities in 55 Committees of the European Commission began, being extended to 95 for the period 2003–2006.[13] During the period 2007–2011, the Rules regarding Autonomous Community participation in the Implementation Committees of the European Commission were approved, whose objective is to establish the general principles governing participation of Autonomous Community representatives in the committees of the European Commission envisaged in Council Decision 2006/512/EC (17 July 2006) (thus modifying

[13] *Ibídem*, p. 149.

Council Decision 1999/468/EC) whereby the procedures for exercising implementation competences assigned to the Commission are established.[14]

In December 2004, two important agreements were adopted in the CARCE. First, the Agreement on the Ministry for Autonomous Affairs in the Spanish REPER before the European Union and concerning participation of the Autonomous Communities in the Working Groups of the European Union Council. Autonomous Community functionaries were thereby incorporated into the REPER. Second, participation of the Communities was extended to the Working Groups and other preparatory authorities of the meetings of the Council of Ministers. These agreements were published in the Official State Gazette (BOE) on 16 March 2005.

With respect to the Ministry for Autonomous Affairs in the Permanent Representation of Spain before the European Union, the Agreement establishes that posts at the Ministry for Autonomous Affairs in the Spain's REPER will be occupied by functionaries proposed by the Autonomous Communities themselves and agreed by consensus in the CARCE. Appointment of these civil servants will be temporary and limited to three years, a system of succession of the functionaries from all the Communities guaranteed by consensus. These regional civil servants, called Counsellors, will report to the CARCE on the work they undertake and are obliged to remit an annual report of their work to all the Autonomous Communities. At the functional level, the Ministry of the REPER works under the leadership of the Ambassador of the Permanent representation who attributes or assigns the tasks of the Counsellors. However, the great importance of the figure of the Counsellors resides in their fundamental role as informers and as watchdogs of those European affairs that are of greatest interest to the Autonomous Communities. Thus, among other functions, they are entrusted with relaying as quickly as possible any information and documentation created in relation to the activities and regulatory proposals of the Community Institutions that may affect the competences or interests of the Autonomous Communities; organising informational meetings between Autonomous Community representatives and Sectorial Counsellors who render their services in the REPER; monitoring Autonomous Community participation in European affairs within the Sectorial Conferences and contributing to the development of said participation, providing information concerning key negotiation issues in said affairs; monitoring information regarding disciplinary procedures invoked by the European Commission, of observations concerning any public aid notified and of the affairs laid before the Court of Justice that affect the competences or interests of the Autonomous Communities; support, when necessary, for coordination between the Offices of the Autonomous Communities in Brussels, contributing to the cooperation mechanisms which maybe established for their improvement, etc. However, further, the Counsellors are dependent upon the

[14] Information about this can be found on the Web Page of the Ministry for Territorial Policy and Public Administration: http://www.mpt.gob.es/es/areas/politica_autonomica/coop_multilateral_ccaa_ue/ccaa_y_ue/part_ccaa_comitologia.html (6.11.2011).

Ministry of Public Administration who determines another series of tasks in relation to said Ministry, among others: to report on any EU Institution activities that may affect the competences of the Autonomous Communities or that affect the political and administrative activity of the Autonomous Communities; to report on the activity of the Committee of the Regions and regarding the most relevant activity of the Offices of the Autonomous Communities in Brussels.

With respect to autonomic participation in the working groups of the European Union Council, this is carried out via the Counsellors of the Ministry for Autonomous Affairs of the Permanent Representation of Spain before the European Union (REPER), which is part of the Spanish delegation in certain Working Groups and via direct Autonomous Community representation for those affairs agreed therein at the corresponding Sectorial Conference through a designated technical director who will form part of the Spanish delegation in the corresponding Working Group.

The Working Groups of the European Union Council where Autonomous Community participation is structured are those that act as preparatory authorities for the following European Union Council groups: Employment, Social Policy, Health and Consumer Affairs; Agriculture and Fisheries; Environment and Education, Youth and Culture. Autonomous Community participation in said groups refers to those affairs that affect the latter's competences. The specific Autonomous Community responsible for this participation is understood to act on behalf of all the Autonomous Communities whose competences might be affected by the issue in question.

The second major Agreement of 2004 is that related to the system of Autonomous Community representation in the European Union Council groups. Here, the Autonomous Communities are represented at the meetings of the previously cited European Union Council formations by including in the Spanish Delegation a member holding the rank of Counsellor or a member of an Autonomous Government Council who represents all the Communities in the affairs that affect their competences.

The general principles that frame direct Autonomous Community representation are: the unicity of Spain's representation in the EU; the unified action of Spain abroad; the need to maintain and facilitate Spain's capacity for proposal and reaction in the system for adopting EU Council decisions; loyalty and mutual trust; joint responsibility; joint representation of the Autonomous Communities and State accountability.

The Plenary Session of the Sectorial Conferences concerned for the affairs to be dealt with will designate the Autonomous Community representative. In the appointment procedure, both the stability (covering at least 6 months) as well as the succession of the representatives proposed by the different Autonomous Communities must be ensured.

The Autonomous Community representative designated assumes coordination with the General Administration of the State and promises to make all the documentation concerning the subject-matter available to the remaining Autonomous Communities to keep them regularly informed about negotiations and to reach a joint stance with the rest of the Autonomous Communities affected. Said representative

is a full member of the Spanish Delegation in all respects and can address the floor when questions that affect Autonomous Community competences are debated and there is a common Autonomous Community position.

In the meeting of the CARUE held on 2 July 2009, it was agreed to extend the above-mentioned participation, including the Competition Group in the area of Consumers Affairs. In the meeting held by said Conference on 15 April 2010, it was agreed to extend said participation of the Working Group affected belonging to the Competition Group in the area of the meetings related to regulations regarding betting and gaming.[15]

Autonomous Community scope of action in European Union institutions has been one of the aspects that statutory reform has most affected to date.[16] Autonomous Community involvement in the European Union is treated in said texts as a prolongation of their exercise of exclusive competences. The main spheres in which the new statutory texts act as regards direct participation relate to the right of the Communities to be present in European Union institutions for the defence and promotion of their interests and to encourage the necessary integration of Autonomous Community policies with those of the State and Europe, as well as the right of the Autonomous Communities to participate in the Spanish delegations vis-à-vis the European Union. Andalusia and Catalonia even envisage the possibility of assuming the Presidency of the delegations, based on the assumption of exclusive competence of the Autonomous Community.

In its analysis of the Statute of Catalonia, Constitutional Court Ruling (31/2010) has validated Autonomous Community participation in European Union affairs whenever it affects their competences and also when it affects their interests.[17] Said participation must take place within the framework of the multilateral procedures that are established, bilateralness being admitted only on the assumption that they exclusively affect the Autonomous Community in question and not the others. With regard to the statutory provision of the determinant nature of the Autonomous Community position in European Union affairs, the Court has established that it should not be understood as "binding", only obliging the State to justify its rejection before the Bilateral Commission.

[15] The reports concerning Autonomous Community participation in the European Union Council can be consulted in the Web page of the Ministry for Territorial Policy and Public Administration: http://www.mpt.gob.es/es/areas/politica_autonomica/coop_multilateral_ccaa_ue/ccaa_y_ue/Participacion_CCAA_Consejo_Ministros/informe_consejo_ministros_ue.html.

[16] Cf. Art. 61 Statute of Valencia; Arts. 184–192 Statute of Catalonia; 230–239 Statute of Andalusia; 92–95 Statute of Aragon; 106–113 Statute of the Balearics, among others.

[17] On this point, we concur with the analysis of Montilla Martos (2011), pp. 153–199 (170).

Participation of the Autonomous Communities in the European Union Following the Treaty of Lisbon

The Joint Parliamentary Commission for the European Union has at its disposal the mechanism for controlling adaptation of internal regulations to the principle of subsidiarity. The 24/2009 Law reformed the 8/1994 Law whereby the Joint Commission for the European Union is regulated for its adaptation to the Treaty of Lisbon. On the one hand, the Law extends the ratio of competences of said Joint Commission, incorporating those conferred on the national parliaments by the Treaty of Lisbon. Among them, it is worth highlighting those for controlling the application of the principle of subsidiarity by European legislative initiatives, the so-called "early warning system", implemented through the Protocol regarding the application of the principles of subsidiarity and proportionality, annex to the Treaty of Lisbon.

On the other hand, the Law includes the possibility envisaged in the annexed Protocol to the Treaty of Lisbon enabling national parliamentarians to consult those regional parliaments that possess legislative competences. This possibility is organised generally by remitting all European legislative initiatives to the Autonomous Communities' Parliaments as soon as they are received without prejudging the existence of the Autonomous Community competences affected. Said parliaments have four weeks for their opinion to be taken into account by the Joint Commission that, if a justified opinion is approved concerning the violation of the principle of subsidiarity by a draft legislative act of the European Union, should incorporate the list of opinions remitted by the parliaments of the Autonomous Communities and the necessary references for their consultation.

The Joint Commission for the European Union is also empowered to request the Government to lodge an annulment appeal before the Court of Justice against a European legislative act due to infringement of the principle of subsidiarity. This power should be exercised within a maximum of six weeks from the official publication of the European legislative act. Nevertheless, the Government can, when justified, reject the lodging of an annulment appeal requested by any of the Chambers or by the Joint Commission for the European Union, a decision that must be justified by the appearance of the Government before the Joint Commission for the European Union, when the latter so requests it.

The regional parliaments have regulated their subsidiarity control procedures in their parliamentary regulations, agreements or resolutions of the presidencies of the Chambers or by the respective Commission for European Affairs.[18]

[18] Carmona Contreras (2011).

Comparative Analysis and Conclusions

With regard to the participation of the Länder and Autonomous Communities in the European Union, one fundamental difference between Germany and Spain concerns the constitutionalisation of the question in Germany, vis-à-vis the absence of any reference to the Union in the Spanish Constitution. In this respect, Spain continues to be subject to the political difficulty that constitutional reform seems to entail but which, however, has not been a hurdle to the introduction in the Constitution of a limit to the deficit demanded by Europe in its new Article 135. Therefore, we postulate the need to introduce the question of Autonomous Community participation in a constitutional reform that should be undertaken in Spain in order to update and clarify the territorial model adapted to the new context of multilevel constitutionalism.

While in Germany legislation exists concerning this matter, in Spain no state legislation is to be found that could act as a general regulatory framework in this question. From 2006 onwards, the reforms of eight Statues of Autonomy have favoured regulation at the statutory level of important aspects of this question, which no doubt affords a certain degree of legal certainty but, likewise, causes dysfunctions with regard to the absence of a common constitutional or legislative framework of reference.

Another major gap in the Spanish model (and no less important if we refer to it again) is the dysfunctional nature of the Senate (Upper House) as regards a body for voicing the will of the Spanish regions and which is even more clearly shown in comparison with the important role played by the German Bundesrat in this regard. In this sense (and in relation to that described in the previous paragraph), we support the demand concerning the necessary reform of the Senate and suggest taking the German constitutional precept as a reference which, moreover, defines its Federal Council as a body for the participation of the Länder in the European Union (Article 50).

The ratification process of the Treaty of Lisbon in Germany, the constitutional and legislative reforms which have accompanied it and the demands in this regard of the Lisbon Ruling of the Federal Constitutional Court (30 June 2009) have entailed a significant boost to the participation rights of the Bundestag and the Bundesrat in European Union affairs which, in the case of the Federal Council, also means greater participation of the Länder.

Through recast Article 23.6 of the Fundamental Law of Bonn, direct and exclusive participation of the Länder in the European Union in certain exclusive regional competences is enabled, subordinated to cooperation with the Federal Government. In Spain, in the Statutes of Autonomy of Catalonia and Andalusia, the possibility has been envisaged that the Autonomous Communities may preside over the Spanish delegation when their exclusive competences are dealt with.

We have highlighted cooperation with the Central State and direct participation in Europe as conventional paths for participation of infra-state bodies in European affairs. In view of the difficulties that the Länder and Autonomous Communities

encounter with regard to direct participation in the EU, it is the first path that continues to be predominant in both models. However, internal progress in cooperation between Central States and the Länder or Autonomous Communities could be reaching the end of its useful life. The difficulties for making progress in direct participation have to do with the diversity of the regions in the different Member States and their distinct aspirations and capacities that make the unified response of the EU difficult vis-à-vis the regional phenomenon.[19]

In this context, the Treaty of Lisbon has incorporated references to the regions and has, above all, promoted the principle of subsidiarity not only for the national parliaments, which in the case of the German Bundesrat is to the advantage of the Länder, but also by providing, in the Protocol, for regional parliament participation in controlling the principle of subsidiarity. The position of the German Länder during the drafting of the Treaty of Lisbon in favour of the principle of subsidiarity[20] clearly demonstrates a third route for relations between the regions and Europe, in the sense of (in view of the sensation of being unable to make further progress in the mechanisms of cooperation and participation) protecting the regional competences vis-à-vis the European Union. Likewise, the intergovernmental focus where cooperation between regions and the European Union has been contextualised is now open to participation of the parliaments.

The cooperative spirit of German federalism, with regard to the competitive nature that frequently characterises relations between the State and Autonomous Communities or of the latter amongst themselves to establish their position in Europe, likewise determines important functional differences between the two models.[21]

In relation to the general analyses and the data of participation in the formations of the Council as well as the preparatory meetings, the truth is that no relation exists between a more developed regulatory framework and greater regional participation.[22]

The mechanisms for participation of the Länder and Autonomous Communities in the EU have without doubt provided a greater degree of acceptance of European Union Law at the regional level, as well as a greater degree of involvement of the infra-state organisations in the process of integration. On the negative side, the complexity of the procedures and, on occasions, the detriment to the efficiency of the system cannot be obviated, giving rise to drawn out and complex decision-making processes that are incomprehensible to citizens and that, therefore, demand accountability and due democratic control difficult, frequently leading, moreover, to decisions based on a minimum common denominator instead of decisions

[19] The need for a certain degree of constitutional homogeneity in order to make progress in the process of integration is considered necessary by: Häberle (2010), pp. 379–411 and Callejón (2010), p. 10 onwards.

[20] Nettesheim and Quarthal (2011), pp. 281–310 (307).

[21] Bauer and Börzel (2010).

[22] Uribe Otalora (2003), pp. 241–287 (260 and onwards).

required for progress. In Germany, promoting the role of parliament (and with particular regard to the present study) and the function of the Bundesrat as a Chamber for state representation of the interests of the Länder, heralds a benchmark route along which to continue going forward. In Spain, improving the model of participation for the Autonomous Communities in the European Union will not be complete until reform of the Senate is undertaken.

References

Arroyo Gil, A., *La reforma constitucional del federalismo alemán*, Institut d'Estudis Autonòmics, 2009, page 92 onwards.

Balaguer Callejón, "Presentación", *Revista de Derecho Constitucional Europeo*, issue 14, 2010, page 10 onwards

Bauer, M. W. and Börzel, T.A., "Regions and the European Union", in Enderlein, H., Wälti, S. and Zürn, M., *Handbook on Multi-Level Governance*, 2010, pages 253–263 (259)

Camisón Yagüe, J.A., *La participación directa e indirecta de los parlamentos nacionales en los asuntos de la Unión Europea*, Senate, 2010

Carmona Contreras, A., "Los dictámenes autonómicos en el sistema de alerta temprana", http://www.fundacionmgimenezabad.es/images/Documentos/2011/20110128_ot_carmona_contreras_a_es_o.pdf (06.11.2011)

Castellà Andreu, J.M., "Las Comunidades Autónomas en Bruselas: la dimensión externa de la participación autonómica en la Unión Europea", *REAF*, issue 6, 2008, pages 37–91 (75 onwards)

Martín y Pérez de Nanclares, J., "La nueva regulación del régimen de competencias en el Tratado de Lisboa: especial referencia al control del principio de subsidiariedad", Martín y Pérez de Nanclares, J., (coordinator), *El Tratado de Lisboa*, Iustel, 2008, pages 273–292

Elías Méndez, C., "La reforma de la Constitución financiera en Alemania: una reforma pendiente", *Revista de Derecho Constitucional Europeo,* issue 6, 2006, pages 223–254 (224)

Elías Méndez, C., "Alemania", in Freixes Sanjuán, T., Gómez Sánchez, Y. and Rovira, A., *Constitucionalismo multinivel y relaciones entre Parlamentos: Parlamento europeo, parlamentos nacionales, parlamentos regionales con competencias legislativas*, 2013

González Pascual, M.I., "¿Deben continuar los Länder negociando en el Consejo de la UE? De la Landesblindheit a la Europafähigkeit en el marco de la reforma federal de 2006", Revista española de derecho europeo, issue 29, 2009, pages 49–97 (63)

P. Häberle, "Métodos y principios de la interpretación constitucional. Un catálogo de problemas", *Revista de Derecho Constitucional Europeo*, issue 13, 2010, pages 379–411

Montilla Martos, J.A., "Las relaciones de colaboración en el nuevo marco estatutario: bilateralidad y participación", Revista de Estudios Políticos, issue 151, 2011, pages 153–199 (170)

Nettesheim, M. and Quarthal, B., "La reforma de las Constituciones de los Länder", *Revista de Estudios Políticos*, issue 151, 2011, pages 281–310 (307)

Pérez González, M., "La incidencia del principio de subsidiariedad en las regiones", Martín y Pérez de Nanclares, J., (coordinator), *El Tratado de Lisboa*, Iustel, 2008, pages 295–307

Sevilla Segura, J., Vidal Beltrán, J.M., Elías Méndez, C., *Vertebrando España. El Estado autonómico*, Fundación Ortega, 2009, page 148 onwards

Suscycka-Jasch, M. and Jasch, H.-C., "The participation of the German Länder in Formulating EU policy", *German Law Journal*, vol. 10, issue 9, 2009, pages 1215–1256

Uribe Otalora, A., "La participación de las regiones europeas en el Consejo de la Unión: Alemania, Austria, Bélgica y Reino Unido", *Corts: Anuario de Derecho Parlamentario,* issue 14, 2003, pages 241–287 (260 and onwards)

The Construction of German Fiscal Federalism vs. the Deconstruction of Spanish "Fiscal Federalism"

Susana Ruiz Tarrías

Introduction

The agreement on the formula for distributing State resources is one of the "key events in every politically-decentralised State", since a break-even point between the federal or territorial principle and the solidarity principle must be reached that is acceptable to everyone (Medina Guerrero 2011) and more so, if that is possible, when the resources to be distributed are scarce as a consequence of the economic world crisis that began in 2007.

In this context, the traditionally-coined terms for the types of territorial organisation of the State appear somewhat blurred if we consider the agents of the process: Decentralised territorial state/entities (Federated States, Autonomies, Regions, Municipalities, etc.), as demonstrated by the fact that the need to modify the procedure for distributing state resources has arisen in both a federal state "without federalists" such as Germany (Sturm 2011), and also in Spain's "mutant" State of the Autonomies (Cruz Villalón 2006). Even in Italy's Regional State, the reforms brought about concerning the distribution of state resources range from Public Property Federalism ("federalismo demaniale") (Legislative Decree of 28 May 2010, no. 85) to Municipal Federalism (Legislative Decree of 14 March 2011, no. 23) (Melica 2011).

Some fiscal federalism reforms fall under the sphere of the so-called "second-generation theory of fiscal federalism" (SGT), where the study of fiscal federalism is not limited to the field of economic sciences, but includes important contributions from the political sciences and other disciplines (Oates 2005). In this context, a brief comparative study of fiscal federalism reform in Germany and Spain will no doubt be useful for Constitutional Law.

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The Financial Relations Between the Federation and the Länder After the Constitutional Reform of 2009

Through the entry into force on 1 August 2009 of the Reform Act of the Basic Law (hereinafter GG) of 29 July 2009, the constitutional reform of the Financial Constitution was established, deferred by the German constituent since the reform of German Federalism was approved on 28 August 2006 (published in the Bundesgesetzblatt 2006, Teil I, Nr. 41, 31.08.2006).

However, this latter introduced some new financial and tax elements that affect the relations between the Federation and the Länder and was the outcome of the agreement of the governmental coalition between the CDU/CSU and the SPD following the federal elections of 2005. It was commonly considered "the mother of all reforms", both because it is the most extensive reform since the adoption of the Basic Law of Bonn in 1949 (given the number of modified precepts of the GG); because of its "significance", which can only be compared to the introduction of the "common tasks" drawn up through the financial reform of 1969; and because of the inclusion of the "European clause" in 1992 (Albertí Rovira 2006), even when the reform of certain aspects of the Financial Constitution had to be renounced.

In fact, one of the objectives of the "Commission of the Bundestag and the Bundesrat for modernising the Federal Order" (Kommission von Bundestag und Budesrat zur Modernizierung der bundesstaatlichen Ordnung, KOMBO) (Schneider, H.-P. 2009), set up in 2003, consisted of reducing joint financing, with the aim of "disentangling" the legislative powers between the Federation and the Länder (Oeter and Wolff 2006).

Following the constitutional reform of 2006, the funding of the common tasks governed by Articles 91a and 91b GG is upheld, and the only new element consists of the removal of the "expansion and construction of Universities, including university clinics" as a common task, thus eliminating one of the most controversial themes for attaining a funding-related agreement. Nevertheless, the new Article 143c GG temporarily compensates for the removal of said common tasks by recognising new financial assistances to the Länder between 1 January 2007 and 31 December 2019, allocated to the Federal budget.

In addition, the constitutional reform of 2006 also strengthened the requirements for obtaining the Federation's financial assistances in the case of joint financing, an aspect that has directly affected the amendment of Title X of the German Constitution ("Finances"), through the new Article 104b. By means of this new regulation, the Federation's control of financial assistances is increased in order to guarantee their effective use and thus avoiding the bad practices that arose under the application of Solidarity Pact II, which consisted of altering the purpose of the funds received (Elías Méndez 2006).

As regards tax autonomy, Article 105.2.a) GG of the constitutional reform of 2006 included, together with the legislative powers of the Länder relating to local consumption and luxury taxes, the provision of a new power for setting the rate of the property purchase tax, thus increasing the scope of the Länder's tax autonomy.

In any case, the financial amendments incorporated into the Federal Constitution through the constitutional reform of 2006 turned out to be fairly "modest" in terms of the content that some sectors understood German fiscal federalism reform should consist of. As Gunlicks points out, neither the Federalism Commission of 2003–2004, the grand coalition parties in their coalition agreement of November 2005, nor the members of the Bundesrat committee formed in the winter of 2006 or the coalition parties in the Bundestag deliberations in the spring and summer of 2006 "were willing to tackle the issue of general finance reform" (Gunlicks 2007).

However, at the same time, no doubt aware that for a profound change in the balance of power between the Federation and the Länder to be effective, such as that made via the constitutional reform of 2006, it must be accompanied by an equally significant revision of the funding instruments (Arroyo Gil 2010; Hrbek 2009), the Bundestag and Bundesrat decided, in their separate meetings on 15 December 2006, to set up the Federalism Commission II (*Zweite Föderalismuskommission von Bundestag und Bundesrat Eingesetzt*) in order to update the financial relations between the Federation and the Länder and "adapt the financial relations between the Bund and the Länder to the modified framework conditions inside and outside Germany, especially for the growth and employment policies" (Sudhof 2009).

The principal financial amendments introduced by the Reform Act of the Basic Law of 29 July 2009 can be grouped into two major areas a) the new regulation of debts in the Basic Law, and b) the "early warning system".

a) The new regulation of debts in the Basic Law

Bearing in mind the instructions of the Council of Experts to evaluate the development of the financial system in its 2005 and 2006 annual reports, together with the discussions about the degree of compliance with the European Stability and Growth Pact (2000–2006), the Federal Constitutional Court's ruling on the Berlin Land's aspirations to obtain additional payments from the Federation from 2002 according to the provisions in Article 107.2.3 GG (BVerG, 2 BvF 3/03 of 19.10.2006) and on the Federal Budget of 2004 (BVerG, 2 BvF 1/04 of 9.07.2007), the Federalism Commission II found itself, first and foremost, faced with the need to consider the Federation's debt situation.

The constitutional reform introduces a new regulation in this area that consists of restricting the debt capacity of the Federation and the Länder by amending Articles 109.3 (following the reform, Section 4), 115 and 143d GG and that was considered to be the "most substantial amendment" due to its significance concerning the future preparation of the Federation's and the Länder's budgets (Arroyo Gil 2010).

According to the new Section 109.4 GG, as a general rule, the Federation and the Länder must prepare balanced budgets, without having to resort to debt. Nevertheless, the same precept provides for the possibility that, through regulations, temporary situations that "deviate from normal conditions" and drive a budget up or down, as well as exception rules for natural catastrophes or unusual emergency situations "beyond governmental control and substantially harmful to the state's financial capacity" can be taken into consideration even though every exception to the rule must contain "an adequate amortisation plan".

In any event, the details of the Federal Budget regulations (Haushalt des Bundes) will be governed by the provisions of Article 115 GG under the premise that it is prohibited to resort to credit and the proviso that the provisions in its first section will "only be deemed to be satisfied if revenue from credits does not exceed 0.35 % in relation to the Nominal Gross Domestic Product". However, when it concerns the Länder, the German constituent of 2009 reveals a greater distrust in budgetary matters, as each of the Länder will "regulate details for the budgets within the framework of their constitutional powers" but, where appropriate, Article 115 GG.1 will only be understood to be "satisfied if no revenue from credits is admitted." A different arrangement that, although it might be considered to restrict the self-governing capacity of the Länder, was unanimously accepted, as the deliberations of the Federalism Commission II clearly show (Gesetzentwurf der Fraktionen der CDU/CSU und SPD 2009).

However, Article 115.2 sets out that, in situations "that deviate from normal conditions," "effects on the budget in periods of upswing and downswing must be taken into account symmetrically" in the event of either economic recovery or recession and that any deviation from the limits established for the assumption of credits are to be recorded on a "control account" whilst debits exceeding 1.5 % of the Nominal Gross Domestic Product must be reduced if the economic situation improves.

Article 115.2 GG also accepts the possibility that, in cases of natural catastrophes or unusual emergency situations "beyond governmental control and substantially harmful to the state's financial capacity," the previously specified credit limits "may be exceeded on the basis of a decision by the majority of the Bundestag members" and provided it is combined with an "amortisation plan" for the incurred costs that, in any event, "must be accomplished within an appropriate period of time."

In the last instance, Article 143d GG provides that the new regulation contained in Articles 109 and 115 GG, although in force from 1 August 2009, shall be applied for the first time to the 2011 budget and any "debit authorisations existing on 31 December 2010 for special trusts already-established shall remain untouched."

In any event, "in the period from 1 January 2011 to 31 December 2019, the Länder may, in accordance with their applicable legal regulations, deviate from the provisions" of Article 109.3 GG (the prohibition to prepare the budget without the provision of receiving no revenue from credits) even though their budgets must be prepared "so that the 2020 budget fulfils the requirements" contained in Article 109.3.

As regards the Federation, the temporary flexibility that the German constituent of 2009 awards for the fulfilment of the new financial requirements is more limited. In fact, as provided for in Article 143d GG, the Federation may deviate from the new constitutional regulations on financial matters between 1 January 2011 and 31 December 2015 and, in each case "reduce the existing deficits" in the 2011 financial year. The Federation's annual budgets will be planned so that the 2016 budget satisfies the requirements of Article 115.2 GG (in other words, the Federation's revenue from credits will not exceed 0.35 % of the nominal gross domestic product) and the relevant implementing rules must be established by federal law.

The greater urgency for the Federation's compliance with the new constitutional requirements are due, on the one hand, to its borrowing capabilities, although also limited, being higher than those of the Länder, and also because compliance with the respective constitutional provisions by some Länder "will depend, to a large extent, on the contributions coming from the Federation itself" (Arroyo Gil 2010).

Because, as provided for in Article 143d.2 GG, in order to assist the Länder on 1 January 2020 to comply with the provisions of Article 109.3, "the Länder of Berlin, Bremen, Saarland, Sachsen-Anhalt and Schleswig-Holstein may receive, for the period 2011 to 2019, consolidation assistance from the Federal Budget" for a total value of 800 million Euros, of which 300 million Euros are for Bremen, 260 million Euros for Saarland and 80 million Euros each for Berlin, Sachsen-Anhalt and Schleswig-Holstein. These assistance payments for Länder in the most difficult financial situations will be "allocated on the basis of an administrative agreement under the terms of a federal law requiring the consent of the Bundesrat" on the condition that, in each case, the financial deficit is completely reduced by the end of the 2020 budgetary year.

The steps for reducing financial deficits and the monitoring of their reduction by the Stability Council, along with, among others aspects, the consequences in the event of a failure to fulfil the steps, will be regulated by a federal law requiring the consent of the Bundesrat.

In the last instance, Article 143d.3 GG sets out that the "financial burden resulting from the granting of the consolidation assistance shall be borne equally by the Federation and the Länder, to be financed from their share of the value-added tax" and details shall be regulated by a federal law that requires the consent of the Bundesrat. A clause that puts the solidarity principle into practice, since those Länder in a better economic situation (that according to the constitutional regulations will not receive the "consolidation assistance") must still contribute to funding the cost of the assistance granted to Länder in less favourable financial situations.

b) The "early warning system"

One of the most significant new elements of the constitutional reform of 2009 stems from the incorporation of the new Article 109a GG, by virtue of which, "to avoid a budgetary emergency, a federal law, requiring the consent of the Bundesrat, shall provide for" (1) "The continuing supervision of budgetary management of the Federation and the Länder" by a newly-created body: the Stability Council; (2) The conditions and procedures for ascertaining the threat of a "budgetary emergency," and (3) "The principles for the establishment and administration of programs for taking care of budgetary emergencies."

Said Budgetary Stability Council was created under Article 1 of the Law for the creation of a Stability Council and to avoid financial problems, of 10 August 2009 (Gesetz zur Errichtung eines Stabilitätsrates und zur Vermeidung von Haushaltsnotlagen, Bundesgesetzblatt, Teil I, S, 2702).

"The decisions of the Stability Council and the accompanying documents will be published" (Article 109a.3 *in fine*, GG) and the Council will be composed of the Federation's and the Länder's Finance Ministers and the Federal Ministers of Economy and Technology, primarily concerning (following the instructions of the Constitutional Court in the aforementioned "Berlin" ruling) the unification of financial statistics and the selection and determination of the appropriate indicators as prior conditions necessary for organising the "early warning system" to help prevent emergency budgetary situations (Sudhof 2009).

The Financial Autonomy of the Autonomous Communities in the Statutes of Autonomy Subject to Reform

The recent reform of the Statutes of Autonomy of Andalusia, Aragon, Castile and León, Catalonia, the Autonomous Community of Navarre, the Valencian Community, Extremadura and the Balearic Islands, has highlighted different ways of understanding the financial autonomy of the Autonomous Communities in a constitutional context that acknowledges the exclusive power of the State on "General Finances" (Art. 149.1.14 CE), as well as the original power of the same to establish taxes by law (Art. 133.1 CE), assigning the organic legislator with governing the exercise of the financial powers of the Autonomous Communities (Art. 157.3 CE), which means that the previous Article 149.1.14 CE, in connection with Articles 138.1 and 157.3 CE, makes the State responsible for regulating the exercise of the financial powers of the Autonomous Communities and for setting the levels of their contribution to the solidarity and leveling among them.

In any case, we point out that the above statutory reforms have taken place in Autonomous Communities belonging to the so-called general regime, leaving out the specifics of the Foral financial system, whose fiscal autonomy beyond the characters of a Federal State (Monasterio 2010).

Said state powers have been developed through the approval of the Organic Law on the Financing of Autonomous Communities (hereinafter LOFCA) that, through the reform implemented by Organic Law 3/2009 of 18 December and Law 22/2009 of 18 December makes a new adjustment to the financing model, paying attention to the powers assumed by the Autonomous Communities by extending their tax capacity and fiscal responsibility and perfecting the system of leveling among them. In this way, the imbalance that existed with regard to the decentralisation of the cost is corrected largely through the decentralisation of incomes from taxes, it being reckoned that, after this new payment, 90% of autonomous financing will stem from the communities' own tax resources and the remaining 10% from state payments (Herrero Alcalde, et al., 2010).

In any event, as the Constitutional Court itself has come to recognise, the constitutional regulations do not exclude the fact that the Autonomous Communities under the common financing system can legitimately regulate the

autonomous finances "as an essential element for attaining political autonomy" (Judgment 289/2000 of 30 November, FJ 3), provided that said regulation takes into consideration that the financial autonomy of the Autonomous Communities should be exercised "in accordance with the principles of coordination with the State's Finances and of solidarity among all Spanish people" (Art. 156.1 CE) and that it is adapted to the "framework of real possibilities of the State's financial system as a whole" (Judgment 13/2007 of 18 January, FJ 5).

Specifically, with regard to the budget of the Autonomous Communities, as the Constitutional Court recently recalled in Judgment 134/2011 of 20 July 2011 [BOE no. 197 of 17 August. FJ. 8a], the freedom to establish the income and expenses plan that is ultimately what the budget constitutes, is not "absolutely" acknowledged constitutionally (Judgment 237/1992 of 15 December, FJ 6); and therefore the imposition of budgetary stability criteria for the non-commercial public sector and Social Security system entities, through the Law on Budgets and by virtue of Article 3.2 of the General Law on Budgetary Stability are based, among other constitutionally-relevant aspects, on the limit to financial autonomy deriving from the principle of coordination with State finances of Article 156.1 CE, under the scope set forth in Art. 2.1b) of the LOFCA.

In this context, all the aforementioned statutory reforms include a Title dedicated to the regulation of the Finances of the respective Autonomous Community, even though, of these, the contents of the Statute of Autonomy of Catalonia—considered prior to the Constitutional Court ruling on the same to be the "peak of statutorily-defined autonomy"—(Corcuera Atienza 2009) has turned out to be particularly controversial, with its Title VI "The Funding of the Generalitat" establishing a system similar to the Agreement and Accord, specifying a time frame of 15 years in Additional Provision 8 wherein to compare the funding capacity per inhabitant of Catalonia to those of the Basque Country and Navarre, a precept that was removed when the Organic Law bill on the Autonomy Statute of Catalonia (hereinafter EAC) was enacted in Parliament (Medina Guerrero 2011).

As everyone knows, the reform of the EAC approved by Organic Law 6/2006 of 19 July was subject to an appeal on the grounds of unconstitutionality, which was resolved by Judgment 31/2010 of the Constitutional Court of 28 June where, among other aspects, the Constitutional Court ruled on diverse contents relating to the Finances of the Generalitat.

Specifically, several precepts included in Title VI, Chap. I of the Statute of Autonomy of Catalonia (The Finances of the Generalitat) were contested, as well as Additional Provisions 7, 8, 9, 10 and 3. For practical purposes, the contested precepts maybe categorised as follows:

a) Governing financial principles for the Funding of the Generalitat

With regard to the challenge of Article 201 Sections 3 and 4 EAC, the Constitutional Court considers that, since the first section is part of the header precept that contains the "principles" (and was not contested), it should be integrated in said context so that the reference therein to the Joint Economic and Fiscal Affairs Commission concerning the "development of this Title" should be understood to

be connected to the coordination and cooperation framework set forth by the Constitution: said Commission being "an instrument for favouring the integration of the positions of the State and the corresponding Autonomous Community" that neither displaces nor excludes the coordinating power of the State.

Concerning Article 201.4 EAC, the Court understands that "it is not unlawful" that the first line of Art. 201.4 EAC states the principle that the financing of the Generalitat shall not entail discriminatory effects for Catalonia, since the same "corresponds directly, on the other hand, to the provisions of Art. 138.2 CE" that actually rejects economic or social privileges among Autonomous Communities (FJ 131).

b) Economic-administrative and tax management bodies of the Generalitat

For its part, Sections 1 and 4 of Article 204 EAC "The Taxation Agency of Catalonia" were contested. With respect to the first, the Constitutional Court understands that the lack of a reference to the "reciprocity" that would acknowledge the possibility of the State intervening in the activity of the Taxation Agency of Catalonia "presents no doubts of constitutionality" insofar as the Court itself expressly rejected that the relations between the State and the Autonomous Communities "could be sustained upon the principle of reciprocity" (Judgment 132/1998 of 18 June, FJ 10 and those cited therein) given the "State's position of superiority" (Judgment 4/1981, FJ 3), and that it is in charge of financial "coordination" "which implies the notion of hierarchy."

Similarly, the Court understands that nor do the "autonomous legal tax management powers" enunciated in Article 204.1 EAC (management, collection, settlement, and inspection) raise problems of constitutionality "when they are projected onto the Generalitat's own taxes" (those that have already been ceded or are subsequently ceded by the State), unless however these are the powers covered by Article 156.2 CE and Article 19 of the LOFCA.

In the last instance, the challenge to Section 4 of Article 204 EAC was disallowed, for referring to the organisational and functional scope of the Taxation Agency of Catalonia, as this is instrumental with respect to Section 1 of the same statutory precept (FJ 132).

In this context, Article 205.1 EAC "Economic-Administrative Bodies" was also challenged, which provides for the administrative review of claims that taxpayers may make "against the acts of tax management of the Taxation Agency of Catalonia."

In this respect, in the Court's opinion, it has no qualms about the constitutionality, understanding that "the reviewing authority has power pertaining to the establishment of said taxes" when it concerns taxes of the Autonomous Community itself or regarding the taxes ceded by the State, "as this does not call the legal system for the assignment of taxes [from the State to the Autonomous Communities] into question." In the last instance, the reference to "its own economic-administrative bodies" has, in the opinion of the Court, "an exclusively self-organisational dimension, without the *nomen* attracting any economic-administrative revisory power to the Generalitat," a competence that can only be established by state law, pursuant to

the provisions in Arts. 156 and 157 CE (Judgments 192/2000, FJ 10; and 156/2004, FJ 6) (FJ 133).

c) Participation of the Generalitat in the mechanisms to ensure leveling among the Autonomous Communities for the provision of basic public services

The challenge to Sections 3 and 5 of Article 206 EAC are included under this heading, the first of them comprising the only declaration of unconstitutionality by the Constitutional Court that affects Title VI "Funding of the Generalitat."

Even though said Article 206.3 EAC does not call into question the State's power to define the fundamental public services and the level of service in the Autonomous Community, as set forth in Article 158.1 CE, the first line of Article 206.3 establishes that the Generalitat will contribute to the solidarity and leveling of such services "provided that [the Autonomous Communities] also make a similar fiscal effort," it being stated that, in the opinion of the Constitutional Court, this is "unconstitutional," insofar as it establishes a "requirement" so that Catalonia contributes to the solidarity and leveling mechanisms for basic services, and that the State will be responsible, under previous Arts. 149.1.14 in connection with Arts. 138.1 and 157.3 CE, "to govern the exercise of the financial powers of the Autonomous Communities and set the levels of their contribution to leveling and solidarity." In this context, the determination of the "fiscal effort" that the Autonomous Communities should make "is a matter that only the State itself can regulate, following the corresponding actions within the constitutionally-established system of multilateral cooperation and coordination."

The concept of "similar fiscal effort" that, as it has been understood, could be compared to the expression "in normative terms" contained in the current Article 15 of the LOFCA, according to the wordings given by Organic Law 3/2009 of 18 December, considering, from this perspective, that its declaration of unconstitutionality could signify "the loss of the statutory guarantee that was expected by introducing this principle in the EAC" (Grup d' experts per encàrrec MHP 2010). Furthermore, this declaration of unconstitutionality has been deemed to be based on a "not exclusively literal" interpretation of the precept in that, beyond the "more or less imperative terms in which they seem to be set", more relevance is granted to the state power, "that nobody disputes" (Arias Abellán 2010).

In turn, the provision in Article 206.5 EAC, also challenged, as it sets out that "the State shall guarantee that application of the leveling mechanisms shall in no case alter the position of Catalonia in the pre-leveling ranking of per capita earnings," does not exactly constitute, in the Court's opinion, "a condition imposed on the State" by the Statute of Autonomy of Catalonia, but "only the reiterated expression" of a duty for the State that stems immediately and directly from Art. 138.1 CE (FJ 134).

d) State-Generalitat funding cooperation mechanisms

Sections 1, 2a), b) and d) of Article 210 EAC were challenged, under which the "Joint Economic and Fiscal Affairs Commission" was created.

The first of the challenged precepts defines the Joint Economic and Fiscal Affairs Commission as the "bilateral body for relations" between the State administration and the Generalitat, and establishes that it is composed of an equal number of representatives of the State and the Generalitat. The Constitutional Court does not consider it unconstitutional so long as it is interpreted "in the sense that it neither excludes nor restricts the capacity of the multilateral mechanisms concerning economic funding, nor violates the reserve of organic law set forth in art. 157. 3 CE and the consequent state powers." Because, in the Court's opinion, any decisions concerning the financial capacity of the Autonomous Communities should be taken within the multilateral bodies and specifically within the Fiscal and Financial Policy Council, although this does not prevent the simultaneous existence of bilateral cooperation bodies, provided that these latter do not exclude or restrict the decision-making powers of the former. The Constitutional Court applies an identical argument to the judgment of contested Article 210.2 a), b) and d) EAC (FJ 135).

An interpretation that has been considered the "pristine example" of the Constitutional Court's tendency in this Judgment, because it broadly extends the interpretative judgment, being able to incur in an "interference of the negative legislator in the field of the ordinary legislator and ends by rewriting its crooked lines" (Alonso González 2010) and, specifically, by reducing the Commission to a "mere consultative body" (Pagès i Galtés 2010).

e) Investments of the State in infrastructures in Catalonia

In this area, the challenged EAC provision is Additional Provision 3.1, the content of which the Constitutional Court deems unbinding for Parliament in the exercise of its functions of examining, amending and approving the General Budgets of the State (referring to the opinion expressed by said Court in FJ 11 of Judgment 13/2007 of 18 January) and therefore in compliance with the Constitution (FJ 138).

An "interpretation" of the Court that, again in this case, turns out to be the only one that makes the statutory provision compatible with the Constitutional Text, but that does not give "a determining sense" to the rule of law (Fernández Amor 2010).

f) Participation of the Generalitat in state taxes

Additional Provisions 8ª, 9ª and 10ª EAC provide for the cession of the revenue of certain special taxes to the Autonomous Community of Catalonia, incurring, in the opinion of the Constitutional Court, (referring to FJ 4 of Judgment 181/1988 of 13 October), in the "phenomenon" of "statutory regulations imposed by the drafting of a bill or Decree-Law on the scope and conditions of the tax cessions prescribed in the corresponding Statute." The Court affirms that said "phenomenon" is connected with the principle of constitutional cooperation and loyalty, and therefore is only acceptable "with respect to the legal authority of the State exercised by Parliament (art. 66.2 CE)" that can only result in the commitment of the Generalitat and the Government to "agree in a Joint Commission" the preparation and content of an ordinary bill that will be freely enacted by Parliament (FJ 137).

Conclusions

As verified, the formula for distributing state resources among the territorially-decentralised entities in Germany and Spain are substantially different, stemming from the descending or ascending mechanism, respectively, of their formulation. Certainly, the reform of German fiscal federalism is set in the context of a constitutional reform, while the reformulation of the financial autonomy of the Spanish Autonomous Communities is included in the reforms of some of the Statutes of Autonomy, in such a way that, in appearance at least, the effects arising from both fiscal federalism reforms are clearly contrasting.

In fact, the singularisation of the elements of financial autonomy themselves in the respective Statute of Autonomy obliges the state authorities (Parliament and the Constitutional Court) to redefine the limits to the financial autonomy of the Autonomous Communities time and again in a never-ending process, since, given that specific Foral financial systems provide said Autonomous Communities higher incomes per capita than those of the Autonomous Communities of the general regime, they trigger an emulator effect in these latter.

However, the apparent "deconstruction" of fiscal federalism in Spain, in the sense wherein the term has been used with reference to the State (Balaguer Callejón 2001), does not stem so much from the lack of a regulation contained in the Constitutional Text, as from the perception of the openness of a constituent moment that can be seen in the reform of the latest Statutes of Autonomy, a circumstance that differentiates these latter statutory reforms from other previous ones.

Because, beyond what is appropriate or not from the start of constitutionally forming a federal State, what is certain is that the State of the Autonomies has now reached a degree of normative and jurisprudential development that is sufficiently extensive and consolidated to make the legal grounds of a "fiscal federalism" possible for the purpose of the State's integration, above all, because there is currently no doubt that the system of interregional transfers is of great importance, both in the integration processes in Europe or Germany, and in the disintegration processes in Belgium, Canada, Italy, and the former Soviet Union (Persson and Tabellini 1996).

In any event, the acceptance for processing by the Plenary of the Bureau of Congress of the Reform Proposal of Article 135 of the Spanish Constitution (BOCG of 26 August 2011, Series B, no. 329-1), processed using the emergency procedure, and clearly inspired by the spirit favoured by German fiscal federalism reform, comes to signify the constitutionalisation of the principle of budgetary stability with a binding nature for all Public Authorities, raising to a constitutional level the guiding principle of General Law 18/2001 of 12 December on Budgetary Stability and that of Organic Law 5/2001 of 13 December, complementary to the General Law on Budgetary Stability, whose application concerning the tax authorities of the Autonomous Communities was ruled favourably upon by the Constitutional Court in recent Judgment 134/2011 of 20 July.

References

Albertí Rovira, E. (2006). Las reformas territoriales en Alemania y en España y la sostenibilidad del paradigma autonómico español. Revista Española de Derecho Constitucional, 78: 9–42.

Alonso González, Ll. M. (2010). La financiación de la Generalitat (Sentencia 31/2010, de 28 de junio). Revista Catalana de Dret Públic. Especial Sentencia sobre el Estatuto, 423–428.

Arias Abellán, Mª D. (2010). Sobre la constitucionalidad de determinados preceptos del Estatuto de Autonomía de Cataluña relativos a la financiación autonómica y local. Revista Catalana de Dret Públic. Especial Sentencia sobre el Estatuto, 429–434.

Arroyo Gil, A. (2010). La reforma constitucional de 2009 de las relaciones financieras entre la Federación y los Länder en la República Federal de Alemania. Revista d'Estudis Autonòmics i Federals, 10: 40–71.

Balaguer Callejón, F. (2001): "La financiación de las Comunidades Autónomas". In, López Guerra, L. (Coord.): Estudios de Derecho Constitucional. Homenaje al Prof. Dr. D. Joaquín García Morillo. Valencia, Tirant lo Blanch, 477–491.

Corcuera Atienza, J. (2009). Las reformas del modelo territorial en Alemania y en España: dos lógicas diferencias. In, Tudela Aranda, J. & Kölling, M. (eds): La reforma del Estado Autonómico español y del Estado Federal alemán, 43–70.

Cruz Villalón, P. (2006). La reforma del Estado de las Autonomías. Revista d'Estudis Autonòmics i Federals, 2: 77–99.

Elías Méndez, C. (2006). La reforma de la Constitución financiera en Alemania: Una reforma pendiente. Revista de Derecho Constitucional Europeo, 6: 223–252.

Fernández Amor, J.A. (2010). Reflexiones sobre la naturaleza jurídica de los compromisos de gasto previstos en la Disposición adicional tercera del Estatuto a raíz de la STC 31/2010, de 28 de junio. Revista Catalana de Dret Públic. Especial Sentencia sobre el Estatuto, 438–441.

Gesetzentwurf der Fraktionen der CDU/CSU und SPD (2009). Deutscher Bundestag. 16 Wahlperiode. Drucksache 16/12410, at http://dipbt.bundestag.de/dip21/btd/16/124/1612410.pdf

Gunlicks, A. (2007): German Federalism Reform: Part One. German Law Journal, 8: 111–131.

Grup d'experts per encàrrec MHP Informe sobre la Sentència del Tribunal Constitucional sobre l'EAC (2010), at www.3cat24.cat/multimedia/pdf/2/6/1279183979262.pdf

Herrero Alcalde, A.; Ruiz-Huerta Carbonell, J. y Vizán Rodríguez, C.(2010). La reforma de la financiación autonómica de 2009. Revista d'Estudis Autonòmics i Federals, 11: 169–205.

Hrbek, R. (2009). La Reforma del Federalismo en Alemania. In, Tudela Aranda, J. & Kölling, M. (eds): La reforma del Estado Autonómico español y del Estado Federal alemán, 19–30.

Judgment of the German Constitutional Federal Court of 19 October 2006. BVerG, 2 BvF 3/03 de 19.10.2006, at http://www.bverfg.de/entscheidungen/fs20061019_2bvf000303.html

Ley de reforma de la Ley Fundamental (Bundesgesetzblatt 2006, Teil I, Nr. 41, 31.08.2006).

Ley de reforma de la Ley Fundamental (Bundesgesetzblatt 2009, Teil I, Nr. 48, 29.07.2009)

Medina Guerrero, M. (2011). Las haciendas autonómica y local en la STC 31/2010. Revista d'Estudis autonòmics i Federals, 12: 471–501.

Melica, L. (2011): Ripensare le autonomie nell'ottica del federalismo fiscale: La meritocrazia degli amministratori locali e la "dimensione territoriale ottimale", at http://www.forumcostituzionale.it/site/images/stories/pdf/documenti_forum/paper/0275_melica.pdf

Monasterio Escudero, C. (2010). El laberinto de la Hacienda Autonómica. Thomson-Civitas, 2010: 257–306.

Pagès i Galtés, J. (2010). La financiación autonómica en la Sentencia 31/2010 del Tribunal Constitucional sobre el Estatuto catalán de 2006. Revista Catalana de Dret Públic. Especial Sentencia sobre el Estatuto, 442–448.

Oates, W. (2005). Toward a Second-Generation Theory of Fiscal Federalism. International Tax and Public Finance, 12: 349–373.

Oeter, S., and Wolff, J. (2006). La posición del Bundesrat tras la reforma del federalismo. Revista de Derecho Constitucional Europeo, 6: 99–123.

Persson, T. and Tabellini, G. (1996). Federal Fiscal Constitutions: Risk Sharing and Redistribution. Journal of Political Economy, 5: 979–1005.

Schneider, H.-P. (2009). La reforma del federalismo en Alemania. Fines, negociaciones, resultados. Revista d'Estudis autonòmics i Federals, 8: 11–36.

Sturm, R. (2011). Informe Objetivos y resultados de las dos reformas del federalismo de Alemania, 2006 y 2009. Cuadernos Manuel Giménez Abad, 1: 15–32.

Sudhof, M. (2009). Los puntos clave en la discusión de la Reforma del federalismo II y tendencias futuras. In: Tudela Aranda, J. & Kölling, M. (eds): La reforma del Estado Autonómico español y del Estado Federal alemán, 173–185.

The Senate: Chamber of Territorial Representation. Reasons for Its Existence

María Marta Cerro

The Senate: Chamber of Territorial Representation. Problems Encountered in Its Operation

The bicameral system is necessary for the operation of a genuinely federal system. The Chamber of Territorial Representation ensures that the functions that have been assigned to the federation are carried out effectively, providing a valuable means of mediation in the conflicts of interest and in the formulation of a basic policy within the area of federal jurisdiction, for which it must take into account the interests of the various member states. Therefore, it is, by needs of federalism itself, a chamber that serves to channel a certain participation of the member states in federal decisions, and particularly in the formation of the federal laws, and not as a chamber for second readings, for reflection or for deliberation. Hence, the need and the importance of the Chamber of Territorial Representation to structure and operate the Federal State (Santolaya Machetti 1984), are the "proper instruments for the accomplishment of one of the fundamental categories of the Federal State, cooperation between both the central State and the units of decentralization as well as among the units themselves."

The idea that the interests of the member states should be expressed is the senate is based on two reasons: a historical reason and a systematic reason.

The historical reason leads us to the model of the federal states, whose archetype is the United States Senate, and whose intention when implemented, was to establish a "more perfect union" among states. This body was structured on a different criteria from those used for classic parliamentary representation,[1] which were based on universal suffrage and proportional democratic representation. The American model has always exercised an undeniable influence on other systems,

[1] El Senado (1996).

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so that the type of representation that they adopted was repeated in many federal states. Under this scheme, the body of territorial representation is always at parliamentary level, an idea seen until not too long ago as the impediment to alternative ideas to this system.

The systematic reasons are linked to the institutional construction of modern states, which considers parliament as the center of the democratic system. Consequently, the participation of the territories at a national level necessarily implies that they are present in parliament as a place of expression of popular sovereignty. Their presence allows them to participate in the main decisions, which benefit not only their own interests, but also those of democracy and give political unity to the state.

This last mentioned reason seems the more appropriate, but not necessarily the more functional.

Is the Senate the Expression of the Manifestation of the Member States in the Formation of the Federal Trust?

The senate should represent territorial entities in a federal state or in a decentralized state, and it should not be a duplicate of the Chamber of Representatives. The senate has not been established to provide representation to "men who are distinguished by their birth, wealth, and position" (Montesquieu). Nevertheless, it is true that the majority wanted a chamber of reflection, determination, counterbalance and of technical improvement, functions that develop the old idea of liberal conservatism to halt or balance the chamber that, having emerged from suffrage, represents "volatile public opinion" (The Federalist 1987), with the chamber that represents quality and ensures continuity (Constant). If such explanation had gone hand in hand with the bankruptcy of the democratic principles at the time of the selection of senators, we would be, unreservedly, before an aristocratic chamber without any possible insertion in a constitution of progressive and democratic imprint and, therefore, egalitarian. However, as this is not the case, the fact that it is a democratic and not an aristocratic chamber has to be proclaimed as an essential element to its nature.

From the logic of democracy, the senate is not essential, but it is not contradictory with it either; consequently, the effectiveness of its activity will provide the adjusted criterion in order to issue final statements about its existence.

The second essential feature of the senate's nature is the territorial distribution of power in accordance with the model of a federal state. According to this, the senate is the chamber of territorial representation, thanks to which, in the words of Garcia Pelayo, one can say that the federal government "is not a simple balance between a central power and a plurality of powers, but a dialectical synthesis between the two of them" (Garcia Pelayo 1959).

The representation of the territorial entities in the senate is "configured as a special representation" (Punset 1987). Specifically, it is special because it seeks to defend the interests of the member states, and it is territorial because the local entities are the ones receiving the power from the federal constitution to appoint the members of this chamber.

Although this is the doctrinal thought of many, the performance of the senate was often far from becoming the place and the instrument needed to express the will of the member states of a federation in the formation of the federal trust.

Durand says that there are three matters to analyze with respect to the Chamber of the States in order to know whether the so-called indirect participation of the member states in the formation of the trust of the federal state actually occurs through this organism (Durand 1930).

In the first place, the way the members of the lower houses are recruited, and the legal relationship with the member states will be useful to affirm that, legally, only in Germany that the senate is considered as the body that represents the communities of the Federation. Only in this case, the members of the Reichsrat belong to the communal governments and can, therefore, be revoked because only in this House, the representatives of each community are allowed to vote to such an effect.

However, this model of Chamber of Ambassadors, proper of the Confederation of States, is exceptional in the compared panorama, and owes its existence to the historical precedent of the German Empire, and cannot be considered a parameter to judge the nature of the different senates in the rest of the federal systems.

There is no representative or organic relation with higher legal effectiveness than the one that may exist between the members of the Lower Chambers and their constituents, whether the senators are appointed by the legislatures of the member states or by the voters. If there is no imperative mandate and revocation, and if the senators from each member state do not have an obligation to cast an equal vote, but rather to act in the House as free representatives, then neither are they bodies of the member states in the sense that the organic relationship has, nor is the senate the body where the member states participate in the production of the federal trust.

The mistake of attributing consequences that go beyond the act of election or appointment to the notion of representation derives from it. The intervention of some bodies of the member states in the way members of the senate are recruited does not convert the senators or the chamber into a body that expresses the will of the member states, which is necessary to produce the federal trust, in concurrence with the will of the people as a whole represented in the Lower House.

There are dynamics or limitations, other than those that affect the members of the other camera, which play on the senators and the senate but not from a political point of view. The only characteristic system is that of Germany and it does not exist in any other country. On the other hand, the trust of a member state expressed by the senators, whom this state has chosen for the federal congress, cannot be questioned.

The second issue that demands the attention of Durand is the criterion to be followed to allocate the seats for the member states. After a lengthy review of the

assumptions for choosing equal number of seats, following the model of the Constitution of the United States, or the proportionality in relation to the number of inhabitants, the author concludes that whatever the criterion, the federal or non-federal nature of the senate does not depend on it.

Thirdly, Durand deals with the position of the senate in relation to the popular chamber. Again, after a thorough examination of the compared panorama, he raises a dual question: "If in effect it is required that the Senate have an absolute legislative veto to have the participation of member States in the formation of the federal decisions, it is necessary to refuse this character not only to Germany and Austria, but also to Australia and perhaps to Venezuela. Thus, at the same time, Bolivia, Ecuador, Uruguay, Cuba and the Dominican Republic would be included in the class of federal States (by reason of this involvement of the non state communities in the formation of the state will) and Australia would be excluded."

> And if it is not required that the Senate, by itself, prevent the passing of a law, to what degree of power shall the required competence of this Chamber be fixed so that the member States participate in the formation of the federal decisions? Will this participation perhaps result from minimal powers, such as the Austrian Bundesrat? This would be reducing it almost to formalism. But if that is not so, where is the limit beyond which there is participation?

The survival of the bicameral system in federal models is certainly not in question, but its meaning has changed considerably.

From results obtained in the various countries where the chambers of territory work properly, experience shows the insufficiency of many jurisdictions with regard to the implementation of the senate as house of representation for territorial interests, because it played a weakest role in the defense of those territorial interests; in many states the rise of other institutional channels of representation functioned in a more effective way (Garcia Morales 1997).

Structural and Functional Problems

The Constitutional doctrine, therefore, has drawn attention to the existence of two types of problems—structural and functional—in the territorial chambers, which, if solved, would bring an improvement in the representative capacity of the senate.

The structural problems are the absence of an imperative mandate, direct elections and the designation of the representatives by their territorial legislative bodies, which prevent a proper exercise of territorial representation (Punset 1987) by encouraging the political-partisan logic when it comes to taking decisions.

Functional problems appear as result of the absence of an effective power for decision-making in the senate, either because it does not have the power of veto in the legislative procedure, or because its role was reduced in front of the other chamber (Ruggiu, 2003).

Thus, there are reasons that speak about a crisis affecting these senate bodies, which cannot carry out their task successfully due to a defective articulation.

We should ask ourselves if the reasons for this dysfunction are temporary (and, therefore, might be overcome with constitutional reform), or if the reasons are the result of changes in the historically conceived "ideal" of territorial representation. The answer may the found in the behavior of the federal system, checking on the current situation of the dynamics of territorial representation in federal states.

One of the characteristics of the federal states nowadays is the tendency to cooperate (Alberti Rovira 1985),—especially in their relationship of vertical dimension, which is expressed in cooperative structures that stand for the absence or the lack of action of the territorial chambers. These structures are considered alternative or complementary models to the senate and emerged to have an institutional cooperative role (Lucas Murillo de la Cueva 2000), and have gained political importance and acquired an institutional position in the different systems of the federal states.

Territorial representation and cooperation are different realities, since the first is an essential requirement of all federal states while the second responds to one way of federalism and appears as its feature with the emergence of the welfare state, faced with the need to overcome the outline of dual federalism, the purpose of which is the common fulfilment of the tasks inherent to the state (Roig Moles 1994).

It has to be said that the meeting and progressive identification between cooperative and representative circuits is a process that arises from a situation of crisis or from the lack of operating capacity of the bodies of traditional territorial representation (Garcia Morales 1997). This is shown through the fact that in the federal states where they function, such assimilation has not arisen. Germany is a clear example of separation between representative circuits (Bundesrat) and cooperative circuits (Intergovernmental Conferences).

Facing the dysfunctions of the territorial entities in regards to representativeness in the senate of the federal states, we can conclude that although there are common causes, there is no unanimous response to all cases. Conclusions can be drawn only from the analysis of each particular case. The truth is that these dysfunctions appear in some countries as a result of structural problems and in others as a result of the needs imposed by the dynamics of the federalism of cooperation (or by both at the same time). Such cooperation led to the emergence of intergovernmental bodies as appropriate and necessary tools to put into practice federal principles. Some of them, while in operation, assimilated the representative and cooperative circuits. Others, on the other hand, were set up only to deal with coordination and cooperative aspects stricto sensu.

The Senate in Argentina

According to the Constitution of Argentina written in 1853, the legislature was divided into two chambers, the Chamber of Representatives representing the people of the nation, and the Senate, representing the provinces. The representation of the provinces in the Senate became quite relative, as the senator is neither subject to the

instructions of the provinces nor has to render accounts about his performance, as he is first a "national legislator" and then a provincial representative, protected by the constitutional privileges stated in Article 68 of the Constitution; even the non-approval of one vote or a statement from the senator by his constituents could become illegal in front of a question of privilege. This independence of the senator from the province that elected him unlinks him from the defense of the specific needs and interests of the territories he represents.

For various reasons, which exceed the present paper, federalism did not behave according to the expectations of the constituent members. This made great part of the doctrine to consider a reform for its recovery necessary. The suggestive, as noted in the opinion of Frías, is that the senate did not "function as Chamber of the autonomies", because it never effectively played its institutional role of defending local interests. Such a circumstance represents "an important factor in the weakening of federalism" (Quiroga Lavié 1991). Such a finding was made evident in the absence of a senatorial doctrine on federal intervention, on the control of natural resources and on federal co-participation both with regard to the distribution between the nation and the provinces and among the provinces themselves. Its result was the amendment of Article 54 in relation to the senate. Has this reform helped to improve the performance of Federal Senate?

The Search for Representativeness

Representativeness is understood as the capacity to accurately reproduce the wills of the citizens represented and it certainly means to transform, in a significant way, the nature and role of the parliamentary body. I believe that a path to reach a satisfactory conclusion would be to investigate deeply—through an exhaustive analysis—the interests that the representatives claim to defend and uphold during their parliamentary session and the factors that contribute to define it, that is to say, to put ourselves in the field of studies of political representation. In this case, we are only interested in the one that, due to its fundamental nature, seeks into the conduct of the representatives, in their behavior and attitudes, as a method to determine the criterion that guides their actions and the factors that they have put forward, from different perspectives, to explain them.

There are two dimensions that have covered, from ancient times, the normative political theory expressing two great controversies where the discussion of the representative link rests: the style and the focus of the representation.

The first controversy was introduced by the style, and it refers to how a representative behaves or should behave in order to work for the best interest of the citizens, and following the instructions of the people he represents, the mandate, or his own common sense as to what he considers better for them, work for their independence.

The *focus*, which has recently become more complex due to the importance of new players on the political scene, mainly the political parties, started to gain

importance and control over the processes, since the representatives lead their actions in response to previous criteria where they establish who they represent and therefore which interests.

The dilemmas of representative democracy are many and diverse. In the current political systems "legislators are elected by a geographically defined sector of the population to represent their interests, despite the fact that their mission as that of representatives is to rule the nation as a whole" (Crisp and Ingall 2002). This is, in Pitkin words, the classic dilemma of representation. It could be argued that there is a clear contradiction between the behavior expected by the constitutional texts and the institutional arrangements designed to get them (Pitkin 1968). Could it be said that the method whereby we select our representatives directly affects the objectives that they are pursuing and the manner they behave? This is especially in the importance that territories have—the electoral districts where they have been elected senators—in the way of understanding and carrying out representation. To explain the *focus* of territorial representation, it is necessary to deal with it in two dimensions: an *attitudinal* dimension that measures the degree of importance the senators give to the territories in their representative conceptions and *behavior*, which measures the flow of bills they start and that only affect their territories, i.e. they have geographically concentrated benefits.

Final Reflection

I am inclined to think that any improvement in the Argentine system will necessarily arise from a serious reflection and analysis of the two dimensions that explain representative behavior: the style and the focus of representation.

In this analysis, three main factors must be taken into account: (1) the degree of federalism; (2) the characteristics of the electoral system ; and (3) the level of centralization of the political parties.

The secondary factors to take into account are: (1) the degree of nationalization of party organizations; and (2) the characteristics of the territorial entities where the legislator comes.

Other variables should be added to these factors: re-election, regional political experience, attitude towards party discipline, and the way in which representatives work in Congress.

Only by detecting reality and its problems will we be able to approach possible solutions. This clearly confronts us with the techniques of change when perhaps a formalism of yesteryear still ties us to schemes that respond more to specific interests than to ideal values. Hence, this should not lead us to look so much to restoration in the prospective, which implies greater imagination and daring.

References

ALBERTI ROVIRA, Enoch.,1985 “Las relaciones de colaboración entre el Estado y las Comunidades autónomas”, en Revista Española de Derecho Constitucional. 14:155

CRISP, B. and INGALL, R., 2002. “Institutional Engineering and the Nature of Representation: Mapping the Effects of Electoral Reform in Colombia”. American Journal of Political Science, 46: 733–748.

ROIG MOLES. E. 1994 “La participación de las instancias federadas: una perspectiva comparada”, en Informe Comunidades Autónomas. Instituto de Derecho Público, Barcelona, 577

RUGGIU, I., 2003 “Órganos y dinámicas de representación territorial en los estados compuestos”, en Revista Española de Derecho Constitucional. 67:5

El Senado, 1996. Cámara de representación territorial, en III Jornadas de la Asociación Española de Letrados de Parlamentos, Tecnos, Madrid, p. 75

BARRERA BUTELER, G. 1996. Provincias y Nación. Ed. Ciudad Argentina, Buenos aires, p. 403

DURAND Ch., 1930 Les Étals federaux, elude de droit conslilulionnelposilif, Librairie du Recueil Sirey,París,.pp 185 a 358.

FRIAS, P J. 1988 El proceso federal argentino. Edic. del autor, Córdoba, p. 34

GARCÍA MORALES, M. J. 1997“Tendencias actuales de la colaboración en los federalismos europeos: una perspectiva comparada”, en Cuadernos de Derecho Público, 2, p.223

GARCÍA PELAYO, M., 1959 Derecho Constitucional Comparado, Alianza editorial, Madrid, pág. 230

HAMILTON A. MADISON J. y JAY J., 1987 El Federalista, FCE, pág. 35.

LUCAS MURILLO DE LA CUEVA, E.2000 Comunidades autónomas y política europea. Civitas, Madrid, p60

PITKIN, H F., 1968 El Concepto de Representación, CEC, Madrid, pp. 65–100

PUNSET, R.1987 El senado y las Comunidades autónomas. Tecnos, Madrid, p. 119.

QUIROGA LAVIE, H. 1991 Derecho Constitucional Latinoamericano. Unam, Méjico, p. 724.

SANTOLAYA MACHETTI, P.1984 Descentralización y cooperación, Instituto de Estudios de Administración Local, Madrid,p. 57.

Reinventing the European Union: The Financial Crisis, an Opportunity for a Federal Model

José Chofre-Sirvent

Introduction

The current financial crisis is proof that it was a mistake not to have shaped the EU as a proper political union from its very inception, since such a move would have allowed effective coordination of the member states' various economic policies. Nonetheless, the financial crisis does hold out an opportunity for the European Union to be politically, economically, and institutionally strengthened—and the threat that it will fall apart if the necessary measures are not taken with due urgency. The challenge may also help strengthen the EU's own international leadership. If this is to be achieved, it is essential to lay the foundations for proper economic government, and to further extend coordination of fiscal policy, as well as introducing the necessary structural reforms. And all of these changes must be inspired by the federal model.

Insufficient Democratic Structuring of the European Union and Its Effects on the Euro

The financial and economic crisis that has menaced the future of the European Union is in fact a profound political crisis. The problem is not only that the Economic and Monetary Union lacks any sustaining political structure that would help it cope with the challenges that continuously hound it, but that at the heart of this situation lies a mutation in the relations of power. Until recently, politics put all its resources into regulating the economy and subjecting the financial powers to a

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certain discipline. Now, however, the political powers (government and parliament) are bound to comply with the recommendations emanating not from community institutions (that would be unproblematic, forming as it would a normal part of institutional workings) but from faceless financial powers lacking any source of legitimation. This is the terrible situation we now face. Moreover, against the almost-complete supremacy of neo-liberal thinking, what is really being discussed is a reappraisal of the socio-economic conceptions of continental Europe, and what is at stake are the defining principles and values of the European Union.

The tragic outcome of the clash between economics and politics is that economics has now become politics and politics, as a whole, has become economics, clearly evidencing the capitalist structuring of state and market. Matters have reached such a head that speculative funds have become "political players", in the sense that they can dictate the economic and monetary policies of states and even of central banks. The immediate consequence is a profound undermining of democracy within the ambits of states and in community structures. Legislative powers will be subject to the dictates of the "new political actors", and will have increasingly less room for manoeuvre. Politics is now unashamedly in thrall to the dictates of economic powers, and democracy is suffering increasing deterioration.

The Greek financial crisis is only the beginning of a process that holds out bleak prospects for the future. The ratings agencies and the speculators have now turned their sights on currencies and public debts. In this situation, the euro is the weakest link in the chain, and by extension, so too is the European Union, lacking any political structure that might sustain it in situations of such extraordinary urgency as at present. It seems unlikely that there will be any quick fix for the crisis. It is no exaggeration to think that it might even affect relations between EU members, given that some national economies dominate others (bank concentrations are a case in point), fostering not solidarity, but intensified competition. Nonetheless, as we shall see, there are indications that the very gravity of the crisis may bring about a change in perspective, leading to strengthened mechanisms of solidarity—although the authenticity of this solidarity may to some extent be debatable, given the exorbitant conditions imposed by the IMF, whose aim is primarily to protect the banks.

In any case, with the qualifications we have made above, the profound democratic deficit of the EU's institutional structure, combined with the dangerous lack of transparency (what has been operating throughout the financial crisis is not the community's institutional structure, but a Franco-German directorate) are a burden on the European Union's credibility. They affect not only its very legitimacy and the principles of the rule of law, but also its international leadership, and the very survival of the euro, which has represented the culmination of a key stage in the process of European integration. It is this last issue that we want to highlight here.

The Euro's Deficient Institutional Architecture: The Origins of the Crisis. The "Euro's Original Sin"

In its origins, European integration was driven by strictly political motivations; the Second World War had only recently ended and there was felt to be a pressing need to take all possible steps to prevent a similar conflict from breaking out. However, the community was structured and subsequently developed on economic foundations. The great majority of the sovereign powers handed over by the member states to the EU are economic. In contrast, developments in the area of politics have been quite limited. Since the introduction of the euro, this gap between the two dimensions, economic and political, has widened. Following the signing of the Maastricht Treaty, attention centred on paving the way for the creation of a single currency. Political issues, on the other hand, were treated as being secondary and irrelevant.

The decisive factor leading to greater European integration was the creation of the euro. However, two key ingredients were missing for the future viability of this step, so important for integration. On the one hand, monetary integration was not paralleled by extended political integration, which would have meant incorporating the necessary political and institutional mechanisms for economic and financial governance of the EU[1]—with a strongly structured political union the impact of the crisis would have been considerably lessened. On the other hand, a single monetary policy has been implemented with no common economic and fiscal policy (these areas remain in the jurisdiction of the member states) and a European central bank with only limited powers. These factors have created the ideal breeding ground for profound destabilisation of the Eurozone—with all the associated hazards—given certain conditions, such as the present financial and economic crisis.

As Pedro Montes rightly pointed out[2] in 2001, we have reached a point where "further delay in European political union may affect the economy of the Union and particularly the euro." Failure to meet the conditions guaranteeing stability of the euro would cast doubt on its viability; political consensuses between member states need to be clear and uniform. The scenario painted by Montes is exactly the one that began to play out in the EU from 2008 on, with the financial crisis in the USA, followed by the crisis in the EU as a consequence of the critical situation of the Greek economy.

Due to its weaknesses, this economic and financial "non-Europe", lacking the mechanisms of governance needed to make decisions and respond to the crisis, is having effects that are almost as devastating (if not more so) than the assaults by the

[1] The main reasons for this lacuna are well known: reluctance by Germany to share decision-making on the euro, the currency that had substituted its iconic Deutschmark and which was so clearly dominated by the German economy; and the position of Britain, which had stayed out of the euro and resisted economic government of the Eurozone.

[2] Montes (2001), pp. 89–94.

ratings agencies; in practice, this situation is one of the single greatest risks to the European Union.[3]

It was only in a few academic circles that attention was drawn to the deficient structure that dogged the euro from its very inception. These writers criticised the fact that a new currency had been devised without any of the scaffolding (fiscal policy, economic policy, etc.) considered essential in any other circulating currency. When the euro was solemnly ushered in and national currencies abolished, a historic change took place; the states, previously the repositories of sovereignty, were stripped of an essential instrument for implementing their economic policies (e.g. currency devaluation). An obvious example was the transfer of sovereignty in the field of monetary policy from the states to the European Central Bank—whose powers, moreover, are not comparable to those of a real central bank, and specifically those of the US Federal Reserve, as we shall see.

The rest of the academic community expressed unbridled enthusiasm for the new currency (which was undisputedly a potent political symbol of European integration). It was only with the coming of a profound and dramatic financial crisis of unpredictable consequences that they began to question the deficiencies and weaknesses underpinning a euro that now looked dangerously rocky. It is at this point, says Montes, that "the whole financial system is called into question, with the emergence of unresolvable levels of debt."

As the author puts it, the key to the problem whereby the euro stands at the epicentre of the earthquake, lies in the external deficit (the amounts owed by certain countries to others).[4] Yet, governments (and the great majority of opposition parties) have persuaded public opinion that the single source of all ills is the domestic government deficit, "when in actual fact this is only one part – and by no means the most important – of the current imbalances". And in such a situation, the only solution they propose is budgetary adjustment. In Spain, the burden of such cutbacks in Spain will fall on those who did not cause the crisis, the working class.

If one thing is clear, it is that the escape from the crisis is undisputedly being used to turn the neo-liberal screw even tighter. Montes is unswervingly pessimistic: "The bourgeoisie is taking advantage of the crisis to batten down the hatches and embark on reforms in areas such as employment and pensions." In Spain, such changes will have particularly serious effects. This turn of the screw has even led to a rushed reform of the Spanish Constitution (the first major reform in 30 years), which solemnly sanctions neo-liberal thinking as the *pensée unique*.

In this profoundly depressing panorama, Paul Krugman has said there are two ways for European countries, including Spain, to resolve their external deficit and overcome the crisis once and for all. The first is a neo-liberal solution: a massively

[3] http://estrella.lamatriz.org/el-coste-de-la-europa-sin-gobierno-economico.

[4] Montes, Pedro, in *Rebelión*: "La recuperación de la crisis económica pasa por romper con el euro": "some economies have large surpluses on their external balance sheets; others, such as Portugal, Greece and Spain, are accumulating a vast deficit." "This external deficit is the great problem."

severe internal budgetary adjustment, involving cutting costs and salaries to increase competitiveness. The second option is monetary devaluation, but this door is currently closed due to the existence of the euro.[5]

Against this backdrop, the European Council met in May 2010. Judging by its conclusions, it appears to believe that the key factors for Eurozone stability are greater economic coordination, extending beyond the fiscal sphere, and reinforced oversight and discipline to ensure compliance with the terms of the Stability and Growth Pact.

Nonetheless, the euro crisis has lent increased credence to those who believe that greater macroeconomic coordination is not enough, arguing that what is required is a true European fiscal policy, complementing and rebalancing the ECB's single monetary policy. Many view this asymmetry between European monetary policy and national fiscal policies as the "original sin" of the euro and continue to call for further progress towards "fiscal federalism."[6]

Based on these elements established in the EMU,[7] a monetary union was created with no fiscal union to back it. There were serious risks implicit in this approach: (a) governments would be tempted to accumulate unsustainable volumes of public debt, forcing the ECB to use inflation to write them off; (b) high debt levels would end up infecting other countries, requiring bail-outs to safeguard the Eurozone as a whole; and (c) risks associated with the loss of foreign exchange policy: in a monetary union, individual countries can no longer devalue their currencies as a strategy for boosting competitiveness or stimulating the economy through exportation. With no common budgetary policy that would allow different economic cycles in member states to be balanced out, countries falling into recession would have only a limited number of instruments with which to escape the situation on their own.

Despite these risks, fiscal policy was left in the hands of national governments. However, it was subjected to three key limitations: (a) the first consisted of the conditions of the Stability and Growth Pact, imposed by Germany. This requires countries to keep their annual budget deficit below 3% of GDP in normal periods and their national debt below 60% of GDP; (b) the second safeguard was to give the ECB complete independence of national governments; in principle this meant armour-plating it against possible external pressure to write off the debt by way of inflation (the ECB was also expressly banned from directly financing any state's budget deficit); and finally, the third safeguard self-imposed on the Eurozone took the form of (c) the clause on non-assistance between countries.[8]

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[5] Montes, Pedro in *Rebelión*: "La recuperación de la crisis económica pasa por romper con el euro."

[6] "El futuro de la Unión Económica y Monetaria Europea: ¿qué ha fallado y qué reformas se requieren?", Manuel de la Rocha Vázquez, *Documento de Trabajo 54/2010*, Fundación Alternativas, p. 36.

[7] http://europa.eu/abc/12lessons/lesson_7/index_es.htm.

[8] Rocha Vázquez, Manuel de la, "El futuro de la Unión Económica y Monetaria Europea: ¿qué ha fallado y qué reformas se requieren?", *Documento de Trabajo 54/2010*, Fundación Alternativas, pp. 7 and 8.

The EU's community budget stands at around 1% of its GDP, or around 3% of total public expenditure in EU countries. With such a limited budget, it is difficult to conduct meaningful anti-cyclical policies on a European scale to offset the rigidity of the ECB's single monetary policy. Therefore, it is essential for community resources to be significantly increased.

In the short-term, we are highly unlikely to see any major increase in the resources handled by Brussels that might lead to true fiscal federalism along American or German lines. In the meantime, then, it is essential to ensure clear and firm progress in economic coordination and in key reforms to shore up the institutional architecture of the euro, the greatest achievement of European integration. At the same time, the lack of greater European fiscal federalism does not mean that there are no mechanisms of economic solidarity available in the EU. The cohesion and structural funds, for example, represent significant financial amounts for less advanced countries and regions. The problem of the EU, and, particularly, of the Eurozone is that it does not have a federal structure like the USA. In the United States, when a state has difficulties paying its public debt, the federal state automatically transfers funds to it. In Eurozone terms, this would involve a hypothetical economic government transferring funds to states with debt problems (e.g. Greece), thus enabling them to resolve the problem without intervention from the IMF, or indeed any other body.[9]

The problem of the Eurozone is not that Greece or anywhere else has a high level of national debt, but that there is no federal structure or economic government to solve the problem. Therefore, the problem, as we have already seen, is not financial, but political.

The Federal Model and the Financial Crisis: An Opportunity to Extend Federalism

On 10 May 2010, the European Council adopted a number of agreements. Bolder even than the creation of the euro in 1999, they marked major advances towards the creation of a European political federation. They agreed to create a €750 billion fund, collectively guaranteed by all European taxpayers, to protect European states from Greece's dilemma: to either abandon the euro or default on its debts.

By making Greece, Ireland, and Portugal permanent debtors of the ECB and the various EU bail-out funds, the Commission and the ECB have vastly augmented the power of European institutions at the expense of the member states. Although for the present, the ECB and Commission's unprecedented control over domestic fiscal policy, public spending, and social policies is restricted to Greece and Ireland, the rescue package has set precedents. It has created institutional capacities that can

[9] Navarro, Vicenç, "Si la Unión Europea tuviera un sistema federal como EEUU," in *Temas*.

gradually be extended to the entire European Union, developing within federal parameters and progressively strengthening such federalism.

The inevitable progression from monetary union to fiscal federalism and ultimately large-scale political union, was predicted by Eurosceptics and Eurofederalists alike as early as 1989, when Jacques Delors first proposed the single currency and again in 1999, with the launch of the euro.

It is certainly true that the germ of the federal idea can be seen in the very origins of the European Communities. From the very moment community institutions were set up, the attribution of powers by member states and the EU's capacity to exercise them over all states followed a clear federal model. It was further enhanced with the formation of the European Central Bank and the establishment of the EU's own (albeit very limited) budget and judicial system. In short, then, federal inspirations can be seen in several elements in the community area, including both institutional and legal systems on the one hand and jurisdictional and monetary systems one the other, whatever the scope attributed to them in different doctrinal positions. Nonetheless, there seems to be some consensus on the use of the concept of federalism.[10]

Considering that the European situation is new, different, complex, and unrelated to previous experiences, so too will its organisational model be. The founding treaties do not establish any model; instead, they structure the European Communities to meet the needs of the new reality.[11] The result is that there is no univocal federal model. Without getting involved in the debate on federal ideas and their relation with the phenomenon of community integration, played out since the very origins of the European Communities,[12] it is worth noting that the concept of federalism can only be analysed within the experience of a specific legal system and the particular political context in which it operates. Despite these individual elements to be found in each different system, there are features that are common to all systems classed as federal.

Prior to the financial crisis, some commentators argued that there was a serious political risk of the fledgling federalism falling apart as a result of the growing supremacy of the core idea of inter-governmentality, and the renationalisation of certain community policies. However—and paradoxically at such a critical time as the present—the defence of greater integration through an extension of the federal concept[13] in the EU is a border post in defending community interests against those

[10] There are conceptual problems in delimiting federalism. González Ilex, describes it as "an enemy of unitarianism, but at the same time a defender of unity in diversity," in short, "a way of achieving unity by respecting pluralism." See Encinar and Juan (1985), p. 81.

[11] Martín and Pérez de Naclares, José.

[12] See the Schuman Declaration, which referred to a "Federation of States." Other politicians who employed federalist ideology to a clearer or vaguer extent include Adenauer, Gasperi, Monnet, Spinelli, etc.

[13] Without ignoring the strong resistance to the adoption of agreements through community procedures at the expense of inter-governmental methods. An example of such resistance can be seen in application of the strategy of the Franco-German directorate, where Germany, and not the European institutions, has a strong influence. There is currently a strong dialectic between the two core ideas of integration and inter-governmental co-operation, whose origins can be traced back to the very inception of the communities.

of the USA. One cannot ignore the fact that a collapse of the Eurozone would remove the EU from the international political stage, leading to a strengthening of the dollar with all the negative consequences that would entail.

In such a situation, Eurozone countries are faced with a radical choice, and one that could lead the break-up of the EU: they must choose between greater European integration or renouncing the euro, bearing in mind that abandoning the euro would mean the dissolution of the EU itself. In the words of the ECB governor, it is not a question of "reciprocal oversight of economic policies", but common action, developing a common policy through European institutions. If a move is made towards greater integration, and the reforms are applied with a true European federalist sense, it will mark a paradigm shift in European construction towards a model of tighter integration with greater solidarity. However, there is a paradoxical danger that a minor improvement in the international economic situation—and Greece's in particular—might dilute the momentum for reform seen amongst Eurozone governments since 2010, leading to a fresh renationalisation of politics. Europe's fate lies with the euro.[14] The great paradox: we take advantage of the profound crisis to make profound changes; this is how Europe has progressed in the integration process.

With a view to defining certain important features of the new paradigm emerging in the face of great difficulty and profound scepticism, we shall therefore focus our analysis on two elements: the European Financial Stability Fund and the European Central Bank, whose reform is now becoming increasingly pressing.

The Euro Crisis and Fiscal Federalism. Towards a European Financial Stability Fund: Issuing Eurobonds

A new instrument was subsequently proposed that, without contravening either the spirit or the letter of Maastricht, would allow stronger solidarity and fiscal integration between Eurozone countries. This was the European Financial Stability Facility (EFSF).[15]

The EFSF was necessary to calm markets and establish a powerful mechanism of financial assistance. It was created for an initial 3-year period and had a restrictive mandate allowing it to intervene only in exceptional circumstances. One medium-term option once the EFSF's mandate has expired would be to turn it into a permanent financial fund for financing Eurozone countries, in other words, a

[14] "El futuro de la Unión Económica y Monetaria Europea: ¿qué ha fallado y qué reformas se requieren?", Manuel de la Rocha Vázquez, Documento de Trabajo 54/2010, Fundación Alternativas, p. 40.

[15] "El futuro de la Unión Económica y Monetaria Europea: ¿qué ha fallado y qué reformas se requieren?", Manuel de la Rocha Vázquez, *Documento de Trabajo 54/2010*, Fundación Alternativas, p. 37.

Eurobond Fund. Such a mechanism would act as a sort of European monetary fund, and would allow countries to obtain regular financing guaranteed by Eurozone countries at below-market rates. The new Eurobond fund would thus act as a powerful market-based incentive to fiscal discipline; countries would try to prevent their borrowing requirements from exceeding the resources provided by the fund, since this would invoke major penalties. The fund would therefore play a dual role: (a) it would act as a rescue mechanism in times of crisis; and (b) at the same time it would become a public financing entity for the EU, reinforcing mechanisms of solidarity between countries sharing a common currency and partially offsetting the current imbalance in the monetary union between monetary policy and fiscal policy.[16]

While a Eurobond fund of this kind holds out clear advantages, we cannot ignore some of the difficulties: for example, the source of the resources needed to finance this single treasury; how a Eurozone treasury would be structured *vis-à-vis* the budget for the rest of the Union and the legitimacy of the treasury in a context of uneven "Euro-enthusiasm" among voters in different member states.[17]

The Challenges Facing the European Central Bank in the Financial Crisis: Reforms to Instruments and Operating Rules

The ECB is an EMU-owned institution with exclusive power to design monetary policy within the EU, with all the important consequences that entails.

Germany played a decisive role in the configuration of the European Central Bank, in terms of establishing its objectives and internal rules of operation. Its complete independence from national governments—from which it can receive no instructions—was fully enshrined in the Maastricht Treaty; so too was its mandate to concentrate on fighting inflation. This anti-inflationary orthodoxy is in marked contrast to the remits of other central banks. The US Federal Reserve, for example, has several main objectives on a par with price stability. These include full employment and the maintenance of moderate long-term interest rates. Other central banks, such as the Bank of England, have two essential aims; price stability and financial stability.

In the early years of the EMU, the ECB was quite successful. However, with the onset first of the international financial crisis and then of the European sovereign debt crisis, it has been strongly criticised for sticking doggedly to the most orthodox and conservative goal of keeping inflation down at all costs. In this regard too, it is at variance with the Federal Reserve and the Bank of England, which have been

[16] "El futuro de la Unión Económica y Monetaria Europea: ¿qué ha fallado y qué reformas se requieren?", Manuel de la Rocha Vázquez, *Documento de Trabajo 54/2010*, Fundación Alternativas, pp. 38 and 39.

[17] de Elvira et al. (2009), p. 43.

quicker to lower interest rates and more innovating when it comes to using creative instruments of monetary policy to encourage demand and prevent deflation.[18]

In effect, although there were some earlier indications, the situation created by the financial crisis has highlighted the fact that the ECB's position in the institutional structure of the EMU is an insurmountable obstacle to the creation of a democratic Europe,[19] given that its executive bodies can decide monetary policy without taking into account any other European institution and without having to answer subsequently to the general public in the electoral processes for the results of their management. As Montes rightly points out,[20] they are at an advantage in not having to concern themselves with the consequences of their decisions, given that there is nobody above them. And this situation clearly favours "imposing a neo-liberal monetary policy, but a counterproductive divergence could arise between what is politically expedient, given the economic and social situation in the countries, and what the monetary orthodoxy adhered to by the ECB's bureaucracy advises."

The ECB's governing council, which formally acts in complete independence from other community institutions, will be incapable of escaping the indirect influence brought to bear by each member state with the mechanisms of economic and political pressure at their disposal. And needless to say, European monetary policy will be influenced by the economic (and political) power of each state in the European Union. For this reason, as established in the Maastricht Treaty (and again in 2011), the ECB is based on German criteria; its functioning, instruments, and objectives may be seen to have been transferred from the *Bundesbank*'s attributes, as befits Germany's economic predominance. In consonance, the Europe created by the Maastricht Treaty is neo-liberal in its conception; its founders made sure that its monetary policy would be liberal/conservative. The ECB's objective, as stated in the Maastricht treaty is to preserve the internal stability of the euro. Any party wishing to use monetary policy for other purposes, such as stimulating growth, will therefore always be met by the opposition of the EU Treaty.

As Montes says, with the euro and the ECB, not only has sovereignty been transferred, with the acceptance of a single monetary policy; moreover, it will be the policy that best suits the dominant countries in the Eurozone.[21] This profound lack of democracy in the workings of the EMU can be seen in the fact that its decisions are not influenced by votes and deliberations on political options, but on countries' size and economic development. Ultimately, this will end up threatening the very existence of the euro. "The impact (on the euro) will be better calibrated when some time has passed and tensions have accumulated, or when circumstances

[18] Rocha Vázquez, Manuel de la, "El futuro de la Unión Económica y Monetaria Europea: ¿qué ha fallado y qué reformas se requieren?", *Documento de Trabajo 54/2010*, Fundación Alternativas, p. 33.

[19] Montes (2001), p. 90.

[20] Montes (2001), pp. 90 and 91.

[21] Montes (2001), p. 92.

arise that shake the European Union to its core. It will be at that point that the offended countries will raise their voices and when it will be most harmful and dangerous not to implement a monetary policy based on citizens' needs or aspirations but one designed to suit the dominant class in the hegemonic countries. Ultimately, the euro come under a range of different attacks. Of course, these need not necessarily lead to a fatal denouement, but they will add to the already rarefied climate its existence may provoke in European societies."[22] One is struck by the extraordinary premonition of this paragraph. Written 11 years ago, it might just as easily have been penned in the midst of the 2011 economic crisis.

Despite great initial reluctance, the gravity of the Greek crisis has forced the ECB to take unprecedented extraordinary measures, quite far removed from the orthodoxy it adhered to until recently. In this regard, its most striking action has been its decision to assist Greece through mass purchase of Greek bonds on the secondary market, a move that it had previously systematically rejected.

In the words of the former governor of the *Bundesbank*; "By subsidising some government borrowers at the expense of others, the ECB has moved dangerously close to becoming a supranational fiscal agent."[23] In effect, whatever the former governor of the *Bundesbank* may think, that is the great step that now needs to be taken—the creation of a supranational fiscal agent. This would allow old nationalist views to be superseded in a globalised world. Moreover, it would demonstrate the incipient emergence of a new paradigm in the process of European integration, by extending the relations between the member states within the framework of the principles of the federal model. This would pave the way for the establishment of a "European economic government", which, *inter alia*, would mean Eurozone taxpayers' providing solidarity backing for the budgetary risks of other member states.

With the experience accumulated since the creation of the ECB, it has become obvious that certain improvements need to be made in aspects related to objectives and operating instruments. The three most pressing changes are as follows: (a) in setting inflation targets, the ECB needs to pay greater attention to economic growth and full employment; (b) the ECB must take greater responsibility and develop the instruments needed to ensure the stability of the financial markets. Here, it is hoped that in the future, the ECB will play a more relevant and active role in oversight and in preventing bubbles and other financial risks; and (c) the ECB must become more accountable and more transparent: it must cease to be seen as an obscure body that is not answerable to the general public.

The treaty endows it with independence and autonomy, but independence must be accompanied by true and thorough accountability and the most absolute transparency. The Treaty stipulates merely that the ECB must address an annual report

[22] Montes (2001), p. 92.

[23] Mayer, Thomas, 2010, cit. in Rocha Vázquez, Manuel de la, "El futuro de la Unión Económica y Monetaria Europea: ¿qué ha fallado y qué reformas se requieren?", *Documento de Trabajo 54/2010*, Fundación Alternativas, p. 34.

on its activities to the European Parliament, Council, and Commission (Art. 284). It may also, at the request of the European Parliament or on its own initiative, be heard by the competent committees of the European Parliament. In practice, the president of the ECB has appeared on a quarterly basis before the Parliament's Committee on Economic and Monetary Affairs, in what has become known as the Monetary Dialogue. Nonetheless, these hearings have proved inadequate, and substantial changes in format are needed for the Monetary Dialogue to become a true forum for oversight and scrutiny of the ECB, along the lines of the US House Committee on Financial Services. At the same time, in order to improve the legitimacy of ECB managers, it would be advisable to establish a practice whereby the European Parliament formally ratified the appointment of the president and members of the governing council (under the EU Treaty, the only requirement is that the European Parliament be consulted on these appointments). Moreover, the ECB must make a greater effort to improve its transparency by publishing the complete and transcribed minutes of its meetings, including votes, as the Federal Reserve does.

Conclusions

Extension of federal mechanisms, leading to real political integration of the EU, is in reality the only viable solution on the table. The only alternative is the ultimate debacle. The EU has a shared central bank—which operates at half throttle, because it lacks the powers of other central banks—but it does not have a shared ministry of finance. The search for a way out of the crisis is being conducted exclusively in the frameworks of national market regulation, and not in European market regulation. In this situation of profound institutional crisis, a serious threat is beginning to emerge; public opinion in European countries is gradually cooling towards the EU. Indeed, we are even witnessing the emergence of a certain opposition to the EU, which is seen as being the cause of all the woes. There is now a significant body of opinion that would like to see the EU broken up.

When the European Union was founded in the last century, the capacity of self-control of some states was overestimated. This crisis has shown that there were states that were prepared to run up debts without much thought and without looking at the real possibilities of their economy. On the other hand, the debts have to be paid by the whole of Europe, and this has naturally led to social protest. More and more people have come out against European integration and against bailing out their neighbours. If this dangerous trend is not reversed, the EU is headed for a final collapse.

The useful lesson is that it is possible to take advantage of current misfortunes to forge a strong and politically unified structure.

Given the EU's important geo-political position, the only possible alternative that could lay the foundations to start strengthening community structures lies in the consolidation of European federalism. This process would have to reflect the

original nature of the integration process; it would neither be a state[24] nor a framework based on a simple "governance" by politicians and technocrats, but a structure[25] infused with a true spirit of democratic renovation and designed to implement the principle of equality among European nations, putting an end to pure competition and removing the associated danger.

References

Crespo Ruiz de Elvira, Clara and Steinberg Wechsler, Federico, "La crisis financiera global como oportunidad para el fortalecimiento de la Unión Europea", in *Crisis económica y financiera: el papel de la Unión Europea*, Eurobask, Consejo Vasco del Movimiento Europeo, 2009, p. 43

González Encinar, José Juan, *El Estado unitario federal*, ed. Tecnos, Madrid, 1985, p. 81

Martín and Pérez de Naclares, José, "El federalismo supranacional: ¿un nuevo modelo para la Unión Europea?", http://eurobask.org/ficherosFTP/LIBROS/10_Universitas_2002.pdf

Montes, Pedro, *La Historia inacabada del euro*, Edit. Trotta, Madrid, 2001, pp. 89–94

[24] Francisco Balaguer argues that a federal state would have been capable of resisting these tensions without capitulating to the major economic interests (in *European Constitutional Law Review*, No. 13, January to June 2010, Presentation).

[25] Balibar, Etienne, speaks of a "community public power".

Spanish State of Autonomies and Economic Freedom: Challenges of the European Economic Constitution Paradigm

Ainhoa Lasa López

Market Unity, Economic Unity and European Economic Constitution

In recent years, the perennial debate on the state of autonomies has taken special significance on the issue of market unity fragmentation because of the proliferation of regional regulations that segment markets, raising transaction costs and hindering the mobility of economic operators. This observation places the maintenance of market unity as a key factor in the process of economic policy decentralization. Hence, the need for a preliminary approach to the concept. There is a broad doctrinal consensus in emphasizing the implicit recognition of market unity in the Spanish Constitution (SC) despite the absence of an explicit formulation. In this sense, market unity is inferred as a logical and necessary consequence of State unity recognized by Article 2 SC and the foundation that gives legitimacy to the free movement of production factors within the Spanish territory guaranteed by Article 139.2 SC.

An interpretation of market unity parallel to that carried out by the jurisprudence of Constitutional Court (CC) that at a very early stage has derived the existence of a single market from the uniqueness of the national economic order (Constitutional Court Judgment No. 88/1986). Furthermore, for the CC market unity it means, at least, freedom of movement for goods, services, capital and labor without hindrance throughout the national territory, and equality of the basic conditions for exercising economic activities (CCJ No. 88/1986). According to this jurisprudential conception, the content of the market unity principle is subsumed within that of economic unity. While it can be considered as the specification of a part that would singularly

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include the movement of production factors and the equality of the basic rules governing economic activity in the Spanish territory.

This prospect of putting the market unity content on a level with that of economic unity leads to the analysis of the second element. The economic unity has in the Constitution its maximum foundation, being a consolidated doctrine the constitutional origin of the uniqueness of national economic order. Having accepted this premise, the question that arises is whether the Constitution determines a particular economic model. In this respect, it replicates the CC judgment stated as follows: the economic constitution in the political constitution does not necessarily guarantee an economic system nor sanctions it, allowing the operation of all systems that conform within the parameters and only excludes those that are inconsistent with them. Therefore, we believe that the reference in Article 38 to free enterprise in the context of the economic social market system allows for a fully liberal economy, "a controlled and planned economy operated at least through indicative planning" (dissenting opinion made by Luis Díez-Picazo to the CCJ No. 36/1981).

Consideration supported in subsequent resolutions as the renowned pronouncement CCJ No. 1/1982, of January 28: "In the Spanish Constitution of 1978, unlike what used to happen with the liberal constructions of the nineteenth century, and similarly to those that take place in recent European constitutions, there are already several rules directed at providing the basic legal framework for structuring and operating economic activity, and all of them comprise of what is often called formal economic constitution". This framework implies the existence of some basic economic order principles that should be applied with a unitary character, a uniqueness repeatedly required by the Constitution, whose preamble guarantees the existence of "a just social and economic order."

Two important consequences follow from these judgments. First, the relationship between constitutional rules that regulate economic relations and the "basic principles of organization of the economic system," impede the autonomous consideration of the economic constitution in the context of the fundamental text. Second, the explicit acknowledgement of some basic lines establishing limits on the economic system. Therefore, acknowledgement of the openness or flexible character of the constitutional text in the economic field because of political pluralism does not mean that there are no common fundamentals constitutionally predetermined for the operation of the economy and, which only support exclusive solutions.

However, these statements require further clarifications in accordance with the basic principles that the majority doctrine identifies as determinants of the structure of the constitutionalized economic clauses. From an administrative perspective, the centrality of private powers in the constitutionalized economic system has been stressed (Martín-Retortillo 1988). Private elements are shown as shapers of the model, establishing a finalist subordination of public intervention, constitutionally normativizing, to private accumulation.

These primary references of the constitutionalized economic model are: free enterprise within the framework of the market economy, the possible existence of

public intervention and the plurality of government authorities in the economic sector in the sector of market unity, organized around the market and competition. In this manner, it is established as a comprehensive and systematic assessment of the constitutionalized economic system, a system of economic freedom. The initial lack of a constitutional definition of the economic constitution model would have led over time to the unequivocal statement of property and free enterprise as central elements of the system (Ariño 1995).

Neither has the constitutional doctrine been subtracted from these considerations. The investment in economic relations characteristic of social constitutionalism, characterizes the form of the constitutionalized State conforming it as the transitional Constitution of the form of State. The key element for the true scope of Article 1.1 SC, despite the wording of the precept, is the new economic constitution that begins to take shape. The effect of this is reflected in the ductility that the guiding principles of social and economic policy are formulated among which the vast majority of social rights are included. The interdependence established between the effectiveness of the social State clause and the economic situation provides the Constitution flexibility, making their contents especially suited for adapting to the changes that are underway.

In this perspective, the conceptual and semantic structure of the economic model defined by the Spanish Constitution is acknowledged, that would not be that of a mixed economy as an alternative to collectivism and liberalism, but of a social market economy. This is defined as an economic system with the limitations imposed by the requirements of the social State, which includes an economic competition system—as unity of thought, action and behavior, which links the freedom of competition with the guarantee of the private property and free enterprise—with social progress. So that a social market economy would act as a constraint to economic modalities in which public economic initiative can be expressed.

In our view, within these considerations the determining factor is the centrality or primacy of the new economic constitution and its determination of the constitutional text. Indeed, the economic model that is established by the constitution among the plurality of supported options, the social market economy, is confronted with the form of the Social State, or in other words, it is an incompatible model with the typical contents of the economic constitution of social constitutionalism. Especially because the primacy of private elements confined to the social link and its implementation mechanisms to positions of subordination, acting as an economic rationalization of social policy. This dialectical relationship between the references that characterize the social State and the proposals of flexibility of the economic system has in the new economic constitution its meeting point.

The contradiction between the principles of the new economic constitution and the constitutional unitary project of the social State disappears from the assessments made. The dissociation of the form of State in the analysis of the economic constitution attenuates the legal effects of the constitutional principle, which places the discourse in terms of continuity preventing that the analysis moves to a level of confrontation between models. The paradigm is the notion of the social market

economy that starts to gain momentum because of its inclusion in the unborn Constitutional Treaty (Article I-3.3). Completed with the note "highly competitive," and where the inclusion of a social regulation in a set order under the principles of the primacy of the market, ended up redirecting this formulation to the pure market economy model, confirming the model of economic constitution in force in the Founding Treaties of the European Communities. An expression reproduced in Article 3.4 of the Treaty of the European Union (TEU).

From these coordinates, the doctrinal proposal discussed distorts the constitutional formulation of the social State through an almost unlimited interpretive flexibility that allows in turn, the characterization of the new economic constitution as a natural consequence of the evolution of the system that is not confronted with the economic regulation of social constitutionalism.

On the contrary, from our point of view, the end of the relative independence between social and economic spaces as a consequence of the sectoral nature of Community competence in building the common market had the effect of harmonizing the new economic constitution of member States with the European economic constitution. Our constitution is inserted in this context, whose interpretation is thus linked to European benchmark. According to this analysis, the content of the market unity is compared to economic unity, which in turn is conditioned by the principles of the European economic constitution, which are integrated in the constitutional axiology of national rights by altering the material bases of the social State. The new organizational principles are defined around the monetary union and disciplining economic policies acting at the same time as legitimation principles of the new public policies conditioned by the central role of the market. Having established these observations, it is time to see their impact on the state of autonomies.

Economic Freedom and Decentralization

In May of 2011, the report "Economic freedom in Spain" was released, which explores two aspects of public intervention in the area of the Autonomous Communities: the regulation of the economic activities and the dimension of the regional governments, their role in providing public and merit goods and financing. In this report, the criteria used to measure economic freedom are ascribed to an economic model aligned within the parameters of "market-State" to the detriment of those of the social State. So, regional economic freedom identifies with the requirements of an economic policy linked to the demands for a greater market liberalization and reduction of the public sector role in economic life. Only a policy of this magnitude can safeguard the principle of economic unity where the unitary market is subsumed (Cabrillo et al. 2011).

The Market-State represents a confrontation between models opposing the social State to the market-State (Bobbit 2003). The analysis of structural changes that have occurred worldwide suggests the adaptation of States to ongoing processes,

emphasizing the subordinate position of the State resulting from the rupture of a public economy government. Thus, the approach to the market State starts from the reaction by the State to its own legitimacy deficit, and specifically, it involves a reaction to the traditional forms of economic intervention imposed by social constitutionalism. The market State is confronted with the intervention forms that materialized in Europe during the golden decades of the social State. The market State and social State are simply incompatible. The search for community welfare is replaced by the maximization of opportunities for individual progress, limited in turn, to free markets. This new differentiation of the political and economic spheres leads to market centrality that postulates a new public intervention whose main characteristic is to confront the model evolved during the establishment of the social State.

In parallel, the regulatory State appears as the form of economic intervention of the market State (La Spina et al. 2000). The paradigm of the new intervention reverses the political primacy that now becomes the market. In the European context, the proposals supporting this new regulatory paradigm have found confirmation in the liberalization processes initiated by the Single Act and consolidated with the Maastricht Treaty, through their materialization in the model assumed by the European Union economic constitutionalism. At the same time, the regulatory State theory rescues the proposals of Freiburg School in the preambles of the Second World War. According to ordoliberalism, the economic model is linked to a particular economic order, the market economy as a normative model of regulation of the economy. In this economic model, the guarantee of the constitutive principles of economic order (monetary policy stability, free market centrality, private liability, and open markets) by public authorities is essential. The proposal includes "social market economy" where social intervention is limited by the guarantee of free market development, introducing the social element as subordinate and unable to condition the market. The goal is a market economy with social protection in accordance with market rules as the free market is capable of generating a higher productivity rate than an interventionist economy (Müller-Armack 1963).

These theoretical formulations of the market State and its economic model, regulatory State, represent the legal-economic background, which seems to draw the report to assess the degree of economic freedom in the Spanish State of autonomies. Basically, because economic freedom is linked to free market competition protection-guarantee. The indicators used to assess the weight of the public sector (public spending, fiscal effort, public debt, civil service employees, taxes, transfers, and subsidies), and the sectors selected to evaluate the degree of economic activity of the public sector in each region (commerce, education, environment, labor mobility, health, and housing), leading to an analysis determined by the parameters of more market, less intervention. In fact, it highlights the virtuous circle between economic freedom and prosperity, establishing a reciprocal relationship reminiscent to that acknowledged by the Spaak report regarding the improvement of living and working conditions of the workforce as a natural consequence of the common market and its evolution.

The outcome of the study confirms these considerations. The Community of Madrid is in first position in the Economic Freedom Index 2011 as it has the lowest

public sector presence in the form of regulation (little government interference in the economic activity) and in direct intervention in the provision of goods or services, from all regions.

To correct the lack of economic freedom, the report calls for an articulation of the decentralization in terms of competition among regulations. The rupture of market unity because of autonomous market segmentation by excessive regulator zeal of regional legislators implies a direct impact on free competition of economic operators (Cabrillo et al. 2011). A different question is whether the existence of different regulations modulates the parameters of institutional competition among regions. A normative and institutional autonomous design that promotes competition leads to greater mobility of individuals, companies and capital in the search for greater efficiency.

This interpretative solution on competition among regulations in the field of autonomous decentralization reproduces the contents of the pure model theory. According to this theory, competition among regulations can be defined as the process where regulators have a more favorable regulatory environment in order to promote competitiveness among regional industries and the attraction of more foreign textile industry. The economic policies and institutional structure are considered production factors offered by regions through their laws in response to the economic agent demands. If supply and demand can be brought into balance, then economic welfare of the society is enhanced (Samuelson 1954).

This theory has Tiebout's formulations applicable to the context of competition among public service providers, the most remarkable development of its premises. His proposal is a model of local regimes where different levels of services and taxes coexist with the residents-consumers of such services, who have the ability to move from one territory to another to choose the service that best suits their needs. In turn, this requires the effective mobility of consumers and full autonomy for regional legislators equipped with the capacity to respond to possible changes in demand (Tiebout 1956). This aspect requires a further specification. The autonomy only covers what is strictly necessary to stimulate this kind of competition among governments. Without this limitation, sub-state authorities could lead to unilateral competition either by setting obstacles to the free movement of production factors beyond their territory or by denying access to capital inputs, services, or a combination of both. Hence, the central or federal authority to assume a central role in ensuring the effective realization of frees movement (Sinn 1992). However, this does not mean that the central government can promote negative integration or seek harmonization in the levels of spending and taxation, replacing competition among governments with a centralized monopoly of the laws of supply.

Based on these assumptions, the approach to the concept of competition among regulations developed by Tiebout suggests that it is desirable and beneficial that countries have different rules and standards, so that market forces can help in some way in selecting the best models. In the translation of these reflections in the context of regional decentralization, we find that the primary function is to ensure the legal market unity through the elimination of all those regulatory barriers that intervene in the free movement of production factors and free competition. In fulfilling this objective, the performance of these regulatory functions includes a mixed

orientation that functions as a presumption in favor of decentralized levels when interregional competition is effective. However, in any case, it is a minimum regulation very different to that developed by the social State through its intervention in the redistributive process.

In this report on economic freedom in Spanish regions that emphasizes the positive aspect of the process of economic decentralization from the perspective of the pure model theory of competition among regulations, it highlights its normative proposal of the rupture of social State. Especially due to the critique of the controller substantive law, based on over-regulation as a result of the destruction of liberal normative rationality underpinning the function of the market with the consequent elimination of its autonomy. The legal form of social State intervention promotes the coordination of activities aimed at extracting rents through redistribution. This political influence in the market through the regulation of the content of social relations implies the subjection of the legislator to pressure from interest groups and their accommodation to them, so that it deviates from social integration and creation of welfare to rent extraction.

On the contrary, the introduction of competition spaces in the area of public policy interventions among sub-state authorities in order to raise capital and optimize the local economy results in a sustainable deregulation that has its raison d'être in the market as the center of definition of regulatory competition. The optimal level of regulation is determined by the market that will reward among competing regional regulations to those that are better suited or that show greater efficiency. Thus, competition among regulations attributes to the market to decide the level of regulation and common standards, it is the market institute that decides the order of regulation.

Within this approach on the benefits of regulatory competition to restore market unity, would be framed the initiative that autonomous regions could recognize unilaterally and voluntarily and with a general character in their territories, the regulations emanated from other regions in areas such as market access for goods and services, the establishment and exercise of economic activities subject to administrative licensing, the exercise of professional activities. So that economic operators can decide on the regulation to which they are exposed in the course of their economic activity, regardless of where it is carried out. In short, this is to adapt the territorial power distribution model to the economic model of the market State. If we have pointed out that the economic constitution of market constitutionalism is built from coordinates opposed to the social State, logically, the establishment of market unity shall be determined by its fundamental principles, market and competition. This does not mean the withdrawal of the State of the economy, but the participation and subordination of the State and decentralized levels to the same market rules that apply to private individuals.

However, what the report omits is that the market State measures to ensure market unity and competition have a direct effect on regional social policies. Although the autonomous social dimension has internalized contents traceable to social protection related to hedging techniques that are not directly linked to the market, it is equally true that the cross-sectioned nature of the approach ends up

affecting these contents being also functionalized to achieve the model described, as discussed below.

Autonomous Social Model and Budgetary Stability

Article 1 SC positivizes the form of social State whose compliance is mandated to the public authorities (Article 9.2 SC and the provisions of Chapter III). Therefore, the realization of the social State principle (substantive equality, solidarity) is not privative of the State, but also involves public authorities, parliaments of the different regions. Participatory regime modulated by Title VII. However, "unitary guidance" that accompanies the Social State is present in the constitutional statement, where closer reading infers that the guarantees for the implementation of its goals, mainly those related to market functioning, involve a reinforcement of State power. Thus, for the effective implementation of the principle of solidarity, both the central (Article 138.1 SC) and the regional (Article 156.1 SC) governments would be empowered, but not for its guarantee that the Constitution expressly attributes to the State.

This is because the fundamentals of social State incorporate a particular relationship between economy and territorial distribution of competence: at the level of national economy in terms of nationalization of the distributional conflict through controller activity and benefits that are incorporated in this way to the set of basic principles for the operation of the market that the State must ensure through their normative standardization (García et al. 1999). From this perspective, they are excluded from the scope of the autonomous competitive action, at least normatively, the social protection systems of contributory nature. At a level of the distribution of powers design the field of action of the autonomous regions is limited to hedging techniques disconnected from the market that allow a diversified treatment (García 2002). Hence, the viability of regional initiatives in receiving statutory social rights is restricted only to those related with the marginalization and social exclusion spaces that the SC and the special status of the Statute of Autonomy (SA) in the constitutional sources system it enables.

In any case, the autonomous regions are key players in the scenario of representation of the social dimension of the State. The statutes of autonomy are not limited to setting the organization of their institutional framework, or take charge of the competences available in Article 148.1 SC. They also have included norms in setting the socio-economic objectives to be pursued by the respective regions. A regional participation in the development of social constitutionalism contents heightened in recent years because of the statutory reforms that introduced Titles on rights and freedoms with particular attention to social rights.

However, the truth is that despite the remarkable efforts of the regional public authorities to comply with the legal-political principle of the social State, these are also affected by the economic constitution of the market State and its constraints. As we noted at the outset, the fundamentals of European economic constitution are

internalized by national economic constitutions undermining the constitutional autonomy in the economic field of the States. This circumstance has as a main trigger the Union Treaty. Priority to free movement of capital and the stability of exchange rates required a coordinated monetary policy with the consequent loss of sovereignty of States and its assignment to European space. At the same time, the conditions of nominal convergence require a considerable deflationary effort. Its subsequent consolidation with the Stability and Growth Pact (SGP) made possible the Europeanization of national functions whose uniqueness is materialized in the moderation of States to pursue expansionary fiscal policies through the limits established for the deficit and public debt.

The influence on the bond that prohibits the excessive deficit on national legal systems affects the national and regional intervention mechanism, as it introduces additional elements of complexity associated to the disciplining logic internalizing a new model. Specifically, the European budgetary intervention in the internal State is seen as a technical tool for determining not only social policy but also the social rights system, being particularly incisive in the sub-constitutional level of protection. Mainly because they are mechanisms that are more sensitive to budgetary constraints. Social spending appears to be the weakest link in the chain by being its principal target for reducing the restrictive fiscal policies demanded by the European budgetary link.

Naturally, this involvement to determine regional power has not been free from numerous conflicts, which the Spanish Constitutional Court has responded to, rejecting the appeal lodged by the Parliament of Catalonia against the Law 18/2001, of 12 November, General Budgetary Stability and the Organic Law 5/2001, of 13 December, complementary to the General Law of Budgetary Stability (CCJ No. 134/2011, of July 20). Both laws internalize in the Spanish legal system the European budgetary discipline. In particular, they deal with the budgetary discipline of the State and autonomous regions in accordance with the requirements of the SGP. For the purposes addressed here, it is useful to highlight some of the arguments made by the CC to support its decision: firstly, if the "new constitutional scenario" that has led to the development of the European Union is taken into account, this new scenario would be represented by principles that are different and opposed by those of the social State, as we have indicated.

Secondly, in the economic model of the market State, budget stability is configured as a basic foundation for internal market unity. Just as in the principle of the market unity of the social State the social protection was an essential element, the unity of the internal market of the market State make member States into the preferred recipients of the European economic constitution that is reaffirmed through the functionalization of national economic policies to a model of the open market economy with free competition (Article 120 Treaty on the Functioning of the European Union/TFUE), reflecting the compatibility of a public intervention based on a monetary policy to restrict inflation and the centrality of market protection. It is the continuation of the fiscal policy paradigm typical of the market economy of ordoliberal inspiration. The SGP as an instrument of control and extension of the contents of the economic constitution to member States through

the budgetary links that affect predominantly the intervention mechanisms characteristics of the social State, carries out additional functions of consolidation of the model.

From this perspective, the context of the debate among models of territorial power distribution models is the European economic constitution. The national market unity is absorbed by the European internal market unity that deepens the primacy of the market against the marginalization and functionality of social intervention. This is the new framework where the State and regional public authorities must operate. A new framework that especially hardens the conditions for the development of regional social dimension by moving directly to the protective system the principle of budgetary stability, penalizing the social solidarity.

References

Ariño, G. (1995). Principios constitucionales de la libertad de empresa. Marcial Pons, Madrid.

Bobbit, P.C. (2003). The shield of Achilles. War, peace and the course of history". Red Classic Penguin, London, 922 pp.

Cabrillo, F., Biazzi, R., Albert, R. (2011). Libertad económica en España 2011. Aranzadi, Navarra, 176 pp.

García, M.A. (2002). Estado, Comunidades Autónomas y derechos sociales: relaciones y tendencias". El Estado Autonómico: cooperación y conflicto. Anuario Jurídico de la Rioja, No. 8, pp. 107–130.

García, M.A. and Maestro, G. (1999). Marginación, Estado social y prestaciones autonómicas. Cedecs, Barcelona, pp. 65–68.

La Spina, A. and Majone, G. (2000). Lo Stato regolatore. Il Mulino, Bologna, pp. 20–35.

Maestro, G. (2002). El vínculo presupuestario comunitario y los derechos sociales. Revista Vasca de Administración Pública, No. 64, pp. 196–201.

Martín-Retortillo, A. (1988). Derecho administrativo económico. Vol. I. La Ley, Madrid.

Müller-Armack, A. (1963). Las ordenaciones económicas desde el punto de vista social. La economía de mercado. Sociedad de Estudios y Publicaciones, Madrid, pp. 83–126.

Samuelson, P. (1954). The pure theory of local expenditures. Review of Economics and Statistics, Vol. 36, No. 4, pp. 387–389

Sinn, S. (1992). The taming of leviathan. Competition among governments. Constitutional Political Economy, Vol. 3, No. 2, pp. 178–180

Tiebout, C.M. (1956). A Pure theory of local expenditures. The Journal of Political Economy, Vol. 64, No. 5, pp. 416–424.

Part II
The Ways of Federalism in Western Countries and the Division of Powers

The Once and Future Challenges of American Federalism: The Tug of War Within

Erin Ryan

Introduction: The Once and Future Challenges for American Federalism

This essay reviews the challenges facing the U.S. federal system through the theoretical lens developed in a forthcoming book, FEDERALISM AND THE TUG OF WAR WITHIN.[1] It also considers the opportunities federalism enables, focusing especially on responsive developments in state-federal intergovernmental bargaining. Part I frames the discussion in terms of American federalism's inherent tensions, the perpetual tug of war within.

The dilemmas of American federalism have become especially palpable in recent years, reflecting the progressing demands on all levels of government to meet the inexorably complicated challenges of governance in an increasingly interconnected world.[2] Some reflect similar dilemmas in other federalist societies, while others are unique to our own particular constellation of national, state, and municipal governance.[3] Some federalism dilemmas are of genuine constitutional import, others more sound and fury—signifying little beyond the substantive political agenda of one interest group or another.[4] Each heralds the potential for real consequences in the

[1] Ryan (2012).

[2] *Id.* at Chap. 5, p. 146–59 (discussing interjurisdictionality in governance).

[3] *Cf.* Jackson (2004) pp. 91, 93–96 (exploring points of comparison and points of singularity among federal systems).

[4] *See, e.g.,* Rubin and Feeley (1994), pp. 910–914 (reviewing opportunistic invocation of federalism ideals in political debates throughout history); Devins (2004), pp. 131, 133–135 (same).

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political arena—and indeed, these consequences are what receive the most sustained public attention.

The political consequences of federalism dilemmas are apparent throughout the policy spectrum. They are visible in the litigation over health care reform efforts that has now reached the United States Supreme Court[5] and in similar battles over environmental governance and climate policy,[6] banking and financial services regulation,[7] immigration policy,[8] and gay marriage.[9] Consequences are also visible in the emergence of popular constitutional political movements, such as the "Tea Party"[10] and even the "Tenthers."[11] The latter are named for the Tenth Amendment to the U.S. Constitution that affirms our system of dual sovereignty, which divides sovereign authority between local and national government at the state and federal levels.[12] After decades of playing a merely supporting role in U.S. federalism theory,[13] the Tenth Amendment has emerged as a passionate site of political contest, rallying advocates for state right-to-die legislation,[14] home schooling,[15] and sectarian education,[16] and among opponents of Medicaid and Medicare,[17]

[5] Complaint for Declaratory and Injunctive Relief, Virginia v. Sebelius, No. 3:10-CV-188 (E.D. Va. Mar. 23, 2010) (arguing that the Patient Protection and Affordable Care Act, H.R. 3590 of March 2010, exceeds federal power under the Commerce and General Welfare Clauses and conflicts with state law); Complaint, Florida v. Dep't of Health & Human Servs., No. 3:10-cv-91 (N.D. Fla. Mar. 23, 2010) (similar challenge in a suit joined by over a dozen other states); Complaint, Shreeve v. Obama, No. 1:10-cv-71 (E.D. Tenn. Apr. 8, 2010) (similar suit).

[6] *See, e.g.,* Roberts (2010) (reporting on states' rights challenges to federal authority for proposed climate and financial reform legislation, among other bills).

[7] *Id.*

[8] United States v. Arizona, 2010 U.S. Dist. LEXIS 75558 (D. Ariz. July 28, 2010).

[9] *E.g.*, Massachusetts v. U.S. Department of Health and Human Services, No. 1:09-cv-11156-JLT, 21-36 (D. Mass. July 7, 2010) (holding that the federal Defense of Marriage Act violates the Tenth Amendment).

[10] *See* Johnson (2010) (reporting on Tea Party support for 'state's rights' initiatives).

[11] *See* Montes (2010) (defining the movement); Balko (2009) (defending the movement).

[12] U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

[13] Ryan (2012), *supra* note 1, at Introduction, p. xvii–xxxii (discussing the evolving role of Tenth Amendment in federalism analysis) and Chap. 4, p. 109–32 (discussing the Supreme Court's evolving Tenth Amendment jurisprudence).

[14] *See* Gaumer and Griffith (1997), p. 357, 372 (arguing that if the Tenth Amendment requires greater federal deference to states rights, it should also require greater federal deference to certain individual rights); Sovell (2000) p. 670, 675 (discussing how right-to-die proponents rely on the Tenth Amendment). *Cf.* Gonzales v. Oregon, 546 U.S. 243 (2006) (upholding the Oregon Death with Dignity Act without directly invoking the Tenth Amendment but broadly addressing the relationship between state and federal power).

[15] *See* Stuter (2003) (arguing that the Tenth Amendment prevents the federal government from interfering in education).

[16] *See* Keynes and Miller (1989) (arguing that the Tenth Amendment reserves state authority to assist sectarian schools and encourage religious activities in public schools).

[17] *See supra* note 5.

federal gun laws,[18] tax collection,[19] drivers' license requirements,[20] and the deployment of National Guard troops abroad.[21]

The principles of constitutional federalism are invoked in each of these substantive debates over policy, but the underlying challenge for American federalism—the reason we become so mired in these policy debates—goes much deeper. In fact, the great underlying challenge for American federalism is the same one that has preoccupied American jurists for more than two hundred years.[22] That underlying problem is that the U.S. Constitution mandates, *but incompletely describes*, our system of dual sovereignty.[23] This requires constitutional interpreters to turn to some exogenous, normative theory of federalism—some philosophy about what federalism is for and how it should work—in order to fill in the blanks that inevitably arise when vague constitutional directives are applied to actual cases and controversies.

Should the proper relationship between state and federal power approximate the dual federalism model—characterized by mutually exclusive spheres of separate subject-matter jurisdiction—or is it better understood in terms of the cooperative federalism model and its emphasis on concurrent jurisdiction?[24] When conflicts arise, should local or national decision-making trump? And which branch of government is best equipped to resolve the issue: the judiciary or the political branches? Always, the question is: "who gets to decide?" The state or federal government? Congress or the Court? And for that matter, what about state and federal executive agencies?[25]

Without clearer constitutional guidance on the details of federalism theory, the result has been decades (if not centuries) of vacillating federalism jurisprudence as the nation experiments with different theoretical models—each with its own advantages and disadvantages, the latest model usually over-correcting for the

[18] Montana Firearms Freedom Act, MONT. CODE ANN. § 30-20-101 (2009).

[19] *E.g.,* State Authority and Tax Fund Act, H.B. 877, 2010 Sess. (Ga. 2010), State Sovereignty Act, H.B. 2810, 2010 Sess. (Okla. 2010); Washington State Sovereignty and Federal Tax Escrow Account of 2010, H.B. 2712, 2010 Sess. (Wash. 2010).

[20] ACLU, *Anti-REAL ID Legislation in the States*, http://www.realnightmare.org/news/105/ (noting that no state met the December 2009 deadline contemplated by the statute, and over half enacted or considered legislation prohibiting compliance with the Act, defunding its implementation, or calling for its repeal). *See also* Romero (2007) (arguing that REAL ID violates the Tenth Amendment, destroys dual sovereignty, and makes Americans vulnerable to identity theft).

[21] *See* Johnson (2010) (reporting on a Utah bill).

[22] Ryan (2012), *supra* note 1, at Chap. 1, p. 7–17 (describing the interpretive challenge of American federalism); Chap. 3, p. 68–104 (tracing it through American constitutional history).

[23] *Id.*; *cf.* Purcell (2007) and Lacroix (2010).

[24] Ryan (2012), *supra* note 1, at Part I Introduction, p. 1–6 (reviewing dual and cooperative federalism among the various operative federalism theories in play over the course of American history).

[25] For analysis of the textual ambiguity that leads to indeterminacy in U.S. federalism theory, see *id.* at Chap. 1, p. 7–17.

errors of its predecessor while introducing new problems of its own.[26] Many of these approaches continued to be claimed on different sides of today's substantive policy debates about health care, environment, immigration, and so on. Meanwhile, innovations in multijurisdictional governance have far outpaced the vernacular of current federalism theory. The relationships between local, state, and federal actors in all branches of government have become more complicated, more entangled, and in many respects, more empowered.[27]

To that end, what American federalism most needs going forward is the development of a more coherent theoretical approach, one that can better cope with the three fundamental tensions within American federalism: the tension between the underlying values of federalism, that among the roles of the three branches of government in interpreting constitutional federalism directives, and that between local and national wisdom and expertise in implementing federalism ideals.[28] These core tensions—the three individual "tug of war" battles underlying the whole—remain the great unresolved challenges of the U.S. federal system. They are the ultimate source of the many substantive policy debates regularly framed in federalism terms. And to meet these challenges, American federalism must undertake three critical tasks.

First, American federalism requires better and more transparent balance between the competing values of good governance at the heart of American federalism. Indeed, this is the core idea of the book: that the best way to understand American federalism is in terms of the core values that give federalism meaning, or the good-governance principles that Americans turn to federalism to help actualize in public administration. The four of greatest significance are (1) the checks and balances between local and national power that protect individuals against overreach or abdication by either sovereign; (2) accountability and transparency in governance that enables meaningful democratic participation throughout the jurisdictional spectrum; (3) the protection of local autonomy, innovation, and interjurisdictional competition of the sort the great federalism "laboratory of ideas" enables[29]; and finally (and most overlooked) (4) the interjurisdictional synergy that federalism enables us to harness between the unique governing capacity that develops at the

[26] *Id.* at Chap. 3, p. 68–104 (reviewing vacillations over the course of American history) and Chap. 4, p. 109–32 (reviewing them specifically in the context of the Rehnquist Court's New Federalism jurisprudence).

[27] *Id.* at Part IV, p. 265–367 (describing opportunities for state-federal collaborative governance). *See also* Chemerinsky (2008) (casting federalism as a means of empowering governance at all levels on the jurisdictional spectrum); Schapiro (2009) (emphasizing the importance of jurisdictional overlap and dynamism in American federalism).

[28] *See generally* Ryan (2012), *supra* note 1.

[29] *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (praising the "laboratory of ideas" enabled by federalism in observing how "a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country").

local and national levels, needed to address the different parts of interjurisdictional problems that require response from both.[30]

The core federalism values are doubtlessly all good things, and we have aspired to each of them throughout American history. The problem, of course, is that each value is suspended in a web of tensions with the others—fueling a perpetual "tug of war" for privilege when they conflict. We cannot always satisfy all of them in any given regulatory context at the same time. For example, the very system of dual sovereignty that creates checks and balances frustrates governmental transparency, as it would certainly be easier to follow the lines of accountability in a fully unitary, centralized system! And yet we willingly accept the compromise to avail ourselves of the benefits of local autonomy and interjurisdictional synergy associated with federalism, creating deeper opportunities for democratic participation and effective regulatory response.[31] Until now, the discourse has done a poor job of even recognizing these tensions, let alone providing meaningful guidance for coping with them, leading to the famously fluctuating approaches to federalist governance over American history.[32]

The second ongoing challenge is that American federalism requires better balance among the functional capacities of the different branches of government in interpreting constitutional federalism directives, in both abstract and concrete circumstances.[33] This begins as a rather intuitive point: we all understand that courts are better at answering certain legal questions and legislatures better at others (and although the American federalism discourse has been slow to recognize it, even the executive branch brings some talent to the table). However, the previous American federalism discourse has largely been a "tug of war" between the proponents of judicial supremacy in federalism interpretation on the one hand[34] and proponents of legislative supremacy on the other.[35] To flourish most healthily, American federalism must afford space for all three branches to contribute what they do best in making sense of the whole. Indeed—it already does, variously enabling the allocation of contested authority through judicial review, legislative policymaking, and executive implementation in different federalism-sensitive contexts.[36] Federalism theory has just been slow to understand how it all works together.

Finally, American federalism must better maximize the input of local as well as national actors in allocating contested authority, which, of course, is the ultimate federalism project. This is the most fundamental "tug of war" of all—the reason for

[30] Ryan (2012), *supra* note 1, at Chap. 2, p. 34–67 (reviewing the intellectual history of these values in federalism theory).

[31] *Id.* (discussing the various tensions and trade-offs between core federalism values).

[32] *Id.* at Chap. 3, p. 68–104 (reviewing the overall history of American federalism) and Chap. 4 (reviewing the New Federalism jurisprudence of the Rehnquist Court era).

[33] *Id.* at Parts III and IV (reviewing the allocation of federalism interpretive authority among the three branches).

[34] *E.g.*, Baker and Young (2001), p. 75, 128; Van Alstyne (1987), p. 769, 782–783, 797–798.

[35] *E.g.* Wechsler (1954), p. 543, 588 and Choper (1980), p.175–176.

[36] Ryan (2012), *supra* note 1, at Parts III and IV (exploring the roles of the branches in interpreting federalism).

our wrestling with federalism to begin with. After all, if local decision-making were always best, there would be no need for a strong federation in the first place (although the failed Articles of Confederation that predated our Constitution suggested otherwise).[37] Similarly, if national decision-making were always best, there would also be no need for the federation—we could have a fully centralized government, like that in China or France.[38] But for reasons both historical and philosophical, American federalism has proven robust in spite of the alternatives. The critical question is how best to balance the wisdom and interests of the local and national governments that have remained so robust within our federal system.

A diagnostic view of actual American governance reveals this as an area where federalism practice has especially outpaced federalism theory.[39] Today, local input in federalism decision-making extends far beyond the canonical device of providing representatives for election to national bodies like Congress. Instead, there is compelling evidence of ample state and local input on allocating contested policy-making and implementation authority in direct negotiations with federal actors, through a variety of constitutional and statutory frameworks that enable such negotiation to take place.[40] The role of intergovernmental bargaining in federalism interpretation is a fascinating and important development in federalism theory, which is only just now beginning to attract the scholarly attention it deserves. It is by no means the only subject of American federalism worthy of study, but in light of its academic debut and to encourage further such inquiry, it is where I will focus the balance of this essay.

Negotiated federalism, which presents on a continuum from the obvious to the opaque, plays a surprisingly foundational role in the American system of dual sovereignty. FEDERALISM AND THE TUG OF WAR WITHIN helps catalog this largely uncharted landscape in a taxonomy of opportunities for state-federal bargaining available within various constitutional and statutory frameworks.[41] The full taxonomy groups them into categories of conventional examples, negotiations to reallocate authority, and joint policymaking negotiations. It reviews the familiar forms of bargaining used in lawmaking, over law enforcement, under the federal spending power, and for exceptions under otherwise applicable laws. It then considers the more interesting (and progressively less obvious) forms of negotiated policymaking, including negotiated federal rulemaking with state stakeholders, federal statutes that share policy design with states, iterative programs of joint policymaking that stagger leadership over time, and even intersystemic signaling negotiations, by which independently

[37] *Id.* at p. 58, 70–71 (discussing the Articles of Confederation).

[38] *Id.* at p. 47–48.

[39] *Id.* at Part IV (exploring the enterprise of state-federal bargaining).

[40] *Id.*

[41] *Id.* at Chap. 8, p. 271–314 (presenting the taxonomy); *see also* Ryan (2011) (presenting an earlier version).

operating state and federal actors trade influence over the direction of evolving interjurisdictional policies.[42]

This emerging understanding of intergovernmentally negotiated federalism—or "federalism bargaining," as we can call it for short—speaks to each of American federalism's core challenges.[43] When federalism bargaining is well-crafted, it creates a legitimate forum for balancing values, functional governance capacity, and local and national input—all through a bilateral dynamic of governance that tracks the very purpose of federalism as a dynamic equipoise between local and national decision-making. Indeed, by incorporating the interests of local, state, and federal actors into negotiated balance, intergovernmental partnerships can safeguard the objectives of federalism on a structural level that unilateral policymaking by state or federal actors alone can never accomplish.[44]

In my forthcoming book and several previous articles, I have explored how state and federal actors use various forms of bargaining to navigate the federalism challenges that invariably arise in contexts of concurrent regulatory jurisdiction.[45] This essay summarizes that literature, highlighting two examples of federalism bargaining that demonstrate governance models well suited to the challenges of negotiating policy among multiple levels of government. The Coastal Zone Management Act enables broadly negotiated local initiative within a framework of federal law that alternates leadership between national and local decision-makers over time.[46] It provides a good model for governance that matches broad national goals with policies best implemented at the local level. By contrast, the iterative policymaking negotiations within the Clean Air Act's mechanism for regulating motor vehicle emissions offers space for limited interjurisdictional competition within a tighter federal framework.[47] This approach serves governance hinging on a national market while preserving space for regulatory innovation, avoiding the concerns of stagnation and capture associated with regulatory monopoly.

Finally, the essay shows how federalism bargaining enables structural and procedural devices that can help resolve federalism's core challenges in a uniquely principled way. Based on these and other examples, the final section of the essay provides theoretical justification for the role that intergovernmental bargaining can

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[42] *Id.*

[43] My discussion of federalism bargaining focuses on the vertical federalism relationship within each given array of state and federal participants. For simplicity, I treat municipal participants in intergovernmental bargaining as state actors, consistent with the Supreme Court's inclusion of municipal activity in its Tenth Amendment jurisprudence. For discussion on how independent municipal activity further complicates the analysis, see *id.* at Part IV Introduction and accompanying notes; *infra* note 132 (quoting the relevant text).

[44] *Id.* at Chap. 10, p. 339–67 (contrasting the structural safeguards of bilateral and unilateral interpretation).

[45] *Id.*; *see also* Ryan (2011) (the basis for Chaps. 8–10); Ryan (2010) (the basis for Chap. 7); Ryan (2007) (the basis for parts of several chapters in Parts I and II).

[46] Coastal Zone Management Act, *codified at* 16 U.S.C. §§ 1451-66 (2006).

[47] Clean Air Act, 42 U.S.C. §7410(a)(1).

play in supplementing the unilateral interpretive efforts of the Courts, Congress, and the Executive to make sense of our ongoing federalism dilemmas. In short, the more (or less) that federalism bargaining incorporates legitimizing procedures founded on mutual consent and federalism values, the more (or less) interpretive deference should be accorded its substantive outcome.[48]

The following discussion provides a digestible introduction to more painstaking analysis in prior work. Part II of this essay explores the dilemma of jurisdictional overlap within American federalism and locates the significance of negotiated federalism within the existing U.S. federalism discourse, especially the ongoing federalism safeguards debate. Part III introduces the federalism bargaining enterprise, providing highlights from the full taxonomy and examples from the U.S. Coastal Zone Management and the Clean Air Acts. Part IV explores of the interpretive potential of federalism bargaining that meets specified procedural criteria associated with fair bargaining and core federalism values. It shows how well-crafted federalism bargaining, subjected to limited but meaningful judicial review for abuses, harnesses the appropriate capacity of all branches at all levels of government in jointly navigating the tensions among federalism values toward good governance.

Jurisdictional Overlap, Bilateralism, and the Great Federalism Safeguards Debate

This section explores the zone of concurrent state-federal regulatory jurisdiction that complicates American federalism. It also reviews the significance of negotiated governance within this zone to the longstanding debate about which branch of government should resolve regulatory jurisdictional issues. This analysis precedes the fuller exegesis of intergovernmental bargaining in Part III in order to demonstrate up front why that exegesis is worth pursuing.

A discussion of the challenges for American federalism necessarily begins with the problem of jurisdictional overlap that American federalism necessarily creates. This is the "interjurisdictional gray area" that bridges the clearer realms of exclusive state and federal jurisdiction as delegated by the Constitution.[49] It is from within this gray area that most federalism controversy spawns, and certainly all that is currently occupying front page news. Simply stated, zones of jurisdictional overlap are those regulatory contexts in which both the local and national governments have some legitimate regulatory interest or obligations at the same time. Sovereign interests and obligations arise from constitutional delegations of federal responsibility and the remaining reservoir of police power constitutionally reserved to the states, but many are triggered by related subject matter areas of

[48] Ryan (2012), *supra* note 1, at Chap. 10, p. 339–56 (detailing this analysis).

[49] *Id*. at Chap. 1, p. 1–17 (reviewing the constitutional basis for jurisdictional overlap) and Chap. 5, p. 145–80 (exploring the gray area of overlap). For examples of exclusive delegations bridged by this gray area, see *infra* note 54.

law.[50] For example, the Constitution explicitly delegates responsibility for uniform national bankruptcy laws to the federal government, but the administration of federal bankruptcy nevertheless relies on state law definitions of property.[51] In the United States, there are many such areas of overlap, from criminal law to financial services regulation, from national security to public health law.[52]

For example, in the context of environmental law, jurisdictional overlap often arises because of the way that many environmental problems partner a need for locally-based land use authority (to police the individual sources of an environmental harm) with nationally-based Commerce Clause authority (to manage boundary-crossing or spillover effects of these harms). The problem of regulating water pollution provides a classic example. Harmful stream sedimentation by a local construction project may be best regulated through a municipal construction permitting process—but if that fails, it will cause problems for downstream communities in other states without direct control over out-of-state permitting.[53] For other health and safety regulations, the same relationship plays out between the states' traditional police power to protect the health and safety of their citizens and the need for federal law to protect the public in other states.

In light of such overlapping sovereign interests, controversy often arises in these circumstances over which sovereign should be able to make which regulatory choices. This, after all, is the ultimate federalism inquiry: "who gets to decide?"—the state or federal government? To be sure, the Constitution provides valuable guidance about the issue, clearly enumerating some powers to the federal government (such as the power to declare war) and reserving others to the states (such the management of elections).[54] Even so, American federalism gives rise to two primary kinds of uncertainty, leading to so many of the substantive debates in the news.

Sometimes, there is uncertainty about the actual boundary line between realms of state and federal jurisdiction, in contexts where we think there may actually be a bright line separating them. For example, controversy of this variety has erupted over the boundary between state and federal reach over matters relating to immigration. The Constitution requires the federal government to establish uniform rules of naturalization, but several states have enacted new laws that, while not administering immigration directly, govern immigration-related activity by state

[50] U.S. Const. amend X.; Ryan (2012), *supra* note 1, at Chap. 1, p. 1–17 (discussing indeterminacy among the details of constitutional delegations) and Chap. 5, p. 145–80 (discussing jurisdictional overlap in detail).

[51] U.S. Const. Art. I, § 8 (delegating bankruptcy administration to the federal government); Nadborny (2005), p. 839, 889 (discussing the role of state law).

[52] Ryan (2012), *supra* note 1, at Chap. 5, p. 145–80 (demonstrating overlap in multiple areas of regulatory law).

[53] *Id.* (reviewing the interjurisdictional problem of watershed-wide pollution control).

[54] U.S. Const. Art. I, sec. 8 (empowering Congress to declare war); Art. I, sec. 4 (delegating responsibility for the mechanics of congressional elections to state legislatures). *See also* Ryan (2012), *supra* note 1, at Chap. 1, p. 8–11.

businesses and law enforcement agencies.[55] Arizona's controversial legislation is currently the subject of a lawsuit by the U.S. Department of Justice, which seeks to invalidate the state measures as preempted by federal law.[56] Related controversy has been playing out in more than a decade of litigation over the proper boundary between state and federal authority over wetlands regulation.[57] Beginning with a 2001 case in which an Illinois municipal agency successfully sued to invalidate federal authority over certain intrastate wetlands,[58] the boundary-drawing problem went on to embroil the U.S. Supreme Court in one of its most fractured opinions ever, *Rapanos v. United States*, which failed to produce a majority view despite four separate opinions.[59]

In other contexts, we are more comfortable with the idea of concurrent jurisdiction and less interested in drawing bright line boundaries between state and federal reach, as demonstrated by general complacency with overlapping state and federal criminal laws[60] or cooperative state-federal management of national highways.[61] Yet uncertainty nevertheless surfaces when conflicts arise between state and federal choices in this gray area—and then the question becomes "who should trump?" Regarding criminal or environmental law enforcement, for example, should national objectives preempt, or should local priorities prevail?[62] Once again, the Constitution provides important guidance through the Supremacy Clause, which clarifies that legitimate exercise of federal authority may always trump conflicting

[55] U.S. CONST. Art. I, § 8; United States v. Arizona, 2010 U.S. Dist. LEXIS 75558 (D. Ariz. July 28, 2010) (describing Arizona's controversial immigration-related law).

[56] *Id.*; Press Release, Dep't of Justice Office of Pub. Affairs, Citing Conflict with Federal Law, Department of Justice Challenges Arizona Immigration Law (July 6, 2010), http://www.justice.gov/opa/pr/2010/July/10-opa-776.html (arguing that the Arizona law exceeds a state's role with respect to aliens, interferes with the federal administration of the immigration laws, and critically undermines U.S. foreign policy objectives).

[57] Ryan (2012), *supra* note 1, at Chap. 5, p. 159–62 (discussing the interjurisdictional problem of wetlands regulation).

[58] Solid Waste Agency of Northern Cook County v. U.S. Army Corp of Engineers, 531 U.S. 159, 173–174 (2001) (limiting federal authority over "hydrologically isolated" wetlands).

[59] Rapanos v. United States, 126 S. Ct. 2208 (2006) (casting further doubt on the reach of federal regulatory authority over wetlands without direct surface connections to navigable waters). Strictly speaking, *Solid Waste Agency* and *Rapanos* were both statutory decisions interpreting the Clean Water Act. However, the Justices and their observers clearly understood their task of statutory interpretation as taking place in the looming shadow of ongoing debate over the reach of federal Commerce Clause authority.

[60] *See* Logan (2006), pp. 104–06; Klein (2002), p. 1541, 1553.

[61] The National Highway System is jointly administered by the states and federal government. Federal-Aid Highway Act of 1956, Pub. L. 84-627, 70 Stat. 374 (June 29, 1956).

[62] *E.g.,* Logan (2006), *supra* note 60 at 104-06 (questioning the increasing federalization of criminal law); Adler (2005), pp. 172–173 (questioning federal preemption in areas of formerly state environmental law).

state law.[63] Even so, the federal government often leaves purposeful space for local participation even when it could theoretically preempt the regulatory field from top to bottom under one of its enumerated powers, usually for the sake of some special regulatory expertise or capacity that local government has but it does not.[64] These days, more often than not, the more difficult preemption question is not whether the federal government *could* preempt, but whether (and to what degree) it *should*.[65]

Ongoing dilemmas about scope and restraint in contexts of jurisdictional overlap demonstrate the force with which federalism and preemption controversies remain alive and well in the United States. They also indicate the considerable uncertainty faced by the people who actually govern in these contexts of overlap in determining how, exactly, they should do their jobs. They face uncertainty about who should "get to decide" when a federalism-charged decision must be made, and how to otherwise share or divide regulatory authority in the performance of their obligations. Yet even as academics struggle to make sense of what the Court and Constitution say about who should decide, those who actually govern in areas of overlap do not usually struggle with academic questions. More often than not, they face down the federalism uncertainty that they confront in their work simply by *negotiating through it*. Working together with their counterparts on either side of the state-federal line, they jointly determine how best to allocate contested authority as needed to cope with the problems entrusted to their care.[66]

Accordingly, much of my own research in recent years has been a voyage of discovery into just how much federalism-sensitive governance is, in fact, the product of intergovernmental bargaining. It has been instructive—even surprising—to discover just how often the answer to the question "who gets to decide?" is reached through some process of negotiation, through a variety of constitutional and statutory frameworks that enable these negotiations to take place. Federalism bargaining includes examples of conventional political haggling, formalized methods of collaborative policymaking, and even more remote signaling processes by which state and federal actors share responsibility for public decision making over time.[67] In the following section, I sketch out some basic

[63] U.S. Const. Art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

[64] Ryan (2012), *supra* note 1, Chap. 8, p. 271–314 (reviewing regulatory realms in which the federal government invites state involvement even though it could legitimately preempt the field).

[65] *Id.*; *cf.* Buzbee (2007), p. 1547 (discussing the advantages of narrowly tailored "floor preemption," which enables state discretion to exceed a federal standard, over the alternative "unitary federal choice" or "ceiling preemption," which does not); Carlson (2009), p. 1097 (discussing the advantages of declining to fully preempt state discretion within a national program of air pollution prevention).

[66] Ryan (2012), *supra* note 1, at Chaps. 8 and 9, p. 271–338 (reviewing the varieties and mechanics of such bargaining).

[67] *Id.* at Chap. 8, p. 271–314.

ways that state and federal actors negotiate with one another in federalism-sensitive contexts. But first, this section highlights two important normative consequences of this research into negotiated governance.

The first engages the growing gap between the rhetorical emphasis of the mainstream federalism discourse and the reality of intergovernmental relations in the United States. The sheer volume of negotiated governance demonstrated in the full taxonomy suggests a story far different from the presumption of state-federal antagonism that colors so many academic discussions about American federalism.[68] Indeed, it belies a pervasive mythology that arguably hangs over much of the discourse, which we might call "the Myth of Zero-Sum Federalism."[69] This is the idea that the state and federal governments are locked in a bitter, winner-takes-all competition for jurisdiction, in which every victory by one side constitutes a loss for the other. There are certainly instances in which this is true, as the Department of Justice's lawsuit over Arizona immigration law will likely demonstrate.[70] However, as Part III of this essay reveals, the line between state and federal power is just as often an ongoing project of negotiation, at levels large and small, and often in ways that often accrue to the advantage of both sides. This simple observation warrants emphasis, because it makes a powerful point about what American federalism actually looks like in practice, and about how federalism in practice often departs from federalism in rhetoric.[71]

The second normative point addresses the significance of the interpretive potential of federalism bargaining, the subject to which Part IV of this essay is devoted. There I argue that this robust recourse to intergovernmental bargaining is not just a de facto response to interpretive uncertainty on the part of the Court or Congress about exactly who should decide in each instance. Instead, I show that—at least when it's done well—such bargaining can *itself* be a constitutionally legitimate way of deciding. That is to say, it can itself be a legitimate way of interpreting federalism—when we understand federalism interpretation as how we effectively constrain public administration to be consistent with the governing constitutional directives., p. 272–73.[72] As Part IV explains, properly designed federalism bargaining can incorporate not only the consent principles that legitimize bargaining in general, but also the fundamental federalism values that should guide federalism interpretation in any forum—as a matter of good governance procedure.[73]

But before advancing to that argument, I here emphasize the significance this second point bears for an important normative problem of federalism theory that American jurists have wrestled for ages. If the most basic inquiry of American federalism is "who gets to decide—the state or federal government?", then the

[68] *Id.* at Chap. 8 (presenting the taxonomy) and Part IV Introduction (discussing its significance).

[69] *Id.* at Part IV Introduction, p. 267–68.

[70] *See supra* note 56 and accompanying text.

[71] Ryan (2012), *supra* note 1, at Part IV Introduction, p. 267–68.

[72] *Id.* at Chap. 8 (defining federalism interpretation), p. 272–73.

[73] *Id.* at Chap. 10, p. 342–56 (evaluating the procedural consistency of bargaining with fairness and federalism principles).

necessary corollary—the meta-inquiry, if you will—is "*who gets to decide that?*" Is it the Court, through judicially enforceable federalism constraints? Congress, through political safeguards? The executive branch, through administrative process? Scholars of American federalism will recognize this as the "Federalism Safeguards" debate that theorists have been engaged over hundreds of years, which seeks to identify which branch of government should hold final interpretive authority over the allocation of state and federal regulatory authority in contexts of jurisdictional overlap.[74] Indeed, it is a debate spanning hundreds of years precisely because it is a hard one to resolve—all three of these branches possess useful tools to bring to bear on the project.

However—and here is the critical point—the entire time we have been holding this debate, it has been focused exclusively on how each of these branches acts to interpret federalism unilaterally—on one side of the state-federal line or the other—alone in their chambers as they figure out whether to enact a law in a context of overlap, whether to uphold it if challenged, and how to implement it if it survives challenge. Yet this entire time, the debate has been missing how the three branches are also interpreting federalism bilaterally—on both sides of the state-federal line—through the processes of intergovernmental bargaining that are the focus of this essay.[75]

This insight into the bilateral nature of so much federalism-sensitive governance in the United States powerfully alters the Safeguards debate about federalism interpretation. Understanding bilateral interpretive tools offers new insight on the available means of federalism interpretation, providing new theoretical justification for existing practices that warrant deference and better means of evaluating whether they do. It also raises new questions about how best to allocate interpretive roles among the three branches and various levels of our system of government. To put flesh on the bones of these provocative assertions, we now explore the federalism bargaining enterprise itself.

Negotiated Federalism: An Introduction to U.S. Intergovernmental Bargaining

This section explores the variety of mechanisms available to state and federal actors for bargaining over federalism interpretation and implementation in the United States. My analysis of negotiated governance adopts the broad definition of bargaining that negotiation theorists prefer: "an iterative process of communication by which multiple parties seek to influence one another in a project of joint decision

[74] *Id.* at Chap. 8, p. 273–76 (reviewing the competing positions within the federalism safeguards debate); *supra* notes 34–35 and accompanying text.

[75] *Id.* at Part IV.

making."[76] Framing negotiation as an iterative process of joint decision making encompasses many examples that fit the conventional notion of negotiation—perhaps legislative lobbying in the back of some smoke-filled room—where the bargaining is neatly bounded in time and space, the parties are all easily identified, and participants see their objective as one of deal-making. But it also includes examples beyond the conventional—such as the iterative policymaking negotiations and intersystemic signaling examples—which may take place over a longer period of time, with a broader array of participants, who may not even think of what they are doing at the time as negotiating.[77]

As aforementioned, my previous work presents a detailed taxonomy of ten basic kinds of federalism bargaining, identifying different opportunities for state and federal actors to negotiate over the allocation of policymaking and implementation authority in federalism-sensitive contexts.[78] The taxonomy groups them into three overarching categories: conventional examples, negotiations to reallocate authority, and joint policymaking negotiations (although some examples fit within more than one category).

The first category requires little explanation in an abbreviated discussion, because most readers will already understand them at an intuitive level. Conventional negotiations are of the "smoke-filled room" variety, reflecting the most ordinary ways in which state and federal actors negotiate with all the hallmarks of traditional deal-making. They involve a simple exchange of value or a purposeful collective deliberation between well-identified participants, with a clear beginning and end. Conventional federalism bargaining is common in administrative proceedings, in settlement of litigation or other specific disputes, and over enforcement matters in which both state and federal actors have an interest. State and municipal agencies also engage in conventional negotiations with federal legislators over matters of joint concern through the interest-group representation model of lawmaking that characterizes our representative democracy.[79]

These most familiar examples of federalism bargaining are also most frequently used, variously addressing matters of policymaking, implementation, and enforcement. The results usually become part of the public record, but the process itself may be largely hidden from view (a consequence of the smoke-filled room), such that details are only available through first-hand accounts. For this reason, even though conventional examples seem most comfortably familiar, they are also the most vulnerable to conventional negotiating concerns about transparency,

[76] *Id*. *See also* Fisher and Ury (1991), p. 100 (describing it as "back-and-forth communication designed to reach agreement" whenever parties have both shared and differing interests); Shell (1999) (describing it as the "interactive communication process" that takes place when parties want things from each other).

[77] *See supra* text accompanying note 42; Ryan (2012), *supra* note 1, at Chap. 8 (discussing these examples in detail).

[78] *Id*.; *see also* Ryan (2011), *supra* note 41 (providing a more detailed taxonomy in comparison to the edited version that appears in Federalism And The Tug of War Within).

[79] Ryan (2012), *supra* note 1, at Chap. 8, p. 280–314 (reviewing conventional negotiations).

inclusion, third-party impacts, and principal-agent tensions.[80] When manifest, and as reviewed in Part IV, such procedural issues may compromise the federalism interpretive potential of such bargaining, even if it does not complicate the legitimacy of the result for other purposes.[81]

The second category, state-federal negotiations to reallocate authority (or depart from an otherwise established legal order) includes slightly more interesting examples. These take place when there actually is some constitutional or statutory line in the jurisdictional sand that purports to answer the question of "who gets to decide?"—but the parties then negotiate around that line. The best known examples are those that take place under the Spending Clause of the Constitution,[82] which enables the federal government to bargain with the states for access to policymaking areas initially reserved by the Constitution to the states, such as education or public health policy. In an example specifically upheld as constitutional by the Supreme Court, Congress persuaded the states to adopt a minimum legal drinking age of 21 years in exchange for federal highway funding (on the theory that raising the legal drinking age would reduce deaths on federally-maintained highways from drunken driving).[83] Spending power bargains are frequently the basis for statutory programs of cooperative federalism, in which the state and federal governments take responsibility for separate parts of interlinking regulatory programs, such as the national highway system mentioned above, the Coastal Zone Management program discussed below, or social safety net programs like Medicaid.[84]

Spending power bargaining enables federal access to policymaking realms reserved to the states, but federalism bargaining to reallocate authority can work in the other direction as well. The states sometimes negotiate directly with Congress to encroach on policymaking arenas specifically delegated by the Constitution to the federal government.[85] This kind of federalism bargaining takes place whenever the states seek (constitutionally mandated) congressional approval for interstate compacts that augment state authority at the expense of federal authority.[86] States often do so when negotiating interstate compacts that would otherwise encroach on the federal commerce power.[87] For example, the Great Lakes-St. Lawrence River Basin Compact was negotiated between 2001 and 2005 when eight regional states feared that federal proposals to divert lake waters to the high plains might lead to

[80] *Id.*

[81] In other words, a smoke-filled room bargain that leads to the enactment of legislation may yield perfectly legitimate legislation, but the bargaining process used to create that legislation may or may not confer the kind of interpretive legitimacy described in Part IV that would require deference from a reviewing court.

[82] U.S. Const. Art. I, § 8.

[83] South Dakota v. Dole, 483 U.S. 203 (1987).

[84] Ryan (2012), *supra* note 1, at Chap. 8, p. 305–07 (reviewing Medicaid demonstration waivers).

[85] *Id.* at 290–96 (discussing bargained-for encroachment).

[86] *E.g., id.* at Chap. 7, p. 219–20 (discussing compacts limiting interstate shipments of low-level radioactive waste).

[87] *Id.* at Chap. 8, p. 290–91 (discussing interstate water allocation compacts).

federally mandated water transfers to arid western states.[88] The compact makes it difficult for later federal choices to divert water from the Great Lakes basin,[89] empowering state decision-making at the expense of federal prerogative despite clear federal supremacy in the allocation of interstate waters.[90]

Nevertheless, this essay focuses attention on the third and most intriguing category of federalism bargaining, the joint policymaking negotiations, which draw on elements of the prior two. These take place in those zones of jurisdictional overlap in which the federal government could fully preempt state involvement under one of its enumerated powers—but it declines to do so, usually in light of some critical substantive expertise, legal authority, or boots-on-the-ground enforcement capacity that local government possesses but national government does not.[91] Negotiated federal rulemaking with state stakeholders provides one example, in which state actors assist federal agencies in drafting regulations ranging from environmental to national security issues.[92] Federal statutes that explicitly share policy design with participating states provide another, such as the Coastal Zone Management Act discussed below.[93] Joint policymaking also takes place through less formalized iterative processes that stagger state and federal leadership over time, such as the Clean Air Act example that follows.[94] Subtle policy negotiations are even conducted informally through the remote device of intersystemic signaling, by which independently operating state and federal actors trade influence over the direction of evolving interjurisdictional policy, such as the ongoing developments in state and national policy over medical marijuana.[95]

In contrast to conventional bargaining where only the results are made public, the process of joint policymaking negotiations is often as available for scrutiny as its results, moderating concerns about negotiated governance that hinge on transparency (and bolstering eligibility for interpretive potential under the Part IV test). Moreover, joint policymaking bargaining is usually the result of legislative design, offering opportunities to engineer support for federalism considerations into the negotiating process even when participants may be distracted by more immediate substantive goals.[96] The following discussion analyzes two examples of joint policymaking federalism bargaining to demonstrate two different models of

[88] Tarlock (2009), p. 24.

[89] *Id.* at § 10-32.

[90] Sporhase v. Nebraska *ex rel.* Douglas, 458 U.S. 941, 953–954, 959–960 (1982).

[91] Ryan (2012), *supra* note 1, at Chap. 8, p. 296–314 (discussing joint policymaking bargaining).

[92] *Id.* (reviewing negotiated rulemaking, including examples regulating stormwater and state identification cards).

[93] Pub. L. No. 92-583, 86 Stat. 1280 (1972) (codified as amended at 16 U.S.C. §§ 1451-1466 (2006)).

[94] 42 U.S.C. §7410(a)(1).

[95] *See* Ryan (2012), *supra* note 1, at Chap. 8, p. 311–13 (discussing the example of medical marijuana policy).

[96] *Id.* at Chap. 10, p. 354–56.

negotiated governance in federalism-sensitive contexts. The first takes the U.S. Coastal Zone Management Act as an example of a "policymaking laboratory" negotiation, and the second draws on the U.S. Clean Air Act's mechanism for regulating automobile emissions to demonstrate the contrasting model of "iterative federalism bargaining."

Policymaking Laboratory Negotiations: The Coastal Zone Management Act

The "policymaking laboratory negotiations" are an especially fruitful variety of joint policymaking bargaining that harness the promise of federalism as a national laboratory of state-based ideas and experimentation.[97] In these negotiations, the federal government invites the states to propose innovations and variations within existing federal laws that address realms of concurrent jurisdiction.

Some federal statutes invite states to experiment with local improvements on the general federal approach by proposing specific waivers or exceptions, as do Medicaid and other Social Security Act programs.[98] Congress also authorizes bargaining in statutes that invite states to lead through local policymaking in support of national objectives, or to design implementation plans in support of federal standards. Federal agencies occasionally use similar processes in articulating rules to implement congressional statutes, as the U.S. Environmental Protection Agency (EPA) did in developing stormwater regulations under the Clean Water Act.[99] Policymaking laboratory negotiations often (though not always) take place in the context of a spending power-based program of cooperative federalism.

The Coastal Zone Management Act[100] (CZMA) presents a model in which the federal government frames the overall goals of regulatory policy and invites the states to take the lead in proposing how best to attain them locally, based on their own unique economic, environmental, or demographic factors. The CZMA creates a complex forum for ongoing intergovernmental bargaining, designed to protect coastal resources from the cumulative impacts of development pressures on a scale beyond that addressed by traditional local land use planning.[101]

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[97] *Id.* at Chap. 8, p. 296–314 (discussing policymaking laboratory negotiations). *See also* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); *supra* note 29 and accompanying text.

[98] *See* Ryan (2012), *supra* note 1, at Chap. 8, p. 305–08 (discussing Social Security Act waiver programs).

[99] 33 U.S.C. § 1342(p)(4) (2000) (authorizing stormwater regulation); EPA Office of Water (1996). *See also* Ryan (2012), *supra* note 1, at Chaps. 5 and 8, p. 151–56, 300–01 (discussing the "Phase II" stormwater rule developed through negotiated rulemaking).

[100] Pub. L. No. 92-583, 86 Stat. 1280 (1972) (codified as amended at 16 U.S.C. §§ 1451-1466 (2006)).

[101] *Id.* at § 1451(i) (2006); 136 Cong. Rec. 26030, 26030-67 (1990) (statement of Rep. Walter B. Jones); S. Rep. No. 92-753 (1972), *reprinted in* 1972 U.S.C.C.A.N. 4776, 4778.

The CZMA addresses a classic problem of overlap, one hopelessly mired in the gray area of concurrent state and federal regulatory interest.[102] The clearest inter-jurisdictional factor lies seaward of the coast, given water's notorious unwillingness to abide by political boundaries. No matter how hard a coastal community works to protect the resources on the wet side of its shoreline, it will find little success without the cooperation of its neighbors. Coastal waters flow across state lines, resources suspended in that water will do the same, and pollutants threatening the quality of all of these resources will also freely migrate across these boundaries. Fisheries, water quality, and other straddling coastal resources simply cannot be managed purely at the local level; the boundary crossing nature of the resource requires a more coordinated approach.

However, neither can the federal government effectively manage these resources on its own. As marine scientists have long warned, among the greatest threats to these shared resources is marine pollution originating from land-based activities regulated at the state and local level. Even traditional land use planning decisions that affect industrial development patterns, suburban sprawl, and private transportation choices can effect marine pollution levels, by encouraging or discouraging the conveyance to coastal waters of manufacturing pollutants, lawn pesticides and fertilizers, and vehicular residues. Recognizing the need for an intergovernmental partnership on this and other grounds, Congress engaged the states in an elaborate, three-tiered program of intergovernmental bargaining through the CZMA.[103]

In the first stage of negotiations, Congress initiates bargaining under its spending power, offering financial and technical assistance for voluntary state management programs to protect resources in coastal waters, submerged lands, and adjacent shorelands.[104] Unlike other laws that promise federal control if states choose not to participate, the CZMA establishes no mandatory compliance standards and does not authorize federal implementation for states that opt out.[105] Nevertheless, the states have responded enthusiastically, with formal participation by all thirty-five eligible coastal and Great Lakes states, as well as extensive participation from municipal governments.[106]

In the second stage of bargaining, the relevant state and federal agencies haggle over the terms of a state's proposed plan, dickering over provisions that one side or the other would most prefer to see in the final plan. In this conventional bargaining forum, the federal government appears to have the most negotiating leverage, given that it

[102] Ryan (2012), *supra* note 1, at Chap. 8, p. 302–08 (discussing the Coastal Zone Management Act in detail).

[103] *Id.*

[104] 16 U.S.C. § 1453(1).

[105] *Summary of Coastal Zone Management Act and Amendments*, EPA, http://epa.gov/oecaagct/lzma.html#Summary%20of%20Coastal%20Zone%20Management%20Act%20and%20Amendments.

[106] Office of Ocean & Coastal Res. Mgmt., Coastal Zone Management Act Performance System 2 (2006), http://coastalmanagement.noaa.gov/resources/docs/npmsupdate.pdf; Wood (2004), p. 57 (discussing local participation).

maintains final approval authority and holds the ultimate carrot of federal funding. However, all bargaining is driven by circumstances in which both sides need something from the other. In this case, only the state possesses the local land use planning authority and governance capacity needed to create and implement these management plans. In this regard, and as is true in so many fields of spending power bargaining, federal fiscal leverage is matched by the leverage of state governance capacity.[107]

In the final and most fascinating stage of the bargaining, the apparent leverage shifts. Once the federal government approves the state plan, it effectively agrees *itself* to be bound by the state plan going forward, or to ensure that all federal activities directly or indirectly affecting the coastal zone will be consistent with the approved state plan.[108] Under a limited waiver of federal supremacy known as the CZMA "consistency provision," federal actors must seek state permission for any actions that could affect protected coastal resources. States may review not only those activities conducted by or on behalf of a federal agency, but also activities that require a federal license or permit, activities conducted pursuant to an Outer Continental Shelf Lands Act exploration plan, and any federally-funded activities that may impact the coastal zone.[109] States may disapprove activities that "affect any land or water use or natural resource of the coastal zone" unless they are "consistent to the maximum extent practicable" with accepted state management programs.[110]

In this way, the Act creates a rare instance in which the federal government must negotiate for *state* permission before taking action, opening the door for ongoing communication, exchange, and innovation over regulatory decision-making affecting the protected resources. The Act also provides a mandatory but flexible mechanism for resolving potential conflicts between state and federal priorities, fostering early consultation and negotiated coordination.[111] The three stages of CZMA bargaining thus effectively engage state and federal actors in an ongoing, *ad infinitum* dialogue about coastal management, informed by both local and national insight in exactly the way that federalism intends.

In extraordinary circumstances, and only if the proposed federal action is "in the paramount interest of the United States," the Act enables the President to override state disapproval after administrative and judicial mediation have failed to produce consensus.[112] However, the vast majority of federal consistency determinations are

[107] For a detailed discussion of the leverage dynamics within federalism bargaining, see Ryan (2012), *supra* note 1, at Chap. 9, p. 315–38.

[108] Coastal Zone Management Act Federal Consistency Regulations, 71 Fed. Reg. 787 (Jan. 5, 2006) (codified at 15 C.F.R. pt. 930).

[109] 16 U.S.C. § 1456(c); NOAA, *Basic Statutory Tenets of Federal consistency*, 71 Fed. Reg. 789-90.

[110] 16 U.S.C. § 1456(c)(1)(A). A federal agency may override objection only if it demonstrates that its activity is consistent with the approved plan to the maximum extent practicable. CZMA §307(c)(1)-(2).

[111] CZMA section 307 (16 U.S.C. §1456(h)(2)). *See also* Florida Department of Environmental Protection, *Coastal Zone Management Act*, http://www.dep.state.fl.us/secretary/oip/czma.htm.

[112] CZMA §307 (16 U.S.C. §1456(c)(1)(B), §1456 (h)(2)); California v. Norton, 311 F.3d 1162, 1167 (9th Cir. 2002).

negotiated and administered without controversy.[113] The National Oceanic and Atmospheric Administration reports that, "[w]hile States have negotiated changes to thousands of federal actions over the years, States have concurred with approximately 93 % to 95 % of all federal actions reviewed."[114] The presidential exemption is exceedingly rare, and may have been used only once, to authorize the military use of sonar in training exercises.[115]

The CZMA enables broadly negotiated local initiative within a framework of federal law that ensures fidelity to both local and national concerns. It provides a useful model for interjurisdictional governance matching broad national goals with policies best implemented at the local level, especially where local land use authority or "place" is a necessarily salient feature of the regulatory problem.

Iterative Federalism Bargaining: The Clean Air Act

The Clean Air Act incorporates a very different example of federalism bargaining, one that provides a good model for governance when an especially salient feature of the regulatory problem is its relationship to a national market. It showcases "iterative federalism bargaining,"[116] in which the federal and state governments share policymaking influence in precise, discrete steps over time. It also provides a good example of the kind of intergovernmental bargaining that may not at first even register as negotiation. In contrast to the formality of policymaking laboratory federalism, iterative federalism bargaining happens so slowly that one might fail to notice the joint decision-making process unfolding within its structure. In this scenario, the federal government creates a uniform national regulation while allowing a single state to improve upon it—and then allows other states to select their preferred alternative over time. By enabling ongoing choice between the federal standard and a single-state alternative, iterative federalism programs create a limited dynamic of regulatory innovation and competition by which state choices pressure federal standards.

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[113] 136 Cong. Rec. H8068-01, 8072 (daily ed. Sept. 26, 1990) (statement of Rep. Jones).

[114] NOAA, Department of Commerce, *Coastal Zone Management Act Federal Consistency Regulations*, 71 Fed. Reg. 787, 789 (Jan. 5, 2006) (codified at 15 C.F.R. pt. 930). *See also* Ryan (2012), *supra* note 1, at Chap. 8 (noting that such high levels of consensus "[may] reflect the federal ability to override state protest through the presidential exemption, which could reduce a state's incentive to expend resources fighting a battle it expects to lose. However, given that the presidential trump has been used so sparingly... a more likely explanation is that the consistency process itself moderates what federal agencies seek. Understanding that federal action will require state approval may promote greater federal deference to state interests in the very spirit intended by the Act. After all, the process that must be navigated after a state objects is costly to resource-poor federal agencies as well.").

[115] *See* Romero (2008), p. 137, 146.

[116] Carlson (2009), *supra* note 65, at 1099 (coining the term to describe "repeated, sustained, and dynamic lawmaking efforts involving both levels of government").

For example, the Clean Air Act (CAA) governs the emission of air pollutants, including those by automobiles and other mobile sources.[117] Congress delegated the primary task of setting national emissions standards to the EPA, saving the automobile industry from the crippling multiplicity of manufacturing standards it feared if states could regulate independently. Nevertheless, it allowed the state of California to set a competing state-wide standard that could be more (but not less) stringent than EPA's.[118] The "California" exception was created initially out of respect for California's leadership in the field, and also because air quality in parts of the state so exceeded national averages that more stringent motor vehicle regulations were necessary to meet other CAA obligations.[119]

Then, in a stroke of great legislative wisdom, Congress later enabled other states to choose between following either the EPA or California standards.[120] This critical structural modification created a powerful forum for policymaking negotiation over the national direction of air quality management, through an iterated process of subtle but joint state-federal decision-making. Over time, an increasing number of states initially following the EPA standards have migrated to the California alternative. As of 2009, fourteen states were following California's more stringent standards[121] and a dozen others were exploring the possibility.[122] The force of state preferences has put upward pressure on EPA standards to match the alternative, even as California's standard continues to evolve.[123] The overall effect, as states vote with their regulatory feet, is that the nation's vehicular emissions standards are in a constant state of evolution toward more ambitious, targeted, and rational goals.

The power of iterative policymaking is in the way that it uniquely balances the needs for federalism innovation and economic uniformity in a national marketplace.[124] In the case of the CAA, automobile manufacturers may prefer a single set of emissions standards, but coping with two is certainly preferable to 50 moving targets. Similarly, states may ideally prefer to set their own standards, but a choice between at least two levels of stringency is preferable to no choice at all. Meanwhile, the managed exchange enables a limited level of regulatory innovation and competition, creating regulatory dynamism that is more responsive to new data and

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[117] 42 U.S.C. § 7543.

[118] 42 U.S.C. § 7543(b)(1) (so authorizing all states with an emissions program before 1966—i.e., California).

[119] Wooley and Morss (2009), p. 11.

[120] 42 U.S.C. § 7507; National Research Council Committee on State Practices in Setting Mobile Source Emissions Standards, State and Federal Standards for Mobile-Source Emissions 70–71 (2006) (explaining that states Congress did so in response to state requests for more tools to meet ambient air standards).

[121] McCarthy and Robert Meltz (2009), p. 13.

[122] Chen (2008) (listing states considering adoption of California standards).

[123] Adelman and Engel (2008), p. 1796, 1840 (explaining the dissemination of CA standards over time as other states, EPA, and automakers gradually adopt them).

[124] Ryan (2012), *supra* note 1, at Chap. 8, p. 308–14 (discussing iterative federalism bargaining in detail).

preferences—and less vulnerable to regulatory capture—than a pure regulatory monopoly.[125] In effect, it offers a precisely constrained, miniature laboratory of ideas.

Iterative federalism strikes a wise compromise in regulatory marketplaces where legitimate concerns over stagnating regulatory monopoly compete with legitimate economic needs for regulatory uniformity. The approach serves governance hinging on a centralized national market while preserving space for regulatory innovation. The iterative policymaking structure also protects state innovators that invest in efforts to resolve their share of an interjurisdictional problem before the rest follow—as California did in regulating automobile emissions, and as several are now doing in attempting to regulate other greenhouse gas production.[126] State innovators would suffer disproportionately if forced to abandon path-breaking regulatory infrastructure to conform to a preemptive federal standard.[127] For these reasons, some scholars have proposed that the CAA's model of iterative federalism policymaking may be a useful means of navigating federalism concerns in U.S. climate policymaking.[128] Given the implied collective action problem at hand[129] and the role many states have already played in early rounds of climate policymaking negotiations,[130] the suggestion may have merit.

The Interpretive Potential of Federalism Bargaining

Drawing from the examples of federalism bargaining in the previous section and the full taxonomy, this final part of the essay demonstrates how some of this bargaining represents more than just a de facto response to federalism uncertainty (although, to be sure, some clearly represents that as well). But in addition, some such intergovernmental bargaining can *itself* yield constitutionally legitimate answers to federalism's core questions—helping to bridge federalism's once and future challenges. It explores how the procedural incorporation of fair bargaining and federalism principles into state-federal bargaining contributes to the overall federalism interpretive project. The analysis establishes a sound theoretical basis for the ways that bilaterally negotiated partnerships legitimately supplement the unilateral

[125] *Id.*; *cf.* Buzbee (2007), *supra* note 65, (showing how unitary federal choice ("ceiling") preemption leads to poorly tailored regulation and public choice distortions of the political process in comparison to "floor" preemption).

[126] *See* Betsill and Rabe (2009), pp. 201–26; *see generally* Engel (2009), p. 432 (reviewing existing state and regional initiatives).

[127] Ryan (2012), *supra* note 1, at Chap. 8, p. 309–11 (further discussing the problematic effects of a preemptive national policy, the threat that would disincentivize states from early action that could most efficiently address the problem).

[128] Carlson (2009), *supra* note 65, at 1099.

[129] *E.g.,* Glicksman and Levy (2008), pp. 579–80 (proposing a collective action framework to determine when state law should be federally preempted).

[130] *See supra* note 126.

efforts of the Court, Congress, and the Executive to protect constitutional values in the structure of American governance.[131]

To clarify the terms of the discussion, I use the word "substantive" to refer to the substance of a legal rule or negotiated outcome, and "procedural" to refer to the process by which that rule or outcome was reached. Although the federalism discourse sometimes uses the term "unilateral" to distinguish the independent acts of separate branches of government (for example, unilateral judicial or legislative action), I use it here to distinguish the independent acts of one level of government from another (in other words, exclusively state or federal activity). By contrast, "bilateral" refers to governance that incorporates both state and federal decision-making.[132] Finally, in discussing "federalism interpretation," I emphasize the variety of means we employ to ensure that governmental practice is conducted in accord with the relevant constitutional directives. In addition to conventionally understood methods of unilateral interpretation, such as legislative statement and judicial review, this Part shows that certain bilateral bargaining does similar work, especially within the gaps of legal indeterminacy in which unilateral methods often underperform.[133]

To summarize my ultimate proposition, it is that the more bilateral intergovernmental bargaining incorporates legitimizing procedures founded on mutual consent and federalism values, the more it warrants deference as a means of interpreting federalism.[134] Bargaining confers less interpretive legitimacy as the factual circumstances depart from the assumptions of mutual consent that underlie fair bargaining—in other words, when negotiators cannot freely opt out, cannot be trusted to understand their own interests, or cannot be trusted to faithfully represent their principals—and when the bargaining procedures contravene the good governance ethics of checks, accountability, autonomy, and synergy that underlie federalism. Courts adjudicating federalism-based challenges to negotiated results should consider these factors when deciding the appropriate level of deference to extend. Political branches engaged in federalism bargaining should consider how to better

[131] For a fuller presentation of this analysis, see Ryan (2012), *supra* note 1, at Chap. 10, p. 339–67.

[132] *See supra* note 43, noting how this discussion treats municipal activity as state action, consistent with the Supreme Court's Tenth Amendment jurisprudence. *But see* Ryan (2012), *supra* note 1, at Chap. 2, p. 51 ("For the sake of simplification, my discussion frequently lumps municipal, state, and regional governance (everything more localized than the national government) together under the heading of 'local,' to best contrast the federal and state-based authority that most federalism doctrine differentiates. However, important scholarship has shown the significance of intra- and interjurisdictional governance that takes place between localities independently of their states (and occasionally their nation-states) and between municipal and federal collaborators—exposing not only the horizontal but the diagonal dimensions of interjurisdictional governance.") (citations omitted).

[133] Ryan (2012), *supra* note 1, at Chap. 1, p. 1–17 (discussing indeterminacy in constitutional federalism directives) and Chap. 10, p. 339–42 (discussing circumstances where bilateral interpretation outperforms unilateral interpretation).

[134] *Id*. at Chap. 10, p. 339–67.

engineer procedural regard for these values into their various processes of public administration.

The remainder takes a cursory stab at unpacking this provocative claim about the interpretive potential of federalism bargaining. The claim is that intergovernmental bargaining can be a constitutionally legitimate way of resolving federalism uncertainty, when it is procedurally consistent with two sets of principles. The first set tests the fundamental fairness of the bargaining process, and the second tests the consistency of that bargaining process with federalism values.

The Bargaining Principles of Mutual Consent

The first requirement for interpretive-quality federalism bargaining is that it must be consistent with the generic principles of mutual consent that serve to legitimize bargaining in general. These are the fairness-based principles that make us willing to defer to the results of negotiated agreement, as human cultures have done for the thousands of years over which we have relied on bargaining as a rational means of pursuing the good in the absence of consensus about the perfect.[135] We do this, in fact, by substituting procedural consensus for substantive consensus—consensus about the process for reaching an agreed-upon outcome, even when we can't agree on a substantive rationale for why this outcome is the objectively correct result. Although admittedly unsexy when rendered in its component parts, the mechanism for legitimizing a negotiated agreement basically goes something like this:

Consider a group that begins in disagreement over how to resolve a dispute, allocate a scarce resource, or otherwise divide a given surplus of value. At the outset, they lack consensus about an objectively correct substantive outcome; they have no reasoned basis for dividing that surplus of value according to shared principles. However, if, after some meaningful process of communication, these competing parties nevertheless reach agreement on some specific outcome—because each has determined that it this specific outcome is better for their own individual interests than no agreed-upon outcome at all—then, um, well—then that outcome must be, in at least some respect, a good idea. (!) It deserves some degree of deference beyond what we might accord a random-chance distribution.

This reasoning may seem too raw to carry the weight of legitimacy that we hang on bargained-for results, but it really does come down to this exceedingly simple lived wisdom. If, through a fair process of exchange, each determines that they are really better off with this result than no deal, then that result must have some inherent merit. So long as we believe the agreement was fairly procured, it warrants respect beyond one obtained by force, guile, or chance—even if the parties have different reasons for why they prefer this alternative. It is in this respect that we substitute *procedural* consensus for *substantive* consensus.[136] And the substitution

[135] *Id.* at p. 342–47 (discussing the principles of mutual consent).
[136] *Id.*

works, so long as the three underlying assumptions of fair bargaining are met: (1) exit-ensured autonomy, (2) interest literacy, and (3) faithful representation.[137]

First, it must be true that genuine exit is available to all negotiators, ensuring participant autonomy.[138] Each must be able to "walk away" from the bargaining table if they so choose, or else the agreement cannot carry the weight of bargained-for legitimacy. If a party lacks a meaningful exit alternative, then the result is not necessarily better for their interests than random chance or no agreement, and accordingly warrants no such deference. An outcome procured in the absence of genuine autonomy may reflect the result of force more than independent judgment. As contract law recognizes, an agreement reached under true duress (and not just relative hardship) should not be enforceable.[139] Nevertheless, both contract law and negotiation theory hold parties responsible for their choices when true exit is available, differentiating between strong leverage and actual coercion.[140]

Second, for the process to confer negotiated legitimacy, we have to believe that the parties possess the requisite level of interest literacy.[141] In other words, we must be assured that the parties each understand their own interests well enough for their agreement to be a meaningful indicator of the merit of the negotiated outcome—or, once again, there is no reason to presume its superiority to random chance or no deal. Negotiators must not be operating under a contract-law disability (such as incompetency or infancy) or other circumstance that might cast doubt on their independent judgment as to why this result is really better than the alternatives.

Finally, we must be confident that the negotiating agents involved in the bargaining process are faithfully representing their principles.[142] In the case of intergovernmental bargaining, this means that the government officials engaged in federalism bargaining must faithfully advance the interests of the citizens they serve. Principal-agent concerns are endemic to all negotiation,[143] and they may be especially fraught in public negotiations of this sort.[144] Evidence of self-dealing on

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[137] *Id.*

[138] *Id.* at p. 343–45.

[139] *Cf.* 17A C.J.S. Contracts § 176 (2010).

[140] *Id.* ("[O]ne may not avoid a contract on the ground of duress merely because he or she entered into it with reluctance, the contract is very disadvantageous to him or her, the bargaining power of the parties was unequal, or there was some unfairness in the negotiations . . . ."). *See also* Ryan (2012), *supra* note 1, at Chap. 10, p. 344 ("Even when the stronger party crafts terms without input from the weaker party, the latter can still decide whether its interests are better served by taking or leaving the proffered deal.").

[141] Ryan (2012), *supra* note 1, at Chap. 10, p. 346.

[142] *Id.* at p. 345–46.

[143] *See, e.g.,* Mnookin, et al., (2000) (describing the principal-agent tension in negotiations).

[144] *See, e.g.,* Schumpeter (1987) (describing how elections can distort incentives for representatives in government).

the part of the government negotiators would certainly negate their legitimacy.[145]

Probing the examples of federalism bargaining in my taxonomy yields examples that put pressure on each of these assumptions. For example, some have argued that spending power bargains are coercive of states that have grown dependent on federal funding, to the point that some have lost the element of free will necessary to satisfy the bargaining autonomy criterion.[146] Some have raised concerns about the principle-agent tension in intergovernmental bargaining that may advance the career-interests of the bargainers more than those of their constituents.[147] Indeed, the more pressure the underlying facts in an instance of bargaining put on any one of these assumptions, the more doubt is generated about the legitimacy of the bargained-for result.[148] Inversely, however, the more the facts in a given example of bargaining *do* line up with these assumptions, then the more legitimacy is conferred on the resulting outcome. Many examples in the taxonomy proceed from solid ground on all three assumptions, and these become the candidates for constitutionally meaningful interpretive potential.[149]

Procedural Faithfulness to Federalism Values

The principles of mutual consent that legitimize bargaining in general are the threshold procedural criteria that must be met before advancing to the second stage. The final analysis tests the criteria that render such bargaining not only fair, but constitutionally significant. And to some extent, the analysis begins with a similar story.

Indeed, we can introduce the procedural application of federalism values in terms not unlike those used to explain the principles of mutual consent. Just as individuals turn to negotiation as a legitimizing procedure of allocation, so do state and federal actors to allocate jurisdiction in areas of overlap. And very often, it is for the same basic reason—the lack of any up-front, substantive consensus about the objectively correct result. As history is our witness, Americans seem to have a lot of trouble agreeing at the outset about whether a given regulatory outcome in a context of jurisdictional overlap

[145] Ryan (2012), *supra* note 1, at Chap. 7, p. 235–37 (discussing the principle-agent tension in state-federal bargaining over jurisdictional entitlements), Chap. 9, p. 337–38 (discussing the currency of "credit" in state-federal bargaining) and Chap. 10, p. 345–46 (discussing the problem of self-dealing in evaluating federalism bargaining legitimacy).

[146] Baker and Berman (2003), pp. 459, 499–500 (arguing that spending power bargains are coercive for this reason); Berman (2004), pp. 1487, 1523–1526, 1531–1532 (same). *See also* Ryan (2012), *supra* note 1, at Chap. 10, p. 360–61 (analyzing these claims and contrasting the examples of the CZMA with the No Child Left Behind Act, which conditioned federal education funds on state adoption of various federal priorities).

[147] McGinnis and Somin (2004), p. 89, 90 (warning that states may collude with federal actors in undermining federalism constraints). *See also* Ryan (2012), *supra* note 1, at Chap. 7, p. 235–37 (analyzing this claim and evaluating them in the context of the Low Level Radioactive Waste Policy Act).

[148] Ryan (2012), *supra* note 1, at Chap. 10, p. 342–47.

[149] *Id*. (discussing procedural faithfulness to federalism values in bargaining).

does or doesn't satisfy the requirements of constitutional federalism. Based on overwhelming evidence in the academic, judicial, and political realms, we can see that it is not always immediately clear how to interpret the federalism contours of a substantive regulatory policy.[150] (At the very least, what may seem immediately clear to some interpreters proves anything but to others.)

Perhaps the most persuasive evidence for this proposition is the wealth of federalism decisions that regularly split the U.S. Supreme Court, in which roughly half of the justices determine that the challenged policy is perfectly consistent with federalism while the other half consider it a constitutional violation. For example, compare the majority and dissenting opinions in *New York v. United States*,[151] a famous Tenth Amendment case holding that a Congressional statute forcing states to internalize their own toxic waste had unconstitutionally commandeered state authority—even though the law had been drafted by the states and the plaintiff had actively lobbied Congress to enact it.[152] Writing for the majority, Justice O'Connor solemnly reminded the nation that "[w]hatever the outer limits of [state] sovereignty may be, one thing is clear: The Federal Government may not compel the States to enact or administer a federal regulatory program."[153] In near incredulous dissent, Justice White argued that "to read the Court's version of events... one would think that Congress was the sole proponent of a solution to the Nation's low-level radioactive waste problem [when the Act] resulted from the efforts of state leaders to achieve a state-based set of remedies to the waste problem. They sought not federal pre-emption or intervention, but rather congressional sanction of interstate compromises they had reached."[154] In this fascinating review of bargained-for encroachment, the two opinions diverge so dramatically that they almost appear to be interpreting different fact patterns. When it comes to federalism interpretation, reasonable minds can (and very frequently do) disagree—even the most highly skilled legal minds of the day.

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[150] *See, e.g., id.* at Chap. 1, p. 17–33 (discussing controversy over the Bush Administration's response to Hurricane Katrina, including invocations of federalism by some officials as grounds for the halting federal involvement), Chap. 3, p. 68–104 (reviewing marked instability in the Supreme Court's federalism jurisprudence over American history), and Chap. 4, p. 109–44 (reviewing academic controversy over the New Federalism revival of the 1990s).

[151] New York v. United States, 505 U.S. 144, 174-75 (1992) (invalidating on Tenth Amendment grounds a federal law requiring states to site waste disposal facilities or assume liability for harm). Unlike many controversial 5-4 Supreme Court federalism decisions since then—including *United States v. Lopez*, 514 U.S. 549, 551 (1995) (overturning the Gun-Free School Zones Act of 1990 for exceeding federal commerce authority); *Printz v. United States*, 521 U.S. 898, 935 (1997) (invalidating parts of the Brady Handgun Control Act of 1993 under the Tenth Amendment for compelling state law enforcement); and *United States v. Morrison*, 529 U.S. 598, 613 (2000) (invalidating portions of the Violence Against Women Act of 1994 (VAWA) for exceeding Congress's commerce power)—*New York* was actually decided by a vote of six to three.

[152] *New York*, 505 U.S. at 174–175, 180–183; Ryan (2012), *supra* note 1, at Chap. 7, p. 215–64 (analyzing the case in detail).

[153] 505 U.S. at 188.

[154] 505 at 189–190 (J. White, dissenting) (citations omitted).

Of course, part of the reason for so many divided-Court federalism decisions is that the individual justices often apply different theories of federalism in reaching their diverging conclusions (indeed, this is one of the core themes of my book). But another important factor, one that is too often missed, has to do with the special difficulty of applying structural federalism directives in specific contexts of jurisdictional overlap, at least in comparison to more straightforward individual rights analysis.[155] In a nutshell, the problem is that it can be very difficult to sort out *just the federalism considerations* that go into a regulated outcome from all the other substantive considerations that must also go into that outcome—for example, to separate out concerns about who should be making health care policy from the complicated substantive elements of health care policy itself. By contrast, it's much easier to figure out whether the *process* by which the parties come to an agreement about substantive policy is consistent with constitutional federalism. And the critically important reason for this, as foreshadowed earlier, is that the foundational federalism values *are themselves* procedural in nature.[156]

Recall the federalism values that I introduced at the beginning of the essay: checks and balances, transparency and accountability, local autonomy and innovation, interjurisdictional synergy. In fact, these values don't hold a lot of particularly substantive meaning. At the end of the day, they don't really tell us much about what the substantive content of good government policy should be. Instead, they hold much more meaning as *procedural* values. They describe what the processes of good government look like—governance that operates with checks and balances, in an accountable way, with space for local innovation and interjurisdictional synergy.[157] Indeed, each of the fundamental federalism values are most directly vindicated through good governance procedure: (1) the maintenance of checks and balances

[155] Ryan (2012), *supra* note 1, at Chap. 10, p. 348–49. As I explain there,

> In contrast to adjudicating rights, a substantive realm in which the Constitution's directions are relatively clear, the adjudication of federalism draws on penumbral implications in the text that leave much more to interpretation. The boundary between state and federal authority is implied by structural directives such as the enumeration of federal powers in Article I and the retention of state power in the Tenth Amendment, but neither commands the clarity of commitment that the Constitution makes to identifiable individual rights. Setting aside marginal uncertainty about the extent that 'no law' really means *no law* in the First Amendment context, the Constitution is comparatively clear in its substantive commitment to free speech and free exercise. It is equally clear on the allocation of certain state and federal powers, such as which is responsible for waging war (the federal government) and responsible for locating federal elections (the states). But the document gives less guidance about the correct answers to the federalism questions that become the subject of intergovernmental bargaining, such as how to balance local and national interests in coastal zone management, or how to allocate state and federal resources in criminal law enforcement. For these reasons, negotiated federalism is not only inevitable but appropriate, and arguably constitutionally invited. . ..

Id. (citations omitted).

[156] *Id.* at Chap. 10, p. 347–56.

[157] *Id.*

that procedurally protects individuals against government excess or abdication, (2) the protection of governmental accountability that procedurally ensures meaningful democratic participation, (3) the preference for regulatory processes that foster local innovation and competition, and (4) the procedural cultivation of regulatory space in which to harness the synergy between local and national governance capacity.[158] Incorporating these values into the bargaining process procedurally allows negotiators to advance federalism directives when consensus on the substance is unavailable—filling the inevitable interpretive gaps left by judicial and legislative mandates that lead to so much substantive controversy.[159]

Accordingly, if we review the process for reaching some negotiated outcome among state and federal actors and we discover that, in fact, it is consistent with these values—it protects rights, enables meaningful democratic participation, and allows for innovation, competition, and synergy—then we can conclude that the given instance of federalism bargaining is consistent with constitutional federalism, and its results warrant interpretive deference. The process itself becomes the center of gravity for constitutional analysis. After all, facilitating the active operation of these values in governance is what American federalism is most essentially *for*. Ensuring governance that is consistent with these values is what federalism is meant to accomplish in the first place, and what federalism interpretation of any kind is designed to advance. In this regard, engineering governance processes to operate this way gets us to the same point as any other form of federalism interpretation, such as the more conventionally understood unilateral forms of congressional lawmaking, executive rulemaking, or judicial adjudication.[160]

Moreover, federalism bargaining has the added advantage of accomplishing these ends *bilaterally*, providing structural support for the local-national equipoise that

[158] *Id.* at Chap. 2 (discussing the values in detail) and Chap. 10 (discussing them as procedural values).

[159] *Id.* at Chap. 10, p. 339–56.

[160] *Id.* Of note, this evaluation of bargaining procedure operates from the *ex ante* perspective, proposing procedural judicial review and the purposeful engineering of interpretive-quality bargaining forums. Bolstering my claim, however, is a skillful empirical literature that goes further to correlate negotiated governance processes and outcomes in terms closely aligned with the foundational federalism values. As I describe in the book,

> [W]hen the bargaining process is designed to safeguard rights, participation, innovation, and synergy, the proposal assumes that federalism bargaining will harmonize with federalism as a procedural matter without reference to the substantive results. Of note, however, bargained-for results that advance federalism values at the more challenging substantive level are further evidence of good federalism process. To this end, the negotiation literature offers encouraging empirical evidence that correlates the use of similar procedural tools with outcomes that are highly consistent with federalism values. For example, Professor Lawrence Susskind has empirically evaluated volumes of governance outcomes against criteria of fairness, efficiency, stability, and wisdom, and found that negotiated governance consistently outperforms alternatives. He convincingly argues that these criteria closely align with federalism values, noting that the problem-solving qualities of negotiation naturally advance localism and synergy values, while representation is the key to successful accountability and transparency.

federalism strives for, in a way that goes beyond what unilateral interpretive mechanisms can offer. Federalism bargaining that meets the requisite criteria necessarily incorporates both local and national interests, perspectives, and wisdom in the manner that federalism intends—and regardless of the subjective considerations of the bargainers. By virtue of its bilateral operation, qualifying state-federal bargaining accomplishes federalism's goals of state-federal equipoise even if the participants never once think about federalism while they are bargaining. Federalism bargaining that meets the procedural criteria therefore provides structural safeguards exceeding the considerations of the previous federalism safeguards debate.[161]

By this analysis, when reviewing federalism-based challenges to such bargaining, the judicial role should shift from de novo review to deferential oversight for these criteria. If an instance of federalism bargaining is challenged under any of the judicially-enforceable federalism doctrines, the court should engage this procedural analysis as a threshold matter before reviewing the substantive results of the bargaining. If bargaining took place in a legitimate zone of jurisdictional overlap and the procedural criteria of fair bargaining and federalism values are met, then the court should defer to the substantive results of that bargaining process.[162] Chances are good that the substantive outcome involves an intricate balance among the many considerations of interjurisdictional governance in which political actors generally outperform judicial actors—one reason why courts have so often deferred to such results.

Nevertheless, were we to review the process and discover that it fails the second set of criteria—if the bargaining process threatens rights, hampers participation, dampens innovation, or subverts interjurisdictional synergy—then this bargaining would not be consistent with federalism values, and its results would warrant no deference as a matter of constitutional interpretation. As foreshadowed earlier, "smoke-filled room" bargaining that takes place beyond the realm of public accountability might be vulnerable in this analysis, as would bargaining with poor procedural commitment to the other values.[163] If such bargaining were judicially challenged on federalism grounds, the court should review it *de novo* without deference to the choices of the political actors involved. And of course, when a

Id. at p. 355–56. For a sampling of this literature, see Susskind and Cruikshank (1987) (discussing this in detail); Emerson, et al., (2009), p. 27 (analyzing the outcomes of 60 mediated agreements between local, state, and federal governments); Susskind and Amundson (1999) (analyzing the results in 105 cases); Freeman and Langbein (2000), pp. 60–64 (reporting on empirical data in studies of collaborative governance).

[161] Ryan (2012), *supra* note 1, at Chap. 10, p. 355 ("[E]ven unilateral governance that procedurally honors the federalism values may warrant some lesser degree of judicial deference when challenged on federalism grounds. Still, although unilateral policymaking may herald interpretive potential in proportion to its satisfaction of similar criteria, negotiated governance provides structural support to federalism values that unilateral regulation can never truly replicate.")

[162] *Id*. at Chap. 6, p. 189–90, 197–98 (setting forth a gatekeeping inquiry to test legitimate assertions of jurisdictional overlap) and Chap. 10, p. 350–54 (exploring the application of these procedural criteria in judicial review).

[163] *See supra* note 81 and accompanying text (differentiating between legitimate results and legitimizing procedure).

court reviews even a qualifying instance of federalism bargaining that is challenged on grounds unrelated to federalism—perhaps for violating the terms of the underlying statute or some other constitutional guarantee—then it should also proceed without deference to the negotiated outcome.[164]

The foregoing analysis accomplishes two normative objectives. First, it proposes a material change in the mechanics of judicial review of federalism-based challenges to intergovernmental bargaining. When the results of qualifying bargaining are challenged under judicially enforceable federalism doctrines, courts should apply procedural scrutiny before substantive review, reflecting the deferential standards used in judicial review of administrative action under the Administrative Procedures Act[165] and agency statutory interpretation under *Chevron v. NRDC*.[166] If the court determines that the bargaining process meets both sets of requisite criteria, then it should defer to the substantive results of the bargaining. If not, it may review the substantive results de novo. The overall effect is to limit judicial interference in qualifying federalism bargaining while retaining judicial oversight for bargaining abuses.

Second, it offers needed theoretical justification for the valid constitutional work that qualifying federalism bargaining has long provided. By clarifying the connection between federalism values and governance procedure, it provides the missing constitutional basis for arguments from political safeguards proponents that the judiciary should refrain from second-guessing political allocations of contested

[164] Ryan (2012), *supra* note 1, at Chap. 10. As I explain there, judicial review of bargaining should unlimited in three circumstances:

> First, if the challenged intergovernmental bargaining takes place beyond the defensible realm of jurisdictional overlap, it receives no interpretive deference. Second, if the challenged bargaining fails the court's threshold procedural review, then the court reviews the substance of the outcome de novo, applying its own interpretive judgment on the federalism-related challenge. Third, non-federalism related challenges to the products of valid interpretive federalism-bargaining warrant ordinary judicial scrutiny—limiting judicial deference only to federalism challenges, and not other claims of constitutional or statutory violation. Otherwise, however, judicial review should be limited to scrutiny of the bargaining process against fair bargaining and federalism principles, deferring to results in a procedural analog to rational basis review. This enables an interpretive partnership between the political and judicial branches that harnesses what each best contributes to federalism implementation while honoring the premise of *Marbury v. Madison*.

Id. at p. 351 (citations omitted).

[165] 5 U.S.C. §§ 551-559 (2006).

[166] 467 U.S. 837, 842-43 (1984). *See also* Ryan (2012), *supra* note 1, at Chap. 10, p. 352 ("New Governance scholars have also proposed theories of judicial review that position courts to monitor and incentivize problem-solving processes, rather than adjudicate substantive disputes. Review of bargaining autonomy, interest literacy, and faithful representation would rely on familiar judicial tools from contract law, agency law, and due process interpretation, and courts could draw from established federalism jurisprudence and scholarship in articulating the tests for procedural consistency with federalism values.") (citations omitted).

authority in contexts of overlap.[167] Nevertheless, by procedurally differentiating between negotiated governance that warrants deference and that which does not, it preserves at least some role for the judicial review championed by judicial safeguards proponents.[168] In this regard, it strikes a pose of measured balance within the federalism safeguards debate, one made possible by recognizing the broader ways in which judicial, legislative, and executive interpreters on both sides of the state-federal divide contribute.

Drawing on the procedural application of fair bargaining and federalism values, negotiated governance thus opens possibilities for filling interpretive gaps in realms of doctrinal indeterminacy. Indeed, it has been doing so all along. But for the first time, this analysis provides theoretical basis for the actual practice of American federalism in clearer constitutional terms. It offers the missing justification for operative political safeguards while preserving a role for limited judicial review. It creates legitimate regulatory space for bilateral and accountable allocations of authority in zones of overlap, balancing values, governmental capacity, and local-national input just as federalism requires.

Conclusion

I conclude by clarifying what I've tried to accomplish in this simplified discussion. My first objective was to identify the fundamental tensions within American federalism that lead to so much controversy in the political sphere. By virtue of its flexible but indeterminate design, American federalism will always struggle with the intrinsic competition among its underlying values of checks and balances, accountability and transparency, local innovation and interjurisdictional competition, and interjurisdictional problem-solving synergy. It will always struggle to balance the roles of the three branches of government in interpreting the Constitution's federalism directives. And of course, federalism is, by definition, a struggle for balance between local and national wisdom in implementing the ideals of good governance.

As outlined in Part I, these ongoing struggles are the once and future challenges of American federalism. The U.S. federal system has been grappling with these challenges since its formative years, as evidenced during the eighteenth century debates of the Constitutional Convention and the precursor Articles of Confederation. They were front and center during the nation's greatest moment of crisis, the nineteenth century Civil War. Our federal system heaved and shifted again to

[167] Ryan (2012), *supra* note 1, at Chap. 10, p. 339–67. *See also* Chap. 8, p. 273–76 (discussing the federalism safeguards debate). For examples of literature from the political safeguards school, *see supra* note 35.

[168] *Id.* at Chaps. 10 and 8, p. 339–67, 273–76. For examples of literature from the judicial safeguards school, *see supra* note 34.

adjust for these tensions during critical moments of the twentieth century, including the Great Depression and the attacks of 9/11. At the turn of the new century, the United States is again embroiled in federalism controversies over the reach of federal authority and the resilience of state alternatives. Over this period, scholars and jurists have turned to successive and competing theories of federalism to make sense of these challenges. To the same end, FEDERALISM AND THE TUG OF WAR WITHIN proposes a theory of Balanced Federalism that accounts for these internal tensions and reconnects normative federalism theory with a more theorized understanding of actual federalism practice, merging elements from its predecessors with new insights.[169]

Drawing from the Balanced Federalism analysis, I then introduced the growing enterprise of state-federal intergovernmental bargaining as one response to federalism's ongoing challenges in an age of increasing interconnectivity. In Part II, I introduced the zones of jurisdictional overlap that complicate federalism theory, and I highlighted the significance of bilaterally negotiated governance to the overall discourse and the federalism safeguards debate that has long focused only on unilateral activity. Part III outlined the basic categories of negotiated federalism and demonstrated its mechanisms with two examples of regulatory laws that create forums for genuine state-federal joint policymaking negotiation. The prevalence of negotiated federalism undermines a stale, tacitly adversarial assumption on which too much of the American federalism discourse is predicated. It also highlights opportunities for the development of tailored forms of intergovernmental bargaining to address the regulatory challenges that arise in interjurisdictional contexts.

Finally, in Part IV, I sketched a bold claim about the interpretive potential of bargaining that is procedurally consistent with the principles of fair bargaining and federalism. When state and federal actors resolve federalism dilemmas through processes consistent with these criteria, I argue that they are negotiating the answer to federalism's fundamental question—*who gets to decide?*—in a manner that vindicates constitutional goals. Negotiated results that are challenged on federalism grounds warrant judicial deference to the extent they satisfy the requisite criteria. Meanwhile, executive and legislative actors can use the criteria identified here to better engineer procedural regard for federalism values into the bargaining processes they employ, improving governance more generally.

This conception of negotiated federalism showcases one application of the fuller Balanced Federalism theory set forth in the book. When it meets the requisite criteria, intergovernmental bargaining can facilitate rational balancing among the competing values of good governance at the heart of American federalism. It effectively leverages the distinct functional capacities of the three branches in interpreting federalism directives, harnessing the best of legislative ingenuity, executive expertise, and judicial neutrality. And it maximizes the balanced input of local and national actors beyond the conventional political safeguards of

[169] *See generally* Ryan (2012), *supra* note 1.

unilateral governance. The proposal for measured judicial deference to qualifying federalism bargaining draws on the insights of the political safeguards school by respecting political federalism determinations that incorporate state and local perspectives. Simultaneously, it draws on the instincts of the judicial safeguards school in preserving a limited role for courts to police for abuses. The tailored dialectic between judicial and political safeguards draws on legislative and executive decision-making where the political branches are most able, backstopped by judicial review of the right issues.

Negotiated governance is hardly the only point of interest in modern American federalism, which continues to grapple with federalism's core challenges on all dimensions, unilateral as well as bilateral, substantive as well as procedural. Nevertheless, effective intergovernmental bargaining is increasingly used to cut through the fiery federalism debates that threaten to paralyze regulatory initiative and punish interjurisdictional collaboration. Better understanding of this realm of federalist governance is a critical new development in federalism theory, warranting attention and future study.

References

David E. Adelman & Kirsten H. Engel, *Adaptive Federalism: The Case Against Reallocating Environmental Regulatory Authority*, 92 Minn. L. Rev. 1796, 1840 (2008)

Jonathan H. Adler, *Jurisdictional Mismatch in Environmental Federalism*, 14 N.Y.U. Envtl. L.J. 130, 172-73 (2005)

William Van Alstyne, *Federalism, Congress, the States and the Tenth Amendment: Adrift in the Cellophane Sea*, 1987 Duke L.J. 769, 782-83, 797-98 (1987)

Lynn A. Baker & Mitchell N. Berman, *Getting Off the* Dole*: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It To Do So*, 78 Ind. L.J. 459, 499-500 (2003)

Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 Duke L.J. 75, 128 (2001)

Radley Balko, *The "Tenther" Smear*, Reason.com, Sept, 21, 2009, http://reason.com/blog/2009/09/21/the-tenther-smear

Mitchell N. Berman, Guillen *and Gullibility: Piercing the Surface of Commerce Clause Doctrine*, 89 Iowa L. Rev. 1487, 1523-26, 1531-32 (2004)

Michele M. Betsill & Barry G. Rabe, *Climate Change and Multilevel Governance: The Evolving State and Local Roles*, *in* Toward Sustainable Communities: Transitions and Transformations in Environmental Policy 201-26 (Daniel A. Mazmanian & Michael E. Kraft eds., 2nd ed. 2009)

William Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction,* 82 NYU L Rev. 1547 (2007)

Ann Carlson, *Iterative Federalism and Climate Change,* 103 Nw. U. L. Rev. 1097 (2009)

Erwin Chemerinsky, Enhancing Government: Federalism for the 21st Century (2008)

Emily Chen, *State Adoption Status on California Vehicle Emissions Control Requirements*, Feb. 2008, http://www.westar.org/Docs/Business%20Meetings/Spring08/ParkCity/03.2.2%20CAA%20177%20states.xls

Jesse H. Choper, Judicial Review and the National Political Process 175-76 (1980)

Neal Devins, *The Judicial Safeguards of Federalism*, 99 Nw. U. L. Rev. 131, 133–35 (2004)

Kirk Emerson, et al., *Environmental Conflict Resolution: Evaluating Performance Outcomes and Contributing Factors*, 27 Conflict Resol. Q. 27 (2009)
Kirsten H. Engel, *Whither Subnational Climate Change Initiatives in the Wake of Federal Climate Legislation?*, 39 Publius 432 (2009)
Roger Fisher & William L. Ury, Getting to Yes: Negotiating Agreement Without Giving In xvii, 100 (1991)
Jody Freeman & Laura I. Langbein, *Regulatory Negotiation and the Legitimacy Benefit*, 9 N.Y.U. Envtl. L.J. 60, 60-64 (2000)
Craig Peyton Gaumer & Paul R. Griffith, *Whose Life Is It Anyway?: An Analysis and Commentary on the Emerging Law of Physician-Assisted Suicide*, 42 S.D. L. Rev. 357, 372 (1997)
Robert L. Glicksman & Richard E. Levy, *A Collective Action Perspective on Ceiling Preemption by Federal Environmental Regulation: The Case of Global Climate Change*, 102 Nw. U. L. Rev. 579, 579-80 (2008)
Vicki C. Jackson, *Comparative Constitutional Federalism and Transnational Judicial Discourse,* 2 Int'l J. Const. L. 91, 93-96 (2004)
Kirk Johnson, *States' Rights is Rallying Cry for Lawmakers*, N.Y. Times, Mar. 16, 2010, http://www.nytimes.com/2010/03/17/us/17states.html
Edward Keynes & Randall K. Miller, The Court vs. Congress: Prayer, Busing and Abortion 176 (1989)
Susan R. Klein, *Independent-Norm Federalism in Criminal Law*, 90 Cal. L. Rev. 1541, 1553 (2002)
Alison L. Lacroix, The Ideological Origins of American Federalism (2010)
Wayne A. Logan, *Creating a "Hydra in Government": Federal Recourse to State Law in Crime Fighting*, 86 B.U. L. Rev. 65, 104-06 (2006)
James McCarthy & Robert Meltz, CRS Report: California's Waiver Request Under the Clean Air Act to Control Greenhouse Gases from Motor Vehicles 4, n. 13 (2009), http://ncseonline.org/NLE/CRSreports/09Mar/RL34099.pdf.
John O. McGinnis & Ilya Somin, *Federalism vs. States' Rights: A Defense of Judicial Review in a Federal System*, 99 Nw. U. L. Rev. 89, 90 (2004)
Robert Mnookin, et al., Beyond Winning: Negotiating to Create Value in Deals and Disputes 69 (2000)
Rick Montes, *What is a Tenther?*, New York Tenth Amendment Center (2010), http://www.tenthamendmentcenter.com/2010/05/06/what-is-a-tenther/
Felicia Anne Nadborny, Note, *"Leap of Faith" into Bankruptcy: An Examination of the Issues Surrounding the Valuation of a Catholic Diocese's Bankruptcy Estate*, 13 Am. Bankr. Inst. L. Rev. 839, 889 (2005)
Edward A. Purcell, Jr., Originalism, Federalism, and the American Constitutional Enterprise: A Historical Inquiry (2007)
Brian Roberts, *Welcome to the Constitutional Crisis*, Tenth Amendment Center, Apr. 27, 2010, http://www.tenthamendmentcenter.com/2010/04/27/welcome-to-the-constitutional-crisis/
Anthony D. Romero, Editorial, *Opposing View: Repeal Real ID,* USA Today, Mar. 5, 2007, http://www.usatoday.com/news/opinion/2007-03-05-opposing-view_N.htm
Joseph Romero, *Uncharted Waters: The Expansion of State Regulatory Authority over Federal Activities and Migratory Resources Under the Coastal Zone Management Act*, 56 Naval L. Rev. 137, 146 (2008)
Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. Rev. 910-14 (1994)
EPA Office of Water, Overview of the Storm Water Program 8 (1996), http://www.epa.gov/npdes/pubs/owm0195.pdf.
Erin Ryan, *Federalism and the Tug of War Within: Seeking Checks and Balance in the Interjurisdictional Gray Area*, 66 Maryland L. Rev. 503 (2007)
Erin Ryan, *Federalism at the Cathedral: Property Rules, Liability Rules, and Inalienability Rules in Tenth Amendment Infrastructure*, 81 U. Colorado. L. Rev. 1 (2010)

Erin Ryan, *Negotiating Federalism*, 52 B.C. L. Rev 1 (2011)
Erin Ryan, Federalism and the Tug of War Within (Oxford, 2012)
Robert A. Schapiro, Polyphonic Federalism (2009)
Joseph Schumpeter, Capitalism, Socialism and Democracy 287 (1987)
Richard Shell, bargaining for Advantage: Negotiation Strategies for Reasonable People 6 (1999)
Emily J. Sovell, *Elderly, Be Alert: The Battle Continues over Deathbed Rights*, 45 S.D. L. Rev. 670, 675 (2000)
Lynn M. Stuter, *Are Public Schools Constitutional?*, Jan. 20, 2003, http://www.newswithviews.com/Stuter/stuter9.htm
Lawrence susskind & Ole Amundson, Using Assisted Negotiation to Settle Land Use Disputes: A Guidebook for Public Officials (1999)
Lawrence Susskind & Jeffrey Cruikshank, Breaking the Impasse: Consensual Approaches to Resolving Public Disputes 14 (1987)
Dan Tarlock, Law of Water Rights and Resources § 10:24 (2009)
Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543, 588 (1954)
Jeffrey H. Wood, *Protecting Native Coastal Ecosystems: CZMA and Alaska's Coastal Plan*, 19 Nat. Resources & Env't 57 (2004)
David Wooley & Elizabeth Morss, Clean Air Handbook § 5:11 (2009)

The Historical and Contemporary Challenges of Canada's Division of Powers

Gerald Baier

Introduction and Background

Like any federation, Canada's is a dynamic and frequently unsettled one. The range of diversities and differences that the federation has to accommodate make for an always interesting present. Canada is a multinational federation, but its geographic and economic diversity are as challenging as the cultural differences that figure in most discussions of Canadian federalism. I note these multiple diversities from the start because they often interact with the institutions of the federal system in ways that are much different from the cultural and national differences seeking accommodation from the federation. From its inception, the division of competences or powers was seen as the key to the success of the Canadian federation. Canada's founders were in large part reluctant federalists, more inclined to the unitary statecraft of Great Britain than what they saw as the fractious and failed federalism of the United States. Therefore, the drafters of Canada's 1867 constitution sought to define competences in a way that would accord with their centralist goals. Not surprisingly, they tried to tilt the game in the central government's favour by giving the federal parliament legislative sovereignty over the pre-eminent governmental concerns of the day.

The evolution of Canadian federalism has been about accommodating a more decentralised trajectory and reality within the frame of that relatively centralist constitution. The most draconian centralist overtones of the original constitution, including a federal veto over provincial legislation, have fallen by the wayside, largely through disuse rather than amendment. In parallel, some of the original competences of the provinces have grown tremendously in importance with the emergence of a modern welfare state in Canada. Those developments are largely

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responsible for the relative decentralisation of Canada today. That decentralisation has also been accompanied by the growth of a labyrinth of intergovernmental relationships that accommodates the everyday practice of federalism and a constitution that casts power and relationships much differently.

The division of competences or powers has been central to the development of Canadian federalism, but not in an obvious way. The original constitutional compromise did not set a predictable course for the evolution of central and regional government powers. The evolution of Canadian federalism has instead been a product of tension with the formal division of competences in the constitution. That has meant that the institutions for informal evolution and accommodation within the federal system have been the critical site in Canadian federalism. The constitutional division of competences' primary influence has been as a constraint on free-wheeling legislating by governments. The division of competences has not stopped governments from being active where they want to be, but it has forced them to work co-operatively rather than independently, to achieve their goals.

K.C. Wheare, whose federal principle was an early benchmark for the rigor of a federal system, did not believe Canadian federalism fit his standard because he perceived that the autonomy of the provinces was constrained by the constitution, particularly the national government's override powers. Since Wheare's original assessment, Canada continues to deviate from a strict or what is often called a 'classical' federal model where governments remain autonomous within their constitutionally assigned spheres. However, it is not the override provisions that are responsible for this deviation from the classical form. Rather, it is the general disregard for the formal division of powers that governments have when they are determined to be legislatively creative, especially when they have willing partners in their enterprise.

However, co-operation and its attendant institutions are forced upon Canada's governments by the strictures of the division of powers and the relative lack of room that the formal powers give for broad legislative experimentation. Unlike the United States where Congress has been able to expand the scope of federal government activities in a virtually limitless way under the aegis of the commerce power, Canada's Supreme Court has been less willing to interpret the division of powers in a way that would give such wide scope to the federal legislature. The division of competences have raised the prominence of accommodative institutions and made their workability absolutely critical to the success and endurance of the Canadian federation. Canada is by result an intergovernmental federation, even though it has few formal institutions to promote and manage its intergovernmentalism.

As a subset of the division of legislative powers, the revenue powers of the two levels of government are also a critical point of contest for intergovernmental relations. An artifact of the original, centralist constitution is the dominance of the federal government in most revenue raising fields. While both levels of government levy income and corporate taxes, the federal government has historically collected a greater share of that revenue. Sales taxes are collected by both levels of government (with one provincial hold out) and provinces have access to natural

resource revenue. The benefits of the latter vary wildly given the differing natural endowments of those goods. The inequality of revenue generation between the federal government and the provinces and among the provinces themselves has resulted in a series of transfers and relationships designed to mete out some of this variation. Under the umbrella of 'fiscal federalism', the federal government transfers per capita funds to the provinces to aid in the acquittal of their legislative responsibilities, and it redistributes federal tax dollars on a needs basis to the provinces through its equalisation programme to iron out some of the inequality in the provinces' ability to raise revenue.

As a result, the budgetary fates of the provinces and the federal government are deeply entwined. In federations, legislative autonomy is generally presumed to only exist if a government is capable to raise the necessary revenues to acquit their responsibilities. The fiscal relationship between Canada's central and provincial governments certainly violates this classical spirit of federalism and in the past has been used as leverage by the federal government to give some direction to provincial policy. Hallmarks of the Canadian welfare state such as the public provision of health care (a provincial legislative responsibility) were accomplished in part with the financial incentives that the federal government offered to the provinces to expand their services. These relationships have created a kind of dependency for the provinces, but also ensured that the federal and provincial governments share a mutual fate when determining their budgets. Because of the tremendous reliance that the provinces presently have on federal money, taking that money away without replacing the capacity to raise those funds independently is nearly impossible, even for a central government that might be committed to a more classical notion of federalism. Likewise, a federal government determined to rein in spending must contend with the fact that a large portion of its budget is pre-committed to the provinces.

The interaction of legislative powers with the taxation and revenue powers necessary to perform them is a further testament to the centrality of the division of powers to the operation of Canada's federal system. The fiscal system, even its more permanent features such as equalisation or long term funding in areas of provincial responsibility is still largely informal and subject to changes of mind and heart on the part of the federal government. There are largely permanent routines and forums for the discussion and negotiation of federal provincial fiscal negotiations, but there are little to no formal institutional structures or constitutional requirements for decision making.[1]

The lack of formal institutions for intergovernmental collaboration and representation in policy-making has meant that the health of Canadian federalism has often been held hostage to the moods and 'chemistry' of executives at the federal and provincial levels. As the principal actors in the intergovernmental system, the

[1] An important exception to this characterization of the fiscal system is the requirement in section 36(2) of the *Constitution Act, 1982* for some form of federal redistribution of funds to ensure that provinces can provide comparable levels of public services at comparable levels of taxation.

ability and willingness of these elected personalities to work together and to share visions and incentives largely determines the quality of the system's outcomes. When executives are inclined to co-operation or have grand designs that require co-operation, the intergovernmental system's informality can be remarkably effective and efficient. Historically, even major constitutional change was possible via these informal mechanisms. More routine or even intense disagreements between the provinces and the federal government can also benefit from the intergovernmental system's flexibility and informality. The lack of formal institutionalisation of provincial representation in the national government for example, prevents the provinces from holding the national legislative process hostage to provincial interests. Informality and secrecy also allow provincial leaders to protest federal government policy in public but compromise behind closed doors and still save face with their electorate.

At the same time, the lack of structured opportunities for interaction and joint decision-making can leave the system moribund or stagnant if personalities and agendas do not line up. In short, flexibility and informality are both strengths and weaknesses of the intergovernmental system, but it is a system that requires some commitment and nurturing to be an effective body for compromising the myriad contradictions and competing tendencies of Canadian federal life. Strong philosophies of federalism held by governments or their leadership at either level in the federal system can undermine the stability of an informal system.

The Division of Powers and Contemporary Canadian Federalism

Today the state of intergovernmental affairs in Canada is a relatively peaceful one, but has the potential to be threatened by conflicting and strongly held philosophies of federalism. Global economic conditions have reined in the ambitions of governments at both levels. Modest plans mean that there is less likelihood of conflict around expansive government programming at either level. Government entrenchment has also meant that they tend to look to one another for the savings or investments that each think will help ride out an economic recovery. The peace though has more the character of a calm before the storm than a lasting détente. There is eternal conflict in Canadian federalism. And the coming battles, as I see them, will be framed in no small part by the constitutional division of powers.

Part of the present peace has come from some longer-term federal investments in areas of provincial interest. If fiscal federalism is a perennial sticking point in intergovernmental relations, money can fix problem in the short and near long term. I will speak more specifically in a moment, but those commitments have made the job of providing services at the provincial level a little easier and ensured some intergovernmental peace. In addition, Canada is only now one year removed from a relatively extended period of minority government at the federal level, which in addition to being uncommon, greatly tempered the policy creativity of the federal

government—it did not want to fight for its life in a minority parliament and with the provinces at the same time.

The division of powers has played a prominent role in the conflicts between federal and provincial governments since the dawn of Canadian federalism. I expect that to be no less true in the near future. The founders of the Canadian constitution—despite some protests to the contrary—presumed that the division of powers would be contested, particularly by the provinces as they sought to be more active than the limited powers assigned to them by the constitution would allow them to be. To keep the untrustworthy provinces disciplined in the scope of their powers, the federal parliament was given the power to disallow (essentially veto) provincial legislation, presumably not just on the grounds of distaste or disagreement with provincial policy, but to keep the provinces within the bounds of the constitutional division of powers. The federal legislative override soon became unwieldy. There were too many provinces and too much legislative activity for the federal parliament to patrol with both with efficiency and political legitimacy. Overriding duly elected provincial legislatures was politically unpalatable for federal politicians who had to compete at the local level for seats in the national parliament.[2]

Thus, judicial authority was advanced as a better way to police the division of powers. The Supreme Court of Canada was created to some degree to cope with questions of constitutionality between provincial and federal governments. While formally independent from the political sphere, its founders hoped that the court would still be imbued with some sense of the national government's superiority and dominance and rule in its favour. Alas, that was not to be. Without reciting the well-worn history of the judicial review of federalism in Canada, over nearly a century since the establishment of the Supreme Court of Canada, and with the help of the Judicial Committee of the Privy Council in London, the Canadian constitution was interpreted in a direction more favourable to the provinces than the federal government.[3]

What we might describe as the competing plenary powers of the federal and provincial governments were interpreted in a manner that restricted federal adventurousness. Moreover, some of the seemingly more marginal powers assigned to the provinces came into their own by the mid twentieth century and the rapid expansion of the Canadian state that took place after the Second World War happened most dramatically in the provinces and not at the federal level.

For those more enamoured of a centralist vision of federalism, balance in the Canadian case came through a long era of federal leadership, particularly in that same expansion of the welfare state in Canada. This era of co-operative federalism was marked by federal leadership and provincial implementation and leaned heavily on the mechanisms of intergovernmental relations. Health care and social programmes, while nominally matters of provincial constitutional authority, were

[2] Smith (1983), pp. 115–134.

[3] Baier (2006). See Chaps. 2 and 5.

deeply engaged in by successive federal governments who funded the provinces in those activities with sometimes nominal and other times relatively strict standards or conditions.[4]

The conditionality of that funding has increasingly disappeared. While early efforts in co-operative federalism were marked by relatively detailed agreements specifying terms and conditions for the receipt of federal funds, in recent years a lot of that conditionality has been taken away in exchange for less financial entanglement. The 1995 federal budget radically renovated the transfers to the provinces, giving more flexibility to the federal government to adjust its overall liabilities to the provinces and to give it the freedom to be more strategic in making intergovernmental investments in the future.[5]

If we are looking for the causes of the present peace, this might be one. Canada has weathered the world economic crisis better than most, including the United States and certainly Europe. This has meant that Canada's governments are in a much less desperate situation than they have been in previous economic tough times. However, conflict has also been reduced by the fact that the brutal changes to the structure of federal transfers that took place in the mid 1990s have made governments leaner and more nimble. In exchange for fewer conditions, the provinces were obliged to make structural changes of their own that entailed significant scaling back of their programmes to cope with lower overall federal transfers. The most important consequence of those changes has been that federal and provincial governments are no longer vulnerable to each other's challenges in a recession. The federal government has more predictable obligations to the provinces and the provinces are less dependent when bad times come.

The one area where there is likely to be some dispute over money and where the peace will be disrupted is in public health care. The provinces are the primary payers and deliverers of Canada's public health system, but they are to varying degrees dependent on the federal government for largely unconditional transfers to deliver those exponentially growing programmes. The rate of growth in costs is staggering. At present, the current federal government has chosen to remain committed to a 10-year accord (negotiated by a previous government) that increases federal transfers 6 % a year. Over the 10 years of the accord, federal transfers for health care will have increased from $16 billion to over $40 billion per year in 2013–2014. Growth will continue at 6 % per year until 2016–2017, at which point the federal government will unilaterally reduce the rate of growth and tie the rate to growth in nominal GDP. This action has been met with some hostility from the provinces, but the long lead time for change has largely put public conflict on the back burner, that and the differential effect of future changes has kept the provinces from mounting a forceful challenge to the federal policy.[6]

[4] Banting (1987).

[5] For a more detailed description of this history, see Chaps. 8 and 9 of Bakvis et al. (2009).

[6] Bailey and Curry (2011).

The original accord was a response to provincial needs and the imbalance in revenue capacity that the provinces have to endure, as well as federal efforts to demonstrate leadership and relevance. Some of the fiscal imbalance has been further addressed by the present government—which is in line with its more formal approach to the division of powers. This is the strong philosophy of federalism that I alluded to in the introduction. The trademarks of the Canadian intergovernmental system have been flexibility and accommodation. The lack of flexibility in the division of powers has required the provinces and the federal government to be flexible and even ambiguous about who should do what in the federation. Historically this has meant a great deal of negotiation and compromise are necessary to keep delivering public services in the coordinated manner that Canadians rely upon. Moving to a more formal interpretation of the division of powers and retreating from the fiscal arrangements that have been the glue of the federal system risks inflaming conflict between governments.

In addition to seeking some redefinition of federal fiscal transfers, the present Conservative government's response to global economic pressures has been to scale back the activities of the federal government within its own legislative responsibilities. While the government has been an active actor in stimulating the economy, it has also sought to shrink the size of the public sector at the national level, making modest cuts to programmes and services and fairly deep cuts to the size of the federal public service. These actions may harden the federal government's resolve in its fiscal relations with the provinces. Much like the dynamic currently taking place between partners in the Eurozone, frugality and sacrifice are expected of those being bailed out. Having made sacrifices itself, the federal government is likely unwilling to rescue provinces that have not undertaken similar self-examination and discipline. The present federal government then appears to have abandoned the traditional role of the national government when faced with the structural imbalance in revenue generation that it enjoys. Rather than seek to continue the self assigned, admittedly paternalistic, national leadership role, the present government looks much more likely to retreat to jurisdictional arguments and claim that it is not obliged to fund areas of provincial jurisdiction, especially if provinces have not made their own rationalisations and retrenchments as the federal government is presently doing.

One remnant of a more active central government preoccupation with how the provinces were spending money in health care is the *Canada Health Act*. That legislation is meant provide the means for enforcing governing principles on the provincial receipt of health care funding. While there is a slim record of any federal government vigorously enforcing those standards, the provinces have always pointed to the act as a constraint on policy experimentation in health care delivery. The general principles in the Act commit provincial governments to public delivery of services and limited room for market driven delivery or competition. The movement of the present government away from taking a leadership or supervisory role, while bad for the provinces bottom line, does seem to loosen the constraints even more than earlier rounds of federal cost cutting. Giving the provinces more room to maneuver does not solve the problem of the ravenous beast that is public

health care, but it suggests that the federal government is not the one that wants credit or blame for solving the problem. The retreat from Canada's peculiar brand of co-operative federalism is striking.

This is illustrated even more clearly by the other priorities that the Conservative party has chosen now that it has a majority in Parliament. Its trademark policies have been focused on areas of clear federal jurisdiction with seemingly little concern for the intergovernmental ramifications of the projects.

The federal government has made substantial reinvestments in military and related procurements, announcing multibillion dollar projects for shipbuilding and fighter planes. Though these kinds of projects are entirely within the purview of the federal parliament, they do have regional economic impacts. With the awarding of shipbuilding contracts, the government appears to have been very sensitive to those impacts and structured the bidding and tendering process in ways that insulated them from much criticism.[7]

More controversial has been a law and order agenda that has seen the federal parliament make major alterations to the federal criminal code and invest in the building of new prisons. Again, both are entirely within federal legislative jurisdiction. However, because the enforcement of criminal law (and much of the court system) is borne by the provinces, setting tougher penalties and mandatory sentences is likely to cost the provinces substantial sums. The provinces have made it clear that they are unhappy with the likelihood of having to bear increased enforcement and procedural costs. The criminal law illustrates the need for collaboration and negotiation that does not fit with the more classical model of federalism that the Conservative government wants to implement.

One more example of the classical federalism strategy may illustrate the challenges of overcoming the status quo of an intensely co-operative federal system. Since coming into office as a minority, the government has pursued the creation of a national securities regulator against the strenuous objections of the provinces. Unlike most other federations, the provinces have been the regulators of the securities industry under their legislative heading of 'property and civil rights'. In the light of increasing capital mobility and the coordination problems that come from 13 jurisdictions regulating the trading of shares in public corporations and other financial transactions, the federal government has sought to centralise this function in a national regulator to promote efficiencies and uniformity of regulations. To this end, the federal government initially sought provincial co-operation, but because of the hostility of some of the larger provinces (though it should be noted not from Ontario, the largest provincial regulator in the country) the federal government chose to pursue a unilateral strategy. The federal government asked the Supreme Court of Canada for a reference ruling on whether such regulation is possible under their federal power for trade and commerce. Many believed that the case law to this point would result in a federal government victory in court. However, the Supreme Court ruled for the provinces and preserved primary

[7] Taber (2011).

provincial power to regulate the securities industry with some minor exceptions granted to the federal government and a note to both sides to seek a co-operative solution to whatever co-ordination problems linger as a result of leaving primary jurisdiction with the provinces. Rather than create the bright lines between federal and provincial responsibility that the federal government sought, the Court kept federal jurisdiction modest and placed a premium on collaboration and negotiation instead of overhaul of the securities system.

There are other examples of how jurisdictional questions have featured in contemporary intergovernmental relations in Canada, and there appear to be tensions on the horizon. The provinces will encounter a federal government whose strategy is not at first instinct to try to appease or please the provinces—but fall back on jurisdictional sanctity and encourage the provinces to do the same.

Evaluating Present Events

Generally, I think the fall back to jurisdictional purity is not such a bad approach. The co-operative federalism of the last half-century allowed governments to be solution-oriented and to circumvent the formal division of powers. The democratic problem of Canadian federalism since the 1960s has been a lack of clarity about who really is responsible for what when the division of powers is cast aside. Voters are legitimately confused as to who to blame when they are unclear about who does what—especially as governments engage in credit seeking and blame avoidance with zeal. Going back to a more Wheare-inspired model of independence of spheres clarifies those roles and responsibilities. It also ignores to some degree the impact that governments inevitably have on each other even when they remain tied down to their constitutional responsibilities.

Part of the unacknowledged genius of Canadian federalism has been the ability to compromise through ambiguity or ambivalence about structural roles—to even be ambiguous about what our ambiguity means. We use 'weasel' words like asymmetry without even clarifying what we mean by it. To some degree, that is actually unintended genius. We get by not facing the fundamental problems that divide communities in Canada. Constitutional politics in the 1980s and 1990s, which featured a good dose of discussion about changes to the division of powers, threatened the stability of the federation by highlighting fundamental questions about the way the system was organised. Trying to face and resolve divisions in the highest law is very challenging and dangerous for consensus in the long term.

A government more inclined to be formal about the division of powers, as activist as it may see itself in its own priority areas, is a new dynamic for Canadian federalism and one that may have us rethinking the informal ability to compromise in the face of a dysfunctional formal relationship. A new government in Quebec, the one province where the majority Conservatives did most poorly, may bring a new dynamic to future relations as well. Quebec is rhetorically happier with more formal and bright line divisions between federal and provincial jurisdiction, but is

also the primary beneficiary of asymmetrical accommodations and compromises. The state of federal and provincial finances and the discord between provinces in their reactions to federal initiatives and preferences will be key features of the future dynamic of intergovernmentalism in Canada. Contrary to the beliefs of the founders, the division of powers has not constrained or reined in the governments of Canadian federalism, except to the extent that it has forced them to be highly engaged with one another. An effort to be less informally engaged or to downplay accommodation in favour of 'watertight compartments' of jurisdiction may prove impossible for even those most committed to those ideals.

References

Ian Bailey and Bill Curry "Flaherty's 10-year health-care plan divides provinces" *The Globe and Mail* December 19, 2011

Gerald Baier, *Courts and Federalism: Judicial Doctrine in the United States, Australia and Canada* (Vancouver: UBC Press, 2006)

Herman Bakvis, Gerald Baier and Douglas M. Brown, *Contested Federalism: Certainty and Ambiguity in the Canadian Federation* (Don Mills: Oxford University Press Canada, 2009)

Keith Banting, *The Welfare State and Canadian Federalism* 2nd ed. (Montreal and Kingston: McGill-Queen's University Press, 1987)

Jennifer Smith, "The Origins of Judicial Review in Canada," *Canadian Journal of Political Science* XVI, no. 2 (1983): 115-134

Jane Taber, "Harper's 'refreshing' approach to shipbuilding contracts gets thumbs up from lobbyist" *Globe and Mail* October 21, 2011

In Search of a Proper Federal Balance Between the Two Orders of Government: The Case of German Federalism

Rudolf Hrbek

There are, at present, a relatively large number of federal systems throughout the world, and the number is growing. Federal systems have a general common feature: they represent non-centralised and non-unitary political systems. However, they do not follow one uniform pattern; instead, they differ considerably, as concerns their specific form of political organisation.[1]

All these different federal systems have in common that they are committed to "federalism", understood first, "as a normative term" that "refers to the advocacy of multi-tiered government combining elements of shared-rule and regional self-rule."[2] Second, federalism has to be understood as an organisational and structural principle, which shall fulfil two major functions: (1) to bring about unity in diversity (as such, the principle can be and has been applied in cases of fragmented societies); (2) to contribute to the separation of powers, to avoid the centralisation of power and to introduce and maintain a system of checks and balances.

Federal political systems refer to a particular—non-unitary—form of political organisation possessing generally the following structural characteristics:

- "At least two orders of government, one for the whole federation and the other for the regional units, each acting directly on its citizens;
- A formal constitutional distribution of legislative and executive authority and allocation of revenue resources between the two orders of government ensuring some areas of genuine autonomy for each order;
- Provision for the designated representation of distinct regional views within the federal policy-making institutions, usually provided by the particular form of the federal second chamber;

[1] This has obviously been the premise of the project "Ways of Federalism".

[2] Watts (2008), p. 8.

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- A supreme written constitution nut unilaterally amendable and requiring the consent for amendments of a significant proportion of the constituent units;
- An umpire (in the form of courts, provision for referendums, or an upper house with special powers); and
- Processes and institutions to facilitate intergovernmental collaboration for those areas where governmental responsibilities are shared or inevitably overlap."[3]

Germany [with the official name "Federal Republic of Germany", coined in 1949 when the constitution—"Basic Law" ("*Grundgesetz*")—of the new, then only West German state had entered into force] does belong to the group of federal political systems. This chapter will describe it and focus on one set of its features: the distribution of legislative and executive authority. However, it will be necessary to observe and take into account other major features of the German federal system; they all together form the comprehensive whole of this system. The structure of the chapter will be as follows: (1) historic roots and fundaments of the federal political organisation; (2) the basic constitutional and political design for the political organisation of the Federal Republic of Germany as a federal political system; (3) trends and developments in the performance (functioning and application) of this design that shows much dynamism and a swinging of the pendulum between the two orders of government (Federation and *Länder*); (4) recent efforts to bringing about a comprehensive reform of the federal political system and their results; (5) current issues and perspectives for the future development of German federalism.

Historic Roots, Emergence, and Development of German Federalism until World War II[4]

Federalism is one of the key features of the political system of Germany. This is based on historical foundations and was re-established in post-World War II situation. Before political unification in 1871 (at which time the German Empire under Prussian leadership was established) "Germany" consisted of a patchwork of states. These states formed the "Old Empire" (*Altes Reich*) with a common institution, the so-called *Immerwährender Reichstag* in Regensburg (1663–1806), composed of representatives of the respective territories. Its major features were power-sharing, bargaining, and compromise-seeking.

Following the dissolution of that Empire in 1806, 39 territories formed, under Napoleon's protectorate, the *Rheinbund* (Rhine-Confederation) that was unwieldy

[3] This list identifying in a general way major institutional and procedural features of federal political systems has been given by Watts (2008), p. 9. Duchacek (1970) has submitted another list that he called "Ten Yardsticks of Federalism" (pp. 2007/2008); they help to distinguishing a loose confederation from a genuine federal political system.

[4] The following part of the chapter is taken, in large parts literally, from the author's country-chapter Hrbek (2005), pp. 150–164, here: pp. 150/151.

and inefficient. The Vienna Congress in 1815 established the confederal *Deutscher Bund*, as successor of the Old Empire and with the *Bundesrat* (Federal Council) in Frankfurt as the supreme but weak institution, composed of representatives of the member states as in former times. Following a revolution in 1848, a constituent assembly (*Frankfurter Paulskirche*) established an alternative structure (a democratic federation similar to the American model, but again with much weight given to the executives from the participating entities). Due to the resistance of Austria and Prussia—the two dominating states, at the same time rivals—this model could not be realised. Political unification was then achieved in two subsequent steps: in 1867 Otto von Bismarck formed the *Norddeutscher Bund* (Northern German Confederation) that then developed under Prussian leadership[5] in 1870/71 into the German Empire, with the larger states in Southern Germany as additional members, but without the Austrian Empire.

The Empire was a federation of 25 states of which Prussia was the dominant entity. The states continued to possess considerable internal autonomy and formed the *Bundesrat* (Federal Council) as the supreme sovereign institution representing the governments of the states, forming a counterweight to the directly elected parliament (*Reichstag*) and acting as a barrier against tendencies towards introducing a genuine parliamentary system of government. Federalism was characterised by the dominance of executives and the public administrations, by the preservation of special features in the participating states, and by the lack of a single national centre. As concerns the financial system, the Empire was dependant on contributions of the participating entities.

After World War I, in 1918/19, Germany became a Republic. Under the new constitution of the Weimar Republic,[6] the federal elements were weakened by strengthening the Reich authorities (a directly elected President, a government accountable to the President and the Parliament—*Reichstag*—in the framework of parliamentary system of government with a strong President) at the expense of the states, which were now called *Länder*. They were represented at the Reich level by the *Reichsrat*, the second chamber, composed of members of Länder governments (formed by political parties), in line with the executive-bias tradition of German federalism. Although the Reichsrat was weak, bargaining between the administrations of the Reich government and the governments of the Länder continued to be the prevailing feature of decision-making. With respect to this fact, one can understand the argument, that "decentralised unitary state" is not the appropriate label for characterising the Weimar Republic.[7]

[5] The King of Prussia was at the same time German Emperor.

[6] The Constituent Assembly met and worked in the city of Weimar.

[7] Holste (2002) argues in favour of greater continuity of the German federal system.

The Constitutional and Political Design of the German Federal System, Established in 1948/1949[8]

The totalitarian Nazi regime following thereafter (1933–1945) abolished all remaining federal elements and established a highly centralised system. Against this background, one can easily understand that the pendulum should—and in fact: did—swing after World War II in the opposite direction: establishing a federal system strengthening again the constituent entities was the direct response and reaction to the centralised Nazi regime. This trend was supported by effects and consequences of the occupation regime of the Allied Powers. Following the unconditional surrender of Germany, there were no German authorities; the Allied Powers took over all powers and responsibilities in the country. They agreed to divide German territory into four occupational zones and to dissolve Prussia. From 1946 Länder—many of them: new Länder (e.g. on the territory of former Prussia)—were established under the supervision of the respective occupational power. These decisions, although not designed to prescribe the future territorial structure of post-war Germany in all details, had a major impact on its future development.

The Cold War deepened the gap between the Soviet and the three Western (American, British and French) zones and made an agreement among all four powers on the future of Germany impossible. The three Western allies, after having merged their occupational zones for practical purposes, decided in summer 1948 to further stabilise the situation by establishing a German state in the area of the three zones they administered. On 1 July 1948 they called upon the German authorities (= the heads of the already existing Länder governments) to prepare a constitution and demanded that its provisions should protect basic human rights, be based on democratic principles, and introduce a federal structure. These requirements, a reaction to the highly centralised and undemocratic Nazi regime, were fully accepted by the German representatives. The federal structure was primarily expected to provide for a system of checks and balances and, thereby, contribute to the principle of separation of powers, and strengthen democracy.

The body to formulate the new constitution, designated the Parliamentary Council (*Parlamentarischer Rat*), with its seat in Bonn, was not a directly elected constituent assembly, but rather was composed of representatives of the Länder parliaments in the three Western zones, reflecting the strength of political parties in these parliaments. Although the Germans agreed on the establishment of a federal structure, the deputies in the Parliamentary Council disagreed on the concrete design of this structure; esp., how to define the relations between the federal government and the Länder in terms of distribution of competences and allocation of powers. The solution laid down in the new constitution—given the name Basic Law (*Grundgesetz*)—can be regarded as a compromise, according to which the strength of the central authority was modified by the establishment of the *Bundesrat*

[8] This part of the chapter, again, is taken, in large parts literally, from the author's country-chapter Hrbek (2005), pp. 152 and 154–156.

as Second Chamber. It is composed of representatives of the Länder governments—which is in line with the historic tradition of its "predecessor" in the 1871 Empire—with, as will be explained in more detail below, considerable powers in the legislative process at the federal level and, of course, in decisions on amendments to the constitution.

The Länder as constituent units of the Federal Republic—which have, as they use to underline, existed before the West German state was established—have the quality of states, with their own institutions. The constitutional order of the Länder has to conform to basic principles, such as fundamental human rights, democracy, rule of law, and it has to provide for directly elected parliamentary representation of the citizens (Article 28 Basic Law). Each of the Länder has a parliamentary system of government, with a directly elected parliament (with a 4 or 5-year legislative term) and a government accountable to it. However, the Länder constitutions differ in terms of provisions on special aspects of the governmental system, such as referendums, government formation procedures, provisions on motions of non-confidence or votes of confidence, individual accountability of ministers, etc.

According to the "eternity clause" in Article 79, par. 3, Basic Law, the federal system as such must not be abolished. However, territorial reform is possible that means that there is no guarantee of the existence or territorial integrity of individual Länder. The Basic Law envisages two procedural routes to territorial reform: a complex procedure (Article 29) and a clause that allows territorial reform in exactly defined cases (Articles 118 and 118a).[9] Following the establishment of the Land Baden-Württemberg in 1952, the Federal Republic consisted of ten Länder. In January 1957 the Saarland[10]—on the basis of Article 23 Basic Law that authorised "other parts of Germany" to join the Federal Republic—became the eleventh Land. Following the reunification in 1990—five Länder of the former German Democratic Republic had, pursuant to Article 23 Basic Law[11] joined the Federal Republic—there were 16 Länder.

The constitution sets out the division of legislative powers between the federation and the Länder, as the two territorial levels of German federalism. The original scheme was as follows: there are matters falling into the exclusive jurisdiction of the federation (Article 73), matters falling into concurrent jurisdiction (Article 74)

[9] The first clause did apply to the German South West, and was the legal basis for the establishment of the Land Baden-Württemberg in 1952 via fusion of three smaller Länder that had been formed by the allied powers in their respective (American and French) occupational zones without reference to historic tradition. The second clause does apply to the case of Berlin and Brandenburg; the first effort towards fusion, however, failed in the mid nineties.

[10] This territory has remained under the control of France. Efforts to give the Saarland a special "European" status failed; in a popular referendum, held in 1955, the citizens voted (with a two-thirds majority against such a status) in favour of "returning" to Germany. The French government immediately accepted the vote.

[11] With reunification, this article became obsolete. In connection with the ratification of the Treaty of Maastricht in 1992, a new Article 23 (the so-called "Europe-Article") was included into the Basic Law.

and matters for which the federation has the right for framework legislation (Article 75); a framework law gives only a general outline and requires subsequent Länder legislation, thus allowing the Länder to decide on details. Article 72 sets out conditions under which the federation may legislate in matters falling into concurrent jurisdiction, namely "if and to the extent that the creation of equal[12] living conditions throughout the country or the maintenance of legal and economic unity makes federal legislation necessary in the national interest." Article 70 stipulates that "the Länder have the right to legislate insofar as this Basic Law does not confer legislative powers on the federation." However, their exclusive competencies are restricted to issues in connection with their own constitutions and related to the local level, to the organisation of their own administration, and to matters relating to police and public order, culture, the media, and education.

It is a feature of German federalism that the Länder are responsible for implementing federal legislation in their own right (Article 83). There are few examples of direct federal administration (matters such as the diplomatic service, the army, border control, air traffic, waterways, inland navigation and federal finances including customs are under direct federal administration).

The Länder participate in federal legislation via the Bundesrat. It is composed of members of the Land governments, and the number of votes varies as follows: each Land has at least three votes; Länder with more than two million inhabitants have four, Länder with more than six million inhabitants five, and Länder with more than seven million inhabitants six votes (Article 51, par. 2).[13] The votes of each Land have to be cast uniformly (in practice as a block vote by one government member) and cannot be split.[14] Participation in federal legislation applies, first, to the right of the Bundesrat to initiate federal legislation and submit a bill, as do the Bundestag and the federal government. Second, each bill, after having been adopted by the Bundestag, has then to be submitted to the Bundesrat. There are two categories of laws: those that require the explicit consent of the Bundesrat, with a majority of its votes[15]; and those that do not. This second category gives the Bundesrat only a suspensive veto that, after a limited period of time, can be overruled by the Bundestag with an absolute majority (or two-thirds majority if two-thirds of the

[12] The original version explicitly said "uniform living conditions"; the new formulation in an "official" translation wrongly says "equal" instead of "equivalent" (*gleichwertig* in the German original).

[13] This is the actual situation. Before reunification, there were only three categories of Länder; with three, four or five votes.

[14] Therefore, each Land government has to decide, prior to the Bundesrat meeting, how to vote. This may lead to a problem in case of coalition governments, if one government party would be in line with the political colour of the federal government, whereas another government party (or: other parties) would be in line with the opposition at federal level. In case, the coalition partners in a Land cannot reach agreement, the following "rule" has emerged and is practised: the Land would then abstain in the Bundesrat. Whenever a positive majority is required, abstentions have the effect of a "No-vote".

[15] Therefore, the effect of abstaining is a "No".

Bundesrat votes have been cast against). The major criteria for laws requiring approval in the Bundesrat are that the law would affect administrative powers of the Länder (they have to implement federal legislation) or have financial implications for the Länder. More than half of all federal legislation has until recently fallen into this category.

The constitution provides, in this context, for a special mediation procedure and a special Mediation Committee (*Vermittlungsausschuss*), which is composed of an equal number of members from the Bundesrat (at present 16, one for each Land government) and the Bundestag (16 as well, selected according to party strength). The function of this committee, which meets behind closed doors, is to find a consensus which would then be submitted to both Houses for approval. This Mediation Committee can be called upon by the Bundesrat, the Bundestag and the federal government. Experience shows that only a small number of legislative projects have ultimately failed. This has been taken as an indicator that politics in the day-to day operation and functioning of German federalism use to follow a consensus-seeking strategy. Amendments to the constitution require a qualified two-thirds majority in both Houses, which requires and contributes to this consensus-seeking approach of major political forces and actors, as well.

Constitutional disputes, amongst them those related to the federal system, are resolved by the Federal Constitutional Court (*Bundesverfassungsgericht*), upon appeal by one of the disputing parties. The Court, which has its seat not in the capital (Bonn for more than four decades, Berlin following reunification in the nineties) but in Karlsruhe (in the South-West of Germany), consists of 16 members elected by an electoral body, composed jointly of members of the Bundestag and Bundesrat, with two-thirds majority. The Court has two Senates, with eight members each.

In its decisions, the Federal Constitutional Court has repeatedly formulated and confirmed the principle of federal comity (*Bundestreue*), which is seen as representing a basic feature of the German federal system, even if there is no explicit clause in the constitution. This principle obliges the federation and the Länder to consider, when conducting their affairs, the concerns of the other side. It has, from 1949 until now, been observed by the federation and the Länder; this has, besides other factors, contributed to maintaining a proper federal balance between the two sides. The German federal system has never adopted the pattern of a "dual federalism", it rather belongs to the type of "cooperative federalism", with a high degree of interdependence and interconnectedness in the vertical as well as in the horizontal dimension. The financial system, characterised by a highly complex arrangement with shared tax revenues and mechanisms of financial equalisations—vertically both between the federation and the Länder, and horizontally between the Länder—fit in and confirm and strengthen this interconnectedness.[16]

[16] This chapter will not deal with the financial constitution systematically, although financial arrangements always belong to the core issues in a federal system.

The Federal System in Operation: Development, Trends and Problems[17]

There are, as we have already mentioned, several constitutional provisions that made the German federal system from the outset look as another example of the type "cooperative federalism". This feature has been confirmed and even strengthened during the development of the Federal Republic. As soon as 1962 an academic observer gave the German federal system the label "unitarian federal system",[18] which implies the swinging of the pendulum in favour of the federation and at the expense of the Länder and their autonomy. The term "unitarian" did not refer to emergence and existence of a centralised power-centre; it pointed to uniform policy solutions throughout the Federal Republic.

The reasons for this undeniable trend towards uniformity can easily be identified:

- Economic and technological developments generated the need for uniform solutions.
- Expectations of the citizens, with respect to supply with public goods and services or to provisions in the fields of school education and social welfare, can be understood as driving forces towards uniformity. Citizens would not have accepted bigger differences or differences at all. In this context one has to consider the specific post-war situation in Germany: with millions of refugees (concentrated in some areas and not distributed evenly across the country) to be absorbed and integrated; with disparities as concerns damages and losses (e.g. in the industrial sector and in the field of housing) as a result of the war; with the coexistence of densely populated areas and rural areas. More or less, all politicians did agree with these expectations.
- The above mentioned formula of the "uniformity of living conditions" in the constitution did coincide with these expectations and preferences of the people and could be used—and was used—as legal basis and justification for uniform policy solutions.

However, uniformity was not at all identical with centralisation; uniform policy decisions were the result of joint efforts of all those politically responsible at federal and Länder level.

- One factor, in this respect, has been that the federation has exploited widely the provisions for concurrent (and framework) legislative powers; this was identical with a substantial loss of autonomous legislative power of the Länder. However,

[17] This part of the chapter is based on and follows two publications of the author: Die föderale Ordnung – Anspruch und Wirklichkeit, in: Marie-Luise Recker/Burkhard Jellonek/Bernd Rauls (Eds.): Bilanz: 50 Jahre Bundesrepublik Deutschland, St. Ingbert 2001, pp. 53–68; and: Föderalismus in Deutschland, in: Revue d'Allemagne, vol. 35, No. 3 (2003), pp. 337–355.

[18] Hesse (1962).

these have been compensated for this loss with an increase in their right to participating in federal legislation via the Bundesrat (with the power to veto all federal legislation affecting the Länder financially and with respect to the organisation of their administration, which has to implement federal legislative acts). The federal government, with its parliamentary majority in the Bundestag, had to find an agreement with the (majority of the) Länder in the Bundesrat.[19]

- Another factor has been, beyond the field of (federal) legislation, efforts towards more cooperation and coordination between federation and the Länder. In this context, one has to take into account aspects of the financial system with shared tax revenues and, especially, the instrument of granting the Länder financial assistance for particularly important investments of the Länder, which strengthened the federation and changed the balance between the two orders of government substantially.
- In addition, horizontal cooperation between the Länder has been practised from the beginning; it amounts to the existence of several hundred of joint bodies where primarily civil servants from the Länder executives are involved. Länder parliaments have become marginalised.

The label "cooperative federalism" that has been applied to characterising the German federal system in the first two decades, did not fit to the pattern of denser and deeper-going interlocking relationships between the two orders of government that has developed and was strengthened by a set of constitutional amendments in 1969, amongst them the introduction of the so-called Joint Tasks (*Gemeinschaftsaufgaben*) in two new Articles (91a and 91b Basic Law). Joint Tasks ("improvement of regional economic structure", "improvement of the agrarian structure and of coastal preservation" and "extension and construction of institutions of higher learning, inclusive university clinics") meant that in the respective policy fields, federation and the Länder—in both cases: the executives—have to work together in identifying, planning and financing projects. The rule of co-financing (=shared financial responsibility)—with the federation responsible for at least 50 % of the expenses—further reduced the ability of a Land to autonomous action; the perspective to receive federal resources has been a temptation, especially for financially weaker Länder. The new pattern, connected with the institution of Joint Tasks and given the label *Politikverflechtung* ("Joint Decisions"), has been criticised heavily[20]; the argument is, that the interconnectedness would necessarily result in a mutual blockade (the "trap") and form a barrier against reform attempts with the goal to change the rules of the game.

There have been attempts to reforming German federalism. From 1973 to 1976 a special commission (*Enquete-Kommission Verfassungsreform*), established by the parliament, discussed about a comprehensive reform of the constitution and one

[19] The term "participatory federalism" (*Beteiligungsföderalismus*)—as a label for a basic feature of the German federal system—aims at characterising this constellation and these mechanisms.

[20] The term has been coined by Fritz W. Scharpf (see Scharpf et al. 1976). Later, Scharpf has spoken of the so-called "Joint Decisions Trap" [see his article: Scharpf (1985), pp. 326–356].

half of the considerations were devoted to federalism. However, none of the proposals was taken up and introduced in the Basic Law.[21] In the 1980ies efforts were started to strengthening the Länder by reducing the fields for Joint Tasks, by self-restraint on the part of the federation in its legislative activity, and by improving the financial basis of the Länder; again without success. The reasons for this failure: the overall economic situation ("decline" and "crisis") in the 1980s and, since 1990, the challenge of reunification (high financial burden linked to efforts to reducing the disparities between the five New Länder and the "old" Federal Republic), have had negative effects as concerns the financial freedom of manoeuvre of all entities in the federal system. From 1992 to 1994 a joint commission of the Bundestag and Bundesrat discussed reforms of the constitution that might be necessary as a consequence of reunification. However, with the exception of a few minor modifications, the federal system remained unchanged, since agreement of the two big parties on major points—necessary for amending the constitution—could not be achieved.

Steps towards Reforming German Federalism Since 2003 and Their Results[22]

From the mid 1990s criticism of the German federal system became stronger and resulted in a large-scale debate on a comprehensive reform.[23] Representatives from enterprises and the private sector participated in this debate; they blamed the actual format of the federal system and its performance for preventing necessary steps towards modernising Germany, perceived as vital condition to regain efficiency in the economic and social fields and make Germany fit for the twenty-first century.[24] The overall intention was to replace the pattern of interlocking relationships between the federal and Länder governments by a structure with greater autonomy and less mutual dependencies of the two sides. Within a relatively short period of time, several concrete proposals from various authors and institutions were submitted, amongst them guidelines for negotiations with the federal government on which the German Länder had agreed, and—as a response—a position paper of the federal government, both in spring 2003.[25] These two documents, which agreed

[21] The required qualified (two-thirds) majority for amending the constitution could not be achieved.

[22] This section of the chapter follows—in parts literally—the following contribution of the author: The Reform of German Federalism: Part I, in: European Constitutional Law Review, vol. 3, issue 2 (2007), pp. 225–243.

[23] See as examples: Männle (1998); Benz (1999), pp. 135–153; Münch (2001), pp. 115–127; Fischer and Große Hüttmann (2001), pp. 128–142.

[24] This has been described by Luthard (1999), pp. 12–23; and by Große Hüttmann (2000), pp. 277–297.

[25] These two documents, together with other proposals, can be found in: Hrbek and Eppler (2003).

on the need to reforming the federal system via loosening the interlocking relationship between the two orders of government, competences as well as financial responsibilities, and removing—at least: reducing substantially—the pattern of "Joint Decisions" (*Politikverflechtung*), marked the starting point for formal negotiations that started in November 2003 in the framework of a Commission that was established jointly by Bundestag and Bundesrat and should elaborate proposals for the modernisation of German federalism. However, the mandate of the Commission explicitly excluded two aspects of the federal system that have always been part of the discussion: the financial relations and a new delimitation (a reduction of the number) of the Länder (*Neugliederung*). Therefore, one could expect only a partial reform, or a first step, focusing on the allocation of competences.

The Commission was composed of 16 members of the Bundestag and Bundesrat respectively; furthermore—but with only advisory functions—four members from the federal government, six members from Länder parliaments and three members as representatives of local entities. Twelve experts (academics, nominated by the Commission on proposals made by the Bundestag party groups) participated in the considerations.

During the Commission work that had started in November 2003, an approximation in a number of issues had been reached, and partial results—although not yet ratified formally—had been agreed upon. There were, on the other side, still dissenting opinions in substantial questions. After one year of intense debates and considerations, the two co-chairpersons (Bavarian Prime Minister Stoiber, CSU, for the Länder, and the chairman of the SPD party group in the Bundestag) announced in December 2004 that the Commission was unable to submit an agreed upon proposal, that is to say: one that would win the support from the necessary two-thirds in both Bundestag and Bundesrat. In a series of major issues it has not been possible to overcome dissent; this applied to competences in the fields of environmental Law, internal security and—especially—education; in addition, the extent of Lander participation in dealing with European Union matters.

The failure of the Commission, which from its establishment had been accompanied with high expectations, was a disappointment. Attempts to explain the failure did refer to disparities amongst and, therefore, differences between the interests of the Länder[26]; to party-political differences; to institutional self-interests of Länder Prime Ministers (who have always tried to use the Bundesrat as framework and basis for playing a strong role at federal level) and the federal government (that pushed to curbing Lander participation in EU matters); to the need to have a solution as a package deal that alone could be acceptable to all or the overwhelming majority of stakeholders involved; and, last not least, to the lack of a jointly agreed concept and understanding on basics of the federal system, amongst them the extent

[26] The major cleavage has always been the divide between "stronger" Länder—advocating greater autonomy—and "weaker" Länder—relying more on support from the federal level and financial solidarity from the richer Länder via equalisation mechanisms.

of differences which would be recognised as acceptable in a federal entity.[27] However, there were many voices demanding new efforts for bringing about a reform.

The decisive step towards a constitutional reform on German federalism was made in connection with the formation of a Grand Coalition, following the national elections in fall 2005. The party leaders of CDU, CSU and SPD (Merkel, Stoiber, Müntefering) agreed to make the reform a priority of their governmental programme. They gave a newly established working group the mandate to promote and push the project in the framework of negotiations to form the coalition. The document elaborated in this working group was included into the coalition agreement of November 2005 as an annex. The Länder Prime Ministers approved this compromise package in December 2005 and established a Länder working group, which should deal with details and coordinate them finally with the federal government.

All these three steps were taken without participation of the Bundestag; with the result that—when in March 2006 the draft of the comprehensive reform bill was introduced formally in the legislative process, groups of Bundestag members who were not at all satisfied with component parts of the compromise package, protested and insisted on the Bundestag's right to be involved in the decision-making process. However, only few details became finally modified.

With 25 articles of the Basic Law affected, the reform package was a very comprehensive one; in addition to and as consequence of these amendments to the constitution, there are new legal provisions below the level of constitutional law. However, as already indicated, this reform was only the first part of the ambitious project to modernise German federalism. It focuses on competences of the two orders of government with the primary goal to make them more independent from each other in their legislative activities. In addition, the reform package did contain few (and rather marginal) provisions in financial affairs, a clause on the capital (Berlin) and its functions, and more precise rules for the participation of the Länder in EU matters. Part of the reform package was the intention to continuing with reform efforts and start immediately with preparatory steps towards the second part of the reform, which should deal with financial relations.

The reform package, concentrating on the distribution of legislative competences, contains the following provisions:

- Federal framework legislation will be abolished; the respective competences shall be re-distributed as follows: some will fall under the exclusive competence of the Federation (e.g. measures to prevent expatriation of German cultural assets) and others under concurrent legislation. As concerns the controversial field of higher education, the Federation shall only be responsible (as concurrent legislative powers) for two issues: admission to university and university degrees.

[27] See the contributions of Renzsch et al. (2005); the contributions in Hrbek and Eppler (2005); furthermore: Sturm (2005), pp. 195–203; Benz (2005), pp. 204–214; Scharpf (2006).

- An innovation is the new provision in Article 72, par. 3 Basic Law on reversed concurrent legislative powers of the Länder (*Abweichungsgesetzgebung der Länder*): Once a federal law in specific areas falling into the concurrent legislative power of the Federation has been decreed, individual Länder are authorised to decree a law that deviates from the federal law. However, this does not prevent the Federation to react in enacting a federal law that deviates from the deviation. Observers warn with the scenario they call ping-pong-effect, which, however, seems to be very unlikely, since a Land government, eager to deviate, must have very good, strong, and convincing arguments as it is accountable to its electorate. The same applies to the Federation. The innovative provision opens the way towards differing solutions and seems to be in line with the concept of "best practice". One cannot exclude the emergence of an "asymmetrical federalism" pattern. Reversed concurrent powers relate to aspects of environmental law and to issues of university degrees and admission to university. Until recently, the new rules have not yet been used; obviously, all participants know that caution is needed.
- The Länder will have the exclusive competence in the field of remuneration, pensions and related benefits and career of members of the public service of the Länder, municipalities and Länder judges. This was a highly disputed issue, financially weaker Länder first objected since they feared that qualified civil servants might be tempted to go to Länder offering higher salaries. However, the danger of greater asymmetries seems, again, to be unlikely, since the budgetary situation of all Länder does not allow generosity. And with respect to differences in the living costs within Germany, one can argue (and it has been argued) that uniform salaries are problematic and unjust as well. Until now, no migration of civil servants has taken place.
- There are further fields that go from federal concurrent legislation into the exclusive competence of the Länder; amongst them highly controversial fields such as legal aspects for specific care facilities (e.g. homes for children, for physically or mentally handicapped people); on the other hand less salient fields such as closing times of shops, or matters relating to pubs, restaurants, gambling facilities, fairs, exhibitions and markets.
- There will be, on the other side, an extension of the catalogue of exclusive competences of the Federation; such as (previously under concurrent powers) the law relating to weapons and explosives, or the production and utilisation of nuclear energy for peaceful purposes, including the construction of respective plants and installations. A new field, in this context, is defence against dangers of international terrorism in cases where the danger goes beyond what Länder authorities could do against. Such a federal law would require the approval of the Bundesrat.
- It was a major goal of the whole reform project to reduce the number of consent-bills that amount to approx. 60% of all federal bills. This was primarily due to the provision of Article 84, par.1 Basic Law ("Where the Länder execute federal laws in their own right, they shall regulate the establishment of the authorities and their administrative procedure in so far as federal laws enacted with the

consent of the Bundesrat do not otherwise provide"), which was amended as follows: In the future, the Federation can—without the consent of the Bundesrat—by means of its federal laws, intervene with and regulate the establishment of the authorities and the administrative procedure of the Länder; however, the Länder are allowed to deviate. And if the Federation wants to avoid a deviation by the Länder from its administrative rules contained in a bill, due to a special need for a uniform federal administrative procedure, such a bill will still require the consent of the Bundesrat. It was expected that the share of consent-bills would, as a consequence of the new provisions, fall to approx. 35 %.[28] This quantitative argument is, as has been underlined in reactions to the figures, not convincing; one has to look more closely to the saliency of each individual bill and—in the past—there were amongst consent-bills that failed those, which were regarded as political key projects.

- As concerns Joint Tasks, another target of wide spread criticism, they were not abolished. Two of them ("improvement of regional economic structure" and "improvement of the agrarian structure and of coastal preservation") were maintained. Only Joint Task 1 ("extension and construction of institutions of higher learning, including university clinics") was eliminated. This task shall in the future belong to the Länder that, however, shall be given a financial compensation from the Federation. Article 91b Basic Law, which until then regulated the cooperation of the Federation and the Länder in the fields of educational planning and in the promotion of research institutions and research projects of supra-regional importance, was reformulated and relates now to the following two fields: (1) The cooperation in the promotion of extra-university research institutions and projects, of university research projects (here the approval of all Länder is required) and of university buildings for research including large-scale equipment. (2) The cooperation in projects to assess and evaluate the efficiency of the educational system in international comparisons and to produce reports and give recommendations.

Another component part of the reform package dealt with the participation of the Länder in EU matters. According to Article 23, par. 6 Basic Law ("When legislative powers exclusive to the Länder are primarily affected, the exercise of the rights belonging to the Federal Republic of Germany as a member state of the European Union shall be delegated to a representative of the Länder designated by the Bundesrat. These rights shall be exercised with the participation and concurrence of the federal government; their exercise shall be consistent with the responsibility of the Federation for the nation as a whole."), Länder representatives sit in EU bodies (Council and formations of the Council). The federal government wanted to delete this paragraph, as it argued that transferring the lead-role in such Council negotiations to Länder representatives does raise problems. The solution found

[28] A study elaborated by the scientific service of the Bundestag could confirm and support these expectations; the study did analyse the effect of the new provision if it would have been applied in the past (Bundestag 2006).

specifies that such a delegation to Länder representatives shall be restricted to three policy fields: school education, culture and broadcasts. The Länder have argued that their quality as states requires that in cases when EU matters centrally affect exclusive legislative competences of the Länder, they must take over the role of representing Germany in the respective EU body.

Only few parts of the reform package fall into the field of financial relations between Federation and the Länder.

- The provision that allows that the Federation may grant the Länder financial assistance for particularly important investments by the Länder or by municipalities under specific conditions (namely "provided that such investments are necessary to avert a disturbance of the overall economic equilibrium, to equalise differing economic capacities within the federal territory, or to promote economic growth"), was subject to concern amongst those who complained about the interlocking relationship between the two levels. The reform package maintains this possibility and adds only some new provisions designed to reduce the preponderance of the Federation. The financial assistance can be granted only for a limited period of time; its use has to be examined regularly; and the volume of the annual transfers must show a declining tendency over time.
- A new Article 143c Basic Law provides for the financial compensation of the Länder by the Federation: the former are entitled to receive particular amounts of the budget of the Federation not any longer used for the previous Joint Task "extension and construction of institutions of higher learning."
- In addition, there are new rules dealing (1) with the internal cost sharing in case of violation of international or European commitments between the Federation and the Länder; (2) with obligations for fiscal and budgetary discipline in the framework of the Monetary Union in the EU.

The provisions clearly show the interdependence of Federation and the Länder. And as concerns the provisions on the allocation of competences, the solutions found can be taken as an indicator, that some form and degree of interconnectedness does belong necessarily to a federal structure. Genuine autonomy for the Länder seems to be incompatible with the German federal system. The reform package, taken as a whole, was only a small step towards finding a new balance between the two orders of government.

A second step towards modernising the German federal system started, as agreed in the first reform package, before the end of 2006.[29] Again, Bundestag and Bundesrat established a joint commission that should deal with financial relations in the federal system. The goals should be: strengthening the own financial responsibility of the Länder and providing for financial resources needed for performing their tasks. The commission has submitted its proposals in March 2009; in July

[29] See for the following Hrbek (2011), pp. 191–210.

2009 Bundesrat and Bundestag decided with the necessary two-thirds majority[30] on a second reform package.

The label "debt brake" (*Schuldenbremse*) for he second reform package underlined what has been the major outcome and reform measure; it indicated at the same time, that the ambitious objective to bringing about a comprehensive reform of the financial relations as a whole, has not been achieved. The package contains the following major points:

- The Federation will be obliged to observe a strict upper limit (0.35 % of the GNP) for new public debts.
- The Länder will be obliged—from 2020—to plan their budgets without new debts. Since a group of Länder (Berlin, Bremen, Saarland, Saxony-Anhalt, and Schleswig-Holstein) at present suffer from high debt burden, there will be so-called "consolidation assistance" (*Konsolidierungshilfen*) that shall help these Länder to eliminate this burden before 2020. Federation and the other Länder will share in these financial support measures.
- The introduction of an early warning system (with a stability council at ministerial level) shall supervise the budgetary situation of the Länder and in case of budgetary risks make recommendations how to avoid problems. However, there will be no sanctions.
- The Federation shall be authorised to give financial assistance to Länder in cases of a natural disaster or extraordinary emergency situations.

Obviously, the interconnectedness has not been abolished.

Perspectives for the Future Development of the German Federal System

The results of the two steps towards reforming German federalism between 2003 and 2009 do not represent a change of the federal system; German federalism has not been given a totally new format and structure. Both steps have been, as we have demonstrated, package deals; as a compromise they did not change substantially but only modify slightly the balance between Federation and the Länder. Even these modest steps could only be achieved under the political constellation of a Grand Coalition, which assured the required qualified majorities for amendments to the constitution.

One major reason—some observers would rather say: the major reason—for this pattern is the fact that a widely shared common understanding of what a federal system should mean and imply, has been and continues to be lacking. Federalism means and implies diversity; but there is no agreement in Germany on how much

[30] Until fall 2009 Germany was governed by a Grand Coalition; the timing for deciding on the second reform package has taken this into account.

difference would be accepted or regarded as acceptable. We find, on one side, the demand for (greater) competition; we find, on the other side those who insist on solidarity as major value and point of orientation. An opinion poll on attitudes vis-à-vis federalism in Germany, whose results have been published in 2008,[31] seem to confirm that the latter value (solidarity) definitely prevails: surprisingly high majorities of the citizens, in this opinion poll, reject competition as a principle that should govern the relations between the Länder. Even clear majorities of citizens in those Länder that belong to the group of net-payers amongst the Länder, are in favour of solidarity within the federal entity. These figures may explain why the political actors did not engage more intensely in more ambitious and further reaching reform efforts.

We find, in considerations on federalism and its values and functions, two criteria which differ considerably. One is efficiency, the other democratic quality. In the latter case a federal system—with decentralised structures, offering a higher degree of autonomy and of responsibility based on autonomy—is expected to offer special opportunities and chances for political participation. Academic observers claim and criticise, that democratic legitimacy—attributed to a federal structure—has played only a marginal role in the debate on reforming and modernising German federalism.[32]

At present, all participants in the Federation and the Länder are occupied in applying and experiencing the new constitutional rules. Here, they discover for example, that the new rule, according to which the Federation is not authorised to cooperate with the Länder in the fields of university education, obviously proves to be dysfunctional. The Minister for Education and Research, Mrs. Annette Schavan, has suggested to reviewing the respective new rules with the objective to include a new constitutional norm that would allow cooperation agreements between Federation and the Länder aiming towards maintaining the efficiency of the education system.[33] This would certainly not change the federal balance substantially, but rather represent a welcome and functional response to an urgent challenge and need. Another issue, very high on the political agenda, is the question related to the ambitious goal of achieving fiscal stability and avoiding public debts.

The dynamic development, inherent in a federal system, will continue. There are considerations under way towards starting a next step in the efforts of reforming and modernising German federalism. Possible topics could, again, be the financial relations, this time tackling the complex question of financial equalisation, in the vertical as well the horizontal dimension. Delimitation of the Länder continues to be discussed, but most observers doubt that a reduction in the number of Länder can really be seen as a realistic goal; pragmatic bi- and multilateral cooperation

[31] Bertelsmann-Stiftung (2008). The project manager in the Bertelsmann Foundation that conducted this opinion poll project was Dr. Ole Wintermann.

[32] See Roland Sturm on what have been the gains from the reform for democracy; Sturm (2007), S.34–45. In more detail, Sturm (2004).

[33] Schavan (2011), pp. 17–26.

amongst neighbouring Länder seems to be the more proper strategy. As concerns German federalism as a whole, the pendulum within the federal system will remain somewhere in the middle, not static, but allowing only marginal movements between the two orders of government, Federation and Länder.

References

Arthur Benz: Der deutsche Föderalismus, in: Thomas Ellwein/Everhardt Holtmann (Eds.): 50 Jahre Bundesrepublik Deutschland, Opladen 1999, pp. 135–153

Arthur Benz: Kein Ausweg aus der Politikverflechtung? Warum die Bundesstaats-Kommission scheiterte, aber nicht scheitern musste, in: PVS 2005, pp. 204–214

Bertelsmann-Stiftung (Ed.). Bürger und Föderalismus. Eine Umfrage zur Rolle der Bundesländer. Gütersloh 2008

Deutscher Bundestag, Wissenschaftliche Dienste, WD 3-37/06 and 123/06, Berlin 2006

Ivo D. Duchacek: Comparative Federalism. The Territorial Dimension of Politics, New York 1970

Thomas Fischer/Martin Große Hüttmann: Aktuelle Diskussionsbeiträge zur Reform des deutschen Föderalismus. Modelle, Leitbilder und die Chancen ihrer Übertragbarkeit, in: Europäisches Zentrum für Föderalismus-Forschung Tübingen (Ed.) Jahrbuch des Föderalismus 2001, Baden-Baden 2001, pp. 128–142.

Konrad Hesse: Der unitarische Bundesstaat, Karlsruhe 1962

Rudolf Hrbek/Annegret Eppler (Eds.): Deutschland vor der Föderalismus-Reform. Eine Dokumentation, in: Europäisches Zentrum für Föderalismus-Forschung Tübingen (Ed.): Occasional Papers No.28, Tübingen, November 2003

R. Hrbek/A. Eppler (Eds.): Die unvollendete Föderalismus-Reform. Eine Zwischenbilanz nach dem Scheitern der Kommission zur Modernisierung der bundesstaatlichen Ordnung im Dezember 2004, in: Europäisches Zentrum für Föderalismus-Forschung Tübingen (Ed.) Occasional Papers No 31, Tübingen 2005

Rudolf Hrbek "Germany (*Federal Republic of Germany*)" in: Handbook of Federal Countries (edited under the auspices of the Forum of Federations), 2nd edition, Montreal & Kingston, London, Ithaca 2005, pp. 150–164, here: pp.150/151.

Rudolf Hrbek. Föderalismusreform in Deutschland: Inhalte, Verfahren, Bewertung, in: Joachim Beck/Fabrice Larat (Eds.). Reform von Staat und Verwaltung – Jenseits von New Public Management? Baden-Baden/Zürich & St. Gallen 2011, pp. 191–210

Heiko Holste: Der deutsche Bundesstaat im Wandel, 1867–1933, Berlin 2002

Martin Große Hüttmann: Die föderale Staatsform in der Krise? ‚Cheques and Balances' im deutschen Föderalismus oder Die öffentliche Debatte um den Föderalismus in Deutschland, in: Hans-Georg Wehling(Ed.): Die deutschen Länder. Geschichte, Politik, Wirtschaft, Opladen 2000, pp. 277–297

Wolfgang Luthard: Abschied vom deutschen Konsensmodell? Zur Reform des Föderalismus, in: Aus Politik und Zeitgeschichte B 13/1999, pp. 12–23

Ursula Männle (Ed.): Föderalismus zwischen Konsens und Konkurrenz. Tagungs- und Materialienband zur Fortentwicklung des deutschen Föderalismus, Baden-Baden 1998

Ursula Münch: Konkurrenzföderalismus für die Bundesrepublik: eine Reformdebatte zwischen Wunschdenken und politischer Machbarkeit, in: Europäisches Zentrum für Föderalismus-Forschung Tübingen (Ed.): Jahrbuch des Föderalismus 2001, Baden-Baden 2001, pp. 115–127

W. Renzsch, Th. Fischer, I. Kemmler, M. Chardon, U. Münch, M. Große Hüttmann, H.-J. Dietsche and S. Hinterseh in: Europäisches Zentrum für Föderalismus-Forschung Tübingen (Ed.): Jahrbuch des Föderalismus 2005, Baden-Baden 2005

Scharpf, et al.: Politikverflechtung: Theorie and Empirie des kooperativen Föderalismus in der Bundesrepublik, Kronberg 1976

Scharpf Die Politikverflechtungsfalle. Europäische Integration und deutscher Föderalismus im Vergleich, in: Politische Vierteljahresschrift (PVS), vol. 26, No.4 (1985), pp. 326–356

Fritz W. Scharpf: Nicht genutzte Chancen der Föderalismus-Reform, in: MPIfG Working Paper 06/2 (April 2006).

Annette Schavan: Bildungs- und Wissenschaftspolitik im Kontext der föderalen Ordnung, in: Europäisches Zentrum für Föderalismus-Forschung Tübingen (Ed.): Jahrbuch des Föderalismus 2011, Baden-Baden 2011, pp.17–26

Roland Sturm: Bürgergesellschaft und Bundesstaat. Demokratietheoretische Begründung des Föderalismus und der Föderalismuskultur, Gütersloh and Berlin 2004.

Roland Sturm: Föderalismus-Reform: kein Erkenntnisproblem, warum aber ein Gestaltungs- und Entscheidungsproblem? In: PVS 2005, pp. 195–203

R. Sturm: Die Föderalismus-Reform I: Erfolgreiche Verfassungspolitik?, in: Ralf Thomas Baus/ Thomas Fischer/Rudolf Hrbek (Eds.): Föderalismusreform II: Weichenstellungen für eine Neuordnung der Finanzbeziehungen im deutschen Bundesstaat, Baden-Baden 2007, S.34–45

Ronald L. Watts: Comparing Federal Systems, 3rd edition, Montreal & Kingston, 2008, p.8

Current Challenges Faced by Swiss Federalism

Regula Kägi-Diener

Introduction

Federal Switzerland is *en route* to the future. What this route looks now and how Swiss constitutional law and the Swiss political system are to meet the requirements that will be put to the State of the future is dealt with in this paper. Clearly, the paper will limit itself to just a few of the many aspects involved.

The route that a legal-political community takes and should take will always be determined by where it has come from, what its current constitution looks and where it wants to go. Thus, historical developments need to be included because they determine what possibilities a State system has to a large extent. Any ideas about the direction that the route should take and its ultimate destination are really examples of Switzerland's own self-image within its search for a viable, federal State. Against this backdrop, characteristic State principles play a role that should not be underestimated. To begin with, we must consider democracy that in Switzerland is afforded high, even occasionally excessive importance. In addition to its representative forms, democracy has several direct forms, not just the show of hands in a public meeting at the municipal level (and in two Cantons at the cantonal level) but also the possibility of far-reaching participation of the population in factual and financial issues. We should consider also the fact that Switzerland's traditional "four-language situation" finds support in the federalist system. Nor should we hide the specific characteristics of a government system that works differently to surrounding States that have a fixed term of office, a government system that is based on an unwritten but not undisputed power-sharing executive basing on the force of the political parties and that operates according to a collegial system. Elements of our consensual democracy, which co-exist alongside the "negotiation-based"

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democracy of everyday democratic life need also to be factored in. Similarly, the increasingly obvious liberal characteristics of the Swiss State together with a certain amount of conservatism will determine future perspectives.

Regardless of the fact that in this paper we cannot deal with all these factors in sufficient depth, all of the above has an influence on legal considerations.

With this setting, this paper provides (I.) a glance at the Swiss federal system, its historical conditions and characteristics. Subsequently, it moves on to (II.) the federal decision-making system in Switzerland and then (III.) deals with current challenges, and moves on to reach (IV.) the conclusions. It closes with (V.) some final remarks.

Specific Features of Swiss Federalism

Power and Territory: Diversity in Unity

Like all federal States, Switzerland is divided into different levels. There are two main levels, namely the member State (Canton) level and the central State or Confederation level. These two are covered by the whole federal State, the encompassing unity that is perceived from abroad. There are 26 Cantons at the member State level. The subdivision of Switzerland is considered complete in that the whole of Switzerland is covered with member-State territories and at the same time the power of central government extends over the whole of Switzerland. There is also a third, "sub-level" below the member States comprised principally of municipalities. These are autonomous statutory bodies under public law that are also constituent parts of the Swiss State. Other entities cited in the constitution that play a role in the federal context but do not possess autonomy to the same degree, are cities, agglomerations and alpine regions that are socio-geographical constructs with a difficult to determine legal personality. The latter (alpine regions) are legally defined but lack government structure or autonomy. They are really rather geographically divided regions with specific infrastructures and economic conditions. The Swiss Constitution provides the framework for all three of these levels. Basically we are talking about a three-stage federal system where two of the stages are better developed. The three stages converge and work together (according to Nawiaski)[1] in a whole State. From here onwards this paper will deal with the member State and central State levels.

The division of territory and power that a federal State has into two or even partly three levels leads to vertical and horizontal segmentation. This kind of division is characteristic of federalism. However, it does not in itself constitute a federal

[1] *Hans Nawiaski* spoke of a 3-part federal State: the member-State level, the central State and the whole federal State. These three parts—which blanked out the municipal level—become clear political realities in the Swiss case and are even named in the constitution as Cantons (member States), the Confederation (central State) and the *Swiss Confederation* (the whole federal State or encompassing entity) all of which have different roles.

system, but rather for a system to be federal, *binding principles* are required to establish a cohesion between the different units, both between units on different levels (i.e. vertically) and between units on the same level (i.e. horizontally—or more specifically between different member States). These principles, which are relevant when governing, lead to horizontal and vertical interaction. Because of the large number of member States (26) and the deeply rooted governmental self-confidence of the Cantons there is a dense network of interactions in all directions in Switzerland.

Hence Swiss federalism has to be understood as being based on the principles of structure and cooperation. The first of these preserves and causes diversity and the second ensures and seeks congruency. The art is to strike a good balance between them.

Historical Roots: Unity in Diversity

Cultural and Political Diversity: And Despite That, Unity

Looking back in history, we realise that Switzerland has been a territory of cultural and structural diversity for a long time. This diversity is not just related to territorial conditions. The Alps were and still are language barriers. From the late Middle Ages Swiss topographical conditions led to the creation of legal communities with pronounced political wills and a high level of governmental self-confidence. The large number of Cantons whose current borders essentially date from Napoleon's 1797 Helvetic Constitution and the 1815 Congress of Vienna are an indication of this diversity. In addition to this diversity, there has also always existed a strong, deeply-rooted will for unity that already existed in the "Old Confederation" from the thirteenth century to 1797 that led to associations and the creation of a widely heterogeneous community that nevertheless had minimal organisation (see "Bottom-Up Federalism" below). This deeply-rooted will gained more specific weight from the middle of the nineteenth century onwards and the creation of nation States. Also, for centuries, a call for tolerance and solidarity had always existed and this led to the *Protection of minorities* that for a long time has been an essential element of State self-image in Switzerland and even includes the protection of linguistic-cultural and religious minorities. This will for unity became the political slogan "Unity in diversity and diversity in unity" that ever since the middle of the nineteenth century has been an important part of Swiss identity.

Bottom-Up Federalism

The centuries-old different State agreements under the "Old Confederation," that is under the quasi-State structure of what is now called Switzerland that existed between the thirteenth century and 1797 (the Helvetic Constitution), led to a system of State alliances that isn't represented in any modern State today but have its own

governing body (so called "Tagsatzung"). After the first Swiss Constitution of 1848 this Confederation (system of State alliances) was to a certain extent carried on. Right from the outset the constitution granted the Cantons a strong position as member States. From the Canton's side this is the remaining mark of their mistrust of central power. Hence, initially, only few competences were handed over to central power, mainly in the economic sphere (a common monetary system, weights and measures, traffic matters, the post and other similar matters). However, Switzerland could no longer avoid modern requirements especially in relation to the changes in international communities of States and the concept of State responsibility. That led to additional competences being given over to the Confederation.[2] Despite this, centralisation tendencies has to take into account the existing linguistic, cultural, religious and democratic diversity so long as this diversity has federal support, i.e. it is stipulated in territories and Cantons whose customary competences are affected.

Cooperation Requires Partnership and Solidarity

Federal States are complex State systems. They only really function if they are based on cooperation, true cooperation. Cooperation is one of the legally weakly consolidated but politically strongly effective principles of the Swiss State. In federalism a balance must be struck every day between the power of the central State—the Confederation—and the member States—the Cantons. This balance is outlined in the constitution and must be directed by it. At the same time it is indispensable that a set of principles insist that partnership and solidarity be guaranteed both horizontally and vertically. In this way, the central State has to primarily concern itself with the unity of the whole Swiss Confederation by which it must grant the member States sufficient room so that they can meet their own needs. For their part each member State must take into consideration the needs of other federal units. It is simply a system based on recognised and considered principles that ensures the political wills of the member States to incorporate the federal state and the political will of the central State that, in its turn, respects established differences.

What Does Swiss Federalism Look Like Today?

Characteristic of Swiss federalism is that it guarantees a strong position for its Cantons. This position has a symmetrical set-up, i.e. in principle all member States are equal.[3]

[2] See below.

[3] This Statement needs to be qualified because six "half-Cantons" also exist. In the House of Cantons, they legally have only one representative (in stead of two) and their vote, when it comes to constitutional provisions, only has half the weight. These are really historical reminiscences that affect small Cantons.

However, this equality is relative because of actual real inequalities between the Cantons. These exist on the one hand because of the different sizes of the Cantons (who can contain anywhere between 15,000 and 1.1 million inhabitants), and on the other because of their different financial strength and economic situation. These inequalities justify support and financial compensation that comes either through the central State or is organised by the central State through the economically powerful Cantons at the member-State level. This is the only way to guarantee that all member States can function sufficiently and carry out their duties. This compensation is also necessary to make the living conditions of the population equal. In fact this final matter is vital for keeping together the Swiss population whose identification with a whole federal State is built at the end of the day on the basis of State cohesion.

Autonomy of the Cantons (Member States) in Detail

As has already been mentioned Cantons traditionally occupy a strong position. This is based on their *autonomy*. Article 47 of the Constitution (altered in 2004 and in force since 2008) States that: "The Confederation shall respect the autonomy of the Cantons." The current Federal Constitution describes *autonomy* in Article 3 as follows: "The Cantons are sovereign insofar as their sovereignty is not limited by the Federal Constitution; they shall exercise all rights which are not transferred to the Confederation." The version of this provision is a throwback to the first Federal Constitution of 1848 and was adopted word by word in the two complete constitutional reviews of 1874 and 1999.[4]

Self-determination in the Cantons

a) The "sovereignty" expressed in the Federal Constitution has to be considered in the light of the historical development of the Swiss Confederation. When Switzerland was founded in 1848 the Cantons were largely, according to international law, sovereign entities. With the creation of Switzerland this sovereignty became relative in the sense of being a *shared* sovereignty, divided between the Confederation (central State) and the Cantons, to create a whole federal State (Swiss Confederation, emcompassing entity). This structure has been maintained; the Cantons have their own internal *constitutional sovereignty* and their own *organisational autonomy*. They each have their own political identity and can organise their State functions themselves including matters of naturalisation or questions regarding democracy. That is why there are different

[4] With one small and difference of little significance: in the first constitution of 1848 it says "The Cantons are sovereign insofar as their sovereignty is not limited by the Federal Constitution, and they shall exercise all rights which are not transferred to *the federal authorities*."

democratic forms in the Cantons regarding for example the organisation of Parliament and the population's political rights or even in relation to the position of municipalities and other territorial units. Today, just as in the past Cantons can reach agreements with each other[5] and in limited terms even with other countries.[6] The Confederation, as the central State, merely proscribes that they must have a democratic constitution and that this can be revised when a majority of voters requires so (Article 51 (1) of the Federal Constitution). All Cantons go far beyond these requirements. The Confederation accepts the guarantees of the Cantons' constitutional framework (one that they have decided upon themselves) and protects the Canton's areas.

b) Secondly this autonomy includes *financial autonomy*. Direct taxes on personal income and property and also company profit and capital gains tax are both laid down and raised by Cantons (and municipalities). The Cantons decide the level and arrangement of these taxes although as far as arrangement goes since 1990 there have existed harmonisation measures for the whole of Switzerland. In addition Cantons can raise further direct taxes such as inheritance and gift tax. Since the Second World War the central State has also levied income and asset tax and tax on profit and capital. This came about initially as a special tax for covering the costs originating from war but today this direct central State tax has been enshrined in legislation and is levied to cover general revenue needs. The tax is lower than Canton and municipal taxes and the Confederation cannot freely decide its level but rather must consider the tax burden that the population bears through Canton taxes.[7] Essentially the Confederation levies indirect taxes. To gain an idea of the degree of financial autonomy of the Cantons we should say that the Confederation disposes of a third of the country's income, Cantons and municipalities two thirds and the Cantons alone around half.

c) The third element of the Canton's autonomy is *their authority to regulate State concerns and tasks* under consideration (self-rule). This has its origins back in history and once again according to constitutional law, subsidiary general competences are in the hands of the Cantons. The central State can only rule on something legally if, according to the constitution, the corresponding power in the matter has been handed over. If no such competence is mentioned in the constitution then the Cantons are responsible.
The regulatory competences of the Cantons include:

   (1) *Genuine competences*: in this case the Canton decides independently whether it wants to take charge of a task as a State task, which ones it wants to take charge of and how it will do so — i.e. with what means, to what degree and in what time frame.

[5] Today, this is expressly regulated in Article 48 of the Federal Constitution.

[6] Regulated in Article 56 of the Federal Constitution.

[7] Article 128 (2) of the Federal Constitution. The maximum tax level for Confederation taxes is stipulated in the constitution.

(2) *Delegated (transferred) competences*: the central State can transfer competences that strictly speaking should be their own (e.g. the central State stipulates land planning and zoning but in the case of planning for specific land this competence is transferred to the Cantons. The Cantons can freely choose how much land they want to give over for building, without the central State being allowed to interfere). Here once again the Cantons have their own decision-making area that the central State has to respect.

We are convinced that the *essential heart* of autonomy is provided through a minimum number of genuine competence areas, a basic right to organise (constitutional autonomy) and financial autonomy in the sense that access can be provided to uncommitted funds.

d) Hence the Cantons are entitled to implement and enforce central State law. This *right to implement and enforce*—which is both a right and an obligation—has, since 2000 been laid down in the Federal Constitution[8] although it had already been developed in practice and was a recognised part of Swiss federalism. It forms part of a shared power system within a framework of vertically divided competences and gives the Cantons their own possibilities and leeway especially in enforcement organisation (appointments of public authorities, procedures, transfer of the execution of the task, control mechanisms, incentive schemes, and others), as long as these possibilities have also been agreed upon in the substantive stipulations of central State law. These independent possibilities are today expressly guaranteed in the constitution although only as a *principle,*[9] something that matters especially to Cantons with limited resources. It is really a matter of central State and member States working together to produce direct responsibility for the Cantons that is positioned someway between autonomous perception of what one's own functions are (self-rule) and participation in the legislation of the Confederation (shared-rule).

e) According to Swiss federalist opinion in order to guarantee self-rule, fiscal autonomy and organisational sovereignty of the Cantons the central State (Confederation) cannot take on for itself any functions nor can it hand them over to the Cantons without taking into account their needs and possibilities. The Confederation must also check that minimum standards for organisation and procedures are present in the Cantons but cannot dictate any details. They must respect the cooperation and coordination between member States, i.e. the existence of a horizontal network and above all they must watch over the needs of the small member States when financial resources are being claimed and handed out. Finally, the Confederation has the obligation to produce and watch over a context of equality.

[8] Article 46 of the Federal Constitution.

[9] Article 46 (2) of the Federal Constitution.

Shared-Rule

The second essential element of the Swiss federal system is the right of Cantons to participate in the decisions of the Confederation. These participation rights and possibilities are an expression of solidarity, of commonality of interests and they lead to dialogue. They require that the federal entities (the Confederation, the Cantons) treat each other as partners and that they take each other seriously and respect each other. Shared rule is arrived at essentially in the legislative process, including the constitutional process, a central part of which is the division of functions or competences.

We will come back to how shared-rule is arranged later.

No Stability

Irrespective of the strong constitutional position of the Cantons and the long tradition in the Swiss Confederation of a centralised-centrifugal arm-wrestle to have centripetal power we should not overlook the fact there has been an insidious and continuing loss of Canton autonomy since the Second World War. This loss presents the biggest challenge to all reforms of federalism that have been undertaken since the early nineties.

The Federal Decision-Making System in Switzerland

The Fundamentals of State Decisions in a Federal Context

The following three elements are adhered to when dealing with the issue of power (competences) in Switzerland:

(1) Division of power (competences) is a traditional, fundamental aspect of a federal State. This power division refers to legislative power and means a vertical division of power in the area of legislation.
(2) Division of power is essential for matters of autonomy. However, in an intertwined, modern world it is insufficient on its own and not broad enough to satisfy many requirements.
(3) Participation and different forms of cooperation between federal units are essential. This presupposes that there is trust between the federal partners and requires that the State make continuous efforts to improve the procedure and attain consistent results. For this reason self-rule, shared rule and cooperation constitute a magic triangle for a federal system in a modern reality.

The Division of Power

Formerly we referred to Article 3 of the Federal Constitution dealing with autonomy and the general powers of the Cantons. This basic principle was (thanks to an amendment to the constitution in 2004—which came into force in 2008) broadened according to the subsidiarity principle (Article 5a of the Federal Constitution). As is clearly expressed in Article 43a (1): "The Confederation shall only undertake tasks that the Cantons are unable to perform. . ." the subsidiarity principle is not only valid (although especially so) for the division of power. Although distinguished voices had already under the old constitution (of 1874) accepted a basic principle of subsidiarity, its implementation in the *division* of power was not truly recognised but actually it dealt rather with the *exercising* of power and matters relating to the *extension* of power (acceptance of implied powers). Until now, the constitutional division of power has essentially followed practical considerations, particularly legislation through democratic rights (popular and Canton initiatives) and through Parliamentary motions. It is often simpler and efficient to table a motion at federal level, because at Canton level there are often mandatory referendum that can represent hurdles to new requests.

However, much that the basic principal of subsidiarity is necessary and apt, its effectiveness is by no means certain; nor can it be proven that it benefits the Cantons or has a counter effect on centralism. This is bound up with the fact that Switzerland has had popular initiatives for constitutional changes lead by political considerations and only on rare occasions by the subsidiarity principle. These represent a common mode of political interventionism. These kinds of constitutional initiatives can hand direct powers over to the Confederation without, according to the subsidiarity principle, having any reference to the member States.[10] The future will show how far the subsidiarity principle can be respected despite these democratic instruments.

Shared Rule (Participation) of the Cantons in the Confederation in Detail

Two Kinds of Participation

The Swiss federal system provides its member States with two forms of participation in the Confederation. One is *formal participation* based on the constitutionally guaranteed "rights" and traditional possibilities for participation that the Cantons have. The other is what is known as *soft participation* carried out through a legally weak but effectively guaranteed right to consultation, consideration and information.

[10] At any rate, a counter-proposal may weaken the effect.

Formal Participation

(1) When talking about formal participation in the Confederation we are really referring to institutions and especially to the House of Cantons. It is equivalent to the House of Representatives in that it is an equal partner in the Federal Assembly, i.e. the Parliament of the central State (Confederation). Each Canton sends two representatives to the House of Cantons, with the only exception of the six half-Cantons who only send one representative. Elections to the House of Cantons are carried out according to the regulations of each Canton. Today all House of Canton members are elected by the people and not, as used to originally happen in several Cantons, by the government. It is interesting also that the Federal Constitution strictly forbids "proxy" voting.[11] Hence the House of Cantons cannot be considered to be a body that represents Canton governments. Canton governments attempt using several different means to win their members of the House of Cantons over to their position, or at least nearer to it. But at the end of the day the House of Cantons is a weak instrument for defending Canton interests within the Confederation.

(2) In many regards there is also procedural participation as can be seen from the following:

   a. A revision or even a partial revision of the Federal Constitution is only possible when, in addition to the majority of citizens there is also a majority of Cantons prepared to accept the changes.[12] A referendum is held in each Canton to gain this opinion. In other words Canton approval is needed and achieved using basic democracy and is not necessarily the opinion of the authorities.
   b. Eight Cantons can request an optional referendum and in this way force a referendum on federal statutes and important international treaties (Article 141 of the Federal Constitution). This possibility represents a weak element in participation. To date it has only ever been used once.
   c. Every Canton has the right to submit initiatives for laws to the Federal Parliament for cases where the area of competence concerned is within the Federal Parliament's remit. The Federal Parliament decides for itself whether it wants to grant the initiative and, if need be, in what form. This mechanism is frequently used although in practice the Parliament does not often follow the motion.
   d. The Cantons can claim specific participation in international matters. This is stipulated in a special law (The Participation Act) that states the right of the Cantons to be consulted and informed in a timely fashion and to work together with the Federal government.

[11] Article 161 of the Federal Constitution: "No member of the Federal Assembly may vote on the instructions of another person."

[12] In this situation the half-Cantons would only have half a vote.

"Soft" Participation

Soft participation is not a formal form of participation but rather a legally weak but effective form of participation. There are several kinds:

a. The most significant is the possibility given to Cantons to take part in the early, preparatory stages of legislation. The Confederation informs the Cantons of its intentions fully and in good time. It *must* consult the Cantons when their *interests* are affected (Article 45(2) of the Federal Constitution) that happens in the majority of cases. The Cantons must also specifically be heard during the preparation of legislation and other projects (when such legislation/projects have an effect on competences belonging to the Cantons) and also in the preparation of major international treaties (Article 147 of the Federal Constitution). In this situation, it is stipulated that the consultation has to be made by the government and not by Parliament. Cantons have no actual right to participation during the parliamentary stage of law-making although involvement of representatives of the Cantons via the Parliament is not ruled out.
b. Working groups can be set up for certain projects. Cantons are not always represented in these groups. Depending upon the subject area it maybe that city representatives, as the engines of social and economic development, are asked to join. On occasions and with increasing success round tables are formed to draft Bills of law. Both Canton and Federal government representatives participate in these.
c. Finally, annual meetings are held between Federal and Cantonal governments. This is what is known as "federal dialogue" and is used a mechanism for exchanging opinions.

A Duty of Consideration Towards the Cantons

The legislative power of the Confederation is finally limited because it has to take into account the financial burden associated with implementing federal law that is placed on Cantons (Article 46 of the Federal Constitution, see above.[13]

Challenges to the Swiss Federal State

Tendency to Centralisation

The first challenge the Swiss federal State faces is a tendency towards a strengthening of central power. This tendency has come about for different reasons:

[13] Article 47(2), second sentence of the Federal Constitution.

– New or greater tasks for the State.
– Internationalisation, especially of commercial law. Many international agreements are being signed that contain laws affecting and curtailing the Cantons fields of competence.
– Disparites between the Cantons. Above all here we mean different positions regarding the political needs. They mean different speeds in the regulation and enforcement of the political needs, as well as different levels of implementation. However, conservative stances are often not compatible with the modern, fast-living era.

All this leads to an increasing lack of true understanding of differences in a globally operating context and an interdependent and quickly changing world and therefore to greater sympathy for uniform rules.

Shifts in Power

(1) After the Second World War new emerging needs coming increasingly from the Confederation were taken in hand and implemented. The social state and the economic state are the offspring of federal legislation: transport infrastructure development, environmental protection, domestic market unification and even procedural law have all become competences of the Confederation. And all this is made without even a glance at the subsidiarity principle, i.e. without looking at whether the Cantons could deal with these issues just as well or even better than the central State. Hence, modern needs are considered as a serious threat to Switzerland's federal structure.
(2) A further problem was an increasing number of financial transfers from the Confederation to the Cantons. Financial relations became complicated, unclear, confusing and counterproductive. A reform was urgently needed.

In 1980, an initial attempt was made to regulate afresh the division of power between the Confederation and its Cantons. Shortly after work was started on this ambitious task it fizzled out because it was not something that was politically wanted. In 1990 entry into the European Economic Area was under discussion. In 1992 a referendum was held on the matter that returned a negative vote. The project made the Cantons politically aware of how they would stand on the international stage if the EEA had strongly curtailed their powers.

This gave impulse to the founding of the *Conference of Canton Governments*, a political organisation that placed the need to cooperate at the highest Cantonal plane. This new structure allowed the Cantons together with the Confederation to prepare the New Financial Equalisation Programme.

Balancing Self-rule and Shared Rule

Until the 1990s, the recipe for compensating for the lost of Cantonal powers was a strengthening of the powers of implementation and enforcement and shared rule. However, this only partly solved the problem. A balanced relationship between self-rule and shared-rule or participation is a decisive factor in determining the quality of federalism. This fact was recognised in the second federal reform of 2004/2008 and was better constitutionally anchored in law.[14] They are ways to finding self-rule that guarantee the autonomy of member States and at the same time do not curtail much of the Confederation's ability to act.

This recognition has meant that Cantons and Confederation sit down together not just to try to disentangle finances but also to take a closer look at the distribution of power.

The New Financial Equalisation Programme as a Reform of Federalism

(1) After approximately 10 years of preparatory work in 2004 a referendum was held that paved the way for the New Financial Equalisation Programme. The new constitutional modifications came into force in 2008. They are significant in that not only do they restructure financial relations but also review federalism. Since the beginning of the 1990s, this has been the second reform of Swiss federalism. There had already been the completely revised Federal Constitution of 1999 (that came into force in 2000) to clarify relations between the Confederation and the Cantons and clearly strengthened the place of Cantons (and municipalities). The aim of the regulations in the case of the New Financial Equalisation Programme was to break the tendency of evolving from a federal State to a decentralised State and in this way the rights of the Cantons also became strengthened.

(2) As part of this New Financial Equalisation Programme the working group set up by Confederation and Cantons suggested the following new distribution of competences:

   a. The transfer of six functions that would become exclusive competences of the Confederation (centralisation).
   b. The transfer of 15 functions that would become exclusive competences of the Cantons (federalisation).
   c. The clarification and improvement in the Confederation-Canton relations in 17 areas.
   d. The setting up of binding cooperation (both between the Cantons themselves and with the Confederation) in nine areas (for example in the field of universities and specialist medicine).

[14] Article 47(2) of the Federal Constitution. Also look at paragraph 4.4.

(3) At the same time vertical and horizontal cooperation was strengthened through several constitutional guidelines.
(4) This was followed by a reorganisation of the Financial Equalisation Programme with the principle goal of reducing the economic disparities between Cantons and equalising their financial power. To do this, a new compensation system was created with added concentration on the Cantons.
(5) A fifth goal was to mitigate burdens of a geographical or social origin. To achieve this two *Burden Sharing* mechanisms were introduced: one to compensate for higher costs arising from difficult topographical conditions or a sparse population (something that especially affects alpine Cantons) and another to mitigate the especially high social costs of big cities who have proportionally greater numbers of the elderly, poor, foreigners and the unemployed in their populations (these are called the A-cities).
(6) For the sixth element the New Financial Equalisation Programme provided for the possibility of a *hardship allowance* aimed at improving political acceptance of the programme in financially weak Cantons and limiting the negative effects of the change.

Conclusions

Federalism is a concept that enables greater proximity to small, people-oriented communities and in this respect creates proximity to the individual. Hence, federalism allows the State to provide individual satisfaction and to act with a human face regardless of the global context of modern State affairs. The origin of all reflections regarding the State and State power is therefore the principle that the State must be considered as a simple container or a vessel for its citizens.

(1) A federal State is structured according to its area and state power. That is how a federal State divides power up into pieces. The smaller the federalist units are the greater the political influence of the individual via democratic (including direct democracy) means. In this sense the corresponding federal unit provides the population with something it can identify with.
(2) The federal horizontal and vertical network provides a platform for each individual unit (the central State, member States, municipalities) and in this way it is possible to manage the area of tension that exists between diversity and unity.
(3) This possibility of belonging to different levels is an important factor in the construction of Swiss political identity.
(4) A procedural concept is being increasingly super-imposed upon the structural concept of a horizontal and vertical sharing of power. This procedural concept that has cooperation and participation as its main criteria provides a new meaning to member States and complements the structural concept.

(5) Cooperation is only successful if principles are observed, if differences are tolerated if all federal partners take their autonomy seriously and show solidarity. This makes major demands on federal partners. Even since the reforms of Swiss federalism at the beginning of the 1990s when these basic principles were renewed, federalism still remains something that makes many demands on those who participate in it. On the other hand federalism can find across a feeling of greater togetherness and belonging and in this sense has a pronounced integration effect.
(6) In our intertwined and interdependent world cooperation is essential especially because we are increasingly confronted with an international or even supra-national set of rules that demand the creation of binding legislation. Hence dialogue and cooperation complement the traditional rights that constitute federal participation. They bind together the different federal units (especially the Confederation and the Cantons) into one, single encompassing unit, the Whole State.
(7) It is also equally clear to see that partnership without autonomy for all sides cannot be guaranteed over time. It is therefore up to the Federal Constitution to define and guarantee this autonomy.
(8) Since the end of the Second World War in Switzerland, we have seen how the significance of the Cantons has been reduced. This phenomenon has been due to various developments in the international community and several internal factors.
(9) However, the Cantons have taken counter-measures to this development by strengthening their position through the creation of a horizontal organisation on the highest political level (different and largely well coordinated transversal organisations have existed in different areas on a ministerial level for many years).
(10) Cantons have been signing regional and nationwide agreements with each other for donkey's years. These agreements were and still are in part of an administrative or political nature and in part legislative, latter having a direct effect on citizens' lives. Since 2008, the vessels for this kind of horizontal cooperation have been strengthened and better organised in the Federal Constitution. If there is a need for greater harmonisation or unification the Cantons do really have an instrument they can use to go outside their narrow borders and issue laws with their own competences. This reduces the need to have regulations coming from the Confederation (central State) and lessens the pressure on centralisation.
(11) The distribution of power in Switzerland had to be thoroughly re-thought and the new distribution is based upon meaningful principles. In this sense the principle of subsidiarity has had its significance strengthened and the principle of fiscal equivalence (the benefits principle) has been introduced. Both of these, together have built the framework for the distribution of State power.
(12) Federalism lives off dialogue and an open flow of information both between the Cantons and the central State (the Confederation) and at inter-Canton level.

Closing Remarks

(1) Balancing the different areas of power in a federal system and striking a balance between the self-rule and shared rule of member States is an on-going process. It is never really finished. Specific goals are re-defined for every historical situation. And we should remember that the competences of the member States provide us with quite concrete opportunities that can be made use of: they can serve as a model for a systematic process in finding solutions to modern problems. Thus, a federal system can be considered a "*learning system*." This kind of step-wise approach to the best legal way of coping with current problems is especially important in a democracy containing direct elements, since this kind of democracy tends towards conservatism if in certain areas people (i.e. voters) are sceptical of change and oppose new regulations (for example in rural areas), whilst in others (urban areas for example), these same issues are valued differently and changes are abruptly accepted. In this sense, federalism also provides room for a State containing *different but nevertheless democratically appropriate speeds*.

(2) However, horizontal cooperation and horizontal exchanges must work well if the afore-mentioned opportunities are to be optimally utilised. This is only to determine, when systematically appraised, the effectiveness, the pros and cons of regulations and to seek out and make known that needs have been unsatisfactorily solved and are newly arising. This means that good data must be made available to all political players. And by political players we do not only mean central and member-State authorities and governments but also MPs and elected representatives at all levels and even other kinds of political players such as political parties and NGOs. This kind of data base is always a major challenge for Switzerland. To date is it a long way from being sufficiently developed.

(3) Still outstanding is a solution to improve the rights of Cantons as member States, so that they really can put up an effective fight against increasing centralisation. In Switzerland it is politically frowned upon that Cantons with complaints about public law disputes appeal to the Swiss Federal Supreme Court. Furthermore, if the Swiss Federal Supreme Court cannot give a valid ruling it is because of explicit provisions bound up in federal laws. Art. 190 of the Federal Constitution says: "The Federal Supreme Court .... applaing law shall follow the Federal Statutes". These provisions, on a proposal made by the Federal government, in accordance with the Cantonal governments can be abolished in the case of disputes over competences. The Swiss Supreme Federal Court should also be able to solve such disputes. The proposal would anyway be rejected by Parliament. Therefore, it is inevitable to search for other ways. Perhaps special arbitrations procedures for clarification of differences between the central State and member States would be meaningful, especially in cases where the member States feel their Autonomy has been infringed. In these

relationships too, there are unresolved challenges that Switzerland is going to have to broach in the future.

(4) Lastly, a final challenge needs to be named that is currently politically taboo and would require a change to the Constitution. The territorial-state structure should be reconsidered. For statistical purposes currently large spaces are all added together and because of the large agglomerations that straddle Canton borders, cross-border cooperation has emerged. This could be used for a wider political debate. However, for the near future, it looks unlikely that this will happen.

The Road Towards Federalism in Italy?

Silvio Gambino

Some Premises

Italy's experience in the matter of regional reform and so-called fiscal federalism urges that the title of this paper should be reformulated and turned into a question.

Any outside observers taking a superficial view of the events that occur in Italy, in other words, without having sufficiently informed themselves, might lend too great a theoretical–political weight to the debatable controversy prompted by Mr. Umberto Bossi, Minister for Institutional Reforms, against the President of the Republic, Giorgio Napolitano, who recently expressed clear opposition to the opening of decentralised ministerial offices in the Northern regions, objecting to the questionable constitutionality of such a measure vis-à-vis Art. 114.3. of the Constitution.

In order to clarify the issue once and for all, the political options outspokenly expressed by the League that comprises the current government majority do not seem to seriously question the state as it stands in its current form, occupying what fundamentally seems to be a symbolic position, calling to mind in an almost ritual manner the idea of "people in arms," and the secession of Padania in Italy. This is not then a serious matter. The only thing that does perhaps appear to be serious is the fragility of the historical, political, and identity-related reasons where the formation of the unified state was based in 1861. Scientific and political debate has discussed the issue widely on the 150th Anniversary of Italian Unification.[1]

There also seems to be a worrying loss of the idealistic reasons that 60 years ago provided the foundation for the "constitutional pact" set out in the Constituent

[1] *On this point, see also our work: "Unità d'Italia e identità nazionale. L'esperienza italiana fra storia e attualità costituzionale," in* Diritto pubblico comparato ed europeo, *2010, no. 3*.

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Assembly between the leading political forces (Marxists, Catholics, and the lay men and women who were heirs to the *Risorgimento*) that fought Fascism in favour of the new unitary and social principles that were to provide the grounding for the republican state. An analysis of the partisan politics that dominates today's political scene and pervades the institutional life of the country reflects the total disappearance of the popular, mass parties where the constitution was drawn up, revealing parties that now have a personal focus and which in terms of ideals and programme are far removed from the underlying culture of the constitution and its caring values.[2]

Nevertheless, questions over the impact of the disappearance of the constituent cultures in the institutional and political debate vis-à-vis attempts at constitutional as well as state reform, and which have been under discussion for at least 20 years, appear to be well founded. The same may also be said of the more general approach to constitutional change aimed at achieving a robust regionalism that even resembles, although it is not identified as such, the long sought after federalism (longed for by many although not by everybody, and not by all political parties).

Moreover, over the last 20 years in particular, constitutional doctrine and political scientists have kept a close watch on issues related to the territorial organisation of power, both from the perspective of subsidiarity in the public function and from the standpoint of relations between territorial decentralisation and government processes, and particularly from the point of view of ensuring citizens' national and social rights.[3]

With regard to such tendencies, in other words, consolidation of regionalism as a "process of federalisation" *statu nascenti*, a number of interesting areas appear regarding the questions and subsequent problems surrounding legal issues related to both the federal and the regional state.[4]

Thus, as framed, the general question posed to jurists, and particularly those legislating constitutional reform, concerns the current evolution or at least the tendency of conventional centralist and centralised organisation of public powers as well as the corresponding forms of democratic legitimisation towards institutional and political systems that are undergoing substantial changes that they may be mistaken for systems that provide the basis for federal-type legal systems.[5]

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[2] One further example among the abundant bibliography is Gambino (2011). On this issue, see also our "Rappresentanza e Governo, fra riforme elettorali (partigiane), partiti politici (sregolati) e governi (deboli)," in *Politica del diritto*, 2008, no. 2; M. Calise, *Il partito personale*, Roma-Bari, 2000; Id., "Il governo di partito in prospettiva costituzionale," in M. Calise (edition by), *Come cambiano i partiti*, Bologna, 1992; Id., *La Terza Repubblica. Partiti contro Presidenti,* Roma-Bari, 2006; G. Giraudi (edition by), *Crisi della politica e riforme istituzionali,* Soveria Mannelli, 2005.

[3] Among others, see Pace (1997), D'Atena (1994), Aparicio (1999), Gambino (2005a), Viviani Sclein et al. (2003), Lang and Sanna (2005), Reposo (2005), Martines et al. (2005), Caravita (2006), and Gambino (2009a).

[4] Among others, see Lombardi (1987) and Lucatello (1939).

[5] Ruggeri (2002), Anzon (2003a), Mangiameli (2002), and Gambino (2003a, b, 2009b).

With regard to said problem, the current work first seeks to appraise to what degree and how current legislative/administrative and constitutional reform in Italy heralds, or at least enables, a triumph over the traditional "centralist-based" organisation of public power, and secondly, whether the reformed constitutional system, with the new competences allocated to each regional level and the much esteemed statutory autonomy recognised to the regions under the constitution, allows us to anticipate potential imbalances between citizens depending on the areas/regions where they belong.[6]

Regionalism Versus Federalism: Questionable Hermeneutic Validity of the Categories of Analysis Used by Legal Doctrine as well as by Political Science Doctrine

With regard to the theoretical framework wherein the state is structured in light of the recent constitutional revision of Title V (Const. law no. 1/99 and Const. law no. 3/2001), it should immediately be pointed out that said revision does not define itself, even "nomine juris," as "federal." Briefly summed up, it can be said that constitutional reform of Italian regionalism merely provides for a constitutional framework, an "architrave" or framework required to ensure "harmonisation" of a vast range of random legislative measures that for over a decade, since 1999, affected the legal system governing regional institutions and local autonomies, and which over the years have appeared one after another due to a lack of any organic reference structure.

The most common interpretation among those following the matter closely is that both law no. 59/97[7] and the most recent constitutional revision of regional matters are not mere "corrections" of the constitutional regionalist model—already implemented under regionalisation in the first and second half of the 1970s[8]—but in fact herald an overall shift in the whole regional and autonomous system, affecting all institutional levels of government (even national), and advocating the completion of the founding of a "Republic of the Autonomies."[9] In this vein, one strand of the country's regionalist doctrine has seen constitutional reform, the subject here under discussion, as a state structure that may be embraced within a "State of regions with municipal tendencies."[10]

Thus, it might be considered that whilst the first two rounds of regionalisation in the 1970s and 1980s merely reflected the application of the constitutional

[6] Among the abundant bibliography, cf. Gambino (2008) and Castellà Andreu and Olivetti (2009).

[7] With which major administrative decentralisation had commenced, also in this case perceived as "administrative federalism to an unaltered Constitution" (Gambino and D'Ignazio 2002).

[8] Cf. Groppi (2008) and Rolla (2009).

[9] Cf. Groppi and Olivetti (2003).

[10] Cf. Groppi (2000) and Escarras (1994).

provisions as previously set out and in force under Title V Const.,[11] the current process of regionalisation (the third) primarily constitutes the realisation of constitutional principles in terms of autonomy and institutional pluralism (ex Art. 5 Const.).[12]

The *ratio* of "administrative reforms" (referred to as "Bassanini Laws"), as confirmed under the constitutional reforms of the late 1990s, did not therefore mean allocating to the regions any functions that essentially differed in constitutional terms to those set out under the 1947 Constitution. The *ratio* in this sense was more a question of rearranging and reorganising the state "in global terms" (seen as a "State-legal system" and not just as a "State-apparatus"), strengthening regions and local autonomies, yet without said reorganisation reaching the formal framework of an actual federal state.

Furthermore, said reorganisation is implemented based on the "orientative" principles set out under Art. 5 Const., which, as it has already been re-interpreted by law no. 59/97, might be structured as an *ante litteram* application of the principle of subsidiarity within the confines laid down in the first part of the constitution for fundamental constitutional rights and principles. The "administrative reform" and, in particular, decrees executing law 59/97 (legislative decrees no. 143/97, no. 112/98, no. 114/98, no. 123/97, no. 132/97, no. 422/97, no. 469/97, in addition to later reform of social benefits set out under law no. 328 of 2000) may easily be considered in this vein, if not as the height of potential institutional and administrative decentralisation, then at least as the height of the devolution secured in the course of Italian State history, prior to the regional reform adopted by Const. law 3 of 2001.[13]

As regards the problem of overcoming the centralised organisation of public powers, the response proposed, particularly in light of recent and extremely stormy constitutional reform, in no way allows fresh reform of the Italian state to be seen as having been inspired by the federal or indeed the proto-federal or pre-federal model. If any model is to be abstractly deduced from the constitutional reform undertaken in early 2000, it is one which continues to be based on a state structured in regional terms and characterised by an "extreme" realisation of the autonomy option, already present in the 1947 Constitution.[14] As regards the latter, as mentioned before, both legislative/administrative and constitutional reform emerge more as a belated "implementation" of constitutional principles (Art. 5 Const.), vis-à-vis the issue of institutional and administrative decentralisation, rather than as an actual modification/integration thereof.

Yet, even when faced with the impossible task of inferring from current reform a state structure that might be termed federal, the changes brought in, firstly by legislative and administrative reform and secondly by constitutional reform, are

[11] Cf. AA.VV (1988).

[12] Cf. Esposito (1954).

[13] Cf. G.D. Falcon, "Introducción," and AA.VV (1998).

[14] Cf. Luciani (1994), Bin (2003) and Gambino (2009c).

indeed significant, insofar as the values and principles already described under the 1947 Constitution were amply "updated," yet remained "closeted" in a manner that owed too much to the liberal state of the nineteenth century, and which were forced to face up to the prominence of political autonomies (political parties) that for over half a century embodied the country's "material Constitution."[15]

As regards the dynamics of the "territorial reforms" undertaken in Italy at least over the last decade, these may only be interpreted as a full-blown and belated implementation of the 1947 Constitution, after the protracted "freeze" where this was subject by the country's major political forces.[16]

Furthermore, with regard to doctrinal models that undoubtedly affect any appraisal of the changes concerning legitimisation when exercising public power, prominent in particular is modification of Art. 114 Const., through which the constitutional agreement expressed in the Fundamental Charter of the Republic no longer envisages the "Republic being divided up into Regions, Provinces and Local Councils," but rather that the "Republic is made up of Local Councils, Provinces, Metropolitan Cities, Regions and the State," where the subject that legitimises exercise of power clearly seems to have been inverted. Together with that set out under Art. 118.1, Const., in addition to the issue of horizontal subsidiarity approved in paragraph IV of the same provision, such a modification clearly establishes and fully implements what had already been introduced in the legal system by the "Bassanini reforms" in the early 1990s and even earlier in Art. 5 of the Constitution.

The very constitutionalisation of the "principle of subsidiarity"[17] is undertaken through said constitutional reform since it has become one of the topics of legal and political publicism, although such constitutional innovation is not free from problems concerning the complex issues posed vis-à-vis the principle of legality and, consequently, protection of those affected by administrative action. With regard to the relation between legislative/administrative reform and constitutional reform, it should be stressed that changes to public functions and structures have not led to the "harmonious" development of a clearly pre-constituted model, but contrastingly, are the result of reforms that have proved partial and sectorial. For this reason, any efforts at legal individualisation and classification of an abstract model, which may prove abstractly necessary for constitutional and comparative analysis, would not appear to be of any great use.

However, certain hypotheses may be put forward that at present is not possible to evaluate, since there are many, mainly political, variables involved. Indeed, with regard to the latter—both in the case of constitutional reform and the case of

[15] Cf. Gambino (2010a).

[16] Cf. Bin (2004).

[17] G.U. Rescigno, "I diritti civili e sociali fra legislazione esclusiva dello Stato e delle regioni," in AA.VV. (a cura di S. Gambino), *Il 'nuovo' ordinamento regionale … cit.;* Gambino (2009d), Luciani (2002), D'Alessandro (2004), Principato (2002), and D'Aloia (2003).

legislative/administrative reform—it is not easy to distinguish between the elements of a systemic rationality.[18]

As a result, in the manner where they were innovatively redistributed in accordance with current reform, legislative and administrative competences do not with any certainty offer us a valid model of relations between the various levels of national and territorial government. Consequently, although some may say that the state's current structure, as applied through the provisions set out under reform, is based mainly on a "barely distinguishable neo-regionalism," others tend to stress a tendency towards formulae of "protection of municipal liberties" or even "a return to neo-centralism," a "triangular autonomy with a twin centre of gravity."[19] Furthermore, such an analytical framework subsequently proves complex due to legislation[20] and neo-centralist forms of management that, particularly in the *Mezzogiorno* regions, might result from public action concerning initiatives of "negotiated planning" or action "managed from the centre" such as Law 488/92 or major works of infrastructure, as well as those involving regional co-participation for management of European structural funds, for which the "weak" regions (Calabria, Sicily, and so on) have thus far shown very little capacity in terms of planning and spending.

Faced with such a scenario, we might well wonder whether legislative/administrative reform and constitutional reform, carried out and *in itinere*, allow us, particularly in fiscally and administratively "weak" regions,[21] to implement policies that "break away" from the former regional-local system based on inefficacy, inefficiency and, above all, the notorious irresponsibility of public institutions and administrations, not excluding state administration in the south. A positive answer may be given to this question, perhaps with a certain risk in the case of southern regions. Such an answer is due to the fact that regional and local institutions are already endowed with wide-ranging and significant powers, enough to permit a variety of even political reforms, and particularly executive self-reforms, resulting from Const. Law no. 1 of 1999, that allow for autonomous institutional and administrative policies aimed at playing a new role in territorial government.[22]

Yet, in such a context, financial and social data highlight the existence of major asymmetries between regions that enjoy a special statute and ordinary regions in terms of staffing, policies and, more generally, as regards exercising their own "exclusive" competences as well as "concurrent" competences. Such asymmetry exists in these ordinary regions, between regions that are "well" run and regions that are "badly" run. The answer to a question posed in such terms essentially leads us to highlight that, at present, the principal uncertainties are due to inadequate reform of

[18] Among others, on this issue see also Vandelli (2002).

[19] Cf. Pitruzzella (1995), Pastori (1997).

[20] Among others, on this question see also Merloni (2005), p. 469 et seq.

[21] "Regioni ad obiettivo 1," according to the terminology used by the EU.

[22] Cf. AA.VV (2001), Gambino (2010b) and Olivetti (2003).

Title V Const., as well as shortcomings therein, particularly regarding relations between state and regions, for the creation of an organisational–functional structure geared towards a regionalism that is mainly "cooperative and integrated."[23] By contrast, the reason for partiality and the difficulty in undertaking reforms vis-à-vis relations between local autonomies (vertical as well as horizontal relations, to date "irresponsibly" neglected in practice) seems to be mainly due to the problems or the inability of the regional governing classes to implement reforms, forgoing their privileges and "weaving networks" with one another, and with infra-regional reality, taking on the task of managing and planning by adopting the right rules and laws.[24]

If the reasons behind the difficulties in planning and implementing "breakaway reforms" have been well highlighted, any solutions that might be posited involve certain legislative mechanisms inherent in the relations between various levels of government. With regard to the first case (state-region relations), if current constitutional reform is not to be perceived as "masking" the preservation of what is still basically centralist legislation, then it must give the regions a constitutional voice and turn the current Senate of the Republic into a Chamber of the Regions.[25] Yet, such a course of action, which has always been defended by the best doctrine, has thus far failed to gain the necessary backing in the reform processes pursued by the various parliamentary majorities that have successively been in power.

If constitutional reform has failed to provide for a Chamber of the Regions, it is clear that the consequences, beyond the possibility of defining the models used in constitutional-comparative research, which is most surely not federal in nature as often highlighted, are bound to impact the degree of State-Region conflict concerning the claims for control over constitutionally allocated competences,[26] as indeed has occurred on occasions. As a result, the Constitutional Court has had to and will indeed continue to have to arbitrate in such a conflict, paradoxically playing a role typically assigned to such a body under federal systems.[27]

As regards regional-local autonomy relations,[28] state legislation does not prove to be insufficient. In addition to the organic discipline set out in the T.U.E.L. (Single Text of Local Authorities, adopted under legislative decree no. 267/2000), in Art. 123 Const., as amended by Const. Law 1/99, a final insertion has now been included allowing for the provision of a "Council of Local Autonomies," that "constitutionalises" so-called "Bassanini reforms" even on this very point, which is generally defined as the "permanent confluence between Region-Autonomy." However, with regard to the statutory implementation of this new institution, it is feared that

[23] Cf. Carrozza (1989).

[24] Cf. Chieffi and Clemente di San Luca (2004).

[25] Cf. Occhiocupo (1975), Paladin (1984), Pezzini (1990) and AA.VV (1996).

[26] Cf. Anzon (2003b).

[27] Groppi (2005) and Groppi (2002).

[28] Cf. AA.VV (2003) and Gambino (2006).

problems might arise, particularly in the southern regions,[29] insofar as the latter evidence no solid institutional tradition in the sense of inter-institutional cooperation, and have neither thus far displayed significant independent skills when engaging in "bottom-up planning." Moreover, the regions have not always been able to evidence "adequate" turnover in the ruling political class,[30] and it has proved difficult to "transfer" the still many positive experiences in local government, particularly in the large cities, to a regional scale. As viewed, the experience gained in this matter by the regional authorities provides an important argument for evaluating the various territorial realities.

Regional Autonomies and National Unity (Structure of the State, Territorial Distribution of Competences and Unitary/Social Citizenship)

However, the central profile of the issue here under analysis is not wholly, or at least not only, the functionalist profile regarding an evaluation of peripheral regional areas and the subsequent emptying of central state areas, but is above all one that leads us to examine the new organisation of competences vis-à-vis ensuring the principle of equality among citizens and therefore unitary and social citizenship as a fundamental aspect of the state as we know it today, in the terms where it has been reformed in regional and local legal systems.

Certain considerations are essential if we are to frame such an important question. Contrary to what was laid down in the previous regional legal system, the reformed Title V of the Const. sets out a clear and direct relation between "new" regionalism and the reformed types of discipline concerning social and civil rights.[31] Compared to the previous constitutional text that was in force, revised Art. 117 Const. establishes and allows for areas of competence in matters that have a major impact on basic social as well as civil rights.

The quantity and quality of the newly allocated competences at a regional scale may be compared in material terms to what is employed in federal and even confederal systems, the difference emerging—beyond the constitutional framework of the state structure adopted—in the institutional techniques used to allocate legislative and administrative competences as well as the way they are implemented and integrated in legislative terms.

[29] Among others, cf. our "Statuti regionali, Consulte statutarie e Corte costituzionale," in www.*federalismi.it*, 2010, no. 3.

[30] Cf. AA.VV (2001).

[31] Cf. S. Gambino, "Regioni e diritti fondamentali. La riforma costituzionale nell'ottica comparatistica," in S. Gambino (coord.), *Regionalismo, federalismo … cit.*; Gambino (2003c, 2007), Pizzetti (2004), Vandelli (1999), and Ruggeri (2001).

When assigning to the exclusive legislation of the state the "matter"[32] concerning "decisions over the essential levels of service provision regarding civil and social rights," the amended constitutional provision [Art. 117.2 *m*)] seeks to safeguard the principle of equality before the law—which should above all be understood as equality before the Constitution—"throughout the whole of the country."

A similar analysis should also be conducted in a detailed study, which is not possible here, at least concerning "protection of competence," the "balance of financial resources," "public safety and order," "civil and criminal systems," and "citizenship," following the guidelines that the Constitutional Court is pursuing in reconstructing the unity of the system in its recent and abundant case law.

Review legislators have changed in a constitutional framework where the old model of uniformity and centralism has finally been overcome in what corresponds, in practice, to regional legislation that is identical. With regard to a similar theoretical perspective, infringing the principle of equality among citizens (interpersonal equality) within each region, but particularly with regard to place of residence (interterritorial equality), has been seen and is still being seen as one possible outcome. Whereas regarding the first situation, the constitutional provisions forbidding any discrimination among individuals (Art. 3.1 Const.) might have proved sufficient, any possible interterritorial imbalances may, by contrast, have remained unprotected by the constitution, particularly when considering the country's socio-political reality, which is still characterised by a pervading "southern question," which needs to be understood as a major socioeconomic difference between the north and south of the country. This relates primarily to a potential but, as we are aware, glaring imbalance, such as the well-known provision of letter *m* of Art. 117.2 Const. which safeguards the rights of "unitary" and "social" citizenship, in addition to the provision of the outer limit marked by the "fundamental principles" reserved to state legislation in the matter of regions' concurrent competences.

However, if possible, infringement of the principle of interpersonal and interterritorial equality, even arising from provisions of amended Art. 116 Const., has been addressed by the constitutional review legislator through provisions of letter *m* of Art. 117.2. Const., the same approach towards safeguarding rights of "unitary" and "social" citizenship provides the basis for the whole system of "fundamental principles," mainly including the personal and caring principle, as stipulated in Art. 2 Const., and constitutional provisions in the matter of fundamental rights, such as "constitutional heritage," which may not be subject to constitutional review since they are "supreme principles" laid down in the constitutional system, according to

[32] . . . which, not surprisingly if observed closely, is a function, as the Constitutional Court has already reminded us of in numerous rulings, such as no. 282/2002, no. 407/2002, no. 510/2002, no. 88/2003, no. 303/2003.

an accepted definition of the constitutional court.[33] Observing the principle of solidarity, it falls to the "Republic"[34] to ensure respect, by virtue of solidarity and "social cohesion," for all the safeguards that, together with the principle of basic equality, help to overcome any imbalances that may arise in the economic and social system, removing any such imbalances and promoting effective exercise of individuals' rights.

State and regional legislators, and indeed the rest of the system of autonomies in the Republic,[35] are charged with ensuring protection of "legal unity" and "economic unity" when exercising the regulatory powers over which they have respective control resulting from constitutional allocation, respecting the principle of subsidiarity and loyal cooperation.[36] The same subjects are also bound, in particular, to ensure protection of basic levels of services in the matter of civil and social rights, dispensing with the territorial limits of local governments (Art. 120, final paragraph, Const.). Here, the State-Government is able to, although one does not understand why not "has to," replace regional bodies, city authorities, provincial authorities, and local authorities in the regulatory instances foreseen in the Constitution (Art. 120.2), observing the procedures set out in the laws governing control over instances where it must replace said bodies (Art. 8 of Law no. 131/2003).[37]

Although provision of Art. 117.2 *m* Const., was not perhaps an absolutely essential principle to safeguard fundamental constitutional rights, such a constitutional provision may be considered justified, a justification that we might even deem to be "pedagogical" in the eminently protectionist need to explain that the constitutional framework of fundamental principles has failed to undergo substantial changes. From such a perspective, the constitutional system only reflects the boundaries—fully constitutionalised in Art. 117.1 Const.—imposed by respect for the Constitution and the subsequent demands of the EU legal system as well as international requirements.[38]

As briefly cited, certain interpretative questions concerning the new constitutional framework may also be highlighted [Art. 117.2 *m*), Const.] regarding not so much the *ratio* of the previously mentioned provision but above all the material content, and consequently the kind of civil and social rights (this latter category

[33] Concerning the limits of (recent and previous) legislation of constitutional revision cf. also recently, Gambino and D'Ignazio (2007).

[34] Cf. Barbera (2003).

[35] Cf. Barbera (2001), Tosi (2002), Bin (2001), Anzon, Falcon (2001), Nocito (2011).

[36] Cf. Anzon (2003c), Morrone (2003), Violini (2004, 2005), D'Alessandro (2004), Merloni (2002).

[37] Cf. A. D'Atena, "*Poteri sostitutivi e* kunkurrierende Gesetzgebung," at http://www.associazionedeicostituzionalisti.it; D'Atena (2003), Mainardis (2003), Scaccia (2004, 2002), Veronesi (2002), Salerno (2004), Giuffré (2003), Cavaleri and Lamarque (2004).

[38] Allegretti (1995), Spadaro (1994), Ruggeri (2003), Caretti (2001), Caia (2003), and Anzon (2002).

having been included in the Constitutional Charter) aimed at ensuring the "essential standards of the relative services" throughout the whole of the country.[39]

"Shared" legislation in new matters that emerge as competences of the regions—implemented largely compared to the previous Art. 117 Const.—as well as that allocated residually will have to be complied with—with the possible differentiation in *status* of the various regions—without jeopardising the statute of citizenship, which must remain "national" and "social," thereby ensuring basic services in civil and social rights, in addition to the unrepealable duty to maintain political, economic, and social solidarity among subjects and the various parts of the country.

As it is founded on an "unnatural" gap between, on the one hand, matters as well as authority/functions, and on the other hand interests, the division made by those legislating constitutional review has proved complex and at times confusing, and even naive in its aim to halt the irreversible movement of the interests where the legal system is based. Thus, once again, the interpreter of the Constitution, and above all the constitutional court, have striven (which they must do) to reconcile in a framework of constitutional compatibilities the differing options of the state legislator and the regional legislator. The provision of letter *m* of Art. 117.2, Const. and the interpretation made thereof by the constitutional court will prove critical if the goals of such a doctrinal and jurisprudential recomposition are to be achieved.

Yet, the doctrinal interpretation of the material content of Art. 117 in the matter of civil and social rights leads us to substantially contrasting interpretations, depending on the prevailing cultural and institutional orientation of discontinuity with regard to the discipline previously in force. The question arises out of the specificity of the limits where concurrent regional legislative authority has been subject, but above all to wider application or not of such links to the very "exclusive"/"residual" legislative authority of the regions. In this vein, full justification would seem to exist for the doctrinal approach that appeals to the guarantee-oriented goal of protecting the constitutional good of "legal unity," and particularly protecting services related to civil and social rights, dispensing with the territorial limits of local governments, as a means to legitimise state legislative authority by justifying eventual intervention, beyond being able to intervene in the regulatory scope of regional legislative, and obviously administrative, authority through "fundamental principles" and specific transversal discipline.[40]

In conclusion, we face a new constitutional framework where fresh regulatory scope and safeguards have opened up for the regions in the matter of civil and social rights, although at the same time the State's authority to intervene in such regional

[39] Rescigno (2003), Ruggeri (2001); Ruggeri; Luciani (2002), Massa Pinto (2001), Massa Pinto (1998), Chessa (1998a, b), Zagrebelsky (1992), Gambino (2005b); Cf. Jorio and Jorio (2002).

[40] Constitutional Court ruling no. 222/2003 ; no. 259/2004, no. 407/2002 ; no. 282/2002. Cf. P. Cavaleri, "La definizione e la delimitazione delle materie di cui all'art. 117 della Costituzione," at http://www.associazionecostituzionalisti.it.

discipline has also been confirmed, both through the "fundamental principles" of the matter and through legislative measures, albeit not in any detail.

Although constitutional reform may basically be seen as following a line of continuity, from the perspective of civil and social rights it evidences a framework of an autonomous legal system valued within the scope of its powers as well as between these—different to how it was foreseen in the previous system—and indeed in the regulatory scope that embraces the very matter of civil and social rights. Such powers have a negative limit when exercised, in the sense that the regions, when exercising concurrent legislative authority as well as residual/exclusive authority, must adapt to the "fundamental principles" and to the same state legislative rules laid down to safeguard the fundamental rights referred to in Art. 120.2 *m*) Const.

However, it should be mentioned that in this matter there have been other proposals and differing interpretations. In an initial interpretation, the essential nature referred to in letter *m* is seen as "minimum content."[41] In order to confirm such an interpretation, recourse is made to the comparative EU approach that contains the general clause referring to "basic minimum content" of fundamental rights (such is the case, for instance, of Art. 19 of the Fundamental Law of Bonn [FLB], Art. 53.1 of the Spanish Constitution, Art. 18.3 of the Portuguese Constitution and Art. 52.1 of the European Charter of Fundamental Rights).

A sounder and more convincing understanding seems to be the almost unanimous interpretation of constitutionalist doctrine which stresses the even semantic irreducibility of the term "essential" to that of "minimum," based on a logical-syntactic and systematic interpretation of the reformed constitutional text that, together with the provisions to letter *m*, those of Art. 119.5 Const., and 120.2 Const., naturally contains the fundamental principles and particular constitutional provisions protecting specific legal situations. However, such an interpretation evidences continuity with the most accredited interpretations of the Constitution *magis ut valeat*.[42] Viewed thus, the term "essential" should be interpreted as a relational formula, in other words as a dictate aimed at embracing the need for constitutional protection.

Ad adiuvandum, one confirmation of said interpretation is found when considering that the nature of "essential levels of services" not only concerns social rights but also includes civil rights that, according to consolidated doctrine—even if the same rights "are hard to secure"—may not be restricted/downgraded in their relative content. Furthermore, since it assumes responsibility for the organisational-administrative consequences of such services, which are also distributed by the State, by the Regions and by the other autonomous bodies in the Republic, and by specifying protection of the "essential levels" of the services related to civil and social rights throughout the whole country, constitutional provision of Art. 120.2

[41] Massa Pinto (2001), *Contra*, Chessa (1998a, b), Giorgis (1994).

[42] Dogliani (1982), Barile (1951), Crisafulli (1952), Gianformaggio (1985), Zagrebelsky (1992).

Const., implies an interpretation of the "essential nature" that is not reduced to the "minimum" content of such rights.

This confirms one possible and convincing interpretation of a "national interest" that has remained, and must therefore be considered, as a true power of the state that has the capacity to intervene in all matters (adapted, in application of Art. 117 Const.), as has been underlined in a highly controversial pronouncement by the constitutional court (ruling 303/2003).[43] It is clearly not the same notion of "national interest" referred to in the previous regional legal system that was in force, in that the "national" interest here is the interest characterised by the particular fact in question, even though the latter, in turn, merits interpretation. Finally, and confirming the previously mentioned orientations, it is agreed that the heart of the matter when striking such a complex balance lies in the value of "solidarity," of "social cohesion" and the mechanisms of financial equilibrium (Art. 119.3 Const.).

In this way, we may conclude that the risk of a "downward slip" in the content of essential services in the matter of civil and social rights, and thereby of a difficult limit opposing the parliamentary and regional "free will of the majorities" might in time be deemed to have been overcome. This can, and indeed, must be achieved using the most advanced and well-founded interpretations of the Constitution, *magis ut valeat*, in addition to constitutional jurisprudence that, in the jurisdictional techniques employed thus far, has been able to evidence balance and prudence when weighing up the constitutional interests involved at each moment in the constitutional process, which embraces the gradual application of legislation as well as respect for the legislator's discretion. This is only to be expected in a State based on a rigid Constitution where the substance of the "essential content" of fundamental rights, attributed both to *status passivus* and to *activus*, to use dogmatic categories of German doctrine, is closely and indivisibly linked to that of "supreme principles" and the "inalienable rights of humankind," as jurisprudence[44] and constitutional doctrine jointly accept when they remove this discipline from the very power of constitutional review.[45]

Configuration of the State, Fiscal Federalism and Citizens' Rights: Comparative Notes

The issue which here seems to warrant raising some concern relates to the matter of so-called fiscal federalism within the framework of the relations between models of political-institutional decentralisation and fundamental constitutional principles.

[43] D'Atena (2003).

[44] Mainly, but not only, in ruling no. 1146/1988 of the Constitutional Court.

[45] Regarding this question, see also our "Normazione regionale e locale e tutela dei diritti fondamentali (fra riforme costituzionali, sussidiarietà e diritti fondamentali)," in Ruggeri et al. (2007).

Within such a framework, one initial question lies in the unsuitable reference, within the text of Law no. 42/2009, on the issue concerning "delegation to the government for the application of fiscal federalism," to a non-existent federalism, which would lead us to imagine that the federal structure is theoretically more suited to safeguarding citizens' rights in areas over which the State has authority.[46] Although it may prove slightly superfluous to say, the name "federal" attributed to the implementation of Art. 119 Const. contributes very little towards unravelling the complex problems involved in applying this constitutional provision. As a result, an initial reflection will be of a comparative nature and will address the relations between rights and member states in the German constitutional experience.[47]

Indeed, if one analyses such a State structure, contrary to the rather meagre provisions of Art. 117.3 of the Italian Constitution, the regulatory area recognised for the concurrent competence of the *Lander* (Art. 74 FLB) can be seen to encompass the same aspect of traditional fundamental rights. A long list comprising 26 "objects" of concurrent legislation gives specific meaning to the federal form of the German State, perceived in its fullest sense.[48] The long list of concurrent competences constitutionally allocated to the *Lander* reminds us that, in accordance with Art. 72.1 of the Fundamental Law, the *Lander* have legislative competence in such areas "only when" and "in the extent to which" the Federation fails to exercise its right to legislate.

Through results that have enjoyed widespread recognition due to the existence of cooperative principles in the relations between *Bund* and *Lander*, the German Constitution ensures the prevalence of federal law over *Lander* law (Art. 31). It safeguards civil equality between all Germans (Art. 33). In the matter of concurrent legislation, it ensures that the Federation has the "right to legislate when and in the extent to which establishing equivalent living conditions in federal territory or

[46] Among others, see also our "Le sfide del neo-regionalismo e l'eguaglianza dei cittadini: il federalismo fiscale secondo il d.d.l. a.s. n. 1117," in *Diritto e pratica tributaria*, 2009.

[47] Among others, cf. Díez-Picazo (1996), Zorzi Giustiniani (1998), Weiland (2000); V. Baldini, "Autonomia costituzionale dei Laender, principio di omogeneità e prevalenza del diritto federale," in AA.VV. (edition by M. Scudiero), *Il diritto costituzionale comune … cit*.; M.E. Gennusa, "I diritti fondamentali nelle costituzioni dei Laender della RFT come fattore di costruzione delle 'tradizioni costituzionali comuni' europee" (*paper*); L. Violini, "Federalismo, regionalismo e sussidiarietà come princìpi organizzativi fondamentali del diritto costituzionale europeo," in AA.VV. (edition by M. Scudiero), *Il diritto costituzionale comune … cit*.; D. Schefold, "Le competenze della Federazione e dei Laender in Germania," in S. Gambino (edition by), *Stati nazionali e poteri locali … cit*., in addition, "Il federalismo tedesco fra Legge Fondamentale e prassi," in AA.VV. (edition by S. Gambino – G. Fabbrini), *Regione e governo locale fra decentramento istituzionale e riforme*, Rimini, 1997.

[48] Among such areas, we should remember due to their importance: civil law; law and criminal execution; the judicial legal system and procedure; the civil state; the right of meeting and association; the right of foreigners to remain and to reside; labour law; the legal system governing businesses; the protection of law; recruitment of workers, as well as social insurance and insurance against unemployment.

protecting legal or economic unity in the interest of the State as a whole, requires federal legislative discipline" (Art. 72.2 FLB). Vis-à-vis the present analysis, such references to provisions contained in the German constitutional legal system highlight the incomparable diversity of the regional-type unitary State model as compared to the federal.

Whilst aware of the distribution of competences between *Bund* and *Lander*, which differ greatly from those adopted by regional-type unitary states, in such a territorial organisation of powers the matter of rights recognises the prevalence of federal law over the laws of Federation member states. In fact, reform of Title V of the Italian Constitution, hurriedly approved by the political majority of the time, can clearly not contain either theoretical or organisational references to typical federal forms of state. Yet, due to its vagueness, use of the term federalism has been adopted by many, both in doctrinal analysis and in the mass media.

As regards the content of constitutional revision of Title V as well as the implementation of so-called fiscal federalism, even prior to so-called administrative federalism set out by Law no. 59/97, this is in any case a formula void of any content, with no specific constitutional correspondence to the federal forms of State documented in comparative studies. In sum, it is no more than a rhetorical formula. In this sense, after the "social" Constitution of 1947, and more generally the constitutional experience of all European states in the post World War II period, it should be highlighted how the Italian unitary State has carried out, albeit gradually and depending on the resources available over the years, a plan for administrative and public services, particularly in the matter of social rights[49] which, without exaggerating, may be termed extraordinary.

One only needs to look at education, health and social security, to see at once how a country ravaged by a war into which it had been dragged by the excessive colonialist moralism of the fascist regime, has managed to consolidate major "social justice," leading to such a significant redistribution of wealth that it has inspired recognised doctrine to draw a comparison between a social State and a socialist State.[50]

Although they may be considered inadequate with regard to the organic provisions of the social state adopted by the Constitution, such redistributive effects of national wealth following principles of social equity have transformed the whole country from one whose social origins, over 60 years ago, were based on agriculture, into an economic power, now facing a crisis like all other European countries, yet endowed with a technological infrastructure and an entrepreneurial spirit that play a major role on the international stage.

Therefore, the legitimacy of emphatic arguments claiming that federalism is a model required to ensure the effectiveness of social rights must be rejected. In this

[49] On this question, see also, A. Lucarelli, "Federalismo fiscale, gestione dei servizi pubblici locali e tuela dei diritti fondamentali," in addition to D. Mone, "Federalismo fiscale, stato sociale e principio autonomistico," both in A. Lucarelli, *Il federalismo fiscale tra processi attuativi . . . cit.*

[50] Cf. in this sense, Mortati (1973). On this question, cf. also Gambino (2002).

sense, the evolution of contemporary social constitutionalism enables us rather to affirm that the *Welfare State* has, through state concentration, provided a better guarantee of the stability and universalisation of social benefits related to citizens' unitary and social rights.

By contrast, there would be fewer doubts if and when the matter more directly concerned a federal solution geared towards administrative modernisation and, more generally, as a means of taking public functions to the citizens, who are the beneficiaries of rights, in line with the principle of subsidiarity.

Analysing the relations between the form of the State and fundamental civil as well as social rights emerged particularly through constitutional problems related to equal living conditions among citizens, specified in a "statute of citizenship," following on from an originally Anglo-American formula that has already become widespread in constitutional research.

Analysis of constitutional jurisprudence provides full confirmation of such an extreme, as previously mentioned, albeit briefly. In this sense, equality can live side by side with forms of state organisation that foresee asymmetries and differences in the way competences are distributed among the regions provided that principles and constitutional provisions in the matter of fundamental rights are safeguarded and do not remain at the discretion of national and regional legislators. This is precisely the case of constitutional provision in Italy where, as is well known, together with the regions that have an ordinary statute there are others that enjoy a special statute, approved through a constitutional law, in addition to outside differentiation as set down in the provision of amended Art. 116 Const.

A less recent Constitutional Court ruling (No. 109 of 1993) provides a better argument for analysing relations between the scope of material competences allocated to the regions (the specific case in hand was a state law concerning "positive action" in favour of female entrepreneurs) and the effectiveness of a constitutional principle of substantial equality (Art. 3.2 Const.), which in the specific case involved overcoming gender-based discrimination. Adopting favourable treatment towards female entrepreneurs was justified by the Constitutional Court on the grounds of the reasonableness of legislative (state) choice favouring individuals—women—who have been subject to social and cultural discrimination and who are still at risk (not abstract) from similar discrimination.

This issue was explicitly addressed and dealt with by a constitutional judge when, in the ruling referred to above, the judge highlighted how exercising a state power conferring advantages on firms that are mainly managed by women is justified by the "need to ensure conditions of equality throughout the whole country" vis-à-vis realising a primary constitutional value, namely securing actual equality between women and men in the business world. Since these measures ("positive action") seek to overcome conditions of inequality among subjects, "they entail adopting differentiated legal disciplines that favour underprivileged social categories, also repealing the general principle of equal treatment set out in Art. 3 Const.." Such differentiation demands that "when implemented it may not be subject to difference or repeal with regard to different geographical and political areas of the country." Indeed, should equal application throughout the country be in

jeopardy, the danger of "positive action" becoming a further factor of unequal treatment not justified by the constitutional imperative of redressing positions of social disadvantage related to being female would be evident.

As regards the relation between the principle of equality and the principle of territorial autonomy, the direction adopted by jurisprudence referred to earlier confirms the Court's permanent orientation where the latter itself excludes or limits regional competences (those of regions with an ordinary statute and those enjoying a special statute) whenever such competences jeopardise interests or fundamental rights (Ruling no. 40 of 1993). In this sense, reference to such constitutional jurisprudence provides a convincing and reasoned response to the question of who in particular in the "regional State" safeguards the effectiveness of social rights.

As already mentioned, similar constitutional problems also emerge in a federal state model or in a state with strong regionalism such as the one currently foreseen in amended Title V of the Const., and as the result of certain decisions regarding so-called "fiscal federalism" which, either through differentiating decisions or the consequences arising from fiscal compensation, might eventually undermine the principle of equality among citizens throughout the country as regards access to basic services in the matter of civil and social rights. Similar problems may emerge in a model of fiscal federalism where the overall financing of public functions allocated to local and regional authorities proves insufficient vis-à-vis the corrections required to favour fiscally weak regions and set out in the compensation fund (according to Art. 119.3 Const.). Although viewed from a different perspective depending on how one wishes to see it, this might explicitly be said of the original "Lombardy proposal" (Northern League).

One final remark required at the end of this approach concerns the complex issue of justiciability of the provisions of Art. 119 Const., due to the poorly defined and specific nature of the reformed constitutional provision. A comparison with such an affirmation, concerning the reasonableness of which the Court must inevitably make a pronouncement, would suggest a substantive interpretation of the institutes adopted by Art. 119.3 Const. regarding those adopted by the German Constitution [from Art. 104 *.a*) to Art. 115].

Before focusing on issues concerning the amended legal system of the Italian Constitution with regard to the problematic relations between the principle of equality and the principle of autonomy, it might prove useful to cite reform of the statutes of the Autonomous Communities in Spain,[51] adding that this is precisely one of the points that said reform has failed to deal with and where the Spanish Constitutional Court has to all intents and purposes dwelt too long, evidencing clear difficulties in solving a conflict sparked by the Popular Party when it filed an appeal of unconstitutionality against the 100-plus provisions set out in the Statute of Catalonia (according to the text approved by the National Parliament).[52]

[51] Among the abundant.

[52] On this question, see among others also Blanco Valdés (2011).

Both in terms of the form of government and the legitimacy of the norms in the preamble to the statutes, or in those sections thereof which aim to establish the fundamental inspiring principles, the constitutional court has set totally insurmountable limits for the regional statutes. In the first instance, jurisprudence is enriched in the matter of political organisation of regional government with the provision linking respect for "harmony" to the Constitution, which it might be necessary to accept as more intense than pure "respect" for the Constitution, in accordance with Art. 117.1, Const., and subsequently, adopting an approach that at least appears to be hyper-constructivist, by adding the term of the "spirit" of the Constitution.

In this manner, with the provision of "programmatic rules" and statutory discipline of rights, the Constitutional Court denies regions any possible recognition of areas that are similar to its own and exclusive to constitutions. Making specific reference to this latter claim demanding a regulatory scope on the part of the regions, and in a manner which is fully convincing to the writer, the Court categorically states that "although materially integrated in a source-act (regional statute), such programmatic rules cannot be recognised as having any legal efficacy, since they remit to the convictions of the various political sentiments present in the Autonomous Community at the time the statute was approved. Such proclamations of objectives and purposes may not be compared to the so-called programmatic rules of the Constitution that, because of their value as a principle, have generally been recognised as having not only a programmatic value vis-à-vis future legislation, but particularly an integrating and interpreting function of current rules."[53]

In the matter of citizens' rights, both in federal states and regional-type unitary states, the principle of autonomy is subject to the unitary principle. The latter's full legitimacy in the search for and safeguard of constitutional values of formal equality and material or substantial equality must continue to be recognised. In this line, the previously referred to doctrine sanctioned in Constitutional Court ruling 109 of 1993, in the matter of positive action, remains valid, subsequent to revision of Title V of the Const.

Efforts by the regional statutes of Umbria, Tuscany and Emilia Romagna, which assumed jurisdiction to establish regulatory provisions aimed at recognising and safeguarding forms of cohabitation other than those of the traditional family, were therefore affected by censorship of the Court. The latter clarified in no uncertain terms which areas of "possible content" regional statutes may address, areas which in no instance may allow them to undermine, by interfering in the competence of the "civil legal system" attributed by the constitutional review legislator to the exclusive power of state law, the constitutionally approved fundamentals of the unitary principle and with it the very principle of interterritorial equality among citizens.

The debate concerning reform of Autonomous Community statutes and the content that may constitutionally be recognised therein vis-à-vis the very matter

[53] Constitutional Court ruling no. 378 in 2004.

of rights has been addressed differently by Spanish constitutional doctrine. Doctrine appears to remain at odds over this matter although, as already seen, more importantly, the Constitutional Court has shown itself divided. Having been forced to issue a ruling on the appeal lodged against the Statute of Catalonia, the Court has only managed to do so recently, while objectively debatable political intervention in support of the statutory text has continued.

Contrary to what may be seen in Italian doctrinal and political debate, which concerns itself above all with issues related to realising so-called fiscal federalism, the debate in Spain seems to revolve around totally different proposals, and responds to nationalist and at times "sovereign" desires on the part of certain regions. As regards the financial relations between State and Autonomous Communities, the financial regime was already set out in the constitutional text of 1978 (Arts. 156, 157 and 158), and responds to three fundamental principles (equality, interregional solidarity and coordination with the State treasury), adopting a structure that, in its very "imprecision," has to a large extent been copied by the Italian legislator in the 2001 constitutional revision, in all instances having remit to the ordinary legislator for implementation thereof. In Spain, as in Italy, said implementation occurred late with regard to the constitutional provision, through the Organic Law on Autonomous Community Financing, no. 8/1980. The main interest from the standpoint of comparison with other strongly regionalist systems, such as the recently referred to case of Spain, lies particularly in the what is foreseen for the Interterritorial Compensation Fund (set out in the Spanish Constitution in Art. 158.2 and in Art. 16 of the Autonomous Communities Finance Act [Spanish acronym- LOFCA], which established the functioning thereof), whereas, in the Italian legal system, Art. 119.3 Const. lays down that "State law sets up a compensation fund, with no binding destination, for territories which have a lower fiscal capacity per inhabitant."

In light of the respective constitutional texts, distribution of the compensation fund in both instances is always referred back to the ordinary legislator and thus to the precariousness of the relative parliamentary majorities on the basis of negotiation, which is mainly political and not legal, within the scope of the State-Region Commission and which, for such reasons, it will be difficult for the Constitutional Court to review. In this respect, it may also prove useful to recall how the Spanish Constitutional Court has highlighted that the compensation fund provides an irreplaceable, although not exclusive, mechanism for safeguarding solidarity in order to ensure that the very principle of solidarity remains effective.

Indeed, the systematic interpretation of Spanish constitutional provisions in the matter establishes the state nature (Arts. 2, 138.1, 156.1 and 158) of the tax and accounting system, a framework where the compensation fund emerges as merely "additional." In the same way as the Spanish Constitution sets out that the national tax system is the competence of the State and that the interterritorial compensation fund is complementary, Art. 119 of the Italian Constitution lays down a similar system. It establishes that the resources referred to in paragraphs 1 and 2 of the article are the ordinary resources of local councils, metropolitan cities, provinces, and regions that they may use to finance the competences assigned to them.

However, this provision must be interpreted within the framework of the constitutional provisions that, on the one hand, assign certain aspects to the exclusive legislative competence of the State (concerning the "tax system"), and on the other, aspects concerning the concurrent competence of the regions ("harmonisation of account balance"), whereby they complement those resources deriving from the State and which are set out under section 1 and 2 of Art 119.

Within this comparative framework, the experience of Spain in the matter of Autonomous Community financing draws its inspiration from strongly asymmetric forms of regionalism that seem debatable from the standpoint of the principle of equality and solidarity. If indeed the thus far unsuccessful sovereign-confederal demands made by internal minorities in the Basque Country are an attempt to break away from the rest of the nation putting forward reasons of identity, what may in essence be even more dangerous are the decisions regarding "bilateral negotiation" in tax affairs imposed, so to speak, on the Spanish state by the statutory provisions of certain Autonomous Communities. Such a pretension threatens to lead to a veritable "nationalist explosion" throughout Spain, with the Constitutional Court and the Constitutional Charter being unable to do much to prevent it.

References

AA.VV. (I.S.R.-C.N.R.), *La potestà statutaria regionale nella riforma della Costituzione,* Milan, 2001

AA.VV., *Il federalismo preso sul serio,* Bologna, 1996.

AA.VV., *La potestà statutaria regionale nella riforma della Costituzione. Temi rilevanti e profili comparati,* Milan, 2001

AA.VV., *Legge 'La Loggia'. Commento alla L. 5 giugno 2003 n. 131 di attuazione del titolo V della Costituzione,* Rimini, 2003

AA.VV., *Lo Stato autonomista*, Bologna, 1998

AA.VV., *Seicentosei dieci anni dopo,* Rome, 1988

U. Allegretti, "Autonomia regionale e unità nazionale," in *Le Regioni*, 1995

A. Anzon, "Un passo indietro verso il regionalismo 'duale'," the *Forum-on line* A.I.C.

A. Anzon, 'Flessibilità dell'ordine delle competenze legislative e collaborazione tra Stato e regioni (nota a C. Cost. n. 303/2003), in *Giurisprudenza costituzionale*, 5, 2003c

A. Anzon, "Il difficile avvia della giurisprudenza costituzionale sul nuovo titolo V della Costituzione," in *Giur. Cost*., 2003b

A. Anzon, *I poteri delle Regioni dopo la riforma costituzionale*, Turin, 2002.

A. Anzon, *I poteri delle regioni nella transizione dal modello originario al nuovo assetto costituzionale,* Turin, 2003a

M.A. Aparicio, *La descentralización y el federalismo. Nuevos modelos de autonomía política (España, Bélgica, Canadá, Italia y Reino Unido),* Barcelona, 1999

A. Barbera, "Chi è il custode dell'interesse nazionale?," in *Quaderni costituzionali,* 2001, no. 2

A. Barbera, "L'assetto complessivo dell'ordinamento repubblicano nel nuovo testo dell'art. 114 Costituzione," in C. Bottari (coord.), *La riforma del titolo V, parte II della Costituzione*, Rimini, 2003

P. Barile, *La Costituzione come norma giuridica,* Firenze, 1951

R. Bin, "L'interesse nazionale dopo la riforma: continuità dei problemi, discontinuità della giurisprudenza costituzionale," in *Le Regioni,* 2001, no. 6

R. Bin, "Problemi legislativi e interpretativi nella definizione delle materie di competenza regionale. Rileggendo Livio Paladin dopo la riforma del titolo V," in *Scritti in memoria di Livio Paladin,* Vol. I, Naples, 2004
R. Bin, "Sette anni di riforme ma i nodi rimangono irrisolti," in *Le istituzioni del federalismo*, 2003, nos. 3/4
R. Blanco Valdés, "El futuro de la justicia costitucional en España. Tras la sentencia sobre el Estatuto de Cataluña," in *Claves de razón práctica,* 2011, no. 212
G. Caia, "Il problema del limite dell'interesse nazionale nel nuovo ordinamento," at *www. federalismi.it,* 2003
B. Caravita, *Lineamenti di diritto costituzionale federale e regionale,* Turin, 2006
P. Caretti, "L'assetto dei rapporti tra competenza legislativa statale e regionale, alla luce del nuovo Titolo V della Costituzione: aspetti problematici, in *Le Regioni*, 2001
P. Carrozza, "Principio di collaborazione e sistema delle garanzie procedurali (la via italiana al regionalismo cooperativo)," in *Le regioni,* 1989
J.M. Castellà Andreu, M. Olivetti (coordinators), *Nuevos Estatutos y reforma del Estado. Las experiencias de España e Italia a debate,* Barcelona, 2009.
P. Cavaleri - E. Lamarque (coord.), *L'attuazione del nuovo titolo V parte seconda della Costituzione. Commento alla legge 'La Loggia' (legge 5 giugno 2003, n. 131)*, Turin, 2004.
O. Chessa, "Bilanciamento *ben temperato* o sindacato esterno di ragionevolezza? Note sui diritti inviolabili come parametro del giudizio di costituzionalità," in *Giur. cost.,* 1998b, no. 6
O. Chessa, "La misura minima essenziale dei diritti sociali: problemi e implicazioni di un difficile bilanciamento," in *Giur. cost.,* 1998a
L. Chieffi – G. Clemente di San Luca, *Regioni ed enti locali dopo la riforma del titolo V della Costituzione,* Turin, 2004
V. Crisafulli, *La Costituzione e le sue disposizioni di principio,* Milan, 1952
S. D'Alessandro, *Sussidiarietà, solidarietà e azione amministrativa,* Milan, 2004
A. D'Aloia, "Diritti e Stato autonomisticom," in *Le Regioni*, 2003, no. 6.
A. D'Atena, "L'allocazione delle funzioni amministrative in una sentenza ortopedica della Corte Costituzionale (note to ruling. C. Cost. 303 of 2003)," in *Giurisprudenza costituzionale*, 2003, no. 5
A. D'Atena, "Materie legislative e tipologia delle competenze," in *Quaderni costituzionali*, 1, 2003
A. D'Atena, *Federalismo e regionalismo in Europa,* Milan, 1994
L.M. Díez-Picazo, "Federalismo, regionalismo e welfare state," in *Il Mulino,* 1996
M. Dogliani, *Interpretazioni della Costituzione,* Milan, 1982
J.-C. Escarras, "L'Italie, un Etat régional ?," in Ch. Bidégaray, *L'Etat autonomique : forme nouvelle ou transitoire en Europe?,* Paris, 1994
C. Esposito, *La Costituzione italiana. Saggi,* Padua, 1954
G. Falcon, "Modello e transizione nel nuovo Titolo V della II parte della Costituzione," in *Le Regioni,* 2001, no. 6
S. Gambino, "Autonomia statutaria e forma di governo regionale (fra revisione costituzionale e Giudice delle leggi)," in A. Benazzo (a cura di), *Federalismi e confronto,* Padua, 2010b
S. Gambino, "Cittadinanza e diritti sociali fra neoregionalismo e integrazione comunitaria," in *Quaderni costituzionali*, 2003c, no.1
S. Gambino, "Federalismo e salute," in *federalismi.it,* 2005b
S. Gambino, "La difficile riforma della costituzione materiale in Italia fra leggi elettorali, partiti politici e Governo," in *Studi in onore di Vincenzo Atripaldi*, Naples, 2010a.
S. Gambino, "La forma di governo in Italia fra *Parteienstaat* e Premierato assoluto," in *Studi in onore di Franco Modugno*, Naples, 2011
S. Gambino, "La reforma regional italiana," in Becera M.J. Terol (edition by), *El Estado autonomico in fieri,* Seville, 2005a
S. Gambino, "La riforma del titolo V della Costituzione: gli enti locali tra autonomia e federalism," in *Guida normativa per gli enti locali. 2006,* Torriana (RN)

S. Gambino, "Normazione regionale e locale e tutela dei diritti fondamentali (fra riforme costituzionali, sussidiarietà e diritti fondamentali)," in A. Ruggeri, *Tecniche di normazione e tutela giurisdizionale dei diritti fondamentali,* Turin, 2007
S. Gambino, "Ordinamento regionale e diritti fondamentali," in S. Gambino (edition by), *Diritto regionale,* Milan, 2009d
S. Gambino, "Statuti, poteri e funzioni degli enti autonomi della Repubblica, fra riforme costituzionali e sussidiarietà," in *Le Istituzioni del federalismo,* 2009c, nos. 3–4
S. Gambino, *Diritto regionale,* Milan, 2009a
S. Gambino, *Stato sociale e Stato socialista* in Costantino Mortati, Lungro di Cosenza, 2002
S. Gambino - G. D'Ignazio, *Federalismo amministrativo e regioni,* Cosenza, 2002
S. Gambino - G. D'Ignazio, *La revisione costituzionale e i suoi limiti, Milano*, 2007
S. Gambino (coord.), *Diritto regionale e degli enti locali,* Milan, 2009b
S. Gambino (coord.), *Il 'nuovo' ordinamento regionale. Competenze e diritti,* Milan, 2003a
S. Gambino (coord.), *Regionalismo, federalismo, devolution. Competenze e diritti. Confronti europei (Spagna, Germania e Regno Unito),* Milan, 2003b
S. Gambino *Regionalismi e statuti*, Milan, 2008
L. Gianformaggio, "L'interpretazione della Costituzione tra applicazione di regole e argomentazione basata sui princìpi," in *Rivista internazionale di filosofia del diritto,* 1985
A. Giorgis, "La sent. n. 134 del 1994: una conferma dell'esistenza di limiti costituzionali alla riduzione dello Stato sociale," in *Giur. cost.,* 1994.
F. Giuffré, "Note minime su poteri sostitutivi e unità della Repubblica alla luce della recente l. no. 131 in 2003 (cd. 'Legge La Loggia')," at *http://www.forumcostituzionale.it/*
T. Groppi, "Giustizia costituzionale e Stati decentrati: La Corte italiana dopo la revisione del 2001," in *Amministrare,* 1, 2005
T. Groppi, "L'evoluzione della forma di Stato in Italia: uno Stato regionale senz'anima?," in *"La Costituzione ieri e oggi"* (Accademia Nazionale dei Lincei, 9/10 gennaio 2008)
T. Groppi, "La garanzia dei diritti tra Stato e regioni dopo la revisione del titolo V," in *federalismi.it,* 2002
T. Groppi, "Le régionalisme italien aujourd'hui: un Etat régionale à tendance municipale?," in *Revue française de droit constitutionnel,* 2000, no. 43
T. Groppi – M. Olivetti, *La Repubblica delle autonomie. Regioni ed enti locali nel nuovo titolo V,* Turin, 2003
E. Jorio - F. Jorio, "Riforma del *welfare*, devoluzione e federalismo della salute," in *Sanità pubblica*, 2002, no. 5.
A. Lang – C. Sanna, *Federalismo e regionalismo,* Milan, 2005
G. Lombardi, *Lo Stato federale,* Turin, 1987
G. Lucatello, *Lo Stato federale,* Padua, 1939
M. Luciani, "I diritti costituzionali tra Stato e Regioni (a proposito dell'art. 117, co. 2, lettera m, Cost.)," in *Politica del diritto*, 2002
M. Luciani, "La tutela costituzionale dei livelli essenziali di assistenza," in "*I livelli essenziali di assistenza nella Costituzione. Doveri dello Stato, diritti dei cittadini,*" Lega delle autonomie, Rome, 2002
M. Luciani, "Un regionalismo senza modello," in *Le Regioni,* 1994, no. 5
C. Mainardis, "Il potere sostitutivo," in G. Falcon (coord.), *Stato, regioni ed enti locali nella legge 131 de 5 giugno del 2003*, Bologna, 2003
S. Mangiameli, *La riforma del regionalismo italiano,* Turin, 2002
I. Massa Pinto, "Contenuto minimo essenziale dei diritti costituzionali e concezione espansiva della Costituzione," in *Diritto pubblico,* 2001, no. 3
I. Massa Pinto, "La discrezionalità politica del legislatore fra tutela costituzionale del *contenuto essenziale* e tutela ordinaria *caso per caso* dei diritti nella più recente giurisprudenza della Corte costituzionale," in *Giur. cost.,* 1998, 2
T. Martines – A. Ruggeri – C. Salazar, *Lineamenti di diritto regionale,* Milan, 2005

F. Merloni, "Il paradosso italiano: 'federalismo' ostentato e centralismo rafforzato," in *Le regioni,* 2005, page 469 et seq
F. Merloni, "La leale collaborazione nella repubblica delle autonomie," in *Diritto pubblico,* 2002, no. 3.
A. Morrone, 'La Corte costituzionale riscrive il titolo V?,' in *Quaderni Costituzionali,* 2003
C. Mortati, *Le forme di governo*, Padua, 1973
W. Nocito, *Dinamiche del regionalismo italiano ed esigenze unitarie,* Milan, 2011
N. Occhiocupo, *La Camera delle regioni,* Milan, 1975
M. Olivetti, *Nuovi statuti e forma di governo delle regioni. Verso le Costituzioni regionali?,* Bologna, 2003
A. Pace (coord.), *Quale dei tanti federalismi,* Padua, 1997
L. Paladin, "Per una riforma del bicameralism," in *Quaderni costituzionali,* 1984
G. Pastori, "Riordino delle funzioni regionali e redistribuzione a livello locale," in S. Gambino - G. Fabbrini (coord.), *Regioni e governo locale. Riforme e decentramento istituzionale. Esperienze e culture a confronto,* Rimini, 1997
B. Pezzini, *Il Bundesrat della Germania federale: il modello tedesco e la riforma del bicameralismo nello Stato a base regionale,* Milan, 1990
G. Pitruzzella, "Municipalismo *versus* neoregionalismo," in *Le Regioni,* 1995, no. 4
F. Pizzetti, La tutela dei diritti nei livelli substatuali," in P. Bilancia - E. De Marco, *La tutela multilivello dei diritti,* Milan, 2004
L. Principato, "I diritti costituzionali e l'assetto delle fonti dopo la riforma dell'art. 117 della Costituzione," in *Giurisprudenza costituzionale*, 2002
A. Reposo, *Profili dello Stato autonomico. Federalismo e regionalismo,* Turin, 2005
G.U. Rescigno, "I diritti civili e sociali fra legislazione esclusiva dello Stato e delle Regioni," in S. Gambino (coord.), *Il nuovo ordinamento regionale in Italia. Competenze e diritti,* Milan, 2003
G. Rolla, *Diritto regionale e degli enti locali,* Milan, 2009.
A. Ruggeri, "Neoregionalismo e tecniche di regolazione dei diritti social," in *Diritto e società*, 2001, no. 2.
Ruggeri, "Potestà legislativa primaria e potestà "residuale" a confronto (nota minima a Corte cost. no. 48 in 2003," in *federalismi.it,* 2003
A. Ruggeri, 'La ricomposizione delle fonti in sistema, nella Repubblica delle autonomie, e le nuove frontiere della normazione', in *Le Regioni*, 4, 2002
A. Ruggeri et al., *Tecniche di normazione e tutela giurisdizionale dei diritti fondamentali,* Turin, 2007
A. Ruggeri, "La riforma costituzionale del Titolo V e i problemi della sua attuazione, con specifico riguardo alle dinamiche della normazione ed al piano dei controlli," in *Il nuovo Titolo V della parte II della Costituzione* (Convegno A.I.C., 14/1/2002, at *www.associazionedeicostituzionalisti.it*)
G. M. Salerno, "La disciplina legislativa dei poteri sostitutivi tra semplificazione e complessità ordinamentale," at *www.federalismi.it,* 2004
G. Scaccia, "Il potere di sostituzione in via normativa nella l. no. 131 in 2003," in *Le Regioni,* 2004, no. 4
G. Scaccia, "Rapporti fra Stato e Regioni: funzione di indirizzo e coordinamento e potere sostitutivo," in *Le Regioni*, 2002, no. 6
A Spadaro, "Sui principi di continuità dell'ordinamento, di sussidiarietà e di cooperazione fra Comunità/Unione europea, Stato e Regioni," in *Rivista trimestrale di diritto pubblico*, 1994
R. Tosi, "A proposito dell'interesse nazionale," in *Quaderni costituzionali,* 2002, no. 1
L. Vandelli, *Devolution e altre storie. Paradossi, ambiguità e rischi di un progetto politico,* Bologna, 2002
L. Vandelli, "Egalité et régionalisme dans la Constitution italienne," in A.M. Le Pourhiet (dir.), *Droit constitutionnel local,* Paris - Aix-en-Provence, 1999

G.P. Veronesi, "Il regime dei poteri sostitutivi alla luce del nuovo art.120, II co., della Costituzione," in *Le istituzioni del federalismo,* 2002, no. 5

L. Violini, "I confini della sussidiarietà: potestà legislativa concorrente, leale collaborazione e *strict scrutiny,"* in *Le Regioni,* 2004, no. 4

L. Violini (coord.), *Itinerari di sviluppo del regionalismo italiano*, Milan, 2005

M.P. Viviani Sclein – E. Bulzi – L. Panzieri, *L'Europa fra federalismo e regionalismo,* Milan, 2003

J. Weiland, "Problemi del federalismo fiscal," in *Le Regioni,* 2000, no. 2

G. Zagrebelsky, *Il diritto mite,* Torino, 1992

A. Zorzi Giustiniani, "Distribuzione delle competenze legislative e federalismo fiscale in sei ordinamenti federativi consolidate," in AA.VV. (edition by S. Gambino), *Stati nazionali e poteri locali. La distribuzione territoriale delle competenze. Esperienze straniere e tendenze attuali in Italia*, Rimini, 1998

The Current Challenges on the Belgian Federalism and the Sixth Reform of the State

Min Reuchamps

Introduction

Since 1993, Belgium is officially a federal state, composed of three communities and three regions, as the first—new at the time—article of the Constitution proclaims. The history of federalism in Belgium is therefore quite recent. Nevertheless, the story is—much—longer since it starts with the independence of Belgium from the United Kingdom of the Netherlands in 1830.[1] The inception of a state and the underlying causes of its creation, as well as its place on the map, the timing of its creation and the characteristics of the elites who take the lead and define the new state's nature are of crucial importance and these elements shape the country's political development for centuries.[2] Nonetheless, although the beginning of any state sets up a path of dependency,[3] there are also critical junctures along its political development that in turn influences the course of history. This is especially true for Belgium.[4] Here, history and politics are intrinsically interrelated. Indeed, the current challenges on the Belgian federalism find their roots in the country's history.

Three main challenges face Belgian federalism: an ethno-territorial challenge, a socio-economic challenge and a political challenge, that is to say the future of the country itself. In this endeavor to assess the current challenges on the Belgian federalism, three variables have to be taken into account. The first variable is the

[1] For the Dutch, it is in 1839 (and not in 1830), when an agreement was reached between The Netherlands and Belgium about the—new—borders of the two countries.

[2] Flora et al. (1999).

[3] Pierson (1996), p. 2; Pierson (2000), p. 2.

[4] Deschouwer (2009c), p. 20.

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territorial principle vs. personal principle debate, which constitutes the backbone of the so-called Belgian community question; it is also intrinsically related to the first challenge: the ethno-territorial challenge. The second variable is the *political parties* because they have played and play the major role in Belgian politics and therefore in the Belgian federal dynamics. The third variable is made of the *people*; that is, at the individual level, the inhabitants or the citizens or the voters and, at the collective level, the language groups of Belgium. These three variables are at the heart of Belgium's past, present and future and continuously interact with one another. In order to offer a clear picture of these interactions, Belgium's history is conceptually divided into three periods: *before federalism* (1830–1960), *federalism* (1960–2007), and *after federalism* (2007–onwards). These three periods shed light on the background of the current challenges on the Belgian federalism. On this basis, the recent institutional agreement that gives Belgium her sixth reform of the state is analyzed as it provides—tentative—answers to the first two challenges. This all leads to the last challenge—the end of Belgium?—dealt with in the conclusion.

Before Federalism (1830–1960)

After having been under Spanish, Austrian and French rule, the territory of—the future—Belgium was united, by the Treaty of Vienna of 1815, to the United Kingdom of the Netherlands led at the time by William I of Orange. The religious—pro-Protestantism—and linguistic—pro-Dutch—policies[5] soon fuelled a movement of contestation among the inhabitants, especially the bourgeoisie, of the southern provinces that led to their secession in 1830 and to the independence of Belgium, quickly acknowledged by the foreign countries.[6] Belgium was a brand new entity—even though the territories of this new country had been sometimes more or less united under the same ruler.[7] A new state—not at all federal—had to be created, and this is where the three key variables came already into action.

The Territorial Principle vs. Personal Principle Debate

Since its beginning, Belgium is composed of a majority of Dutch-speaking inhabitants. The first national census of 1846 counted 4.3 million Belgians, of which 42 % spoke French, 57 % spoke Dutch, and 1 % spoke German.[8] Nonetheless, Belgium was a unitary state and a unilingual country, where French was the unique official language but also the exclusive language in politics, in economy or

[5] Witte and Van Velthoven (2000).

[6] Mabille (2000), pp. 83–97.

[7] Deschouwer (2009c), pp. 16–18.

[8] McRae (1983).

in culture. As Kris Deschouwer mentions, "the choice of French as the sole official language of Belgium was an obvious choice for the political elites, but it was a choice for a language that was not spoken by a small majority of the population."[9] This choice and especially its consequence on the life of Dutch-speaking Belgians, who were not allowed to use their mother tongue for official matters, gave birth to the Flemish movement.[10] This movement, born with—or better in reaction to—Belgium, started to claim the recognition of Dutch as a second official language, at least in Flanders. Yet, these demands were fiercely rejected by the—French-speaking—Belgian elites throughout the country because they feared it would impede the development of the Belgian nation based on French as the lingua franca from South to North, from East to West.[11] This continuous refusal made way to a radicalization of the Flemish movement, slowly reinforced by the expansion of voting rights.[12] It is only in the 1870s that the first laws were passed to formally allow the use of Dutch in the Northern provinces in criminal courts and in public administration.[13] In 1898, the "Equality Law" recognized Dutch as an official language and thus put it on an equal footing with French, even though the latter remained the dominant language in the country.

In 1921, the universal—male—does not modify the domination of the French-speaking bourgeoisie throughout the country, despite the increasing political weight of the Dutch-speaking citizens—and now voters. Yet, the Flemish movement's demands led to new linguistic laws in the years 1920s and 1930s that allow for the use of Dutch in many areas: notably justice, administration and education. In the meantime, the generalized bilingualism, i.e. throughout the country, is rejected by both French-speaking elites and Dutch-speaking elites; each group wanted primarily to ensure the protection of its own language on its own territory.[14] The logic of these linguistic laws is *territorial*. According to the language of the majority of its population, each commune—the smallest administrative division in Belgium—belongs to a unilingual linguistic region—Dutch, French or German—with the exception of the communes in Brussels that are in the sole bilingual region. Brussels itself is at the heart of the issue. Initially a Dutch-speaking city in the Dutch-speaking region, it became rapidly a "Frenchified"[15] city as its role of capital city of the country attracted the—French-speaking—elites and the administration. These territorial and linguistic issues are the foundations of the subsequent developments of Belgian politics and especially the transformation of country from a unitary state to a federal state. This is the ethno-territorial challenge in the making.

[9] Deschouwer (2009c), p. 28.

[10] Deschouwer (1999–2000).

[11] At the time, the population in the South, i.e. Wallonia, spoke Walloon dialects and not standardized French—only the elites used French as their primary language.

[12] Deschouwer (1999–2000), Deschouwer and Jan (2001).

[13] Zolberg (1974), p. 2; Zolberg (1976), p. 2.

[14] Swenden and Jans (2006): p. 879.

[15] Witte and Van Velthoven (2000).

The Political Parties

The previous section has showed how important the behaviour and the choices of the elites were in the creation of Belgium and in her development. However, who are the elites? The first part of the answer is: they are French-speaking throughout the territory and thus even in Flanders, where the Flemish movement is led by Dutch-speaking leaders mainly from the small bourgeoisie and the middle-class. The second part of the answer is: not only does language divide but also religion and socio-economic issues. Belgian elites were unhappy with William I, the ruler of the Kingdom of the Netherlands, for two main reasons: religion and language. The Catholic Church played an important role in the new country and its strong position gave birth to the first political divide and party formation.[16] Indeed, although Catholics and liberals united to secede from the Netherlands and to consolidate the country with "unionist" governments from 1830 until 1840,[17] their differences were too important to be kept on the back burner. In 1846, the Liberal party was created in order to defend the separation between Church and state—the most contentious issue between the liberals and the Catholics—as well as a more democratic voting system and better working conditions for the working class. In 1884, the Catholics decided to formally create a political party, bringing together different catholic associations, in the wake of the first school war between the liberals and the Catholics.

While the liberals and Catholics were disagreeing on the school question, the Belgian Workers' party was created in 1885 in order to improve the working conditions of the workers. As its potential voters had not the right to vote, its major demand was the universal suffrage, which it succeeded to obtain in 1893 with the universal but plural—that is some voters had more than one vote based on property, income or diplomas—suffrage and in 1921 with the universal—male—suffrage. The introduction of universal, albeit plural, brought about an important change in the political landscape in Belgium: the competition of three political parties. In addition, the distribution of the vote shares was remarkable. The Catholic party had a full monopoly in the Northern provinces—Dutch-speaking provinces—while the Workers' party had all of his representatives in southern provinces—French-speaking provinces—and the Liberal party keeping its electorate around Brussels.[18] As Kris Deschouwer writes, "this shed a very clear light on the meaning of territory in Belgian politics, even before the language issue became really salient."[19] It is also a first indicator of the socio-economic challenge. Above all, it shows how the first variable—the territorial principle vs. the personal principle debate—interacts with the second variable—the political parties. These two variables also interact with the third variable—the people—through what has been called "consociationalism."

[16] Deschouwer (2009c), pp. 20–26.

[17] Mabille (2000), pp. 103–46; Delwit (2009); Terlinden (1929); Balace (1989).

[18] Bouhon and Reuchamps (2012).

[19] Deschouwer (2009c), p. 29.

The People

Belgium is one of the most striking examples of consociationalism;[20] that is to say a fragmented democracy that has managed to deal with its internal fragmentation through consociational devices that are used by elites: power sharing (or grand coalition) and segmental autonomy as well as—in complement of the first two devices—proportionality and minority veto.[21] In Belgium, three pillars—the catholic, the socialist and the liberal—had been taking care of every Belgian from cradle to grave.[22] Only elites of each pillar met with the other pillars and made together the decisions in order to ensure the stability of a divided society—both in terms of religion and in terms of socio-economics. In the pre-federalism period, the language issue was not as salient as the two other cleavages. In fact, it acted as a cross-cutting cleavage within and between the pillars and it was even reinforced by the difference in the power distribution between the regions: Dutch-speaking Catholics who had a strong majority in Flanders could offer protection to French-speaking catholic minority in Wallonia, while French-speaking socialists who were the major political force in Wallonia could protect the Dutch-speaking socialist minority in Flanders. All the ingredients were ripe for the emergence of federalism in a deeply divided Belgium.

Federalism (1960–2007)

Federalism came about in Belgium as a conflict-management solution, not as a chosen solution.[23] It was incremental and to some extent unintentional.[24] However, in less than half a century, Belgium transformed from a unitary state to a full-fledged multinational federation.[25] Here again the relationship history-politics and in particular the three variables play an important role in understanding these dynamics that are shaping today's challenges on Belgian federalism.

The Territorial Principle vs. Personal Principle Debate

The linguistic laws of the 1920s and of the 1930s created linguistic regions based on the language of the majority in each commune. Yet, the increasing frenchification

[20] Lijphart (1981, 1984).
[21] Lijphart (1977).
[22] Deschouwer (2002), Huyse (1970) and Huyse (1981).
[23] Deschouwer (2005, 2009b) and Reuchamps and Onclin (2009).
[24] Deschouwer (2009b).
[25] Beaufays et al. (2009) and Burgess and Pinder (2007).

of the—Dutch-speaking—area surrounding Brussels was a very contentious issue; the Flemish elites feared Dutch-speaking communes would become bilingual or worse become unilingual French-speaking.[26] To prevent any further frenchification, the question about the use of language at home was abandoned in the census and as a consequence the—hitherto—movable linguistic border was frozen in 1962–1963, although some Dutch-speaking communes, with a minority or even in some cases a majority of French-speakers, were forced to offer language facilities in French.[27] In other words, it was the freezing of the territorial principle within the Belgian political system. This all fuelled the ethno-territorial challenge in Belgium.

In the meantime, another essential change was in motion: the economy of Flanders was surpassing the economy of Wallonia for the first time in Belgium' history. Until then, the Walloon industries had been the engine of the Belgian prosperity. However, after World War II, the Walloon economy were quite declining, while the Flemish economy were picking up and entering an economic boom.[28] As a response to this new economic situation, Walloon elites demanded autonomy, not on linguistic or cultural grounds, but on economic grounds as to be able to develop policies more suited for their declining economy. Since then, the socio-economic challenge was putting pressure on the Belgian federal dynamics. There is also a second aspect to the socio-economic challenge: as the gross domestic product of Flanders was increasingly higher than the gross domestic product of Wallonia (and to some extent of Brussels), financial transfers flowed from Flanders to Wallonia in order to maintain an interpersonal solidarity. The salience of this dimension increased as the time went by and the gap between the two regions widen. Consequently, the feeling that Walloons were benefiting undeservingly grew in Flanders.

In this context, the linguistic and cultural autonomist (but also economic) demands from the North and the economic autonomist demands from the South gave birth to a quite unique two-layered federal system, composed of Regions and Communities, with a defined territory for each of these sub state entities.[29] Nonetheless, the territorial principle vs. personal principle debate (i.e. the ethno-territorial challenge) has also influenced the federal organization of the system. Indeed, the Flemish elites decided to merge the Flemish Community with the Flemish Region into one single entity. The French-speaking elites decided the French-speaking Community (that is now called the Wallonia–Brussels Federation) would be the—linguistic—link between the French-speakers in Wallonia and in Brussels. Above all, these choices reflect different visions of what Belgium should be: for—most of—the Flemish elites, it should be made of two Communities—Dutch-speaking and French-speaking—and for—most of—the francophone elites,

[26] Swenden and Jans (2006), p. 879.

[27] Janssens (2001).

[28] Quévit (1978, 2010).

[29] Reuchamps and Onclin (2009).

it should be made of three Regions—Flanders, Wallonia and Brussels. Here is thus the Belgium's paradox: the Flemish prefers the linguistic ties of the Communities but need the Regions to entrench their borders and to obtain more autonomy, the Francophones prefer the regional division as a way to recognize Brussels as a Region but need the French-speaking Community to link Brussels and Wallonia.

The Political Parties

The freezing of the linguistic border and in general the ethno-territorial challenge through the language issue sparked heated debate in and out Brussels. These tensions had two major consequences on the political parties.[30] On the one hand, the tensions led to the break up of the three tradition parties. The Catholic party—which had become Christian democratic—split up into two parties along the linguistic cleavage in 1968. It was followed by the splitting up of the Liberal party in 1971 and of the Socialist party in 1978. On the other hand, new parties were created. Among them, regionalist parties made their way quite quickly to the Parliament: in Flanders, the Volksunie (VU), in Wallonia, the Rassemblement wallon (RW), and in Brussels, the Front démocratique des francophones (FDF).[31] Although they did not agree on the objective of the reforms, these parties made strong pressures on the political system to first initiate a process of state reform in 1968–1971 and then further the federalization of the country in subsequent state reforms in 1980, 1988–1989, 1993 and, to a lesser extent, 2001.

The splitting up of the three traditional parties and the emergence of regionalist parties had not only consequences on the electoral outcomes[32] but also on the federal dynamics. Specifically the absence of federal—or national—parties has left the centre unprotected and made quite impossible for voters to vote across the linguistic border.[33] In other words, elected representatives were only responsible before their own linguistic communities. In a centrifugal process, it does not help to temper one-sided demands—rather it may promote them—making it each time more difficult to find an agreement. However, since the whole dynamics of federalism in Belgium relies on reaching agreements between the two main communities—each has therefore a veto—this lack of electoral pressure to keep moderate demands or to accept moderate demands for more autonomy was likely to lead to deadlocks. Above all, the Belgian federation faces the so-called "Paradox of federalism"[34]: "[t]he fundamental question, then, is whether federalism provides a

[30] Verjans (2009).

[31] Deschouwer (2009d), p. 4; van Haute (2005); van Haute and Pilet (2006), p 3.

[32] Deschouwer (2003), p. 3; Deschouwer (2009a), p. 1.

[33] Deschouwer (1997); Pilet et al. (2009).

[34] Anderson (2004), p. 1; Cameron (2009), p. 2; Sinardet (2009); Erk and Anderson (2009), p. 2; Buchanan (1991); Balthazar (1999), p. 1; Bakke and Wibbels (2006), p. 1.

stable, long-lasting solution to the management of conflict in divided societies or is, instead, a temporary stop on a continuum leading to secession and independence. A federal arrangement that formally recognizes ethno-linguistic diversity to help manage the political system can also set this newly—or increasingly—federal state on a path to eventual disintegration."[35] In Belgium, in the consociational tradition, the political parties were the major actors of the political system and therefore those dealing with the process of integration vs. disintegration. Yet, they did based on what they perceived to be the public opinion.

The People

As a consequence of consociationalism, the people had little to say—elites were taking care of the political business. This separation between the people and the elites explained why so many reforms could be achieved in so few years—comparing to another countries such as Canada, for instance[36]—but it also led to the creation—or at least the reinforcement—of two separate publics: Dutch-speaking and French-speaking. There were not only increasingly separate on political terms, but also on cultural terms.[37] The well-known Flemish—the *Bekende Vlamingen*—are for the most part totally unknown in French-speaking Belgium and vice-versa. In other words, the process of federalization was not accompanied by a mitigating process of "refederalization": it was a one-way process towards more autonomy. Autonomy called for more autonomy. And the more it seemed difficult to find an agreement at the federal level, the more it was voiced to have transfers of powers from the federal level to the regional and community levels. Here, the ethno-territorial challenge and the socio-economic challenge reinforce each other and increase the pressure on the federal system.

During the period 1960–2007, the two public opinions kept on diverging: an increasing number of the Flemish were willing to give more autonomy to Flanders, and a large number of the French-speakers unwilling to do so because they were afraid that would lead to the end of the country.[38] In this dilemma, the members of the two Communities who held different opinions than the majority were unheard, and in fact constituted an underserved public because no political parties were defending their visions of Belgium.[39] The situation was ripe for post-federalism, which was triggered by the emergence of the autonomist party, the Nieuw-Vlaamse Alliantie (N-VA), an heir of the former Volksunie, which shared with this former

[35] Erk and Anderson (2009), p. 192.

[36] Fournier and Reuchamps (2009).

[37] Sinardet (2003), p. 3.

[38] Swyngedouw and Billiet (2002); Swyngedouw et al. (2007); Frognier and Aish (1994); Frognier et al. (2007); Swyngedouw et al. (1993, 1998); Frognier and Aish (2003, 1999).

[39] Frognier et al. (2008); Swyngedouw and Rink (2008).

party the essential stance on the importance of the Flemish's interests but adopted a denationalize strategy in order to obtain more autonomy for Flanders.[40]

After Federalism (2007–Onwards)

Belgium was created as a unitary, albeit already divided, state and was transformed to a federal state. Because the ethno-territorial challenge had not been entirely resolved by the federalization of the country, it has continued to stress the whole federal system. In a context of dual division of the parties and of the people, the federal context was therefore quite explosive in Belgium. The first explosion happened in the wake of the federal elections of 2007 with the victory of the regionalist/autonomist platform made of the Flemish Christian democrats and the N-VA.[41] Negotiations started in order to find an agreement on a new reform of the state, i.e. another step towards more autonomy in order to answer both—at once—the ethno-territorial challenge and the socio-economic challenge. Yet, the divisions between the two camps proved to be so big that no agreement could be found. One of the reasons was that the French-speaking parties were not demanding anything ("they were asking for nothing"); and this was new in the federal formula. Hitherto, both groups were coming to the table of negotiations with specific demands and compromises could be found—some times at a very expensive cost for the state budget—by basically giving enough to each Community. However, in 2007, the old recipes were not working anymore. It took 194 days to form a—Christian democrat, liberal and French-speaking socialist—coalition that however had not been able to find an agreement on a state's reform[42] and therefore the ethno-territorial and the socio-economic challenges were left unanswered. Then came the second explosion in 2010.

The Territorial Principle vs. Personal Principle Debate

There is one issue that is as old as Belgian federalism (and that is at the heart of the ethno-territorial challenge), the question of BHV—that is the electoral and judiciary district of Brussels (which is the bilingual region), Halle/Hal and Vilvoorde/Vilvorde (which are in the Dutch-speaking region).[43] In this district, French-speakers enjoyed facilities most notably in terms of voting rights—they can vote for French-speaking lists, if they wish to do so, and in fact they do so—and of

[40] Sinardet (2009).

[41] Sinardet (2008), p. 5; Pilet and van Haute (2008), p. 3.

[42] Brinckman et al. (2008).

[43] Sinardet (2010), p. 3.

judiciary rights—they can go to court in French. Yet, these privileges are in opposition with the territorial principle since these citizens live in Flanders. From problematic, the issue became even more problematic in 2003 when the smaller electoral districts were merged at the provincial level, except for BHV. The Constitutional Court saw a rupture of equality in this situation that therefore required a different solution. Several solutions could be thought of but the Flemish parties saw as the unique solution the division of BHV into two districts: on the one hand, a bilingual district in Brussels and, on the other, a unilingual district in the Flemish Brabant including Halle/Hal and Vilvoorde/Vilvorde. In other words, it was a solution in the line of a strict application of the territoriality principle. This was, quite predictably, unacceptable for the French-speaking parties. It was one stone of contention in the formation of the coalition in 2007 but they decided—as it was often done in Belgium—no to decide and leave it for later. In 2010, the Flemish liberals, one of the ruling partners, decided it lasted for too long and stepped back from the coalition, calling the citizens to the booth.

The outcome of the 2010 elections was quite remarkable. First, in Flanders, the autonomist party N-VA won the elections, leaving the three Flemish traditional parties far behind. Second, in Wallonia, the Socialist party (PS) came first. So on two important dimensions of politics, quite a few Flemish and Francophones voted in opposing directions: for more autonomy and more to the right with the N-VA and for more Belgium—or at least to not so much autonomy—and more to the left with the PS. This electoral outcome is a perfect example of how the ethno-territorial challenge interacts with the socio-economic challenge in Belgium. However, it proved very hard to resolve them at once. Indeed, the two winners of the elections, the N-VA and the PS, started negotiations but without any success. Everything was on the table of negotiations, making the whole exercise even more complex. The question of BHV was still unresolved and generally the question of Brussels had also to be resolved. Indeed, as Kris Deschouwer puts it "even today it is and remains a very divisive issue, but its very location is at the same time why the end and the splitting up of Belgium is not an easy and obvious way out of the conflict."[44] The political parties were stuck in difficult negotiations, but this difficulty is also a historical legacy.

The Political Parties

Federalism in Belgium was implemented to pacify the community conflicts (the ethno-territorial challenge). On that regard, it did quite well—Belgian federalism was a successful story. Nonetheless, it did not prevent for further conflicts and, on the contrary, it actually fostered the conflicts—it is why 40 years later we still have to deal with the ethno-territorial challenge. Political parties have always played a

[44] Deschouwer (2009c), p. 23.

major role in shaping the federal system but the federal system has also shaped their behaviour. As it was mentioned above, the splitting up of the parties combined with the existence of two distinct electoral arenas left the federal system without federal parties. In addition to this and because of this division, elites do not know each other anymore since their political socialization differ. It is therefore more difficult to negotiate with people you do not know very well. Yet, the solution has to be found by the political parties, since the idea of public consultation, i.e. a referendum, is still somewhat taboo in Belgian politics.[45] The only such public consultation that was held in the country was during the Royal question in 1950 and the results were quite different from one region to another, bringing the country in the brink of the civil war.[46] Finally, political parties have also to adapt to the evolution of the public opinions that also have been shaped by the old and recent history of federalism in Belgium.

The People

At first glance, the results of the elections show the division between the two language groups. However, there are in fact more divisions within the language groups. While everyone acknowledges federalism, understood as a negotiation process (not so much the distribution of powers between the federal state, the regions and the communities *per se*), is not currently working in Belgium, the solutions for this stalemate diverge between citizens.[47] One group of them, in Flanders (5–10 % of the population) but also in Wallonia (5–10 %), believes the separation should be the way out of the conflict. Next to this separatist group, there is a large group of autonomist, again both in Flanders (50 %) and in Wallonia (35 %). There are also groups of citizens willing to keep the status quo (25 %) or willing to give more power to the federal state (20 % in Flanders, 30 % in Wallonia). A last group calls for the transfers of all the competences back to the federal state (5 % in Flanders, 10 % in Wallonia). To say the least, the population is quite divided;[48] yet, a majority favors a deeper autonomy for the Regions and the Communities. This is the next step in the evolution of the Belgian federalism.

[45] Nonetheless, recently, on 11 November 2011, an original event—the G1000—gathered more than 700 "ordinary" Belgian citizens to discuss important topics for the future of Belgium: social security, distribution of wealth and immigration. It was not a referendum, but rather a first attempt to introduce some form of deliberative democracy in Belgium: Reuchamps (2011).

[46] Mabille (2000).

[47] Deschouwer and Sinardet (2010).

[48] Reuchamps (2011).

Answers to the Current Challenges

The first three sections have shown how the ethno-territorial challenge and the socio-economic challenge have emerged in Belgium and how they have challenged Belgian federalism. Since 2010, the country was in an impasse because of the absence of joint decision-making on how to resolve these two challenges. After several months (more than a year of negotiations), eight political parties reached an agreement about a new reform of the state, on 11 October 2011.[49] The negotiations were led by the president of the PS, Elio Di Rupo, and involved the Flemish Christian democrats (CD&V) but without the NV-A that was eventually (after several months of failed attempts of negotiations) perceived as not willing—enough—to come to a compromise, the French-speaking liberal party (MR) but without the FDF which did not accept the agreement because it was not meeting its minimal expectations, the Flemish liberals (OpenVLD), the Flemish socialists (SP.a), the French-speaking Christian democrats (cdH) and the green parties of both language groups (Ecolo and Groen!). Altogether, the eight parties reached a quite far-reaching package deal that offers—tentative—answers to Belgian federalism's main challenges in four chapters: political renewal, BHV and Brussels, more autonomy and a new financial equalization system.

Political Renewal

The first chapter of the agreement signed by the eight parties calls for a political renewal. The political crisis has definitely eroded the trust in political institutions in Belgium. The first aim of the state's reform is therefore to improve political trust through several reforms. One of them will be the creation of an independent ethics committee that will be in charge of writing a code of deontology for holders of public responsibilities. The parliament will be reinforced in its missions of control of the executive and of policy making. Moreover, the Senate (Belgium's higher chamber) will be transformed as of the next regional elections in 2014. On the one hand, it will be made of 50 indirectly elected Senators (29 Dutch-speaking, 20 French-speaking and 1 German-speaking), based on the results of the regional elections. On the other hand, there will be ten co-opted Senators, i.e. chosen by their peers (six Dutch-speaking and four French-speaking), on the basis of the results of the elections for the Chamber. The Senate will play a more limited role, but it will be the Chamber of the substate entities, to some extent. However, these are principles that have now to be discussed and elaborated in a working group made of representatives of the eight parties.

Beside several other elements such as the vote of Belgians living abroad or the idea of a cooperative federalism, the main point of this chapter is the

[49] Accord institutionnel pour la sixième réforme de l'Etat, "Un Etat Fédéral Plus Efficace Et Des Entités Plus Autonomes" (Bruxelles 2011).

re-synchronization of the federal and the regional elections. Until 1999, federal elections were held every 4 years and regional elections (along European elections) were held every 5 years. It was decided to hold federal (i.e. elections for the Chamber—given the reform of the Senate) elections every 5 years, as of the next European elections (and therefore the regional elections) in June 2014. This is to avoid too many elections and avoid—too many—incongruent coalitions between the different levels of government. Nonetheless, Regions are granted to right (through constitutive autonomy that is also extended to the Region of Brussels-Capital and to the German-speaking Community) to decide the length of each legislature and the date of the election of their assembly. So the next main general elections in Belgium will be held in June 2014—the outcomes of these elections will affect the composition of each assembly in the country (in addition to the Belgian MPs elected in the European Parliament): the Chamber of Representatives, the Senate (indirect composition on the basis of the elections of the regional parliaments and the Chamber), the Flemish Parliament, the Brussels Parliament, the Walloon Parliament, the Parliament of the French-speaking Community (indirect composition with MPs elected in the Walloon Parliament and MPs elected in the French-speaking group of the Brussels Parliament) and the Parliament of the German-speaking Community.

BHV and Brussels

The dual question of BHV and Brussels is the core of the ethno-territorial challenge. For the former—BHV—two decisions were made: to split the electoral district of BHV (but with guarantees for the Francophones who live in the six communes of the periphery; they are allowed to vote either for the—mostly Flemish—candidates in the district they live in—i.e. the Flemish Brabant district—or for the candidates—Flemish or Francophone—in the Brussels-Capital district) and to split the judiciary district of BHV (but with guarantees for the Francophones who live in Halle/Hal and Vilvoorde/Vilvorde—this includes the six communes of the periphery—which will imply some changes in the composition of the jurisdictions). For the latter—Brussels—given its important role in the federal dynamics but also in terms of its socio-economic weight, Brussels and its so-called hinterland (that is around 1.8 million inhabitants who live in over 30 communes in both Flanders and Wallonia next to Brussels) will be considered as a "metropolitan community," which has still to be defined more precisely. Moreover in Brussels itself (the Region), there will be a simplification of the institutions notably towards a reinforced and integral security scheme and an increased homogeneity in the distribution of the competences (in terms of urbanism, social housing, mobility, parking, cleanliness, sports' infrastructures, professional training, tourism, bi-cultural institutions of regional interest). As for the reform of the Senate, these reforms for Brussels will be dealt with by a working group, made of Brussels' representatives of the eight parties.

More Autonomy

In order to give an answer to the ethno-territorial challenge and to the socio-economic challenge, several competences are transferred from the federal state to the substate entities; that is to say, they have more autonomy. The first package is made of competences related to the job market (that go to the Regions), but social security remains federal (as well as a social dialogue and wages' policy). Health care is further devolved to the Communities, but interpersonal solidarity remains federal (that is to say an equal access to health care throughout Belgium; i.e. the INAMI—the Belgian statutory national medical insurance Institute—will still be controlled by the federal government). In order to have coherent (albeit sometimes different) policies between the Communities, agreements of cooperation will have to be signed between them and the federal government. Family allowances go to the Communities (in Brussels to the Common Community Commission—COCOM). To make sure no Community will eliminate them, the right to family allowances will be written in the Constitution. In terms of justice, in their own competences, substate entities will have a bigger say. However, an agreement of cooperation will have to be signed. This is, for instance, the case for the sanctions against young people that are of the responsibility of the Communities (COCOM in Brussels). Finally, there is devolution in several other areas: mobility (quite a lot of rules go to the Regions but not the road code itself), economic and industrial policy, energy, agriculture, urbanism, housing, local administration. Indeed, this is a large-scale devolution of competences. It amounts to a total of 16,898 million EUR. In addition to these transfers, the reform brings about a new financial equalization system.

New Financial Equalization System

The objective of the new system is twofold: to give more fiscal autonomy and to make the entities more accountable, while maintaining solidarity throughout the country. Several principles guide this reform: prevent too much fiscal competition between the entities, keep a progressive tax scheme for personal income tax, do not structurally impoverish one or more entities, ensure the long term viability of the federal state and maintain its fiscal powers in order to ensure the interpersonal solidarity, increase the fiscal accountability of the regions for their competences, take into account the specific socio-economic context and the role of Brussels, use criteria based on population and pupils, maintain a solidarity between the entities, ensure financial stability for the entities, have the entities contribute to the improvement of public finances, and check the relevance of the models through simulations. As one can imagine, it was definitely not an easy reform to negotiate, since so many variables had to be taken into account. It would be too tedious to explore every detail of the new equalization system. However, three key points should be mentioned.

First, the Regions are granted substantial fiscal autonomy (through a proportion of the personal income tax where they can apply their own rate); it amounts to a total of 10,736 million EUR. In addition to this fiscal autonomy, Regions will receive direct payments from the federal state for the new competences. Second, since in Brussels the two Communities are competent on the same territory, Communities have lesser fiscal leverage. Therefore, they get their financial means through direct payments from the federal state (based on the value added tax and a proportion of the personal income tax collected by the federal government). Third, the Regions of Brussels-Capital receive extra means (for a total of 461 million EUR) because a large number of people work in Brussels but do not live in Brussels, and therefore do not pay taxes there. The application of the new equalization scheme will take several years. It will start in 2012 but its full-effects will only come 10 years (and in some instances even more) from now. Thus, the impact of the new equalization system has still to be assessed.

Conclusion: The End of Belgium?

Belgian federalism is—still—at a crossroad. Both from inside and from outside, it is increasingly complex to understand why Belgium had been stuck in an impasse, on the one hand, while still functioning, on the other hand. The challenges facing Belgian federalism and the answers that have been provided in the different waves of state's reform explain why this country, once a unitary state then a federal state and probably in the future a post-federal state, has been embedded in such a paradoxical situation. Federalism was gradually, reform after reform, implemented to pacify the ethno-territorial issue creating Regions and Communities in order to give autonomy to the different people of Belgium. In the meantime, the federalization reinforced the tensions by institutionalizing them, often bringing the federal level to a stalemate.

Thus, the last current challenge on the Belgian federalism is the by-product of the first two challenges—the ethno-territorial challenge and the socio-economic challenge. It is, simply put, the question of the existence of Belgium. From the beginning of Belgium, and in particular for the last 50 years, the community conflict (that is not only ethno-territorial but also socio-economic) has sparked intense tensions. On top of this, for over 500 days Belgium was without a full-fledged federal government (it had an interim government nonetheless), this inevitably stressed seriously the whole architecture of the country, even though the five other governments were functioning. Now that a full-fledged government is working, the spectre of the end of Belgium has diminished but the question "still Belgium?" remains. In fact, federalism in Belgium has come about through subtle compromises. The last reform of the state, which still has to be enacted through the revision of the Constitution and the special laws, belongs to this category of—typical Belgian—subtle compromises. Yet, subtle compromises, while they have often provided a short-term solution, were as often the sources of further tensions. No one can predict whether this will be the fate of the sixth reform of the state but no one can exclude it.

References

Accord institutionnel pour la sixième réforme de l'Etat. "Un Etat fédéral plus efficace et des entités plus autonomes." Bruxelles, 2011.

Anderson, Lawrence M. "Exploring the paradox of autonomy: federalism and secession in North America." *Regional & Federal Studies* 14, no. 1 (2004): 89–112.

Bakke, Kristin M., and Erik Wibbels. "Diversity, Disparity, and Civil Conflict in Federal States." *World Politics* 59, no. 1 (2006): 1–50.

Balace, Francis. "Les libéraux, les catholiques et l'unionisme (1831–1846)." In *Le libéralisme en Belgique. Deux cents ans d'histoire*, edited by Hervé Hasquin and Adriaan Verhulst. Bruxelles: Centre Paul Hymans, Editions Delta, 1989.

Balthazar, Louis. "The Quebec experience: Success or failure?" *Regional & Federal Studies* 9, no. 1 (1999): 153–69.

Beaufays, Jean, Geoffroy Matagne, and Pierre Verjans. "Fédéralisation et structures institutionnelles: la Belgique entre refondation et liquidation." In *La Belgique en mutation. Systèmes politiques et politiques publiques (1968–2008)*, edited by Jean Beaufays and Geoffroy Matagne, 9-48. Bruxelles: Bruylant, 2009.

Bouhon, Frédéric, and Min Reuchamps, eds. *Les systèmes électoraux de la Belgique*. Bruxelles: Bruylant, 2012.

Brinckman, Bart, Isabel Albers, Steven Samyn, and Wouter Verschelden. *De zestien is voor u. Hoe België wegzakte in een regimecrisis. Het verhaal achter de langste regeringsvorming ooit*. Tielt: Lannoo, 2008.

Buchanan, Allen E. *Secession: the morality of political divorce from Fort Sumter to Lithuania and Quebec*. Boulder: Westview Press, 1991.

Burgess, Michael, and John Pinder, eds. *Multinational federations*. New York: Routledge, 2007.

Cameron, David. "The Paradox of Federalism: Some Practical Reflections." *Regional & Federal Studies* 19, no. 2 (2009): 309–19.

Delwit, Pascal. *La vie politique en Belgique de 1830 à nos jours*. Vol. 6, UB lire références. Bruxelles: Editions de l'Université de Bruxelles, 2009.

Deschouwer, Kris, and Dave Sinardet. "Taal, identiteit en stemgedrag." In *De stemmen van het volk. Een analyse van het kiesgedag in Vlaanderen en Wallonië op 7 juni 2009*, edited by Kris Deschouwer, Pascal Delwit, Marc Hooghe and Stefaan Walgrave. Bruxelles: VUB Press, 2010.

Deschouwer, Kris. "Coalition Formation and Congruence in a Multi-layered Setting: Belgium 1995–2008." *Regional & Federal Studies* 19, no. 1 (2009a): 13–35.

Deschouwer, Kris. "Comprendre le nationalisme flamand." *Fédéralisme Régionalisme* 1 (1999–2000).

Deschouwer, Kris. "Falling apart together. The changing nature of Belgian consociationalism, 1961–2000." *Acta Politica* 37 (2002): 68–85.

Deschouwer, Kris. "La dynamique fédérale en Belgique." In *Le fédéralisme en Belgique et au Canada. Comparaison sociopolitique*, edited by Bernard Fournier and Min Reuchamps, 65–72. Bruxelles: De Boeck Université, 2009b.

Deschouwer, Kris. "Political Parties in Multi-Layered Systems." *European Urban and Regional Studies* 10, no. 3 (2003): 213–26.

Deschouwer, Kris. "Une fédération sans fédérations de partis." In *La réforme de l'Etat… et après ? L'impact des débats constitutionnels en Belgique et au Canada*, edited by Serge Jaumain, 77–83. Bruxelles: Editions de l'ULB, 1997.

Deschouwer, Kris, and Maarten Theo Jans. "L'avenir des institutions, vu de Flandre." In *La Belgique: un état fédéral en évolution*, edited by André Leton, 209–25. Bruxelles ; Paris: Bruylant; L.G.D.J., 2001.

Deschouwer, Kris. "Kingdom of Belgium." In *Constitutional Origins, Structure, and Change in Federal Countries*, edited by John Kincaid and G. Alan Tarr, 49–75. Montréal ; Ithaca: McGill-Queen's University Press, 2005.

Deschouwer, Kris. *Politics of Belgium: Governing a Divided Society*, Comparative Government and Politics Series. London: Palgrave Macmillan, 2009c.
Deschouwer, Kris. "The Rise and Fall of the Belgian Regionalist Parties." *Regional & Federal Studies* 19, no. 4 (2009d): 559–77.
Erk, Jan, and Lawrence Anderson. "The Paradox of Federalism: Does Self-Rule Accommodate or Exacerbate Ethnic Divisions?" *Regional & Federal Studies* 19, no. 2 (2009): 191–202.
Flora, Peter, Stein Kuhnle, and Derek Urwin, eds. *State Formation, Nation-Building, and Mass Politics in Europe: The Theory of Stein Rokkan*. Oxford: Oxford University Press, 1999.
Fournier, Bernard, and Min Reuchamps, eds. *Le fédéralisme en Belgique et au Canada. Comparaison sociopolitique*, Ouvertures sociologiques. Bruxelles: De Boeck Université, 2009.
Frognier, André-Paul, and Anne-Marie Aish, eds. *Élections: la fêlure? Enquête sur le comportement électoral des Wallons et des Francophones*. Bruxelles: De Boeck, 1994.
Frognier, André-Paul, and Anne-Marie Aish, eds. *Des élections en trompe-l'oeil. Enquête sur le comportement électoral des Wallons et des Francophones*. Bruxelles: De Boeck, 1999.
Frognier, André-Paul, and Anne-Marie Aish, eds. *Élections: la rupture? Le comportement des Belges face aux élections de 1999*. Bruxelles: De Boeck, 2003.
Frognier, André-Paul, Lieven De Winter, and Pierre Baudewyns, eds. *Élections: le reflux? Comportements et attitudes lors des élections en Belgique*. Bruxelles: De Boeck, 2007.
Frognier, André-Paul, Lieven De Winter, and Pierre Baudewyns, eds. "Les Wallons et la réforme de l'Etat. Une analyse sur la base de l'enquête post-électorale de 2007." In *PIOP*, 23. Louvain-la-Neuve: Pôle Interuniversitaire sur l'Opinion publique et la Politique, Université catholique de Louvain, 2008.
Huyse, Luc. *Passiviteit, pacificatie en verzuiling in de Belgische politiek: Een sociologische studie*. Antwerpen: Standaard Wetenschappelijke Uitgeverij, 1970.
Huyse, Luc. "Political conflict in bicultural Belgium." In *Conflict and coexistence in Belgium: the dynamics of a culturally divided society*, edited by Arend Lijphart, 107-26. Berkeley: Institute of International Studies, University of California, 1981.
Janssens, Rudi. *Taalgebruik in Brussel. Taalverhoudingen, taalverschuivingen en taalidentiteit in een meertalige stad*. Brussel: VUB Press, 2001.
Lijphart, Arend, ed. *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-One Countries*. New Haven: Yale University Press, 1984.
Lijphart, Arend, ed. *Democracy in Plural Societies: a Comparative Exploration*. New Haven: Yale University Press, 1977.
Lijphart, Arend, ed. *Conflict and coexistence in Belgium: the dynamics of a culturally divided society*. Berkeley: Institute of International Studies, University of California, 1981.
Mabille, Xavier. *Histoire politique de la Belgique: facteurs et acteurs de changement*. 4ème ed. Bruxelles: CRISP, 2000.
McRae, Kenneth D. *Conflict and Compromise in Multilingual Societies. Volume 2, Belgium*. Waterloo: Wilfrid Laurier University Press, 1983.
Pierson, Paul. "Increasing Returns, Path Dependence, and the Study of Politics." *The American Political Science Review* 94, no. 2 (2000): 251–67.
Pierson, Paul. "The Path to European Integration: A Historical Institutionalist Analysis." *Comparative Political Studies* 29, no. 2 (1996): 123–63.
Pilet, Jean-Benoit, and Emilie van Haute. "The federal elections in Belgium, June 2007." *Electoral Studies* 27, no. 3 (2008): 547–50.
Pilet, Jean-Benoit, Jean-Michel De Waele, and Serge Jaumain, eds. *L'absence de partis nationaux: menace ou opportunité ?*, Science politique. Bruxelles: Editions de l'Université de Bruxelles, 2009.
Quévit, Michel. *Flandre - Wallonie: Quelle solidarité ? De la création de l'Etat belge à l'Europe des Régions*. Charleroi: Couleurs livres, 2010.
Quévit, Michel. *Les causes du déclin wallon*. Bruxelles: Vie ouvrière, 1978.

Reuchamps, Min, and François Onclin. “La fédération belge.” In *Le fédéralisme en Belgique et au Canada. Comparaison sociopolitique*, edited by Bernard Fournier and Min Reuchamps, 21–40. Bruxelles: De Boeck Université, 2009.

Reuchamps, Min. “Le G1000.” *Politique: Revue des débats*, no. 72 (2011): 64–66.

Reuchamps, Min. *L’avenir du fédéralisme en Belgique et au Canada. Quand les citoyens en parlent*, Diversitas. Brussels: P.I.E.-Peter Lang, 2011.

Sinardet, Dave. “Belgian Federalism Put to the Test: The 2007 Belgian Federal Elections and their Aftermath.” *West European Politics* 31, no. 5 (2008): 1016–32.

Sinardet, Dave. “De communautaire koorts: Symptomen, diagnose en aanzet tot remedie.” *Samenleving en Politiek* 10, no. 3 (2003): 14–24.

Sinardet, Dave. “Des accents flamands au Canada.” *Le Soir*, 22 octobre 2009, 19.

Sinardet, Dave. “From consociational consciousness to majoritarian myth: Consociational democracy, multi-level politics and the Belgian case of Brussels-Halle-Vilvoorde.” *Acta Politica* 45, no. 3 (2010): 346–69.

Sinardet, Dave. “Futur(s) de la fédération belge: paradoxes fédéraux et paradoxes belges.” In *Le fédéralisme en Belgique et au Canada. Comparaison sociopolitique*, edited by Bernard Fournier and Min Reuchamps, 209-30. Bruxelles: De Boeck Université, 2009.

Swenden, Wilfried, and Maarten Theo Jans. “‘Will it stay or will it go?’ Federalism and the sustainability of Belgium.” *West European Politics* 29, no. 5 (2006): 877–94.

Swyngedouw, Marc, and Nathalie Rink. “Hoe Vlaams-Belgischgezind zijn de Vlamingen? Een analyse op basis van het postelectorale verkiezingsonderzoek 2007.” In *Onderzoeksverslag Centrum voor Sociologisch Onderzoek (CeSO)*, 19. Leuven: Instituut voor Sociaal en Politiek Opinieonderzoek (ISPO), 2008.

Swyngedouw, Marc, Jaak Billiet, Ann Carton, and Roeland Beerten, eds. *Kiezen is verliezen. Onderzoek naar de politieke opvattingen van Vlamingen*. Leuven: Acco, 1993.

Swyngedouw, Marc, Jaak Billiet, Ann Carton, and Roeland Beerten, eds. *De (on)redelijke kiezer. Onderzoek naar de politieke opvattingen van Vlamingen. Verkiezingen van 21 mei 1995*. Leuven; Amersfoort: Acco, 1998.

Swyngedouw, Marc, and Jaak Billiet, eds. *De kiezer heeft zijn redenen. 13 juni 1999 en de politieke opvattingen van Vlamingen*. Leuven: Acco, 2002.

Swyngedouw, Marc, Jaak Billiet, and Bart Goeminne, eds. *De Kiezer Onderzocht. De verkiezingen van 2003 en 2004 in Vlaanderen*. Leuven: Universitaire Pers Leuven, 2007.

Terlinden, Charles. *Histoire de la Belgique contemporaine 1830-1914*. Vol. II. Bruxelles: Librairie Albert Dewit, 1929.

van Haute, Emilie. “La Volksunie (VU): triomphe des idées, défaite du parti.” In *Les partis régionalistes en Europe. Des acteurs en développement*, edited by Pascal Delwit, 243–64. Bruxelles: Editions de l’Université de Bruxelles, 2005.

van Haute, Emilie, and Jean-Benoit Pilet. “Regionalist parties in Belgium (VU, RW, FDF): Victims of their own success?” *Regional & Federal Studies* 16, no. 3 (2006): 297-313.

Verjans, Pierre. “Mutation des systèmes partisans et résultats électoraux: Proportion congrue et gouvernabilité.” In *La Belgique en mutation. Systèmes politiques et politiques publiques (1968–2008)*, edited by Jean Beaufays and Geoffroy Matagne, 49-96. Bruxelles: Bruylant, 2009.

Witte, Els, and Harry Van Velthoven. *Language and Politics. The Situation in Belgium in a Historical Perspective*. Brussels: VUB Press, 2000.

Zolberg, Aristide R. “Les origines du clivage communautaire en Belgique. Esquisse d’une sociologie historique.” *Recherches sociologiques* 7, no. 2 (1976): 150–70.

Zolberg, Aristide R. “The Making of Flemings and Walloons: Belgium: 1830–1914.” *Journal of Interdisciplinary History* 5, no. 2 (1974): 179–235.

Part III
The Division of Powers and the Horizons of Territorial Autonomy in Spain

Current Issues Around Territorial Autonomy in Spain

Alberto López-Basaguren

Territorial Autonomy from Success to Failure? The Grounds for Dissatisfaction

The constitutional design of the system of territorial autonomy and its practical development have been regarded, for over 25 years, as a great success. This was even the view of many critics or those who demanded greater autonomy for their territories. During these years, there was particular satisfaction with the sizeable task performed by the Constitutional Court (CC); decisive owing to the paucity of constitutional regulation and the challenge of building a system devoid of tradition. The doctrine of the CC provided the system of territorial autonomy with solid foundations (Cruz Villalón 1991b).

The formal precautions contained in the Spanish Constitution (SC) appear to be directed at establishing a weak regionalism, which would be developed under strong political control by the State. It seemed likely that autonomy would not be generalised throughout the whole territory, that most of the territories which became Autonomous Communities (AC) would have a limited autonomy

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(Art. 143 SC)[1] and that the widest autonomy permitted by the Constitution (Art. 151 SC)[2] would be restricted to Catalonia, the Basque Country and Galicia, territories mentioned in the Second Transitional Disposition SC.[3] These provisions were immediately shattered: there was widespread creation of Autonomous Communities (AC) and various territories expressed their willingness to assume the highest degree of autonomy, reluctant to remain in a more limited autonomy.

The two major parties in Parliament, who had agreed upon a controlled development of the autonomous system, were overwhelmed. They had to adopt solutions that, on occasions, contravened constitutional regulation. Andalusia became an AC through the procedure established in Art. 151 SC and directly attained the same level as Catalonia, the Basque Country and Galicia; Valencia and the Canary Islands achieved this indirectly, via organic laws of delegation and transfers (Art. 150.2 SC), which extended the competences established in their respective Statutes of Autonomy (SA); and the CC issued Ruling 76/1983, of August 5, regarding the Organic Law of harmonisation of the process of territorial autonomy, which rendered practically unused the figure of the "laws of harmonisation" (Art. 150.2 SC). This signalled the complete failure of the first Pacts on territorial autonomy (1981) signed by the two major parties on a national level (then, UCD and PSOE). This cycle came to an end with the second Pacts on territorial autonomy (1992) signed, once again, by the two major parties (now PSOE and PP), which freed the way for reform of the SA of the AC of Art. 143 CE, levelling in a general sense the competences of all the AC (Aja 1996; Ortega 2004). This process greatly distanced the Spanish system from the initial concept of a weak and controlled system of territorial autonomy, in the Italian style, and developed a system of autonomous territories with enormous political strength.

The satisfaction with this result coincided with criticism of some of the elements of the system or of the interpretation established by the CC. These stances have revealed the coexistence of criticism of the structural problems and functioning, in the perspective of its reform, with positions from which it was dismissed as insufficient. This dismissal was voiced by the Nationalists, who in the case of Catalonia and the Basque Country led the governments of their respective territories. The dissatisfaction with the system of territorial autonomy became steadily more intense, especially in those two territories, as 25 years passed from the approval of their SA. Whilst in the Basque Country, amongst the nationalists,

[1] The AC created via Art. 143 SC could only assume the competences established in Art. 148.1 SC and would only be able to extend them, within the limit established in the list of State competences (Art. 149.1 SC), by means of the reform of its Statute, after a minimum of 5 years (Art. 148.2 SC).

[2] The AC created by Art. 151 SC could assume, directly, all the competences not reserved for the State in Art. 149.1 SC.

[3] Those "territories which in the past had approved by plebiscite projects for Statutes of autonomy and have, at the time of adopting this Constitution, provisional autonomous systems" could establish themselves as Autonomous Community through the simple agreement of this provisional autonomous body. These are the territories known, not without objection, as "historic nationalities."

there prevailed a generalised rejection—and an attempt to attain a new political status—in Catalonia the majority sought to specify the problems that had led to the crisis of the autonomous system, proposing a reform within the constitutional limits.

This analysis (Aja and Viver 2003) was expressed with particular clarity by Viver (2003), former CC Justice who coined the expression that, finally, the Spanish system was notable for having granted the AC a "broad autonomy of low quality." In his opinion, "the characteristic features of political autonomy" would have been blurred, in such a way that the model that ultimately prevailed most resembled "a simple administrative autonomy." The AC would have scant capacity to "adopt their own policies" that would provide them with a "real possibility of transforming important aspects of social, economic or political reality in accordance with their own political options"; there would be a lack of "efficient mechanisms for the participation of the AC in institutions and in the shaping of state politics"; and the constitutional guarantee of the autonomy of the AC would be flawed, owing to the degree of imprecision of rules regarding the distribution of competences between the State and the AC, which find themselves, thus, "at the mercy of the short-term parliamentary majorities."

Irrespective of the opinion merited by this conclusion, there can be no doubt as to the importance of the analysis of the problems that lead to a judgement of this nature. The central problem lies in the distribution of competences. On the one hand, according to Viver, there is the "fragmentation of the areas attributed to the competence of the AC"; secondly, the "extension given to the areas of state competence – in particular, the so-called horizontal titles, like the general structuring of the economy"; thirdly, the "detail involved in the basic rules which the State can issue in numerous areas." This last aspect is fundamental: after 25 years "there should be an admission that the 'basic rules-development' tandem employed as a criterion for delimiting competences in a generalised manner in our system has proven to be legally inefficient." The concept of basic rules has been configured in such a way that, "within it there is room for almost any content the State chooses" and the CC "lacks any legally secure constitutional parameter to reject, except in extreme cases, decisions taken" by the state legislature. Thus, the model of distribution of competences "is deconstitutionalised and at the mercy of the constituted powers."

These considerations highlight various problems. The question of the so-called "horizontal" competences is generalise widespread in federal systems, where, formulated in one way or another, there exist instruments of federal intervention, especially in the economic sphere, with a "horizontal" effect. This fact ought to lead one to qualify the structural problems in the Spanish system, though without denying the importance of the need to define it precisely.

Different, in my view, is the issue of shared competences. The Constitution systematically refers to a system of distribution of competences, of a shared nature, where it corresponds to the State to establish *basic rules* and to the AC their

legislative development and execution; this is the backbone of the system of distribution of competences. The CC has sought to impose formal requirements vis-à-vis the competence of the State to determine these *basic rules*, such as the demand for a formal law; however, obliged in part by the wording of the Constitution—which only in some cases refers to "basic legislation"—has failed in these pretensions. Neither has it succeeded in establishing limits to the competence to determine *basic rules* (like principles), which has afforded the State the freedom to decide what is basic in a given area, that is, to establish the limits of its competence and, consequently, of the competence of the AC (Jiménez Campo 1989; Montilla 2003). After more than 30 years of development, this is one of the most important structural problems in the system.

Linked to the distribution of competences a problem has been addressed of considerable political significance: the outstanding transfers. Particularly in the case of the Basque Country, the affirmation that the State still has not transferred dozens of competences that, according to the SA, would correspond to the AC,[4] has been a key element in the process of loss of legitimacy of the system of territorial autonomy (López-Basaguren 2010).

The transition to a system of territorial autonomy from a centralised State required the transfer to the AC of the services and staff corresponding to the competences assumed, which is agreed upon in a Mixed Commission. The CC has repeatedly affirmed (since CCR 25/1983) that it is the SA—and not the Decree of transfers—which assigns the competence, which may be exercised in the absence of a transfer; although, when the action refers to the administrative service not yet transferred, the competence must continue to be exercised by the State. This is a "provisional" and "anomalous" situation, which can only be rectified via the constitutional loyalty of the parties (CCR 209/1990). There are no control channels capable of resolving the absence of agreement in the Mixed Commission on transfers.

The problem is not as sizeable as some would claim. The impossibility of exercising the competence is limited to the administrative management of untransferred organs; almost without exception, these are specific aspects within an area[5]; the grievance is based upon arguable interpretations regarding the scope of the competence attributed in the SA; and, on occasions, the AC does not accept the transfer following disagreement over its economic value. The absence of transfer affects, fundamentally, financing.

Along with the structural problem in the distribution of competences exist, without a doubt, other problems in the development of the system of territorial autonomy, such as that of the Senate, reform of which has been the subject of

[4] According to the Basque Parliament's "Report on statutory development" of 1 July 1993, there were 54 competences. Meanwhile, Saura (2005), then a Member of the Catalan Government, numbered as "over ninety" the competences still to be transferred to Catalonia.

[5] This explains the references to such high numbers of competences still to be transferred, superior, by a considerable degree, to the list of competences contained in the SA.

discussion for decades, in order that the constitutional definition as "Chamber of territorial representation" might be adapted to the autonomous territories, instead of representing, principally, the provinces.

However, the most significant problem is that of financing. It has not been possible to establish a stable system that has been accepted, especially by Catalonia. From its approval in 1980,[6] the funding system of the AC has undergone radical reforms—in 1996, 2001 and 2009[7]—each of them seeking to establish the "definitive system." The system of Financing is based on the taxes made over by the State and on the capacity of the AC to establish their own taxes, limited by the impossibility of their being directed at taxable transactions already taxed by the State; the system is completed with the tax revenues that it transfers to the AC. However, in the process of successive reforms, significant tax revenues have been made over to the AC, such as 50 % of Income Tax and 50 % of VAT (Value Added Tax)—the two taxes that produce the highest revenue—whilst there has been recognition of the AC's legislative capacity in the transferred part of the taxation, with the object of stimulating fiscal responsibility.

Situated outsider this system are the Basque Country and Navarra that, with the application of the system of Economic Agreement,[8] ultimately dispose of a considerably higher amount of public resources per inhabitant (Zubiri 2000, 2007; Monasterio 2003; de la Fuente 2011).[9]

Financing is a key element of the dissatisfaction with the autonomous system particularly in Catalonia where there is a widespread sensation of fiscal mistreatment. It is felt that the resources assigned by the system are scant and that the contribution to inter-regional solidarity is excessive. The clearest evidence of this would be found in the alteration of Catalonia's ordinal position in public resources per inhabitant following levelling: AC benefitting from the levelling would enjoy more resources per inhabitant than AC contributing to it—which

[6] Organic Law 8/1980, of September 22, of Financing of the Autonomous Communities (LOFCA).

[7] The three profound reforms of the LOFCA were undertaken via Organic Law 3/1996, of December 27; Organic Law 7/2001, of December 27; and Organic Law 3/2009, of December 18.

[8] The roots of this system are to be found in the process of repealing the *Fueros* (*Charters*) of Navarra and the Basque Country at the end of the Carlist Wars, during the nineteenth century. The 1978 Constitution recognised this singular character in the First Additional Provision, which "shelters and protects the historical rights of the 'territorios forales' (territories ruled by *Fueros*)", whose "general update" will be undertaken "within the framework of the Constitution and the Statutes of Autonomy" (Corcuera Atienza and García Herrera 2002). Upon these bases, the system of Economic Agreement has been developed (Zubiri 2000; López Basaguren 2005).

[9] According to the analysis by de la Fuente, the problem lies not so much in the system of Economic Agreement, as in a "benevolent" calculation of the Basque Country's contribution to State expenditure, which is based on a low valuation of the State costs not assumed by the Basque Country and on the calculation of the VAT adjustment, which employs obsolete figures for the ratios reflecting the preponderance of the Basque Country in national consumption and in the base for the tax. The combined effect of both factors is a contribution that is considerably lower than that which corresponds; this difference amounted to 6.21 % of the GDP of the Basque Country in 2002 and 6.89 % in 2007.

includes Catalonia, but also Madrid and the Balearic Islands, principally—(Bosch 2012). Criticism apart, the 2009 system has done a lot reduce these two problems (López-Laborda 2010a, b). However, the Government of Catalonia is not satisfied and demands resources comparable to those that the Agreement system guarantees to the Basque Country and Navarra. The exceptional status of these two territories—and the generous calculation of their contribution to the General Treasury—have been possible owing to their reduced impact upon the system as a whole, approximately 8 % of Spain's GDP between the two of them; to extend this to Catalonia—which represents around 19 % of the Spanish GDP—would create considerable tension vis-à-vis other AC and would be difficult to sustain financially (Zabalza 2011).

This combination of structural problems in the system of territorial autonomy is causing, against the backdrop of nationalist criticism, growing tension, in certain territories in particular, which is increasing its loos of legitimacy and fuelling political strategies of rupture.

The "Principle of Availability" and the Attempt to Reform the Territorial Autonomy Through the Statutes

The diagnosis of the problems within the system of territorial autonomy pointed to the need for profound reform. It should affect, necessarily, important aspects of relations between the State and the AC, most notably, the delimitation of competences and the improvement in the system of financing the AC. Its objectives lie, fundamentally, in the constitutional sphere or, at least, in the general ambit of the system of territorial autonomy and not in the political-institutional field of the AC. A crucial question was thus asked with regard to the reform: could it be achieved via the SA or was it necessary to reform the Constitution? On the one hand, there was discussion over the appropriateness of the SA, as a legal norm, to deal with a reform such as the one contemplated, because of the issues it should address; and, on the other, the appropriateness of undertaking via the SA a reform that should be performed from a vision of the territorial system as a whole (Tornos 2006) and not only from the particular perspective of one specific AC. This question has been at the heart of the crucial confrontation over the reform of the system of territorial autonomy and its ultimate fate.

Although constitutional reform was considered necessary (Balaguer 2008a), politically it did not appear to be feasible. There was a fundamental problem that, probably, prevented it: the non-acceptance on the part of the conservative party—PP—of the diagnosis of the problems of the territorial system and of the objectives of the reform demanded by most Catalan political forces. However, in any case, the

climate of profound rupture between the two major parties—PSOE and PP—and the exclusion of the latter from any pact in Catalonia rendered it unworkable.[10]

The path to reform via the SA prevailed. Added to the difficulties involved in reforming the Constitution, the reason for this was the evident prominence of Catalonia in its impetus and in the establishment of its objectives (Colino 2009), although it was followed—or preceded, even—by the reform of other SA[11]; however, above all, what was decisive was the profound conviction regarding the suitability of the SA to achieve it. What was the basis for this conviction?

The Constitution configures an open system of territorial autonomy. This flexibility is not limited to the creation of the AC; it also affects the definition of the competences of each AC, which will have to be specified in their respective SA (Arts. 147.2 and 149.3 SC).[12] This set of constitutional provisions has been identified as the expression of a "principle of availability," which allows the autonomy of each AC to be specified in its SA (Fossas 2007). By virtue of this principle, the SA does not only regulate the internal political-institutional system of the AC, it is also the legislation that assigns competences. However, the constitutional guarantee of the distribution of competences, as an essential element of the federal pact, also exists in the Spanish system, because the SA form part of the laws that constitute the parameter of judicial review of the laws of the State and the AC: the CC should declare as unconstitutional laws contrary to Constitution and the SA, as norms that delimit the competences of the State and the AC (Art. 28.1 Organic Law of the CC—OLCC). Therefore, the SA contain, necessarily, substantially constitutional provisions; in other words, they are part of the "Territorial constitution of the State" (Cruz-Villalón 1991a).

The principle of availability—and its consequences—is closely related to the procedure for passing the SA. Compared with what occurs with the territorial Constitutions within Federations, the SA is not an autonomous manifestation of

[10] The political impossibility of constitutional reform was evidenced by the proposal for constitutional reform presented by the Government of the Socialist Party. On 4 March 2005, it agreed to request from the Council of State, in its role as consultative organ, a Report on a proposal for constitutional reform which, with regard to the autonomous system, proposed the inclusion in the Constitution of the denomination of the AC and the reform of the Senate. The Council of State Report was approved on 16 February 2006 (www.consejo-estado.es/bases.htm) and was the object of an important academic debate (Consejo de Estado 2006). However, it never had the opportunity to prosper.

[11] The Basque Country presented the first proposal for a new SA, which was rejected by the Lower House (1.02.2005); this was a proposed rupture, based upon what Basque nationalism called the "right to decide." During two terms in office (2004–2008 and 2008–2011) the new SA of Valencia, Catalonia, Andalusia, the Balearic Islands, Aragón, Castilla-León and Extremadura have been approved. The Canary Islands and Castilla-La Mancha withdrew their proposals during processing in the Lower House because of differences over the required modifications. Navarra also reformed its particular "SA" via OL 7/2010, of October 27. No reform proposals have been put forward by the AC of Galicia and five uni-provincial AC (Cantabria, La Rioja, Murcia, Asturias and Madrid).

[12] Art. 149.3 SC includes a clause of residual attribution of competences to the State, to whom will correspond all competences that—not being reserved for the State in Art. 149.1 SC—the SA does not attribute to the AC.

the territory's political will—constitutional autonomy—but a product of the combination of wills of the representatives of the territory and of the Parliament of the State (Art. 151 SC).[13] The constitutional function of the SA justifies the necessary concurrence of the will of the State in their approval, which, otherwise, would be simple political control of the internal political-institutional options. A relevant academic sector attributes to this peculiar characteristic considerable importance within the singularity of the Spanish system to the point that it would prevent it from being considered as a federal system (Albertí 2007, 2011).

Upon this basis, it is maintained (Viver 2005a, c; Balaguer 2008b, 2011) that the SA may delimit "with binding character" the scope of territorial competences and indirectly of those of the State. For this sector, the competences of the State—as in federal systems—would be "those expressly acknowledged by the Constitution"; but "in all that which is not *clearly* assigned it by the Constitution, the Statutes may reserve competences" for the AC, with the result that "these indirectly delimit the scope of the State's competences" (Viver 2005b; emphasis added). This means that not only is the SA competent to establish the *whether* of the competence (that is, whether the AC assumes or does not assume a competence that does not form a part of the competences reserved for the State), but also the *quantum* (that is, the extension of the competence) (Viver 2011).

In my opinion, the problem with this interpretation is the binding force it seeks to attribute to statutory provisions when they specify the limits of the competences reserved to the State in the Constitution.

According to Articles 147.2 and 149.3 SC, this function is limited to the allocation of the competences assumed by the AC within the framework established in the Constitution; in other words, amongst those that it does not reserve for the State. In spite of the formal differences, the distribution of competences between State and autonomous territories in the Spanish system is not qualitatively different from what is typical in federal systems: the competences reserved for the State/Federation are established directly in the Constitution and the list containing them (Art. 149.1 SC) is a typical list of federal reservation of competences. The system becomes complicated in the definition of the specific competences assumed by the CA. In the Spanish system there is no residual clause attributing to the AC everything that is not allocated to the State in the Constitution. To this end, the constitutional imprecision is limited to the consequences of the absence of a residual clause of this nature, which must be compensated for by the list of competences of the AC established in the SA. This constitutes, in the field of competences, the constitutional function of the SA and their configuration as parameter of constitutionality of the laws of the State and of the AC (Art. 28.1 OLCC).[14]

[13] The representatives of the territory present the project to the Lower House; a delegation of the representatives of the proposing territory and a Commission from the House agree upon the definitive text, which is submitted to referendum in the territory and, if approved, will be presented to Parliament for ratification as Organic Law.

[14] This aspect is complemented with what is included in Art. 28.2 OLCC, referring to Organic Laws as components of the constitutional block; in the case of the SA, it involves their

In order fully to understand this complicated constitutional architecture one should bear in mind that it was intended for circumstances in which, probably, only some territories would become AC or, in any case, not all would have all the competences permitted by the Constitution. In this context, to the State was reserved the exercise of a political control in the definition of the specific autonomy that, within the Constitution, would be assumed by each territory.

However, these provisions have been far exceeded. Autonomy is generalised throughout the territory and all the AC have assumed—minor details apart—all the competences permitted by the Constitution. The statutory lists of competences are, currently, the symmetrical opposite of the constitutional list of competences reserved for the State. In these circumstances, the statutory list of competences of the AC has lost, certain details notwithstanding, all the meaning intended for it. To such an extent, that it would make total sense for the SA to include, quite simply, a general clause—much like the traditional residual clauses of allocation of competences in federal systems—establishing that to the AC correspond all competences not allocated to the State in Art. 149.1 SC. This is what was proposed, quite provocatively, by Cruz Villalón (2009)—former CC Chief Justice—in the imaginary quotation from "an improbable book of legislative drafting style" for the drafting of SA and is perfectly illustrative of the significance of the constitutional function of the SA in the current state of development of the system of territorial autonomy.

Certainly, this has not been the route chosen. In the Spanish political context, in some territories in particular, it was inevitable that the SA, needing to specify the competences corresponding to the AC, would move within the limits of the constitutional allocation of competences to the State, attempting to exploit it to the maximum and, even, force it as far as was possible. This is the reason why, to guarantee constitutional limits, in the "first generation" SA—modelled upon the SA of Catalonia of 1979—there was a proliferation of clauses "without prejudice": a competence was allocated to the AC "without prejudice" to the contents of the constitutional provision that established the competence of the State or of the Organic Law referred to by the Constitution. In this way, the question remained open to post-constitutional development and to the moment, when this was the case, of the conflict between norms that would activate the control of constitutionality by the CC.

This has been an option that has provided some significant results. On occasions, the State Legislature, by regulating the area via the Organic Law required by the Constitution, followed the criteria established in the SA; or the Organic Law allowed for certain options in those cases when the SA made such provisions. In other cases, the efforts of the CC to render compatible Constitution and SA have enabled the AC to exercise competences in fields where there were doubts regarding the possibility of accommodating a territorial competence (Viver 2011; López Basaguren 2011a).

configuration—in their status as "basic institutional law" of the AC (Art. 147.1 SC)—as parameter of constitutionality of the laws of the AC.

The new SA of Catalonia (SAC)—paradigm of the "second generation" SA—has sought to exploit this path to the maximum, specifying, in a generalised manner, the material limits of the competences reserved for the State in the Constitution, as well as the functions corresponding to it; especially, the significance of the function of issuing *basic rules* in the legislative competences shared by State and AC. The question is whether, in this operation, the SA can go beyond the effects of a residual clause in the traditionally federal sense. Given the qualitative similarity of the list of competences reserved for the State to the lists of competences of the Federation, this hypothesis must, as a general rule, be rejected (Ortega 2005). The imprecision in the allocation of competences to the State is a question of interpretation of the Constitution, not of integration or development of its provisions.

Certainly, the laws—also, in particular, the SA—represent an interpretation of constitutional limits. The SA, therefore, may introduce the provisions it considers to be compatible with the Constitution; also in the field of distribution of competences. However, in doing so, the SA would not be defining elements that the Constitution had intentionally left open in order to be closed by this special law; it would be merely interpreting the meaning of certain constitutional provisions regarding the distribution of competences. In other words, these dispositions do not have a "material" constitutional nature and, consequently, they are not binding on the judge who has to review the laws from the perspective of the Constitution, in the terms of Article 28 OLCC. It would be difficult for this to be otherwise, taking into account the rules of a SA are "by definition subject to the Constitution and open to being declared null by the Constitutional Court" (Tornos 2006): the CC should interpret the rules of the SA "in accordance with the Constitution" and not the constitutional rules "in accordance with the Statute of Autonomy."

As a consequence, of the democratic principle, the CC, when controlling the constitutionality of laws, is obliged to adopt an attitude of *self-restraint* that requires deference to the legislative option; its annulment, on the grounds of unconstitutionality, can only occur in the event of the CC being unable to reconcile it with the interpretation of the Constitution. In the event of a conflict between a state act of exercise of a competence reserved for it by the Constitution and the delimitation established in the SA considered by the AC to have been violated, both must be confronted with interpretation of the constitutional provision that attributes the competence to the State. In this sense, the existence of a statutory norm delimiting the competence of the AC in interpreting the limits of the competence reserved by the Constitution for the State will require of the CC, if it regards as in accordance with the Constitution the exercise of the competence by the State, a justification of the interpretation of the constitutional norm in different terms to those specified by the SA. Indeed, Viver (2011) clearly states that he has no doubt that "as a law subject to the Constitution, the Statute and its reforms are permanently submitted to a control of constitutionality which corresponds, as the highest judge, and 'at all times' (LB 57 [SCC 31/2010]) to the Constitutional Court." However, how then can they constitute this "legally secure constitutional parameter" in the control of conflicts over competences on the part of the CC, which was the object of the reform?

The answer might be found in an element that this scholar discourse underlines in a particular fashion in the peculiar features of the SA in the Spanish system: its status as "political pact" between the State and the AC. The basis for this consideration would lie in the peculiar process of approval of the SA and of their reforms and in their particular legal nature: the definitive formulation of the text is agreed upon by the representatives of the territory and a Commission from the Congress of Deputies; after being approved by referendum in the territory in question, it is ratified by both Houses of Parliament; it is adopted as an Organic Law (State law); and the State "will recognise and protect them as an integral part of its legal system" (Art. 147.1 SC).

The process of approval of the SA and its reforms has significant consequences, as its modification requires the concurrence of both wills—State and territorial. However, the problem arises in the consequences claimed to be deduced from its peculiarity. From its nature as a pact—denied by prestigious scholars (Muñoz Machado 2005)—some draw conclusions that pose considerable problems. The supporters of this thesis believe that the State should be obliged by the "statutory pact" in the exercise of the competences attributed to it by the Constitution and in the regulation demanding an Organic Law; in other words, in spheres or competences that do not form part of what the Constitution reserves for the SA. And this would be a condition that would not be merely an obligation of a political character but, apparently, an obligation of a legal nature (Viver 2010, 2011). In this way, without a doubt, the statutory options would be protected via the future exercise of their competences by the State in the areas affected.

The extraordinary consequences that would result from this characterisation of the significance of the SA is highlighted in the context of a statutory reform that seeks to define the significance of some of the central elements of the constitutional reservation of competences for the State and, also, determine elements the regulation of that, in accordance with the Constitution, corresponds to the State via Organic Law. In this way, however, the material ambit corresponding to the SA would be exceeded and the formal speciality of the SA would be transferred to material ambits where the Constitution enables another type of law that is not submitted to such strict and particular formal demands.

This expansion of the material ambit of the SA has important consequences vis-à-vis the democratic principle, as is evidenced by the approval of the new SA of Catalonia, in which the then major opposition party in the State Parliament did not participate in the agreement. This would mean that this political force could not opt, in the future, for different solutions to those established in the SA, in the exercise of competences that the Constitution allocates to the State, although it enjoyed sufficient parliamentary majority to do so.

This route had already been taken in the first SA—especially, in those of the Basque Country and Catalonia (1979). When, in these cases, the State has turned down the statutory option—particularly via organic laws—this has been regarded as non-fulfilment by the State of the "statutory pact." The interpretation of the "political pact" further encouraging progress along this path towards the loss of legitimacy of the system of territorial autonomy.

Here lies, in my opinion, the major problem with these interpretations of the SA. Admittedly, the SA is a crucial element, of extraordinary legal and political significance. The demarcation of its own ambit is not always easy to achieve, *a priori*, in an abstract manner. Its relationship with the Constitution is not simple. This means that the SA requires a flexible field of deployment. However, in reciprocal fashion, one cannot demand unqualified acceptance of the statutory options, as an indisputable concretion of the Constitution. One cannot expect the powers of the State to be subordinate to the statutory options, when, upon separation, they act legitimately, in accordance with the Constitution.

The excessive focus upon the constitutional function of the SA—which has led to talk of the "myth of the Statute as Constitution" (Muñoz Machado 2005)—has had negative consequences upon its own functioning and relevance as "basic institutional law"—that is, as "internal Constitution"—of the AC; and has spread the opinion that the rejection of that construction would be to ignore its constitutional significance. In this way, insufficient value is attributed to its function of configuring the political-institutional system of the AC, which is that of the internal Constitutions of territories in federal states.

The defence of the SA must be undertaken, necessarily, within the limits of federal *loyalty*, which requires logical acceptance of its subordination to the Constitution and the legitimacy of the activity of the parliamentary majority when exercising competences of the State, even when these are contrary to statutory dispositions; and accepting that to do this is not to show disloyalty towards the SA nor to violate any pact, but the exercise of competences recognised in the Constitution.

The Failure of the Attempt: The Constitutional Court Ruling on the New Statute of Catalonia

The Parliament of Catalonia passed—on 30 September 2005—a proposal for reform of the SA which, in the line established in the *Informe sobre la reforma del Estatuto* (*Report on the Statute's Reform*) (2003), sought to address the problems indicated in the diagnosis of the "broad autonomy of low quality" and others related to the national identity of Catalonia (Saura 2005). Despite the stated intention of keeping within the confines of the Constitution, this was an ambitious reform that, in the opinion of many, posed serious constitutional problems (De Carreras 2005). During its processing in the Lower House the governing majority at the time (Socialist Party), upon whom the success of the proposal depended, introduced important modifications; both in the most striking political aspects (references to Catalonia as nation), and in the more significant ambits from the structural point of view: the delimitation of competences and financing. The text, finally, was approved through referendum in Catalonia, ratified by Parliament and adopted as Organic Law 6/2006, of July 19 (De Carreras 2005; Colino 2009).

The Catalan political parties, which supported the proposal by a huge majority, regarded the resulting text as a minimum agreement. The deep political fracture produced during the process led the PP—a party that had had remained outsider the agreement in Catalonia and which opposed its approval in the Spanish Parliament—to lodge an appeal of unconstitutionality against the new SA.[15]

The appeal of unconstitutionality created an unprecedented situation; this was a direct and general challenge to the new SA, which had enormous political and legal significance. Until then there had existed a tacit respect for the constitutionality of the SA, which had not been formally contested (Cruz Villalón 2006), with the exception of some particular cases of confrontation between SA from different CA. However, this had not prevented the CC from specifying the meaning of numerous statutory provisions in order to render them compatible with the Constitution (interpretation in accordance with the Constitution).

The CC had to address the analysis of the constitutionality of the SA of Catalonia in extreme conditions. The *auctoritas* of the Court had been increasingly questioned, and its members accused of "partisan" alignment; Parliament was unable to agree upon the renewal of the members who had served their full term as stipulated by the Constitution (Art. 159.3 SC); one of the members was objected to and sidelined from the issue; another died and was not replaced; and one scholar (Pérez Royo 2007, 2009, 2010) questioned its capacity to judge a political pact between the State Parliament and the Parliament of Catalonia that, moreover, had been ratified in referendum by the electorate of that territory. All of this in the midst of a bitter confrontation between the two major parties, on the one hand, and between the majority of the Catalan parties and the contesting party—PP—on the other. In this atmosphere, the CC's decision took almost 4 years, until the issuing of CCR 31/2010, of June 28, with significant internal divisions in the Court.[16]

The CC adopted a rigid and inflexible position regarding its own function as supreme interpreter of the Constitution, refining itself as an authentic "extended or subsequent constituent power," the only one competent to emit "the authentic – and indisputable – definition of constitutional categories," which allows it to formulate "one of the various meanings that might admit a constitutional category"; a position that has been severely criticised (Requejo 2011; Viver 2011). Based on the delimitation of its functions in these terms, the CC lodged a comprehensive appeal in favour of the "interpretative ruling," specifying the interpretation that, necessarily, must be attributed to a particular provision in order for it to be regarded as compatible with the Constitution; that has also received different kinds of criticism (Díaz Revorio 2011; García Roca 2011).

[15] However, the PP did participate in the proposal to reform the SA of Andalusia, which contained a significant number of similar provisions to those of the SA of Catalonia that were contested before the CC. Appeals were also lodged against some provisions of the SA of Catalonia by the Ombudsman and the AC of La Rioja, Murcia, Valencia, the Balearic Islands, and Aragón.

[16] The other appeals against the SA of Catalonia were resolved by CCR 46 and 47/2010, of September 8, 48/2010, September 9, 49/2010, September 29 and 137 and 138/2010, of December 16.

The Ruling declared only a few provisions to be unconstitutional—in some cases, specific sections of a provision—of an extensive SA, in an appeal that contested a large number of its provisions. The effects of the Ruling, however, are much more profound, as a result of the "interpretation consistent with the Constitution" that it establishes in relation to different statutory provisions. The combined effect of both actions was to nullify the most significant objectives of the new SA. Analysis of the Ruling in the two most important fields, from the structural point of view—competences and financing[17]—is very revealing.

The principal objective of the reform was the clarification of the competences of Catalonia; in particular, it aimed to establish a clear criterion vis-à-vis the requirements and limits of the State's competence to establish *basic rules* in those areas where the Constitution reserves it this function. After stating that the SA cannot define constitutional categories—in other words, what is exclusive competence, what are the basic rules or what is meant by competence to execute—the CC declares Art. 111 SAC to be unconstitutional and nullifies the pretension that *basic rules* be configured as "principles or minimum common normative in laws with force of law, except in cases determined to be in accordance with the Constitution and the (. . .) Statute."[18] The CC considers that this provision is unconstitutional because it opts for one of the possible forms that the basic rules may assume, in accordance with constitutional jurisprudence. Although it acknowledges that the statutory characterisation is "the content that best adapts to the structural and homogenising function of the basic rules and the manner that, for reasons of stability and certainty, is most appropriate to them," it considers that the definition or delimitation of what should be the basic rules "is not an issue to be specified in a Statute, but only in the Constitution, that is: in the doctrine of this Court which interprets it" (SCC 31/2010, Legal Basis—LB—60).

In the sphere of competences, the rejection of this central element of reform is completed with the interpretation "in accordance with the Constitution" provided by the CC with respect to two other general provisions: those which define exclusive competences (Art. 110) and the implementing tasks (Art. 112) of Catalonia. With regard to the first question, it affirms that there is no objection to the definition of the functions that correspond to Catalonia in the ambit of exclusive competences ("in integral manner legislative power, regulatory power and the

[17] Admittedly, apart from other elements of a diverse nature, there was a third central element in the reform of the SA of Catalonia: the elements of the national status of Catalonia. The indirect reference to the national identity of Catalonia and, above all, the regulation of Catalan as "preferential" language, were also the object of declarations of unconstitutionality and of significant references to interpretation consistent with the Constitution, which nullified the pretensions of reform (López Basaguren 2011b).

[18] In relation to this provision, the CC also ruled as unconstitutional Art. 120.2, on Savings Banks, in which it stated that basic state laws in this area would establish "principles, rules and minimum standards" and attributed to Catalonia some aspects of the area, and Art. 126.2, on other credit institutions, which referred to "the principles, rules and minimum standards established in basic state laws."

executive function"); which does not mean, however, that it should be thus in the configuration of subjects as delimited by the SA, as it will be necessary to analyse in each case whether that delimitation is compatible with the allocation of competences to the State established in the Constitution, without statutory regulation being an obstacle to this. In other words, it nullifies the SA's pretension to specify the material limits of competences allocated to the State in the Constitution.

In similar fashion, the affirmation contained in paragraph 2 of the same article—in areas of exclusive competence, Catalan law is applicable "with preference over any other"—should be interpreted, in the opinion of the CC, in the sense that "it does not prevent the application of State law issued by virtue of its concurrent competences" and without undermining the clauses of prevalence and substitution contained in Art. 149.3 SC (LB 59). Finally, with regard to implementation tasks, regarding which Art. 112 EAC includes "regulatory power," understood as "provisions for the execution of State legislation," the CC considers that it cannot be understood as "regulatory power of general scope," but as legislative competence "of a functional character" that enables the issuing of "internal regulations of organisation of the services necessary for the execution" and of "functional structure of autonomous executive competence," as was established in its consolidated jurisprudence.

Certainly, it must be concluded that "the ruling practically deactivates all the novelties the Statute sought to introduce in this ambit" (Viver 2010), in such a manner that it totally fails to achieve its goals (Solozábal 2011a, b).

The second major objective of the reform of the SA of Catalonia was financing. During its passage through the Lower House, the initial proposal approved by the Catalan Parliament underwent an important modification in this area, ruling out the notion that, as in the system of Economic Agreement in the Basque Country and Navarra, the regulation, administration and collection of all taxes should correspond to the CA. In this framework, however, some provisions remained and continued to be the source of controversy. The CC ruled as unconstitutional a section of Art. 206.3 SAC, which subordinated the contribution of Catalonia to the levelling of resources between the different AC to the "similarity of the fiscal effort performed." The CC states that the determination of the fiscal effort to be performed by the AC corresponds only to the State, within the multilateral system of cooperation and coordination provided for in the Constitution, without, in any case, the SA of an AC being able to impose it upon others.

Moreover, the CC specified the significance of paragraph 5 of the same Article where it declares that the State "will guarantee that the application of the levelling mechanisms will in no case alter the position of Catalonia in the order of income *per capita* amongst the Autonomous Communities prior to the levelling." The CC considers that this provision is not unconstitutional, in that "it is not properly a condition imposed upon the State by the Statute of Autonomy of Catalonia," but the expression of a duty imposed by the Constitution itself on account of the principle of solidarity. According to the CC, this principle cannot suppose for the wealthier AC "greater prejudice than that inherent to all solidarity-based contributions,"

which excludes the result of the "worse relative condition of the contributor compared with the beneficiary" of the contribution; in that case, it would cease to be solidarity-based and to favour a balance between CA, creating an "imbalance of a different type to that which it sought to correct." However, in the opinion of the CC, this is a guarantee that "would only operate when the alteration in the position of the Autonomous Community of Catalonia resulted from, not the application of the levelling mechanisms, but exclusively to the contribution made by Catalonia as a consequence of its possible participation in these mechanisms." A surprising argument given that, if this is a demand imposed by the Constitution, it is hard to understand why it should be restricted to the part that Catalonia contributes to the levelling (López Laborda 2011).

Finally, with regard to financing, the CC specifies the interpretation in accordance with the Constitution of some aspects of Art. 210 SAC. This article regulates the Mixed Commission on Economic and Fiscal Affairs between the State and the AC of Catalonia. According to the EAC to this Mixed Commission corresponds "the concretion, the application, the updating and the monitoring of the system of financing, as well as the channelling of the combination of fiscal and financial relations" between the AC of Catalonia and the State (paragraph 1). This Commission has, amongst others, the functions of agreeing "the scope and the conditions of the making over of State taxes and, in particular, the percentages of participation in the use of state taxes, partially made over (...) as well as a five-yearly revision"; agreeing "the contribution to solidarity and to levelling mechanisms"; and negotiating "the percentage of participation of Catalonia in the territorial distribution of European structural funds." The CC recalls the State's competence to regulate the financing of the AC and that the decisions that affect the financial independence of all the AC must be taken within the multilateral organs. However, it specifies that this "does not prevent the specific and complementary action of the bilateral organs of cooperation." Its field of activity is limited to that typical of a "bilateral framework of negotiation and formalisation of agreements that complement, without questioning it, the general decision-making process within the multilateral organ of collaboration and coordination"; in other words, the functions of the Mixed Commission "neither exclude nor limit the capacity of the institutions and organisms of a multilateral character in the area of financing," as a result of which "they neither affect the reservation of Organic Law provided for in Art. 157.3 SC, nor substitute, impede or undermine the free exercise by the State of its own competences" (LB 135).

The difficulties involved in attempting to introduce statutory regulations in the ambit of financing, which would condition the system in a "unilateral" manner, were obvious (Tornos 2006, 2007; García Ruíz and Girón 2005). The failure of the pretensions of the Catalan proposal, in any case, took place, in the main, in the Lower House of the Spanish Parliament, precisely for this reason. The provisions retained in the text that was finally approved were of a little importance in

comparison with those initial pretensions.[19] Their interpretation by the CC brought into question, in any case, its capacity to impose its decisions in a unilateral manner. However, the reform of the LOFCA in 2009 has incorporated them within the general system, rendering them compatible with the demands of a system of a multilateral nature. The reform, qualitatively of utmost importance, substantially improved the financial situation of the AC and resolved many of the problems affecting the previous regulation (López Laborda 2010b). The Government of Catalonia, however, remains unsatisfied and demands the extension to Catalonia of the system of Economic Agreement or, in its absence, of a system guaranteeing similar resources to those of the Basque Country and Navarra. It is what is termed the "fiscal pact," (Paluzie 2012) which represents, at present, the principal grievance of the government of Catalonia and upon which depend the acceptance of the autonomous system or the option of strategies of rupture such as those calling for "sovereignty."

In short, CCR 31/2010, on the reform of the SAC has nullified, by one means or another, the pretensions of reforming the system of territorial autonomy that it contained. In the criticism of the Ruling, there is an aspect that directly affects the position of the SA and the attitude of the CC in the control of constitutionality of its provisions. There has been criticism in particular of the lack of sensitivity of the CC regarding the special nature of the SA and the scant deference shown it whilst performing this control of constitutionality (Albertí 2011; Vintró 2011). Certainly, in the ruling there is evidence in one direction and in the other (Solozábal 2011a). And, in my opinion, the CC did not have the same limitations or demands in every area; in some it was obliged to show deference and in others it could not avoid confrontation with the unconstitutionality of the statutory provision.

In general, those who criticise the lack of deference of the CC with singular nature of the SA in this Ruling demand the open interpretation of the function of the SA established by the CC in Ruling 247/2007, of December 12, regarding the SA of Valencia where it admitted the constitutionality of a statutory provision that established the "right to water" of the citizens of the AC of Valencia (Tornos 2008), although establishing an interpretation that limited its pretensions almost absolutely. It is true that this Ruling contains affirmations that the advocates of the reform of the SAC have attached great importance in recognition of the role that the SA may play in determining the competences of the AC (Viver 2011). However, the CC situates them within a framework that has often been ignored or avoided:

[19] The SAC also includes a third Additional Provision, regarding investments and infrastructures, according to which the State's investment in Catalonia in infrastructures, excluding the Interterritorial Compensation Fund "will be in line with the relative participation of the GDP of Catalonia in relation to the GDP of the State for a period of seven years", which can also be used "for the elimination of tolls or construction of alternative highways." The CC has declared, in any case, that this provision "should be interpreted in the sense that it does not bind the State in the definition of its investment policy, or undermine the absolute freedom of Parliament to decide upon the existence and quantity of these investments" (LB 13).

the statutory provisions must always be interpreted in accordance with the Constitution, this being the only parameter to judge their constitutionality; they complement the Constitution, but in a subordinate manner; they are limited by the areas reserved to other organic laws, which, by defining their own ambit, limit the efficiency of the former; they have the function of determining the competences of the CA, but without influencing the deployment of the competences reserved for the State in Art. 1491 SC; they can, in some ambits, delimit the competences of the State, but, fundamentally, in the ambit of the clause of residual attribution of competences and the CC being the interpreter of the limits imposed by the Constitution; they are prohibited from—like the State Legislature—the generic and abstract interpretation of the constitutional system of distribution of competences with the objective of general connection with all public authorities, imposing upon them its own interpretation of the Constitution; and to the CC corresponds the control of these limits, as ultimate judge of the Constitution.

The practical development of the system of territorial autonomy had shown us that, exceptionally, in a particular manner, it is possible for the determination of the competences of the AC in their SA to have consequences beyond the ambit of residual competences, being able to perform a function of delimitation of competence reserved for the State in the Constitution. That is what the CC expresses in the Ruling on the SA of Valencia. The problem with respect to the contrast between what is expressed in that Ruling and the interpretation contained in the Ruling on the SAC is to be found in the fact that what appears in the former to be an exceptional hypothesis, in particular cases, becomes the backbone of the definition of the competences of the AC in the reform of the SAC, seeking to delimit, via the SA, with general character, the competences reserved for the State in the Constitution.

In any case, CCR 31/2010 contains, on many occasions, a definite firmness that was absent from CCR 247/2007. The interpretation maintained in the Ruling on the SA of Valencia was severely criticised (Fernández Farreres 2008) and it was thought, even, that it paved a "constitutional path towards the Middle Ages" (Muñoz Machado 2008), insofar as it opened the way to the proliferation of valid laws without any practical application. However, I believe that the SA, in its status as "basic institutional law"—internal Constitution—of the AC demands, by confronting the possible unconstitutionality of its provisions, an attitude of *Federal Comity* (*Bundesfreundlichkeit*). Admittedly, Federal Comity "is a delicate relationship (...) a cultural phenomenon" that demands "a high level of trust" between different institutions (Oliver 2003). Then, this principle demands greater deference towards the SA in the control of constitutionality of its provisions. The peculiar openness or imprecision of many of the constitutional norms related to the system of federal autonomy and the function of the SA reinforce this need for special deference.

This does not mean establishing limits to the function of the CC in the control of constitutionality, and far less, to its capacity to declare the unconstitutionality of statutory provisions (López Basaguren 2011a; Fossas 2011). What it demands is an avoidance of the declaration of unconstitutionality of the statutory provision

whenever this is not essential, limiting it to cases where it is in major confrontation with the constitutional provision. A requirement that is particularly necessary in cases of abstract control of constitutionality of the statutory provisions; the appropriate moment for the cancellation will be the actual control of constitutionality, when the conflict between State law and SA law occurs in an effective way and where the CC must submit both to comparison with the interpretation of the constitutional norm.

The need for the deference required by *federal comity* is, in my view, especially evident in the cases where the constitutional provision which is the parameter of control of the statutory provision lacks precision—as the CC acknowledges to be so in many of the provisions make up the list of competences reserved for the State or in the indication of in what should consist the competence of the State to establish *basic rules*—; different are the cases where the statutory laws directly affect the rights of citizens. It should be borne in mind that in Ruling 31/2010 the CC nullifies, for instance, Art. 111 SAC, although it recognises that the statutory option is "that which best adapts to" the contents of the constitutional norm. Was it really necessary to declare the nullity of this provision in an abstract control of constitutionality? I think this should have been left for the moment when the conflict arose as a result of the effective exercise of the competence by the State; particularly given that the statutory provision left the door open to the exception of "cases which are determined in accordance with the Constitution." Furthermore, in this way, statutory integrity is respected and the way is left open to a hypothetical evolution of the constitutional interpretation that, if it occurred, once the statutory law had been nullified, would prevent it from having effect (López Basaguren 2011a).

If a consequence of this is the proliferation of non-applicable valid statutory laws, it does not appear, given the particular singularity of the SA, to be a grave problem, from a legal point of view, neither quantitatively nor qualitatively; and it is a consequence of the balances typical of a federal structure. The risk is of a political nature, if, as has already happened on many occasions, there is a lack of *federal loyalty* and no assumption, with all its consequences, of the subordination of the SA to the Constitution and the aim is to present it as a genuine interpretation of the Constitution or as a pact that binds the State beyond the limits reserved to the SA by the Constitution.

The Reform of the Constitution in the Way of Federalism: A Challenge

The reform of the SAC represented an extraordinary effort, but has achieved none of its fundamental objectives. It has left in its wake a feeling of deep frustration, especially in Catalonia, and a bitter confrontation between the two major parties—the parties in government those that might form a government—a poisoned political climate. Nevertheless, the structural problems of the system of territorial autonomy

remain virtually unaltered; and the passing of time without addressing them can only exacerbate the situation. The failure of the attempt to reform the system via the reform of the SA leads, necessarily, to the need to reform the Constitution. Not all the problems require constitutional reform, but this is necessary for some of the most important ones. It is difficult to know whether the time and effort devoted to the statutory reforms will facilitate or complicate the debate over the reforms that are needed.

In this direction, there are two prior problems. In the first place, a fundamental problem, of a general political character: the difficult viability of any proposal of constitutional reform. Some political sectors flatly reject the idea of constitutional reform, whilst other sectors see it as an opportunity radically to change the foundations of the system. Although the approval of a recent constitutional reform might suggest the contrary,[20] in the political climate that prevails in Spain reform only seems possible when imposed by external imperatives and secretly agreed upon by party elites. Secondly, the system of territorial autonomy is especially untouchable; this means opening the can of worms. This has been a favourite battleground for the two major parties; there is no basic shared diagnosis regarding the problems affecting the system of territorial autonomy or how to address them; and this question unleashes nationalist grievances, which are often situated beyond the general logic of the system. One understands why any appeal to the constitutional reform of the system of territorial autonomy is considered to be "an exercise in nostalgia" (Cruz Villalón 2009).

Nevertheless, the majority of scholars insist upon the need for constitutional reform. The constitutional regulation, contained in Title VIII, lacks sense after over 30 years of development of the system; the generalisation of territorial autonomy and the assumption of all the competences left free by the reservation of competences for the State by all the AC (García Roca 2011). By and large, these are procedural provisions, which have had a transitory value. The constitutional regulation has been limited, practically, to the list of competences allocated to the State. A list that, at this stage, in light of practical experience, poses significant problems, both in the delimitation of policy areas and in its internal functions. That means that in the Constitution there are a considerable excess of provisions useless now, a need for regulation of certain important aspects, and the list of competences allocated to the State, which is its backbone, requires a major adjustment.

Underlining the urgent need for constitutional reform of the system of territorial autonomy leads to a dilemma over which direction should be taken. Some feel bound to the particularities of the Spanish system, which fundamentally revolves

[20] On 27 September 2011, the Parliament approved the reform of Art. 135 of the Constitution, which introduced the requirements for budgetary stability. The reform was undertaken without prior debate and was privately agreed upon by the (then) President of the Government and the Leader of the Opposition. Previously, Art. 13 of the Constitution was reformed to incorporate the right of foreigners to passive vote in local elections, as a consequence of the ratification of the EU Treaty (Maastricht 1992).

around the central function of the SA as instrument of determination of the competences of each AC. Following the vicissitudes of the reform of the SA of Catalonia, this is an excessively well-trodden path, which has become an important source of internal tensions. In this context, the only alternative in the evolution of the system of territorial autonomy, if we wish it to be successful, is to advance along the path of federalism.

What does the reference to federalism mean? It is not the—largely sterile—debate over whether Spain is a Federation, or, if one prefers, a federal political system. It is something simpler. The extraordinarily positive balance of the experience of the development of the system of territorial autonomy over these past three decades or so—a landmark in our history—must be the starting point from which to address our future development. However, in this development significant problems have been highlighted that, in order for the experience not to fail, must be tackled firmly. In this sense, the diagnosis of the "broad autonomy of low quality" is an unavoidable reference, irrespective of whether one agrees with all its elements or not. The problem lies in the determination of the most appropriate solutions to try and resolve these problems; in other words, what should be the direction of the reforms that need to be undertaken. The reference to federalism means that in this task we should learn from the experience of the federal systems in our legal-political surroundings. Only thus can we provide our own system with the solidity that will enable it to face the challenges ahead. It is not a question of forgetting our singularities or the need to address certain elements of diversity within the system of territorial autonomy. We have examples that demonstrate that it is possible to do this successfully when the necessary conditions coincide. This is a federal option as a means of improving the system of territorial autonomy that benefits from the experience of the systems of our neighbours.

Does this option represent a break with our tradition, with our system of territorial autonomy, to the extent of rendering it unviable or risky? In Great Britain, Dicey (1893, 1913), in his radical opposition to the successive proposals of *Home Rule* for Ireland, maintained that their approval would mean the establishment of a new Constitution for the United Kingdom. He considered that it would represent *a leap in the dark*, which, moreover, would not resolve the Irish question; in this sense, it would be no more than a *fool's paradise*. The pretension of advancing along the paths of federalism in the development of the system of territorial autonomy in Spain, can this also be described as a leap in the dark that, as a means of resolving the nation's problems, would only be a fool's paradise?

Regardless of one's opinion of Dicey's views on *Home Rule* for Ireland, it is obvious that the development of the Spanish system of territorial autonomy over the last thirty or so years precludes this option from being a leap in the dark. The federal condition of the Spanish system is denied by the most enthusiastic supporters of its singularities—especially, of the constitutional function of the SA—and by those who believe that, given its limitations, it is not deserving of so honourable a description. However, symptomatically, some of the most prestigious foreign scholars affirm this condition (Elazar 1994; Watts 1999, 2009). What is important now is not a debate over the federal label; it is a case of clarifying whether taking as

a reference the experience of the neighbouring federal political systems poses problems of incompatibility or rejection, as a result of their not sharing the same foundations.

Even those who deny the federal nature of the Spanish system admit, in fact, its closeness to that category, denying it on account of specific aspects that other authors have shown to respond to theoretical models to which not all Federations correspond. In any case, it seems clear that the evolution of the system of territorial autonomy in Spain from the time of the approval of the Constitution (1978), which has profoundly transformed early expectations, has set it on the route of federal political systems. It would be a question of continuing along that path, in a process of gradually overcoming the limitations and singularities which, because of the decisions or indecisions of the time of its creation, prevented the incorporation of elements that, in different federal experiences, have proven to be useful in the functioning of the legal-political systems that are based upon the recognition of territorial political autonomy. To advocate that the future development of our system should follow the guidelines of neighbouring federal systems, therefore, could in no sense represent that leap in the dark repudiated by the English constitutionalist. In our case, it would mean continuing along a path that we are already treading, trying to learn from the experience of those who set off before us.

The risk that, on the other hand, we do run is that the call to federalism might become a fool's paradise, in the belief that it offers a certain remedy to the problems of integration and territorial stability facing Spain. There are aspects—in particular, the nationalist grievances—that will continue to be as source of tension even in a system that continues to learn and borrow from other federal experiences with a longer historical tradition. These are grievances that are unlikely to be satisfied in the terms sought by their supporters. However, the continued reinforcement of the federal architecture will allow them to be addressed from a more solid position; above all, because it will provide the system of territorial autonomy with a balance and rationality that, today, are not always present in sufficient a degree.

Bagehot (1867) pointed out that "no polity can get out of a nation more than there is in the nation"; neither will do any legal-political design. The deterioration of the political system in present-day Spain leaves one with few illusions as to the capacity of the party system coherently to progress towards institutional improvement along the path of federalism; nor with regard to the political effects of this process of evolution, were it to develop. The likelihood of understanding, at the very least, between the two major parties so as to advance in this direction, in a manner providing an answer to the current problems within the system of territorial autonomy and addressing nationalist grievances in reasonable and balanced fashion, making possible sufficient integration, generates considerable scepticism. Scepticism similar to that shown by Alexander Hamilton to Rufus King in 1797 regarding the high hopes some had concerning the chance and beneficial effects of the cohabitation between John Adams and Thomas Jefferson in the presidential tandem: "Skeptics like me quietly look forward to the event, willing to hope, but not prepared to believe."

References

AJA, Eliseo (1996): «Los principales periodos de desarrollo del Estado autonómico», *Anuario Jurídico de la Rioja,* 2, 121-144

AJA, Eliseo y VIVER, Carles (2003): «Valoración de 25 años de autonomía», *Revista Española de Derecho Constitucional,* 69, 69-113

ALBERTÍ, Enoch (2007): «Consideraciones del Informe sobre otras posibles reformas del modelo autonómico», in GÓMEZ MONTORO, Ángel J. (ed.): *La reforma del Estado autonómico. Jornadas de Estudio sobre el Informe del Consejo de Estado,* Madrid: CEPC, 106 ss.

ALBERTÍ, Enoch (2011): «Concepción y función del Estatuto de Autonomía en la Sentencia 31/2010, de 28 de junio, sobre el Estatuto de Autonomía de Cataluña», *Revista Catalana de Dret Públic,* Special Issue on the Statute's Rulling, 81-85

BAGEHOT, Walter (1867): *The English Constitution,* (quoted from the Oxford University Press edition, 2001)

BALAGUER, Francisco (2008a): «Lo Stato autonomico spagnolo: la stagione delle riforme», in D'ATENA, Antonio (ed.): *I cantieri del federalismo in Europa,* Milano: Giuffrè,

BALAGUER, Francisco (2008b): «La riforma dello Statuto d'autonomia dell'Andalusia nel contesto della pluralità di spazi costituzionali di ámbito europeo», in GAMBINO, Silvio (ed.): *Regionalismi e Statuti. Le riforme in Spagna e in Italia,* Milano: Giuffrè, 137-170

BALAGUER, Francisco (2011): «El Tribunal Constitucional como 'supremo intérprete' de la Ley de Aguas. Una reflexión sobre la posición de los Estatutos de Autonomía en nuestro ordenamiento constitucional y un comentario a la STC 30/2011», *Revista d'Estudis Autonòmics i Federals,* 14, 114-151

BOSCH, Nuria (2012): «Horizontal Equity in the 2009 Regional Financing Model», in INSTITUT D'ECONOMÍA DE BARCELONA: *IEB's Report on Fiscal Federalism'11,* Barcelona, 54-59

COLINO, César (2009): «Constitutional Change Without Constitutional Reform: Spanish Federalism and the Revision of Catalonia's Statute of Autonomy», *Publius. The Journal of Federalism,* vol. 39, 2, 262–88

CORCUERA, Javier y GARCÍA HERRERA, Miguel A. (2002): *La constitucionalización de los derechos históricos,* Madrid: CEPC

CRUZ VILLALÓN, Pedro (1991a): «La Constitución territorial del Estado», *Revista catalana de Dret public,* 13, recently in CRUZ VILLALÓN, Pedro (2007): *La curiosidad del jurista persa y otros estudios sobre la Constitución,* Madrid: CEPC

CRUZ VILLALÓN, Pedro (1991b): «La construcción jurisprudencial del Estado de las autonomías», *Revista Vasca de Administración Pública,* 31; now in CRUZ VILLALÓN, Pedro (2007): *La curiosidad del jurista persa y otros estudios sobre la Constitución,* Madrid: CEPC

CRUZ VILLALÓN, Pedro (2006): «La reforma del Estado de las autonomías», *Revista d'Estudis Autonómics i Federals,* 2,

CRUZ VILLALÓN, Pedro (2009): «La dificultad del Tribunal Constitucional como garante de la autonomía territorial», *Revista catalana de Dret Public,* 39, 21-36

DE CARRERAS, Francesc (2005): «Reflexiones sobre la propuesta de nuevo Estatuto de Cataluña», *Teoría y Realidad Constitucional*, 16, 43–82

CONSEJO DE ESTADO (2006): *El Informe del Consejo de Estado sobre la reforma constitucional. Texto del Informe y debates académicos,* Madrid: CEPC

DÍAZ REVORIO, Francisco J. (2011): «La tipología de los pronunciamientos en la STC 31/2010. Sus efectos sobre el Estatuto catalán y otras normas del ordenamiento vigente», *Revista catalana de Dret Public,* 43, 53-86

DICEY, Albert V. (1893): *A Leap in the Dark. A Criticism of the Principles of Home Rule as Illustrated by the Bill of 1893,* London: John Murray

DICEY, Albert V. (1913: *A Fool's Paradise: Being a Constitutionalist's Criticism on the Home Rule Bill of 1912,* London: John Murray

ELAZAR, Daniel J. (1994): *Federal Systems of the World. A Handbook of Federal, Confederal and Autonomy Arrangements,* Essex: Longman, 2nd. ed.

FERNÁNDEZ FARRERES, Germán (2008): *¿Hacia una nueva doctrina constitucional del Estado autonómico? (Comentario a la STC 247/2007, de 12 de diciembre, sobre el Estatuto de Autonomía de la Comunidad Valenciana),* Madrid: Civitas

FOSSAS, Enric (2007): *El principio dispositivo en el Estado autonómico,* Oñati/Madrid: IVAP/ Marcial Pons

FOSSAS, Enric (2011): «El control de constitucionalidad de los Estatutos de Autonomía», *Revista catalana de Dret Public,* 43, 1-19

GARCÍA ROCA, Javier (2011): «El intérprete supremo de la Constitución abierta y la función bilateral de los Estatutos: o la insoportable levedad del poder de reforma constitucional», *Revista Catalana de Dret Public,* 43, 87–120

GARCÍA RUIZ, José Luis y GIRÓN, Emilia (2005): "La financiación autonómica: ¿competencia constitucional o estatutaria?", *Revista Española de Derecho Constitucional,* 75, 33-58.

JIMÉNEZ CAMPO, Javier (1989): «¿Qué es lo básico? Legislación compartida en el Estado autonómico», *Revista Española de Derecho Constitucional*, 27, 39-92

DE LA FUENTE, Ángel (2011): «¿Está bien calculado el cupo?», *Moneda y Crédito,* 231, 93–150

LÓPEZ BASAGUREN, Alberto (2005): «El Concierto Económico y la financiación de la Comunidad Autónoma del País Vasco entre mito y realidad», in *El Estado autonómico: integración, solidaridad, diversidad. 25 años de Estatuto de autonomía del País Vasco,* vol. I, Madrid: Colex-INAP, 619-634

LÓPEZ BASAGUREN, Alberto (2010): «Trasformazioni dello Stato autonomico e reforma dello Statuto del Paese Basco: tra rottura e 'accomodamento a volontà'», in GAMBINO, Silvio (ed.): *Regionalismi e Statuti. Le riforme in Spagna e in Italia,* Milano: Giuffrè, 171-218

LÓPEZ BASAGUREN, Alberto (2011a): *Acerca de la caracterización del Estatuto de Autonomía en una perspectiva federal*, Zaragoza: Fundación Manuel Giménez Abad

LÓPEZ BASAGUREN, Alberto (2011b): «Nación y lengua en el Estatuto de Cataluña. Consideraciones sobre la STC 31/2010», *Revista General de Derecho Constitucional (Iustel)*, 13, 1-25

LÓPEZ LABORDA, Julio (2010): «¿No hay quinto malo? La reforma de la financiación autonómica», *Economistas*, nº 123, pp. 182-187

LÓPEZ LABORDA, Julio (2010): «La reforma del sistema de financiación de las Comunidades Autónomas: descripción, primera valoración y algunas cuestiones pendientes», in INSTITUT D'ECONOMÍA DE BARCELONA: *IEB's Report on Fiscal Federalism'09,* Barcelona, pp. 22-37

LÓPEZ LABORDA, Julio (2011): «La financiación autonómica en la Sentencia del Tribunal Constitucional 31/2010 sobre el *Estatut*», in TORNOS MAS, Joaquín (dir.): *Informe sobre las Comunidades Autónomas 2010,* Barcelona,

MONASTERIO, Carlos (2003): «Federalismo fiscal y sistema foral. ¿Un Concierto desafinado?», en *Hacienda Pública Española/Revista de Economía Pública,* 192 (1/2010), 59-103

MONTILLA, José A. (2003): «Los elementos formales en el proceso de producción normativa de lo básico», en *Revista Española de Derecho Constitucional,* 68, 89-120

MUÑOZ MACHADO, Santiago (2005): «El mito del Estatuto-Constitución y las reformas estatutarias», in *Informe de las Comunidades Autónomas 2004,* Barcelona: Instituto de Derecho Público, 731-

MUÑOZ MACHADO, Santiago (2008): «La senda constitucional hacia la Edad Media», *El Mundo* newspaper*,* 16 January

OLIVER, Dawn (2003): *Constitutional Reform in the UK,* Oxford: Oxford University Press

ORTEGA, Luis (2004): «The Descentralisation Alternatives on the Spanish Constitutional System», *European Public Law,* vol. 10, Issue 3, 469-480

ORTEGA, Luis (2005): «La redefinición por los Estatutos de Autonomía de la distribución territorial del poder contemplado en la Constitución», in ORTEGA, Luis (dir.): *La reforma del Estado Autonómico,* Madrid: CEPC,

PALUZIE, Elisenda (2012): «Perspectives on a New Economic Agreement for Catalonia», in INSTITUT D'ECONOMÍA DE BARCELONA: *IEB's Report on Fiscal Federalism'11,* Barcelona, pp. 60-64

PÉREZ ROYO, Javier (2007): «Hay que encontrar una salida», *El País* newspaper, 13 October
PÉREZ ROYO, Javier (2009): «La última palabra», *El País* newspaper, 5 September
PÉREZ ROYO, Javier (2010): «Por qué no», *El País* newspaper, 1 May
REQUEJO, Paloma (2011): «La posición del Tribunal Constitucional español tras su Sentencia 31/2010», *Revista Catalana de Dret Public*, 43, 317-341
SAURA, Joan (2005): «¿Qué quiere Cataluña?», in *El País* newspaper, 13 May
SOLOZÁBAL, Juan José (2011a): «La Sentencia sobre el Estatuto de Cataluña. Una visión de conjunto», *Revista de Estudios Políticos,* 151, 203-229
SOLOZÁBAL, Juan José (2011b): «Una Sentencia en la federalización del Estado», *Revista General de Derecho Constitucional (Iustel),* 13
TORNOS, Joaquín (2006): "Valoración general", in *Informe de las Comunidades Autónomas 2005*, Barcelona: IDP, 19 ss.
TORNOS, Joaquín (2007): "Valoración general", in *Informe sobre las Comunidades Autónomas 2006,* Barcelona: IDP,
TORNOS, Joaquín (2008): «La Sentencia del Tribunal Constitucional 247/2007 y el sistema constitucional de distribución de competencias entre el Estado y las Comunidades Autónomas», *Revista d'Estudis Autonòmics i Federals*, 7, 79–105
VINTRÓ, Joan (2011): «Valoración general de la Sentencia 31/2010», *Revista Catalana de Dret Públic,* Special Issue on the Statute's Rulling
VIVER, Carles (2003): «Finalmente una amplia autonomía de baja calidad», *El País* newspaper, 6 September
VIVER, Carles (2005a): «La reforma de los Estatutos de autonomía», in VIVER, Carles; BALAGUER, Francisco; TAJADURA, Javier: *La reforma de los Estatutos de Autonomía. Con especial referencia al caso de Cataluña,* Madrid: CEPC
VIVER, Carles (2005b): «Los límites constitucionales de las reformas estatutarias», *El País* newspaper, 6 May
VIVER, Carles (2005c): «En defensa dels Estatuts d'Autonomia com a normes jurídiques delimitadores de competències. Contribució a una polèmica juridicoconstitucional», *Revista d'Estudis Autonòmics i Federals*, 1, 97-
VIVER, Carles (2010): «Efectos jurídicos de la Sentencia del Estatut», *El País* newspaper, 20 July
VIVER, Carles (2011): «El Tribunal Constitucional, ¿"siempre, solo. . . e indiscutible"? La función constitucional de los Estatutos en el ámbito de la distribución de competencias según la STC 31/2010», *Revista Española de Derecho Constitucional,* 91, 319–351
WATTS, Ronald (1999): *Comparing Federal Systems,* Kingston
WATTS, Ronald (2009): «Spain: A Multinational Federation in Disguise?», in TUDELA ARANDA, José y KNÜPLING, Felix (eds.): *España y modelos de federalismo,* Madrid: CEPC, 55
ZABALZA, Antoni (2011): «El Pacto fiscal que España y Cataluña necesitan», *El País* newspaper, 9 November
ZUBIRI, Ignacio (2000): *El Concierto Económico en el contexto de la Unión Europea,* Bilbao: Círculo de Empresarios
ZUBIRI, Ignacio (2007): «Los sistemas forales: características, resultados y posible generalización», in LAGO PEÑAS, Santiago (ed.): *La financiación del Estado de las autonomías: perspectivas de futuro,* Madrid: IEF

Division of Powers, Distribution of Competences, and Configuration of Public Spheres in the Autonomous State Integrated in Europe

F. Balaguer Callejón

Introduction: Federalism and the Division of Powers

With regard to territorial division of power, federal or politically decentralized structures of state power favor the essential function of controlling political power and preventing it from becoming a power without limits, which is the core concept of constitutionalism. In the earliest forms of constitutionalism, the division of powers served this purpose, based on a reciprocal control between powers in a centralist state model. That mutual control was designed to procure freedom and citizens' rights, these being understood as rights that required the inaction of the state for their implementation. Division of powers was thus coherent with the idea that the state should not intervene in society, a principle typical of nineteenth century liberalism.

The transformation of the liberal state in a social state, which was also the transformation of the legal rule of law into a constitutional rule of law, was to involve a change in the understanding of the principle of the division of powers, not only because political parties were being developed and their actions organized into parliamentary systems where the dividing line between the legislature and the executive became blurred (as a parliamentary majority and government was becoming identified), while the line that separated the parliamentary majority from the opposition was being strengthened, but, above all, because the legal division of power, established in normative constitutions, was added to the political division of power.

In a state that has to intervene continually in social life, constitutional normativity involves recognition of pluralism that the earliest constitutionalism had denied and that the inter-war constitutionalism had been unable to organize into a constitutional system that could serve as an instrument for peaceful coexistence

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amongst all sectors of society. In normative constitutions, on the contrary, the social pact is articulated by recognizing the preference for the majority in order to develop its political program, but at the same time minority rights are guaranteed by the constitution itself.

This fundamental transformation was consolidated in Europe in the constitutions of the second half of the twentieth century. However, the normativity of the constitution is accompanied, in certain constitutional systems, by supranational processes of integration and territorial decentralization of the state. Both processes involve a new division of power that is not usually reflected in the constitutional dogmatic but can currently be considered of greater relevance in the context of the globalization where we are immersed. Indeed, starting from the processes of supranational integration and territorial decentralization, we can define a plurality of constitutional realities that converge in the same territory, giving a new dimension to the principle of the division of powers.

This dimension is clearly projected onto the legal field, in the legal division of power that is manifested in the distribution of competences established in the constitutions or in the fundamental rules of the supranational structures. However, at the same time, it is projected, although to a lesser extent than it should be, onto the political division of power, in the public spheres where democratic decision-making processes are developed. As we will attempt to demonstrate in this work using the Spanish case as an example, a remarkable asymmetry exists between the projection that the distribution of competences has (and, therefore, the legal division of power) and that which the public spheres have (and, therefore, the political division of power), given that, as regards the latter, a predominance of the state public sphere still exists that no longer corresponds to the distribution of competences between the different state and infra- and supra-state authorities.

The Spanish case is interesting for analyzing the asymmetry between the legal and political divisions of power because in Spain, in a relatively short period, political decentralization and supranational integration have taken place simultaneously, with the development of new infra- and supra-state public spheres that were not directly contemplated in the constitution. Indeed, the Spanish Constitution of 1978 did not create the Autonomous State, which has been progressively developed based on the precepts of the constitution down to the present. Moreover, in 1986 Spain became a member of the European Community, now the European Union, and has gradually assumed the transformations that have taken place in the European institutions since then. Thus, in the last 30 years, based on a normative constitution that established a democratic system, Spain has experienced a dual transformation of considerable scope: profound political decentralization and its integration in the supranational structure of the European Union, both entailing dynamic processes that continue to evolve now and will do so into the future.

The Division of Powers in Normative Constitutions

Insofar as in a normative constitution the division of powers is articulated through a system that attributes competences to the state bodies, that definition of competences means that control of power is no longer founded solely on the mutual control of the different powers of the state, but also on their external control, the control of the constitutionality of the exercise of its functions, of its conformity with the constitution (as regards the respect for the order of competences and with regard to the material congruence of its exercise with the constitutional text). That external control is based on constitutional democracy (that guarantees minority rights), while reciprocal or internal control of the different powers of the state are built on the confrontation between the majority that governs and the minority that controls in the daily exercise of political activity.

Both controls (internal and external) correspond to two ways of dividing power and, in this respect, both update the principle of the division of powers that, again, splits into two in an internal and external division of power. Moreover, external control has a dual aspect: on the one hand, it is a manifestation of the principle of the division of powers and, on the other, it guarantees effective implementation of that principle and the subjection of all public powers to its legal and constitutional procedural limits.

In general terms, it could be said that external control is a legal control whilst the internal or mutual one is a political control. However, that claim should be clarified. All controls are regulated by law and in that sense all are legal. What happens is that external control implies legal limitations on the actions of the public powers and is based on an objective parameter, whereas internal control is not based on legal limitations nor is it performed within an objective parameter.

Differentiating between these two areas of the division of powers does not prevent interferences between the two, especially when reciprocal control is shown at times to be ineffective because of the stagnation of the structures handed down from earlier historical times that corresponded to other needs. The impossibility of proceeding to reciprocal control may lead to the incorrect use of external control mechanisms as a substitute for internal control (this occurs in every claim of unconstitutionality that does not proceed from an authentic conviction or from a real doubt about the consistency of a rule with the constitution, but rather from a political strategy developed as a reaction to a negative response of the majority to reach a consensus). This confusion between internal and external control may correspond to specific needs but can also be the clearest example of atrophy in the traditional mechanisms of internal control that makes it necessary to seek an exhaust valve in external control.

The Division of Powers in a Supranational Context

To the diversity of formulations of the division of powers and control of power in normative constitutions, can be added, the European sphere that involves the process of European integration. Paradoxically, integration has been implemented from the standpoint of the division of powers and control of power. On the one hand, in the field of the European Union, there is no institutional organization clearly based on this principle, so they are essentially the states which adopt the relevant decisions by means of the procedures of supranational agreement, within the Council. Clearly, the European Parliament is gradually adopting an ever more important role but it cannot be said that its position is comparable to that of the national parliaments. On the other hand, control of power, which is exercised in the national public spheres confronting the majority and the opposition as well as through public debate promoted by political parties and the media, is absent. In the European Union, public debate continues to be structured around the national interests of the states, which are the ones that essentially control European political processes. We can say that, despite everything, an external control of power *does* exist, exercised by the Court of Justice, and based on parameters and techniques that are similar to the constitutional ones.

The absence of an internal division of power comparable to that of the constitutional systems of the member states, with a political control of power that allows the institutional structure to be characterized as democratic, is so evident that it is common to highlight the incompatibility between the democratic principles that the EU demands of new states that join it and its own internal organization.

However, it should be stressed that the process of European integration incorporates (despite its shortcomings from the democratic point of view) a division of power that acts as a restriction on the political power of the member states. It is a limit that is already manifested at the constitutional level, inasmuch as it generates a fragmentation of the constituent power of the national state.[1] However, at the same time, it is also a limit that creates an additional guarantee for the democratic constitutional structure of each member state.[2] Finally, it is a limit that makes the additional guarantee of democratic conditions for the exercise of power in each of the member states possible.[3]

Thus, paradoxically, the democratic deficit the European Union, despite having a negative impact on the democratic quality of the member states, is not incompatible

[1] Cf. in this respect, my work: Francisco Balaguer Callejón (2002), pp. 99–130.

[2] Cf. my work: Francisco Balaguer Callejón (2009a), pp. 65–94.

[3] Cf.: Articles 2 and 7 of the European Union Treaty (TEU). In accordance with Article 2 of the TEU: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law, and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society characterized by plurality, non-discrimination, tolerance, justice, solidarity and equality between men and women." For its part, Art. 7 of the TEU establishes the measures that can be adopted against those states where a serious and persistent violation of the values proclaimed in Art. 2 of the TEU occurs.

with its functioning from the point of view of the division of powers and control of power of those states. Supranational integration thus involves a specific formulation of the division of powers that, at the least, favors the democratic stability of the European states.

The Evolution of the Autonomous State in Spain and the European Projection of the Territorial Level

The Spanish Constitution of 1978 does not contain a specific territorial model but rather it established a framework within which different possible configurations of the state were possible from the territorial point of view. The absence of a model in the constitution has yielded certain advantages in the transition towards the Autonomous State, such as greater flexibility and a gradual, progressive evolution without sudden transformations (something especially positive if we bear in mind that the Spanish state was strongly centralized, since its organization dates back to the dictatorship). However, at the same time, the so-called "deconstitutionalization"[4] of the territorial structure has sparked many problems in different areas.

The dispositive principle where the construction of the Autonomous State is based has impregnated all aspects where this formula has been deployed. Those subjects that could exercise the right to autonomy (nationalities and regions) had the possibility of deciding practically everything: from the access path to autonomy (full or deferred) to the number and quality of the competences taken on, as well as the institutional configuration that they considered appropriate [with the generic limits of Article 152 of the Spanish Constitution (SC) for those Autonomous Communities that had followed the access route contained in Article 151 (SC)].

As well as the indefinition of the number of Autonomous Communities itself (of which there are finally 17, although there could have been 19 or 15), each Statute has been able to assume the competences it has wished to and with the level (legislative and executive development or only executive) that appeared most appropriate to it, within the limits established by the Constitution. For quite a few years, the State did not have the same competences in all the national territory since, of the 17 Autonomous Communities which were constituted, only 4 (Andalusia, Catalonia, Galicia, and the Basque Country) assumed all the competences that the Spanish Constitution did not reserve for the State, while the rest had fewer. That situation was resolved to a large extent after 1992, with the extension of the competences of those Autonomous Communities that had not followed the path

[4] Pedro Cruz Villalón (1982), p. 59. Cf. also, Pedro Cruz Villalón (1990). Clearly, the term, "deconstitutionalization" is of dubious application to this case in its traditional sense (cf. in this regard, my work: Francisco Balaguer Callejón 1992, p. 125, note 19). However, in the sense and context where it is used by Professor Cruz Villalón, it has proved to be enormously descriptive of the disassociation between Constitutional State and Autonomous State that occurs in the Constitution.

of Article 151 SC and that, by means of Organic Law 9/1992 and the subsequent processes of statutory reform, basically assumed the same competences as the other Communities. From that moment onwards, the Autonomous State was perceived to be following a path of consolidation[5] where it would be necessary to extract all the consequences of a State model similar to the federal one, distinguished from the classical regional State and based on an equal status between all the Autonomous Communities.

This evolution first pointed to the shortcomings of the constitutional regulation of the Senate (Upper House of Parliament). The Senate should be an authentic Chamber for territorial representation but, as it is not truly configurated by the Constitution as a Chamber that represents the Autonomous Communities, the articulation of state and autonomous policies proves difficult, despite being especially necessary in the context of the process of European integration.

The constitutional characteristics of the Autonomous State and particularly the absence of a specific constitutional prevision with regard to this State model not only affects the relationship between the State and the Autonomous Communities but also the relationship with the European Union. It must be borne in mind that the Constitution itself does not contain a specific clause about Europe and that an important deficit also exists in relation to Europe in the Statutes of the Autonomous Communities (that are, from the functional point of view, the Constitution of each Autonomous Community). However, that deficit has been resolved in the new Statutes of Autonomy that have been reformed in recent years (Andalusia, Aragon, Castile and Leon, Catalonia, the Valencian Community, the Balearic Islands and Extremadura, as well as that of the Organic Law for the Reintegration of the Autonomous Statute of Navarre: "LORAFNA"). Although up to now only 8 of the 17 Spanish Autonomous Communities have reformed their Statutes, the truth is that those eight Statutes represent the majority of the population and territory of the State and is, therefore, an important reform.

Compared to the unreformed Statutes and to the previous Statutes of Autonomy, the new Statutes of these eight Autonomous Communities are profoundly pro-European. Some, such as the Catalan or Andalusian Statute, contain more than 50 references to Europe or the European Union, which is an indication of the importance they have attached to this question (the others also include a large number of references of this type).

With regard to participation in the European sphere, the new Statutes incorporate the participation of the Autonomous Community in the formation of the positions of the State with respect to the European Union (ascendant phase) both indirectly (participation in the formation of the position of the State) as well as directly

[5] Political decentralization was completed throughout the whole country by means of the particular statutory regime of the Autonomous Cities of Ceuta and Melilla, the two Spanish enclaves in North Africa. This regime was established via Organic Laws 1/1995 and 2/1995 (13th March 1995), which approved the Autonomous Statutes of the cities of Ceuta and Melilla. These are territories that are not configured as Autonomous Communities and which, although they assumed wide material competences, lack legislative powers.

(participation in the Spanish delegations with respect to the European Union). Participation in the ascendant phase is established both multilaterally and bilaterally in relation to those affairs that exclusively affect the Autonomous Community and follows the guidelines established in the Agreements of 9th December 2004 prefiguring any progress (the possibility of assuming the Presidency of the delegations, in the case of the Statute of Catalonia or the Statute of Andalusia, in the matters related to the exclusive competences of the Autonomous Community, in accordance with that stipulated in the relevant regulation).

The participation of the Autonomous Community in the descendent phase is also regulated, the principle of institutional autonomy being explicitly or implicitly recognized. Therefore, it is recognized that the development and execution of the law of the European Union in the areas of its competence corresponds to the Autonomous Community. In some cases, specific previsions are contemplated regarding the exercise of the executive competences (management of European funds) or of the competences of legislative implementation of basic state regulations, which will allow the European regulations to be directly implemented should the European Union establish a regulation which substitutes basic State regulation (Statutes of Catalonia and Andalusia). In this way, it is hoped to prevent basic state regulations ending up by reducing the competences of the autonomous communities to zero in these cases, as they occupy, through the basic regulation, the entire internal normative field.

With regard to the early-warning system, the new States, although aware that the Protocol regarding the application of the principles of subsidiarity and proportionality was still not in force when most of them were passed, incorporated a generic reference to make future participation of the Autonomous Communities in their application possible. It should be borne in mind that a broad consensus existed in the European Union regarding the need for this early warning system which has been incorporated in the Lisbon Treaty, by means of Protocol Number 2 regarding the application of the principles of subsidiarity and proportionality.[6]

Other types of questions of a European scope that are included in the new Statutes affect the autonomous delegations in the EU, as well as the relations among the European regions, or establish specific obligations of information on the part of the State in certain fields, such as the case of the obligation of the State to report in relation to the revision of the Treaties, regulatory projects or to procedures followed by the Court of Justice.

[6] The Protocol came into force on 1st December 2009 with the Treaty of Lisbon.

The Organization of Constitutional Levels in a Politically Decentralized State Integrated Within a Supranational Organization

Articulation of constitutional levels is necessary in a context of territorial decentralization and supranational integration of the State. In such a context, constitutional references must be reciprocal so that the complex constitutional reality projected onto the citizenry can be coherent and balanced. Many constitutions of the member states of the European Union have incorporated European clauses, thus conforming what Peter Häberle has characterized as "national European constitutional law."[7] In the case of Spain, although the Constitution has not been reformed to incorporate this type of precept[8]—given that reform of Article 135 cannot be classified within this logic[9]—a significant acceptance of the process of European integration has taken place at the territorial level, as we have seen in the previous section, as a result of the latest reforms of the Statutes of the Autonomous Communities.

At the European level, signs of recognition of the constitutional reality of member states have also been seen. This recognition is shown in the dual function (hermeneutic and normative) that the Constitutional Law of the member states performs in relation to the fundamental law of the European Union. The first of these functions is recognized by the Charter of Fundamental Rights of the European Union when, in Article 52, Section 4,[10] it refers to interpretive criteria of its precepts which are framed within what Professor Häberle defined as "European common constitutional law",[11] expressing the idea that the constitutional law of the European Union has been formed and continues to be formed based on the common constitutional traditions of EU member states.

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[7] Cf. Peter Häberle (2000), pp. 87–104.

[8] Cf. my work: Francisco Balaguer Callejón (2009b).

[9] On the other hand, reform of Article 135, which came into force on 27th September, the same day as its publication in the Official State Gazette (BOE), implies entry of the European Union in the Constitution through the back door, given that while one objective of the reform, as indicated in the "Exposition of Reasons", is "to reinforce the commitment of Spain to the European Union", the truth is that the Constitution offers us from now on a regrettable "image of Europe": the references to the European Union are devoted to the limits imposed on the national public powers: the State and the Autonomous Communities "will not be able to…" Thus, the image of Europe which the reformed Article 135 of the Constitution projects is clearly negative: the Europe that limits and prohibits, which reduces the possibilities of developing public policies that make it possible to introduce social rights. It is not, obviously, an image that contributes to strengthening the commitment of Spain to the European Union because it distances the citizenry from the idea of Europe as it projects a certain way of viewing it that is incompatible with the values and principles that form part of European constitutional culture.

[10] Article 52.4 CFREU: "In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions."

[11] Peter Häberle (1993).

The normative function of the constitutional law of member states as regards the source of community law was already contemplated in Article 6.2 of the European Union Treaty (TEU) prior to the Treaty of Lisbon that referred to other legal systems in order to integrate the European legal system by means of accepting the fundamental rights set out in those juridical systems as general principles of community law.[12]

This normative function has not disappeared with the Treaty of Lisbon. On the contrary, the content of Article 6.2 of the TEU, which was incorporated into Article 9.3 of the Constitutional Treaty Project, became Article 6.3 of the TEU, in accordance with the Treaty of Lisbon, with the following formulation: "Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law."

Secondly, the constitutional reality of the member states is also directly reflected through its specific recognition on the part of European law. Thus, the Charter of Fundamental Rights of the European Union determines in Article 53 respect for the standards of protection of the rights established in the member states' constitutions, which cannot be restricted or adversely affected by the dispositions contemplated in the Charter itself.[13]

Likewise, Article 4.2 of the TEU, in the version modified by the Treaty of Lisbon, establishes that the Union will respect the national identity of the States, inherent to their fundamental political and constitutional structures and also with respect to local and regional autonomy.[14] Therefore, the European Union itself has recognized that a constitutional nucleus exists, made up of the fundamental political and constitutional structures of the member states which should be preserved. It has also recognized it, moreover, in relation to the territorial organization of the member states, as an integral part of their constitutional reality.

The constitutional reality of each of the spheres which converge in the territory of the European states comprising the European Union is called upon to carry out

[12] "The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law."

[13] Article 53 CFREU: "Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions."

[14] Article 4.2 TEU: "The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State."

greater interaction in the future. This refers to a dialectic based on a deeper and broader division of power than the national state previously knew: a division of power where the interaction between the different constitutional areas fosters new developments in fundamental rights and makes new ways to control power possible that are inherent to the existence of the different territorial authorities where their own political power is exercised.

In short, it concerns the creation of new constitutional realities that are more coherent with the process of globalization and must respond to the need to control power and the requirement for political accountability that is the basis of the principle of the division of powers.

The Need to Reorganize the Public Spheres and Adapt Them to the Real Competences of Each Level of Government

As we have previously seen, although unequally (curiously less at the state constitutional level than in the Statutes of Autonomy or the fundamental regulations of the European Union themselves), there exists a recognition and an interaction between the different levels in the legal field. However, the transformations that have taken place at the supranational and territorial level are not equally manifested, with the corresponding scope, at the political level of each of the public spheres. The cultural dimension of the national state is projected inevitably onto the other two spheres (territorial and European), despite the fact that the competences that the state currently has are no longer the same. The over-dimension of the state public sphere in relation to the supranational or territorial sphere can be explained by different causes related to the perception of identity by the citizenry with regard to its configuration as a political community.

This situation is especially perceptible in relation to the process of European integration. The formation of a European political community depends largely on the development of a European identity. Clearly, insofar as the states are the main agents of the process of integration, it might be thought that they are also the principal parties interested in promoting a European identity. In fact, what exists of the European identity is largely because of the process of integration that the states have set in motion. However, it cannot be said that the states have always promoted European identity. On the contrary, it could be claimed that the states have promoted as much as hampered that identity. By means of supranational integration, the states have designed policies at the European level that have not been controlled either at that level (due to the absence of a structured public sphere and a consolidated European political community) or at the state level (because competences in certain matters have been transferred to the European Union). The result is that citizens have attributed responsibility for those policies to Europe, policies that were outside the control of the citizens because they could not be the subject of decision-making in the national sphere of each country, or the subject of

political debate at a European scale on the part of the citizenry. Europe's image has suffered considerably because of states operating in such a way.

This situation does not favor the construction of a European identity or allows integration to make sure and steady progress. At present, there is a clear asymmetry between the internal constitutional level and the European level. Without attaining it, that internal asymmetry seeks to combine a democratic constitutional culture at the internal level and a deficient legal and political culture at the European level, from a constitutional and democratic point of view.

Yet the construction of a European identity is not only hampered at the European level itself. The national constitutional cultures also continue to cling to determining factors that proceed from the past and hinder the construction of Europe. A large part of national constitutional law has more to do with the limitations derived from its historical conformation than with its insertion in the context of European integration.

On the other hand, the concept of a European identity itself should be the subject of reflection. It is impossible to think of European identity being built in the same way where national identities were historically formed. Europe does not need great Academies and Museums nor can it aspire to a single unifying language. The culture that can unify Europe from the point of view of the construction of its identity is the constitutional and democratic culture forged around the concept of European citizenship.

The national identity of the citizens of Europe is built around a system of constitutional and democratic values. That system is an essential component of identity that is manifested by means of an order of institutional legitimacy via which integration of the different social sectors is channelled. Orienting the components of identity towards the ideas of democracy and citizenship is bound to be strongly reinforced in the future. This is due to the progressive development of the multicultural components of many European countries.

In the context of ever more complex societies, it is difficult to articulate the keys to identity where the development of national states was based. The possibilities of continuing to maintain the idea of a "people" with common characteristics as a support for the constitutional systems grow ever smaller. On the contrary, the concept of citizenship may serve as a future reference for creating identity in European societies.[15]

On the other hand, it is evident that religious and moral values, however widespread and representative of the majority, do not allow us to construct a meeting place for all social sectors. That meeting ground can only be found in the constitutional spheres (European, state and autonomous communities) where democratic coexistence is ordered through an institutional organization and a system of rights and duties.

The concept of citizenship has, moreover, a clear future projection for the development of identity for many reasons:

[15] Cf. my work: Francisco Balaguer Callejón (2008a), pp. 1923–1933.

- It makes possible the configuration of an own identity in the different constitutional spheres where it is deployed (territorial, state and European).
- It is a neutral concept that prevents or reduces the confrontation of identities. Citizens' identity at all constitutional levels is complementary, each level incorporating a legal statute of common rights and duties that is added to the others.
- It lacks intrinsic territorial limits, making a European citizenship of variable borders possible, as the process of integration and enlargement advances.
- It establishes an essential continuity between those constitutional spheres because all of them define the rights and duties of the citizenry. This continuity fosters interaction between those spheres, which may contribute towards developing an ever more advanced statute of rights.

Overall, the concept of citizenship enables a conciliation of political, territorial, cultural and religious identities and an opening for new constitutional realities that are being developed inside and outside the state. Therefore, it is a concept for the future. This does not mean that it is a concept without problems and that it does not evidence certain inconsistencies that hamper its operational capacity.

Thus, for the concept of citizenship to be able to carry out that central function in European Constitutional Law, it should overcome its present shortcomings that obstruct it spreading to all the social sectors that make up the different political communities (autonomous, state and European) with a constitutional projection. This is the case of long-stay immigrants who are denied a citizens' statute of rights due to the historical link between citizenship and nationality.

Furthermore, as regards a concept that appeals to a legal order of rights and freedoms, citizenship cannot be disassociated from the constitutional and democratic context where it attains its full sense. That constitutional and democratic context is real and effective in the internal area of each member state. However, it still proves highly inadequate in the European area, which is one reason why the image of Europe is not always perceived positively by European citizens.

If the structural cohesion of Europe must be carried out around the citizenry, the latter is also the subject that will enable the constitutional construction of Europe through the configuration of a political community based on citizens' and democratic values. The projection of the citizenry at the European level and the formation of a political community cannot imply the end of states, in the same way that construction of a European identity is not equivalent to the disappearance of national identities.[16]

In reality, the articulation of the role of the citizenry and the states in the constitutional construction of Europe must be based on a balance inexistent until now: a balance where the citizenry can participate in the creation of a European public sphere that has virtually been monopolized by the states. That is the essential reason why the state public sphere is over-dimensioned compared to the European

[16] Cf. regarding the controversy about the possible configuration of the European Union as a "Super- state", my work: Francisco Balaguer Callejón (2008b).

one. The states have not allowed citizens to participate directly in the European sphere and for that reason, European public debate is channelled through the state and national public debates,[17] artificially increasing the size of the national public sphere with respect to the European one.

One example of the excessive size of the state public sphere with respect to the European one and that of the autonomous communities can be found in Spain. Spanish political culture is still too centered on the state political sphere, in such a way that the European and Autonomous public spheres take a very secondary place. The state is required to develop policies in areas that are no longer the subject of state powers because they have been decentralized at the territorial level or transferred to the European level.

As regards the public spheres of the Autonomous Communities, this orientation may be relativized up to a point, insofar as leadership in the state public sphere is weakened because of the political process itself. For example, when the national parties do not occupy power at the state level, their national leaders may see themselves in a weaker position with respect to the Autonomous leaders of that party who exercise power in certain Autonomous Communities. That does not necessarily mean greater attention to the public sphere of the corresponding Autonomous Community but it may, on the contrary, imply greater projection of Autonomous Community leaders onto the state public sphere.

At the same time, the consolidation of strong leaderships in the autonomous political sphere determines that different and even contradictory orientations can occur, with the lines established by the parties at state level. We have had some examples in the Autonomous State of conflicts between Presidents of Autonomous Communities and Ministers and Governments of the same party on specific questions. In these cases, territorial pluralism has also worked as a technique that is inserted into the division of powers and the constitutional mechanisms for controlling power.

In any case, the territorial division of power may contribute to fostering an autonomous political culture that serves as a counterweight to the state level and encourages the control of power when centralizing tendencies are generated at that level. As a mechanism for the division of power and for producing pluralism (in its specifically territorial formulation) it must occupy its corresponding public sphere, not only in its relationship with the state but also with respect to the process of supranational integration that the European Union implies.

[17] Cf. my work: Francisco Balaguer Callejón (2011).

Conclusions

The normativity of the Constitution is, in some constitutional systems, accompanied by processes of supranational integration and territorial decentralization of the State. Both processes involve a new division of power that is not usually reflected in the constitutional dogmatic but can currently be considered of the greatest relevance in the context of globalization where we are immersed. Indeed, from the processes of supranational integration and territorial decentralization we can define a plurality of constitutional realities that converge in the same territory, giving a new dimension to the principle of the division of powers.

That dimension is clearly projected onto the legal field, in the legal division of power, which is manifested in the distribution of competences established in the constitutions or in the fundamental regulations of the supranational structures. However, at the same time, it is projected, although to a lesser extent than it should be, onto the political division of power in the public spheres where the democratic processes of decision-making are developed. As we have sought to show in this work, using the Spanish case as an example, a remarkable asymmetry exists between the projection that the distribution of competences has (and, therefore, the legal division of power) and that the public spheres have (and, therefore, the political division of power), given that as regards the latter, there continues to exist a predominance of the state public sphere that no longer corresponds to the distribution of competences between the different state and infra- and supra-state authorities.

As we have been able to see, although unequally (curiously less so at the level of the state constitution than that of the Autonomous Statutes or, indeed, the fundamental regulations of the European Union), a recognition and an interaction exist between the different levels of power in the legal field. However, the transformations that have taken place at the supranational and territorial level are not equally manifested with the corresponding scope at the political level of the public spheres. The cultural dimension of the national state is inevitably projected onto the other two spheres (territorial and European) even though the competences currently available to the state are not what they once were. The over-dimension of the state public sphere in relation to the supranational or territorial one can be explained by different reasons related to the perception of identity of the citizenry with respect to its configuration as a political community. As regards the European Union, it has to be borne in mind that the states have not allowed the citizenry to intervene directly in the European sphere and, for that reason, the European political debate is channelled through the State and the national public debates, artificially increasing the dimension of the national public sphere with respect to the European one.

One example of the excessive dimension of the state public sphere with respect to the European and Autonomous Communities can be found in Spain. Spanish political culture is still too centered on the state political sphere, to the extent that the European and autonomous public spheres occupy a very secondary place.

Development of policies in areas that are no longer the subject of state powers is demanded of the State even though they have been decentralized to the territorial level or transferred to the European level.

In any case, the territorial division of power can contribute to fostering an autonomous political culture that serves as a counterweight to the state level and favors control of power when centralizing tendencies are generated at that level. As a mechanism for the division of power and the creation of pluralism (in their specifically territorial formulation), it must occupy the corresponding public sphere not only in its relation with the State but also with respect to the process of supranational integration that the European Union implies.

References

Francisco Balaguer Callejón "Diritto e giustizia nell'ordinamento costituzionale europeo," in *Giustizia e diritto nella scienza giuridica contemporanea*, a cura di Antonio Cantaro, G. Giappichelli Editore, Torino, 2011

Francisco Balaguer Callejón "El Tratado de Lisboa en el Diván. Una reflexión sobre constitucionalidad, estatalidad y Unión Europea," *Revista Española de Derecho Constitucional*, number 83, May-August, 2008b

Francisco Balaguer Callejón "La incidencia del Tratado de Lisboa en el sistema de fuentes de la Unión Europea y su influencia en los ordenamientos estatales," in F.J. Matía Portilla (Dir.): *Estudios sobre el Tratado de Lisboa*, Instituto de Estudios Universitarios/Editorial Comares, Granada, 2009a, pages 65-94

Francisco Balaguer Callejón "Constitución y ciudadanía en perspectiva europea>>, in AAVV *Estudios sobre la Constitución Española. Homenaje al Profesor Jordi Solé Tura*, Cortes Generales, Madrid, 2008a, Vol. II, pages 1923-1933

Francisco Balaguer Callejón *Fuentes del Derecho*, Editorial Tecnos, Madrid, 1992, Vol. II, p. 125, note 19

Francisco Balaguer Callejón "El *status* constitucional de la reforma y la fragmentación del Poder Constituyente," in AAVV, *La democracia constitucional. Estudios en homenaje al Profesor Rubio Llorente*, Congreso de los Diputados, Tribunal Constitucional, Vol. I, Madrid, 2002, pages 99-130

Francisco Balaguer Callejón "Possibilidades e limites da reforma constitucional na Espanha no contexto do Estado autonômico integrado na União Européia," *Direitos Fundamentais & Justiça*, nº 6, Porto Alegre (Brazil), 2009b

Pedro Cruz Villalón: "La estructura del Estado o la curiosidad del jurista persa," RFDUC, n. 4, 1982, p. 59

Pedro Cruz Villalón, "Introducción: la Constitución territorial del Estado" in P.Cruz, A.Porras, M.Medina, M.Terol: "El Estatuto de Andalucía.I. Las competencias," Ed. Ariel, Barcelona, 1990

Peter Häberle, "Gemeineuropäisches Verfassungsrecht," *EuGRZ*, 1991, Spanish version by Emilio Mikunda, "Derecho constitucional común europeo", *REP*, n. 79, 1993

Peter Häberle: "El Estado constitucional Europeo", *Cuestiones Constitucionales* nº 2, Mexico, January-June, 2000, pages 87-104

A Complex Model for Distributing Competences That Requires Further Safeguards

Paloma Biglino Campos

The Case of the River Guadalquivir Farmer

Trying to explain some of the problems inherent in the current power sharing system in Spain is by no means an easy task, even for experts in the matter. We also need to admit that, although the distribution of power forms the basis of federalism, reading about it proves particularly tedious. In order to avoid both pitfalls, I have decided to start with a brief tale that, whilst not foregoing certain scientific rigour, seeks to illustrate how a normal citizen (in this instance an irrigation farmer) might be affected by some of the peculiarities of our system. I hope that readers will forgive me for being so bold.

Scene 1: May 2011

> The old man peered out of the window and, despite the distance separating them, was able to make out the men he so dreaded. Without a moment's hesitation, he grabbed his shotgun, loaded it with two pellet cartridges and went out to meet them. When they showed him the credentials that gave them the authority to inspect the irrigation channel, the old farmer not only kept pointing his gun but also sank it into the man's chest. "Get off my land," he said. "The Andalusian government has no authority here."

The hero of our tale was indeed right to a certain extent. Just a few months earlier, in March 2011, the Constitutional Court had revoked Article 51 of the new Statute of Autonomy of Andalusia, which had given said Autonomous Community exclusive

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competency over the Guadalquivir River in the region. For the Constitutional Court, said power remained in the hands of the State.[1]

Scene 2: September 2011

> The old man peered out of the window and, despite the distance separating them, was able to make out the men he so dreaded. Without a moment's hesitation, he grabbed his shotgun, loaded it with two pellet cartridges and went out to meet them. When they showed him the credentials that gave them the authority to inspect the irrigation channel, the old farmer not only kept pointing his gun but also sank it into the man's chest. "Get off my land," he said. "The Spanish Government has no authority here."

Here, too, there are arguments to support the irrigation farmer's position. In August 2011, the national government passed a Decree-Law[2] by virtue thereof certain Autonomous Communities[3] were granted the power to inspect and manage inter-community waterways.

Third and Last Scene: At Some Point in the Future

> The old man peered out of the window and yet despite the distance could see his lands stretch out before him. There was nothing between him and the row of poplar trees that lined his irrigation channel. He trudged slowly up to the water. After gazing up a while at the sky, which had remained a clear blue for months now, he sighed and, with a gesture of resignation, turned up the water flow.

Readers will be asking themselves why the inspectors disappear from the story in the final scene. At the end of October in the same year, the State passed a Royal Decree[4] whereby the human and personal means that, subsequent to the approval of

[1] Constitutional Court Ruling (STC) 30/2011. The Court deems that said granting divided "the legal and administrative regime of the waters belonging to a single inter-community river," thereby interfering with Article 149.1.22 of the Constitution. According to said precept, "legislation, management and granting of means and use over water resources when the latter run through more than one Autonomous Community" is under the exclusive control of the State. In a similar vein, the Ruling dated 14 June 2011 issued by the Third Chamber of the Supreme Court revoked Royal Decree 1666/2008, on the transfer of functions and service of the General State Administration to the Autonomous Community of Andalusia in the matter of water use and resources.

[2] Royal Decree-Law 12/2011, dated 26 August.

[3] This included Andalusia, as Article 50.2 of the Statute of Autonomy grants said community power over public water policy as set forth in State legislation. In ruling 30/2011, the Constitutional Court had confirmed the constitutionality of this precept when affirming that "nothing may prevent State legislation from granting Autonomous Communities the functions or power over public water resources in inter-community waterways" (Legal basis 12).

[4] Royal Law-Decree 1498/2011, dated 21 October, whereby in application of the sentence, the human and material means transferred to the Autonomous Community of Andalusia under Royal Decree 1666/2008, dated 17 October are included in national administration.

the Statute, had been transferred to the Autonomous Community in Andalusia to manage the Guadalquivir River, were returned to national administrative control. However surprising it may seem, after renouncing the competence over the river, through the Decree-Law issued in scene 2 of our tale, the State took back the means to make such competence effective.

Although the characters and events described in the story I have just told are pure fiction, their resemblance to reality is no coincidence. It should be said that the story has been simplified because, amongst other things, I have failed to mention the problems that a Decree-Law such as the above cited, whose internal cohesion is as clear as water, causes in terms of legal application.[5]

Although this is just a tale, the fictitious events could serve to highlight some of the difficulties that our current Autonomous Community model entails. Indeed, the problem arises subsequent to reform of a Statute that sets out in detail the competences an Autonomous Community holds over inter-community waterways, the exclusive powers over the river Guadalquivir on its passage through the Community, and the joint powers of execution over inter-community waters, "notwithstanding" the powers of the State, "in the terms set forth in State legislation" or when such powers are attributed to the State.

My aim over the next few pages is not to explore the specific problems listed above, which have been cited merely because they are symptomatic of deep-rooted questions, but rather to examine some of the more general reasons that have brought this situation about. The first of these causes relates to how the Statutes of Autonomy were reformed in the matter of competences. A mention, albeit brief, should therefore be made of the aims that these changes sought to achieve, which will then allow us to gauge to what extent said goals have been accomplished. As we shall see later, some of the difficulties which prevented reform from being fully successful were not due to the manner the Statutes were drafted or to the Constitutional Court's interpretation thereof, but to deep-rooted factors concerning how the question of competence is conceived in the Spanish Legal system.

We will subsequently need to ask ourselves whether the problems referred to earlier might also be attributed to the system currently in place that seeks to ensure the distribution of competences. We will then examine whether the control that at present falls to the Constitutional Court prove sufficient or whether, in addition, other safeguards of a procedural nature aimed at securing greater territorial integration in the decision-making process should be adopted.

[5] In fact, Royal Decree 12/2011 amends the Code of Civil Procedure for the application of the International Agreement on the preventive embargo of ships, declares certain works of water infrastructure built for irrigation purposes to be of general interest, and regulates Autonomous Community competences in the matter of public water policy.

The Situation Today: The Constitutional Court Between the State and the Autonomous Communities

The latest wave of statutory reforms has broken away from a certain levelling that had gradually begun to emerge in the various Statutes of Autonomy. Today, the way that the Statutes of Andalusia or Catalonia, on the one hand, or those of Castilla y León or Valencia, on the other, deal with the distribution of powers differs substantially. However, in general, there is a tendency towards approaching the matter with far precision than before.

By way of an example, the Statute of Autonomy of Catalonia devotes over 60 Articles to defining and enumerating competences. The Statute of Andalusia does not go quite so far, although it does devote some 40 Articles to these issues.

This regulatory technique was adopted due to Autonomous Community need to expand their sphere of self-management. From this standpoint, the Autonomous Communities argued at the time[6] that they lacked exclusive competences, such that they were unable to adopt their own policies, even in areas where they had control. In fact, they enjoyed little autonomy since, in legislative terms, they were confined to implementing the decisions taken by the central authorities. Therefore, the aim was not only to increase but also to safeguard the competences of the Autonomous Communities question. In other words, the goal of the reform was to "shield" or "armour-plate" their competences on two fronts: against the State and against the Constitutional Court.

With regard to the State, of particular concern was the way the State had used its constitutional power when establishing rules, how it had availed itself of organic laws set forth in Article 81.1 of the Constitution—particularly in the matter of fundamental rights—and its use of horizontal legislation, such as general economic planning set out in Article 149.1.13 of the Constitution.

Dissatisfaction with the Constitutional Court lies particularly with the manner the Court had interpreted said State competences as the Court was deemed to have been over-generous towards the State, thereby damaging the interests of the Autonomous Communities.

The Constitutional Court ruling on the Statute of Autonomy[7] of Catalonia drastically curbed the latter's expectations. Whilst it is true that most of the new competences successfully passed the test of constitutionality, the Communities do not seem to have been quite so successful in achieving the main aims sought by those drafting reform. Briefly, this was first because the Constitutional Court refused to accept that State competences could be affected by the terms set out in the Statutes as these derive directly from Article 149.1 of the Constitution and not from any interpretation that Statutes may make thereof. Secondly, as we shall now

[6] The best description of this is still to be found in the first chapter of the *Informe sobre la reforma del Estatuto*, published by the Institut d'Estudis Autonòmics (2003), which in fact bears the title, "Balance y diagnóstico de la aplicación del Estatuto" (pp. 15–41).

[7] Constitutional Court Ruling (STC) 31/2010.

see, the Constitutional Court was categorical when stating that the Statutes of Autonomy are subordinate to the Constitution and therefore to the Court's own jurisprudence.

The Constitutional Court's decision has been the target of criticism from scholars, particularly in those Autonomous Communities affected by the Court's decisions.[8] A lot has been written and said on the matter[9] that no further attention need be devoted to the issue. However, what should be highlighted is the fact that many of the difficulties that have arisen to date do not so much concern the specific powers set out in the Statutes or the manner that these have been addressed by the Constitutional Court. The root of the problem indeed goes further and lies in the very way where the system of distribution of competences in our legal system has been implemented.

The Root of the Problem: The Structure of the Distribution of Competences

The model in question is rooted in the Austrian Constitution of 1920,[10] and reached our current legal system through the 1931 Spanish Constitution. Therefore, it is characteristic of states that underwent a process of "devolution" after centuries of centralisation.[11] The principal goal of such territorial structures was to restrict pre-existing and well-established state power, and thereby guarantee the position of the new territories.

Perceiving federal states in this manner is based on a specific interpretation of the Constitution. In its original Kelsenian form,[12] the Constitution is not restricted to creating the powers of the new federation (as is the case of the United States) but, because the Constitution establishes "total order," seeks to create a whole new territorial organisation of power and distribution of functions and competences between the various territories. Moreover, the Constitution distributes

[8] Not only Catalonia, but also Andalusia, in the sense that the latter's Statute of Autonomy copies some of the former's previsions regarding basic institutional regulations.

[9] For all these questions, see the work published by Carlos Viver Pi-Sunyer in issue number 91 (2011), of *Revista Española de Derecho Constitucional*, "El Tribunal Constitucional, ¿«Siempre, solo. . . e indiscutible»? La función constitucional de los Estatutos en el ámbito de la distribution de competencias según la STC 31/2010."

[10] By way of an example, when it was drafted, it listed almost 100 areas covering such apparently minor matters as veterinary affairs, high and low tension electrodes, mediation in private affairs, or the fight against plant diseases. On this matter, see Biglino Campos (2007).

[11] It has to be said that the term "devolved federalism" is not fully satisfactory because not all the communities or regions where political power was devolved actually held such power in the past, or if they did, did not hold the same type of political power. Even so, the term does suffice to mark out the difference between this kind of organization and others that, on the contrary, are the result of a process through which sovereign states opt to rescind part of their sovereignty to join the federation.

[12] H. Kelsen uses this concept of Constitution, for example in *Teoría General del Estado*, translated by L. Legaz Lacambra, México DF, 1975, p. 264.

responsibilities in a particular manner, conceiving the distribution of competences as virtually universal, as its aim is to embrace as many functions and areas as possible, such that the residual clause tends to have little application.[13] In addition, the goal is to be as exhaustive as possible by seeking to exclude any areas of uncertainty that may favour central power. Finally, exercising competences is seen as indeclinable and exclusive. In such legal systems, powers may be basic or developmental, legislative or executive, and can be held by the State or by the Autonomous Community. Yet, once it has been decided where the power lies, the competence must only be exercised by the authority that is legally empowered to do so, exercise by the other authority being deemed unconstitutional and, therefore, null and void.[14]

Thus, this understanding of the distribution of competences is characterised by a certain inflexibility, the main aim thereof is to ensure that the central authority does not exceed the limits of its powers.

However, this does not mean that the State or Federation lacks significant powers since, thanks to a historical legacy, it retains important competences not only by virtue of horizontal legislation but also due to the weight of the legislative function. A further point favouring the central authority is that such federalisms are executive. To a certain extent, they follow the theories of *pouvoir municipal* typical of the early nineteenth century, which placed decision-making in the hands of the central authorities and left the right and the obligation to apply such decisions in the hands of the regional authorities or communities.

Added to these features, which are common to almost all devolved federalism, the case of Spain evidences a further particular trait. In fact, the Constitution does not mark the conclusion of the model entirely, as it leaves greater detailing and specification thereover to the Statutes of Autonomy. These norms form part of the parameter of constitutionality but lack the strength of the Constitution, such that they are also subject to the test of constitutionality.

[13] In this respect, also significant are the differences with integrative federalisms such as the United States, where the Constitution confines itself to listing the powers of the federal bodies, the Tenth Amendment recognising the remaining powers as being delegated to the member states.

[14] Such a system rules out the possibility of shared (or concurrent) competences, where member states may continue to act in instances when the federation fails to do so, a situation that is commonplace in other models. In such instances, once the Federation does decide to intervene, and in view of the supremacy of federal law or *federal pre-emption*, member state rules are superseded. Although this particular vision emerged with the Constitution of the United States and is also set out under Article 72 of the German Constitution, it is best defined in Article 2.2 of the Treaty on the Functioning of the European Union, according to which: "When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence" (On these matters, Biglino Campos, P, *Federalismo de integración*. . .cited, p. 170, et seq.)

The complex distribution of power that I have just referred to has sparked tension in the territorial model, thereby reinforcing the weight of the Constitutional Court as the arbiter of the system. The Court acts as a judge over competences, the central State and member states or regions being submitted to its jurisdiction in equal measure.

It should be recognised that this way of distribution of competences has its advantages because both here and in other similar systems (such as Italy), it has enabled a peaceful transition from states that were previously centralised to states that are highly decentralised. Yet, it also entails certain drawbacks.

From a conceptual standpoint, it might be said that it recreates some of the limitations of German Theory of the State, as it functions on the basis of the latter's methodological approach, ignoring the fact that federalism, since its origin, is characterised by an overlapping of powers. In fact, there are two centres of authority governing the same group of citizens and the same territory (the federation and member states,) both of which are legitimised to issue laws.

On the contrary, our way of understanding distribution of competences is based on the creation of theoretical categories (notions such as exclusive, shared and executive competences), a conceptual apparatus that is extended to a range of areas which it attempts to dissect almost in the manner of Linnaean Taxonomy. However, such an aspiration is thwarted by one key factor: the fact that reality is extremely complex and defies any such segmentation into closed compartments.

To return to the same argument where we started, one example of this situation is water. Here, we can again see how this particular area may encompass a variety of related activities (from fisheries to hydraulic energy) or involve questions concerning health risks (for example, dumping). Mention should be made of the various uses that water is put, such as human consumption or irrigation, to cite just a few examples. Water may be affected by the exercise of other functions (such as general organisation of the economy) or by the application of other policies that may be imposed, such as fundamental laws (like consumer defence or environmental protection). And that is not all.

One further point to be considered in these matters, and one that depends on the nature of each, is that it is possible to exercise legislative functions (basic or developmental) or merely executive functions. Finally, it should be pointed out that each of the authorities involved in the issue of water, in other words the State, the Autonomous Communities, acts over a different territorial area. Moreover, local councils also have something to say, for instance in the matter of water treatment.

Both the Statute of Autonomy of Andalusia and that of Catalonia have sought to set out in extremely precise terms the competences that, in the matter of water, correspond to the Autonomous Communities. Yet, both Statutes address only certain aspects of the issue and in many instances do so notwithstanding the competences that may correspond to the State when it exercises its own competences.

Added to these difficulties is the fact that the detailed lists of competences may prove useful for measuring to what extent an Autonomous Community exercises certain powers. However, it proves far questionable in the case of the State, since

each Statute of Autonomy regulates functions and matters differently. This means that certain State rules and acts, which are appropriate for one particular Autonomous Community, may prove to be inappropriate or inapplicable in another.

The difficulties that the model entails are not only particular to Spain but may also be found in other legal systems that have implemented a similar power sharing arrangement. One such example is the *oggeti ad imputazione multipla* described by Antonio D'Atena,[15] in other words, areas related to various matters and to different competences. The author cites the example of nurseries in workplaces (that may involve protection in the workplace, and education), mobbing (civil legal system or tutelage and health and safety in the workplace), labour contracts that involve training (civil legal system, tutelage and health and safety in the workplace, training), agro-tourism (agriculture, tourism, health protection, fishing policy), or waste management (environmental protection, countryside, town planning, hygiene and health).

The complex distribution of competences inherent to models of this kind requires, above all, to establish mechanisms of cooperation between the various territorial bodies. Furthermore, it also reinforces the Constitutional Court's role as mediator since, even if the State and the Autonomous Communities are able to reach an agreement, tension might be created that demands a legal solution. The possibility of a repeat of what happened in the case of the Statute of Andalusia should not be ruled out. In this particular instance, there was no clash between the Autonomous Community and the State, the conflict in fact being put before the Constitutional Court by the Autonomous Community of Extremadura. It may even be the ordinary courts that submit the problem to the Constitutional Court by posing a question concerning possible unconstitutionality, or citizens who may be able to seek recourse to said Court. Such instances are less common but, as we shall see, do provide certain interesting cases.

Jealously Guarding Its Power

Thus far we have explored how detail in the enumeration of competences, the disperse nature thereof and, in the case of the Spanish system, their partial deconstitutionalisation, far from restricting the Constitutional Court's role within the system, in fact serve to highlight it.

It is within the nature of our system, which is Kelsenian in origin, that the Constitutional Court should act as "guardian" or "arbiter in the issue of competences."[16] However, the authority of the Court in Spain is greater than that.

[15] *Diritto Regionale*, Turín 2010, p. 146.

[16] The Austrian author describes the Constitutional Court in such terms. On this matter see "L'esecuzione federale. Contributo alla teoría e alla prassi dello Stato Federale, con particolare riguardo alla Costituzione del *Reich* tedesco e alla Costituzione federale austríaca" and "Le giurisdizioni constituzionale e amministrativa al servizio dello stato federale secondo la nuova

In fact the Court has not only the supervisory power over the ***exercise*** of the competences but also over the ***distribution*** of the competences. This decisive influence could put in danger the territorial equilibrium and position of the Constitutional Court in the entire system.

The main problem is that, in the end, the Constitutional Court position varies. The Court is not anymore an institution created to review the decision taken by representatives democratically elected. Far from this, the Court becomes the central actor in the decision making process.

To trace the thin red line that divides the State competences from the Autonomous Communities competences is a delicate task that can be done in technical terms. However, this mission also involves a certain degree of discretion. In fact, there are as many arguments to sustain a particular solution as there are in support of the contrary one.

It is true that this situation is not unique to Spain or to devolved federalisms, but may also be found in systems that embrace differing structures, such as the United States. Even so, it has to be said that our Constitutional Court has taken on this role with marked enthusiasm in its latest jurisprudence. There are several examples reflecting how said body has underpinned its role as an interpreter of the constitutional system of competences, to the possible detriment of other political stakeholders such as parliaments, or jurisdictional bodies.

The first such instance is Ruling 31/2010, on the previously referred Statute of Catalonia. In this decision the Constitutional Court analyzes the limits that the Statute establishes on the basic laws of the State. The Constitutional Court does ***not*** recognize that to decide what is basic or not is a competence of the State. The court does ***not*** declare that the State disposes of certain freedom under the Constitution previsions. In addition, the Court does ***not*** restrain its mission to review the State decision on the issue.

The Court put the point succinctly by declaring that to decide what is basic "is not a matter to elucidate in a Statute, but only in the Constitution, namely, in the doctrine of this Tribunal which interpreters it."

A further and recent example of the zeal shown by the Court when safeguarding its role in the territorial system may be found in Constitutional Court Ruling 66/2011, dated 16 May. For the claimants, the fact that the Administrative Court had neglected to take account of regional law, without previously raising the question of unconstitutionality, was in violation of due process of law.

Now is not the time to analyse the content and consequences of the Ruling. The only interesting fact worth highlighting is that the Constitutional Court, as it has done on other occasions,[17] assigned to itself any case involving a contradiction or conflict to arise between State and Autonomous Community laws.[18] The Court thereby rules

constituzione austríaca del 1° ottobre 1920." Both texts are published in *La giustizia costituzionale*, a cura di C. Geraci, Milan, 1981.

[17] Such as Constitutional Court Ruling 163/1995. On this kind of jurisprudence, De la Cuadra-Salcedo Janini (2011), p. 71 et seq.

[18] Legal basis 5.

out the possibility that the administrative court may fail to apply State or Autonomous laws.

Legal theory has explored in detail the problems concerning legitimacy that the *judicial review of legislation* has raised from the standpoint of democratic principles. In my view, such legitimacy deserves similar attention from the standpoint of territorial pluralism. In this instance, thought should also be given to the reasons that legitimise the role corresponding to constitutional justice as the positive legislator in territorial matters and the exclusion of other State powers, including ordinary justice, when delimiting the spheres of competences.

Are There Other Safeguards?

As we have seen, Spanish legal system establishes legal control as the principal safeguard for territorial pluralism, a task entrusted to the Constitutional Court, the body that rules over who is deemed to hold competences. Taking account of the manner where such competences are set out, when a conflict arises the Court examines the provision whose validity is under debate, frames it within the attributions put forward by each of the bodies or authorities involved, and finally subsumes said provision into the competency it deems to be most appropriate, given the function and matter in question.

As pointed out earlier, such a safeguard is required in any form of complex territorial organisation. Yet, the question we should ask ourselves is whether this is enough: in other words, whether other safety nets should be implemented in order to prevent the conflict itself.

I do not feel it necessary to mention the kinds of safeguards usually referred to as political and that involve aspects such as a Senate endowed with functions and a composition that is in truth territorial, or the current political party structure. Some of these may have juridical entity and may, in certain circumstances, prove effective. Yet, it should be recognised that it is difficult to ensure that this political guarantees fulfil their task since they are not always subject to jurisdictional control.

However, what I would like to refer to in somewhat detailed manner is another kind of safeguard that involves procedures imposed on public powers in the decision making process. Such requirements might consist of pre-requisites for the initiative, or a requirement that justify the exercise of the competence. On occasions, these safeguards seeks to ensure that territorial bodies, and particularly the central body, take into account other authorities in the decision-making process, thereby legitimising any solution adopted. In other instances, such procedures operate more as a restriction because the aim is to ensure that the institution that is acting does so within the confines of its own sphere of competence.

At least in Spain, jurists often tend to speak of the need to enhance and extend such safeguards when referring to executive powers, mention being made of means for establishing cooperation and coordination between Autonomous Community governments and central government. Yet, rarely is the need highlighted for

establishing similar mechanisms between legislative bodies, by implementing forms of participation and procedural requirements similar to those in place in other systems.

Such is the case, for instance, in the United States, where the Supreme Court has required from Congress what certain sectors of legal doctrine have called the *due process of lawmaking*.[19] This deliberative model states that any measure adopted by the House should pursue a clearly defined goal, that the need for federal intervention should be necessarily documented, and that other alternatives should be duly considered.[20]

A further example of such safeguards may be found in Article 72.2 of the German Constitution, a that restricts federation intervention in certain matters to the requirement that its legislation be indispensable in order to create equal living conditions or to ensure legal or economic unity. Moreover, the Constitution further strengthens these requirements by charging the Constitutional Court not only with the task of ensuring that the measure is indispensable but also whether this condition is maintained.[21]

From the time the Treaty of Lisbon came into force, the European Union has also strengthened this kind of safeguard by establishing fresh procedures to ensure the principles of subsidiarity and proportionality. In fact, the the control of the Court of Justice over the compliance with those principles has been tightened.[22] Furthermore, an early warning system has been created through which national parliaments intervene prior to the EU legislative procedure in order to ensure said criteria are complied with.

However, such safeguards are not totally alien to the Spanish legal system. The Constitution, it should be stressed, does contain similar safeguards in the form of requirements imposed on the national parliament enabling it to intervene in certain matters that directly affect Autonomous Communities.

Perhaps the most important of these procedural requirements is the need for each chamber, through an absolute majority, to issue one of the Laws of Harmonisation set out under Article 150.3 of the Constitution. One further procedural requirement that may be cited is the third additional provision of the Constitution, which stipulates that any change to the financial and tax regime of the Canary Islands shall require a prior report to be issued by the Autonomous Community.

Experience has shown that both procedural requirements have acted efficiently as restraints on national legislation, particularly as a result of having been applied by the Constitutional Court when ensuring the validity of national laws.

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[19] The expression was coined by Linde (1976), p. 197.

[20] On this matter, see Frickey and Smith (2002), p. 1728.

[21] Art. 93.2 LFB. On this matter, Arroyo Gil (2009), p. 48 et seq.

[22] Indeed, this control acquires fresh substance as Article 8 of the "Protocol concerning the application of the principles of subsidiarity and proportionality" deems non-compliance of said criteria to be a specific cause for annulment of EU acts, which may be made effective through procedures set forth in Article III-365 by the member states and at the behest of national parliaments.

It is sufficient to recall Constitutional Court Ruling 76/1983 concerning the Organic Law on the Harmonisation of the Autonomy Process. In its ruling, the Court required the Spanish parliament to evidence sufficient justification to intervene in Autonomous Community competences. The national parliament only was allowed to avail itself of such rules when the system for distributing competences set out in the Constitution proves insufficient for safeguarding the general interest of the nation.[23]

Further examples of the efficiency of such requirements imposed on legislators are Constitutional Court Rulings 35/1984 and 137/2003, wherein two Royal Decrees were found to be unconstitutional, having been drafted without the prior knowledge of the Autonomous Community of the Canary Islands.

The examples cited above are by no means the only procedural limits that our legal system imposes on national legislation. There are further requirements, set out in the Statutes of Autonomy, which have fulfilled a similar function. This is the case, for example, of the seventh additional provision of the Statute of Catalonia that required, and still requires, agreement between the Catalan Autonomous Government and the national government of Spain in order to modify the taxes ceded by the State to the Autonomous Community.

In this particular case, the Constitutional Court also drew on this provision when declaring Law 30/83, governing concession of national taxes to the Autonomous Communities, to be unconstitutional.[24] In the view of the Court, the absence of any agreement between the State and the Autonomous Community constitutes a procedural defect resulting from the failure to comply with a requirement aimed at ensuring the Autonomous Community's involvement in such an important topic as its financial resources.[25]

[23] The key argument underlying the Court's rationale is based on a systematic interpretation of Title VIII of the Constitution. In the Court's view, Article 150.3 constitutes "merely one part of the overall system for distributing competences." For the Court, the constituent assembly already took account of the principle of unity and the general interests of the nation when listing the competences that corresponded to the State. For this reason, the harmonisation laws are only justified when there is evidence of the "impossibility of the constitutional text being able to cover all instances." Based on this statement, the Court defines harmonization laws as "rules for concluding the system" and sets out the conditions where they may be used. According to the Court, the State may only resort to Article 150 in two instances; firstly, in the absence of any specific competence, set out in the Constitution, to establish regulation covering the matter in question. Secondly, when, despite the existence of such competence, it proves insufficient to ensure the harmony required by the general interest. Pursuant to this latter consideration, the Court recognises the State's right to establish harmonisation laws not only in matters that are exclusive to the Autonomous Communities but also where shared competences are concerned.

[24] Constitutional Court Ruling 181/1988. Specifically, subsection two of the third paragraph of the first final provision of Law 30/1983, dated 28 December, was declared null and void.

[25] The Court ruled that a requirement of this nature is not only justified due to the need to endow Autonomous Communities with an effective financing system but also because it "ties in with an inherent principle of cooperation and constitutional loyalty, which foresees adopting procedures involving consultation, negotiation or, where appropriate, a search for a prior agreement in order to establish regulations on matters of vital importance concerning implementation".

Conclusion

I do not wish to end these observations without first relativising some of the conclusions that might be drawn from what has been written. I therefore feel it necessary to make two kinds of clarification.

Firstly, it should be underlined that the procedural requirements and limits referred to only make sense when applied to the State, and lack almost all efficacy if applied to Autonomous Communities. Indeed, Autonomous Community rules, established in application of their own competences, are binding within their own territorial area and over the citizens within that territory. However, in the case of the State, it is different. It is not just a matter of the State's provisions being applicable over a general geographical area; as a result thereof, they also affect the areas controlled by the Autonomous Communities. It is also a question of the nature of the actual competences that correspond to the central authority. As highlighted previously, the federal model in Spain is executive in nature, such that fundamental decisions are adopted by the State and must be implemented (legislatively or merely in executive terms) by the Autonomous Communities. Whatever the State decides imposes certain obligations on the Autonomous Communities, a burden that at times shapes to a great extent the scope of the autonomy recognised by the Constitution.

The different nature of this position would seem to suggest that, when legislating, the State should embrace Autonomous Communities within the decision-making process, either as a whole—when said legislation affects all of them—or bilaterally, when the measure adopted by the State proves binding for just one of them.

The second clarification I wish to make is that the efficacy of such safeguards varies. In certain instances, they may serve to prevent possible conflicts, yet might not prove appropriate when judging the validity of the norms in question. For this reason, under no circumstances are they fit to replace the current system of power allocation.

Despite its drawbacks, the distribution of power between State and Autonomous Communities that characterises our system of devolved federalism and Constitutional Court control thereover remains the most effective means of ensuring that neither of the two territorial bodies exceeds its authority. Further, it is worth highlighting that the current model would prove even more effective the Constitution itself conclude the distribution of competences.

Yet, it remains true that raising the power allocation to such a status would not prevent the difficulties that exist when delimiting competences, a task where the Constitutional Court must continue to play a key role. However, including the distribution of competences within the Constitution would lift the pressure that the Constitutional Court is subject when forced to decide on such important political matters as reform of the statutes of autonomy.

Whilst admitting that such procedural safeguards may only act when applied to the State and that they may in no instance replace any judgement issued concerning

competency, we should not underestimate the advantages that said safeguards might contribute to our model of territorial organisation and to others of a similar nature.[26] The appropriateness of such mechanisms ties in with the actual nature of federalism that, from its beginning, has shown itself to be a further manifestation of political pluralism.[27] For this reason, if territorial organisation is to function correctly, it requires channels for expressing and negotiating amongst differing opinions, such that decisions may be taken in line with the basic ground rules of democratic principles, in other words, based on majority rule, respecting minorities and in a public process.

Thus, federalism is not an exception. The best means of ensuring integration, including territorial integration, is the actual procedure itself since what matters is not only *what* is decided but also *how* it is decided.

References

Arroyo Gil, A. *La reforma constitucional del federalismo alemán. Estudio crítico de la 52ª Ley de modificación de la Ley Fundamental de Bonn*, 28 August 2006, Barcelona, 2009, page 48 et seq

Biglino Campos, P. *Federalismo de integración y devolución: el debate sobre la competencia*, Madrid, 2007, page 130 et seq

De la Cuadra-Salcedo Janini, T. "Los principios de competencia y prevalencia como regla de resolución de conflictos en el Estado Autonómico," in Biglino Campos, P; Mapelli Marchena, C. (dir.), Garantías del pluralismo territorial, Madrid, 2011, p. 71 et seq

Frickey P.P. Smith, S.S. "Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique" 111 *Yale Law Journal*, 1707 (2002), page 1728

H. Linde in "Due Process of Lawmaking," 55 *Nebraska Law Review* 197 (1976)

J. Madison, *The Federalist, on the new Constitution*, Hallowell [Me.] Masters, Smith & co., 1857, p. 47

[26] It should also be remembered that their inclusion in our legal system will not always require the Constitution to be reformed, as some may be embraced in inferior norms.

[27] J. Madison cites as one of the advantages of the new Union, the limits that this may impose on the excesses of certain majorities. In this vein, he states "Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other" (Number X, Madison 1857, p. 47).

The Distribution of Competences in Spain a Year After the Ruling 31/2010 of the Constitutional Court: The Reaffirmation of the *Unitary State*?

Carles Viver Pi-Sunyer

Introduction

In the short space of time available to me, I propose, firstly, briefly to recall the effects of Constitutional Court Ruling 31/2010 upon the Statute of Catalonia in the area of competences and then, having focused the question thus, analyse the activity developed in this sphere during the first year following the Ruling by legislators—state and autonomous—and by the Constitutional Court of Spain (CC).

Although I will address these issues from the Catalan perspective, which I am most familiar with, I believe that much of what I will say is applicable to the other Autonomous Communities (AC). Furthermore, in answering these questions, I will point out some of the essential features that in my opinion define the system of distribution of competences prevailing in Spain today.

Obviously, given the aforementioned time restriction, I can only undertake a partial analysis of the questions posed and must do so, moreover, without the many nuances doubtless applicable to each and every one of the claims that I shall make. I hope to be able to refer to some of these qualifications in the debate that will follow our presentations.

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Effects of Ruling 31/2010

When taking stock of the impact of the ruling upon the Statute of Catalonia of 2006 in the sphere of the distribution of competences I think one should distinguish between legal and political assessment.

From the legal perspective, the ruling left things, by that I mean the competences, the same as they were before the process of statutory reform began or, in other words, with precision of a Swiss clockmaker, it deactivated virtually all the improvements that the new Statute sought to introduce.

Thus, following ruling 31/2010:

- The exclusiveness of the exclusive competences of the AC continued not to be so. It continued to be an "improper" exclusiveness as the Ruling politely described it, employing an expression that might well be considered contradictory in its own terms.
- With regard to shared competences, the questions appears to be more complex, as the Ruling introduces a change in the established doctrine of the CC by declaring that the principle was not applicable, according to which bases set up by the State should be contained in laws and be principalist, exceptions apart, and concluding, consequently, the criterion of restrictive interpretation of exceptions was not applicable (in this chapter, when referring to this principle, I will use the concept "rule-exception principle"). Nevertheless, this doctrinal *overruling* cannot be said to have produced a deterioration of the situation prior to ruling 31/2010, as in practice the rule-exception principle has never seriously been applied.
- And, thirdly, with regard to the executive competences of the AC, they still did not include the *ad extra* regulatory power.

In yesterday's session of this Congress, there was discussion of the concept of political autonomy, connecting this directly with the capacity to adopt one's own policies in certain specific areas. Well, one can say in the wake of ruling 31/2010 that the political autonomy of the AC in Spain continues to be of low quality.

So, following the ruling, the Generalitat of Catalonia stands as it was prior to the reform of the statute and in this respect differs from the case of the other AC that reformed their Statutes at the same time as Catalonia in the sense that the latter incorporated new competences (such as policing, as penitentiary system, etc.), while in the case of Catalonia the reform of its statute of autonomy aimed less at broadening its competences than improving the quality of the latter and that objective has clearly not been achieved.

In fact, the reforms of the statutes of autonomy have constituted one more step, almost the definitive one, towards symmetry in competences, especially if one takes into account the standardising interpretation that both the state legislator and the CC have tended to favour for decades with regard to the differences existing in the competences incorporated into the various statutes. It should be noted that symmetry in competences, today one of the typical characteristics of the model of distribution of competences in Spain, is generally unknown or misinterpreted by

our foreign colleagues, who often believe that the so-called State of the autonomies is still governed according to an asymmetric model.

I have maintained so far that Ruling 31/2010 preserves the *statu quo* prior to the statutory reform of 2006, however, it is true that there are two specific aspects where the Government of Catalonia has regressed in comparison with the previous situation:

The first refers to the "preferential" use of Catalan by public administrations in Catalonia and their media. This is a provision that was calmly incorporated into the Catalan law on linguistic policy of 1998 concerning state administration and has now become unconstitutional even with regard to Catalan Administrations. On the other hand, in relation to the other linguistic rules ruling 31/2010 has not altered preceding constitutional doctrine, although the confusing drafting of some of the legal bases dealing with this subject[1] or the simple reiteration of doctrine have led to an increase of both contentious and constitutional litigiousness.

The second reverse resulting from ruling 31/2010 refers to the fact that, for a while at least, the path towards reforming statutes of autonomy has been legally blocked as a means of achieving a substantial improvement in self-government with respect to competences.

In fact, the constitutional functions of the Statutes of Autonomy and their position in the system of sources—in the block of constitutionality—have been seriously weakened following the Ruling. And here we see the second mailing of the Statute. Not only did it fail to improve the quality of competences, but also neither did it attain the objective of increasing the constitutionalisation or juridification of the system of distribution of competences. This continues to be largely in the hands of political ownership and, let us not fool ourselves, in the hands of the ordinary state legislator. This is, without any doubt, another of the characteristics of the Spanish system of distribution of competences. It is a characteristic that is not particular to Spain, but that is not shared by recent trends in other federal or politically decentralised countries.

In my opinion, in this matter the reasoning behind the Ruling reveals serious defects, born above all of the incoherent logic involved in deducing from premises that are obvious and widely shared by nearly all jurists (the supremacy of the Constitution over the statutes, the competence of the CC to control the constitutionality of the statutes, etc.), as if it were a question of a logical and legally necessary consequence, something that by no means has that supposedly unavoidable character: that the Statutes cannot limit the scope of autonomous-community competences nor

[1] Paradigmatic, even for the incomprehensibility of its content, is legal basis 22 regarding the obligation of linguistic availability imposed upon companies in their relations with users and consumers. Unclear too is the practical scope that should be given to exceptions to equality in treatment of languages and to the citizens' right to linguistic choice of legal basis 23. Clear to me appears the interpretation, favourable to constitutionality, of the right to use Catalan before constitutional bodies located outside Catalonia, however, the blatant non-application to date of this doctrine perhaps reveals too a certain difficulty in interpreting this legal basis 21.

contribute as a result towards indirectly limiting the scope of state competences. However, I shall not criticise the Ruling here, as I have already made so elsewhere.[2]

From a political perspective, the Ruling has served, along with other factors such as the economic crisis, to highlight the existence of a profound crisis in the State of Autonomies. The Ruling has not caused the crisis in the State of Autonomies; this already existed and had very deep roots. The Ruling has blocked one of the possible routes towards solving the pre-existing crisis and has contributed, in a decisive manner, to make the crisis more visible.

This is a serious and highly polarised crisis, as it is proclaimed from absolutely antagonistic positions in terms of the diagnosis of its causes and the appropriate means of achieving a solution.

Indeed, on the one hand, the State of the Autonomies has ceased to be considered as a satisfactory solution by broad political, social and economic sectors, in Catalonia in particular and, I think, in the Basque Country. Whilst acknowledging, inevitably, the advances in self-government represented by the State of the Autonomies, these sectors believe that the Constitution and the Statute, interpreted as they are by the State and ruling 31/2010, are radically insufficient from the point of view of the political power wielded by these AC, of their being recognised as distinctive national communities and, in the case of Catalonia, of its economic resources and financial autonomy. This diagnosis gives rise to proposals based on assymetrical and plurinational federalism, with or without the right to self-determination, and even "sovereigntist," confederal or secessionist proposals.

However, on the other hand, there are also broad political, social, and economic sectors that feel that the State of Autonomies has gone too far not only from the perspective of political autonomy but also, ultimately, from the perspective of administrative decentralisation. There is argument for the need for uniformity in all policy areas, virtually without exception: in areas of directly or indirectly economic content, as this would be required by market unity—in other words by the interests of the economic sector and the supposed comfort of the people; in other areas, as this would be necessary in order to preserve equal rights amongst all Spaniards. There is no room in Spain, it is said, for 17 differentiated public policy systems in any of the areas of competence. In fact diversity, especially policy diversity, has never been a value particularly valued by these sectors. To these arguments, already old, is now added, as a consequence of the economic crisis, the need to avoid the wastage, the overlapping and the lack of coordination between Autonomous Communities. For this reason, the solution to problems regarding areas of competence would lie in recentralising competences, slimming down autonomous administrations and stimulating cooperation. This trilogy would solve all the problems.

Along with those who adhere to one of the two aforementioned antagonistic theses, there are also sectors, increasingly minority, which simply deny the existence of the crisis in the State of autonomies or identify an easy solution on the basis

[2] Viver (2011), pp. 363–399.

of restricting—the actors who should be summoned to the task of redesigning the future territorial organisation of the State to -only?-the two state-wide political parties, the Spanish Workers' Party and the People's Party.

What Has the State Legislator Done Since the Issue of Ruling 31/2010?

Continuity is the word that best responds to this question. Continuity with regard not only to the regulatory policies prior to the "Catalan" Ruling, but also to policies prior to the beginning of the processes of reform and to approval of the new Statutes. This has been the case because the state legislator too scant notice of the entry into force of these Statutes and as a consequence between 2006 and 2010 did not modify any of his regulatory policies (except in the case of autonomous financing, with respect to which a new system of financing was established via reform of the LOFCA and other laws).

Neither could it be said that, following ruling 31/2010, the state legislator has adopted measures to alleviate the negative effects of this resolution regarding autonomous competences in those instances in where inconstutionality or restrictive interpretation was based not on substantive reasons but on the fact of being regulated in a Statute and not in an ordinary state law.[3]

The discontinuity means that this year the state legislator has continued to attribute his competences with what is, in my opinion, an enormous material and functional expansion, had this has been achieved via the five traditional channels:

1. Via the material and functional expansion of the framework or basic powers (bases): at the Institute of Autonomous Studies we have been analysing this question for some time[4] and as a result of this monitoring one can affirm first of all that in Spain the "normative" instrument by means of which bases are normally established are not laws but royal decrees, ministerial orders and implementing acts. And from the material point of view it might be concluded that bases established via minimum principles or miminum standards are virtually non-existent in our system. The extraordinary detail of the basic regulation constitutes a rule without exception. In fact this detail often reaches extremes of near parody.[5]

[3] As sole exception, without a doubt partial, one could perhaps quote, in relation to ruling 30/2011 and the Statute of Andalusia and specifically the management of the River Guadalquivir, the entrusting of management to the Government of Andalusia of some non-decision-making executive competences (the mandate is effected via an agreement announced in the Official State Bulletin (BOE) of 7 July 2011 and extended via a resolution published in the BOE of November 7 of the same year).

[4] Some documents related to this monitoring may be found on the Institute web: http://www10.gencat.net/drep/AppJava/ambit.

[5] There are numerous examples. Some rules occupy dozens of pages of the BOE (see the documents referred to in the previous note).

Paradoxically, the State has a greater functional and material sphere of operation via its basic competences than through its purely legislative competences.

This result should come as no surprise bearing in mind that for some time the criterion used by the CC to determine the basic character of a regulation or an implementing act has been exclusively that of "necessary complement" in order to attain the objectives sought by the bases. This requirement, almost by definition, almost by legal necessity, must be satisfied by all the regulations and implementing acts of the bases. Moreover, following ruling 31/2010 the state legislator has credible evidence that the formal and material expansion of the bases is not an exception but fits naturally into their usual content of the bases.

2. By means of the material and functional expansion of the horizontal competences of Articles 149.1.1 and 149.1.13 of the Constitution.

   In 149.1.13 there is still room for almost everything.[6] The CC has no useful parameter of constitutionality to limit the content and scope of this competence. Any act or provision that has any economic repercussion, even if it does not affect general economic activity, nor has a significant impact upon a specific economic sector, has a place in this authentic general clause of competences. In fact, given the State's use and, in my view, abuse of Art. 149.1.13, one wonders whether the state legislator can still increase its intervention in favour of market unity without eliminating completely the political autonomy of the AC in the economic sphere and whether, apart from the competence of 149.1.13, the pertinent constitutional and legal reforms should assign him new competences in this field, as is maintained by certain political, economic, and academic sectors.

   And with regard to 149.1.1 of the Spanish Constitution, despite the effort to assess its content made by rulings such as 61/1997, the fact is that this competence is used more and more frequently and erratically by the state legislator—and by the CC itself- without a sufficiently clear definition so far of the object and content of this provision. There is as yet no coherent and uniform conception of this clause regarding competences, neither in scientific doctrine nor in the Court's, and the legislator does not seem to have one either.[7] Thus, for example, Art. 149.1.1 covers non-prescriptive activities, contrary to the literal wording of this provision that defines its content via the term "regulation" and the state legislator employs it to carry out policies in fields where it lacks other competences. The State's abundant spending power is one of the spheres wherein may be found repeated examples of the application of Art. 149.1.1 to cover acts of mere execution in policy areas where it lacks other competences.[8]

[6] Still relevant regarding this issue is Manuel Carrasco's book, The distribution of competences between the state and the Autonomous Communities with regard to economic activity, Ed Tirant Lo Blanch-Institut d'estudis Autonòmics, 2005.

[7] On this problem see also Carles Viver La cláusula competencial de l'artículo 149.1.1 CE en Autonomia i Justícia a Catalunya, Consell Consultiu de la Generalitat de Catalunya 2004.

[8] One of many examples is that constituted by the subsidies of the Secretary General of Social Policy and Consumer Affairs, which, in the absence of other areas of competence, is always based on 149.1.1 of the Spanish Constitution (for all Order SPI/1166/2011, of April 28), which approved the regulatory principles of the concession of subsidies subject to the general system of subsidies of the Secretary General of Social Policy and Consumer Affairs.

3. Indeed, the extension given by the State to its subsidising activity, to its *spending power*, is another of the means whereby the State broadens the scope of its competences acting in areas of autonomous-community competence, conditioning its policies and duplicating its activity.[9] When it configures the scope of its *spending power* the State is frequently in open rebellion against a consolidated constitutional case-law and at the same time contradicts the content of some of the new Statutes that in this area restricted themselves to reproducing the said jurisprudence, with the blessing in this case of ruling 31/2010 (see Art. 114 Catalan Statute of Autonomy).
4. A fourth path is the supraterritoriality of phenomena that are the object of competences. I refer not to the case of "natural" supraterritoriality of these phenomena, established by the Constitution as State competence (for example that of the rivers that flow through the territory of various AC), but to the instances, very common, where the State, in policy areas of competences of the AC, *artificially* creates objects of competence located in various or all of the AC (for instance the creation of vocational training reference centres or centres for accreditation of de environmental certifying companies[10]). In many cases the state legislator uses the criterion of supraterritoriality—which usually masks the old and never banished the principle of the "general interest of the State"—without abiding by the constitutional doctrine that limits the use of the criterion of supraterritoriality as competence of state activity, necessitating firstly a fragmentation of public activity between the AC affected and to seek mechanisms of horizontal cooperation (for all, see rulings 329/1993 and 243/1994). This constitutional doctrine is now incorporated in some Statutes of Autonomy (e.g. in Art. 115 of the Catalan Statute of Autonomy).
5. A fifth channel is that of the State's almost total protagonism in the task of transposition of European directives, even in areas of competence exclusive to all the AC. This protagonism with regard to competences is usually justified via an expansive interpretation of Article 149.1.13 of the Spanish Constitution, although it should be acknowledged that the AC's apathy in this sphere has often prompted the action of the State, responsible to the EU.

Via these five routes and the deregulation of the system of distribution of competences with the transfer of this task to the unilateral decision of the ordinary state legislator—with the sole control, remote and without clear legal parameters, del CC, for some years now in Spain there has been a situation of generalised overlapping of competences: the State may act and does act in all policy areas without exclusion—even in those where the AC have exclusive competence—and

[9] On this question see the recent book by Torres (2011).

[10] From this pespective and from the increasingly less respect that the European Union shows towards the principle of internal institutional neutrality, see Royal Decree 1715/2010, of December 17, which designates the National Accreditation Agency (ENAC) as national accreditation body in accordance with what is established by Regulation (EC) number 765/2008 of the European Parliament and the Council.

may do so with the intensity that it deems necessary in each case. In short, the State and the AC can perform the same public activities with effect upon the same objects via different competences.

Indeed, today in Spain in practically all policy areas there exist, overlapping, two circuits: autonomous and state, which regulate phenomena that affect what are regarded as general interests of the State, or interests of more than one AC—although often they have a limited territorial scope. As we will see in the conclusion, according to the CC, the possibility of the State acting in all policy areas, the existence of a sort of general State competence, would result from the nature of unitary State enshrined by the Spanish Constitution of 1978.

I will return to this question at the end, for now I would like to point out that this generalised overlapping incorporates at the same time a certain mutation of the principle, barely applicable in practise, of prevalence of acts of exercise of exclusive competences of the AC enshrined in the Constitution –Art. 149.3—and in the Statutes—e.g. Art. 110.2 of the Catalan Statute of Autonomy. Specifically, the CC, basing itself sometimes on the criteria of supremacy of the general interest of the State (see for example rulings 13/2007 and 46/2007 with quotation from ruling 40/1998), proclaims the prevalence of the acts of exercise of state competences in policy areas where exclusive autonomous competences coincide and accepts the duplicity of regulations, provided the regulation or the autonomous action, even in areas of exclusive autonomous competence, is "compatible" with that of the State in the sense that it does not negate or limit the efficiency of the State measures.

The overlapping of competences and the five channels of expansion of state competences that we have just highlighted, are not unique to Spain. To a greater or lesser degree they are evident in many federal and politically decentralised states. However, in Spain, some of these characteristics reach comparatively high centralising levels and in any case serve as a counterpoint to the claim, as reiterated as it is unfounded, that today the Spanish State is one of the most politically decentralised States in the world.

What Has the Autonomous-Community Legislator Done?

The Catalan legislator, the subject of my study, has to a large extent "suspended" statutory legislative development,[11] whilst, as I have indicated, there has been an increase in the number of conflicts over competences provoked by laws of development of the Statute passed previous to ruling 31/2010.

From July 2010, 18 Catalan laws have been challenged, and the bilateral commission has reached interpretative agreements with regard to nine of them. The challenge against five of the nine remaining laws refers to regulations of a

[11] With a few specific exceptions such as the legislative proposal for popular consultation "by means other than referéndum."

linguistic nature. These are Law 10/2010, on reception of people immigrating and returning to Catalonia; 20/2010, on the cinema 22/2010, on the Consumer Code, 35/2010, on Occitan, Aranese in Aran and 12/2009, on Education, although in the latter case the linguistic motivation behind the appeal is indirect and not exclusive. The other four challenged laws are the second book of the Civil Code, the law on popular consultation, the laws on gaming and on traditional "fiestas" involving bulls.

Following ruling 31/2010 there has also been an increase in contentious-administrative conflict with regard to linguistic issues.

Finally, What Has the Constitutional Court Done in the Wake of Ruling 31/2010?

From July 2010 until late October 2011 the CC has issued 24 rulings on the subject of competences. Six of them resolve appeals against the Statute of Autonomy of Cataluña that were pending ruling. None of these resolutions are of particular interest from the perspective of this work as they simply apply the doctrine of ruling 31/2010.

With regard to the 18 remaining rulings it is worth noting, once again, the doctrinal continuity with respect to both ruling 31/2011 and the doctrine prior to this latter resolution, with the qualifications that I shall now detail.

Certainly, ruling 31/2010 introduced two doctrinal changes of utmost importance, although it did so, *Lampedusa-style*, with objective of maintaining, or not being obliged to revise, the content that previous constitutional jurisprudence had given to the areas of competence of the Generalitat and the State. One might say that the 31/2010, the Catalan ruling, changed general doctrine in order not to change specific case-law.

These doctrinal changes are those I indicated previously: that concerning the principle "rule exception" in the definition of the basic legislation and that concerning the constitutional position of the Statutes of autonomy, which is evidenced in a devaluation of the mandates directed at the state legislator by the Catalan Statute of Autonomy—which until that time had existed peacefully in the previous Statutes of Autonomy—and, above all, in the change in the constitutional function of defining the content of autonomous competences and indirectly of state ones, which formerly recognised the Statutes. This second change became more evident when the CC, by means of its Catalan ruling, overruled its own decision with respect to the Valencian Statute. I will return to this question immediately given that the CC seems to deny the occurrence of this last doctrinal change.

For the time being I would just like to point out that one of the criticisms I feel can be levelled at the Catalan ruling is that the CC, when judging the proposals for doctrinal change and for reinterpretation of areas of competence formulated by the new Statute, instead of making a new judgement—which of course might have

produced the same result as previous resolutions—mechanically applies, what had been said on earlier occasions—sometimes 25 years before.

One might say that the Court was confirming the ingenious and 100-year-old words of judge Charles Evans Hughes "The Constitution is what the Judges say it is" and turning constitutional doctrine into a direct and immediate canon of constitutionality of laws. This is, for me, a difficult doctrine to share. And, in fact, it is worth noting that the ordinary state legislator does not share it either when, as quite often happens, he deviates from constitutional doctrine, as if wishing to recommend to the Court a reconsideration of its previous doctrine. The reform of the Criminal Code introduced by Organic Law 5/2010 is one of the clearest examples of legislative departure from a constitutional doctrine, and recent too.[12]

In any case the continuity mentioned is apparent during this first post-ruling year with regard to:

1. The content and the scope of the bases and the application of the canon of judgement of "necessary complement." As usual, in the application of this canon, practically all the allegations related to the formal and material excesses of the bases are rejected by the CC. This occurs, for example, in the CC's ruling 113/2010 with regard to the scope of the bases of the statutory scheme for civil servants in the regulation of entrance requirements for the civil service in an Autonomous Community; also in its ruling 18/2011 concerning the bases of the energy system in relation to the electricity sector in Las Canarias, or in its ruling 65/2010 with regard to the scope of environmental bases related to subsidies in areas of socio-economic influence of National Parks. The sole exception is its ruling 1/2011 that considers that certain executive acts of accreditation and certification connected with activities of vocational training in the health sector do not fulfil the requirements necessary in order to be regarded as basic. The CC's rulings 118, 138 and 139/2011, concerned with the internal organisation of the Savings Banks, allow for detailed bases in this area, e.g. Art. 149.1.11 of the Spanish Constitution, although the first of them declares the unconstitutionality of four paragraphs because of excessive detail. Finally, the ruling 156/2011 regarding state subsidies in education, which gave an extraordinary breadth to the bases but declared as unconstitutional the resolution of the Supreme Council for Sports challenged for non-compliance with the formal requirements of the bases. I shall return to this decision forthwith.
2. The material and functional expansion of horizontal competences. In effect, in 2011 there was a clear confirmation of the almost limitless breadth of Art. 149.1.13 the Spanish Constitution. All the rulings have dismissed the claims of unconstitutionality formulated against what the appellants viewed as excessive with respect to the content that the state legislator sought to give to his competence regarding "general organisation of the economy." This is the case, in the first place, of ruling 18/2010 on the Canarian electricity sector that includes in

[12] See Viver (2011), pp. 390–395, *ob.cit.*

the competence of Art. 149.1.13 all the regulation and all the implementing acts contained in the contested regulation by considering that they are a necessary complement to guarantee electricity supply in the Islas Canarias, although it admits that autonomous competence in this field also enables the AC to perform implementing acts with the same objective.

Other examples are to be found in ruling 65/2010, also quoted, as to the bases in questions of the environment are added those of Art. 149.1.13 to justify the subsidies in the aforementioned areas of influence of the National Parks. Or 129/2010 on the regulation of basic income support for young people in order receive subsidies. The ruling 130/2010 on promotional sales, which are not included in the area of commerce but in the protection of competition included in the state competence of Art. 149.1.13 of the Spanish Constitution. Finally, one should refer to rulings 88/2010 and 140/2011, on business opening hours. The second of these rulings specifically accepts the constitutionality that prevent any type of legislative development thus emptying of content autonomous competence in the field of trade, which had previously included the regulation of opening hours. On the other hand, the aforementioned ruling 1/2011 is also an exception to the interpretative expansion of horizontal competences in its recovery of the doctrine, virtually forgotten, of the "sections of fundamental rights" that rulings 154/1988 and 188/2001 had used as a criterion the determine the content of the state competence of Art. 149.1.1 of the Spanish Constitution CE.

3. Continuity to with regard to the expansion of supraterritoriality. For example, in the area of opening hours the aforementioned rulings 88/2010 and 140/2011 employ the criterion of the need for a unitary and homogenous decision as a criteiron for atributing competence to the State. The latter declares "legitimate that the State...—regarding confectioners, bakers...—establishes a homogenous system of freedom for the entire national territory, so that entrepreneurs may decide the timetable that in each case is most appropriate in order to satisfy...demand." Meanwhile, the limits to the excessive expansion of the criterion of supraterritoriality are recalled by the oft-cited rulings 1/2011 and 156/2011 on subsidies in education, also quoted. Important with regard to the supraterritoriality of a materially supra-autonomous object is ruling 30/2011 concerning the Statute of Andalucía, to which I shall now refer.
4. As examples of the admission of duplicity in competences one could refer to ruling 46/2010 on the Crown of Aragon Archive, 88/2010 on trading hours and the aforementioned 18/201 that, explicitly, admits the overlapping of planification and implementing acts in the Canarian electricity sector.
5. Finally one also observes a marked continuity in constitutional doctrine regarding state *spending power*, although there is confirmation of the tendency, already mentioned above, to attribute to the State all regulation of subsidies, even in areas where the State only has basic competence, considering for this that in the the relevant case this regulation might be included in the exceptions provided for in constitutional doctrine, and, on the other hand, assigning to the AC the implementing acts—and, when appropriate, the establishment of procedural rules to undertake the administration of subsidies. Consequence of the application

of this doctrine are the three rulings that partially annul three state subsidies. These are rulings 129/2010 and 159/2011 (state subsidies for local institutions)—which assign normation to the State and administration and rules on procdure to the AC—ruling 156/2011, abrogated, as we know, for formal reasons. Only in ruling 65/2010 is the appeal lodged the state subsidy dismissed.

Nevertheless, despite the case-law continuity and the faithful implementation of the doctrine of ruling 31/2010, four resolutions have been issued with regard to the latter that introduced certain nuances to the doctrine established in the previous one. It is still too early to decide whether these qualifications will finally prove to be mere anecdotes or will be the seed for a change or a doctrinal evolution.

The first nuance refers to none other than the doctrine related to the rule-exception principle which, as we know, gave rise to one of the few declarations of unconstitutionality of ruling 31/2010. During this last year the Court has issued three rulings that mention—ruling 18/2011 (FJ 7)—and even quote verbatim—ruling 65/2010 (FJ 6) and ruling 158/2011—ruling 69/1988, which contains the doctrine that enshrines the principle which for the sake of simplicity I have called rule-exception. And, recently, ruling 156/2011 not only reproduces long paragraphs from the aforementioned ruling 69/1988—and from many others that enshrine the principle of rule-exception—but also argues that this principle should guide constitutional interpretation and, in fact, this principle becomes the *ratio decidendi* that provided the basis for the declaration of unconstitutionality because the bases were not developed in any formal law. Attention should be paid to the evolution of this jurisprudence that in my opinion clearly contradicts what is formally established in ruling 31/2010 via decision that modified a consolidated doctrine that now seems to be recovering.

A second "qualification" is to be found in ruling 18/2011, with regard to the Canarian electricity sector, and consists of the explicit acceptance of bases applicable only in this AC. It is true that ruling 31/2010 acknowledged in passing—as was inevitable given that this was simply setting a fact—that on some occasions the CC had admitted different bases according to the AC to which they were to be applied, but the fact is that the declaration of unconstitutionality of the provision of the statute related to shared competences is based essentially upon the necessary uniformity of the bases throughout the state domain. It is possible that the CC will not change its doctrine, and will cite the special nature of the insular circumstance in order to justify the decision, but there is no doubt that this Ruling provides useful arguments to those who seek to continue defending the constitutionality of establishing assymetrical bases.

Finally, the crucial ruling 30/2011, which resolves the appeal by Extremadura against the Andalusian Statute, appears a priori also to be set to introduce an important qualification of the *ratio decidendi* of ruling 31/2010 as it states that in order to resolve the conflict over competences it is going to refer to the doctrine established not in the "Catalan" ruling but in ruling 247/2207 on the Statute of Autonomy of the Valencian Community (Valencian ruling from now onwards).

In the ruling 30/2011, the Court seems to wish to "demostrate" that between the Valencian Ruling and the Catalan Ruling there is no contradiction whatsoever.

However, in my view this could only be the case if the Valencian ruling were made to say what it neither does say nor can say, unless it is transformed into a decision that is incongruent because it is internally contradictory.

Indeed, let us not forget that ruling 247/2007 begins by stating, as a premise for the entire argument, that the Constitution does not define the competences of the State, that it merely articulates them; it further adds that the constitutional text does not offer guidelines of interpretation for interpreting this content and that it is the Statutes that, defining the content and scope of their competences, contribute indirectly to defining the scope and content of those of the State. The fundamental premise where this ruling is based is, then, that the Statutes can indirectly the contents of state competences. Admittedly it adds to this premise certain limits that the Statutes must respect when performing their defining constitutional function: they must respect the content which characterises the state competences; they must bear in mind the territorially limited scope particular to the Statutes of Autonomy and, finally, they must allow the State competences fully to deploy their own functions. However, what the ruling does not and could not say is that the limits to the premise could actually negate the premise. It could not say that given that when defining competences it had to respect the recognisability and full deployment of the functions of the state competences, as a result, it could not define the AC's own competences nor indirectly those of the state.

And this is exactly what the Catalan ruling does, in flagrant contradiction of the Valencian ruling. In the Catalan ruling what in the Valencian one was a limitation to the possibility of defining competences—the full deployment of state competences—replaces the premise and becomes a veto of the delimiting function of the statutes: the State's competences are in the Constitution, the Statutes can only articulate the competences reserved for the AC but can neither define the scope of these competences nor indirectly the scope of the State's competences.

Nevertheless, the Andalusian ruling, although it declares that it is going to apply the doctrine of ruling 247/2007, in fact finally applies that of the Catalan ruling leading to the conclusion that the Andalusian ruling does not introduce any change or nuance to the Catalan one: it respects the doctrine of the latter and thus contradicts the preceding doctrine, with the aim of not having to contradict or revise previous doctrine regarding the scope of diverse areas of competence.

Conclusion: The Reaffirmation of the *Unitary State* According to the CC

I would like to conclude with a brief reference to an *obiter dictum* contained in paragraph 3 (FJ8) of the Andalusian ruling that might have some significant expansive effects in the future and that, in any case, lends a unitary sense to the characteristics of the system of distribution of competences I have referred to throughout this paper, whilst it is revelatory of the CC's conception of the Spanish

model of distribution of competences and more broadly of the nature of the State of autonomies. This is an *excursus* that is perhaps not out of place in a congress on federalism, even taking for granted that, as was said in yesterday's session, with a little effort and good will almost all the decentralised states may be included in the increasingly more magmatic and less useful category of federal state.

The paragraph to which I allude affirms emphatically that "the Spanish 'autonomous State is a 'unitary State' which, as such, is characterised by the fact that the decentralisation inherent to the autonomous principle and the diversification which is also inherent have as **an absolute prerequisite the guarantee of the ultimate unity of the system through a common denominator which it is the State's responsibility to guarantee as it forms a part of the actual functions of the state's competences**."

It is true that the Andalusian ruling immediately leads one to the specific case and links this affirmation to the supra-autonomous nature of the regulation of the Guadalquivir, but these affirmations are of a markedly generalising type, were already *in nuce* underlying the Catalan ruling and in fact are included in a broader and articulated sense in a dissenting vote on a subsequent Court's decision.[13]

I shall not embark here upon a critical analysis of the construction of the Constitutional Court's argument, particularly the weakness of the attempt to deduce from an abstract concept of unitary state, supposedly the cornerstone of the so-called State of the Autonomies, requirements and specific mandates regarding the scope of specific areas of competence or specific clauses like supplementariness.[14] What I would like to highlight is that is that in this paragraph may be found the definitive explanation of the material and functional extension of state competences, of the generalised overlapping and duplicity, of the idea that no area or subject-matter can be alien to state legislator, of why the autonomous legislator should always act on the basis of previous state legislation that establishes the framework of uniformity via which he should restrict himself to establishing nuances and and specific actions. Unlike what usually occurs in federal states, the ordinary state legislator should always intervene between AC legislator and the block of constitutionality. These premises beg the question, for example, as to how many days of life remain to the "federalising" constitutional doctrine that denies the character of universal competence of the clause of supplementariness of the state

[13] By magistrates Javier Delgado Barrio and Manuel Aragón Reyes against ruling 137/2011.

[14] It is clear that in our system the State has competences with regard to different areas of the legal system—for example, those of Articles 149.1 6 and 7—which enable it to guarantee in these spheres the definitive unity of the legal system and it is also true that legal doctrine usually constructs its proposals via the construction of concepts drawn from the systematic analysis of specific precepts to deduce from the constructed in this way specific new regulations. However, courts should be particularly prudent when performing this kind of construction and in the case analysed here there are elements in the block of constitutionality—lists of competences, literal tenor of the constitutional clauses that regulate relations between the "general" state system and the autonomous systems. . .—which lead one to question the solidity of the dogmatic construction employed by the Court when deducing from the concept of unitary state the specific conclusions it proposes.

law established in rulings issued in 1996 and 1997 or, rather, how many dissenting votes such as those mentioned will be necessary before its contents become constitutional doctrine?

Barcelona, 14 de noviembre de 2011

References

Aida Torres, La projecció de la potestad subvencional sobre la distribución competencial. Anàlisi de la pràctica estatal. Institut d'Estudis Autonòmics, Barcelona, 2011

Viver C. **"El Tribunal Constitucional, ¿'sempre, només ...i indiscutible'? La funció constitucional dels estatuts en l'àmbit de la distribució de competències segons la STC 31/2010,"** *Revista d'estudis autonòmics i federals,* 12, (2011) 363-399. There is a Spanish version in *Revista Española de Derecho Consittucional*, 91, (2011) 319-351

A Ruling on the Federalisation of the State

Juan José Solozábal Echavarria

Contextualising the Crisis of the Autonomous State: Indicators and Possible Reactions

The purpose of the present paper is to frame ruling 31/2010 on the Statute of Catalonia (hereinafter *Estatut*) within a furthering of Autonomous State federalisation, wherein it may prove to be a crucial element. Therefore, I do not feel that said ruling poses a problem for the Autonomous State, nor that it in any way signifies a regression or rectification thereof, but quite the contrary. As it contains clear considerations concerning the various instances and limits inherent in our system of territorial organisation, for me the ruling is key towards ensuring order in the autonomies. Indeed, the ruling offers a number of innovative aspects, concerning formal matters such as the separation it establishes between legal antecedents and rules, thereby endowing the text with greater precision and penetration. As with other rulings, in each issue brought before the court it has also shown its capacity to determine the central issue at stake, thereby avoiding any digressions or secondary reasoning, and providing a clear indication as to the thread of the argument and the core pronouncements.

From the material standpoint and although the systematising or overall purpose of the ruling is clear, such that its attempt to provide a turning point in Autonomous State case-law is evident, it can nevertheless clearly be seen as a continuity of previous rulings. There is no about turn, nor much less any deviation compared, for instance, to ruling 247/2007 issued on the Statute of Valencia. The current ruling heralds more of a shift in level, a repositioning of the constitutional court's previous declaration that it embraces although does not reiterate, a common course of action when dealing with multiple issues.[1]

[1] Solozabal (2011).

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Undeniably, we stand at a crossroads in our system of autonomous communities. There is increasing political tension concerning the current political structure's ability to integrate, which is being put to the test, as evidenced in the political failure of the ruling issued by the constitutional court that, contrary to what it has achieved on previous occasions, has been unable to find a peaceful solution to the matter in hand, but rather seems to have sparked a feeling of uneasiness in Catalonia vis-à-vis the latter's position within the Autonomous State. Coupled with this particular crisis, the current economic situation is highlighting a number of major flaws in the solvency of a system where urgent measures are required to curb autonomous community spending, which does not seem to have adapted to the restraint and efficiency that is so essential when exercising the responsibility that autonomy implies. Spain's ability to take decisions that will allow it to behave in a credible manner within the heart of the European Union is clearly being called into question, and is reflected in the difficulty the country appears to be experiencing in convincing its autonomous communities to behave responsibly in financial terms. From the technical or structural standpoint, Spain has failed to develop certain aspects related to participation, promoting centripetal instruments (reforming the autonomous communities or the Senate [Upper House]), or cooperation mechanisms that are able to enhance the efficiency of the system and provide an adequate and effective balance to the centrifugal aspects of the autonomous structure where intervention is to all intents and purposes excessive.

A satisfactory answer to this situation must be found. From this particular standpoint, the problem is to avoid adopting ill-thought out measures, proposed without sufficient reflection and very often taken on the basis of inaccurate appraisals of a situation that those measures seek to amend.

The danger in such a situation as this is to exaggerate the scale of what is undeniably a crisis. Yet, the truth is that our system, which has evolved into what is virtually a federal model, has worked reasonably well, both in terms of integration as well as with regard to its ability to ensure provision of the services expected from a modern social state. From the point of view of integration, the question to be answered is not much whether the autonomous state has been able to satisfy nationalist demands but rather what such demands might have meant to the stability of the country had territorial decentralisation not been undertaken with the endeavour and to the extent that it has been. As regards the system's functional performance, as highlighted earlier, what stands out is that decentralisation has led to a reduction in differences amongst territories and has ensured a certain degree of uniformity in the services provided to the nation, irrespective of where people live, the country's social system today being that of the autonomous communities. It is true that there is administrative duplicity, confusion over legislative powers, and much waste in public expenditure (not to mention the nonsense that so often arises when addressing the language issue).[2] Yet, if we judge the situation fairly, inefficiency and corruption are not confined to any one particular area, although they

[2] *The Economist*, 8 November, 2008.

may seem to be more rife in the autonomous communities. There is no doubt in my mind that now is the time to reform the autonomous state.

In my view, the alternatives are clear. One choice is to opt for confederal reform of the State, which might be achieved by explicitly amending the Constitution or by reshaping it, or through implicit transformation without using the mechanisms for change foreseen in the Constitution. This would take us beyond the limits of the Constitution, along the lines of what the experiments set out in the "Ibarretxe Plan" (devised by the former Basque Regional Government President of the same name) and the reform of the *Estatut* sought to achieve.

I do not favour confederal reform of the State, much less any transformation that would lead to the same outcome. The latter is a path that, I feel, would prove impossible to go down and would lead us to an undesirable destination, whether we undertook explicit constitutional reform or not. Confederation is a temporary political state, an ineffectual political system, the forerunner of an independence that, I believe, no sensible person would even consider.

The alternative is to undertake broader federalisation, whether through explicit constitutional reform or not. Yet, explicit federal reform comes at a price, since embracing the term "federal" will meet with opposition, and the problems that applying it from a technical perspective will entail are equally significant. Using an explicit defining clause for this purpose may lead to objections concerning inflexibility in the design of the model, which may not be apparent in the system of autonomous communities, or may even draw the silence of the constituent assembly on the matter. Addressing the issue of legislative powers will also bring certain questions to the fore such as whether only the federal Constitution should be used to allocate powers, complemented by a residual clause favouring the State. Making changes to legislative powers may be justified in terms of providing clarity in the distribution thereof, yet might have the perhaps undesirable effect of making redundant a constitutional case-law that has over the years gradually built up a *corpus* that it might be unwise to completely rid ourselves of.

In sum, these are virtually insurmountable problems that lead me to consider the advantages inherent in furthering the federal system vis-à-vis reforming the autonomous state since, rather than a regulatory system, federalism is an effective political structure that can embrace a number of different configurations, all of which, however, may be included under its general name.

I therefore favour moderate changes to our Autonomous State, within which the ruling on the *Estatut* is key, as it provides a number of interesting insights enabling us to approach the future of our territorial system successfully. I feel that the ruling contains valuable indications concerning the limits and possibilities open to our political system.

A calm look at the content of the ruling might provide us with valuable lessons that help us forge our new Autonomous State. As highlighted earlier, if read correctly and if we follow the bases with which we posited the changes required to the model, the ruling does not entail any radical turnaround, as has wildly been claimed, but rather certain continuity and change.

The Conclusions to Be Drawn from the Ruling on the Statute of Catalonia

Stemming the Shift Towards a Break-Up of the Autonomous State or the Confederal Centrifugal System

What the ruling on the *Estatut* basically sets out is a rejection of different centres of power or sovereignty within our system that might question the legitimacy of a regulatory decision endorsed by the electorate, the people, of an autonomous community. For many, the appeal against the *Estatut* before the constitutional court represented a clash of sovereignties, and rejected the possibility that a constitutional court might have power over a law that had been endorsed by the electorate in Catalonia. Ruling 31/2010 rejects such an interpretation and confirms the legitimisation and legitimacy of the constitutional court's action by controlling the *Estatut's* compliance with fundamental laws as it did with another sub-constitutional law.

It should be pointed out that prior to the ruling, constitutional court control was being questioned and that much of the criticism aimed at the actual content of the ruling was not so much due to any discrepancies with the arguments put forward in the ruling or the invalidating scope thereof, but rather an *ex radice* or in principle objection to constitutional court control itself.

It should be stated that such an attitude is inadmissible. The constitutional court is clearly legitimised to exercise such control since it falls to said court to impose the Constitution, even on the Statutes of Autonomy as organic laws through any corresponding challenge lodged against them. In this regard, Article 27 of the constitutional court's own organic law includes the Statutes of Autonomy as being subject to the control of the court in the corresponding declaration of unconstitutionality. In its ruling on the 2007 Statute of Valencia, the constitutional court recently issued a reminder of its power to determine "as the supreme interpreter of the Constitution whether the Statutes of Autonomy have incurred in any unconstitutionality."

Constitutional court control over the *Estatut* would also appear appropriate from the standpoint of legitimacy, or perhaps stated in better terms, of justification, for one fairly simple reason. Like statutory reform, our autonomous community system balances what we might term centrifugal and centripetal aspects, the former reflecting the territoriality of the system, the latter its scale or degree of unity. The initiative to undertake reform, in the hands of the proposing parliament, the power to withdraw the project at any stage during its processing, and above all the support of the electorate in the autonomous community for the text approved as an organic law by the parliament, reflect the importance of autonomous community involvement in drafting and approving reform of the Statutes of Autonomy under Article 151 of the Spanish Constitution. Yet, in line with the idea of balance inspired by the creation of the autonomous system, the relevance of these aspects

is counterpoised by the involvement of national bodies in the reform process. The proposed statute bill goes through parliament and is approved by the latter as an organic law, notwithstanding the fact that those with the power to do so may, through the corresponding appeal, request that the constitutional court ensure the constitutionality of the text in the statute. As highlighted, constitutional court intervention reflecting the balanced logic of the model not only entails no over-intrusion on the part of the central state but indeed contributes and gives sense to parliamentary intervention in the reform process. Such control may be seen in other legal systems. The supreme court of the United States has on several occasions annulled various precepts of the reformed constitutions of its member states. It is ultimately the constitutional court's control over the statute that enables parliament to examine the text properly, ensuring for instance certain uniformity in the statutes and above all exercising basic or general control of the bill's constitutionality beyond any political considerations. The text is then subsequently submitted to a more thorough and technical jurisdictional examination by the constitutional court. Contrary to what is often believed, the constitutional roadmap of statutory reform does not necessarily conclude when the text is approved by the electorate in the respective autonomous community, but rather through the constitutional court ruling concerning any appeal lodged against statutory reform, as occurred in the present instance.

Said ruling also halts what might be considered erroneous interpretation of any *identity aspects*, as a possible element of the Statute of Autonomy. What the court is undoubtedly seeking to achieve when proposing a constitutional interpretation of statutory statements related to Catalonia's assertions concerning its own identity is to ensure that these do not necessarily lead to a nationalist interpretation thereof, thus preventing the possibility that such assertions may subsequently be used as a legal basis for sovereignty claims. The court's position in this respect is deft, since it does not deny the legitimacy of what is contained in the *Estatut*, which it might have done had it not based its judgement on the correct interpretation of the statutory reserve of Article 147 of the Spanish Constitution, and had it not been familiar with the integrating sense of the statutes strengthening the identity of the autonomous community. However, the constitutional court has shown itself conscious of the potentially disintegrating effect that certain elements contained in the *Estatut* concerning the question of identity might have meant for the text as a whole.

The constitutional court's views on what is the legal interpretation of a nation are well-known, namely only that which is recognised in the Constitution as the sole depository of sovereignty in the country, without this necessarily denying the existence and legitimacy of certain spiritual or cultural conceptions that reflect the affirmation of Catalonia's position as a nation. Being able to refer to "symbols of nationality, without any resulting claim of legislative powers or contradiction with the symbols of the Spanish nation" is perfectly in line with the Constitution. The Preamble has validity since it is a mechanism of genetic interpretation and indicates a legislative will that naturally cannot be imposed on the constitutional court, which is the true and supreme interpreter of the Constitution. In this particular ruling, the constitutional court assumes a moderate historicist basis of the

institutional system. Contrary to the historical rights of the Basque Country and Navarre, in the case of Catalonia the legislative relevance of such rights is restricted to the private domain. In their possible public domain, historical rights point to a uniqueness that is expressed time and again in the statutory text. The constitutional court's ruling regarding the issue of language could be summed up in what might be termed a balanced idea of bilingualism or perfect bilingualism, which forbids any regional policy that marginalises or ignores an official language. As well as rejecting any disregard of a language, as is set out in the Constitution, the constitutional court also forbids any one language from being treated preferentially, since an official language's status prevents disregard thereof, this neglect being deemed synonymous of unequal and inconsiderate treatment. The position of Spanish as the official national language reflects its status as a common language throughout the whole country. This does not prevent the language spoken in the autonomous community from becoming the pivotal point of the language system in that particular region or from it being the subject of policies aimed at recovering it, in an effort to make up for any disadvantages or neglect it may have suffered. Therefore, it is perfectly feasible for the regional language to be considered in statutory terms as the vehicular language for the corresponding public authorities, Catalonians in this particular instance, since this is embraced within the *Estatut*, although it does not prevent Spanish from being deemed to hold a similar status.

In general, I interpret these constitutional court pronouncements to be *appropriate*, since they refer to aspects of the *Estatut* that had been challenged by claimants and, in agreement with the principle of procedural coherence that guides the constitutional court such as those formulated in the *petita* of the lawsuits, could not have been overlooked by the court. I also feel them to be *correct*, and I concur with them from the standpoint of their constitutional basis, set out as they are exclusively within "the reason of law," even if, as such, they might appear debatable. I also feel that constitutional case law is expressed *moderately*, although firmly, and that these conclusions are clear in rational terms and that the content is temperate.

Clarifying the System of Legislative Powers as the Backbone or Substance of Self-government

As is well-known, the ruling does not dismantle the range of legislative powers established in the *Estatut*, which were allowed to pass almost in their entirety. However, although the legislative powers were allowed through, the system underlying them was not, and was rejected by the court. The system of legislative powers set out in the *Estatut* corresponds to a protected or *shielded* model that seeks to ensure the autonomous community's own legislative domain, mainly through two mechanisms: firstly by delimiting the framework of autonomous community

legislative powers by specifying such powers as well as the material object thereof, and secondly by marking out, in statutory terms, the legislative powers of the State.

The constitutional court raises no objection to the *Estatut's* wish to set out in detail autonomous community legislative powers, although I would say that the court does not seem particularly enthusiastic about the idea. I would suggest that underlying the court's position on this matter there is, however, one objection that is made clear and another that is perhaps even more important, yet not manifested but that is, nevertheless, in my view, there for all to see.

The court has indeed on certain occasions warned of the inflexibility that statutory treatment of a given issue may have for the regulatory future of such an issue. From a democratic standpoint, reversibility is preferable to regulatory fossilisation. Statutory treatment of an issue continues to have the effect of stripping autonomous legislators of regulation thereover. The ruling points out that the particular inalterability of the Statute of Autonomy entails, "a hardening of the content thereof which may lead to a failure to allow the effective right to political participation in the exercise of the powers set out in the *Estatut*."

I would go as far as to say that the constitutional court questions in constitutional terms the attention to detail vis-à-vis regulation in the statutory text, which is more extensive than in the Constitution and whose form at times resembles a series of rules than a constitutional document. I would not say that the constitutional court is unconcerned about the legal assuredness that may be deduced by specifying the attribution of autonomous powers, although this advantage does not perhaps make up for the denaturalisation of the statutory document's constitutional character. In my view, the constitutional court's basic objection relates to the challenging tone, namely the *shielding* effect referred to earlier, which the *Estatut* seems to adopt towards the position of the constitutional court. Leaving aside the origin of the procedures used, what the new *Estatut* is basically seeking, particularly when positing that an extension of legislative powers be implemented by marking out such powers, is seen as restrictive of national legislative powers, and is aimed at curbing constitutional court influence over the system. Statutory specification ultimately consists of assigning to the *Estatut* the task of interpreting clauses related to the legislative powers of the State, and which may only influence basic regulation and in terms that it only falls to the constitutional court and not the Statute of Autonomy to determine.

Carles Viver[3] is to a certain extent right when he compares the continental European federal model that, perhaps somewhat exaggeratedly, he describes as legal, and the model employed in the United States, that he describes as political and ultimately dependent upon the Supreme Court. If the aim was to draw up an

[3] See the interesting article published by this author in issue 91 of *Revista Española de Derecho Constitucional,* "El Tribunal Constitucional, ¿siempre, solo… e indiscutible? La función Constitucional de los Estatutos en el ámbito de la distribución de competencias según la STC 31/2010" For a political description of constitutional justice in the United States, see the recent opinion of Posner (2011).

Estatut that would restrict constitutional court intervention by detailing legislative powers, it has to be said that the attempt has proved to be a resounding failure.

As commented on above, detailing legislative powers is one facet of the technique of shielding. The other is the delimitation of State powers that the *Estatut* seeks to achieve, and this is where it clashes head on with the opposition of the constitutional court. There is no reticence or indirect objection of the constitutional court's deliberations, but rather a full-blown rejection from the court itself. Interpreting and delimiting the legislative powers of the State prior to specifying the legislative powers set out in the various autonomous community statutes is a constitutional task that, as such, can only fall to said constitutional court and under no circumstances may be undertaken by the Statute of Autonomy, which may not supplant the constitutional body charged with interpreting the country's basic laws. We shall later pursue in further detail this particular task that is forbidden to the Statute of Autonomy, and we shall seek to understand what this "no-go" area consists of by describing what is excluded from the scope of statutory action. We shall also posit a case where perhaps the ruling does not act with its full weight, or when in our view, the basic laws may have been delimited by the court in a manner that is somewhat open to question. Having established these initial considerations, we may now analyse in some depth the position that the ruling adopts vis-à-vis the matter of legislative powers.

Accepting certain determinations with regard to legislative powers set out in the *Estatut* is carried out by adopting the technique of interpretative rulings. The constitutional court uses this particular type of decision in a manner that we might call excessive and improper. Indeed the court foregoes the cautionary tone that should be adopted towards such pronouncements. The court had pointed out that interpretative rulings are "extremely delicate and difficult to apply" (Constitutional Court Ruling 5/1981), and yet it resorts to such a technique on numerous occasions whether dealing with a particular interpretative ruling or one that is *sui generis*, since it fails to propose any understanding of the precept being challenged, thereby upholding its constitutionality to a certain extent. What the constitutional court does instead is to consider an addition that needs to be included in the understanding of the precept being questioned. Therefore, this is an interpretative ruling, yet not one that is conventional, but rather complementary or clarifying. The ruling normally accepts the constitutionality of the statutory rule being challenged yet, particularly with regard to the issue of legislative powers, alerts to the simultaneous or complementary nature of State action in the matter, such that inclusion at the statutory level does not entail exclusion at the state level. Thus, perhaps contrary to the author's intentions, statutory regulation in no way prevents any action on the matter that may be based on a legitimate, and therefore extra-statutory article of the constitution, except for an interpretative principle, in the rationale of the *Estatut*, which tends to be recommended in the constitutional domain: *inclusio unius exclusio alterius*. Indeed, the ruling recognises that statutory attribution concerning the exclusivity of the autonomous community "does not prevent exercising the exclusive legislative powers of the State, ex Article 149.1, be it when these coincide with autonomous community legislative powers on the same matter or object, or be

it when dealing with matters that are of shared legislative competence" regardless of whatever term or expression may be used in the *Estatut* for descriptive purposes. Such an idea is repeated on numerous occasions in the ruling, for instance with regard to articles shared by the State and by the autonomous community concerning control over local bodies.

These rulings clearly reject the claims made since they do not uphold the claimants' desire to see certain pronouncements annulled, yet they also have a regulatory effect, as legislation is altered subsequent to their issuance. It is true that the legislation does contain the same provisions. However, what it does not contain is exactly the same rules, since the latter can only embrace those that either in a positive or negative sense emerge from constitutional case-law concerning the provision being challenged. No rules may be accepted that may be considered unconstitutional and those where a positive ruling has been issued by the constitutional court must perforce be included in the legislation. The nomothetic purpose of these rulings leads to a morphological facet thereof, which in truth proves unnecessary, since outside its annulling scope, the efficacy of the ruling with regard to its value for case law may be drawn from its rationale, wherever this may happen to be found and whether or not it is reiterated in the ruling itself. More than in any other of the interpretative rulings issued to date by the constitutional court, this particular ruling includes in its pronouncements the case law established *strictu sensu* in the legal rationale. Since it stands alone, this case law thus not only imperatively proposes a way of understanding the legal or constitutional precept that it interprets, the constitutionality of which is upheld, as set out under Article 5 of Constitutional Court Organic Law, but determines, through acceptance or rejection, the actual content of the legislation, which it then subsequently establishes in regulatory terms.

The interpretative technique used in the ruling allows the court to establish an argument that is repeatedly stated: attributions of legislative powers in an autonomous community statute are never truly exclusive, since they must perforce comply with national competences when applied to the same legal matter or object.

As is well-known, the *shielding* technique that seeks to consolidate a safe area or haven for the autonomous community cannot be implemented to a significant extent without statutory determination of the national competences, a task that cannot in turn be achieved unless the *Estatut* assumes the role of interpreting the legislative powers of the State. Clearly, the scope of autonomous community powers can only depend on the scope of State powers, yet only if the Statute of Autonomy assumes an interpretative role may it be in a position to claim a clear delimitation of its own framework for legislative powers. The problem is not, therefore, that the *Estatut* should interpret the Constitution, which indeed it must do if it is to establish the scope of its own legislative powers, in other words within the constitutional framework, as is well-known. The key issue is the extent and firmness with which it attempts to carry out this interpretative task in its efforts to define and set out national legislative powers.

For the constitutional court, the *Estatut* cannot have any defining function. It can detail the powers that competence entails, within the constitutional framework, but it cannot set out either in abstract terms or in principle what competence actually

consists of. Statutes may not undertake to delimit legislative powers or to attempt any abstract configuration thereof, although they may describe them. The *Estatut* is in a position to say whether the autonomous community is competent in certain matters or to what degree it is competent, but it cannot establish what competence is or what it actually consists of.

Thus, it is not possible to delimit national legislative powers by specifying the powers of the autonomous communities, as it is the task of the constitutional court to define competence. However, the *Estatut* can specify and implement but not interpret any of the powers of the State that may, moreover, impose any obligation on the latter.

In truth, the court finds itself treading delicate ground. What distinguishes the constitutional intellection required to apply basic rules from configuration or delimitation? In certain conflicts over legislative powers, the court has on many occasions elevated statutory specifications to the level of constitutional, using the statutory clauses as an appropriate specification of the Constitution, and has applied control measures to both the Constitution and the Statute of Autonomy, since both Constitution and Statutes form part of the constitutional block. What is true is that on this particular occasion what the *Estatut* sought was to endow the Statute of Autonomy with naturalness and to justify this intervention as a system with a constitutional semblance. Yet, the *Estatut's* position as a parameter for the constitutional court might not allow any criticism of the former's inferiority when compared to the constitutional court. Everybody would agree that the constitutional court can control the constitutionality of the *Estatut*. However, it might not prove totally advisable for the constitutional court to do so. The situation might also be due to a desire to teach that the constitutional court is sometimes guilty of, when it not only justifiably establishes the existence of national competences over the exclusive domain of the autonomous community, or points to specific excesses in the powers set out in the *Estatut*, when regulatory application is divided or unclear in the Constitution, but when in abstract terms the court also limits the autonomous community's scope of action, forbidding it from carrying out any abstract delimitation, from defining the system of sources, or laying down constitutional categories. It also remains to be seen whether it is in the constitutional court's role to engage in the abstract task of devising or creating constitutional principles, or whether such a task should be left to academics whose main function is to engage in theory and not deal with specific rulings, even though the court's arguments should be backed up by sound reasoning when conflicts over competences are brought before what is the highest legal authority in the land.

Indeed, the constitutional court's desire for exclusivity when defining certain concepts leads it to establish case-law based on rules, rescinding the corresponding part of Article 111, over which the constitutional court's jurisdictional intervention is debatable, due precisely to the initial ambiguity, wherein it distinguishes between a statutory description (licit) and defining description (proscribed). The *Estatut* cannot define what are the bases of a matter, which it also does incorrectly, since it essentially conceives them as a law governing principles, thereby relegating to an exception the fact that the rules cannot be established on principles or that they can

be established by a rule that is not the law, which then consists of the regulation of a specific aspect of the matter, or that the rules may be laid down through a regulation or an act. With regard to the issue of shared matters, according to the article in question the legislative powers of the Catalonian Autonomous Government (*Generalitat*) are to be exercised within the framework of the rules set down by the State "as principles or common regulatory minimums that enjoy the status of law, except in instances that are determined in accordance with the Constitution and the present Statute." Whilst some clarification of nuances may be required, I feel that the *Estatut* does correctly describe what the power to establish rules involves, but without defining or actually setting this out, a task that could have been performed by the constituent assembly but that was not, and which is carried out by the constitutional court. The constitutional court states that shared competence is typical of the autonomous state. Indeed the *Estatut* refers to a key element in shared regulation, namely the fundamental notion, defined in the terms we are familiar with. The constitutional court strongly rejects the legal principle of Article 111 of the *Estatut* that it deems unconstitutional and which it annuls, correctly interpreting that the rules may be framed within certain norms that are not legal, the content of which exceeds a description of principles.

Indeed, as stated above, the constitutional court is here exceeding its authority, if we concede that its pronouncement on the matter springs from a deep-rooted objection based on a denial of the legislators' capacity to define or establish, and not merely to lay down competences, insofar as the capacity to define the concept of rules falls to the constituent assembly and to the constitutional court itself. Indeed, we should understand this precept by accepting that the expression "except" opens up what is not an exceptional or extraordinary note of caution, but one which is rather outside the normal or ordinary and refers both to the status of the regulatory medium (law, regulation, act) as well as to its content (principles or specific establishment of rules of a fundamental aspect of the matter).

In sum, the interpretative line of reasoning adopted by the constitutional court, prohibiting the constituent assembly from engaging in any configurative action, ultimately equates to forbidding them, at least in constitutive terms, from undertaking any action whatsoever concerning actual sources, an area where the very "categories and concepts" themselves are established. The *Estatut* is thereby prevented from defining any rules or from establishing them *ex novo*, although it is allowed to describe them, in what is clearly an interpretative exercise, should this prove useful for exercising regional competences. In this particular instance, founded on what the rules might be or on what they might be understood to be, subsequent legislation can then be established and implemented. Determining the scope of state intervention then allows for the scale of statutory powers to be established.

The *Estatut's* definition of the concept of rules is felt by the constitutional court to be inappropriate, not because the definition is in any way erroneous but rather because the *Estatut* itself is not the appropriate framework to forward such a definition. Yet, the problem arises that in another instance, similar action was taken that did not draw any reproach from the court. I am referring to Article 189

of the *Estatut*, section 3, which undoubtedly adopts an interpretative decision vis-à-vis the sources that, according to the doctrine of the court, it does not have the power to do, by foreseeing the *Generalitat's* capacity to draw on European Union legislation that might replace Spain's basic rules and regulations, and subsequently approving the corresponding laws to be applied. In application of this article, it is indeed true that "should the European Union establish legislation that replaces the basic rules and regulations of the state, the *Generalitat* may adopt and apply legislation based on European norms."

Promoting Participation or the Federal Nature of the System

As is well-known, federal systems not only ensure that regional authorities enjoy their own independence, which is guaranteed under the Constitution, but also establish mechanisms for involvement in the composition and running of the state's central or common bodies. Reform of the *Estatut*, fully backed up in this respect by the constitutional court, sought to underpin this participation, both at an institutional scale as well as with regard to the exercising of state powers. Indeed, there are two very clear conclusions to be drawn from the ruling on the *Estatut*. The first is that there are no legislative powers that are exclusive to the autonomous community, and which totally override state intervention, by virtue of the residual powers held under the Constitution and that consist of the cross-cutting or implicit powers guaranteed under the systemic principles that are predominantly the responsibility of the central authorities. The second conclusion is that there is room for autonomous community involvement in the powers that are exclusive to the State.

The *Estatut* contains a number of examples of cooperation between the State and the Autonomous Community, supported by the constitutional court. This is the case, for instance, with the principle of bilateralism, which recognises the constitutionality of institutions such as the joint Government-*Generalitat* commission, and which also recognises the autonomous community's power to request the signing of treaties or receive information thereon, its power to put forward proposals concerning the composition of various national bodies or institutions, its right to intervene in the application of certain national competences, like the planning of the economy, autonomous community involvement concerning national powers related to road communications between different autonomous communities, or autonomous community proposals regarding the number of immigrants to be allowed to enter.

All of these are cases that relate to autonomous community involvement in the exercise of national competences that affect the application of regional powers. These instances are set out in the *Estatut* in general terms and, moreover, involve action on the part of the communities that does not call into question either that terms that autonomous community intervention is envisaged will be established by the State, or that the decision regarding the timeliness of such an exercise corresponds to the State as the authority holding such competences.

Such is the case with the following two examples. The constitutional court points out that "the interpretation that Article 183.1 of the EAC (*Estatuto de Autonomía de Cataluña*) makes of the Bilateral *Generalitat*-State Commission, as the "general and permanent framework for relations between the governments of the nation and the *Generalitat*" does not run contrary to the Constitution interpreted in the sense that it does not exclude other frameworks for relation, nor confer on said Commission any other function than that of voluntary cooperation with regard to the field of competences of the two governments, which are binding." Any decisions or agreements that "may be adopted by the Bilateral Commission as a cooperation body" shall not prevent the free and full exercise by the State of its own competences nor, consequently, replace, bind or leave without effect the decisions that it may adopt.

Thus, as at a wider international level in EU law, and having established that State intervention affects Catalonia's interests or competences, the constitutional court recognises Catalonia's right to be involved when the country's position as a whole is being determined, and is being shaped multilaterally. Such an attitude is consistent with the constitutional court's view that "when the State engages in commitments with the European Union it must seek the widest possible consensus with the autonomous communities." This is why the statutory prevision is constitutional, whilst at the same time not undermining the powers that are in the hands of the State, and depending on whether or not only Catalonia is affected, and is also why the manner wherein Catalonia's participation in how the nation's position is established proves to be constitutional. In this vein, the *Estatut* envisages, within Spanish representation, the participation of representatives from the *Generalitat* who do not question the involvement of members from other autonomies and that it falls to EU or Spanish law to determine and control.

To sum up, I feel that if read correctly, this ruling contains the essential core, in the sense of content that is binding and may not be renounced, of what is required to reform the system of autonomous communities, whether or not explicit formal changes are made. Coherent reform of the autonomous community system should therefore set out to accomplish the following objectives:

A) To avoid any confederal drifting of the State.
B) To reaffirm a comprehensive understanding of the system of powers where exclusivity plays a very minor role as a means of interpreting relations between the central administration and the autonomous communities.
C) To promote participation or the federal nature of the system.
D) To consolidate the constitutional court's position as a guarantor of autonomous community powers.

References

Juan José Solozabal: "La Sentencia sobre el Estatuto de Cataluña: una visión de conjunto," *Revista de Estudios Políticos*, issue 151, January-March 2011

Posner, "The Court: A Talk with Judge Richard Posner," *New York Review of Books,* September 29, 2011

The Inevitable Jurisprudential Construction of the Autonomous State

Francesc de Carreras Serra

This paper considers whether, in the construction of the Autonomous State, especially as regards distribution of competences, it was avoidable or unavoidable that the Constitutional Court (CC) had an essential role. Irrespective of any speculation concerning what might have occurred but did not, if we cast our thoughts back, we cannot deny the fact that the doctrine of the CC with regard to the Autonomous Communities has been decisive in structuring the territorial organisation of the state. The numerous studies concerning said jurisprudence[1] confirm this observation. From our point of view, this situation was foreseeable if we go by the content of Title VIII of the Constitution. Although this is true and the CC has performed a more than commendable and widely acknowledged task, there is also general agreement that this is not the best way forward and there are other avenues that should be sought in order to reduce the influence of jurisprudence in questions of a political nature.

To set forth these ideas, we will divide this paper into three parts. In the first, we will offer some thoughts about the objective obstacles that the CC has had to overcome to carry out its difficult task; in the second, we will try to establish the negative consequences of these hurdles and, in the third, we will give some proposals for reform in order to solve these negative consequences.

[1] For all, see the book by Fernández Farreres (2005).

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Obstacles to the Work of the Constitutional Court

When resolving appeals, questions of unconstitutionality and conflicts regarding competences that affect subject matters related to the Autonomous Communities, the CC has faced a difficult task because of certain objective obstacles that we will now examine.

The Concise Constitutional Regulation of the Autonomous State

At first sight, it might seem that the subject-matters of the Autonomous Communities are only regulated in Article 2 and Title VIII of the Constitution. However, if we look carefully, this is not the case, even though the regulation is specific in said Article and Title. A constitution is a structure where its norms are interconnected, and to interpret the specific precepts we have to turn to others that are not in order to carry out hermeneutic tasks systematically. Therefore, the constitutionalisation of the Autonomous State is not merely, as is often maintained, contained in Article 2 and Title VIII, but in the entire constitutional text. Constitutional regulation is not, therefore, as succinct as would first appear.

It is also true that many of the constitutional precepts, especially those relating to the Autonomous Communities, are vague and indeterminate with different shades of meaning. This is normal in all constitutions and is one of the inherent features of these texts that must perforce be characterised by their stability, which consists not only of the fact that the reform procedure is made worse but also that it contains norms of an elemental nature. In this way, future legislators can develop them according to different criteria without having to change the letter of the Constitution, something which, as over 30 years' experience has shown, is difficult in Spain because of historical precedent and specific circumstances that it is not here to consider.

Thus, the vagueness and indeterminateness of Art. 2 of the Spanish Constitution (SC) and Title VIII evidence, to a greater or lesser extent, the same problems as in other federal constitutions and, further, its precepts are specific than in many of them, for example, the United States. That, therefore, is not the problem. What truly distinguishes the Spanish Constitution as regards hindering its work as interpreter is the lack of a federal tradition in our historical constitutionalism and, consequently, in not having precedents where to base the interpretative task. This evident lack has, without doubt, been and continues to be, an obstacle for interpreting constitutional precepts of the Autonomous State.

Nevertheless, although on occasions Constitutional Court rulings have displayed certain indeterminateness, the Court has always managed to find some constitutional precepts to cling to and where to construct, based thereon, a reasonable and well founded legal doctrine. This indicates that, while the constitutional text is succinct (i.e., says little), what it *does* say is substantial. This can be verified if we

seek to find substantiality in another federal state and compare it to our own Constitution.

Indeed, if we deduce the core structures of a federal state by bearing in mind the fundamental characteristics of these types of states in our political-cultural environment, we find the following structural elements: (a) a valid federal constitution in the whole state that guarantees equal fundamental rights for all citizens; (b) a federal legal code equally valid in all the state territory together with partial codes for applying in the federated territories; (c) a system for distributing competences that makes it possible to determine what exactly the competences of the federation and those of the federated states are; (d) the inexistence of a hierarchical political relationship between the federation and the federated states: only a relationship of competences between both, guaranteed by legal controls; (e) institutions and procedures for relationships between the federation and the federated states in order to integrate them in the political will of the federation and to increase the effectiveness of the whole; (f) and, lastly, separate treasuries between federation and federated states.

The Spanish Constitution already contains the skeleton of these structural elements common to a federal state: (a) a Constitution as a highest norm of the legal code, valid throughout the State that establishes unity, autonomy and solidarity as basic principles of territorial organisation (Articles 1.2, 9.1, 14, 137–139 SC, among others); (b) the statutes of autonomy as basic institutional norms of the territorial bodies (Articles 147 and 152, SC); (c) the basic criteria for distributing competences (Articles 148–150, SC); (d) legal controls and state coercion as a closing clause typical of federalism (Articles 153, 161–163 and 155, SC); (e) concords and cooperation agreements between both territorial spheres (Article 145, SC) and (f) separation between state and autonomous treasuries (Articles 156–158).

The only thing missing to complete the diagram is, as well as the concords and cooperation agreements referred to in Article 145, for the Constitution to create an integrative body between both power spheres that is common to all federal states in their capacity as a state and, therefore, as a unitary body, as well as the federal constitution that guarantees this unity: that is, an organisation that links central and territorial institutions to promote integration. This would enable Autonomous Communities to participate in State institutions, thus contributing to collaboration and cooperation with the latter as well as facilitating the mutual collaboration and cooperation of Autonomous Communities. To carry out these functions, the classic body is the Senate. However, that foreseen in our Constitution is, neither for its composition nor for its functions, a federal Senate.

This absence should also be included within the context of a lack of federal tradition, probably because of the scarce constitutional tradition, which was only attained in the brief period of the Second Republic and a federalist movement during the nineteenth century and beginning of the twentieth inspired by models different to present-day federalisms.

Indeed, federalism in Spain has been understood in the confederal sense by peripheral nationalists—who have confused autonomy with sovereignty—and in

the centralist sense by Spanish nationalists, who have always considered Autonomous Community participation in the State and the mutual collaboration between organisations to be disconcerting for the working of the public authorities. This a serious mistake of perspective if we bear in mind the current needs of the states and the functioning of the federal states within our cultural environment that are not limited to separation of powers and competences but rather interpret federalism as a system where collaboration and cooperation between these powers and the loyal exercise of the competences is fundamental. Thus, today, although the Autonomous State is structurally federal (leaving aside that it should be completed by a Senate that performs the integrative function), functionally it is still barely so because of lack of political and administrative practice that would have assimilated the lessons of current federalism.

Thus, while it could have been sustained at a given moment, with acceptable reasons, that the Autonomous State was "deconstitutionalised," that is to say, that its design was not in the Constitution,[2] that was due simply to two principal reasons: (a) because its final model was not known and (b) because distribution of competences between State and Autonomous Communities depended to a large extent on the Statutes, of which at that time only those of Catalonia and the Basque Country were approved and that, above all, in accordance with the Constitution, might vary enormously depending on the route chosen to attain autonomy. These two reasons gave rise, with good reason, to doubts about the final model of the future territorial organisation of the State. However, the essential elements of the future State had already been formed (more as principles than rules) in the constitutional text and simply needed to be implemented and interpreted. The former has been in the hands of both the state legislators (with the statutes and other laws) and the autonomous states (with their own legislation). The latter has been in the hands of the Constitutional Court, whose doctrine as regards the Autonomous Communities has been decisive in specifying and giving substance to many constitutional precepts.[3]

Therefore, those terms of Article 2, SC and Title VIII that at first seemed insufficient to structure territorial organisation and whose meaning was unknown, are today principles and rules with a content that is highly defined by legislative development and jurisprudence. Further, the institutional development of the Autonomous Communities (of which the statutes are an essential part) has also contributed to shaping territorial organisation. With hindsight, therefore, it can be stated that the Constitution, interpreted by the Constitutional Court and implemented by the legislator, contains the basic outline of our territorial state model.

[2] See what was at the time a stimulating article by Cruz Villalón (1999).

[3] M. Aragón is categorical in stating: "It may be said, without exaggerating, that our Autonomous State has been built principally by the Constitutional Court through its rulings." In his article: "La construcción del Estado autonómico," included in Aragón Reyes (2009), p. 737.

The Different Territorial Conceptions Present in the Constitutional Consensus

It is well-known that one of the virtues of the 1978 Constitution is that it was drawn up by consensus. What does drawing up a Constitution by consensus mean? It means, simply, that the partial agreements that the political forces reached when drafting the text were not approved by a numerical majority of votes but rather by means of transactions between the different political groups that enabled a solution acceptable to all. In this way, they sought to achieve something that no Spanish constitution had ever attained: that all the parties and political tendencies (or, at least, an immense majority) could consider the Constitution as common to all, that was, all things considered, everybody's Constitution. This enormous virtue had, however, an inevitable downside: that some subject-matters were regulated in a very open, ambiguous, and indeterminate way. We have seen how this feature is, up to a point, inherent in any constitution that wishes to survive a long time. However, if excessive, the problems that arise are not resolved but rather put off.

Up to a point, this is what happened with respect to the Autonomous Communities. Simplifying a little, beneath the constitutional consensus initially three different positions were concealed:

a) *Socialist and Communist Federalism*. By historical tradition and conviction regarding the need to democratise the State, the PSOE and PCE-PSUC had quite similar postures that converged in a federalist position, understanding this as that of western federal states.
b) *Regionalism of the UCD and AP Parties*. This regionalism (to give it a name) of the bloc of parties in the centre and right was more undefined and even contradictory. In some cases it was limited to a generalised administrative decentralisation, in others to a combination of autonomy with a high level of competences for certain nationalities (the Basque Country, Catalonia and, if there was no alternative, Galicia) and an administrative decentralisation for the regions (that is, the rest of the communities). In general, it can be stated that for many sectors of the AP, the attitude was one of rejection of autonomy and for the majority of the UCD, autonomy was accepted but with considerable suspicion.
c) *Confederalism of the Nationalist Parties* (*PNV and CDC*[4]). There were undoubtedly differences between one and the other: the PNV was more in favour of the "foral" (charter-granted) regions, and the CDC more in favour of autonomy. It should also be noted that without their support at the stage of the initial development of the Autonomous Communities, especially in the period 1980–1983, the Autonomous State might not have attained the present levels of political decentralisation. However, autonomy was for both parties because of

[4] In the constituent parliament (1977–1979), Convergència Democràtica de Catalunya (CDC), the party of J. Pujol and M. Roca Junyent, had still not formed an electoral coalition with Unió Democràtica de Catalunya (UDC), which gave rise to CiU, which is still in existence.

their nature as nationalist parties, a mere stepping stone to attaining sovereignty, that is to say, independence. In other words, they showed themselves in favour of autonomy insofar as it was a gradual procedure in achieving independence. Whatever the case, both parties also coincided in that they were the political representatives of their respective nations (Basque Country and Catalonia) and that the rest (with doubts regarding Galicia) formed part of another nation, namely Spain. In consequence, as was seen years later when rebuffing the 1992 Autonomy Pact, they rejected any notion of equal competences between the Autonomous Communities. Their "differential reality" as nations gave them a right to be treated differently to other communities, as was later confirmed in the processes of reforming the statutes (the failed Ibarretxe Plan and the Statute of Catalonia of 2006, and especially their tortuous process of drafting). Whatever the case, naturally, neither the PNV nor CiU are parties with a federalist notion of territorial organisation, but rather, in their most moderate pretensions, of a pact for territorial organisation regarding what they call Spain.

Over time, with the exception of the nationalist forces, their positions have varied. The UCD has disappeared and, coinciding with the change of name from AP to PP in the 1990s, the position of the latter approached that of the PSOE. It can be said that between 1990 and 2003 there was almost no difference between the major parties and the consequence of this agreement was established in the signing of the Autonomous Pacts of 1992 and their subsequent materialisation by means of the statutory reforms and extensive transfer of public services. The fact that Fraga Iribarne occupied the Presidency of Galicia from 1990 is not an irrelevant fact in the change of heart of the PP. The PSOE, for its part, abandoned collaboration with the PP as a result of proceedings in the Catalan Parliament (January 2004–September 2005) and later in the Spanish Parliament (November 2005 until its approval midway through 2006) of the Statute of Catalonia. In the other statutes approved during this new wave of reforms, PSOE and PP collaborated once again although circumstantially, precariously and unconvincingly. IU, and even more so IC, the party that succeeded the PSUC, opted to a greater or lesser extent for reconciliation of positions towards the nationalist forces in the Basque Country and Catalonia, causing great confusion in the rest of Spain, especially in the PCE, the principal component of IU.

All these different initial approaches and, later, the changes and ups and downs of the different parties in this regard, had an influence on the fact that political interpretation of the Autonomous State had repercussions at the heart of the Constitutional Court, increasing to an extreme degree in the last years because of the slow and arbitrary drafting of the ruling on the Statute of Catalonia (31/2010). In the woeful process of drafting the ruling, the guilt was shared between those inside the CC who selfishly leaked confusing news of the internal debate to the press, the ignorance of constitutional matters or the bad faith of the media in reporting the news and the partisan pressures on the judges. All of this contributed to eroding the independent image of the Court *vis-à-vis* public opinion.

The Lack of a Benchmark

The Constitution does not describe Spain's territorial form of State in precise terms. During the Constituent Parliament of the Second Republic, a debate emerged regarding this question and various, always unsatisfactory, adjectives were considered that swung between describing the State as Unitary or Federal. This issue was settled by the President of the Constitutional Commission, Professor Jiménez de Asúa, PSOE Member of Parliament, with a word then in fashion among the constitutionalists: integration. Thus, he named it the Integral State. The third paragraph of Article 1 of the 1931 Constitution states: "The Republic constitutes an Integral State, compatible with the autonomy of the Municipalities and the Regions." The reasons for that denomination were set out by Jiménez de Asúa in his introductory speech to the Constitutional Project,[5] a speech that was quite obscure and confusing where he presented the Integral State as superseding the unitary or federal one, both, said Asúa, subject to serious crisis. Whatever the case, this denomination as "Integral State" did not clarify anything with respect to the territorial nature of the State: this had to be deduced from Title I of the Constitution (Articles 8–22), interpreted within the whole of the text.

In the 1978 Constitution, no term is used to describe the territorial form of the State. The problems of choosing one or other term were similar to those of the constituent republicans of 1931: the classical denomination of Federal State was not convincing, that of decentralised or regional State did not seem satisfactory for the historical nationalities, and that of Integral State had no repercussion in comparative law. Instead of inventing a new term, the constituent members chose not to use any denomination and the doctrine, which in the early years used many terms, has opted mainly for Autonomous State. In turn, the CC, which at the beginning tended towards politically decentralised State, compound State or complex State, has never finally decided on a specific terminology.

Does this have any importance? In truth, it would have little if it did not contribute to adding doubts regarding the model set out in the Constitution. If the Constitution had explicitly said that Spain is a federal state, the use of the techniques inherent to this type of state would have been less debateable. We have previously stressed that, substantially, the structural model is strictly federal even though in its working it evidences major shortcomings. However, if we abide by the constitutional precepts, we can see that the greatest influence comes from the 1931 Constitution, not only in the basic ideas and concepts but also in its grammatical formulation itself. Nevertheless, because of its short existence and the limited development of the autonomous regions, said Constitution has hardly been able to serve as a benchmark for the Constitutional Court.

As it happens, however, the 1931 Spanish Constitution had a marked influence on the Italian Constitution of 1947 that established a model that the majority of the

[5] See the speech of Jiménez de Asúa in Juliá (2009), pp. 215–216. This volume contains other speeches by constituent members of parliament which affected this matter.

doctrine has denominated Regional State. In the constituent period, this Italian model, which seemed to be in its decisive moment of development, was present in the ideas of many members of parliament and among many specialists in public law. However, during autonomous development, especially in constitutional jurisprudence, the benchmark was the German Constitution that, in some of its basic structural elements, is quite different to the Spanish model, which has at times brought about strained and debateable interpretations.

Further, a peculiarity of the Spanish autonomous system, which is not in any federal model, has created many interpretive difficulties. I refer to the fact that, according to Article 149.3, SC, the competences of the Autonomous Communities are assigned in their respective statutes with the limit of the national competences reserved for the State in Article 149.1, SC. This strange and confusing way of allocating competences to the communities, derived from the curious relationship of the statutes with the Constitution, has been the cause of many conflicts over competences. The doctrine, on the basis of the interpretation of Article 28 of the Organic Law of the Constitutional Court, has shaped the notion of a "bloc of constitutionality," whose difficulty in interpreting stems above all from the fact that solving conflicts between state and autonomous law at times requires bearing in mind that two norms of different hierarchical rank (especially, Constitution and Statutes) are the parameter of constitutionality.

Later, we will refer to the need to resolve this complex and obscure problem through constitutional reform. Whatever the case, suffice it to note that the absence of a clear benchmark (including its precise denomination) and this method of attributing competences, different to all the rest in comparative law, has created enormous interpretive difficulties for the Constitutional Court.

The Gradual Territorial Establishment of the Autonomous State

Article 2 of the Spanish Constitution establishes autonomy as a right of the nationalities and regions that make up the Spanish nation although these are not specified in the constitutional text. This meant that, unlike the majority of federal states, the map of sub-state bodies that make up territorial organisation was not drawn beforehand but rather had to be designed subsequent to the Constitution coming into force. Title VIII of the Constitution establishes different paths for this. Therefore, an inappropriate right to autonomy is configured—in the sense that it is not a question of a subjective right—which has also been denominated the "dispositive or voluntary principle."

Although the map was practically decided at the time the Constitution was approved (the so-called "pre-autonomous communities" almost totally prefigured it), the different constitutional procedures towards achieving autonomy meant that, depending on the path chosen, their institutional and competence regimes were markedly unequal until the reforms derived from the Autonomous Pacts of 1992, which were not finally implemented until 2001 and 2002. Therefore, the substantial

inequality between the different levels of autonomy lasted a little over 20 years which, however, is a period that should be considered brief if we bear other countries in mind and, above all, if we also take into account that Spain had been a centralised State from the time of its formation in the nineteenth century and that it had reached its apogee in the Franco period.

In this 20-year period between 1980 and 2000, the Constitutional Court had to interpret the constitutional precepts in relation to the statutes, in accordance with the idea of the "bloc of constitutionality," especially on the thorny topic of the distribution of competences. As regards competences, 12 communities were subject to the limits of Article 148.1, SC, while two also had extra-statutory competences (Canary Islands and Valencia due to LOTRACA and LOTRAVA, Organic Laws foreseen in Article 150.2, SC). Navarre was a case apart given its "foral" nature and the four that had acceded via Article 151 (Basque Country, Catalonia, Galicia and Andalusia), had neither identical competences nor acceded at the same time and in the same way as the Autonomous Communities. Further, the Basque Country was also, like Navarre, a "foral" community protected by the so-called historical rights of the first Additional Provision of the Constitution.

Therefore, the Constitutional Court in these years had to draw up jurisprudence where statutes of a different nature and content formulated an Autonomous State in a transitional phase towards an uncertain objective. It was not an easy task. Moreover, without the intervention of the Court, it is probable that it would not have been possible to formulate all the pieces of this model under construction.

Consequences of These Obstacles

While the process has not been easy, looking at the autonomous process in perspective, it can be said that, at least until the years 2000–2002, the chosen route proved coherent: constructing a politically decentralised State within the habitual parameters of federalism. As could already be foreseen in 1978 when the Constitution was approved, and as became crystal clear in 1981 when the UCD-PSOE Autonomous Pacts were signed, the Autonomous Communities spread throughout Spain. Indeed, with the exception of the cities of Ceuta and Melilla, in February 1983 the last four statutes were approved, the whole of Spain now coming to be made up of Autonomous Communities. However, this generalisation did not imply equality and, therefore, the final model was still an unknown factor. This was cleared up in 1992 with the new Autonomous Pacts signed between the PSOE and PP, which decided to reform the statutes derived from the path of Article 143, SC, so that the different communities could attain a similar level of competences.

Once this phase concluded in 2001, after the last transfers of health powers and a profound reform of the LOFCA (Organic Law for Financing the Autonomous Communities), a third stage had to be undertaken after the generalisation stage (1981–1992) and the levelling stage (1992–2001): this concerned addressing the integrative stage. Indeed, the State had undergone a profound process of political

decentralisation and the unfinished business consisted of completing the integration of the Communities into the State to finalise the federal design. After an implementation process lasting almost 25 years, the vaguely defined Autonomous State, regulated only in outline by the Constitution, had become a Federal State: that is to say, in one more member of the family of federal states that in Europe was initiated by Switzerland, Germany and Austria.

However, an incoherent turnabout then took place in this slide towards federalism: first, the attempt to reform the Basque Statute (the so-called Ibarretxe Plan), which was not even processed in the Lower Chamber of Parliament, and, second, reform of the Catalan Statute, which began to be drawn up in 2000, was boosted in 2004 by the formation of the Tripartite Government presided over by Maragall, was approved and came into force in 2006. In its wake, other autonomous statutes were also approved (Valencian Community, Andalusia, Aragon, the Balearic Islands, Castilla-Leon and Extremadura) which have added little to the model and that, after the 31/2010 Ruling of the Constitutional Court regarding the Catalan Statute, among others, have turned out to be obscure. Today, the integrative stage has yet to commence and, in fact, autonomous development remains exactly where it was 10 years ago.

In these 30 years of autonomous development, probably the most solid aspect (that has authoritatively determined concepts and limits) has been the doctrine of the Constitutional Court. Let us remember some fundamental milestones: compatibility between unity of the State and autonomy of the Communities, as well as local autonomy; the constitutional recognition of historical rights; the relationship of the statutes with the Constitution, the organic laws and the laws of Article 150 (SC); the prohibition of merely interpretive norms; the concept of rules, core laws and core legislation; the nature of the different competences, the delimitation between them, the role of the residual clause and the additional principle, as well as the laborious delimitation of many of these competences, especially the location of those assigned to the State in Articles 149.1.1, 149.1.13 and 149.1.18 of the Constitution; the establishment of the principle of constitutional loyal and the concepts of coordination, cooperation and collaboration; or, finally, the legal impact of European Union law on domestic Spanish law without upsetting the balance of State and Autonomous Communities competences.

With the inevitable discrepancies, in general, it has certainly been an impartial and balanced jurisprudence, well accepted by the various political and doctrinal sectors, which has enabled both the state and autonomous legislators to orientate and consolidate the territorial organisation reasonably well and regarding which numerous doubts existed at the beginning. Nevertheless, it must be admitted that when specifically applying this jurisprudential construction, in many cases the Constitutional Court has had to act more like an arbiter than a judge, thus occupying a place that does not correspond to it.

As is known, judges must limit themselves to finding meaning in the norms in accordance with the methods of interpretation accepted by the legal community, the community of interpreters. The judge must appease the controversies according to the principle of equality, acting within the context of the law and no more.

On the other hand, the role of arbiters differs. Without disregarding the norms, they attempt to conciliate the interests of the parties that have chosen them as arbiter because they are recognised as an authority because of their honesty, moderation, and impartiality with respect to the circumstances of the question under debate. There are points of similarity between judge and arbiter (as well as between the figure of the mediator in relation to both) but the distinction is clear and established in two aspects: the judge is not chosen by the parties but rather is predetermined by law and is only subject to legal rules; arbiters are chosen by parties, who have previously decided to be bound by their decisions. These decisions are founded not only on norms but also on the respective interests. Arbitrage plays an important role in questions of private law but little in public law. And although the border is, at times, a little blurred, the Constitutional Court is, above all, a body that must resolve questions of public law.

Therefore, the CC must be judge and only judge, without leaving gaps obliging it to act as arbiter. And if it *has* decided to act as arbiter it is because of over-indecisiveness on the part of the legislator or too many lacunae in the constitutional text, given its succinct drafting with respect to the autonomous question, especially because of the difficulty of delimiting competences by conciliating two norms of a different nature and hierarchy: Article 149 (SC) and the precepts of the corresponding statute that assigns the competences.

Further, the CC itself put a rope around its neck when ruling, at least technically, that the prevalence clause contained in Article 149.3 (SC) was inapplicable in our system. Although there are reasons to maintain this position—the similarities of our distribution of competences with Austria and, on this point, the Kelsenian theoretical diagram—it is unquestionable that one principle of dogmatics is that any precept must find some meaning within a legal system and cannot ignore its existence. If the constituent parliament introduced it, we have to presume that it was for some reason and, above all, wanted to give it some legal consequence. Even more so, when similar precepts are current in benchmark federal systems such as the United States and Germany, and are contained in Article 21 of the 1931 Constitution, another proof of the influence of the republican text on our constituent assembly.

Whatever the case, there is no doubt that this absence of legal meaning of the prevalence principle is disconcerting and offers serious interpretative doubts. In the following section, we will try to find a meaning.

From all we have said, we can deduce two consequences. First, the political decentralisation stage had ended by 2001 and we have not moved on to the integrative stage, as would have been coherent with the federalist line pursued until then. Thus, what is lacking is to culminate the model. Second, the CC must cease to be an arbiter and become only a judge, the interpreter of the legal norms applied to a controversial case: whether an appeal, a question of constitutionality or a conflict of competence. To achieve this, political entities (especially, a reformed Upper Chamber) and not the CC must carry out autonomous implementation, especially at this stage of integration. Further, the hermeneutic task of this Court must be facilitated, clarifying the distribution of competences and encountering

legal meaning to the prevalence principle. As a conclusion, we have to prevent, as far as possible, the construction of the Autonomous State from falling, as regards that that is outside its jurisdiction, on the shoulders of the CC.

Proposals for Reform

With everything we have discussed, we reach the conclusion that while the jurisprudence of the CC has thus far been inevitable and positive in shaping the Autonomous State, the disadvantages and drawbacks should not be overlooked, above all at the integrative stage that is yet to commence.

First, the quasi-arbitral function where the CC has been subjected, due to the type of controversies about which it must rule, has on specific occasions caused (the last and best-known being the 31/2010 CC Ruling regarding the Statute of Catalonia) serious wear and tear after being accused of politicisation and of losing the *auctoritas* that is essential for correctly performing its functions. Second, as many jurists have pointed out, the fact that the CC has played a key role in shaping the Autonomous State, does not mean that this is the ideal, even more so when we are at a time of integration that does not require much constitutional doctrine to resolve conflicts as constitutional and legislative reforms that the Court cannot, under any circumstance, put into practice.

Thus, what is at stake in this stage is to politically integrate the Autonomous Communities in the bodies of the overall State and to facilitate the task of the Court so that it is limited to its role of judge and does not find itself obliged to overstep the limits of that function. We will now outline certain reforms in both lines of action.[6]

Integrating the Autonomous Communities in the State: Reform of the Senate (Upper Chamber of the Spanish Parliament)

Over the last 20 years, reform of the Senate has been the focus of constant academic and, at present, also political debate. Indeed, although the Constitution describes the Senate as a "chamber for territorial representation" (Article 69.1, SC), neither its composition nor its functions allow it to play such a role, and it proves merely a legislative chamber for second readings with barely any powers for controlling the Government. In sum, it is a body with little institutional weight and without any

[6] The reforms that we will indicate below are not the only reforms that, in our opinion, the Autonomous State needs but rather only those that relocate the functions of the CC so that its rulings do not erode the strictly jurisdictional nature of the body. Regarding the other reforms, see my collaboration in the collective work: VV. AA., "*La reforma constitucional ¿hacia un nuevo pacto constituyente?*" Minutes of the XIV Conference of the Lawyers' Association of the Constitutional Court, CEPC, Madrid, 2009, pp. 47–112.

decisive function concerning the organisation of the Autonomous Communities. The idea that the Senate was established as a toothless chamber has been present from the time of the passing of the Constitution, a belief confirmed by the role it has played over the years of constitutional democracy. Therefore, reform of the Senate is widely supported, although this consensus vanishes when a specific model is put forward.

Indeed, greatly varying models for the Senate have been proposed, although in the overwhelming majority of cases with a common concern and objective: that the second chamber should serve to integrate the Autonomous Communities in the state institutions. This is the most glaring gap in our institutional model.

Any reform of the Senate would result from the combination of two elements: the method of election and the functions of the chamber. The coherence between both elements is one of the principal parameters for judging its suitability. The different types of Senate that have been proposed can be grouped into three main models based on how Senators are designated: (a) direct universal suffrage in each of the Autonomous Communities; (b) indirect suffrage by means of the election of Senators by Autonomous Parliaments; (c) designation of Senators by governments of the Communities. Based on these models, we can deduce the possible functions of the Chamber.[7] We will now comment briefly upon the fundamental features.

A Senate Elected by Direct Universal Suffrage in Each of the Autonomous Communities

This model does not offer any substantial variation compared to the present one: the principal difference between them being the size of the electoral district. Indeed, among its champions there is agreement in that said constituency should be the Autonomous Community and not the province, as at present, doing away with those Senators elected by Autonomous Parliaments. Further, of course, the functions ought to be specialised in subject matters that affect territorial organisation. However, the result would continue to be a Chamber similar to the Congress (Lower House) and, therefore, would not provide any substantial change: the partisanship of the Chamber would be transferred to the Senate with the same results.

Such a Senate would not carry out the functions of integrating the Communities or the participation of the latter in the governing of the State. Thus, reform would

[7] The bibliography regarding reform of the Senate is extensive. A good synthesis of the different models proposed can be found in the Report of the Council of State and in the academic works that accompany it. Indeed, the papers of Professors Eliseo Aja, Paloma Biglino, Alfonso Fernández-Miranda, Piedad García-Escudero, Pedro González-Trevijano, Francisco J. Llera, and Ramón Punset, bring the different positions together very well. In turn, the work of the secretary of these papers, Professor Ángel Garrorena, included in said volume, goes way beyond a mere summary of the different positions and explains the debate that arose in depth and with knowledge. See all of this in: Llorente and Álvarez Junco (2006), pp. 178–241 and 709–929. For the recent state of the question, with a final thesis, see the article by: Cidoncha Martín (2001).

merely involve scratching the surface rather than bringing about any profound change and, in reality, in my opinion, to achieve that goal it is better not to embark on any constitutional reform and leave things as they currently are.

Senate Elected by the Autonomous Parliaments

This is a second option. Already at present, a small part of the Senate is elected in this way. This is the formula employed in some federal countries, as is the case of Austria. Indeed, Senators there are elected by the parliaments of the *länders* in a number proportional to their population. They have few functions, however: only occasionally does the Senate have an absolute veto and most times it can only suspend, the final decision always resting with the Lower Chamber. Further, and most significantly, it is not a specialised chamber in federal questions but in legislative functions. The federal questions are decided in an *ad hoc* body, the Conference of Presidents of the *länders*.

Transposing such a model to Spain would of course require constitutional reform and would turn the Senate into a representative, although indirect, body of the citizens of the Autonomous Communities, as long as the number of Senators was proportional to the population of these Communities. With this model, the Communities would have a greater influence than now on legislative functions—especially on the ever conflictive basic legislation—and would also enable said Communities to participate indirectly in electing members of upper constitutional bodies such as the Constitutional Court, the General Council of the Judiciary as well as the Ombudsman and the National Audit Office, among many others. With this, the integration of the Communities in the State would be stronger than now although not to the ideal necessary level.

However, a composition of this type would not escape partisanship, nor would this body be adequate for performing functions of cooperation, inherent in governments and public administrations. Nor would it be the ideal instrument for the communities to participate in the European Union, given the technical character this institution requires, which is most likely beyond the ability of the Senators. Therefore, although the change would have greater depth than the previous model and the functionality of the Senate would increase, it would not be the most adequate model for the Upper Chamber to perform the functions that current federalism needs.

Senate Designated by the Autonomous Governments

Probably the best choice would be to fashion a Senate model similar to the one in Germany—from my point of view the best adapted to the needs of cooperative federalism, typical of the Social State. Indeed, the German Senate (*Bundesrat*) is designated by the Governments of the *länders* and exercises important legislative functions in all those areas that affect its competences, as well as mutual

cooperative functions. In consequence, the *Bundesrat* is a body that enables the participation of the Governments of the *länders* in the federal institutions, both legislative and, even, executive.

A formula of this type would allow the autonomous executives in Spain to participate, through the Senate, in the drafting and approval of the legislation that affected them (laws regarding rules, finance or others of interest to the Communities) and to exercise functions of cooperation between the Autonomous Communities. Further, with the previous supposition, the Autonomous Communities would also participate through the Senate in the election of members of the constitutional bodies of the State previously mentioned, as well as other political and technical bodies of parliamentary election. In a Senate of this type, the Communities could also establish common positions on decisions affecting Europe in collaboration with the State. With this model, the Senate could perform a decisive integrative role within a strong federal system.

Facilitating the Work of the Constitutional Court So That Its Function Is Exclusively Jurisdictional

Of the various aspects mentioned in previous pages, we would highlight two that have complicated enormously the jurisdictional work of the Court: first, the lack of definition caused by the fact that the autonomous statutes allocate competences to the Autonomous Communities. There, as we have said, the CC must determine what is the imprecise vacuum between the competences of the State and Communities: those of the state deducible from a higher ranking norm (the Constitution) and those of the Communities deducible from a norm subordinated to the previous one (the Statute). In this imprecise ground, the CC has serious difficulties in establishing limits.

Second, the non-use of the prevalence clause, contained in Article 149.3, SC, but that, as we have said, has not been given the function that it has in other federal states such as the United States or Germany. We believe the formula for attributing competences contained in Article 149.3, SC, should have been modified to give legal effectiveness to the prevalence clause by means of a federalist interpretation. We will now examine these questions.

Constitutional Reform of the Allocation of Competences

The Spanish system for distributing competences is without doubt peculiar, unique in comparative law and, as seen in the reform processes of the Basque and Catalan Statutes, it offers too many opportunities for those who want to propose reforms that pose doubts, permanently and disloyally, about the Autonomous State.

Indeed, in the present system, the procedure for sharing competences between State and Autonomous Communities is established in the first two paragraphs of Article 149.3, SC, and consists of two simple rules: first, "the subject matters not expressly assigned to the State by this Constitution will correspond to the Autonomous Communities by virtue of their respective Statutes"; second, "competence regarding the subject matters which have not been assumed by the Statutes of Autonomy will correspond to the State." In turn, Article 147.2(d), SC, establishes that the State should list competences that the respective community assumes within the constitutional framework.

From all this, it can be deduced that the Statutes allocate the competences to the Autonomous Communities (the State being the ultimate authority) as well as those competences that correspond to it by virtue of the Constitution (established especially, although not only, in Article 149.1, SC), and also those others that residually correspond to the State on not having been assumed by the Statutes as their own. Thus, the Statutes are, by virtue of that established in the Constitution (Articles 149.3 and 147.2(d) SC), the norms responsible for the distribution of competences to the Communities and also, by default, to the State, in application of the residual clause.

This way of assigning competences clearly derives from the dispositive principle, from the different levels of powers of each Community in accordance with the path chosen to access Autonomy and, in consequence, corresponds to the idea that autonomy is a right of the nationalities and regions. In my opinion, this right to autonomy has lost effectiveness when all the nationalities and regions have gained this right to autonomy. The logical thing would be no longer to consider said autonomy a right but rather a configurative principle of the territorial organisation of the State. Further, the present way of allocating competences has emerged as unclear and politically worrying, among other reasons because it encourages constant bidding to attain more competences via reform of the Statutes, despite the fact that these have assumed all the competences that the Constitution allows. The new Statutes, especially that of Catalonia, are a clear example of all this.

The most reasonable course of action for settling these problems (the legal incoherence and political drawbacks) would be to adopt the formulae of consolidated federal countries, such as the United States and Germany, and attribute to the State only the competences that correspond to it according to the Constitution, all others being granted to the Autonomous Communities. This would prove clearer, less conflictive and, above all, more equal. Thus, the Statutes should not explicitly state the autonomous competences. In this way, as they do not have to include the competences in their text, the Statutes would become what the Constitution already establishes: basic institutional norms (Article 147.1, SC), that is to say, norms whose purpose is limited to regulating the internal institutions of the Community.

Bringing about such a reform in the Constitution is straightforward: it is enough to modify the first two paragraphs of Article 149.3, SC, previously mentioned, and merge them into one that, very simply, could be worded as follows: "The competences not expressly allocated to the State by this Constitution will

correspond to the Autonomous Communities."[8] In this way, all the Communities would enjoy the same degree of autonomy and an end would be put to the recurrent bidding to include new competences in the statutes, always used as an ideological and partisan standard-bearer in some Communities by the nationalist parties and the subject of inevitable emulation in all the others. Thus, discrepancies with respect to jurisdiction over competences would abandon the field of politics and would then be individually resolved in the jurisdictional sphere: the judges would, in each case, resolve the conflicts in accordance with the law, something that is normal in federal countries.

Moreover, by means of this reform, the laws contained in Article 150, SC, would cease to have any meaning (one more confusing lacuna), also unprecedented in comparative law. Therefore, this Article should also be revoked.

This change in the system of attributing competences would allow us to end, or at least to attenuate, the permanent pressure of the nationalist parties to obtain more competences that leads, inevitably, to the expectation of new statutory reforms. It is true that they need this agitation more as an emblem of their protest than as a real necessity. Solving conflicts by judicial authority would contribute to depoliticising these questions and redirect them, as far as possible, along legal channels.

Nationalism, as is known, always feeds off imaginary conflict. Indeed, the nationalists claim, using words of mysterious meaning, that they are the representatives of a "nation" (Catalonia, Basque Country) that is not "comfortable" because "it doesn't fit" into the other "nation" (Spain). However, insofar as the representatives of the latter (who are also representatives as they are integrated within it) offer some solution to finding a better "fit" and reaching a stage of greater "comfort," the former accept it immediately and subsequently say that it is insufficient and then propose new demands. When, after a certain time has passed, these new demands are finally satisfied, they accept them again and, immediately, propose other different ones, *ad infinitum*.

We have witnessed this process in the recent statutory reforms in the Basque Country and Catalonia. Normally, the solutions they request and are finally satisfied with are, as well as being financial, the competences. Thus, establishing a definitive framework for the respective competences is essential and probably the most decisive issue in consolidating the autonomous model. The vacuum that the present drafting of Article 149.3, SC implies, proves to be as original within comparative federalism as it is dysfunctional for our constitutional order and political system. A federal system for distributing competences that substitutes the present system, permanently open to new reforms, is the key to stable consolidation of the autonomous model.

[8] This is the formula proposed by F. Balaguer Callejón in his paper included in the cited volume of: *Informe de Consejo de Estado*, op. cit., see pages 579–581, with similar reasoning, if not identical, to those herein set out. On the other hand, in the body of the Report, the question is treated tangentially and considered, with barely any argument, as a simplistic proposal (see, *Informe del Consejo de Estado*, op. cit., page 132).

A New Interpretation of the Prevalence Principle

The principle of the prevalence of state law over autonomous community law (contained in a clause of Article 149.3, SC) does not seek to resolve conflicts over competences but rather collisions between the norms of the two different codes.

In conflicts over competences, what is settled is who has jurisdiction over a function: that is to say, whether the policy area that has been assigned a competence (i.e., that it is authorised to exercise a function over a subject matter) is the State or an Autonomous Community. Assigning the competence to one of the bodies excludes it also being allocated to the other. Therefore, the conflict is resolved by declaring the acts or norms regarding who is not competent null and void: i.e., invalid. Said conflict is decided, therefore, according to validity.

The prevalence principle does not seek to determine the subject-matter that has been attributed a competence but to resolve normative conflicts in the event that both State and an Autonomous Community have competence over a specific matter: that is, on the basis of concurrent competences. In this situation, the norms emanating from both levels are valid but only one can be applied. Thus, prevalence does not resolve problems of validity but of applicability.

If we consider that, in accordance with the literalness of Article 149, SC,[9] distribution of competences is carried out by delimiting only the subject matters, there is no possibility of any normative conflict existing between state and autonomous competences, given that the respective powers believe that they act within their own sphere of competence. In that case, competence conflicts, but not normative ones, may arise in practice.

However, legislative practice has demonstrated that this is not clear in so-called transversal competences, especially in the competences assigned to the State in the 1st and 13th sections of Article 149.1, SC. Indeed, the former establishes that the State is the exclusive authority for "regulating the basic conditions which guarantee the equality of all Spaniards in the exercise of rights and fulfilment of constitutional duties." The latter gives the State exclusive competence in the "rules and conditions of the general planning of economic activity," a competence that has been interpreted as equivalent to the "general code of the economy." Certainly, both competences horizontally affect many other subject-matters, both those enumerated in Article 149.1, SC, and especially those that assign competences to the

[9] Indeed, literally interpreted, Article 149, SC, refers only to subject matters, be they of the State or of the Autonomous Communities. In this regard, the first paragraph of Article 149.1, SC, states: "The State has exclusive competence over the following *matters* (. . .)." In turn, Article 149.3, SC, refers twice to the subject matters of the Autonomous Communities, both in the attribution and residual clause: "The *matters* not expressly attributed to the State by this Constitution will correspond to the Autonomous Communities by virtue of their respective Statutes. Competence over the subject matters which have not been assumed by the Autonomous Communities will correspond to the State (. . .)."

Autonomous Communities in their respective statutes. For this reason, they are usually referred to as transversal competences.

Due precisely to such transversality, these two sections of Article 149.1, SC, have caused the most conflicts between State and Autonomous Communities, giving rise moreover, to contradictory casuistic rulings of questionable foundation. These are the cases where it has been sustained with good reason that the Constitutional Court has acted more as an arbiter by conciliating interests, than as a judge by applying the norms. This is probably because of a mistaken premise: the 1st and 13th sections of Article 149.1, SC, do not as such assign subject matters to the State but rather to aims or objectives that, as they are implemented normatively, should not affect Autonomous Community authority over the competences but rather should condition exercise thereof. In sum, they do not prevent exercise of any autonomous competence guaranteed in their respective statutes but rather, where the case, the State, which has jurisdiction over these transversal competences, can condition the exercise of the autonomous competence in question.[10]

In these suppositions, the hypothetical conflict—which, let us remember, is not a dispute about the competence but about what is the applicable norm—is resolved by applying the prevalence principle established in Article 149.3, SC: the norms of the State "in the event of conflict, will prevail over those of the Autonomous Communities in everything which is not attributable to the exclusive competence of the latter." Therefore, in this supposition, if a jurisdictional claim is lodged to clarify which of the two norms—the State or the Community, both being valid—should be applied, the body that should resolve it is not the CC (given that it is not a conflict of competence) but rather ordinary jurisdiction and, specifically, the claims and administrative courts.

In this way, we find the meaning of the prevalence clause. No constitutional reform would be necessary to give it this meaning. An interpretation by the CC would be sufficient with regard to the transversal competences, identifying them not as functions that are projected onto subject matters (that is the case of the other competences) but onto the aims or objectives of the authorities, something not unknown in comparative law.

The legal fundament regarding the nature of the aim (and not subject-matter) of the transversal competences is contained in some of the main precepts of Title VIII (included in Title, I denominated "General Principles") that, because of their position, throw an interpretative light on the remaining precepts, among them, of course, Sections 1 and 13 of Article 149.1, SC. Specifically, this concerns Article 139.1, SC (equality of rights and obligations of all Spaniards in any part of the territory of the State), which supports Article 149.1.1st, SC, and Article 138, SC, (effective guarantee of the principle of solidarity by means of the duty to ensure adequate and fair economic balance between all the parts of the territory and interdiction of economic and social privileges as a result of differences between

[10] This approach is brilliantly set out in the book by: de la Quadra-Salcedo Janini (2008), pp. 155–200 and 201–219.

the statutes) which serves as the fundament of Article 149.1.13, SC. By giving this function, typical of federal states, to the principle of prevalence of national law over Autonomous Community law, the CC would cease to run the risk of appearing (rightly or wrongly) to be an arbiter in the resolution of all these conflicts by transferring them to ordinary jurisdiction.

Conclusions

In my opinion, with these reforms or reinterpretations, the powers of the State and Autonomous Communities would continue to be balanced. On the one hand, the constitutional reforms of the Senate and of Article 149.3, SC, in the sense previously outlined, would strengthen the role of the Communities and integrate them within the State: that is, giving them a greater weight in the latter and levelling their competences, at the same time as annulling the residual clause in favour of state competences. On the other, in line with the interpretation described, a constitutional meaning would be found for the prevalence clause and the State would become the guarantor of equality and effectiveness in economic matters.

Further, the role of constitutional jurisdiction would also be limited as regards further development of the Autonomous Communities. The reformed Senate, comprising representatives of the Communities, would then have a fundamental responsibility in said development. At the same time, fewer conflicts of this type would be submitted to the Constitutional Court, and this jurisdictional body would no longer have to decide upon conflicts that should be resolved by politicians.

Francesc de Carreras
Barcelona, December 2011

References

M. Aragón Reyes, *Estudios de Derecho Constitucional*, CEPC, Madrid, 2009, 2nd edition, page 737

A. Cidoncha Martín, "El Senado y su reforma (un clásico de nunca acabar), *Revista Jurídica de la Universidad Autónoma de Madrid,* 2001

P. Cruz Villalón: "La estructura del Estado o la curiosidad del jurista persa," included in the book: *La curiosidad del jurista persa y otros estudios sobre la Constitución*, CEPC, Madrid, 1999

T. de la Quadra-Salcedo Janini, *Mercado nacional único y Constitución*, CEPC, Madrid, 2008, pages 155-200 and 201-219

G. Fernández Farreres: *La contribución del Tribunal Constitucional al Estado autonómcio*, Iustel, Madrid, 2005

S. Juliá, *La Constitución de 1931*, collection: "Las Constituciones españolas" (dir. Miguel Artola), vol. VIII, Iustel 2009, pages 215-216

Rubio Llorente and J. Álvarez Junco, *Informe del Consejo de Estado sobre la reforma constitucional. Texto del informe y debates académicos*, CEPC, Madrid, 2006, pages 178-241 and 709-929

The Distribution of Competences in Federal Systems: A Proposal for a Hypothetical Constitutional Reform in Spain

Joaquín Tornos Mas

Introduction

The present work is based on the following premises. After more than 40 years of the "Autonomous State," a debate should take place regarding the reform of the 1978 Spanish Constitution with respect to the design of its model for territorial organisation and, specifically, of how competences are distributed between the State and the Autonomous Communities. The present system has not resolved tensions with Catalonia and the Basque Country and should be tailored to the new reality of a Spain integrated within Europe and in a globalised world. Further, it must define a system of power sharing that the Constitution of 1978 deliberately left open.

Recent statutory reforms have failed in their attempt to redefine both the autonomous powers and those of the State.[1] Thus, we find ourselves with more complex statutes but in fact sustained in the re-reading of the 1978 Constitution and subject, moreover, to what the Constitutional Court rules. That is to say, we are in

[1] Regarding the scope of Constitutional Court ruling (31/2010) that examined the constitutionality of the 2006 Catalan Statute and its effect on the hoped-for reform of the system for distributing competences between the State and the Autonomous Communities, see: Ortega (2011), p. 47 and after. Specifically, the author states on page 66: "the first major consideration which we should draw from this sentence is that the wave of new autonomous statutes has not given rise to a new model of competences. It has, however, clarified the model and, especially, the distinct role that the Constitution and the Statutes of Autonomy play in the model and, together with the Constitution, the interpretative function of the Constitutional Court. Everything concerning the model of competences which is contained in the Constitution and in the interpretation carried out by the Constitutional Court is binding on the Autonomous Statutes, which in this regard are now clearly considered as infra-constitutional norms."

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the same position as before. Now, it is necessary to posit a reform that is based on an overall vision of the state.

The best general formula for escaping from the present uncertainty and for laying the foundations of a new, stable model is to look at the principles of the federal system[2]: a system that evidences multiple variations but remains the best possible formula for integrating the presence of diversity into a unitary system.

In accordance with these premises, we first outline the general principles of the federal systems as regards distribution of competences and then we outline the subject that should be included in a hypothetical, and for the time, distant constitutional reform. Yet, the fact that reform remains some way off does not mean that it is not a good idea to begin the debate regarding its desirability and possible content.

On the other hand, it is evident that constitutional reform of territorial organisation cannot be limited merely to the issue of competences. Territorial distribution of power should also take into account other related questions that we cannot deal with here, such as the organisational aspects of financing and coordination between the two levels and also the relationship with Europe, given that the European Union is a continual source of alteration of the distribution of internal competences.

First Part: Federal Systems and Distribution of Competences

Federalism and Distribution of Competences

Federalism, understood as a type of government based on a certain way of distributing and exercising political power in one territory,[3] continues to be the

[2] I take the expression "uncertainty" and the need for a federal model from the book by Professor Tudela (2009). Without denying the complexity of the federal system and the lack of true federalists in Spain, we believe that this model offers most guarantees for the future. As the author cited says in the book's conclusions: "federalism is not a simple system. It requires multiple balances and good legal engineering. But more importantly, it requires a culture of power, a culture which involves respect for diversity and acceptance of unity, which implies loyalty and collaboration in the conviction that unity yields the greatest benefit for the unrenounceable subject of every action of political power: the citizen."

[3] We take this broad definition of federalism from: Croissat (1999), p. 19. As is known, there are many definitions of federalism, attempts to establish its identifying elements and to try to determine which States are or are not federal. However, precisely for this reason we prefer to refer generally to "federalism" as a principle that imposes a way of distributing power. In this sense, Wheare (2008), p. 86, states that the federal principle involves "the method of distributing competences which means that the general and regional governments are all, within a certain area, coordinated and independent." Another definition is to be found in: Anderson (2008), p. 15. For this author, to talk of federalism "there must exist two constitutionally established levels of government with a certain real autonomy with regard to the other and the Governments of each level must be directly responsible with regard to their electorate." As a general summary of the

best legal formula for restoring unity out of diversity and enabling the best government of complex societies. As has been said: "today, in spite of the difficulties, problems and disappointments, there is no alternative on the horizon to federalism and the associated formulas and territorial distribution of power which could at the same time piece together the jigsaw of complex, plural societies whilst at the same time allowing decisions to be taken by the citizens."[4]

Under this common denomination—federalism—it is certain that different models coexist with distinct origins and with equally diverse legal structures with regard to the degree of power attributed to different territorial organisations, their relationships or to the formula for solving conflicts. Further, federalism, with respect to its model of territorial organisation, is indeed a dynamic process, linked to the evolution of relationships between State and society, to the sense of identity of the various parts that make up the Federation and, in the case of Europe, to the process of integrating the diverse member states in a structure of higher power.[5]

One essential element in the configuration of the federal states is the distribution of competences between the different levels of territorial power[6]: the Federation and Member States, a distribution which is established in a higher norm (the Constitution) binding on the two entities—the federation and member states.[7]

The aim of the present work is to seek to highlight the essential elements that should be borne in mind in whatever process may be adopted for distributing competences in a federal state, and then to formulate proposals regarding the application of these criteria to a hypothetical process of constitutional reform in

doctrinal positions regarding the essential aspects of federal systems, see: Muñoz Machado (2007), p. 185 onward. The debate about which States can be described as Federal is extensive. In the case of Spain, there are positions for and against recognising that the 1978 Constitution establishes a federal model. Those supporting such a view of federal systems include such renowned scholars as Watts and Elazar. Seijas Villadangos, refers to them in his (2006), p. 26. The posture of Watts is contained in the work cited, p. 92.

[4] Argullol (2004).

[5] We wish to highlight in this section the evolutionary nature of federalism as regards a political organisational formula. As Professor Martín Retortillo pointed out some years ago in his introduction to a collective book edited by him (1973), p. XXXVIII: we have to recognise "the profoundly relative nature which, as regards time and space, the legal formulae of political organisation have," adding in this respect a quote from Forshoff: "centralisation and decentralisation do not designate situations, existing codes, but rather principles and tendencies by which the structures of administration are guided: they thus imply directions..."

[6] Regardless of the importance of this element in the construction of any federal system, the truth is that, as Bussjäger states in (2010), p. 159, "one of the most surprising shortcomings of the theory of the Federal State is the manifest lack of a general theory for the distribution of competences between the level of the constituent units and the level of the federation," a lack of general theory that is certainly due to the complex, changing structure of the federal states. Therefore, any system for distributing competences is in debt to the historical, political and cultural context where it is constructed.

[7] In accordance with Croissat (1999), p. 25, op. cit., the distribution of competences forms part of the principle of separation that, together with principles of autonomy—the inexistence of hierarchical control of one body over another—and of the participation of the State in federal decisions, make up the three basic pillars of any federal state.

Spain: a reform that we consider necessary after the failure of the statutory path as an option for modifying the system for distributing powers within the Spanish state. This failure has become patently obvious in the case of the 2006 Catalan Statute of Autonomy and in its desire to impose reform of the distribution of competences between the State and the Autonomous Communities in a statutory regulation[8]—in the "Constitution" of the member state. The Constitutional Court has roundly rejected this option when it denied the Statutes of Autonomy the competence to take on tasks that it understands to be reserved for the constituent power and for the supreme interpreter of the Constitution.[9]

Models for the Distribution of Competences

The way the distribution of competences has been carried out in the federal states is clearly predetermined by the direction where the construction of the federal system took place. In this regard, integrative federalism and devolutionary federalism should be differentiated.[10] In the former, the federal state is constituted based on transferring minimum specific competences to the federation (defence, foreign affairs, foreign and interstate trade, etc.), and adding an open clause that allows these competences to be extended due to future needs for common policies. The new state, which arises out of the decision of the pre-existing states, posits the question of "sovereignty," given that the original states do not want to renounce their initial sovereign power (this would be the case of the United States of America).

In devolutionary federalism, a unitary state is politically decentralised, creating (or recognising) territorial organisations with their own political capacity within the

[8] In the case of the Spanish State, when talking of the State we are referring to the central state, to the federation, while the Autonomous Communities would correspond to the member states.

[9] In this regard, it is enough to cite the content of legal foundation 58 of Sentence 31/2010 where the Constitutional Court resolved the challenge presented by the Popular Party against the Catalan Statute. The Court states: "a basic qualitative limit on the possible content of a Statute of Autonomy is that which excludes as the mission of this type of norm the definition of constitutional categories. In fact, this limitation is what gives due recognition to the nature of the Statute of Autonomy, a regulation which is subordinate to the Constitution, and that which defines in the last resort the institutional position of the Constitutional Court as the supreme interpreter of the Constitution. Said categories include the concept, content and scope of the normative functions whose code, attribution and discipline is addressed in the Constitution as regards the creative norm of a regulated legal procedure of the exercise of public power, whether it is to legislate, administer, execute or judge; whatever the terms of relationship are between the different normative functions and the acts and regulations which result from its exercise; whatever the content of the rights, duties and powers which the Constitution sets and regulates are questions which, as they constitute the language in which the constituent should be understood, can have no other basis than in the formal Constitution nor more meaning than that prescribed by its supreme interpreter."

[10] Regarding this distinction, see: Biglino Campos (2007). See also: Solozábal (2004) and Alli (1996), p. 143.

federal structure (the case of Spain). As has been said: "while integrative federalisms follow a flexible idea of competences, in the pursuit of the construction of the union, devolutionary federalisms adopt a stricter understanding of competences, aimed above all at safeguarding the legal position of the territories which comprise them."[11] In this case, the sovereignty debate is less present, given that new member states are created by the Constitution from a single sovereignty, although the debate concerning the prevision of the respective areas of action is strengthened, regarding power sharing through the distribution of competences.

This distinction, based on the origins of the construction of the federal solution in each territory, and which certainly helps us to understand some of the current differences in the systems of distributing competences in force, has nevertheless lost importance. The Kelsenian Doctrine and the supremacy of the Constitution as a norm superimposed on the federal and state codes, allowed the sovereignty debate to be abandoned and to forget in part the origins of the creation of the federal state. In this new stage, interest is centred on analysing the real scope of the distribution of political power between the two territorial levels: "what are important are the quantitatively different degrees of the same phenomenon: that is to say, decentralisation and decentralisation of state functions."[12]

Based on this new approach, technical solutions are important for implementing power sharing and analysing the real processes of political decentralisation.

Federal models are, thus, basically distinguished by bearing in mind the competences of each level as dual or executive federalisms. In dual federalisms, each territorial level carries out all the functions corresponding to a material sphere: normative, executive and financial, while in executive federalisms the functions are shared in such a way that the federation assumes the definition of the policies that the member states will later implement.

In dual federalism models, diverse practical solutions can be found.

Distribution by subject matters is wide-ranging and extremely varied, and takes account of historical and economic reasons and questions of identity. As Friedrich has said: "sharing (of subject matters) is a question of interest, full of political criteria which will be resolved in unequal and variable decisions depending on time and place, decisions in which the most disparate influences come into play (economic and social life, military and geographical factors). Everything will have an influence on the decision of each particular arrangement."[13]

The recent evolution of the federal states (a trend that may increase as a consequence of the global economic crisis) allows us to identify a predominance of centralisation, a significant criticism of dual federalism due to its inability to face

[11] Biglino Campos (2007), p. 25, op.cit.

[12] Muñoz Machado (2007), p. 188, op.cit., quoting A. Mazziotti.

[13] I take the quote from Muñoz Machado (2007), p. 397, op.cit. For an empirical verification of this diversity of models for distributing powers within the systems of dual federalism, see the work directed by: Argullol (2004), p. 31 and 207 onwards, op.cit. See, also: Watts, p. 142, op.cit and appendix.

up to the challenges of the globalised market and a defence of executive federalism compensated by a greater participation of member states in designing federation policies.

But this general tendency should be clarified. "General" should not hide the diversity of each specific supposition, the existence of different problems to which, with the techniques inherent in any federal system, diverse answers are given. As has been observed: "this clearly uniforming concept (the advance of executive federalism) may suit certain federated states or regions in which the value of unity clearly outweighs the desire for self-government, but may well not respond to the demands of certain national communities which will have difficulty accepting the configuration of their capacity for self-government as a mere administrative decentralisation qualified with some greater or lesser effective participation in the adoption of unitary political decisions."[14] We will return to this question later but, whatever the case, we can state that dual federalism has not disappeared and that a certain rebirth of nationalisms of identity may demand a reconsideration of the material distribution of competences.

All things considered, as we stated previously, the distribution of competences is a distribution of power[15] and, therefore, must be carried out by taking into account the political tensions that underlie any decision that deals with this question. To distribute competences between the Federation and the member states is not the same as distributing administrative competences within the same territorial entity, even though the techniques and legal concepts that are used may be similar. For that reason, as we have said, the distribution of competences generates permanent dissatisfaction, an "uneasiness which is merely the consequence of the tension which emerges in any system with various power centres between the drive for unitary and the drive for decentralisation. After our analysis, we consider this uneasiness to be a reality which is *per se* insurmountable and which should be assumed as something intrinsic and characteristic of any system of decentralisation of power."[16]

Legal Organisation of the Distribution of Competences

As we have observed, the distribution of competences between the Federation and the member states is a distribution of power. This distribution is at first glance clearly political, and involves determining what quota of power is attributed to each

[14] Viver i Pi-Sunyer (1989), p. 33.

[15] Regarding this idea of the distribution of competences as the distribution of power, see: Biglino Campos (2007), op.cit, p. 64. The Spanish Constitutional Court, for its part, in the 143/1985 Sentence of 24 October, (FJ 3), stated that "the quantum of political power of a body depends to a large extent on the extent of its material area of competences," but also on its functional area.

[16] De la Quadra Janini (2006), p. 14 and 15.

entity. This agreement is what constitutes the pact which is formalised in the Constitution.

Formalisation of the pact requires the need for legal techniques. The law must allow this political agreement to be given shape with the greatest possible guarantees for reflecting its content and to provide it with the necessary stability. Jurists thus have a significant role in the construction of the federal state. As Wheare has said: "federal government is principally legalistic. It is created and regulated by a legal document and is safeguarded by a court of justice."[17]

The legal solutions are formally diverse,[18] although when distributing competences the code attempts to specify the set of powers or functions that it specifically assigns to each particular body.[19] For this, it uses two elements: the function and the subject-matter that, in turn, make up each competence.

Another aspect common to practically all the models is that the distribution of competences is established in the constitutional text. The supra-ordinated norm, binding on the parties, fixes its respective areas of action, and the Constitutional Court guarantees the content of the constitutional text. The Spanish case is an exception as the specification of the competences of each member state (each Autonomous Community) is remitted by the constitution to the statutes of each Autonomous Community that must only respect the limits of the competences assigned by the constitution to the state (to the federation). This is the so-called "dispositive principle" whose scope was substantially limited by Constitutional Court ruling 31/2010 where it denies the Statute of Autonomy the competence to define functional norms, to delimit state competences and to influence Constitutional Court doctrine.[20]

If, in practically all the federal states, the constitutional norm plays a determinant role in the construction of the federal state and, therefore, in the distribution of the competences between federation and member states, several technical solutions can be adopted in each case. Let us now look at these differences.

a. Diversity of contents. Although they correspond to general common criteria, the subject-matters and functions assigned to each territorial level differ. That is to say, even though in all cases there is recourse to the construction of the competences based on the attribution of a function over a specific material area, the competences that are recognised at each territorial level differ.[21]

[17] Wheare (2008), p. 65, op.cit.

[18] For a description of these, see: Croissat (1999), p. 35, op.cit.

[19] A complete study concerning the legal formalisation of the distribution of competences can be found in, Salas, J: "El tema de las competencias" in the collective work edited by: Martín Retortillo (1973), vol. II, p. 304 onwards, op.cit.

[20] A complete study of the "dispositive principle" is contained in the book by Professor Fosses (2007). Said work highlights the problems that, in the author's view, constitutional suppression of this principle would involve, a suppression that we later defend. See, in particular, p. 170 onwards.

[21] Again, I refer at this point to the work directed by Argullol (2004), op.cit.

b. System of lists. All the constitutional texts contain lists of subject-matters in favour of the federation and the member states, but models of one, two or three lists may exist: lists of the competences of the federation, of the member states and of concurrent competences.[22] The model of lists conditions the content of the residual clause. The most realistic is to use the system of the "three pillars," given that not all the subject-matters can be distributed exclusively between the two levels of power.
c. Residual clause and rule of prevalence. A residual clause is established to achieve completeness of the system. It should be foreseen that whatever the Constitution does not expressly contemplate must correspond either to the federation or to the states. If the system is of a single list, the residual clause will attribute all the subject-matters to the other entity. In the Spanish case, given the uniqueness of its dispositive principle, we have a double residual clause. Everything that is not reserved for the State can be assumed by the Autonomous Communities in their statutes but at the same time what the statutes do not expressly assume becomes a state competence.

   For its part, the prevalence rule is linked to integrative federalisms. Attributing certain limited competences to the federation required the establishment of a prevalence clause in favour of its regulations to allow it to be able to impose its policies in defence of common interests. In the Kelsenian constitutional system, and in devolutionary federalisms, when establishing a complete distribution of competences in the Constitution itself, the prevalence clause lacks any sense. Every entity has its competences guaranteed in the Constitution, without the need to envisage any rule favouring the supremacy of federation competence.
d. Typology of competencies. As already pointed out, competence is legally constructed by adding function and subject-matter. However, the attribution of each competence gives rise to a different typology according to whether we take into account the nature of the function assigned or rather the exclusivity or not of the attribution.

   In accordance with the first criteria (nature of the function), the competence can be legislative, regulatory or executive in the strict sense (simple emanation of acts of application).

   In accordance with the exclusivity or not of the attribution, we can differentiate between an exclusive competence (all the functions over an entire sector are attributed), a concurrent competence (the legislative function regarding a subject-matter is shared, so that the federation approves the rules and the states apply them), a shared competence (a subject-matter is shared: for example, the federation controls transport in the federal area and member states control

[22] A complete description of these diverse models can be found in: Muñoz Machado (2007), p. 398 onwards, op.cit. For this author "an analysis of constitutional systems reveals a progressive complication of the initial plans for distribution of competences which had a simpler and, in a certain sense, more naive formulation."

inter-state transport) and indistinct competences (the same function and subject-matter corresponds to the federation and to the member states, in this case establishing which norm prevails in the case of conflict).[23]

How competences are allocated allows gradation at the decentralisation level to be established. In this regard, the maximum decentralisation (or the guarantee of true policy autonomy) is obtained by the member states when they have a legislative and exclusive competence, since that allows them to set their own alternative policies in their laws. A lower level of policy autonomy is attained in the cases of concurrent legislative competences or the application of basic federal norms, although in this case the real scope of policy autonomy depends on the extension of the content of the federal law when exercising its competence over the rules of a subject-matter.

In sum, the degree of policy autonomy of the member states depends on strict application of dual federalism, that is, the existence of a precise share of complete subject areas where member states can freely exercise their legislative capacity.

e. Specification of subject matters. The way the material element of competences must be legally specified also evidences differences. In some cases the constitutional text is limited to certain generic statements of the material norms, while in other cases the subject-matters that correspond to each territorial body are clearly defined, resorting on occasions to the game of subject-matters and sub-subject-matters.

Recourse to greater specification of the material areas is considered to be a useful instrument in order to better guarantee policy autonomy for member states. Thus, it has been said that "objective and generalizable delimitation guarantees the supremacy of the constitutional (and statutory) regulations which distribute the competences with respect to the performance of the ordinary legislators." This greater precision "guarantees the different bodies – and fundamentally the Autonomous Communities – the stable existence of their own, exclusive self-government in the subject-matters. In short, it contributes to guaranteeing policy autonomy."[24]

While not denying the importance of clearly delimiting the respective material areas of competences, other authors warn of the dangers of an excessive trust in the formal sharing of competences, resorting to the precision of the respective material norms. These authors highlight the fact that it is not possible to divide reality in precise terms and then to attribute the competence to each entity so that they can regulate this particular sector of reality and make it perfectly distinguishable from the rest. Further, they understand that this excessive trust in the power of the norm

[23] Regarding these typologies and the nuances that can be established within each type, see: Salas, J. p. 309 onwards, op.cit, and Muñoz Machado (2007), p. 415 onwards, op.cit.

[24] Viver i Pi-Sunyer (1989), p. 18, op.cit.

to differentiate material realities implies *de facto* an increase in conflicts and the transfer of the final decision to the legal reasoning of the Constitutional Court, decisions that should be adopted in many cases in political offices.[25]

Legal and Political Guarantees

The sharing of competences, as laid out in the Constitution, requires a safeguard mechanism. As we have seen, it is difficult for the legal norm to establish perfectly delimited material areas of action and on many occasions the activity under discussion may form part of different material norms, even in the case of constitutions that include broad relations of competence norms. Further, the scope of the basic legislative function, or what should be understood as executive competences, maybe the subject of controversy.

For all these reasons, defence of the constitutional pact, which at the time established the distribution of power between the federation and the member states, requires the presence of effective safeguard mechanisms, which may legal, political, or both.

In those models in which the constitutional norm precisely establishes the different areas of competences, the role of the Constitutional Court stands as a guarantor of the position of both the federation as well as the member states.[26]

However, in any case, the interpretative power of the Constitutional Court is extensive—even in those models that have sought to establish a detailed formal distribution of competences. This allows it to act as a constituent power as it creates the constitutional model with its doctrine. Therefore, the Constitutional Court ¡s the guarantor of a negotiated model, whilst at the same time contributing to defining that model.[27]

This situation has led to highlighting the importance of finding other non-legal guarantees with the aim of guaranteeing the constitutional pact and allowing its adaptation to the changing socio-economic reality. Justification for introducing non-legal guarantees was especially strong in North American Federalism where,

[25] Regarding the first statement, see: De la Quadra Janini (2006), p. 17, op.cit. Regarding the second, see: Biglino Campos (2007), p. 211, op.cit.

[26] On the other hand, when the constitutional norm is more open, the role of constitutional law suffers. As De la Quadra Janini, T. says: op.cit. p. 50, "...the legal guarantees have significant limitations derived from the ample scope of the federal competences: an ample scope which involves the recognition of a quasi-general competence of the federation which would have, however, as a compensation, the possibility of guaranteeing the state prerogatives by means of the political procedures without the need to require the judicial power to draw lines of competences which it would be difficult to find protected by a judicial and objective ruling, but which it is suspected that they are based on a reasoning of a political nature."

[27] Regarding this interpretative function of the Constitutional Court and the techniques that these Courts normally use, see: Muñoz Machado (2007), p. 475 onwards, op.cit.

it must be remembered, there was a formal system for the distribution of competences that included many open clauses in favour of the federation. In this country, as De la Quadra[28] has highlighted, suppressing legal guarantees was posited in order to favour the political ones. Although these extremes have not always been reached, in general it has been defended that guaranteeing autonomy and the spheres of decision-taking will be principally obtained through the presence of state interests (of the member states) in the composition of federal power and, therefore, by the presence of state powers when determining federal acts themselves.

Argullol[29] analyses the working of different federal states and formulates general proposals for improving federalism and refers to the importance of the Senate (or Upper House), the participation of the states in the configuration of federal constitutional organisations or the latter's involvement in the configuration of the Constitutional Court itself. Thus, in view of the trust in the norms for distributing competences and their interpretation by the Constitutional Court, the aim is to create mechanisms that allow a non-conflictive interpretation of the constitutional text and to provide member states with a trust regarding the operation of the federation in the exercise of its competences by integrating the states in the federations' constitutional bodies.

On the other hand, reality has shown that the constitutional text can on occasions be interpreted in certain negotiated texts where the federation and the member state agree the meaning and scope of the norms that attribute the competence. Thus, in the Spanish case, a norm that is in principle discrete, the Royal Decrees of transference, which should be limited to specifying the material, personal and economic measures linked to the distribution of competences, have in fact been used on many occasions to delimit the scope of the concepts which define the function and subject-matter of the different competences and establish relational mechanisms for exercising the respective competences.[30]

[28] De la Quadra Janini (2006), p. 38 onwards, op.cit.

[29] Argullol (2004), p. 52, op.cit.

[30] Regarding this point, see: Muñoz Machado (2007), p. 498, op.cit. In the case of Catalonia the importance of what is stipulated in the Royal Decrees of transference to define the true scope of competences can be seen in the book: "El traspàs de serveis de l'Estat a la Generalitat. De l'Estatut de 1932 a l'Estatut de 2006," Departament d'interior, Generalitat de Catalunya, 2010, in which all the Royal Decrees of transference approved after the Constitution of 1978 have been collected. As an example, we can cite Royal Decree 2646/1985, of 27 December regarding the transfer of functions and services of the State Administration to the Catalan Government as regards waterworks. Said Royal Decree does not restrict itself to identifying the personal, material and economic subject-matters which are transferred to the Autonomous Community. The Royal Decree defines the scope of the autonomous powers by means of a long list of specific administrative competences and also specifies the competences which remain in the hands of the State as well as the formulae for coordination and collaboration which should be set up.

Flexibility

Distribution of competences is formalised in the Constitution. In this way, a legal text, by means of legal concepts, determines the competences of the federation and the member states.

When including the distribution of public powers in a rigid text such as the Constitution, the problem may be posited that the evolution of the socio-economic situation makes the constitutional text dysfunctional. However, on the other hand, constitutional rigidity guarantees the pact between the federation and the states for distributing their competences.

In this way, the necessary balance between the principles of stability and flexibility is present. As Croissat has said,[31] federalism is a process and, therefore, the initial pact should be conceived as an agreement that includes its subsequent adaptation to new realities. De la Quadra[32] has likewise stated that, "any system of territorial decentralization of power must seek a balance between stability of the system and its flexibility. Stability provides the system with safety and enables citizens to clearly perceive responsibility at each territorial level. Flexibility allows the system to adapt to any new challenges which may emerge without the need to resort to costly reform procedures."

Legally, flexibility can be carried out by interpreting the constitutional text. Constitutional Court jurisprudence can adapt the meaning of the constitutional precepts to reality at all times, especially the constitutional principles and the precepts that contain attributions of cross-cutting competences or open clauses. Without altering the substance of the constitutional pact, the original concepts can be adapted to a changing reality, whilst continuing to respect the constitutional text.

Another way of making the constitution more flexible is to include transfer mechanisms or delegation of powers from the federation to the member states. This transfer or delegation can be general (for all the member states) or unique to certain states if we wish to take account of territorial realities that have differential needs. The constitution is thus open to future requirements without the need to undergo the costly formal process of reforming it.

Second Part: The Spanish Case

The second part of this work is devoted to formulating proposals regarding the criteria that, in our opinion, and based on the general considerations posited in the first part, should guide future reform of the Spanish constitution with regard to the model of territorial organisation of the Spanish state and, specifically, the distribution of competences between the state and Autonomous Communities.

[31] Croissat (1999), p. 118, op.cit.

[32] De la Quadra Janini (2006), op.cit. Note 13 on page 24 and page 31 onwards.

Commitment to constitutional reform does not ignore the fact that this will only be possible if a general consensus exists to initiate the process between the principal national political parties (PSOE and PP) and the main autonomous parties, CIU (in Catalonia) and PNV (in the Basque Country): a consensus that at the moment does not exist and does not look likely to emerge in the near future. However, there are some factors that suggest that, at the very least, a debate concerning the need for reform and its basic principles should be initiated: thus, the failure of the attempt to redefine the distribution of specific competences by means of statutory reform,[33] the passage of time since the constitutional pact of 1978, the excessively open nature of our constitutional model that awards a discredited Constitutional Court an excessive prominence, the economic crisis and the new role of the states in controlling the economy and the growing importance of the European Union and the extensive interpretation of its competences.

In order to provide some ideas for this debate, we list below the principles that we understand should form the basis for needed discussion regarding reform of the territorial organisation model contained in our Constitution. Although specific proposals are formulated, what we wish to highlight from our contribution is the attempt to identify the central points of a complex debate that requires detailed development.

The Distribution of Competences Should Be Established in the Constitutional Text

Given the consolidation of the Autonomous State and the existence of 17 Autonomous Communities and two Autonomous Cities, it no longer makes any sense to maintain, as regards the system for distributing power, the open arrangement adopted in 1978 that gave rise to the main mechanism. While in 1978 it was not known how many Autonomous Communities should exist and what degree of autonomy to give them, today the situation is extremely diverse.

In accordance with the general federal structure, it is the constitutional text that should contain the distribution of competences between the state and the

[33] Regarding the scope of Constitutional Court ruling 31/2010 in the Articles of the Statute of Autonomy of Catalonia, the various works published in the Catalan Journal "Dret Públic" can be consulted: "Especial sentència 31/2010 del Tribunal Constitucional, sobre l'Estatut d'autonomia de Catlunya de 2006," EAPC, Barcelona 2010, pp. 249–381; Viver i Pi-Sunyer (2011), pp. 363–401, and Tornos Mas (2011), pp. 34–41 and Ortega, L. op.cit. Although they offer different readings of the Ruling, all authors coincide in saying that the Constitutional Court has put a stop to the statutory attempt to widen unilaterally the level of competences by marking out the limits of the state competences and trying to reinterpret constitutional jurisprudence. It was hoped to achieve this objective by taking the definition of the functional scope of the competences to the Statute (that means exclusive, concurrent and executive competence) and through a detailed definition of the material norms using the game of subject-matter and sub-subject matter.

Autonomous Communities. The Constitution, a norm that is supra-ordinated to state and autonomous codes, establishes the "pact" between the state and Autonomous Communities and allocates the distribution of competences (and therefore of power) between the two levels of territorial organisation.

Distribution should be contained in a system of three lists (competences exclusive to the state, exclusive to the Autonomous Communities and concurrent) with a residual clause[34] in favour of the state and without a rule of prevalence.

Taking the distribution of the competences to the constitutional text will have a substantial bearing on the current nature of the Autonomous Statutes, given that they not only lose the function of being the creative norm of the Autonomous Community but also cease to establish the scope of competences of each Autonomous Community and, therefore, will no longer form part of the block of constitutionality when having to resolve conflicts over competences.

Stripped of a function which is not that of the basic institutional norms or "constitutions" of the member states, the Statutes of Autonomy become the leading norms of the autonomous codes with an essentially organisational task and without affecting questions of general state interest. Consequently, approving new statutes and their reform will not necessarily require the approval of Congress (Lower House of the Spanish Parliament). Congress will be able to limit itself to ratifying the text approved by the Autonomous Parliament after verifying that its content does not violate the Constitution. In turn, a prior test of constitutionality could be restored, to be resolved in a brief period, and the definitive statutory text subsequently subjected to referendum.

Regarding the Subjects of the Constitutional Pact

The procedure for implementing constitutional reform is established in Articles 166 and 167 of the Constitution (we do not believe that the procedure of Article 168 should be used). The procedure, which can be instigated by the Government of the nation, Congress, Senate or the legislative assemblies, requires for its approval an enhanced majority of the two Chambers and, where necessary, a referendum. Whatever the case, therefore, reform is in the hands of the representative state body and the Spanish nation (if taken to referendum). In this way, the initiative corresponds in fact to the major national parties that can attain the majority necessary to agree to reform.

[34] Given the nature of devolutionary federalism which Spain has, the residual clause should be established in favour of the State. See, Watts, p. 136, op.cit. However, the Spanish experience shows the limited value of such a clause, since in the event of conflict the Constitutional Court always tries to seek an existing norm of competence to incorporate in the "new" subject-matter. Watts states: "the most important is the relationship of competences and the least are said residual powers."

This fact does not obviate a reality. If constitutional reform is limited to modifying the system for distributing competences (Article 148–151 and related ones), reform does not take into account one of the fundamental parts of the new constitutional pact: the Autonomous Communities.

Certainly, the "sovereignty" debate that marked the creation of the first federal states is no longer posited in the same terms and the existence of a single sovereignty should not be questioned, that of the Spanish nation, where constitutional reform is based.[35] However, in turn it cannot be forgotten that the present reform is carried out bearing in mind the existence of 17 Autonomous Communities that represent different communities that express their will in their respective parliaments.

The existence of nationalist parties should also not be forgotten. These represent wide sectors of the population in Catalonia and the Basque Country and to a lesser extent in Navarre, Galicia and the Canary Islands (the real strength and survival of the regionalist party in Cantabria is still to be judged and other nationalist parties enjoy scarce representation). These two facts should be reflected in the process of constitutional reform that affects the system for distributing power between the state and the Autonomous Communities. If reform is only formally subject to the requirements of Articles 166 and 167 of the Constitution, informal means of participation for the autonomous parliaments should be established in the process of approving the new constitutional text and the consensus of the political forces should include the nationalist parties.

What Competences?

Constitutional reform, as regards the system for distributing competences between the state and the Autonomous Communities, should go beyond a mere reinterpretation of the text currently in force. We must begin to consider what competences should be in the hands of the state and what competences should belong to the Autonomous Communities at the beginning of the twenty-first century. This should be the debate undertaken, that implies, given the importance and difficulty of the subject, an attempt to draft a new "constitutional pact" that should subsequently be formalised by means of the appropriate legal techniques, regarding which there no longer exists great discussion. This debate should answer three general questions.

[35] In the Spanish case, the sovereignty debate was especially present in the drafting of the 1931 Constitution and the Catalan Statute of 1932, but practically disappeared in the debate over the 1979 Statute and no longer appeared in discussion of the 2006 Statute. Regarding these debates, see: Tornos Mas (2007). In the debate over the 1931 Constitution, the speech by Azaña should be highlighted where he reiterates several times that the statutes are a consequence of the Constitution and that the only sovereignty resides in the Spanish nation. Regarding this debate, see the previously cited, page 38 and pages 45 onwards.

Dual or Cooperative Federalism

As already pointed out, the two major models of federalism correspond, in a simplified way, to the wish to guarantee separate spheres of political capacity and responsibility for the federation and the member states (dual federalism) or to the concern to seek methods of organising the two levels in order to attain efficient management of public tasks, attributing to the federation the essential political decisions and to the member states their execution (cooperative federalism).

There is no doubt that, in the case of Spain, a system that, due to its origins is a "devolutionary federalism," the new constitutional model must correspond to principles of dual federalism, recognising exclusive legislative competences both for the state and the Autonomous Communities, although these legislative competences can also be concurrent, in virtue of the play between rules plus development.[36]

The important thing is to establish the configuration of the Autonomous Communities in the Constitution as territorial bodies endowed with sufficient capacity to draw up their own policies and, therefore, with the functional competence to approve laws exclusively and concurrently. What exactly should be understood as exclusive and concurrent competence must be outlined in the constitutional text.[37]

However, the defence of dual federalism should not forget the importance that the collaborative and cooperative mechanisms possess for the exercise of the respective competences. For this, the Constitution could establish the basic principles of these relational techniques between the State and the Autonomous Communities and establish in what situations these techniques should be used. Therefore, a pure system of dual federalism cannot be expected, given that the overlapping of competences is inevitable as it is practically impossible to define watertight compartments of exclusively attributed competences. Dual and executive federalism coexist within the same system wherein the techniques of one or another model are applied. The important thing is to be able to determine which subject-matters allow a system of exclusivity and which require shared management.

Clarity in the distribution of competences is essential to ensure the effectiveness of the system as a whole but also in order to guarantee the autonomy and responsibility of each level, which is key to the democratic system.

[36] All in all, what we defend is the constitutional setting of the scope of the "right to legislate" of the Autonomous Communities, in the sense which Professor Bayona Rocamora (1993).

[37] In this regard, a good starting point for the drafting of the constitutional precepts is Article 110 and 111 of the Catalan Statute of Autonomy.

Which Functions and Subject-Matters Should Correspond to Each Level?

The answer to this question, in my opinion, demands a greater effort of reflection and subsequent consensus, insofar as setting the respective spheres of competences is always seen as deciding the quantum of power at each territorial level.

It should also be recognised that at the present moment constitutional reform can no longer be confined to reinterpreting the precepts of the Constitution in force or to improving the legal techniques with which the 1978 consensus was reached. Reform is justified, if we wish to adapt the 1978 consensus to the new socio-economic reality at the beginning of the twenty-first century and to a Spain integrated in Europe, in accordance with the experience accumulated over the 40 years of an Autonomous State, in order to establish a new power sharing between the state and the Autonomous Communities. For this, the distribution of functions and subject-matters must be the subject of a new agreement.

From this perspective, I understand that two major options could be posited as general starting points. On the one hand, reform of the competences may have as a guiding criterion the search for a better working of the "Federal State" as a system, attempting to identify (in the sense that the principle of subsidiarity requires) which functions and subject-matters each of the levels can carry out most effectively: the state and Autonomous Communities (we will expressly leave to one side the subject of local bodies). On this point, we can use approaches similar to fiscal federalism and, therefore, introduce the criterion of efficacy as an instrument that helps to decide the criteria on the basis of which to assign the competences.

The other option is to explain the sharing of competences as a mere sharing of power, so that a discussion is posited between the conflicting parties whose respective objective is to attain the maximum quota of decision-making power. In particular, with respect to the Autonomous Communities, reform can be defended exclusively as the way of increasing their political power, given that this increase in power is always good *per se* and is the aim to be secured.[38]

Whatever the case, in our opinion the distribution of competences should not simply be a sharing of power where territories confront each other (the state and the Autonomous Communities) with the respective aim of retaining what they have and, insofar as possible, increase the amount of power, but rather as a debate

[38] As Sevilla-Vidal (2011), p. 255 has said "until very recently it seemed that the central objective of the development of the autonomies was to share what is yours and mine between the Government and the new Autonomous Councils where the logic of confrontation has predominated as it was posited in a zero sum framework (in which the competences were fought over and financing was added)." As Tudela (2009) has reminded us: op.cit, p. 257, this was based on the "certainty that all decentralisation implies economic and social development and improvement in citizens' living standards," so that any question concerning its appropriateness and the possibility of improvement decreases without disappearing. The questions should be formulated in order to obtain satisfactory answers regarding the appropriateness and the problems of decentralisation and consequently to adopt the necessary measures.

concerning how to attain the best distribution of competences so as to secure the best action of the public powers for the benefit of the citizens.

To a certain extent, the point of view that is limited to obtaining the greatest possible power was posited with the reform of the 2006 Catalan Statute after considering that the "constitutional pact" was not being fulfilled due to the extensive interpretation of the basic legislation and of the horizontal norms of competences (basic conditions that guarantee the equality of Spaniards, Article 149, 1-1 EC and general regulation of the economy, Article 149 1–13 EC).[39] From this conviction, a reinterpretation of the constitutional text was posited whose fundamental objective was to seek to extend the autonomous sphere of competences to the maximum possible constitutional levels. With this aim, a task founded exclusively on legal criteria was carried out consisting of interpreting the meaning of the functional and material norms of Article 149, 1 EC in the light of whatever constitutional jurisprudence that proved most favourable to the autonomous competences in order to try to reach the maximum possible ceiling of competences allowed in the 1978 Constitution. Once this ceiling was set, there was an attempt to guarantee and consolidate this maximum level by defining the Statute of the functional norms and a wide list of subject-matters and sub-matters.

Based on the general principles previously outlined (dual federalism model, suppression of the dispositive principle), and assuming the experience accumulated since 1978, we believe that the fundamental objective, should constitutional reform be carried out, should be to achieve an attribution of competences that corresponded to the desire of the different territorial levels and that allowed efficient management of the different responsibilities distributed. The power awarded to each territorial level should promote the improved satisfaction of the interests of the citizens, thanks to the good working of the system of territorial organisation as a whole.

The competences for regulating credit, domestic trade, the environment or regulation and management of airport services, to give just a few examples, should be attributed taking account of the need or otherwise for a uniform norm throughout the whole country in order to achieve better regulation of the different material fields and the most appropriate level for the management of that contained in the norm. Overall, it is a question of introducing efficiency criteria, not as a new single principle, but as a criterion to be taken into account, in particular as regards the distribution of competences that directly affect the working of the single state and European market. This distribution of competences should recognise the diversity of suppositions and, at the same time, attempt to attain uniform blocks of subject-matters that later allow, as far as possible, homogeneous and, therefore, responsible management at the different levels. What affects the running of the economy and the reality of a single European market is not the same as that related to the government of the territory itself, internal organisation or the provision of personal services.

[39] In Catalonia, the general belief seems to be that the autonomy attained is basically administrative, extensive, but all the same basically superficial: "a low quality autonomy."

The warning call concerning the principle of efficiency does not imply any neglect of "territorial interests," the demand for respect for the autonomous power of decision in whatever constitutes the identity of the territorial community and its survival as a different reality. This fact should equally be taken into account in the distribution of the competences, which may affect policy areas such as education, culture, language, civil law or territorial organisation, in sum, differential aspects. The latter demand for competences will have greater or lesser force depending on the nature of the different Autonomous Communities.

However, at the same time, the reality of supra-state economic regulatory powers should be recognised in the European single market, the uniqueness of certain assets (water, coasts) or services (transport, energy) or the necessary equality of basic conditions in accessing the essential services of national citizens, all of which are areas requiring general treatment and where it does not appear rational to create separate spheres of decision. Further, they are policy areas where the survival of the different nationalities or historical-cultural nations that make up the Spanish nation does not depend.

As has been said: "it has to be admitted that the ideal level of decentralisation does not as such exist, but rather according to each case and specific era, where political, historical, cultural and, of course, economic factors interact. Furthermore, it is not simply a technical question, as certain works seem to suggest, but fundamentally political. In other words, any decentralisation is a political undertaking because it concerns a process in which power is distributed or reassigned and the institutional structure is thus determinant for the final result and for the procedure which leads to it."[40] Yet, precisely because of this political content of the question, a new agreement is necessary that takes into account all the factors involved.

Whatever the case, what we wish to highlight is that, when it comes to distributing competences, the different subject-matters should be treated in a different way according to their principal link with aspects inherent to the reality of Autonomous Community identity or with questions that affect the general working of the federal system. Dual federalism and executive federalism must appear complementarily. In the same way, the distribution of competences should take into account the uniqueness of certain subject-matters that do not correspond to specific sectors of administrative action but rather to general functions of the state, to justice, to powers of territorial organisation, local organisation and its legal set-up or to the possible extension of citizens' rights and duties. In these cases, the constitutional text should set certain unique rules for distributing competences.

Considering all that has been said in this section, building the new model for distributing competences should not remain in the hands of the jurists at the initial stage that involves determining what corresponds to each level (the state and the Autonomous Communities). It is not a question of reinterpreting a text based on legal reasoning and re-reading of constitutional jurisprudence but rather of

[40] Álvarez, JL and Molero, J.C.: "Federalismo fiscal y descentralización: España, un caso atípico," in the collective work previously cited; "Cómo reformar..." op.cit. page 27.

achieving a new "national pact." Jurists should enter at the second stage, which involves formulating by means of norms of criteria for distributing the subject matters that others have decided upon on the grounds of non-legal arguments.[41]

Uniformity or Diversity

At this previous stage wherein it should be agreed what each territorial level must do, the question regarding uniformity or diversity in the distribution of competences should also be addressed, something that introduces a new element of complexity and political debate that cannot be ignored.[42]

The 1978 Constitution allowed a certain level of diversity with the recourse to the dispositive principle. The Statutes of Autonomy could set different levels of competences according to the reality or the aspirations of each territorial community. However, it is true that for essentially practical reasons and the rational functioning of the autonomous system, the substantial equalisation of the level of competences was gradually imposed.[43]

If the dispositive principle is eliminated, as we have proposed, the difference should remain established in the constitutional text. The historical rights of the "foral" (charter-granted) territories and the differential facts of other Autonomous Communities should be specified in the Constitution.[44]

[41] In this regard, reform of the Catalan Statute, which had the limits inherent to not being a constitutional reform, attributed an almost exclusive prominence to jurists. Criticism of constitutional development is based on formal aspects (excessive development of the basic factors, abuse of the horizontal state competences, etc.), but it does not examine the real consequences of the existing distribution of competences regarding the best or worst working of the public services, the working of the economy or public functions such as justice or security. The new norm for the competences of the 2006 Catalan Statute was drafted with the sole objective of attaining the maximum levels of competences possible, based on Article 149.1 of the Constitution and of the most favourable doctrine of the Constitutional Court towards the Autonomy. The only arguments where the defence of this objective were sustained were legal ones and, in the last resort, the desire to increase the quota of power as an absolute value in all areas.

[42] Criticism of the "drinks all round" philosophy has always been present in the "historical" Autonomous Communities.

[43] A comprehensive account of the evolution of the Autonomous State and its effect on the system for distributing competences can be found in: Aja (2007).

[44] Elimination of the dispositive principle, we believe, does not explain in any case the problems of constitutional reform pointed out by Fossas, E. op.cit. Removing the dispositive principle does not involve denying the initiative for statutory reform in favour of the Autonomous Communities, nor their full organisational autonomy or a broad autonomy when exercising their legislative competences. What is proposed is to take the definition of the state and autonomous competences to the Constitutional text, eliminating the current situation where the level of autonomy, within the Constitution, is left to each Statute. Removing the dispositive principle would certainly be a change to the system but if carried out in the terms that we propose would not, we feel, require constitutional reform by means of Article 168 of the Constitution currently in force.

As is known, the Spanish Constitution of 1978, in its seventh Title, attempted to solve two different problems: on the one hand, modernising a strongly centralised state by uniformly distributing power towards new territorial infra-state bodies and, on the other, providing an answer to the historical demand for self-government in Catalonia, the Basque Country and, as we have pointed out, to a lesser extent, in Galicia.

For this reason, the option of a uniform and diverse (asymmetric) model for distributing competences is, in the Spanish case, unquestionably crucial. The Spanish Constitution of 1978, with its open model, recognised in several of its precepts the different reality of the territories that form part of the Spanish state. The reference to regions and nationalities, the different processes of attaining autonomy, the reference to Autonomous Communities that in the past had voted in a plebiscite for a Statute of Autonomy or the recognition of the historical rights, were no more than formulae to recognise the different reality of certain territories that historically had demanded quotas of self-government (Catalonia, the Basque Country and to a lesser extent Galicia) from others whose identity was much less defined and that, in no case, posed problems of a differentiated identity within the Spanish nation.

This initial peculiarity of the constitutional model, which satisfied the positions of the Catalan and Basque nationalist parties, nevertheless became diluted over time. The option of Andalusia to place itself in the first level of autonomy, which was followed by the cases of the Valencian Community, the Canary Islands and Navarre, culminated in the statutory reforms of 1992. The so-called "drinks all round" philosophy became established as well as the substantial equalisation of levels of competences. The difference between nationalities and regions was left void of content and only the "differential facts" were admitted by the constitution and which were not reserved in all cases for the nationalities and "historical" Autonomous Communities. This was the case with language, special civil law, insularity or territorial organisation.

Today, the reality of 17 constituted Autonomous Communities is now an incontrovertible fact and the process of "substantial equalisation" in aspects of organisation and competences of all the Autonomous Communities is unstoppable. We even believe that the reviled "drinks all round" has had some positive effects for the rapid development of self-government and the process of decentralising the Spanish state. Central power structures have been dismantled with greater ease when they no longer had any justification, the competences which justified their existence having been transferred to all the Autonomous Communities.

However, neither should it be ignored that the demand for greater quotas of self-government, and for a differentiated position within the system on the grounds of the "national" character of the people who comprise an Autonomous Community, is still present in the case of Catalonia and the Basque Country (the "internal nations"). In the case of the Basque Country, we should remember the Ibarretxe Plan, a proposal for a new way to formulate the relationship of the Basque Country with the Spanish state and in the case of Catalonia the reform of the Statute

approved by the 6/2006 Organic Law. Reform of the model of territorial organisation is demanded and promoted from these Autonomous Communities.

In both cases, these initiatives have failed. The first was aborted by the Constitutional Court and the objective of the second was watered down by the same Court. Further, in the case of Catalan statutory reform, the objective of uniqueness has also disappeared due to the immediate setting up of similar processes of statutory reform in other Autonomous Communities. Because of all this, constitutional reform cannot ignore the reality of the demand for a unique treatment for Catalonia and the Basque Country if we hope to reach the necessary consensus that a reform of this nature requires.

Now restricted to the aspect of competences, the balance between national unity and asymmetry does not seem easy, more so when integration in Europe and the global economy impose a trend towards reduction of exclusive competences.

Whatever the case, we *do* believe that the new constitution should recognise the national reality in the Basque Country and Catalonia and the scope of historical rights (Basque Country and Navarre) and differential facts (Catalonia) that may be derived from this situation. Any uniqueness should not be placed on the same level as "privilege" and cannot affect the working of the system as a whole. However, and here we return to the previously outlined argument regarding the different nature of the competences to be distributed, the national identity demanded can be reflected in the field of competences most directly linked to the national reality, such as aspects related to language, education, culture, special civil law, public order, justice, territorial organisation itself or foreign relations linked to the previous issues.

National uniqueness need not necessarily lead to a totally differentiated regime, to the creation of special Autonomous Communities that are differently integrated within the state, which are only linked to the latter through bilateral relations and possess a totally differentiated system of competences, but it should lead to the establishment of a system for transferring competences which modulates the principles of unity and symmetry with those of singularity and asymmetry.

Finally, we wish to point out that the singularity of the autonomies may also be manifested within the symmetry of the competences, insofar as exclusive competences for the Autonomous Communities are recognised concerning complete subject areas. The autonomies could exercise different political options when regulating subject matters. Singularity will be exercised with the differentiated exercise of identical competences.[45] The law of one Autonomous Community need not necessarily be a photocopy of the law previously drafted by another Community. Thus, just as there is an initial asymmetry that should correspond to

[45] In this respect Watts, p. 171, op.cit. draws attention to political asymmetry derived from objective facts (an Autonomous Community of 9 million inhabitants is not the same as another with 800,000). This political asymmetry is different to the constitutional asymmetry that is the difference between Communities established in a constitutional norm. This is the case, for example, of the special financial systems in the Basque Country and Navarre.

the national reality of certain Autonomous Communities, there is a final asymmetry that will depend on the exercise of the respective homogeneous competences.

How to Formulate the Distribution of Competences

Once agreement has been reached regarding what each territorial level should do, it is time for the jurists who will be asked to give shape to this "political pact." Having reached this point, and even though questions may remain open, the answers are simpler. Succinctly, we will outline the principal topics to be taken into account that refer exclusively to aspects of competences.

a. To establish a system of two or three lists (competences of the state, the Autonomous Communities and another possible one of concurrent competences), plus a residual clause. We have already declared ourselves in favour of a system of three lists and a residual clause in favour of the State. The rule of prevalence should not be included.
b. To define the functional norms and their content. Competence is understood to be exclusive, concurrent, shared and executive. The model of the 2006 Catalan Statute maybe useful.
c. To define in precise terms the subject areas, yet without resorting to long lists of subject-matters and sub-subject matters. We should try to attribute to each level certain exclusive competences regarding integrated policy sectors, so that the Autonomous Communities can exercise true political autonomy in these subject matters.
d. To define the differential elements: "constitutional" asymmetry.
e. To promote non-legal guarantees for the autonomy of the Communities. The Constitutional Court must be maintained as the last guarantor of the Constitution for those cases where the state and Autonomous Communities cannot reach agreement concerning its meaning but taking into account that the new constitution will have completely established the system for distributing the competences and the function of constructing the model for distributing territorial powers should not be attributed to the High Court. Guaranteeing the position of the Autonomous Communities, and where appropriate the state, must be established through political channels, fundamentally the Senate (drafting of laws), sectorial conferences (administrative activity), proceedings prior to the constitutional conflict, Autonomous Community involvement in the ascendant and descendent phase within the European Union and participation in state constitutional bodies.

   These political channels must also allow an evolutionary interpretation of the constitutional text, adapting it to the needs of each moment without having to resort to its reform.
f. To establish mechanisms that, beyond the evolutive interpretation to which we have just referred, allow us to make the content of the constitutional text more

flexible in order to reorganise the system for distributing competences that, in essence, is linked to the evolution of the socio-economic reality and to the position of the state in relation to society.

With this objective a system of transfers or delegation of competences can be foreseen from the state to the Autonomous Communities (as well as a system of devolution of competences to the state), differentiating the suppositions where this transfer or delegation is carried out for all the Autonomous Communities or singularly for one or various Autonomous Communities.

References

Aja, E. "El estado autonómico. Federalismo y hechos diferenciales," 2nd edition, Alianza, Madrid 2007

Anderson, "Federalisme: una introducción," IEA, Barcelona, 2008, page 15

Argullol, E. Director, "Federalismo y autonomía," Ed. Ariel, Barcelona, 2004

Bayona Rocamora, A. gives to that expression: "El dret a legislar en l'estat autonomic," EAPC, Barcelona, 1993

Biglino Campos, P. "Federalismo de integración y devolución: el debate sobre la competencia," CEPC, Madrid, 2007

Bussjäger states in "Homogeneidad y diferencia," IEA, Barcelona 2010, page 159

Croissat, M. "Le federalisme dans les democraties contemporaines," 3rd ed., published by Montchrestien, Paris 1999, page 19

Cruz Alli: "La fórmula del Estado de las autonomías como transición al federalismo asimétrico," in Arrieta-Astigarraga, "Conciliar la diversidad. Pasado y presente de la vertebración de España," University of the Basque Country, Bilbao, 1996, page 143

De la Quadra Janini, T.: "El sistema europeo de distribución de competencias," ed. Civitas, Madrid 2006, pages 14 and 15

Fosses, E. "El principio dispositivo en el Estado autonomic," ed. Marcial Pons, Madrid 2007

Martín Retortillo, S "Descentralización administrativa y organización política," Ed. Alfaguara, Madrid 1973, page XXXVIII

Muñoz Machado, S. "Derecho público de las Comunidades Autónomas I," 2nd edition, Ed.Iustel, Madrid 2007

Ortega, L. "Los estatutos de autonomía tras la sentencia del Tribunal Constitucional 31/2010," in "Istituzioni del Federalismo," 2011, 1, page 47

Seijas Villadangos, E : "Introducción a la traducción castellana de la obra de Watts, R.L. Sistemas federales comparados," published by Marcial Pons, Madrid-Barcelona, 2006

Sevilla-Vidal "El salto (a la necesaria eficiencia) federal," in AAVV, "Cómo reformar las Administraciones territoriales," Círculo de empresarios, Libro Marrón XXVII, Madrid 2011, page 255

Solozábal, JJ, "El Estado autonómico en perspectiva," Revista de estudios politicos, nº 124, 2004

Tornos Mas, J. "La sentencia del Tribunal Constitucional español 31/2010 sobre el Estatuto de Autonomía de Cataluña, "Istituzioni del federalism," 2011, January-March, pages 34 to 41

Tornos Mas, J. "Los Estatutos de Autonomía de Cataluña," ed. Iustel, Madrid 2007

Tudela, J.:"El Estado desconcertado y la necesidad federal," Civitas, Madrid, 2009

Viver i Pi-Sunyer, C.: "Materias competenciales y Tribunal Constitucional," ed. Ariel, Barcelona 1989, page 33

Viver i Pi-Sunyer, C. "El Tribunal Constitucional, ¿sempre, només...i indiscutible?. La funció constitucional dels Estatuts en l'àmbit de la distribución de competències segons la STC 31/2010," in Revista d'estudis autonòmics i federals, no. 12, March 2011, pages 363 to 401
Wheare, K.C, "Govern Federal," "Clàssics del federalism" edition, IEA, Barcelona 2008, page 86

The Function of the Constitutional Court in the Distribution of Competences: A Critical Vision

José Antonio Montilla Martos

Distribution and Delimitation of Competences in the State of Autonomies

One of the peculiarities of Spain in the context of decentralised models is the influence of the Constitutional Court in the configuration of territorial structure. One is familiar with the use of the expression "Autonomous jurisdictional State" to define the State of autonomies[1] and numerous works have explained its configuration and development following the rulings of the Constitutional Court.[2] In this context, the influence of the Constitutional Court is especially apparent in the distribution of competences; it is, fundamentally, a "doctrine of competences."[3]

The origin of this special influence lies in the so frequently mentioned "deconstitutionalisation" of the distribution of competences. As is known, the Spanish Constitution of 1978 did not specify the jurisdictional powers of state ownership subsequently to complete the distribution with a federal clause, by virtue of which those that are not attributed by the Constitution to the State are a responsibility of the autonomies. The model is less precise. It includes in Art. 149.1 SC a list of areas of exclusive competence of the State, where, on the one hand, generic headings are employed (external health, immigration, marine fisheries) and, above all, most of them are areas of shared competence, either via the legislative articulation basic rules-development or through reservation for the State of legislation, with the possibility of autonomous execution. Within this framework, the Autonomous

[1] For all, M. Aragón Reyes, "¿Estado jurisdiccional autonómico?," RVAP, 16, September–December, 1986.

[2] Perhaps the most complete construction is that of Fernández Farreres (2005), although there have been numerous works with this objective.

[3] Cruz Villalón (1991), p. 3350.

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Communities could assume legislative powers in their Statutes of Autonomy, by virtue of the dispositive principle. Nevertheless, those Statutes of Autonomy included lists of areas with the same generic character as the Constitution.

The consequence was, it should not be forgotten, that a mere reading of the Constitution and the Statutes did not clarify whether a particular jurisdictional power referring to domestic trade, fishing, etc. was a competence of the State or the autonomy. Neither the Constitution nor the first Statutes specified the actual powers corresponding to each, as both employed generic references.

In this context, the Constitutional Court has performed a fundamental task over recent years. It has determined in diverse areas of competence the public powers or activities located in the respective zones of competence, state and autonomous.

This process has certainly accentuated sharing and even concurrence. Let us observe this from the perspective of the areas of competence exclusive to the State, which have finally been shared, despite the literal diction of Art. 149.1 SC as a result of the intervention of the Constitutional Court. With regard to the "administration of justice" (Art. 149.1.4.° SC), the Court has accepted autonomous competence over the "administration of the administration of justice" (CCR 56/1990) on the basis of the interpretation of the "subrogatory clauses" included in the Statutes. Also in relation to the question of "International relations" the Court has qualified its initial doctrine to allow the Autonomous Communities "activities of international significance" (CCR 165/1994), despite the character of exclusive State competence declared in Art. 149.1.3 SC.

To this original deconstitutionalisation of the distribution of competences should be added another reason that explains the aforementioned influence of the Constitutional Court: the absence of constitutional reform in Spain. In those countries where constitutional reform represents an exceptional process, the doctrine of the Constitutional Courts acquires greater importance. This has occurred in the USA, Australia and Canada.[4] It does not strike me as necessary to elaborate upon the difficulty of constitutional reform in Spain. After 33 years in force the Constitution has only been reformed on two occasions; in both cases these were minor reforms, linked to European demands, formal or substantive, and they were undertaken via an emergency process, skirting a genuine public debate. At an autonomous level, in spite of the reiterated doctrinal defence of the "constitutionalisation" of the State of autonomies,[5] there is no sign of that constitutional reform being addressed.

In any case, it is worth remembering that this "deconstitutionalisation" of the distribution of competences was accompanied by a reference to the Statutes of Autonomy.[6] It is the Statutes that establish the autonomous competences, by constitutional reference, by virtue of the dispositive principle. This assigns them a specific position in the constitutional order as they complete the territorial Constitution.

[4] Cfr. Argullol I Murgadas and Velasco Rico (2011), p. 21.

[5] Balaguer Callejon (1997).

[6] Cruz Villalon (1992).

It has been said that Statutes did not specify the jurisdictional powers included in the autonomous space but that they also regulated generic issues, leaving the Constitutional Court a broad margin to delimit respective jurisdictional powers.

This is the situation that has been modified in recent years with the reforms of the Statutes of Autonomy of Catalonia in 2006 (LO 6/2006), and of Andalusia in 2007 (LO 2/1997) insofar as they replaced the lists of generic areas of autonomous competence, of exclusive or shared nature, with the detailed analysis of each of these areas, delimiting the powers corresponding to the Autonomous Community in relation to them and, instead, therefore, those reserved for the State. The basis of this statutory option was established in the *Report on the Reform of the Statute* prepared in 2003 by the Institute of Autonomous Studies of Catalonia, and that established the basic rules of the subsequent statutory reform. Given that the Constitution neither defines nor specifies the meaning of the competences the assumption of which it permits in the Statutes, and that these competences can be assigned varying breadth or functionality, nothing prevents the Statutes from doing what the Constitution has made.

In theory, this option appears to be compatible with Art. 147.2 d) SC. This indicates, amongst the necessary contents of the Statute, "the competences assumed within the framework established in the Constitution." The Constitution allows for the delimitation of the area of autonomous competence in the constitutional framework via the Statute, as a "basic institutional law" the creation of which necessarily involves a double will, of the autonomy and of the State, in that whatever the process of elaboration and reform, it must be approved by the autonomous parliament and finally by the State Parliament, regardless of whether referendum is demanded or not.

In the exercise of this constitutionally assigned function: the determination of the area of autonomous competence, nothing prevents the Statute from, instead of referring to generic headings, specifying the jurisdictional powers assumed by the Autonomous Community, that is, the tasks or public activities of autonomous competence. On the other hand, this technique of breakdown provides a greater guarantee of legal security in relations between the Autonomous Community and the State, between legal operators and the citizens themselves, who can enjoy a clearer notion of the distribution of competences.

The Constitutional Court itself has accepted the presuppositions of this breakdown, in CCR 247/2007 when it refers to two aspects characterising Art. 149.1 SC, which includes the areas of competence exclusive to the State. In the first place, the Court states that it refers to areas the contents of which is only announced, in other words, neither described nor delimited; secondly, it points out that exclusive State competence refers on occasions to the entirety of the areas declared in the general terms described, but in other cases includes only the function relative to this area (LB 7). As a result, concludes the Court "the Constitution establishes the areas of State competence, but does not directly specify the contents or scope of either the areas or the material functions upon which the former is projected" (LB 7).

Therefore, the question was: to whom corresponds this specification, this definitive delimitation of competences? Prior to 2006 this had been the task of the

Constitutional Court, as neither the Constitution nor the Statutes specified the contents of the respective competences of the State and the Autonomous Communities. However, in the statutory reforms of Catalonia and Andalusia, the Statutes attribute themselves with that delimiting function, on the basis that to the Statutes corresponds the task of determining competences, that is, describing them or defining them with in the constitutional framework.

Certainly, what these Statutes do is, to a large extent, reflect the delimitation specified over these years by the "doctrine of competences" of the Constitutional Court or even the practice developed in the autonomous State, without express statutory acknowledgement (integration of immigrants, etc). After 30 years of autonomous development relations regarding competences have been clarified by the activity of the Constitutional Court, or political practice itself, and it is hardly descriptive of autonomous reality to refer to the generic headings of agriculture, environment or domestic commerce, when the legislation and jurisprudence have defined different profiles in each area.

The Constitutional Court has fulfilled the delimiting function in the period of the construction of the State of autonomies, but the model requires regulatory references that are now provided by some Statutes with the premise that the Constitution does not specify the distribution of competences, but the Statute, where the Constitution refers, does do this.

The Self-affirmation of the Delimiting Function of the Constitutional Court Vis-s-Vis the Statute in CCR 31/2010

This statutory breakdown, in a sense natural and a consequence of the evolution of the State of autonomies has given rise to an important doctrinal debate where the Constitutional Court defined its position in CCR 31/2010, with a significant epigone in CCR 30/2011. In CCR 31/2010 the Court self-affirmed its delimiting function in the distribution of competences. And it does this by means of limiting the function and constitutional position of the Statute of Autonomy. This is the question that I hope to outline in the following pages, some time having passed since the issuing of the important ruling on the Statute of Catalonia.

The evaluation of the Constitutional Court's participation in the delimitation of competences has undoubtedly been positive. In its early years in particular, it defined autonomous policy, configured the dispositive principle, the prevalence clause, the material concept of bases subsequently formalised, the principle of collaboration or, some years later, the supplementary clause, to name some well-known examples. Even CCR 247/2007, though it did not take statutory rights seriously (G. Cámara)[7] contains a notable propadeutic account of the evolution of the State of autonomies. However, the self-affirmation of the delimiting function of

[7] Camara Villar (2009).

competences vis-à-vis the Statute in CCR 31/2010 appears deserving of criticism both from the perspective of the functioning of the State of autonomies on account of the position where the Statute of Autonomy is relegated, and with regard to the actual legitimacy of the Constitutional Court in a democratic State.

The new Statutes of Catalonia and Andalusia break down and define the competences in the Statute. From a perspective of constitutional politics in Catalonia it is not presented as a natural evolution after 25 years of autonomous development but as a strategy, possibly erroneous, to protect the area of autonomous competences from the invasion of State competences, and in particular horizontal titles. We are interested above all in the breakdown, more than the definition of categories of competences (exclusive, shared, and of execution) that is also the objective of these Statutes.

There is a breakdown of the submaterials (Viver) or profiles of competences (Balaguer) of each of these areas, instead of employing the technique of generic headings,[8] especially in those areas where there may exist a risk of State interference, in such a way that the delimitation of the area of autonomous competence appears precise, and in this sense, it is hard for the State to encroach via horizontal titles or the fine detail of the fundamentals. What is sought, in short, is the objective definition of the material scope of the different competences assumed by the Autonomous Communities, "determining with greater precision the elements included, especially in those cases where there has been conflict or there is a greater chance of this occurring."[9] In this way the aim is to guarantee the integrity or stability of the contents of the competences assumed in the event of reductionist interpretations or applications in the future. The delimitation effected by the Statute may be unconstitutional as the Statute is subordinate to the Constitution, but if unconstitutionality is not specifically declared, then this Distribution of competences is established and the framework established must be respected by legal operators.

Surely more as a result of the manner where it is presented (shielding of competences) than for its contents, there has arisen considerable doctrinal criticism of this statutory pretension, in particular of the delimitation of autonomous competences in the Statute. The criticism is based on the fact that the distribution of competences is already established in the Constitution and, therefore, this cannot be supplanted by the Statute. The singular position occupied by this source in the constitutional order is not defined by its conformity with the Constitution. However, that is not the question. The Statutes are not Constitution, and their laws are of a different nature to constitutional laws. Consequently, they are subordinate to the

[8] Cfr. the respective works of C. Viver and F. Balaguer on this question, in Viver I Pi Sunyer et al. (2005).

[9] Cfr. Alberti Rovira, op. cit. p. 31.

Constitution, although the contradiction had never been resolved until CCR 31/2010 via the declaration of unconstitutionality but via the "appropriate interpretation."[10]

The critical position rejects the so-called "Statute-Constitution myth" (Muñoz Machado), that is, the "the gradual formation of the myth that the Statute is commensurate with the Constitution in terms of normative function."[11] It rejects the notion that statutory power can revise what constituent power seeks definitively to establish, in this case, the scope of the competences attributed to the State by Art. 149.1 SC.[12] In short, it is understood that specification of the attributions of the Autonomous Community in the Statute is an attempt to revise through the Statute the distribution of competences effected by the Constitution, extending its legislative function.[13]

The weakness of the argument lies, in my opinion, in that it presupposes the existence of a Constitution that, indeed, would have defined respective responsibilities in shared competences. This is made by the German or Swiss Constitutions, but not the Spanish Constitution. Here that delimitation of competences has been performed by the Constitutional Court. I reiterate that, as indicated by the Court itself in CCR 247/2007, in Art. 149.1 SC we only find generic headings interpreted, in a case-study doctrine, by the Constitutional Court. It is sufficient to check the evolution of constitutional jurisprudence in various spheres (international relations, administration of justice, etc.) to observe that there exists no constitutionally precise delimitation of State and autonomous competences.

This is especially flagrant in the case of the fundamentals, given the peculiar form of delimitation: initial action by the estate legislator and subsequent delimitation, when appropriate, by the Constitutional Court. Only in a generic form has it been established by the Constitution. The specific confirmation depends on the state legislature and jurisprudential case-study. Indeed, that imprecision enables the

[10] The CC has expressed this with clarity, particularly in its doctrine regarding exclusive autonomous competences. In this sense, it indicates that the Constitution "its dominant legislative force remains intact as lax superior of the entire legislation; a legislative force which is neither exhausted nor reduced by the enactment of the Statutes of Autonomy" (CCR 20/1988/3). In any case, the Court favours the constitutionally appropriate interpretation of the statutory provisions. Thus, CCR 69/1982/1 had indicated that "the Statutes of Autonomy must always be interpreted within the terms of the Constitution" and in clearer manner CCR 56/1990 indicates that the apparent contradiction between the Statute and the contradiction must be resolved "seeking an interpretation consistent with the Constitution, in a hermeneutic line of general character and specifically affirmed on repeated occasions by this Court."

[11] Cfr. Muñoz Machado (2005), p. 731 passim.

[12] Cfr., for example, De La Quadra-Salcedo Janini (2004), pp. 148–149, passim.

[13] Taking the argument further it is said that in this sense we are witnessing an attempt implicitly to modify the Constitution via modification of the Statutes. It is hardly necessary to reiterate the idea of the desirable constitutional reform prior to the statutory reform, but on this level what should be regretted is the political inability to proceed to constitutional reform not the autonomous initiative of statutory reform. With regard to the implicit reform of the constitution, using the same broad strokes, I understand that the reform does not exist because if it is in accordance with the Constitution nothing is reformed and if it is contrary it will have to be removed from the legislation or interpreted as compatible with the Constitution.

Statute to modulate in a negative manner respective areas of competence as it corresponds to the Statute to determine the autonomous competences in the generic framework of Art. 149.1 SC.

This does not mean, logically, that the statutory delimitation must be accepted in all its terms as the statute-makers may have exceeded their mandate and is also subject to the control of constitutionality. Simply, it fuels the argument that, by specifying autonomous competences, the Statute is acting within the framework that the Constitution has left open, not supplanting the Constitution. Therefore, the problem is not in the methodology adopted but, when appropriate, in the specific delimitation of autonomous competences that may have been undertaken in each area.

In the context of this doctrinal debate, the Court issued a declaration regarding the Statute-Constitutional Court relationship in the distribution of competences and has made it with different suppositions and consequences in CCR 247/2007 and CCR 31/2010.

CCR 247/2007 explains, in a correct manner, that nothing prevents the Statute from specifying the scope of autonomous competences; in the same way that nothing would stop the power of reform from the State's range of competences. It indicates that the limit for that statutory confirmation of autonomous competences is that it cannot prevent the deployment of the competences reserved for the State, in other words, they cannot encroach upon the field of competences reserved for the State. In any case, in view of the generic constitutional reference, to determine whether it affects this deployment we have recourse only to the doctrine of the Constitutional Court that directly interprets the Constitution or what may arise in the future from the resolution of conflicts that it addresses. In these conditions, in the framework of CCR 247/2007, the Statute offers a positive delimitation of the area of autonomous competences that is directly derived from our singular model of territorial organisation and fits within the territorial Constitution.

The Court expressly denies that this precision represents an inverted LOAPA (Organic Law on the Harmonisation of the Autonomy Process), contrary to CCR 76/1983.[14] It has even taken advantage of this ruling to specify its doctrine

[14] See this idea in Ortega (2005), pp. 66–82. The thesis of the inverted LOAPA consists in affirming that when autonomous competences are defined delimiting their material and functional scope this is an interpretation of constitutional norms of distribution of competences, in other words, these would be interpretative laws, expressly prohibited by the Court in the ruling on LOAPA (CCR 76/1983). However, as had been noted by the literature and is now reflected by the Constitutional Court the actions of the statute-making power was totally different from that prohibited by CCR 76/1983 as the Court itself had differentiated between the interpretative operation necessarily derived from the legislative activity and the abstract interpretation of the constitutional block vetoed by the aforementioned ruling (STC 227/1988/3). As P. CRUZ suggests, the problem lies not in the fact that the legislature interprets the constitutional concepts but in that it claims "its" interpretation to be the only one possible ("¿Reserva de Constitution? Comentario al Fundamento Jurídico 4 de la STC 76/1983, de 5 de agosto sobre la LOAPA" (1983), in *La curiosidad del jurista persa y otros estudios sobre la Constitución,* CEPC, Madrid, 1999, p. 160).

regarding the prohibition of "interpretative laws" (CCR 76/1983). The Court now says that this interpretative action is constitutional when it is not generic or abstract from the constitutional system and when its laws are directed towards its sphere of competences exercising its own competences. However, in the case of the Statutes of Autonomy, that undeniable interpretative function linked to the breakdown of areas of competence in their specific powers has a totally distinct scope to that performed by the state legislature, "in response to the double legislative dimension of the Statute, insofar as it is a state law, with the category of organic law, an integral part of the constitutional block, and is also the basic institutional law of the Autonomous Community and, therefore, of the subordinance which is configured in that territory." The consequence of its condition of basic institutional law, the Court explains, is that the Statute "addresses the actual authorities of the Autonomous Community, exercising a task of ordering its respective powers, in other words, establishing the legislative framework in which they must act." For this reason, the Statute may "determine the Community's own competences and establish their scope," that is, detail the submaterials or fields of competence, without prejudice, logically, to the fact that the specific delimitation may be subject to appeal before the Constitutional Court.

Acting thus the state legislature does not commit a breach of unconstitutionality albeit it might violate a specific attribution of competence attributed to the State, but this constitutional infraction would be completely independent of the previous one (LB 10). Consequently, the technique of breakdown is not prevented but in any case it will be possible to prosecute its specific range in different areas.

This recognition of the breakdown and, with it, of the function of the Statute in the delimitation of the distribution of competences acknowledged by CCR 247/2007 should have consequences with regard to the function heretofore fulfilled by the Constitutional Court in the distribution of competences. It would come to mean the substitution of a deregulated and established model, essentially, regarding the action of a jurisdictional body by another where delimitation is effected via the basic institutional law of the Autonomous Community, fruit of agreement between autonomous and State wills, provided that specification has been considered compatible with the Constitution, expressly or implicitly, and without prejudice to the competence of the Constitutional Court to resolve possible issues that might arise, incorporating into its action paraconstitutional laws.

This substitution was logical, in my view, as a consequence of the evolution of the State of autonomies. The Constitutional Court has developed that delimitating function because neither the Constitution nor the first Statutes specified the content of the areas of competences. The function it has developed has been more a consequence of the vacuum created by the conduct of the constituent and the statute-maker than an ideal option: neither should the Court have been responsible for that delimitation, only for resolving sporadic conflicts that arise, given the fragmentary character of its action on the basis of previously defined legislative contexts; nor, on account of its method of acting, typical of a jurisdictional institution that intervenes at the request of a party, may it configure a complete and

systematic model of distribution of competences that guarantees plenitude.[15] Because of this, it was not a model that could persist over time but it was necessary to define legislative contours.

Therefore, following these statutory reforms and with the support of the doctrine established in CCR 247/2007 we should have embarked upon a new phase, where the delimitating function is exercised by the Statute within the constitutional framework, and in the absence of constitutional reform, whilst the Constitutional Court does not develop a delimitating function with political content but its function as a Court of conflicts. However, this has not been the case because CCR 31/2010 contradicts previous doctrine and reaffirms the function of delimiting consequences of the Constitutional Court compared with the Statute. The academic criticism of CCR 247/2007[16] seems to have made an impression on the Constitutional Court. Thus, in CCR 31/2010, instead of applying the doctrine of CCR 247/2007 to the statutory attempt to break down the enabling provisions it introduces certain affirmations that "deactivate" that change in the delimiting function sought by the statutory reforms of Catalonia and Andalusia.[17]

Let us recall some of the affirmations contained in this sentence that seeks to devalue the constitutional function of the Statute and, as a result, its function in the delimitation of competences.

a) In the first place, it regards the Statute as just another organic law, with the position in the system of sources that corresponds to that source. In this sense, its qualification as basis for the validity of primary level laws as purely doctrinal or academic. The character of agreed law, which expresses the double will, general and autonomous, and is situated, therefore, at the apex of the autonomous legal system, has disappeared. This is a source that is inferior to the Constitution and superior to the regulation, which relates to the other legal sources via the principle of competence. Even when later, in Legal Basis 4, it recognises the constitutional function of the Statute of creating autonomous legislative systems in which it constitutes the basic institutional law its status as parameter of constitutionality is by reference of the Constitution, so that "unconstitutionality for violation of a Statute is, in reality, violation of the Constitution, the only legislation capable of attributing the necessary competence for the production of valid laws."
b) Secondly, it is claimed that the Statute can attribute legislative competence in a particular area but what is understood by a competence and what powers correspond to legislative as opposed to the executive bodies are presuppositions of the definition of the system that forms the legal system, reserved for the Constitution, and consequently, to its interpreter, the Constitutional Court. Only

[15] The characteristics of the Constitutional Court doctrine that I apply to this case in Balaguer (coor.) et al. (2011), pp. 133–137.

[16] Fernández Farreres (2008).

[17] On the deactivating attitude of CCD 31/2010 regarding the novelties introduced by the Statute of Catalonia (LO 2/2006), see Viver i Pi Sunyer (2010).

the Constitutional Court is genuinely competent to define constitutional categories and principles. No infraconstitutional law may act as constituent power.

c) Thirdly, when the Statute specifies competences and reflects the doctrine emanating from the Constitutional Court in its jurisprudence it aims to develop a function more typical of the Constitutional Court than of the Statute.
d) Fourthly, states the Court, in decidedly surprising terms, the categories and principles that govern the autonomous State have been the object of a perfectly completed jurisdictional definition in its substantive content, which has made it possible to reduce them to units via their ordering as a system (LB 58). It is difficult to conceive how via a case-by-case action and on third party request that systematic plenitude has been achieved.
e) In fifth place, it is claimed that the Statutes may relate without defining, with the sole objective of describing an unavailable legislative reality (LB 58).
f) Finally, in sixth place, says the Court, the terms of the Statute can only be interpreted, beyond the literal expression of the statutory provisions, within the limits of the doctrine of the Court itself and in the light of the meaning acquired therein over time.

The consequence of these clear declarations is the configuration of the Constitutional Court as the "lord" of competences, in an emphatic manner previously unknown, as opposed to the legal irrelevance of what, in turn, may be established by the Statute of Autonomy where the Constitution refers. The Constitutional Court abrogates, therefore the delimiting function of distribution of competences, denying in turn the scope of the activity of the Statute Autonomy.

Consequences of the Doctrine of CCR 31/2010 with Regard to Shared Competences

The position of the Constitutional Court in relation to the statutory treatment of autonomous competences has specific consequences in the distribution of competences. The most notable is the limitation of the delimiting function of the Statute in the area of autonomous competence, especially in the case of shared competences.

Without a doubt the most far-reaching effect of this new doctrine of the Constitutional Court occurs with regard to the limitation of the basic state legislature that may derive from the statutory specification of the sphere of autonomous activity. The inclusion of a particular power in the Statute locates it precisely in the autonomous area of competences and it can no longer be the object of State regulation in the exercise of its competences to establish bases. Logically, it is possible for the statute-maker to exceed his mandate on establishing a positive configuration of the area of competences. In this case we would have a conflict of competences that could only be resolved by the Constitutional Court, via a corresponding conflict

with the expulsion of the system of statutory legislation or its "appropriate interpretation," in the sense expressed by the Constitutional Court itself.

This delimitation of the basic rules is not strictly undertaken by the Constitution but by the ordinary State legislature that establishes the basic rules, the bases or basic legislation. In this situation the question has been asked as to whether the Statute can delimit the capacity of the State to establish the basic rules.

We should once again recall, as an undeniable premise, the singularity of our State of autonomies and the unique legal nature of the Statute of Autonomy. They perform a function that cannot even be fulfilled by the constitutions of the member states of a federation, but only by the federal constitution: the assignment of competences to the autonomous territorial institutions.[18] That capacity of attribution must be established within the framework of the Constitution and is only limited by the Constitution itself. As a result, the basic state legislature cannot limit who is empowered by the Constitution for the attribution of competences.

The Statute, indeed, seeks a negative delimitation of the bases. By implicitly determining the powers of action of an Autonomous Community in an area it is limiting the delimiting capacity of the state legislature. That does not mean that this negative delimitation remains unscathed as the Statute may have violated the legislative framework. However, that is something to be decided by the Constitutional Court when resolving a conflict over competences in this sense. In this way the minimum common law would not be affected as content of the basic that can be established by the Constitutional Court when resolving a specific conflict; what would be restricted is the absolute freedom of the ordinary state legislature to define the bases and to change them at any time as that change would not only provoke the ensuing unconstitutionality of the autonomous legislative development of the fundamentals but could contradict a statutory law and, thus, the constitutional block that would result in its unconstitutionality unless the Constitutional Court considered, upon resolution of the conflict, that the Statute of Autonomy had been exceeded by delimitation of the autonomous area of competences.

What we reject is that the Statute cannot break down its area of competences, also in shared competences, because this would be limiting the freedom of the state legislature to establish the fundamentals. And for two reasons. On the one hand, the basic state legislature is an authority limited by the constitutional block, which includes the Statute of Autonomy, without prejudice to the fact that the contents of the latter may be submitted to constitutional control. On the other hand, the limit does not affect its capacity to regulate the fundamentals in the framework delimited by the territorial Constitution but to redelimit that framework in the process of legislative production of the fundamentals, a different process from the previous one in that this second operation must respect the rules regarding the production of the legal system.[19]

Consequently, the breakdown of competences implicitly limits the capacity of the state legislature to delimit the basic rules, at least in practice, as it has been

[18] In this sense, Aragón, op. cit. p. 19.

[19] On the difference between the delimitation of basic rules and regulation of basic rules, see Beleaguer Callejón (2006), p. 41.

delimited in a negative sense by the Statute in the specification of the autonomous area of competences as a consequence of our model of territorial organisation and that delimitation incorporated into the constitutional block must be respected by the state legislature when regulating the fundamentals or modifying that regulation.

The limitation of the delimiting capacity of the basic legislature has a positive consequence for the functioning of the State of autonomies that we cannot ignore: it may help to stabilise the contents the fundamentals in each of the areas of competences. There is a tendency to overcome the well-known "variability of the basic rules."[20] This aspect of our model that was originally favourable to the Autonomous Communities in that it allowed them to develop the fundamentals even if the State had not regulated the area has provided the State with total freedom, in form and in content, to determine at every moment what is basic and to alter that delimitation with the accompanying displacement of autonomous legislation and the rendering obsolete of recent legal provisions, even affecting the legal security of citizens. Therefore, establishing the fundamentals via the constitutional block is a positive and even a necessary process for the correct functioning of the State of autonomies. That this is performed by the Statute rather than the Constitution is the consequence of the position of the Statute in our model and of the apathy of the power of constitutional reform.

This attempt firmly to position the delimitation of the fundamentals does not prevent the state legislature from changing the regulation to adapt it to the changes in society, in other words, it does not petrify the legislative treatment of a specific issue.[21] What it limits is its capacity to delimit the fundamentals by establishing a precise parameter of constitutionality. Neither does it petrify the distribution of competences. Certainly, the founding sources of the respective legal systems, be it the Constitution or the Statute, characterised by their rigidity, tend to persist. In this sense, Art. 149.1 SC also petrifies the distribution of competences. However, on the one hand, its reform should not be seen as a traumatic process but as something normal, an adaptation to new circumstances, and on the other, its rules are more open to adaptative interpretation than those of other sources.

This interpretation has been rejected by a sector of the literature on consideration that the Constitution refers to the basic legislature and, as a result, prevails over statutory provisions. I do not relieve that this position can be maintained on the basis of the doctrine of the Constitutional Court prior to CCR 31/2010. On the one hand, the Court has not included the basic legislation in the constitutional block; on the other, ha it has established the subjugation of this not only to the Constitution but also to the Statutes. Remember the declaration of CCR 141/1993 when it establishes that "such regulation corresponds only to the State via laws of a basic nature insofar as this

[20] The essential references on this question are Jiménez Campo (1989) and García Morillo (1996).

[21] In any case, the Autonomous Communities should participate in this regulation because it influences their potential development. Thus has been frequent mention of the regulation of basic rules as one of the laws where a Senate chamber of territorial representation could participate directly. However, in any case, this should be the subject of debate in a multilateral forum.

permitted by the Constitution and the Statutes of Autonomy." In my opinion, the thesis that the basic legislation prevails over what is established in the Statutes of Autonomy ignores the unique characteristics of our model of territorial organisation. According to this position, the Constitution completely delimits state competences, in such a way that the distribution of competences is constitutionally closed. However, a simple reading of Art. 149.1 CE reveals that this is not the case. For genetic reasons, to where I referred earlier, our title VIII, and in particular Art. 149.1 SC bears no resemblance whatsoever to the attribution of competences in other constitutions of decentralised states where the State's competences are specified.[22]

CCR 247/2007 appears to support this interpretation in a double sense. On the one hand, in that it highlights the fact that Art. 149.1 SC does not provide a detailed description of the contents of the areas of State competence and, on the other, because in certain cases it only includes some functions with regard to the subject, y and not all of it. Without any doubt, the most significant case is that of the basic rules. The limit established by the sentence is that the statutory legislative regulation should not denaturalise the contents particular to each area, "which permits its recognisability as institution" (LB 10). In this manner, a limit is established to the statutory delimitation of the autonomous area of competences, which logically is subject to constitutional control, but that does not imply enabling a hypothetical state delimitation via basic laws to prevail over that established in the Statutes. In the case of the scope of the basic rules, this question is obvious. It is the state legislator who performs this delimitation and is subject to the Statute as the Statute forms part of the constitutional block. A different question would be to suggest that this is not the ideal model and it should be the Constitution that delimits the basic rules. However, our system does not function this way.

This interpretation obviously does not limit the capacity of the Constitutional Court. This may rule that a statutory provision is unconstitutional because it encroaches upon basic state laws, but not simply because the state legislator regards it as basic but because in its interpretation of the Constitution the Constitutional Court has regarded as basic that particular aspect of the area of competence now included in the Statute. It is even possible for there to arise the ensuing unconstitutionality of the statutory regulation on consideration that a new context necessitates a broadening of state bases for the fulfilment of their function. What we reject is that his may derive from the actions of the ordinary state legislature, with the consequent imposition upon statutory activity.

Nevertheless, CCR 31/2010 has questioned that delimiting function of the Statute in shared competences. In reality, the Court has affirmed in this ruling that there are no constitutional obstacles to the breakdown of enabling powers, in other words, for it to specify, in shared competences too, which jurisdictional

[22] I do not share, in this sense, the view of T. de la Quadra Salcedo Janini, who from this conception rejects that "statutory power should revise the work of constituent power in that which constituent power has sought to leave as closed, precisely the case of the scope of the competences attributed to the State by Art. 149.1 of the Constitution" (op. cit. p. 196)

powers are placed in the autonomous space. However, in turn, it has stressed that basic state legislature is not mandatory given the negative delimitation effected by the Statute when defining autonomous competences. There is no "shielding" derived from the concretion of jurisdictional powers as this concretion does not involve a limitation of the area of competences of basics, in other words, cannot restrict the area of competences attributed to the State by the Constitution.[23]

However, there is no incompatibility between the absence of shielding and the link between basic state legislature and statutory contents. Even when the Statute cannot condition the fundamentals, the statutory reform affects this process of delimitation. By lifting in exhaustive retail autonomous competences it conditions the delimitation of the basic rules, without this contradicting the affirmation that this may finally correspond to the Constitutional Court in the event of conflict. And for two interconnected reasons: the alteration in the parameter of constitutionality that it involves and what we can term the "double deference" of the Court, not only to the basic legislature but also to the Statute.

The technique of breaking down autonomous competences implies an alteration in the constitutional block and, consequently, in the canon of constitutionality employed by the Constitutional Court in the process of delimitation of the basic rules where the Statute also forms a part.[24] Certainly, this alteration of the parameter must have consequences.[25] When the Statute establishes with precision the autonomous character of a particular public activity, within the wide margin provided by constitutional indefinition, the Constitutional Court could only consider it in the scope of basic state competence after demonstrating that it had exceeded its mandate by establishing the positive delimitation of autonomous competences, which involves the expulsion of the statutory legislation or its "appropriate interpretation" or, even in the absence of excess, there coincide exceptional circumstances which justify the existence of a State title, since, as we know, the interpretation of the respective titles must be systematic.

Moreover, along with deference owed to the basic state legislature, in that it initially corresponds to him to establish the basic rules, there is also deference to the delimitation of the autonomous area of competences effected by the Statute through constitutional reference. The question of which of the two deferences prevails has already been resolved in favour of the Statute insofar as, on the one hand, it is referred to by the Constitution for the delimitation of competences and, on the other hand, the function of basic state legislature is not delimitating but regulatory, subject, therefore, in any case, to the constitutional block. This does not mean that it has to accept any statutory contents as the relationship is one of competences

[23] Cfr. In this sense in the literature, De La Quadra-Salcedo Janini (2005), pp. 185–187.

[24] Viver, "En defensa. . .", cit. pp. 120–121.

[25] What I do not share is the idea that the statutory content is imposed upon the Court as a secondary constitutional norm as a result of its function as complement of the Constitution and the consequent inclusion in the constitutional block (*ibidem*).

but it does counteract the consequences of unilateral deference to basic state legislature that has allowed it to penetrate the area of autonomous competences.

Henceforth, I believe that the Court loses the broad interpretative freedom afforded it by the generic nature of the autonomous enabling provisions and, in this sense, it would no Langer have the delimiting function resulting from basic state legislature but that of resolving in the terms laid out the possible conflict that might arise in the new statutory framework between that proposal and the negative delimitation implemented by the Statute when defining the autonomous area of competences, from which might indeed derive a redelimitation of basic rules in a specific field.

Nonetheless, CCR 31/2010, on the basis of the aforementioned affirmations, rejects this conception. If the Statute is just another organic law, the categories and principles have been the object of a perfectly rounded jurisdictional definition or the terms of the Statute can only be interpreted within the limits of the doctrine of the Constitutional Court, this is clearly preventing the delimiting function of the Statute and configures the Court as delimiter of shared competences, instead of organ of resolution of conflicts.

Criticism of the Delimiting Function of the Competences Abrogated by the Constitutional Court

Reference has been made to the intention of the Constitutional Court permanently to configure itself as the delimiter of the distribution of competences, in the absence of any constitutional reform to "constitutionalise" the State of autonomies and in view of the Statute of Autonomy's quest to fulfil this function. This has been exemplified in the case of the delimitation of the basic rules. With regard to the pretensions of CCR 31/2010 I would argue that a model of delimitation of competences stemming from the division outlined in the Constitution based upon the rulings of the Constitutional Court, without normative references, is unacceptable after 30 years of constitutional development.

The Constitutional Court has developed a commendable labour of delimitation, concretion and guarantee in diverse areas of competences. I even consider to be correct the affirmation, now a commonplace, that without the delimiting activity of the Court "the State of autonomies would simply not have functioned." Questionable is whether it can continue to do so in an appropriate manner in the future on the sole basis of the doctrine of the Constitutional Court. And, of course, I am of the opinion that this jurisdictional action has not "constitutionalised" the distribution of competences.[26] It has been unable to do this in the sense that Court acts at the

[26] This is the response offered by G. Fernández Farreres to negate the "deconstitutionalisation." It is not a case of negating the importance of constitutional doctrine in the configuration of the autonomous State but, as is noted afterwards, the impossibility of building a model on the basis of jurisprudence that logically cannot be systematic. Cfr. G. Fernández Farreres, op. cit. pp. 73–77.

request of a party and it actions reveal the case-study traits typical of any jurisdictional body. It is a fragmentary and complementary activity that, by its nature, cannot guarantee plenitude. CCR 31/2010 itself referred to the "shortcomings typical of any jurisprudential work in terms of cognoscibility and recognition on the part of the community of its recipients those it affects" (LB 58).

However, not only is it unable to define with plenitude the delimitation of competences, neither, I believe, should it, as this is a function that corresponds when appropriate to the constituent power, which has opted to leave it open, referring to the Statutes and, in any case, these are decisions which should be the subject of democratic public debate. When the Constitutional Court assumes this function of delimiting competences instead of limiting itself to resolving conflicts, it inevitably becomes the focus of public debate. It is not a question of ignoring the political character of any conflict over competences but, on another level, excluding the Court from the political definition involved in the delimitation of competences. As the Court indicates in one of its foundational rulings (CCR 11/1981) one level should be the setting for political decisions, amongst which are included the division of competences between the State and the Autonomous Communities, and the political evaluation of these decisions, and on another the legal response to the conflicts that may arise. If the aim is to exclude the Constitutional Court from the political debate, with the accompanying risk of delegitimisation, it should also be distanced from an essentially political function that is that of determining activities and tasks of state and autonomous competence restricting itself to the sphere of legal response to conflicts.

We must be aware of the development of this new framework of competences. The most correct course of action would be for the Court to return to the doctrine of CCR 247/2007, acknowledging the delimiting capacity of the Statute, and apply it to the more specific system of competences derived from the reformed Statutes of Autonomy, ignoring some declarations included in CCR 31/2010, which are somewhat surprising and possibly linked to the situation of political tension during which that ruling was issued. However, in may also persist in that undervaluation of the Statute reflected by CCR 31/2010. This is also the line followed by CCR 30/2011 when it declared a statutory provision to be unconstitutional, in this case the Statute of Andalusia. It does not even contemplate the possibility of an appropriate interpretation to qualify the exclusive nature of an autonomous competence, when it always explored this avenue (SCCR 69/1982, 20/1988 o la 56/1990).

If it persists in this vein it will have turned its constitutional jurisprudence into a genuine "constituent doctrine,"[27] whilst devaluating the Statute of Autonomy. Given this lack of legislative density in the delimitation of competences there seems to be a need to push for constitutional reform. It is a case of recognising in the Constitution specific state competences, with the particular corresponding powers, in as precise a manner as possible. A clause will have to be added according to which those competences not assigned to the State will belong to the Autonomous Communities, to complete the model.

[27] Cfr. this accusation in De Cabo Martín (2003).

In this context, the "constitutionalisation" of the distribution of competences, so often advocated, is not only convenient but absolutely essential.

In this way, not only will many of the conflicts over competences be resolved but, above all, the Constitutional Court will assume its function of dealing with conflicts, beyond the delimitation of competences, a function corresponding to other actors of a political nature. In short, the legitimacy of the Constitutional Court will be protected from itself within the constitutional framework.

References

E. ARGULLOL I MURGADAS; C.I. VELASCO RICO (dirs.), *Instituciones y competencias en los estados descentralizados,* Institut d'Estudis Autonomics, Barcelona, 2011, p. 21

F. BALAGUER CALLEJON, "La constitucionalización del Estado autonómico," in *Anuario de Derecho Constitucional y Parlamentario,* 9, 1997

F. Beleaguer Callejón, "Las cuestiones competenciales en los actuales procesos de reforma de los Estatutos de Autonomía," RGDC, 1, 2006, p. 41

F. Balaguer (coor.), G. Cámara, J.F. López Aguilar, M.L. Balaguer, J.A. Montilla, *Manual de Derecho Constitucional,* Tecnos, Madrid, 2011, sixth edition, pp. 133–137

G. CAMARA VILLAR, "Los derechos estatutarios no han sido tomados en serio (a propósito de la STC 247/2007, de 12 de diciembre, sobre el Estatuto de Autonomía de la Comunidad valenciana," *REDC,* 85, 2009

P. CRUZ VILLALÓN, "La jurisprudencia del Tribunal Constitucional sobre autonomías territoriales," in *Estudios sobre la Constitución española. Homenaje al profesor Eduardo García de Enterría,* Volumen IV, Civitas, Madrid, 1991, p. 3350

P. CRUZ VILLALON, "La constitución territorial del Estado," *Autonomies,* 13, 1992

C. DE CABO MARTÍN, *La reforma constitucional en la perspectiva de las fuentes del Derecho,* Madrid, Trotta, 2003

T. DE LA QUADRA-SALCEDO JANINI, "¿Es el Estatuto de autonomía una norma capaz de modular la legislación básica del Estado," REDC, 72, 2004, pp. 148–149, passim

T. DE LA QUADRA-SALCEDO JANINI, "La reforma de los Estatutos de Autonomía y sus límites constitucionales. La imposibilidad de "blindar" las competencias autonómicas a través de una mera reforma estatutaria," CDP, 24, 2005, pp. 185–187

G. Fernández Farreres*, La contribución del Tribunal Constitutional al Estado autonómico*, Iustel, Madrid, 2005

G. FERNÁNDEZ FARRERES, *¿Hacia una nueva doctrina constitucional del Estado autonómico?,* Civitas, Madrid, 2008

Andy J. García Morillo, "La versatilidad de lo básico," *RAP,* 139, 1996

J. Jiménez Campo, "¿Qué es lo básico?. Legislación compartida en el Estado autonómico," *REDC*, 27, 1989

S. MUÑOZ MACHADO, "El mito del Estatuto-Constitución," in *Informe Comunidades Autónomas, 2004,* Marcial Pons, Barcelona, 2005, p. 731 passim

L. Ortega, *Reforma constitucional y reforma estatutaria*, Civitas, Madrid, 2005, pp. 66–82

C. VIVER I PI SUNYER, "Los efectos jurídicos de la sentencia sobre el Estatuto," RCDP, Special Ruling on the Statute, 2010

C. VIVER I PI SUNYER, F. BALAGUER CALLEJON, J. TAJADURA TEJADA, *La reforma de los Estatutos de Autonomía*, CEPC, Madrid, 2005

Autonomous State Reform in the Face of Challenges from Regulation and Integration

José Tudela Aranda

Premises for Debate

One of the key political decisions taken by the 1978 Constituent Assembly was to opt for political decentralization of power. Few people question that the basic reason for adopting such a decision was to seek a response to the peripheral nationalisms of Catalonia, the Basque Country and, to a lesser extent, Galicia. At the same time, the advantages of decentralization for revitalizing inland Spain and the consequent empowerment of the citizens were placed on the table. Whatever the case, what clearly emerges from both the constituent debate and the actual wording of the Constitution is that the underlying aim of decentralization was to satisfy the nationalist pretensions of the above territories and, thus, resolve one of the secular problems of our history,[1] a debate that should be understood within the historical framework where it took place.

The historical view of the territorial issue in twentieth century Spain deserves a more detailed treatment than is impossible in these pages. There are many suppositions in this regard, some of which would need significant clarifications, if not outright denials. Therefore, a thorough examination of this question is crucial if we are to have at our disposal the necessary elements for judging, at such a time as the present, when significant aspects of our model of territorial organization seem to be in need of reform. Thus, correctly establishing the evolution of the legal and political debate surrounding Basque and Catalan nationalism, undertaking an

[1] In this respect, for all of the problems, see: García De Enterría, pp. 453–455. In the same pages, the author underlines how, in view of the debate that this subject caused in the Constituent Parliament of 1931, the decision to decentralize the state, in a more pronounced way than in 1931, was taken by consensus and absent of all drama.

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objective review of the decentralization process implemented, or revising the assumption that only in Catalonia, the Basque Country, and Galicia was there a desire for autonomy, seem, among others, to be necessary questions.

Like many other things, such a historical perspective was to be truncated by the Civil War. Until then, the debate was approached in terms that, although never uniform, revolved around the growing consolidation of demands for self-government on the part of the peripheral nationalisms.[2] However, among those in exile after the Civil War, the territorial question did not prove to be fundamental. Of outmost important was the need to recover democracy and freedom on the premise of reconciliation among all Spaniards. It is doubtless possible to find numerous references to this question[3] that need to be brought together, not so much to improve our historical memory but rather our current understanding. Yet, what proved most significant was that even where the territorial question was to be found, it was deemed secondary to the collective aims of all Spaniards, namely freedom and democracy.

From the 1960s onwards, the territorial question once again found an important foothold in the political debate. Around such a debate, a discourse linked to words such as autonomy, federalism, nationality or region emerged repeatedly. At this point, it should be remembered that the inclusion of the expression "nationalities and regions" was by no means coincidental or, even less so, the result of pressure from factional forces who wished to banish the term "nation." The word "nationalist" reached the Constitution on the back of profound political connotations linked to the needs and demands of nationalism. Its significance was great and was understood as such by both those defending its inclusion in the constitutional text and those who mistrusted it. In this respect, it should not be forgotten that including it would entail, in compensation, amending the proposal of Article 2, in order to include the reference to the "indissoluble unity of the Spanish nation."[4]

Over and above the circumstances that surrounded the debate during the years of the transition, an analysis thereof must be undertaken if we are to gain a full understanding of both the evolution and its current situation, we should confine ourselves to the development of the institutional framework established by the Constituent Assembly in relation to this question. In this regard, it is well-known that the most characteristic aspect of this model is its lack of definition or openness. This same flexibility forces us to appraise what happened: that is to say, just as today there is a general agreement that the Spanish state is close to being a federal model, territorial decentralization might well have been confined to a limited

[2] See, VV.AA, *Documentos para la historia del nacionalismo vasco,* Ariel, 1998; Prat De La Riba (1925) and Cambó (1929).

[3] The book *Diálogo sobre las Españas* is significant. Therein, Bosch Gimpera defends the need to distinguish the Spain of Castile in order to conceive of Spain "as the harmonic whole in which everybody can live fraternally without losing anything or acquiring impositions" (Bosch Gimpera 1960, p. 30). For his part, in 1962 Fernando Valera published a brief treatise championing the federal republic as the best regime for Spain (Valera 1962).

[4] In this respect, see: Julia, pp. 22 and 23, Fundación Pablo Iglesias.

model, both quantitatively and qualitatively. In other words, the high degree of political decentralization is the result of a political will where distinct agents converge. Whatever the case, what is interesting in this debate is to stress how the open constitutional framework has been developed in a profoundly decentralizing tone, to the point that Spain has gone from being a perfect example of a highly centralized state to a state with a strong level of decentralization both in quantitative and qualitative terms.[5] From this statement, which obviously admits many shades of opinion, we will have to approach the present.

Whether today, as we will have occasion to examine, many different agents question the wisdom of our model of territorial organization, a point worth remembering is that until a little over 5 years ago this model was highly praised. The economic development of our country was seen to be indissolubly linked to the process of decentralization and nationalist tensions had been, at the least, intelligently channelled. In just a few years, intense decentralization of power had been effected at little cost and to great benefit. One key point is that in social terms, the population had embraced the autonomous state as a natural part of their lives, and indeed their identification with it was both intense and far-reaching throughout all the Autonomous Regions.[6] There were few negative aspects, while the positive aspects were widespread. The inevitable question is, therefore, why the negative aspects have come to dominate everyone's judgment.

This turnaround is no mere coincidence. The last 10 years have witnessed notable events, some directly related to the Autonomous State and others that, without being so, have also had a marked impact on it. Schematically, everything can be reduced to the resurgence of nationalist demands and to the acute economic crisis. From different standpoints, both questions will influence how territorial organization is judged, and will do so with regard to the two objectives it sought, namely, a better and efficient service for citizens and the resolution of nationalist tensions. What is surprising is not that this has occurred but rather the speed and intensity with which the positive initial premises have become eroded, despite the initial promise. Explaining this is by no means a simple task, although it would be easy to enumerate the significant mistakes made during this period. Whatever the

[5] This state is comparable to a federal state. From abroad, Ronald Watts, among others, had already reinforced this view in a past stage of the autonomous state: Watts (1999), pp. 129–13: a view that the author himself has ratified in a recent work: Watts (2009). If we look at the figures, the conclusion offers no doubt: at present, the Autonomous Communities manage 36 % of total non-financial spending; 24 % of non-financial income; 41 % of state public investment; 54 % of public workers. Moreover, 72 % of regional spending is social expenditure. Finally, 1,967 transfers of powers from the state to the Autonomous Communities took place between 1978 and 2011 (Source: López Laborda 2011).

[6] This feeling is constantly reflected in regional opinion polls conducted by CIS (Sociological Research Centre), although a certain deterioration in identification with the Autonomous State is apparent. In the opinion poll for July 2010, carried out between January and March of that year, 47.9 % were of the opinion that the creation of the Autonomous State had been positive for Spain, while 26.4 % had a negative point of view.

case, the feeling that frivolous judgement and lack of reflection regarding this question remains prevalent in our political agents is not the least serious factor.

Although renewed nationalist tensions emerged as a result of the debate surrounding the so-called Ibarretxe Plan,[7] these have come vigorously to the fore because of the debate brought about by the passing of the new Statute of Autonomy of Catalonia and, in particular, by the STC 31/2010 (the Sentence of the Constitutional Court), regarding this matter.[8] The Statute of Autonomy of Catalonia heralded a new political and legal stage of territorial organization, marked by the passing of the so-called second generation Statutes, a stage that, however it is viewed, implied a qualitative leap in the development of the autonomous state. Aside from the implications vis-à-vis self-government, the doubts concerning the constitutionality of certain processes, or the political and social controversy surrounding the Catalan Statute, two key facts should be borne in mind. On the one hand, the Statutes had, for the first time, been modified for those Communities that had gained autonomy under Article 151 of the Constitution, and had done so not by reforming the original text but, significantly, by passing a new Statute. Moreover, for the first time in the evolution of the Autonomous State, the desire to emulate was to give way in favour of individual options. Each of the Autonomous Communities has followed a different path and, unlike the past, no common texts are to be found. At most, one can point to some similarities. The result is a highly heterogeneous map as regards the level of self-government in evidence. The paradox is that several Statutes were reformed or passed after the Catalan one strengthened the image of emulation, despite the considerable differences between them.[9]

Yet this has not been the only or indeed the most important paradox to emerge from the passing of the second-generation Statutes. Beyond any consideration and any legitimate disappointments, it is difficult to question the fact that the passing of the new Statute meant a significant advance in the levels of self-government for Catalonia. However, (and this is the paradox) social dissatisfaction, particularly that of the Catalan political elite, with self-government is today notably greater than before the Statute was passed. In fact, it is only now that important leaders are beginning to spread the belief that Catalonia cannot hope to satisfy its aspirations whilst it remains part of the State.

This jostling for position, linked to the probable return to power of the nationalist parties in the Basque Government, means that in coming years nationalist tensions are likely to take center stage in the national debate. Whatever the outcome of these

[7] Regarding the so-called Ibarretxe Plan, see: Solozábal Echavarría (2006), p. 107 onwards.

[8] For a view of the commentaries that the 31/2010 Sentence has merited in Catalan legal doctrine, the monographic studies can be consulted that the Catalan Journal "Dret Públic" (December 2010, Special) and the Revista d'Estudis Autonòmics y Federals (n° 12, March 2011) have devoted to this subject.

[9] In this way, the foreseeable emulation was broken. In this regard, see: VV.AA, *Encuesta sobre el Estado autonómico,* Teoría y Realidad Constitucional n° 24, pp. 11–108. With respect to the significance of the break with the idea of emulation, see: Tudela Aranda (2010).

tensions, what seems unlikely is that the solution to this problem is to be found within the framework of the principles that govern the Autonomous State. However flexible this maybe (which is not as much as some appear to want to see), the truth is that the Constitution establishes certain limits that in the end must be respected, as the debate regarding the Statute of Autonomy of Catalonia has shown. Therefore, it is not difficult to venture that the constitutional framework has failed as regards the solution to the nationalist tensions and that the solution to these, if it indeed exists, will have to be sought in constitutional reform. An entirely different question would be the analysis of the causes of this failure. This is unlikely to be rooted in the letter of the Constitution but rather in the evolution of certain events that have been badly handled by all.

If statutory reform has led to an almost radical questioning of the Autonomous State's ability to resolve nationalist tensions, the economic crisis has greatly eroded its credibility as an efficient management model. Generally, and surprisingly in view of the previous silence, the Autonomous State seems to be on many people's lips as one of the most obvious reasons for the economic crisis and, what is worse, as one of the most serious hurdles to recovery. Legislative multiplicity, breaking the principle of market unity, duplication of and unequal access to services—all of these and many other reasons—are constantly being expounded to account for the evils that the development of the Autonomous State has brought on from an economic perspective. In this way, the image that used to tie decentralization of power to economic efficiency and, above all, to the improvement of public services, has begun to be eroded.

Thus, if Montesquieu's Persian jurist were to return to our country, not only would he be even more surprised by the divergence between the letter of the Constitution and the reality of territorial organization, but he would also express serious concerns as to its future. Questioned from every perspective and with its defenders lost in previously relevant treatises that are now unfortunately less so, the Autonomous State is torn between puzzlement and its death throes. The interlocutor of the illustrious Persian visitor would be unable to help feeling a sense of bitterness. He would be unable to answer the big question as to why things had been allowed to go so far and his answers would draw only silence. Only in a final effort, and after listening to the true misfortunes where the good Persian is a daily witness, would he dare put into writing certain hopeful reflections.

Regulation, Uncertainty and Crisis

From the Regulated State to the Uncertain State

The passing of the first Statutes of Autonomy, those that served to create the corresponding Autonomous Communities, yielded a substantially heterogeneous yet regulated map of self-government. Four Autonomous Communities (Catalonia,

the Basque Country, Galicia and Andalusia) enjoyed the maximum level of autonomy whilst a further two (The Canary Islands and Valencia) had an intermediate status and another (Navarre) reaffirmed its singularity. The remaining ten Communities passed predominantly similar texts.[10]

From then until 2005, the tension of emulation prevailed and, with it, the securing of similar levels of self-government, despite the persistence of major asymmetries.[11] After the eventually ineffective attempt to bring the question of the Autonomous State to a close with the organic laws for transferring powers in 1992 and the subsequent reforms of the Statutes of 1994, in 1996 Aragon and the Canary Islands undertook a new and substantial reform of their Statutes. This process was eventually to affect all the Communities that had originally passed their statutes following the procedure set out under Article 143 of the Constitution and that would, in fact, entail substantive matching of the levels of self-government.[12] Leaving aside what may be termed objective differential facts, such as language, civil law granted by charter or insularity,[13] by the time the reform of the last of the Statutes had been passed in 1999 in La Rioja, actual differences between the various Communities had become scarce. The only difference in competences was restricted to the possibility of creating their own police force or to executive powers over prisons (only Catalonia had this competence). In institutional terms, one difference that did prove significant was the power to dissolve parliament and subsequently call separate elections, on a different date to the municipal ones.

Whatever opinion such an evolution deserves, what is certain is that its link to a process of regulation and rationalization of the development of self-government was undeniable. The homogenization of the map of autonomous competences had the opposite effect of the homogenization of the projection of the State over all the national territory. Coordination and cooperation between the various public administrations should, in theory, have proved easier.

Under what appeared to be rationality and homogeneity, there lay, however, a divergence that was bound to be a motive for future concern. This is none other than the singular system of financing in place in the Basque Country and Navarre, a system rooted in the so-called historical rights that eventually became a different system of financing in qualitative terms for these Communities. The final result was per capita income for their citizens that was substantially higher than that of the inhabitants of the other Autonomous Communities. As expected, such a situation, which narrowly escapes being described as a privilege, was to open the door to demands from other territories and, particularly, Catalonia. In this regard, it should be underlined that the essential problem is not so much the existence of two

[10] For an overall view of the Autonomous State, see: Aja (2003) and Santiago Muñoz Machado (2007).

[11] In this regard, see: García Roca, pp. 92 and 93.

[12] These reforms, which included transferring power over health to the Autonomous Communities involved, led to homogenization of competences.

[13] In this regard, see: Aja (2003), opinión pública. Cit., pp. 169–206; López Aguilar (1998).

financing models but rather the way where the resulting Basque and Navarre model was calculated. In other words, the model does not prejudge a result that is different from the ordinary system of financing.[14]

The greatest consequence of this process was the loss of uniqueness in Catalonia, a loss reflected in the incorporation of the nationalist voice in the Autonomous Statutes of Aragon and the Canary Islands, where this had been a long-standing demand.[15] Behind that nominative reflection, there was a substantial levelling both in terms of competences and institutions. It seemed that of the two options that constitutional development offered, homogeneity for the Autonomous Communities had emerged victorious.

The above statement should immediately be clarified. Although reform of the Statutes of the Autonomous Communities that had gained autonomy under Article 143 undeniably brought about the homogeneity previously referred to, it is no less deniable that the most significant political area of their uniqueness remained. What had truly made the position of Catalonia and the Basque Country special in the development of the Autonomous State (in the political regulation of the State as a whole) had been the relevant position that the respective nationalist parties held in the Spanish Parliament, both in qualitative and quantitative terms. From such a position, their influence had come to prove decisive when the national government had been formed. This unique position was clearly not altered in any way by this process of statutory reform. This, it should be stressed, is where differences find their natural milieu that is the result of each Autonomous Community's different political desire for self-government. Therefore, we should be congratulated on a model that gave expression and strength in national politics to the nationalist parties in proportion to the number of their votes.

The previously referred to balancing of statutory texts proved to be one of the key triggers sparking the process of passing a new Autonomous Statute for Catalonia, a process that, nevertheless, took place in the context of an ideological revival of peripheral nationalism. The result is well-known. Catalonia embarked on a new phase of the Autonomous State presided over by the passing of the so-called second generation Statutes of Autonomy, a phase that today, in October 2011, seems to have concluded. For their part, the other Autonomous Communities cover a wide repertory. Some, such as Andalusia, Aragon, the Balearic Islands or Castile and Leon, have passed a new Statute of Autonomy, whilst others, such as the Valencian Community, have undertaken major reform in the wake of the first communities to engage in this process. Some, such as Extremadura, have significantly remodelled their text, using the reform procedure itself in an attempt to demonstrate their express rejection of fundamental aspects of what the new Catalan

[14] Regarding the consequences of this model, see: Zubiri Oria (2010). See also: Novo Arbona (2010).

[15] Discontent with the original path to autonomy and the consequent levels of self-government was a constant feature of Aragon society. Regarding the ups and downs of the process of creating the Aragon Autonomous Community, see: Garrido López (1999).

Statute represented as well as some of the questions that other Statutes incorporated.[16] For its part, Navarre has simply updated its Statute slightly. A significant group is represented by those Communities that saw their desire for reform rejected in the lower house of the Spanish Parliament (the Basque Country, the Canary Islands, and Castilla-La Mancha) or in the Autonomous parliament itself (Galicia). Finally, there is a group of Communities where there has either been no desire for change or where the said desire failed to reach a satisfactory or relevant conclusion (Asturias, Cantabria, La Rioja, Madrid, and Murcia).

If the political position of each Autonomous Community has been different as regards the initiative, it has also been so with respect to the result of the initiative wherever this took place. In this respect, it is significant to note how none of the Autonomous Communities completely imitates the Catalan Statute or, with the exception of Andalusia, remains at a considerable distance from it in terms of content and form, or does not even consider the possibility of reform. It is also particularly interesting to observe how in the texts debated in the final phase of the process, namely the failed text of Castilla-La Mancha and the new Autonomous Statute of Extremadura, the path followed by Catalonia was expressly rejected.

Approval of so-called second generation Autonomous Statutes was the source of objective problems for the development of the Autonomous State. While in most cases there was agreement between the Socialist Party and the Popular Party, the political rift between these parties as regards the founding Statute of Catalonia caused dissent to predominate over consensus, sparking hitherto unknown levels of disagreement. Furthermore, it would be difficult for anybody to say that the final result was known or that it was the consequence of a predetermined objective. The result achieved, whatever it maybe, was merely the fruit of the sum of fickle political circumstances, the situation at the time prevailing over structural factors. Moreover, the State was the essentially passive subject of the process, confined to eliminating anything from the statutory texts that could clearly damage the constitutional text. The Autonomous Communities held the initiative and fixed both the rules of the relationship with the State and the essential features of a political model that largely can be described as different to the pre-existing one, given the importance of the changes introduced. Finally, and perhaps most importantly, as has been pointed out, far from fulfilling the initial objective of promoting the integration of Catalonia into the national State, the final result has been a marked increase in the political tension between said Autonomous Community and the rest of the State. For all these circumstances, it could be said that, with regard to its territorial organization, the State was uncertain and consequently in need of reacting and designing a road map for the coming years.[17]

[16] With regard to reform of the Extremadura Statute of Autonomy, see: Solozábal Echavarría (2011).

[17] In this regard, see: Tudela Aranda (2010).

The Uncertain State Runs Aground on the Sands of the Economic Depression: Recentralization as an Alternative

From the mid 1980s, a time when we can begin to talk of the consolidation of the Autonomous Communities, the evolution of the Autonomous State was accompanied by strong economic growth throughout the whole of the country that brought with it a marked expansion of the social state. Autonomy, economic growth and the social state were to come together in the political and social imagination. Economic and social prosperity made any debate concerning specific dysfunctions in the model of territorial organization unnecessary. The maxim that any increase in the levels of autonomy for the Autonomous Communities was positive for the whole nation took root. In parallel (a fundamental factor), a new political class and social elite had become established in the Autonomous Communities, and had done so with sufficient power to defend the previously mentioned imagined situation with force, conceal any problems and demand self-government.[18]

Problems undoubtedly existed. It is true that the development of the Autonomous State and, in particular, Autonomous Community control over virtually all aspects relating to the management of the social state, had been accomplished without any special problems and that the aim was to attribute to this process obvious merits such as having contributed to a better distribution of wealth or having extended the range of social benefits and management thereof by means of the multiplicity of experiences and their emulation. Yet, inevitably, certain problems were bound to exist. Some were not particularly relevant but rather normal dysfunctions of a new model that was taking its first steps. However, others were structural in nature. These include the unresolved problems that accompanied Autonomous Community financing from the beginning of autonomous development, difficulties in cooperating (vertically and horizontally) and in regional inordination, the lack of any global view of the relationships between the various territorial bodies, including local administration or, finally, the progressive growth of administrative structures, the need for which was at the very least questionable and gradually weighed down the autonomous budgets. All of these are questions profoundly related to the divergence existing between the levels of decentralization achieved and those envisaged by the constituent assembly.

Approval of the second generation Statutes of Autonomy was not a response to these problems. Its aim was to increase self-government in the respective Autonomous Communities and to modernize the corresponding statutory text. This does not mean that certain questions mentioned such as the insertion of a local regime, financing, collaboration or regional inordination were not present in the Statutes. Indeed, they were and moreover, strongly and centrally, but not from the point of view of the global resolution of a problem of the state considered as a whole, but

[18] See, Ortega Álvarez, *¿Estado federal, integral o autonómico?* in *España y modelos de federalismo,* pp. 96–97, ob cit.

rather from the perspective of each individual Autonomous Community. Indeed, far from solving the principal problems raised by the developmental form of the Autonomous State, this fragmented view of the different questions, which was clearly evident in the financing or in the sublimation of bilateralism, is what led to such problems being aggravated and sparking the uncertainty referred to earlier.[19]

It seemed that nobody considered what might happen if the economic cycle were to change and depression to follow the boom. This had not been envisaged when the autonomous state was created. However, it was evident that any change of economic cycle was bound to affect significant aspects of the territorial organization model, particularly if we bear in mind the prominent role played by the Autonomous Communities in the management, and even design, of the Social State referred to previously. One clear indication of how the design of the territorial model has remained oblivious to the economic situation is the reform of the financing model for the Autonomous Communities approved in 2010 in the middle of an economic crisis of historical proportions. However, the context of the crisis was ignored.

It is impossible to know what the consequences of the economic crisis on the Spanish model of decentralization are going to be. What appears difficult to believe is that there will not be any or that they will be merely temporary. Indeed, beyond the financial difficulties that many Autonomous Communities are suffering at the moment, it is foreseeable that structural modifications will take place. In fact, the reform of Article 135 of the Constitution has already been interpreted as awarding the state a new and powerful instrument of control over the budgets of the Autonomous Communities and, therefore, a significant change in the design of the State model. It is also obvious that the paradigm that any increase in decentralization is positive has disappeared. Even in this typical opinion swing, a generalization of conflicting statements can be observed, in the sense that many of the evils related to the economic crisis have their basis in political decentralization. It is not uncommon to hear voices demanding that the state take over certain competences that are today in the hands of the Autonomous Communities or, at least, a rationalization of the decentralization process. Although I believe that it cannot be claimed that these are majority positions, what does seem clear is that the decentralization honeymoon is over and that today facets of the latter that not long ago were indisputable are now being questioned.[20]

Thus, it can be said that the extent to which the initial objective of greater efficiency and better service for citizens through decentralization has been fulfilled is being somewhat questioned. This questioning leads inevitably to a lack of

[19] We cannot overlook the fact that the origin of these questions corresponded, as in 1978, to the desire of the peripheral nationalisms for more self-government, in this specific case, Catalonia.

[20] The most significant political expression of this movement is the emergence of the Union for Progress and Democracy Party, one of whose fundamental proposals is the strengthening of the central state in areas such as health and education. This party has carried out the work: *El coste del Estado autonómico,* Grupo de Administración Pública de UPyD, 2010. Vid, J. L. Barbería, *¿Y si pensamos, racionalizamos el Estado de las autonomías?* El País, 27th October 2011.

objectivity. If it was absurd to attribute to the Autonomous State all the social and economic progress to have occurred in Spain since the Constitution was passed and to deny any specific problem or dysfunction, it is equally absurd today to think that all the country's evils are related to political decentralization. In this respect, it is timely to remember how, although still lacking conclusive studies, all the analyses carried out agree that decentralization as such neither increases costs nor ensures better management. At most, we may point to certain benefits deriving from the flexibility and competitiveness of the model. This will obviously depend on virtues and defects that may tip the balance one way or another. As pointed out previously, it is difficult to disagree with the argument that the Autonomous State model in force today in Spain suffers from structural problems that should be resolved if greater efficiency in all public administration is to be achieved.[21] Yet, even less debatable is the consolidation of the autonomous map amongst citizens and its contribution to the expansion of the social state. Therefore, in these times of anxiety, it seems necessary than ever to call for calm and to suggest careful reflection. This should be the positive conclusion to be drawn from the convergence of the Autonomous State with the economic crisis.

The Autonomous State and the Challenges of Integration

The Failure of Statutory Reform as an Instrument for Integration of Peripheral Nationalisms

As pointed out at the beginning of these pages, together with the aim of improving the efficiency of the different administrations and revitalizing largely forgotten parts of the country, the decision of the Constituent Assembly to opt for political decentralization was based on the search for a way to integrate peripheral nationalist sentiment. This was, in truth, the real reason for decentralization. It is difficult to imagine that, without the Basque and Catalan issue, the territorial organization model as we know it today would have been chosen, at least with regard to the amount of powers transferred to the Autonomous Communities.

For many years, it appeared that this objective had been achieved. However, at the beginning of the century there were signs that what had drifted into the background had once again taken center stage. The nationalist question regained a presence in the national political debate. In these pages it has been underlined how the breakup of the asymmetry, as a development of the constitutional model, was one of the reasons behind the revival of the nationalist question. There were, of course, other reasons. In any case, it is important to note how the debate was framed

[21] Professor Aja drew our attention to some of these problems (Aja 2003, pp. 207–266, ob cit.). Regarding virtues and deficiencies see: Solozábal Echavarría (2006), pp. 27–56, ob. cit.

in different terms in Catalonia and the Basque Country, the leading communities in the debate over national integration, and where the reasons converged and diverged. It is impossible to carry out a detailed analysis of the reasons: a certain political climate (the second term of President Aznar); the coincidence in the debilitation of the model designed by the Constituent Assembly or the ideology of identity, so in vogue in those years, are some of the causes that can be defined as common.

As is known, the Basque Country sought separation from the statutory framework with the proposal of the so-called "Ibarretxe Plan," a text that, while formally a proposal for the reform of Autonomous Statute, basically meant an essential reform of the Constitution since it outlined a framework of relationships between the Autonomous Community and the State that broke with all the essential principles defined in the constitutional text. As is known, the Chamber of Deputies (the Lower House of the Spanish Parliament) rejected any consideration of this text, thus essentially burying it. Basque reaction to this rejection was one of normality, and indeed the government presided over by Ibarretxe was succeeded by the first non-nationalist government in the history of Basque autonomy.

In Catalonia, little by little, the need for statutory reform took hold as an instrument for consolidating self-government. Two fundamental objectives were initially linked to this: on the one hand, improving the quality of the Autonomous Community. What was sought under this term was an attempt to secure, by means of the statute, surer and less conditioned use of the autonomous competences than was afforded by basic state legislation.[22] Secondly, improved financing was sought that would increase the resources available to Catalan Autonomy. Behind this latter question, the difference in financing with the charter-granted communities (the "foros") gave rise to an increasingly intolerable grievance. Yet, if the previous objectives can be defined as the initial aims of statutory reform, the desire to go even further gradually began to take root in the political imagination, by repealing the 1979 Statute and approving a new text that, in form and content, would remain similar to a Constitution.[23] This change is well reflected in the importance of including elements of acquired identity in the statutory text, such as defining Catalonia as a nation, nationalist symbols, the language, or statutory and historical rights. The result of this process was Catalan parliamentary approval of a bill for an Autonomous Statute that, whilst taking greater care of forms than the text of the Ibarretxe Plan, failed to go further in basic questions. Behind the project, a co-federal relationship with the State was clearly set out.[24]

This project was to have a different fate in the Spanish Parliament than the Ibarretxe Plan. The Lower House took the text into consideration when debating

[22] The "quality" in the meaning of this expression was essentially projected onto the way of exercising the competences (Viver I Pi-Sunyer 2008, pp. 140–146).

[23] Professor Muñoz Machado was the first to perceive this identification (Muñoz Machado, *El mito del Estatuto Constitución* en *La reforma del Estado autonómico*, pp. 65–84, ob. cit).

[24] With respect to the Bill for the Catalan Autonomous Statute passed by the Catalan Parliament, see: Solozábal Echavarría (2006), pp. 27–56, ob. cit.; Corretja Torrens, *La reforma del Estatuto de Autonomía de Cataluña* en *la reforma del Estado autonómico*, pp. 11–128, ob. cit.

and finally passing it, although from the beginning the need to reform it in order to adapt it to the Constitution in matters that might raise greater doubts was underlined by the Government and the Socialist Parliamentary Group. As is known, the text underwent major changes during its passage through the National Parliament but was finally passed, although it was on the point of not doing so. This was only possible thanks to the fact that, in view of the desertion of Esquerra Republicana (the Republican Left Party), the Government found an alternative ally in CIU (Catalan Nationalist Party). Despite everything, the resulting text continued to present important doubts regarding constitutionality both for the Popular Party and for a part of the doctrine.

The rest is well-known. After a referendum, the new Statute was passed, although less than enthusiastically. For their part, the Popular Party and the Ombudsman lodged an appeal against the Statute that questioned the majority of its precepts. After a long, sad process, the Constitutional Court pronounced its sentence (31/2010) wherein it limited the declaration of unconstitutionality expressly to a little over ten articles, the majority of which were related to Judicial Powers. Thus, the tone of the statute would be saved by means of the opportune reform of the Organic Law of Judicial Power (LOPJ). However, essential aspects of the statutory doctrine remained in question because of the interpretation that the sentence made thereof.

When the Spanish Parliament refused to consider the Ibarretxe Plan, social and political reactions in the Basque Country had been minimal, but the same did not occur in this case. Prior to the Sentence, the signs of conflict arising from the mere intervention of the Constitutional Court were abundant. The most significant expression was the joint editorial run by Catalan newspapers: "For the dignity of Catalonia."[25] Prior to this, and despite the fact that the Court had taken obvious care in limiting the declaration of unconstitutionality to as few precepts as possible and to those of least importance, there was vehement political and social reaction, starting with the immediate demonstrations on the streets of Barcelona against the High Court decision.

From then on, the proclamations of remoteness, indifference, and even open rejection in relation to the State have been continuous and progressive. The official declarations of the President of the Generalitat (Catalan Government) on the Catalan National Day in 2011 expressively condense this on-going process. It is not difficult to understand that the new Autonomous Statute involves a significant advance in self-government for Catalonia, both for its literal wording and for the potential that its development involves. It also seems clear that with its passage a new phase has opened up in the interpretation of the Autonomous State and its possibilities. The ruling of the Constitutional Court (31/2010) may clarify some of these considerations but in no way does it annul them. However, the political

[25] A joint editorial published by twelve Catalan newspapers on 26th November 2009.

reaction from most Catalan political forces has been unfavourable as has academic reaction, as has been pointed out.[26]

Leaving aside other questions, the essential fact is that it signifies a failure of the statutory path for the integration of nationalism into the State. It might be thought that no objective reasons exist for such a conclusion, at least in such radical terms. Yet, everything points to our having entered a phase of the Autonomous State that will not be presided over by the rational logic that drew up the constituent pact.

The Death Knell of the Constitutional Pact

Although only briefly, it is necessary to state the strength of the conclusion drawn by the Catalan nationalist world from the process described. To have a precise idea of the consequences of this claim it would be convenient to define that nationalist world, an exercise that is complicated in Catalonia by the position of the PSC–PSOE (Catalan Socialist Party and the Spanish Socialist Workers' Party). Whatever the case, there maybe some coincidence in the fact that the main voice of that sentiment is represented by CIU, the governing party. Therefore, and obviously, because of its own institutional position, the position of the President of the Generalitat is, in this regard, especially significant.

As underlined, since the lodging of the different appeals against the Catalan Autonomous Statute, nationalist sentiment began to change, based on the gradual spread of the idea that a court, however constitutional it maybe, could not make a pronouncement regarding a text passed by two parliaments and supported by the electoral body of Catalonia.[27] The unfortunate history of the appeal, with the different difficulties that the Constitutional Court suffered and the successive delays in issuing its ruling, only served to cultivate this climate of dispute. When the sentence was eventually issued, the reception by Catalan nationalism and, in principle, by the whole of Catalan society, was extremely negative. Bearing in mind the scarce number of precepts declared to be unconstitutional and their relative unimportance, another nuanced sentence might well have been issued. Yet, everything indicated that there was no interest in this, the times for nuances and balanced arguments having become outdated.

Alongside this, another legal-political circumstance has aggravated the feeling of discord. Reform of Article 135 of the Constitution by agreement between the two major national parties led CIU to describe the reform as the death knell of the Constitutional pact. It is no coincidence that during the process of this reform the

[26] In this respect, the meaning of the last chapter of the monograph that the Catalan journal of dret públic (public law) devoted to the sentence is significant. It also includes a reflection concerning the securing of an independent state (López Boffill 2010, pp. 479–487).

[27] In the doctrine, the maximum exponent of this thesis was Professor Pérez Royo (Pérez Royo, *La última palabra,* EL PAÍS, 4th September).

PNV (Basque Nationalist Party) tabled an amendment that defended the introduction of the right to self-determination and that CIU presented another defending the exclusion of Catalonia from the application of the cited precept. Even with the well-known urgency with which the reform was passed, the Government and the Socialist parliamentary group made significant efforts to secure at least the abstention of CIU. On that occasion, even that agreement proved impossible. Finally, CIU, such as the PNV, voted against it, explaining the decision in the strongest terms.

The death knell of the Constitutional pact was to accompany the beginning of a historical process. The words of President Mas in the official acts of the Catalan national day are eloquent in this regard and perfectly summarize what it is possible to read every day in editorials in the Catalan press or hear from their most important political leaders. If on the 10th September, in an official speech, Mas stated: "we face years of historic importance which will decide the course and our future as a country for a long time to come" and he considered "the rules of the game of the Spanish transition to be definitively broken," on the 11th September he went into further detail, pointing out that "the national transition is taking place because in the minds and sentiments of the people of Catalonia the need for more sovereignty and freedom is gaining ground." As sources for the strengthening of Catalan nationalism he cited the 31/2010 sentence of the Constitutional Court, the financial deficit, the latest jurisdictional pronouncements regarding language and constitutional reform. The Catalan Nationalist movement would spread because of the "loyalty of those who were already on board and because of those who realize that it is the only way to build and defend our country." The President of the Catalan Parliament expressed herself in similar terms.[28]

Leaving aside the explanations that can be found for these words from a party or electoral point of view, it cannot be disguised that they are only a formal summary of a message that has been repeated ever since the debate concerning the Catalan Autonomous Statute: a message reiterated not only by nationalist political leaders but also read or heard from other social agents such as businessmen and women, trade unionists and intellectuals. It is as if the idea of the inability of the Autonomous State to accommodate Catalonia or, what is worse, the incapacity of the rest of the state to understand it and, therefore, to satisfy its wishes, has become entrenched among a wide spectrum of the Catalan leading classes and, from them, gradually spread out amongst the citizens. It is significant to underline that, from the time the response of the Constitutional Court became known, nobody has proposed a possible reform of the Constitution as a solution to the problem. Nobody talks of a new constituent pact. Rather, it is taken for granted, or it wishes to be, that this pact is impossible. The inevitable consequence would be none other than independence. In this respect it is difficult not to understand the words of President Mas, whom it is impossible to accuse of ambiguity in this context.

[28] In this respect, see: La Vanguardia, 11th and 12th September 2011.

The Constitution's Ideological and Instrumental Response

It could be argued that what we have thus far seen is more concerned with the field of political theory, and even political action, than law. Some might contend that jurists can do nothing in this particular regard, and that they should confine themselves to seeking legal solutions to specific legal problems. I do not concur with this standpoint. The autonomous state poses many specific as well as not so specific questions for jurists, all of which are of enormous interest and require analysis. Doubtless, the challenges in terms of efficiency explored in previous pages today pose an unavoidable challenge not only vis-à-vis the survival of the autonomous state but also for the continuance of the standards of social development achieved in recent decades. This is another issue of the utmost importance. Yet, this importance, coupled with a somewhat untimely topicality, cannot hide the gravity of the fact that the goal of integration may be slipping away. Failing to realize this question and neglecting to explore it may prove to be a fatal error. However, it is not only political stakeholders who must face up to the challenge arising from the need to undertake a fresh appraisal of the cost of integrating peripheral nationalisms. It is also the responsibility of jurists firstly to draw attention to the seriousness of the situation and, secondly, to seek possible solutions since, if a solution does exist, it should find expression in legal terms. As on many other occasions, the legal solution may pave the way for a political solution by shedding light on options hitherto unseen by political stakeholders.

Any solution must perforce be constitutional. From this standpoint, a fresh eye must first be cast over the text of the 1978 Constitution, its underlying spirit and the historical circumstances that made possible its very emergence. In particular, the ideology of decentralization contained therein must be reviewed. All too often, it is claimed that territorial organizational is deconstitutionalized. The obvious fact that key elements of the model lie outside the Constitution does not mean that it is not possible to find therein the ideology with which the Constituent Assembly of the 1978 Constitution approached the matter. The 1978 Constitution constitutes a model of territorial organization based on an equilibrium between two core binomials, that of unity and autonomy, and that of symmetry and asymmetry. By converting the unity of the state into competences and, thus, by delineating the margin of autonomy afforded to nationalities and regions, all the tension contained in the first binomial was concentrated in article 149, the true heart of ideological decentralization. Tension in the second binomial was left more open to the deliberation of the various political and territorial forces when developing the Constitution, a sensible course of action. As pointed out, however, this should not prevent us from recalling that the road map initially set out tended more towards asymmetry than towards any standard decentralization, an asymmetry that, in any case, continued to embrace possible standardization that, if not perfect, was at least significant. As is well known, this road map owed much to the *dispositive* principle, which was the root of certain problems inherent in the model, and yet at the same

time also undeniably provided much of the technical basis where the opening out of our model of territorial organization is founded.[29]

Bearing these premises in mind affords an insight into the events to occur from the time the Constitution was approved. In this regard, what first needs to be recognized is both the quantitative and qualitative relevance of decentralized power,[30] at which point it should be stressed that this was not actually written into the Constitution. This decision to opt for a profound decentralization, as legitimate in constitutional terms as would have been another quite different option, has mainly been the result of political action based on consensus and in many instances brought about by the weight that nationalist parties carried at a national scale. A further point to be borne in mind today perhaps more than ever is that the Constitutional Court has not remained aloof from the matter, taking such significant decisions as elaborating the concept of basic material legislation, its interpretation of the principles of prevalence and supplementarity, or the rejection of everything that a law like the LOAPA [Organic Law on the Harmonisation of Autonomous Communities] entailed. It is no exaggeration to say that autonomy has proved to be the overarching value in constitutional development. Very few, if indeed any, of those present in the original parliament, including nationalist representatives, thought that we would today stand where we do.

Yet, it is of little comfort to recall today what is obvious, namely, as we have seen, that this has failed to satisfy peripheral nationalist desire for self-government, which forces us to ask ourselves why. When they themselves are asked, nationalists point to a number of causes, as reflected in the words of the Catalan President Artur Mas, blaming others. Even national parties tend to be sympathetic towards such a view. Yet, it is one that should not be shared because the blame should not be attached to any one particular sector. As we have seen, the level of self-government that Catalonia and the Basque Country have managed to attain is substantial, and is indeed greater than that achieved by most federal countries, and far outstrips what was envisaged in 1978. Furthermore, despite the well-documented lack of mechanisms and autonomous participation, the above-cited communities have enjoyed a privileged position when the most relevant political decisions have been taken at a national scale, the respective parliamentary groups having acted responsibly in the House when being required to undertake the task. If this situation has been reached, it has not only been thanks to a series of stumbles, and even errors, on the part of the national actors involved but also because of the errors,

[29] The State Council Report devotes a number of pages to the *dispositive* principle, highlighting how its initial nature as a principle guiding the creation of the autonomous state was in some way transformed, when the "reforming" nature thereof became a unilateral force driving the autonomous communities (pages 136 and following). On the same topic, see: Fossas (2008), pp. 71–72; García Roca, *El riesgo de la generalización de asimetrías en las reformas estatutarias y los límites al principio dispositivo*, work cited.

[30] Underscoring the profound decentralization as an undeniable success of the autonomous communities, see: Solozábal Echavarría, *Falsas y verdaderas reformas del Estado autonómico* en *Tiempo de reformas,* cited work, pp. 28 and 29.

conscious or otherwise, of the nationalist parties, ever in need of living on the front-line when it comes to demands.

Any response to such a situation proves complex, and the law must play a leading role therein. Yet, a cultural response first needs to be constructed, a response springing from mutual understanding, a culture of diversity yet also of unity, a culture that brings us closer to understanding divergence. Not agreeing means opposing. This culture must relativize extreme positions and must be one where dialogue and reflection predominate, understanding that Catalan is a Spanish language and that Spanish is a Catalan language. Yet, to build such a culture, a clear will to co-exist must be in evidence. If the cost is the inexistence of such a will or, simply, its constantly being questioned, the solution, which is also cultural as a premise, must inevitably head towards clarity and its consequences.

The legal reflection of such a culture can be none other than federalism. More than just a specific institutional architecture, federalism is a culture, and one that comprehends that unity and diversity are values that can be added and complement each other, understanding that together they are more, which is perfectly compatible with a respect towards differences. Given its equalitarian roots, it may be argued that federalism and states that have nationalist tensions do not live well together, although on the contrary, it is easy to point to the existence of federal states built on the basis of asymmetry such as Canada or Belgium, or indeed the decentralized British model. Yet, aside from these examples, which are not without their problems, what may first be posited is the flexibility of the federal idea as an approach and as a culture which can adapt to the demands of each territory. Secondly, even if federalism is unable to live side by side with differences there is no alternative, unless an effort is made to re-orient nationalist sensibilities to accept homogeneity, if such an option may be deemed viable.[31]

In such circumstances, more than a possibility, constitutional reform seems a necessity. Nobody should, however, believe that reforming the Constitution and renaming the state as federal will solve the problems. However, reform in itself should furnish the occasion for a fresh agreement where the state embraces all territorial sensibilities. Intelligent reform is still able to afford a range of possibilities that can bring people together. Greater clarity in core concepts concerning the territorial distribution of power can lead to better quality autonomies and enhanced assuredness for the state in its positions. Establishing equitable and essentially identical financial rules for all nationalities and regions, generous recognition concerning questions of identity and, with the right balance, recognition of a certain level of asymmetry, may prove to be some of the guidelines to be found along the way, adopting the serenity, reflection and rigour required by a process of this nature.

[31] Indeed, it is often posited that the problems these countries suffer reflect how bad asymmetric federalism is as a solution, whereas in fact, quite the contrary is true. What we should instead be thinking is what would have happened if the flexibility of federalism had not been able to provide an escape valve for the particularities existing therein.

Faced with such a possibility, we may be resigned to the status quo, placing our trust in the peaceful co-existence proposed by Ortega y Gasset. For many, this is perforce the most cautious way forward, since embarking on constitutional reform entails a certain risk and does not guarantee success. This may indeed prove to be the case. We may have to content ourselves with enduring an interminable situation such as the one we are faced with presently. Yet, there are signs that one of the parties has broken the will to maintain peaceful co-existence, in which case caution may prove fatal. Failing to listen to what many are so clearly proclaiming may mean ending up being faced with a *fait accomplis*.[32] It must, however, remain clear to us that the fight for the joint construction of a federal state can still be won, a fight that ultimately seeks to preserve a state and a nation. In order to win, we must begin to act, to take the initiative, to offer solutions. Yet, we should also make people see that the reality is more complex and richer than some would have us believe.

The crises of integration and efficiency previously referred to make any judgement of the development of the territorial organizational model established in the Constitution of 1978 inappropriate from the standpoint of the present state of the autonomies. Any model that is to be repeated deserves praise for its contribution to core issues such as a better distribution of income, promoting territories, or making citizens identify more closely with their institutions. Crises are said to offer a good opportunity for change, which is true to a certain extent. They can indeed prove to be so if one has the patience to undertake changes calmly, fleeing from the rapid judgements that are so often resorted to at difficult moments. Yet, crises can also prove to be eminently negative if they lead to action that is taken only as a result of the immediate circumstances. This is the crossroads where the current autonomous state in Spain stands in the two facets of its crisis. It must take advantage of both if it is to deal with the problems that merge the current circumstances with the long-term structural situation. Yet, in both there is the risk of satisfying those who make the most noise and ultimately doing more harm than good.

References

E. AJA, *El Estado autonómico. Federalismo y hechos diferenciales,* Alianza, 2003

P. BOSCH GIMPERA *Cataluña, Castilla, España* en *Diálogo sobre las Españas,* Ediciones de Las Españas, 1960, p. 30

F. CAMBÓ, *España, Cataluña y la Nueva Constitución,* Editorial Independencia, 1929

E. FOSSAS, *El principio dispositivo en el estado autonómico,* Revista de Derecho Político n° 71–72, 2008

E. GARCÍA DE ENTERRÍA, *Estudios sobre autonomías territoriales,* pages 453–455, 1931

[32] This of course in no way means that the whole of Catalonian society identifies with the opinions expressed by one, however high-profile, sector of the nationalist political elite. Catalonian society is, like all others and is evidenced in the election results, also complex and multi-faceted in this regard.

J. GARCÍA ROCA, *El riesgo de la generalización de asimetrías en las reformas estatutarias y los límites al principio dispositivo* en L. ORTEGA ÁLVAREZ (dir.) *La reforma del Estado autonómico,* CEPC 2005, pages 92 and 93

C. GARRIDO LÓPEZ, *Demanda regional y proceso autonómico: la formación de la Comunidad Autónoma de Aragón,* Gobierno de Aragón, 1999

S. JULIA, *Nación, nacionalidades y regiones en la transición política a la democracia*, 2011, pages 22 and 23

J.F. LÓPEZ AGUILAR, *Estado autonómico y hechos diferenciales,* CEPC, 1998

H. LÓPEZ BOFFILL, *Lévolucio cap a un estat propi,* Catalan journal of dret públic, 2010, pages 479–487

A. NOVO ARBONA, *La excepcionalidad del modelo federal foral vasco,* Tirant lo Blanch, 2010

E. PRAT DE LA RIBA, *La nacionalidad catalana,* Biblioteca catalana, 1925

SANTIAGO MUÑOZ MACHADO, *Derecho público de las Comunidades Autónomas,* Iustel, 2007

J.J. SOLOZÁBAL ECHAVARRÍA, *Reflexiones constitucionales sobre la propuesta de modificación estatutaria de Ibarretxe* en *Tiempo de reformas. El Estado autonómico en cuestión*, Biblioteca Nueva, 2006, pages 107

J.J. SOLOZÁBAL ECHAVARRÍA (Coord.), *El nuevo Estatuto de Extremadura,* Fundación Alternativas-Marcial Pons, 2011

J. TUDELA ARANDA, *El Estado desconcertado y la necesidad federal,* Cívitas, 2010

J. TUDELA ARANDA, *Heterogeneidad y asimetría en un Estado indefinido. Una aceptación de la diversidad que es puerta de futuro* in J. TUDELA ARANDA and F. KNÜPLING (eds.), *España y modelos de federalismo,* CEPC, 2010

F. VALERA, *Actualidad de la idea federal,* documents and studies about the Spanish Republic, Cuaderno n° 2, 1962

C. VIVER i PI-SUNYER, *El Estatuto de Cataluña en el marco de la Constitución* en *Las reformas estatutarias y la articulación territorial del Estado, Las reformas estatutarias y la articulación territorial del Estado,* F. PAU i VALL Cortes de Aragón., Tecnos-AELPA, 2008, pages 140–146

R. WATTS, *España ¿Una federación multinacional encubierta, http://www.fundacionmgimenezabad.es/,* 2009

R.L. WATTS, *Sistemas federales comparados,* Marcial Pons, 1999, pages 129–13

I. ZUBIRI ORIA, *Los sistemas forales: características, resultados y su posible generalización,* www.fundaciónmgimenezabad.es, 2010

Exclusive vs. Concurrent Legislative Power in the Federal Republic of Germany

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The German Debate on the So-Called "Dual Powers"

In the Federal Republic of Germany prior to the constitutional reform of 2006, it was widely held to be impossible for both the Federal and *Land* parliaments to be simultaneously authorised to legislate, with the same scope, on a single matter.[1] This is what is known as the exclusion of "dual powers" ("Doppelzuständigkeit").

Nonetheless, before accepting this view unconditionally, we must accept that a minority, including some important writers, disagree. They include Michael Bothe, who argues that in exceptional cases, there are overlapping areas of competence, where both Federation and *Länder* are empowered to legislate. This situation—he argues—derives from Art. 31 GG,[2] setting out the so-called principle of supremacy of federal law over *Land* law ("Bundesrecht bricht Landesrecht").[3]

[1] This view was practically uncontested in constitutional jurisprudence [*BVerfGE 36, 193* (*202 et seq.*)*; 48, 367* (*373*)*; 61, 149* (*204*)*; 67, 299* (*321*)*; 68, 319* (*328*)] and is generally supported by legal theorists (Stern 1984, p. 676; Münch 2000, p. 215; Badura 1996, p. 298; Stein 1998, pp. 123 et seq.; Maunz 1986, pp. 7 et seq.; Gubelt 1995, p. 404; Dreier 1998, p. 631; Pieroth 1997, p. 556; Pernice 1998, p. 597; Stettner 1996, p. 1319; Erbguth 1999, p. 993; Ossenbühl 1989, pp. 42 et seq.).

[2] Bothe (1989), pp. 1667 et seq.

[3] There is an extensive bibliography in German on this issue where the following is a representative sample: März (1989); Böckenförde (1971), pp. 119–127; Gubelt (1995), p. 404; Dreier (1998), p. 631.

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Bothe argues that it is not possible to achieve the aim stated in both the theory and the jurisprudence of interpreting the delimitation of powers and of classing laws in order to ensure a clear separation of the material fields. Bothe also holds that the Federal Constitutional Court, in its ruling on the law of state responsibility,[4] appears to want to avoid entirely excluding the existence of dual powers; although it classes a duplication of powers as "alien [. . .] to the constitutional legal system of the jurisdictional rules," it recognises shortly after that the Federation, by virtue of its legislative power to regulate civil law through a reform of accountability of functionaries, may "intervene in that field if not restricted from the accountability of the functionaries of the *Länder* and thus to exclude or displace the legal regulation of the *Land* (Art. 31)."

The only possible inference to be taken from this ruling, Bothe concludes, is an acceptance of a double competence to determine issues related to the law of liability, although, in all cases, moderation is required in this field, with all possible steps being taken in the interests of legal clarity, to ensure that the interpretation of the jurisdictional rulings and the classification of the laws make it unnecessary to accept these dual competences. However, insofar as they cannot be excluded, the issue pertains to the area of conflict of law rules (Art. 31 GG). Moreover, the principle of prevalence of specific law (*lex specialis derogat generali*) would apply, meaning that the special law of the corresponding *Land* would abrogate any general federal law.[5]

Christian von Pestalozza also defends the existence of dual powers deriving either from the same title of competence, when this entitles both the Federation and the *Länder* to legislate on the same matter (in the case of concurrent powers), or either of two (or even more), when the Federation empowered to legislate on a specific matter derives from one title of competence and that of the *Länder* from another. In this latter circumstance, the *Land* law would exist provided and insofar as the Federation has not used its title, since, otherwise, by application of Art. 31 GG, Federal law would prevail over the (coinciding or variant) *Land* law.[6]

In Spanish, an argument against the practical effectiveness of the principle of prevalence in the German legal system can be found in Arroyo Gil: *El federalismo alemán en la encrucijada*. On the attempt to modernise the federal order in the Federal Republic of Germany, Medina Prologue by Guerrero (2006), pp. 106, 118 et seq. and 176; Arroyo Gil (2009), p. 205; Arroyo Gil (2007), p. 416. See also Gómez Orfanel and Arroyo Gil (2005) [published in February 2007], pp. 233 et seq.

In Spanish, an argument in favour of the peaceable coexistence in the same legal system of the principles of competence and hierarchy or prevalence in the resolution of legislative conflicts can be found in Quadra-Salcedo Janini, Tomás de la: *Mercado nacional único y Constitución* (Los artículos 149.1.1 y 139 de la Constitución), Prologue by Reyes (2008), pp. 164 et seq.

And in general, an exhaustive study of the idea of competence in different federal models (albeit at variance with the position maintained here) is contained in Biglino Campos (2007). See, finally, the critical commentary of this work by Arroyo Gil (2008), pp. 337 et seq., which stresses the insurmountable difficulties of accepting the coexistence of the aforementioned principles of prevalence and competence in the resolution of legislative conflicts.

[4] *BVerfGE 61, 18* (*20*).

[5] Bothe (1989), pp. 426 et seq. See likewise, Kunig (1996), p. 9.

[6] Pestalozza (1996), pp. 25 et seq.

Here too, however, some observations are necessary, given that the use of a single term with different meanings appears to cause some confusion. In our opinion, neither concurrent powers nor those cases that might supposedly be covered by Art. 31 GG, are related to the specific issue of dual powers, albeit there might initially be points of intersection. In reality—and Pestalozza himself recognises this, it is not possible for different legislators simultaneously and validly to legislate on the same matter. One must therefore conclude—in opposition to the author's own arguments—that dual powers (understood as such, at least) were excluded from the German constitutional system until the constitutional reform of 2006 as we maintain here.

Another separate issue—as Pestalozza states—arises if double powers are taken to entail the occasional authority of two legislators to regulate a single matter, which could never in practice translate into the existence of two simultaneous regulations of that same matter by different legislators. Pestalozza states this quite clearly: "The popularly-stated idea that the Basic Law does not allow for dual powers is only true when one includes the utilisation of the competence. Nonetheless, although this corresponds closely to the common interpretation of the term, it is not the meaning intended in the Basic Law, as Article 72 GG demonstrates."[7] However, it is not clear that this is an entirely correct interpretation of the use of language in the provision in question. Ultimately, however, it is of little importance; suffice it to know that it is not (or rather was not) possible for the same object to be simultaneously legislated on validly by the Federal and *Land* parliaments. This is what we refer to as the exclusion of dual powers.

Rüdiger Sannwald, for his part, although accepting that a dual power, by virtue of which both the Federation and the *Länder* could legislate on the same matter in different ways, would be alien to the system of legal-constitutional jurisdictional rules, nonetheless recognises that there is a certain weakening of this principle following the constitutional reform of 1994, with the introduction of the entitlement to re-transferral contained in Arts. 72.3 and 75.1 *in fine* GG, and in the transitional provision of Art. 125a.2 GG,[8] which thereafter accept the possibility that the same

[7] Pestalozza (1996), p. 162.

[8] The wording of these provisions prior to the 2006 reform was as follows:

Art. 72.3 GG: "*A federal law may provide that federal legislation that is no longer necessary within the meaning of paragraph (2) of this Article may be superseded by Land law*." [This provision is retained in its entirety, although from the 2006 reform it has become Section 4 of Art. 72 GG].

Art. 75.1 GG: "*Subject to the conditions laid down in Article 72, the Federation shall have power to enact provisions on the following subjects as a framework for* Land *legislation: [. . .] Paragraph (3) of Article 72 shall apply mutatis mutandis*." [Art. 75 GG was removed in its entirety in the 2006 reform].

Art. 125a.2 GG: "*Law that was enacted pursuant to paragraph* (2) *of Article 72 as it stood until November 15, 1994 shall remain in force as federal law. A federal law may provide that it may be superseded by* Land *law*. [In essence, this provision, insofar as it is relevant to this discussion, was not amended in 2006].

matter may (in an equal or different way) be governed exclusively by Federal law in some *Länder*, exclusively by *Land* law in others or partly by Federal law and partly by *Land* law in other territorial areas.[9]

However, whilst accepting this to be the case, we still maintain that, in the meaning of the term "dual powers" employed here, in actual fact not even in those cases could there validly exist at the same time a federal law and a different *Land* law covering the same territorial area and on the same matter. In any case, were the previsions of these provisions to be acted upon, the result would be the substitution of Federal law by *Land* law, since the conditions for the former to be maintained would have ceased to exist; in other words, for these purposes, the Federation would have ceased to be competent to legislate on the matter in question in each case.

In short, in accordance with constitutional jurisprudence and prevailing legal theory, to which I ascribe, there are proven grounds for arguing that prior to the constitutional reform of 2006 in the Federal Republic of Germany dual powers could not exist, and that this is how matters should stand in a system governed, without exception, by the principle of exclusive legislative power for each type of law, as we shall now see.

Exclusive Legislative Power as a Common Feature of All Legislative Types in the Federal Republic of Germany Before the Constitutional Reform of 2006

It is generally accepted that up to the constitutional reform of 2006, in the Federal Republic of Germany and from the perspective of the Federation, a distinction existed between four types of law, as per the Basic Law of Bonn: exclusive, concurrent, framework and basic federal law.[10]

Although one might presume that only "exclusive" legislation is actually exclusive, a detailed analysis of each of the types of law shows that, despite their names, they all contain similarly exclusive legislative faculties, although this does not mean that the scope of each is the same.

Thus, in the area of "concurrent" legislation (*konkurrierende Gesetzgebung*), when the Federation makes use of its faculty to legislate, because the requisite conditions set out in Art. 72.2 GG are met (conditions over which, incidentally, the Federal Constitutional Court has for many years exercised little control), it can exhaust legislation of the matter, leaving no further margin for the *Länder* to establish their own implementing legislation. In other words, concurrent federal law, if it does exist, has (or can have) the same scope as exclusive legislation. One might therefore refer to a "false concurrence"; false because it is either federal law or *Land* law, but not both simultaneously with the same scope.

[9] Sannwald (1999), p. 1010.

[10] See Gómez Orfanel and Arroyo Gil (2007), pp. 237 et seq.

Summing up, we could argue that in this terrain there is a potential concurrence, given that in the event of certain conditions being met, the regulation of certain matters, which until that point were the exclusive power of the *Länder*, from that point on might also correspond to the Federation, to such an extent that the federation would be in a position to legislate, in their entirety, on matters that were the subject of this type of law.

Given that this is a faculty, and not a requirement, the Federation may therefore legislate on those matters or remain uninvolved. In the first case, its legislation displaces that of the *Länder*, so that in the moment that the Federation acts, the potential concurrence will disappear without having had any effect. Moreover, as we have seen, the Federation may act in this case with the same liberty as in the area of its exclusive powers, given that there is no restriction whatsoever on its legislating on the matter in question with the scope that it deems fit. On the other hand, if the Federation does not act, the *Land* law will continue to be perfectly valid. In short, there is no real concurrence possible, but rather a clear jurisdictional division, albeit subject to the fulfilment of certain conditions and to the will of one of the parties, the Federation, which has absolute freedom to act if the aforementioned conditions have been met.

In the case of the (now extinguished) framework legislation and the federal basic law, types of law which, despite their differences, are quite closely associated, the situation is, naturally, not comparable. In these cases, the Federation can, in principle, only establish in law the principles, bases or directives of legislation on the matter in question, leaving scope for the *Länder* to establish their corresponding implementing legislation. However, even aside from the fact that, particularly in the case of the framework legislation, the Federation, with the consent once more of the Federal Constitutional Court, has frequently enacted complete regulation of the matter, the fact is that in these cases as well, what is involved is an exclusive legislative faculty of the Federation and *Länder*.

For in effect, the Federation has a recognised exclusive faculty to establish those principles, bases and directives in the regulation of the matters referred to in the corresponding constitutional provision, which means in consequence that the *Länder* cannot. Likewise, the latters' recognised faculty to establish their respective implementing legislation is also exclusive in nature, aside from the exceptional constitutional circumstances provided for (Art. 75.2 GG) and that as the result of a vitiated legislative practice the Federation has been allowed to establish implementing regulations in this regard.

This view of the different legislative types (exclusive, concurrent, framework and basic law) in the Federal Republic of Germany confirms a rule that, in the light of the facts, appeared up to the constitutional reform of 2006 to allow for no exception: that exclusive legislative power is intrinsic to the principle of power in the distribution of legislative tasks. Alternatively, that concurrent legislative power is alien to the way powers are distributed in the Basic Law of Bonn). This is despite the fact that there may be types of law that are formally classed as "concurrent"; once examined

closely, they may be seen to pertain also to the logic of exclusive legislative power, however much their exercise is subject to certain conditions or requirements.

As on so many other occasions, the problem in this terrain no doubt derives from the confusion between two apparently similar concepts or ideas, which are in fact barely related, if at all. Those are the concepts contained in the terms "exclusive legislative power" and "complete regulation of a matter." As we have already seen in the case of "exclusive" law and (provided the necessary conditions have been met) concurrent law, the Federation's regulation of the matter in question is or may be complete; in the case of framework legislation and federal basic law, on the contrary, the Federation's regulation must be confined to the establishment of bases or principles. However, in both cases—it should be reiterated—the legislative faculty of the Federation (and the *Länder*) is exclusive: the Federation has exclusive power for complete regulation of the matter in the case of exclusive and concurrent legislation as well as the exclusive power for regulation of the bases or principles in the case of the framework or basic legislation. For their part, the *Länder* also enjoy exclusive power to establish the implementing legislation in the latter case.

Were one to view the jurisdictional relations within the German legal-constitutional systems differently, accepting the concurrence of two legislators, the Federation and the *Länder*, to regulate a matter with the same scope and at any point in time, without either's intervention being subject to any condition, one would have no alternative but to accept that any possible conflicts that might arise between the laws of the two parties would have to be resolved by applying either the rule of prevalence of federal law over *Land* law (Art. 31 GG) or the chronological criterion (*lex posterior derogat priori*).

However, for the reasons given above, these are not the criteria used to resolve legislative disputes within the German constitutional system when the laws under dispute come from different legislators. On the contrary, the system itself is responsible for resolving such legislative disputes, which are no more than a reflection of a jurisdictional argument, through application, precisely, of the principle of legislative power. One should therefore infer that to the extent that a federal law comes into conflict with a *Land* law (or vice versa), one of the two legislators must be stepping outside its jurisdictional area. This may be because it has not been allocated the power to legislate on the matter in question, whatever its scope (complete, in the field of exclusive legislation; and limited in that of framework and basic law); or because the conditions established in the Basic Law have not been met for (federal) intervention to be jurisdictionally legitimate (in the case of concurrent law).

In practise, this general rule, thus formulated, runs into added difficulties; the real situation is naturally a *continuum* that cannot easily be compartmentalised.[11] In any case, this practical observation does not obviate the continued need for a specific

[11] See Arroyo Gil: *El federalismo alemán en la encrucijada*…, pp. 160 et seq.; and *La reforma constitucional del federalismo alemán:* Estudio crítico de la 52.ª Ley de modificación de la Ley Fundamental de Bonn, de 28 de agosto de 2006, Prologue by Solozábal Echavarría (2009), p. 142.

jurisdictional division—firstly in law and ultimately by jurisprudence—that will enable a division to be drawn between the legislative powers of the Federation and *Länder*, when these are related (in that they involve the same object) but separate (because of the constitutional prescriptions themselves); the constitution seeks to extend federal power to the point where the power of the *Länder* begins, and vice versa, by distributing the pertinent matters and functions.

Seen from this perspective, German constitutional rules cannot admit of any jurisdictional overlap. From a strictly legal point of view, the purpose of the framers of the German constitution was to distribute the powers between the Federation and the *Länder*, giving neither one any universal powers for complete regulation of any matter. Hence, until the reform of 2006, from an entirely constitutional systematic interpretation, it would be senseless to defend the notion of concurrent legislative power—i.e. the possibility of different legislators being equally competent to regulate a matter with the same scope at any time.

And when situations of uncertainty arise, as they inevitably will, due to the aforementioned proximity between different matters, they must be resolved by applying the interpretative method, in order to determine who is responsible for legislating on the matter in question: the federal parliament or the *Land* parliament; and if it is only the federal legislator, then which type of law is applicable.

In this regard, the Federal Constitutional Court from an early stage required a "strict interpretation of Arts. 73 et seq. GG."[12] The first criterion used has been that of "natural and historical affiliation of the matter" ("wesensmäßige und historische Zugehörigkeit der Materie"), applying in consequence the principle of "jurisdictional continuity" ("kompetentielle Kontinuität"), i.e. the matter will continue to pertain to the party where by nature and historically it belonged. The effectiveness of this criterion is manifested, above all, in the case of matters that have not changed or, at least, not substantially, with the passage of time. In the case of less static issues, which are therefore more conditional on technical or social developments, one needs to apply other general methods of interpretation, "interpretation suitable to the purpose and function of the law" ("auf dem Wege sachgemäße und funktionsgerecht Auslegung"). In other words, it is necessary to determine whether the corresponding legislative matter may, by its nature, be more appropriately legislated on in unitary form by the Federation or whether, on the contrary, each *Land* should be allowed to enact its own legislation. And only in cases where no satisfactory solution can be found by this method, does the general principle of the Basic Law governing all matters related to the distribution of powers [as derived from Arts. 70 and 72 GG (in connection with Art. 30 GG)] come into play. This stipulates that if the constitution does not state otherwise, the *Land* shall have the right to legislate on a given matter.[13]

Alongside these methods of interpretation, other factors to be taken into consideration are the importance of the prevalent material connection of an object with another corresponding either to the Federation or to the *Länder* and the principle of specificity.

[12] *BVerfGE 12, 205 (228 et seq.); 15, 1 (17); 26, 281 (297 et seq.).*

[13] Vogel (1996), p. 646.

On occasions, these will be decisive in determining whether the faculty to legislate lies with the federal legislator or the *Land*.[14]

In short, this approach should lead to the determination in each specific case, of the party responsible for legislating on a matter and the scope thereof. However interconnected many matters may actually be, from a legal perspective, in the Federal Republic of Germany, a delimitation needs to be established in order to determine whether their legislative regulation (complete or only partial) pertains to the Federation or the *Länder*.

In any case, beyond the specific situation in Germany, we believe that this is the most appropriate approach to jurisdictional—and thus legislative—relations between the different parties comprising a territorially decentralised state and best respects their central underpinning precept, the federal principle.

This principle requires a constitutional balance of powers between the different parts of the federal relationship. By definition, this balance cannot be left up to any one of them, since such a situation would largely distort the distribution of powers contained in the federal constitution. It also requires that each parties' powers be clearly defined; only in this way is it possible to determine which one is responsible for their exercise.

Balance of powers and determination of responsibility are two features of federally-structured states. This does not mean that both the central state or federation and the member states or *Länder* (in the case of Germany) must be in a position of absolute parity in terms of the contents and scope of their respective powers (or competences). On the contrary, in order to safeguard general interests or even the unity of the overall state itself, it is normal for the central state to have certain authority to act or intervene, precisely to safeguard those greater goods; such powers should not necessarily be viewed, in simplified terms, as an expression of hierarchical superiority.

One can argue, in any case, that this difference in positions—and by extension responsibilities—was already taken into account by the framers of the constitution in establishing the distribution of powers. And it seems to us that this important objective of delimiting respective responsibilities has not been properly fulfilled if a given matter can be legislated on simultaneously and with the same scope by two different legislators, as is the case with concurrent legislative power.

It is our belief that the distribution of faculties established in the German constitution should be interpreted from this general perspective. As we have already seen, up until the reform of 2006, the Basic Law did not allow for so-called dual powers nor, by extension, the so-called "jurisdictional overlap," however deceptive the terminology might sometimes be (as in the case of the "concurrent law" governed by Art. 72 GG).

However, this situation was substantially altered by the constitutional reform and we need to reconsider the current meaning of the principle of exclusive legislative power in German federalism (and, in a wider perspective, in an *ideal* theory of federalism). However, first, let us examine the specific terms of the constitutional amendment of 2006 in this regard.

[14] Maunz (1986), pp. 7 et seq.

Divergent Legislation of the *Länder* (*Abweichungsgesetzgebung der Länder*) or the End of Exclusive Legislative Power in German Federalism

The constitutional reform of German federalism implemented in 2006, involved, *inter alia*, the introduction of a new Paragraph 3 in Art. 72 GG, the article governing concurrent legislative powers. This is the "Abweichungsgesetzgebung der Länder" or "divergent (deviating) legislation of the *Länder*." Under this provision, the *Länder* may enact any laws they wish to with respect to certain listed matters at variance with laws previously enacted by the Federation, which is equally competent to legislate, at any time, on those same matters.[15]

Taken at face value, this provision could be deemed to mean that in principle, the *Länder* could only legislate by means of a formal law,[16] in the fields listed in Art. 72.3 GG[17] if there previously existed a federal law in the same regard, with which they might be at variance.

However, this does not appear to be the most appropriate interpretation from a systematic perspective. On the contrary, the most suitable approach would be to consider that all matters forming the object of the concurrent law established in Art. 74 GG can be legislated on by the *Länder*, as provided for by Art. 72.1 GG, "so long as and to the extent that the Federation has not exercised its legislative power by enacting a law"; however, only with regard to those listed in Section 3 of the same Art. 72 GG can the *Länder* establish a legal regulation at variance with that enacted by the Federation.

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[15] Art. 72.3 GG: *If the Federation has made use of its power to legislate, the Länder may enact laws at variance with this legislation with respect to:*

1. *Hunting* (*except for the law on hunting licenses*);
2. *Protection of nature and landscape management (except for the general principles governing the protection of nature, the law on protection of plant and animal species or the law on protection of marine life*);
3. *Land distribution*;
4. *Regional planning*;
5. *Management of water resources (except for regulations related to materials or facilities*);
6. *Admission to institutions of higher education and requirements for graduation in such institutions*.

Federal laws on these matters shall enter into force no earlier than six months following their promulgation unless otherwise provided with the consent of the Bundesrat. As for the relationship between federal law and law of the Länder*, the latest law enacted shall take precedence with respect to matters within the scope of the first sentence*.

For a general study of this new legislative type, see Grünewald (2010); Meyer (2008), pp. 164 et seq.; Stock (2006), pp. 226 et seq.; Scharpf (2006), pp. 6 et seq.; Münch (2008); Gerhards (2007).

[16] The law is the only legislative form accepted in this terrain. See Uhle (2007), p. 145.

[17] The law, incidentally, comes from the derogated framework law of the former Art. 75 GG, although there is not always an exact correspondence between the two.

This particular situation, together with others, turns the divergent legislation of the *Länder* into a type of law that is autonomous and independent of concurrent law, albeit its constitutional regulation is framed within Art. 72 GG, which governs the legal system of concurrent law.

The most striking thing about this new type of law is that it allows the Federation and *Länder* to intervene in legislative terms with entire liberty. Theoretically, at least, this means that it would be perfectly possible for the two to be locked into an endless combat to establish their own legislation; each would enact laws that, by application of the chronological criterion (*lex posterior derogat priori*), would substitute (though not derogate, since the prevalence is in application) existing laws enacted by the other party, with no possibility of calling a halt to this unchecked contest. This is what in German legal jargon has come to be called the ping-pong effect, a term that graphically illustrates the endless exchange of laws between Federation and *Länder*.[18]

The rule on resolution of the conflict between Federal law and *Land* law, as we have said, is not that of jurisdiction, given that both legislators will be now equally competent to legislate on the matters listed in Art. 72.3 GG, nor that of prevalence under Art. 31 GG, since this provision only allows for the derogation of the *Land* law by the Federal law, and not vice versa. Rather the conflict will be resolved using the chronological criterion; in all cases, the later law will prevail over the former, be it a Federal or a *Land* law. This prevalence shall, in no case, involve the derogation of the prior law, which may again be applied if the prevailing rule is, at any future time, derogated.[19]

Conclusion

To sum up, the issue of divergent *Land* law highlights the survival of a feature we believed to have been excluded from the German legal system, namely the existence of dual powers, in the sense that Federation and *Länder* are simultaneously authorised to legislate on a single issue with the same scope. The introduction of this new type of law therefore represents a radical *volte-face* in the way of understanding federative relations within the German constitutional order. It is no longer sufficient to determine who is empowered to do what in each case; instead, with respect to certain matters (those listed in Art. 72.3 GG), one must accept that two legislators can be simultaneously competent. This is important when it comes to determining political responsibility; it will no longer be sufficient to predicate this responsibility only with regard to the party that, at a given time, has enacted certain legislation, but also to the other, which is empowered to amend that legislation making use of its own power.

Until now, we had held that concurrent legislative power, in the sense in which it is defined here, was alien to the German system of distribution of powers. Generally,

[18] See Kloepfer (2007), 659 et seq.; Uhle (2007), p. 156.

[19] See Ipsen (2006), p. 2804; Degenhart, Christoph: "Die Neuordnung der Gesetzgebungskompetenzen. . .," p. 1212.

we questioned its effectiveness as a technique of jurisdictional distribution in any territorially decentralised state. An "ideal" jurisdictional system should be based on the idea of exclusivity of each of the powers corresponding to the different parties making up the decentralised state. Only in this way will it be possible to determine clearly which of these parties shall be responsible for legislation (or the lack thereof) of the matter in each specific case. From the point of view of the democratic principle, this is an issue that cannot be simply ignored.

There is a general public interest in elucidating any doubt as to the party to whom responsibility for public actions should be attributed, as manifested, on this occasion, in the form of legislation. If this does not occur, it is highly likely to increase public mistrust of the system. This is what is known as democratic disaffection and the consequences can be more serious than one might initially imagine.

It is for this reason that the introduction into a model of jurisdictional distribution such as Germany's of the category of divergent legislation and the consequent acceptance of the category of dual powers, creates many doubts.

It is possible that its practical effectiveness may be irrelevant, given that the matters covered by this type of law are not very important, and it is unlikely that either the Federation or the *Länder* would use this technique to legislatively undermine one another. Nonetheless, it does appear clear that this legislative technique leaves much to be desired, at the very least because it clouds political responsibilities, which from the perspective of the democratic principle is a highly questionable path to take.

To sum up, the two principles of concurrent legislative power and exclusive legislative power do not sit well together in the same legal system. The characteristic feature of the latter is that it is essentially played out within the terrain of *legal* safeguards, given that the operation to be performed in each specific case will determine the title of the respective power. On the contrary, concurrent legislative power, even if the disputes it provokes are also resolved by the application of legal criteria (by the chronological criterion, in the case of variant legislation), basically belongs to the field of *political* safeguards, and that marks the beginning of a paradigm shift where we are not sure that the German legal and political system is entirely prepared.

References

ARROYO GIL, Antonio "Los principios de competencia y prevalencia en la resolución de los conflictos competenciales. *Una relación imposible,*" *Revista Española de Derecho Constitucional,* 80 (2007), p. 416

ARROYO GIL, Antonio: "El inacabado debate sobre la competencia," REDC, 83, 2008

ARROYO GIL, Antonio: *El federalismo alemán en la encrucijada*. Sobre el intento de modernización del orden federativo en la República Federal de Alemania (prólogo de Manuel Medina Guerrero), CEPC, Fundación Manuel Giménez Abad de Estudios Parlamentarios y del Estado Autonómico, Madrid, 2006

ARROYO GIL, Antonio: *La reforma constitucional del federalismo alemán*: Estudio crítico de la 52ª. Ley de Modificación de la Ley Fundamental de Bonn, de 28 de agosto de 2006, prólogo de Juan José Solozábal Echavarría, Colección Con(Textos)A, núm. 11, Institut d'Estudis Autonómics, Barcelona, 2009

ARROYO GIL, Antonio "Competencia *versus* Prevalencia en los Estados territorialmente descentralizados. *Con especial referencia al Estado autonómico español,"* RJUAM, 20, 2009, p. 205.

BADURA, P.: *Staatsrecht* (Systematische Erläuterung des Grundgesetzes für die Bundesrepublik Deutschland), C. H. Beck, München, 2nd ed. revised, 1996, p. 298

BIGLINO CAMPOS, Paloma: *Federalismo de integración y de devolución* (El debate sobre la competencia), CEPC, Madrid, 2007

BÖCKENFÖRDE, Ernst-Wolfgang: "Kollisionsfälle und Geltungsprobleme im Verhältnis von Bundesrecht und Landesverfassung," DÖV, 1971, pp. 119–127

BOTHE, M.: "Artikel 30 GG (*Funktion der Länder*)," in Wassermann, R., *Kommentar zum Grundgesetz für die Bundesrepublik Deutschland (Reihe Alternativkommentare)*, Volume I, Luchterhand, Neuwied-Kriftel-Berlin, 2nd ed., 1989, pp. 1667 et seq

BOTHE, M.: "Artikel 70 GG (*Gesetzgebung des Bundes und der Länder*), in Wassermann, R., *Kommentar zum Grundgesetz für die Bundesrepublik Deutschland* (Reihe Alternativ-kommentare)," Volume II, Luchterhand, Neuwied-Kriftel-Berlin, 2nd ed., 1989, pp. 426 et seq

DREIER, H.: Artikel 31 GG (*Vorrang des Bundesrecht*), in DREIER, H. (Ed.): Grundgesetz Kommentar, Volume II (*Artikel 20–82*), Mohr Siebeck, Tübingen, 1998, p. 631

ERBGUTH, W.: "Artikel 30 GG (*Kompetenzverteilung zwischen Bund und Ländern*)," in Sachs, Michael (Ed.), *Grundgesetz Kommentar*, C. H. Beck'sche Verlagsbuchhandlung, München, 2nd ed., 1999, p. 993

GERHARDS, Wolfgang: "Abweichungsrechte (Art. 72 Abs. 3 -neu-) und Erforderlichkeitsklausel (Art. 72 Abs. 2 GG), in Holtschneider, Rainer/Schön, Walter (Ed.), *Die Reform des Bundesstaates* (Beiträge zur Arbeit der Kommission zur Modernisierung der bundesstaatlichen Ordnung 2003/2004 und bis zum Abschluss des Gesetzgebungsverfahrens 2006), Nomos Verlag, Baden-Baden, 2007.

GÓMEZ ORFANEL, G. / ARROYO GIL, A.: "El reparto territorial de facultades legislativas y el *Bundesrat* en el federalismo alemán (1871-2006)," *Cuadernos de Derecho Público,* 26 (2005) [published in February 2007], pp. 233 et seq

GRÜNEWALD, V.: *Die Abweichungsgesetzgebung der Bundesländer - ein Fortschritt im föderalen Kompetenzgefüge des Grundgesetzes?*, Logos Verlag, Berlin, 2010

GUBELT, M.: Artikel 31 GG (*Vorrang des Bundesrechts*), in MÜNCH, I. von / KUNIG, P. (Ed.): Grundgesetz Kommentar, Volume II (*Art. 21 bis Art. 69*), C. H. Beck, München, 3rd ed., 1995, p. 404

IPSEN, Jörn: "Die Kompetenzverteilung zwischen Bund und Ländern nach der Föderalismusnovelle," NJW, 39, 2006, p. 2804

KLOEPFER, Michael: "Die neue Abweichungsgesetzgebung der Länder und ihre Auswirkungen auf den Umweltbereich," in Pitschas, Rainer / Uhle, Arnd (Ed.), *Wege gelebter Verfassung in Recht und Politik* (Festschrift für Rupert Scholz zum 70. Geburtstag), Duncker&Humblot, Berlin, 2007, 659 et seq.

KUNIG, P.: "Artikel 70 GG (*Gesetzgebung des Bundes und der Länder*)," in Münch, I. von / Kunig, P. (Eds.), *Grundgesetz Kommentar,* Volume III (*Art. 70 bis Art. 146*), C. H. Beck, München, 3rd ed., 1996, p. 9.

MÄRZ, Wolfgang: *Bundesrecht bricht Landesrecht*. Eine staatsrechtliche Untersuchung zu Artikel 31 des Grundgesetzes, Tübingen Schriften zum Staats- und Verwaltungsrecht, Volume 1, Duncker-Humblot, Berlin, 1989

MAUNZ, T.: Artikel 75 GG (*Rahmenvorschriften*), in MAUNZ / DÜRIG / HERZOG / SCHOLZ: Grundgesetz Kommentar, Volume IV, C. H. Beck, Lfg. 25, 1986, pp. 7 et seq.

MEYER, Hans: *Die Föderalismusreform 2006* (Konzeption, Kommentar, Kritik), Duncker&Humblot, Berlin, 2008, pp. 164 et seq.

MÜNCH, I. von: *Staatsrecht I*, (Einführung; Deutschland; Teilung und Vereinigung; Staatsform; Staatsorgane; Deutschland in der Europäischen Gemeinschaft), Verlag W. Kohlhammer, Stuttgart-Berlin-Köln, 6th ed., 2000, p. 215

MÜNCH, U.: "Materielles Abweichungsrecht der Länder und föderative Asymmetrien in der bundesdeutschen Bildungspolitik," in Europäisches Zentrum für Föderalismus-Forschung (Ed.), *Jahrbuch des Föderalismus 2008* (Föderalismus, Subsidiarität und Regionen in Europa), Nomos Verlagsgesellschaft, Baden-Baden, 2008

OSSENBÜHL, F.: "Pluralismo territorial y sistema normative," in AA.VV., *Pluralismo territorial en la República Federal de Alemania* (Spanish translation by Manuel Cancio Meliá), MAP/INAP, Madrid, 1989, pp. 42 et seq.).

PERNICE, I.: "Artikel 30 GG (*Kompetenzverteilung zwischen Bund und Ländern*)," in Dreier, Horst (Ed.), Grundgesetz Kommentar, Volume II (*Artikel 20–82*), Mohr Siebeck, Tübingen, 1998, p. 597

PESTALOZZA, Ch. von: "Artikel 70 GG," in Mangoldt, H. von / Klein, F. / Pestalozza, Ch. von, *Das Bonner Grundgesetz*, Kommentar, Volume VIII (*Artikel 70 bis Artikel 75:* Die Gesetzgebungskompetenzen), Verlag Franz Vahlen, München, 3rd ed. 1996, pp. 25 et seq.

PIEROTH, B.: "Artikel 30 GG (*Kompetenzverteilung zwischen Bund und Ländern*)," in JARASS, H. D. / PIEROTH, B.: Grundgesetz für die Bundesrepublik Deutschland (*Kommentar*), C. H. Beck, München, 4th ed., 1997, p. 556

QUADRA-SALCEDO JANINI, T.: Mercado nacional único y Constitución (Los artículos 149.1.1 y 139 de la Constitución), (prólogo de Manuel Aragón Reyes), CEPC, Madrid, 2008

SANNWALD, R.: Artikel 70 GG (*Abgrenzung der Zuständigkeit zwischen Bund und Ländern*), in Schmidt-Bleibtreu, B. / Klein, F., *Kommentar zum Grundgesetz*, Luchterhand, Neuwied-Kriftel-Berlin, 9th ed., 1999, p. 1010

SCHARPF, Fritz W.: "Föderalismusreform: Weshalb wurde so wenig erreicht?," ApuZ 50/2006, pp. 6 et seq.

STEIN, E.: *Staatsrecht*, Mohr Siebeck, Tübingen, 16th ed., 1998, pp. 123 et seq.

STERN, K.: *Das Staatsrecht der Bundesrepublik Deutschland*, Volume I (*Grundbegriffe und Grundlagen des Staatsrechts, Strukturprinzipien der Verfassung*), C. H. Beck, München, 2nd ed., 1984, p. 676

STETTNER, R.: "Artikel 70 GG (*Gesetzgebung des Bundes und der Länder*)," in DREIER, Horst (Ed.): Grundgesetz Kommentar, Volume II (*Artikel 20–82*), Mohr Siebeck, Tübingen, 1996, p. 1319

STOCK, Martin: "Konkurrierende Gesetzgebung, postmodern: Aufweichung durch "Abweichung"?," ZG, 3, 2006, pp. 226 et seq.

UHLE, Arndt: "Art. 72 GG [Konkurrierende Gesetzgebung]," in Kluth, Winfried [Ed.], *Föderalismusreformgesetz*. Einführung und Kommentierung, NomosKommentar, Nomos, Baden-Baden, 2007, p. 145

VOGEL, J. J.: "El régimen federal de la Ley Fundamental" (Capítulo XII), in Benda / Maihofer / Vogel / Hesse / Heyde. . . (Eds.,), *Manual de Derecho Constitucional* (Edición, *Prolegomena* Spanish translation by A. López Pina), IVAP, Marcial Pons, Madrid, 1996., p. 646.

The Competences and Faculties of the Autonomous Communities in the Area of Justice: Progress, Limits, and Alternatives for Reformulation

Miguel Angel Cabellos Espiérrez

Judicial Power and Federalism

Although the plurality of legislative and executive powers is consubstantial to the notion of federalism, the same cannot be said of judicial power. With regard to the latter, there are composite states where the structure, organisation and regulation of judicial power is attributed solely (or with occasional specific exceptions to such exclusivity) to the federation, and there are others where said power is attributed both to the federation and the constituent entities that, under different systems, are included in the notion of judicial federalism.

It might be felt that in the former instance (exclusive attribution to the federation) this is done to maintain a single judicial power and thereby the principle of jurisdictional unity. Yet, this is not the case. Involving the various constituent entities in this area is compatible with the existence of a single judicial power as well as with the establishment of several—jurisdictional unity not necessarily requiring judicial power to be structured from a single entity, the federation.

However, there is an important historical element in the way that judicial power is ultimately structured when a composite state is formed. Lucas Murillo de la Cueva highlights how in a state that has been created on the basis of the unification of several previously existing states or political entities, plurality of the judicial powers that existed prior to said union is usually maintained and that, just as both the federation and constituent member states have their respective government and

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parliament, said states, and not just the federation, will also have their own judicial power, as they did before joining the newly created political body. On the contrary, in the case of composite states that emerge as a result of the decentralisation of what was previously a single unitary state, executive and legislative powers are usually divided whereas judicial power is not.[1]

With regard to the first instance, Comba underlines how the federalising process, whereby separate political communities create a common constitutional structure to resolve common problems, or wherein (second possibility) a single-unit state is decentralised and recognises the political autonomy of a number of territorial units under a common constitutional structure, is not in fact a single process but rather the result of several, each of which relates to one State power, the direction and speed of the process possibly varying.[2] As regards the judicial power referred to earlier, American doctrine speaks of "judicial federalism" when referring to those systems where, as occurs in the United States, the coexistence of federal (and state) jurisdiction is accepted as a further example of the existence and structure of the federal state.[3]

However, we should point out that within systems where both the federation and federate entities are involved in the structuring of judicial power, there is no single model to be followed, as the chosen system depends on whether there is a wish to maintain the principle of jurisdictional unity or not. As mentioned above, federate state intervention does not necessarily entail the break-up of jurisdictional unity, as there are ways wherein this may be maintained intact, as shall later be seen.

Before exploring the issues outlined above in greater detail, we should ask ourselves one preliminary question: Is judicial federalism useful? The fact that there is a range of options in existing composite states prevents us from giving any categorical answer. The efficiency of a judicial system depends on other factors apart from simply whether its structure corresponds to one model or another. Yet, what remains clear is that from the standpoint of institutional consistency and the political system itself, if there are a number of parliaments and governments, and a variety of (federal and state) legal systems, having a judicial power that is structured and managed essentially from just one of the two sides of the scale will continue to pose certain inconsistencies.

Whilst recognising the difficulty of establishing a concept of judicial federalism, certain starting points may, however, be shown to exist. Specifically, in line with Gerpe Landín,[4] we can see how there are two premises and three requirements that are needed to ground the concept of judicial federalism.

The first premise is naturally the existence of several legal systems, which at the same time is consubstantial to the notion of federalism. The second is that jurisdictional authority must be organised on two levels, such that there are two court circuits, one applying essentially state law, and the other applying what is basically federal law.

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[1] See Lucas Murillo de la Cueva (1998), p. 17.

[2] See Comba (1996), pp. 43 and 44.

[3] In this regard, see Ruiz (1994), p. 15.

[4] See Gerpe Landín Introduction to the book coordinated by Gerpe Landín and Barceló Serramalera (2006), pp. 19–20.

We stated above that there need not necessarily be more than one judicial power, an idea that should again be stressed. Judicial federalism does not perforce dividing the unity of judicial power, leading to the creation of as many judicial powers as there are states, in addition to federal judicial power. Indeed, judicial federalism maybe fully consistent with the idea of unified judicial power, such that there may well exist a single judicial power, the only condition being that states are charged with organising and managing the courts that apply mainly state law, and the federation with those that apply mainly federal law. On the contrary, as we shall see later, the idea of unified judicial power in Spain has traditionally been perceived in a manner that has made it utterly impossible for Autonomous Communities to be involved in anything other than merely handling the administration of the justice system.

Again, following Gerpe Landín,[5] the requirements maybe summarised thus:

- Institutional autonomy of the federation and the constituent bodies, perceived as the competence for dealing with matters such as the appointment of judges, organisation of jurisdictional practice, or running the judiciary.
- Jurisdictional autonomy of each judicial circuit, such that each concludes the procedure for the causes based on its respective law.
- There should also be mechanisms to ensure coordination between state (and federal) courts. Such mechanisms must stipulate, for instance, what should happen when a case is based on federal law or state law, and must avoid any contradictions when state courts apply the former.[6]

For the above-cited author, these two aspects (institutional and jurisdictional) of autonomy allow for certain adjustments depending on the systems in question, and will not always be found in their purest sense. Yet, it is clear that putting the two systems into effect, however this may be implemented, must go beyond simply recognising the capacity of the bodies involved to oversee purely managerial competences in the area of justice administration or creating a single court circuit, no matter how the territorial factor and mere demarcation of these may be taken into account, as is the case in Spain.[7]

Therefore, judicial federalism is not consubstantial with federalism but prove to be consistent with it. This highlights the flexibility of the idea of federalism in general. Federalism is a system of organisation that, beyond certain requirements without which a system could not be deemed federal, endows the states applying it with enormous flexibility, specifying and varying a range of factors to the extent that we can say that there is no single federalism, but rather a number of federalisms.

Due to the flexibility inherent in federalism, wherever judicial federalism exists, organised in accordance with the requirements and premises described above and taking account of the adaptations, adjustments or specificities particular to each system, judicial federalism may be structured on the basis of accepting multiple

[5] Idem.

[6] Regarding this specific aspect, see also López Aguilar (1994), pp. 60–61.

[7] Idem, p. 20.

judicial powers, or on the existence of a single judicial power whose courts, nonetheless, are organised depending on the various authorities, either by the Federation or by the constituent entities. This thereby provides an understanding of judicial federalism that is compatible with the continued existence of the principle of jurisdictional unity, perceived on the basis of the premises that we shall now outline.

As tends to happen in composite states that emerge from the decentralisation of what was previously a single state, the Spanish Constitution establishes a single judicial power for organisation and management that is dependent on the State. Thus, in cases such as ours, progress in the decentralisation of legislative and executive power is not reflected in similar progress in judicial power. As Aparicio Pérez points out: "in its basic outline, our Constitution does not innovate the conventional judicial model and, above all, fails to take account of the new political and legal realities over which said power operates (. . .). In practice, justice is the basic and functional area which has developed least in the Autonomous Communities and, in theoretical terms, is an issue which has not even been globally addressed."[8]

As pointed out, majority of this is related to a specific understanding of the principle of jurisdictional unity, according to which recognising the institutional autonomy of any entity other than the State would entail the break-up of said principle. Yet, as cases like Germany have evidenced, such an understanding proves to be biased. Ensuring judicial independence is consubstantial to the Rule of Law where the principle of unity is a further means that need not necessarily be understood in a purely territorial sense and that forces jurisdiction to be organised in such a way that it excludes the constituent entities of the State. This has been succinctly highlighted by Arozamena Sierra: the principle of jurisdictional unity immediately points to special jurisdictions being excluded, and is linked to the principle of the independence of judges and magistrates and to the rights of those subject to jurisdiction. In special jurisdictions the safeguards for the latter tend to diminish, and the independence of judges cannot usually be proclaimed in the same way as it is in ordinary jurisdiction. As a result, ensuring jurisdictional unity, perceived as a refusal to accept special jurisdictions, aims precisely to ensure jurisdictional unity. There is no need to extend this understanding of unity to the territorial aspect, by excluding everything that is not related to the State (under the axiom of the existence of a single judicial power throughout the whole of the State, which would thus remain in the latter's hands). As the same author reminds us, once certain common safeguards and procedures have been ensured, in other words once a basic judicial structure has been put into place, there is nothing to prevent those constituent entities of the State that have been endowed with political autonomy from being able to exert a direct influence on the organisation of the legal system, notwithstanding jurisdictional unity, unless the latter were perceived in a territorial and extreme sense.[9] The following words by Arozamena bear out this idea in a crystal clear fashion:

[8] See Aparicio Pérez (1997), pp. 969–971.

[9] In this respect, see Arozamena Sierra (1991), p. 3036 et seq. Also of interest with regard to the principle of unity are the works by Reverón Palenzuela (1996) and Jimena Quesada (2000). With

> Independence, exclusivity (judicial monopoly or the reserve of jurisdiction) and jurisdictional unity are, in the history of justice, and in the same conceptual idea, principles that pursue a single common goal: that jurisdiction should be entrusted to independent judges, incorporated into a system that is independent from all other power; that jurisdictional functions should be carried out by judges and that the involvement of special judges should be excluded. This, it seems to me, is the fundamental essence of "jurisdictional unity."[10]

Germany provides a clear example. There the basis is provided by the unity of judicial power. However, this does not prevent certain courts from being set up, organised and governed from the level of the *Länders*.[11] As Lucas Murillo de la Cueva reminds us: "it is significant that the Fundamental Law of Bonn embraces under a single and general section all the rules concerning jurisdiction, and that it should make clear that exercise thereof involves the participation of the Constitutional Court, the federal courts, and the courts of the *Länders*. In other words, no separation or caesura exists between federal judicial power and federate judicial power,"[12] an idea that is also stressed, for instance, in Heyde[13]: federal courts and federate courts make up a single jurisdictional system where the main issues are dealt with, and in which the high courts are organised by the *Bund*, whilst organisation of the remaining courts is in the hands of the *Länders*. This is one of the possible models that, if it had been adopted by those who drafted our constitution, would have allowed for a more logical adaptation between autonomic state and judicial power without undermining jurisdictional unity.

In contrast, the Spanish model clearly remains at some distance from the concept of judicial federalism based on a concept of a strongly territorial jurisdictional unity founded on the principle of excluding all bodies other than the State from the

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regard to the issue of separating the territorial aspect from the principle of jurisdictional unity, the latter author points out that, in his opinion, the principle of jurisdictional unity is basically ensured "by the Supreme Court, by exercising the judicial function, reflected in the various kinds of appeals that may be made to higher courts." See Jimena Quesada (2000), p. 34, op cit.

[10] See Arozamena Sierra (1991), p. 3036, op cit. The author takes the dissociation of the principle of jurisdictional unity regarding the territorial aspect to the extreme: even in the United States where there are numerous judicial powers, jurisdictional unity could well be perceived as the overarching principle. Yet, I feel this idea to be debatable: it is one thing to hold that jurisdictional unity exists when the only common jurisdiction is organised by two bodies (Federation and States), yet it is quite another to believe that it exists when there are several separate ordinary jurisdictions.

[11] As Degenhart states, "The Federal State of the Fundamental Law of Bonn (...) has shown its unitary components, with regard to jurisdictional function. As a result, establishing and safeguarding the unity of the legal system through the unity of judicial power has played a more important role than the diversity of the member states of a federal state. (...) *Bund* jurisdiction and *Länder* jurisdiction are not independent of each other, but are organised rather on top of each other, criss-crossing between each other." See the chapter by C. Degenhart devoted to German jurisdiction in the book coordinated by Gerpe and Barceló: *El federalismo judicial*, op. cit., pp. 304 and 310.

[12] See Lucas Murillo de la Cueva (2008), p. 26, op cit. The author refers to Title IX of the German Constitution, headed by Article 92: "Judicial power is entrusted to the judges. It is exercised by the Federal Constitutional Court and by the federal courts foreseen in the current Fundamental Law, and by the courts of the *Länders*."

[13] See Heyde (1996), p. 767. Also cited by P. Lucas Murillo de la Cueva.

organisation of jurisdiction: a unity that is equivalent to the presence of a single body competent in this sphere over the whole of the country.[14] Based on this premise, the following pages will seek to explore the role that Autonomous Communities have played.

The Starting Point in Spain

The main distinguishing feature of the Spanish model, which was particularly brought to light during the Statute reform process that commenced in 2006, is that in our system there are three rules that come into play when devising the structure that outlines the involvement of the various bodies in justice administration: two of them, the Constitution and the Law on the Judiciary (Spanish acronym: LOPJ), were established from the outset, since the former remitted to the latter (for instance in its Articles 122.1 or 152) concerning specification on a whole range of matters. The third kind of rule, the Statutes of Autonomy, entered the fray later on, without any express constitutional provision (yet without violating its provisions) and in a somewhat complex position since, as we have seen, there is constitutional remit to the LOPJ.

The first point that stands out is that the Constitution establishes a framework where Article 149.1.5 plays a central role and severely restricts the possibilities of autonomous competences[15] in that it declares the matter of "Justice Administration" to be an exclusive competence of the state. This did not prevent the statutes from wanting to subrogate the position that corresponded to the central government. The LOPJ in principle respected such provisions, although it adjusted them downwards, the Constitutional Court accepting the interpretation whilst adding certain limitations.

Subrogation clauses certainly proved to be an imaginative means of overcoming the restriction apparently set out under Article 149.1.5 of the Spanish Constitution, albeit at the expense of interpreting the latter in a manner that was clearly removed from its literal meaning. As Balaguer has highlighted: "In their Statutes, the Autonomous Communities may only assume those competences which have not previously been attributed to the State by the Constitution in application of Article 149.3 of

[14] The characteristics of the federal model in the legal sense, as well as possible variations thereof, can clearly be seen by analysing the German and American models, which we shall not go into here for reasons of space. Amongst the abundant references in this regard, an extremely valuable overview is provided by Cappeletti (1989) and Comba (1996) op cit. From the comparative standpoint, one interesting work concerning Spain is Lucas Murillo de la Cueva (2008), pp. 17–27, op cit., together with the previously cited work of Gerpe and Barceló, which is more recent.

[15] Less restrictive was the version of this Article in the draft constitution, Article 138.28, which also stated that justice was the exclusive competence of the State, but which added that: "The State shall establish the bases which will allow exercise of judicial functions to be reconciled throughout the whole of the State, in accordance with the principle of judicial unity and the various professional bodies embraced therein, notwithstanding the involvement of the autonomous territories in the organisation thereof." Exclusivity was thereby more a question of sharing, the last sentence expressly recognising Autonomous Community involvement (and subsequent competence) in the organisation of justice administration.

the Spanish Constitution, competence over "Justice Administration" having been expressly attributed to the State by the Constitution, without the latter distinguishing in any broad or strict sense, and much less between the faculties that correspond to the national government or to the parliament (...). It is the duty of those legislating on organic laws to decide whether these faculties should correspond to the national government or to the governments of the Autonomous Communities, not to the Statutes of Autonomy."[16]

Whatever the case, this was the only way where, albeit to a limited extent, the effects of regulating judicial power could be attenuated outside the composite structure of the State, and one that certainly did not prove to be very consistent with the general institutional structure set out by the Constitution. On the basis of this, as well as subsequent reforms of the LOPJ, a series of competences and faculties where the Autonomous Communities were allowed to intervene over a range of areas was established between the 1980s and the early part of the 2000s[17]:

- In the organisation of jurisdiction, with certain faculties relating to the organisation of demarcations, where central power was to be located, or the possibility of being consulted over the creation of sections and courts.
- In the exercise of jurisdiction, with the capacity to urge the General Council of the Judiciary (Spanish acronym: CGPJ) to call public examinations, cooperate with the latter through a range of bodies in the management thereof, or propose a short list of three candidates for the post of High Court Judge in the Civil and Criminal Division of the corresponding Supreme Court of Justice.
- In the relation with the CGPJ, which envisages limited Autonomous Community competence, as well as a series of mechanisms linking the former with the Autonomous Communities (Articles 108–110 of the LOPJ).
- And, particularly, competences related to material resources and staff in the justice administration.

The gradual regulation reflected in the LOPJ has given rise to a model where, in unequal measure, three actors converge: State, Autonomous Communities and CGPJ, and where the possibilities available to the Autonomous Communities are severely restricted by factors such as considering public sector employees who work for the justice administration as a single national body. Such an arrangement substantially curtails the scope of action open to the Autonomous Communities, and can also have a collateral impact on related areas such as public sector workers' knowledge of a regional language, which has traditionally been considered merely a merit. Further aspects to be taken into account include the fact that, as regards management of judicial power, the CGPJ has undergone no decentralisation of mechanisms beyond the figure of the territorial representative charged with supervising one or more autonomous territories, or that Autonomous Community involvement in Ministry of Justice and

[16] See Balaguer Callejón (2000), p. 60.

[17] See Gerpe Landín (1998), pp. 52–57; Jiménez Asensio (1998), pp. 32–40; and Cabellos Espiérrez (2004), pp. 77–124.

CGPJ decision-making processes always lacks relevance, or finally, that the High Courts of Justice, which reflect (albeit merely symbolically) a certain adaptation of the organisation of judicial power to the composite nature of the State, are in many instances underused, while the Supreme Court is incapable of handling the mounting number of matters it is forced to deal with.

The successive proposals for reform that have been put forward, either by the Supreme Court (through the document it drafted in 2000[18]), the CGPJ (its 1997 "White Paper" and its report of 1999[19]), or the Ministry of Justice, which championed the State Pact that was ultimately to fail,[20] approached these issues in a variety of ways, yet without eventually managing to bring about any changes which proved in the least substantial.[21]

[18] If we are to go by what is stated in point one, there are two lines that guide the document: redefining the competences of the Supreme Court and doing so such that the composite structure of the State may have a greater influence on the organisation of judicial power. This might be achieved in a number of ways, one of which is to strengthen the powers attributed to the Supreme Court of Justice, thereby discharging the Supreme Court of some of its own.

[19] At its meeting on 25 September 1999, the plenary session of the General Council of the Judiciary agreed to approach the Governing Chambers of the Supreme Courts of Justice, of the National Court, and of the Supreme Court, to urge them to put forward proposals to the Council for legislative reform aimed at improving justice administration. At the same time, it also set up a commission (by agreement of the plenary session of 14 October) to draft a report on these proposals and on the Council's own "white paper" which might be submitted to the Government and National Parliament. The initial version of the report was drafted by said commission, comprising members of the Council, amendments to the report subsequently being submitted by other members. All were discussed at three plenary sessions of the CGPJ (18, 19, and 25 July 2000). The outcome was adoption of the final text that, as can be seen, substantially reduces the number of changes sought by the initial report and some of the amendments regarding decentralisation of judicial power, strengthening the competences of the Supreme Courts of Justice, and reforming the appeals system.

[20] After the so-called "Emergency Plan for Streamlining Justice Administration," the main goal of which was to deal with the problem of the large number of vacancies for the position of judge, and which was reflected in Organic Law 9/2000, discussions amongst political parties concerning a wide range of issues (system for choosing members of the CGPJ, a statute for the legal profession, the role of the Public Prosecutor's Office, strengthening the figure of the judicial secretary, the structure of judicial offices and how they should be organised, shared services, promoting the transfer of competences to Autonomous Communities that remained pending, and so on) led to the Ministry, the PP and the PSOE signing the National Justice Agreement on 28 May, 2001. This paved the way for its specific introduction (the agreement was mostly general), which was reflected in reform of the LOPJ (Article 112 et seq.) through Organic Law 2/2001 of 28 June with regard to the matter of election of CGPJ members, and with regard to the remaining matters by reforming exactly the same rule undertaken through Organic Law 19/2003, of 23 December. In September 2003, the PSOE announced it was withdrawing from the agreement, which thus meant it was formally terminated.

[21] Regarding said proposals and their impact on the issues highlighted, see Cabellos Espiérrez (2004), op cit., passim.

The Statutes of Autonomy as a Means of Overcoming Initial Shortcomings: The Case of the Statute of Catalonia

Introduction

If, after nearly 30 years of the Constitution, the Autonomous Communities remained in a situation of almost total irrelevance with regard to justice administration, limited *de facto* to managing the latter's resources, but bound by a series of restrictions that practically stripped them of all capacity to take their own decisions, it was only to be expected that when a series of statutory reforms began to emerge that some of them should consider using the Statute as a means of changing the *status quo* that had been reached. When all is said and done, after the Constitution had been approved it, too, seemed to have excluded the Autonomous Communities from any kind of involvement (see Article 149.1.5 of the Spanish Constitution). Yet, the Statutes did manage to effect change through certain clauses that had in no way been envisaged beforehand, but were nevertheless accepted (with certain restrictions, it has to be said) by the LOPJ and the Supreme Court. Attempting to do so once again would certainly prove risky. Seeking to accomplish more than what had been achieved through the subrogation clauses, after these had only been accepted with certain restrictions as pointed out earlier, could in no way be guaranteed *a priori*, particularly if any extension were to include not only material and staff resources but also an attempt to influence such matters as the governance of judicial power or the competences of the Supreme Court of Justice.

The new Statutes did not follow only one model. At the risk of simplification, it may be said that the Catalan and Andalusian Statutes followed a similar pattern (in the latter instance by adapting the Statute previously established by the former) that sought to explore all the possibilities for improvement afforded by the Statute. For their part, the other Statutes that were to be reformed undertook a more concise and less ambitious change.

We will now take the changes to the Statute of Catalonia as the analytical reference point for two reasons: firstly, because, as pointed out before, this was the most ambitious attempt at bringing judicial power closer to an Autonomous Community; and secondly, because it was the subject of a Constitutional Court judgement through ruling 31/2010, wherein the Court set the limits for the Statutes in this particular respect, and established the relation between Statutes and the LOPJ. Thus, we will now analyse the principal developments that statutory change brought about compared to what had existed beforehand.

High Court of Justice (Article 95 of the Statute of Autonomy of Catalonia)[22]

Firstly, express reference is included to the Statute's competence for safeguarding statutory rights, and the four areas where it will be competent are listed. These are the four conventional areas (civil, criminal, social, litigation) as well as "whichever others might be created in the future." This latter reference should be understood in relation to the idea that was present at certain moments when the Statute Bill was being drafted in the regional parliament and where the Statute itself envisaged setting up a Division of the Supreme Court of Justice devoted to safeguarding statutory rights. In the end, this idea failed to prosper although the clear reference to it, albeit in extremely veiled terms, did allude to the possibility.

Secondly, the Statute establishes its competence over appeals that are dealt with in Catalonia, "whatever the applicable law invoked may be." This, to a certain extent, refers to mixed appeals, in other words to those that invoke both Catalonia's own law as well as national law. In such instances, which are a large majority, a doubt was initially expressed as to whether the Supreme Court of Justice was competent to resolve appeals in their entirety or whether the part corresponding to the State should be remitted to the Supreme Court (which would entail subsequent delays and procedural complications). The majority of these would arise in civil cases, Article 478.1 of the Code of Civil Procedure (Spanish acronym: LEC), establishing the competence of the Supreme Court of Justice for mixed appeals.[23] Yet, as we have seen, the statutory precept states "whatever the applicable law invoked may be," in other words, it also refers to cases where, for instance, only state law is invoked. In such cases, the appeal would also correspond to the Supreme Court of Justice. This is consistent with what the precept then goes on to say: "notwithstanding the competence reserved for the Supreme Court for the unification of doctrine." Put differently, in the words of the Statute of Catalonia itself, the function of the Supreme Court is restricted to unifying doctrine. As we shall see, this limitation, which the Statute sought to impose, was one of the aspects to be challenged, and where the Constitutional Court was to issue a ruling in 2010.

Finally, it is recognised as being competent in the matter of all review appeals lodged against final resolutions issued by jurisdictional bodies in Catalonia, and not only in cases where said resolutions are related to the Autonomous Community's own

[22] For the position and competences of the Supreme Courts of Justice, see in detail Sáiz Garitaonandia (2009), pp. 245–386.

[23] "Resolving appeals in civil matters corresponds to the First Chamber of the Supreme Court. Nevertheless, it shall correspond to the Civil and Criminal Divisions of the High Courts of Justice to resolve appeals stemming from resolutions issued by civil courts located in the Autonomous Community, provided that the appeal is based exclusively, or in conjunction with other reasons, on offences against civil, charter-granted law, or the Autonomous Community's own special law, and when said attribution is set forth in the corresponding Statute of Autonomy."

law, since, as is well known, review is in no way related to the kind of rule being applied, but rather to the appearance of certain circumstances that justify reopening a case where a final resolution had already been issued.

Establishing a Council of Justice in Catalonia (Articles 97–100 of the Statute of Autonomy of Catalonia)

This is without doubt one of the most significant developments in the Statute of Catalonia: setting up a council of justice, perceived as a decentralised body of the CGPJ that would undertake a series of functions related to the jurisdictional bodies located in the region.

The first point to be made relates to the model chosen. In the new Statutes, we see how two different models converge: on the one hand, one where there is a decentralised body dependent on the CGPJ itself (and not on the Autonomous Community) for the setting up of which the Statute simply envisages reference to the LOPJ. This is the model used in the Statutes of Catalonia and Andalusia. On the other hand, we have the model of the Council perceived as an advisory commission for the Autonomous Community and, therefore, dependent upon the latter, as a result of which it does not fulfil any of the functions that the CGPJ might require of it in the first model that, to all intents and purposes, would be an internal body pertaining to the CGPJ. The second kind of model would entail a Council that would merely undertake the role of advising the regional Ministry of Justice on whatever issues the Autonomous Community might be competent in with regard to the matter of justice administration, and would therefore have no say on matters relating to the management of judicial power.[24]

Secondly, it should also be highlighted that most of the functions that Article 98.2 assigns to the Council (subsequent to provision by the LOPJ) are of a non-decision making nature, and involve putting forward proposals to the CGPJ, publishing reports for the latter, or participating in certain procedures (such as inspecting courts or appointing certain posts). However, there are certain exceptions, particularly "exercising discipline over High and Low Court Judges in the terms set out under law" and "when applicable, specifying and applying the rules of the General Council of the Judiciary in the Autonomous Community of Catalonia."

The statutory changes that were initially approved finally included references to the need for the Council of Justice to adhere to the criteria set out by the CGPJ when the latter makes any decisions concerning appointments, authorisations, granting of leave (Article 98.3), appeals filed against any action taken by the Council of Justice (Article 100), and finally regarding the Council's composition (Article 99), stating that it should be presided over by the President of the Supreme Court of Justice and that, in accordance with the stipulations set out in the LOPJ, it should comprise High and

[24] Regarding this duality of models, see Cabellos Espiérrez (2011), particularly pp. 94–98. In this regard, see also Lucas Murillo de la Cueva (2008), p. 980.

Low Court Judges, public prosecutors or renowned jurists. It also stipulated that the Catalonian Parliament should be involved in the appointment process, which in practical terms, and according to the same precept, means the latter "appointing whichever members of the Council might be determined by the Law on the Judiciary."

Knowledge of the Autonomous Community's Own Language and Laws

In the case of national bodies, the decision concerning the requirements to be met by candidates applying to join said bodies corresponds to the State through the LOPJ and applications of its laws. However, this does not prevent the Statute from including provisions which reflect Autonomous Community interest in both proposing the call for public examinations and competitions (Article 101 of the Statute of Autonomy of Catalonia) as well as stating that evidencing a command of the region's own language and an understanding of its laws is required.

With regard to the matter of High and Low Court Judges and public prosecutors, it is stated that they must accredit an "adequate and sufficient" command of the Catalan language, which is sufficient to ensure citizens' language rights. Two points are particularly worthy of note here: first, there is no strict measure of what such a command of the language actually is, but simply an open clause, to be specified by law (clarification is here required as to whether it refers to the LOPJ or to the Autonomous Community law on language policy. The former might remit the matter to the latter to resolve the issue); secondly, the link between said provision and citizens' language rights, exercising which may, in practice, prove impossible if, as often occurs in justice administration, judges and public prosecutors do not speak the regional language. A command of the regional language is also "specifically and particularly valued" in transfer applications. As regards staff working for the justice administration and public prosecutor's office, the system is virtually identical: an indication is given that there is a requirement to accredit "adequate and sufficient command of the two official languages, enabling them to undertake the functions inherent to their post." It is worthy of note that in this instance reference is made to the two languages, and that there is no mention of the rights of those being tried. However, both problems are dealt with in the stipulations set out under Article 33.3 of the Statute of Autonomy of Catalonia, which does contain said provisions, reference also being made to such staff.[25] Finally, neither in the matter of High and Low Court Judges nor public prosecutors nor any of the other remaining staff is there any mention of how and

[25] Article 33.3 of the Statute of Autonomy of Catalonia: "In order to be able to provide their services in Catalonia, and in order to ensure the right to choose the desired language, High and Low Court Judges, public prosecutors, notaries, property and business registrars, those in charge of the civil register, and staff working for the justice administration must, in the manner set forth under the law, accredit adequate and sufficient command of official languages which enables them to undertake the functions inherent to their position or to the post they occupy."

when they should provide accreditation of a command of the language, an issue which is left to the decision of the LOPJ.

Of the various options available concerning this matter (evaluating the regional language simply as a merit, compulsory command of the language as a requirement and, as a compromise between the two, evaluation thereof as a determining merit or one deemed to be of particular importance), an option was chosen that was half-way between a requirement, the method for accreditation of which is not established (nor the consequences of non-accreditation) and, related to what we said concerning transfer between posts, a command of the language as a determining merit. In sum, everything is left to subsequent regulation by the LOPJ.

As regards knowledge of Autonomous Community laws, accreditation is also required of an "adequate and sufficient" command of the language for High and Low Court Judges and public prosecutors wishing to take up a post in Catalonia, and is evaluated specifically in transfer applications.

Personal and Material Resources: Judicial Office

Material and personnel resources had traditionally been an area where the Autonomous Communities had been involved in the sphere of justice administration, in application of the subrogation clauses contained in the statutes. What is new, is the specification of the particular (sub)resources over which the competence of the Catalonian Regional Government (*Generalitat*) is established in each of these areas. As regards personnel resources, specific mention is made of the "legal statute" applicable to personnel that, by constitutional mandate, is reserved for the LOPJ. Therefore, Autonomous Community competences must be based on this framework and must respect it. There are two types of such competences: normative and executive. As pointed out, Article 103 of the Statute of Autonomy of Catalonia sets out the sub-resources to which each competence relates. A further point to be highlighted is that the same precept also foresees the possibility that the *Generalitat* may create its own bodies of staff that work for the justice administration. It is to be assumed that said bodies may under no circumstances undertake the same functions as existing national bodies, but should seek to cover areas that do not currently correspond to them.

The same is also true of material resources, Article 104 of the Statute of Autonomy of Catalonia specifying the sub-resources within which the *Generalitat* may act. One that has emerged as prominent, due to the controversy it has aroused, concerns management of judicial accounts and financial allocations, handling of which should involve the *Generalitat*, according to the Statute of Catalonia. The terms wherein said involvement should be overseen are laid down by the State. The decision of the Constitutional Court in Ruling 50/2006 to consider said management as coming under the auspices of the Public Treasury and not the Justice Administration (which subsequently excludes application of subrogation clauses) will, however, make it

difficult for the Autonomous Communities to achieve any relevant involvement in the matter.[26]

Finally, with regard to the issue of the judicial office (Article 105 of the Statute of Catalonia), the Statute recognises the *Generalitat* as being competent to "establish the creation, layout, organisation, equipping and running of judicial offices as well as of those who provide support services for jurisdictional bodies," under the framework set out in the LOPJ.

Other Matters

Finally, the Statute of Catalonia exercises control over other matters: the position of the Chief Public Prosecutor in Catalonia, to be occupied by the Chief Public Prosecutor of the Supreme Court of Justice, the capacity to put forward proposals regarding a review of judicial demarcation and institutions, competences concerning the organisation of free legal services, or Justices of the Peace or, finally, inclusion in Article 109 of the Statute of Catalonia of the subrogation clause that, taking into account the detail with which the Statute describes the *Generalitat's* powers in all areas, is unlikely to stand much chance of being applied, unlike in the previous Statute.

The Relationship between Statutes and the LOPJ in Constitutional Court Ruling 31/2010

As has been seen, the Statute of Catalonia (and the Statute of Andalusia whose regulation is practically identical,) seeks to exhaust as far as it can all the possibilities for Autonomous Community involvement in the area of justice administration. Said attempt still understandably leaves the model some way off from judicial federalism as the Constitution affords no room for this whatsoever, although at least there is an attempt to explore the possibilities that the Constitution allows.

The next question to be asked is whether the Constitution really does allow such an attempt to be made. The key lies in ascertaining the role and scope of the reserve that the Constitution makes for the LOPJ, and in determining whether said reserve totally excludes statutory intervention in a series of areas (full reserve in favour of the LOPJ in all instances), or whether it accepts statutory cooperation in some (relative reserve), it naturally being understood that the LOPJ will always have the final say.

Understandably, Statutes are based on the second interpretation, and seek to regulate on a series of matters that to date they had not addressed, whilst constantly remitting to the LOPJ. This leads to inter-normative cooperation where the Statute proposes certain regulation covering the areas already pointed out. However, it is the LOPJ that must ultimately merge these proposals and "activate them." This does not mean that there is any obligation for those legislating on organic laws, as they may opt

[26] For this, see Gerpe Landín and Cabellos Espiérrez (2006), pp. 1073–1086.

not to do so, or to regulate the matter in question differently, in which case said legislator's decision would prevail. Yet, in any case, it would seem logical to assume that, with both norms (Statutes and LOPJ) emanating from the same legislator (albeit in the case of the Statutes with the prior intervention of the other), the provisions of the former norm would be accepted by the latter.

Title III of the Statute of Catalonia was also challenged. We cannot here enter into a detailed analysis of the content of the Constitutional Court's ruling regarding this Title,[27] although we can, however, examine its basic essence. The appeal was based on the grounds that the Statutes are totally unsuited to regulate on any issue that might be affected by constitutional reserve in favour of the LOPJ. Therefore, the basis used is an extremely broad concept of absolute reserve towards the latter that would completely exclude statutory norm intervention under any system. In their arguments, the Catalonian government and parliament understood that absolute reserve could be applied in areas specifically set out by the Constitution, but that beyond these, a relative reserve was applicable where statutory cooperation did prove admissible, and where statutory regulations might even be able to omit what was set out in the LOPJ.[28] The Attorney General underlined this idea of cooperation, yet without subscribing to the latter argument, based on the distinction between validity and effectiveness of statutory norms in the matter of justice administration. In order to prove valid and effective, statutory norms would require the LOPJ to adopt statutory regulations, thus being unable to claim that they were effective if the LOPJ did not do likewise.

The Court accepts this idea of inter-normative cooperation with the predominance of the LOPJ in most of the issues put before it, yet, as we shall see, distances itself from said cooperation regarding the matter of Councils of Justice. However, before exploring this question, it is worth highlighting to what extent the Court deems any hint of

[27] See Gerpe Landín and Cabellos Espiérrez (2011), pp.302–330; Porras Ramírez (2011), pp. 331–362; Aparicio Pérez (2010), pp. 199–205. For how the ruling addresses the issue of the Council of Justice, see Cabellos Espiérrez (2011), op cit., passim, and Cámara Villar (2011), pp. 197–220.

[28] "If statutory provisions hold any place in the Constitution it is that they respect the reserves in favour of the Law on the Judiciary, reserves which should link to an opening-up of the constitutional model that structures the organisation of judicial power, an opening-up which could not make itself dependent upon the content which at each moment said Organic Law might have. With regard to this point, there is insistence on the need to distinguish between the areas of absolute reserve and relative reserve, since the relation between Statute and Organic Law is not a matter of competence, but rather one of respect for the absolute reserve which the Constitution contains in favour of the basic nature of judicial power. Constitutional reserves that favour Organic Laws are expressed in broad terms, the legislator being able to choose from amongst a number of different legitimate options which are constitutionally applicable. By approving the Statute, the state legislator has opted for one of those choices without infringing upon the absolute constitutional reserve favouring the Law on the Judiciary. In order to determine the constitutionality of statutory provisions relative to judicial power, they should not be compared with a Law on the Judiciary which goes beyond the constitutional area of reserve" (summary issued by the Court of the arguments put forward by the *Generalitat* in Legal basis 42 c).

judicial federalism to be impossible, in a declaration that is as emphatic as it is unnecessary, vis-à-vis the judgements it had to make. The Court indeed states that:

> Normative systems (. . .) produce their own rules based on the application of certain legislative and executive powers which are also their own. Yet, jurisdiction, through which such rules are endowed with a final form and content, is always and solely a function of the State. In sum, if the Autonomous State starts off with a single Constitution it will also conclude with a single jurisdiction, the diversity of bodies and functions being contained in the stages of the normative process which mediates between the two extremes. In the sphere of normative specificity, the unity of jurisdiction and judicial power is thus the equivalent of the unity of the constituent will at the abstract level (Legal basis 42).

Such a firm declaration is based on premises that are more than debatable. For a start, as Aparicio Pérez has highlighted, if we heed the words of the Court, all norms will lack "final form and content" until they are applied by the courts and will, in the contrary, remain provisional, a view that most certainly does break new ground.[29] The Court also fails to state which body should apply the rule or how many times it needs to be applied, etc., for it to be understood as final. Moreover, said unity between the two extremes does not in fact exist since, as Aparicio points out, in one of them the unity of jurisdiction and judicial power is not apparent to the extent and degree that the ruling would have us believe.[30] Yet, despite all this, the conclusion that the Court gives is equally conclusive:

> By principle, the territorial structure of the State is irrelevant when it comes to either judicial or state power. The Constitution restricts the relevance of the principle of autonomy in the area of jurisdiction to very specific terms that make the Autonomous Communities one of the key units of the legal power structure over the whole country. Therefore, such a territorial organisation in Autonomous Communities is valid as a criterion for demarcating jurisdictional bodies and procedural authorities, and does not interfere with the fact that they are integrated in State power. Having been assured its essence through attribution to the State of exclusive competence in the matter of justice administration, this basic functional unit is perfectly compatible with Autonomous Community recognition of certain competences in the area of "administration of justice administration," when the latter results from their control over their own competences related to purely administrative affairs that serve national jurisdictional power (Legal basis 42).

Commencing thus ("By principle, the territorial structure of the State is irrelevant when it comes to either judicial or state power"), it is indeed surprising that the Court did not rule the whole of Title III of the Statute to be unconstitutional. In fact, it not only failed to do so but indeed embraced the opinion of the Attorney General concerning validity without effect in order to save all of the statutory regulations that had been

[29] Aparicio Pérez (2010), p. 201, op cit.

[30] As Aparicio Pérez also points out (op cit., pp. 201–202) there is no single jurisdiction (there is also that of the Constitutional Court, the European Court of Justice, the European Court of Human Rights . . .), and judicial power "does not operate solely in the area of normative specification for many reasons: many cases perish in the higher courts and others do so before even reaching them. The nature of the source of legal decisions is by no means clear, nor is the level which they occupy, and the often invoked unity of power can only in truth be attributed to the Constitutional Court, which does not form part of judicial power."

challenged, except with regard to the Council of Justice,[31] where it was deemed unacceptable that the Statute should contain any regulation thereon. However, instead of declaring the unconstitutionality of the whole, it declared only a part to be unconstitutional, allowing the continuance of a Council of Justice perceived merely as an advisory body within the Autonomous Community, and one bearing no relation to what the Statute had sought to establish (a decentralised body of the CGPJ).[32]

Therefore, this point dispenses with the concept of inter-normative cooperation that had been accepted in the remaining issues (some of which were by no means minor questions, such as regulation of Supreme Court of Justice competences, an issue which the EAC insisted on in a manner that would have meant it having to be declared unconstitutional if the same criterion as was applied to the Council of Justice had been applied in this instance). For the Constitutional Court:

> Based on the constitutional structure of judicial power cited in previous legal bases, the Statute of Catalonia clearly exceeds itself when creating in Article 97 a Catalonian Council of Justice, which it describes as a "governing body of judicial power in Catalonia" that would act as a "decentralised body of the General Council of the Judiciary." Judicial power (whose organisation and functioning are based on the principle of unity *ex* Article 117.5 of the Spanish Constitution) can have no other governing body than the General Council of the Judiciary, whose statute and functions are expressly reserved for those legislating on organic laws (Article 122.2 of the Spanish Constitution). In such conditions, there is clear infringement of Articles 122.2 and 149.1.5 of the Spanish Constitution, in application of previous decisions (for all, Constitutional Court Ruling 253/2005, dated 11 October, Legal basis 5), as no entity other than the General Council of the Judiciary may govern the jurisdictional bodies included in judicial power, which is exclusive to the State. Nor may any law other than the Law of Judicial Power determine the structure and functions of said Council giving rise, vis-à-vis the matter in hand and whenever applicable, to possible decentralised structures, the existence and organisation of which, as they are not essential in constitutional terms, is to be determined by decision of those legislating on organic laws, applying the constitutional limits previously expressed (Legal basis 47).

Stating that no entity other than the General Council of the Judiciary may undertake any governing function for jurisdictional bodies would seem to ignore the functions carried out by the governing chambers of the Supreme Courts of Justice, Chief Justices, and so on. Moreover, declaring that no law other than the Law on the Judiciary may determine the structure and functions of said Council means, as pointed out, radically dispensing with prior acceptance of the Statute as a rule that might put forward regulatory proposals to the LOPJ that the latter could then accept.

Summary

Introducing any changes in judicial federalism in Spain is impossible without constitutional reform, a fact which the Court has reminded us of. However, this was made in a manner that is unnecessarily conclusive and dogmatically debatable,

[31] In this regard, see in detail Gerpe Landín and Cabellos Espiérrez (2011), pp. 313–321, op cit.

[32] See Cabellos Espiérrez (2011), op cit, passim.

as was seen previously when pointing out the stipulations of legal basis 42. Yet, statutes such as the Catalonian or Andalusian (and others to a far lesser extent) did not seek to introduce any hint of federalism. What they intended, rather, was solely to benefit from any gaps that still remain open on the road to adapting judicial power to the current model of the State, albeit in modest terms. Here the Court's behaviour is inconsistent, since in most instances it is prepared to embrace for the majority of cases such a prudent approach as the one adopted by the Attorney General of accepting the validity without effectiveness of statutory norms and pre-eminence of the LOPJ. At least from a legal standpoint, it is extremely difficult to ascertain why the Court totally changes its criterion regarding the matter of the Council of Justice and why, rather than also stating that such a Council will only exist when and how the LOPJ decides, the Court issues a ruling to the effect that regulating over and converting said body into another (overriding the will of the legislator in the process) is (moreover, only partially) unconstitutional, the statutory norm meanwhile having been deemed valid but without effect.

The possible scope for Autonomous Community involvement in the area of justice administration thus remains slight, although it is up to the will of the LOPJ to give life to these valid yet ineffective regulations and even to reconsider the issue of establishing Councils of Justice as decentralised bodies. This will depend on the political climate at each particular juncture. Moreover, with the concept of validity remaining without effect, statutory norms may emerge as effective at a given point in time, and subsequently (through further reform of the LOPJ reversing the situation) become ineffective, such is the precarious nature of the adaptation that judicial power has undergone in the latest statutory reforms. Going any further would imply constitutional reform, which in Spain, unlike in most other composite states, is virtually impossible, at least in light of the experience of the last 30 years that have witnessed only two extremely limited reforms.

References

Aparicio Pérez, M.A., "Jueces y justicia en la Constitución Española", in Asensi Sabater, J. (ed.), *Ciudadanos e instituciones en el constitucionalismo actual*, Tirant lo Blanch, Valencia, 1997, pages 969–971.

Aparicio Pérez, M.A., "Comentario a la STC 31/2010. Sobre el Poder Judicial", *Revista Catalana de Dret Públic*, special issue on ruling 31/2010, pages 199–205.

Arozamena Sierra, J., "El principio de unidad jurisdiccional", in *Estudios sobre la Constitución Española. Homenaje al profesor Eduardo García de Enterría*, Civitas, Madrid, 1991.

Balaguer Callejón, F., "Poder Judicial y Comunidades Autónomas", in *Revista de Derecho Político*, 47, 2000, pages 53–68.

Cabellos Espiérrez, M.A., "La adecuación del Poder Judicial al modelo de Estado", RVAP, 68, 2004, pages 77–124.

Cabellos Espiérrez, M.A., "Los Consejos de Justicia en el actual proceso de reformas estatutarias y sus perspectivas de futuro", *Revista de Derecho Político,* 80, 2011, pages 89–116.

Cámara Villar, G., "Reformas estatutarias y consejos autonómicos de justicia a la luz de la doctrina del Tribunal Constitucional", *Teoría y Realidad Constitucional*, 27, 2011, pages 197–220.

Cappeletti, M., *The judicial process in comparative perspective*, Clarendon Press, Oxford, 1989.

Comba, M., *Esperienze federaliste tra garantismo e democrazia. Il "judicial federalism" negli Stati Uniti*, Casa Editrice Jovene, Napoli, 1996.

Gerpe Landín, M., "La regulació estatutària i la seva delimitació per la Llei Orgànica del Poder Judicial", in *Informe Pi i Sunyer sobre la Justícia a Catalunya*, Fundació Pi i Sunyer d'Estudis Autonòmics i Locals, Barcelona, 1998, pages 52–57.

Gerpe Landín, M., and Barceló Serramalera, M., *El federalismo judicial*, IEA, Barcelona, 2006, pages 19-20

Gerpe Landín, M. y Cabellos Espiérrez, M.A., "La gestión de los depósitos y consignaciones judiciales", *Revista Jurídica de Catalunya¸* 105, vol. 4, 2006, pages 1073–1086.

Gerpe Landín, M. y Cabellos Espiérrez, M.A., "La regulación estatutaria del Poder Judicial y su tratamiento en la STC 31/2010", *Revista d'Estudis Autonòmics i Federals*, 12, 2011, pages 302–330.

Heyde, W., "La Jurisdicción", in Benda, Maihofer, Vogel, Hesse and Heyde, *Manual de Derecho Constitucional*, Marcial Pons/IVAP, Oñati, 1996, page 767

Jimena Quesada, L., *El principio de unidad del Poder Judicial y sus peculiaridades autonómicas*, CEPC, Madrid, 2000.

Jiménez Asensio, R., *Dos estudios sobre Administración de Justicia y Comunidades Autónomas*, IVAP/Cívitas, Madrid, 1998.

López Aguilar, J.F., *Justicia y Estado Autonómico*, Civitas, Madrid, 1994.

Lucas Murillo de la Cueva, P., "La posició del Poder Judicial a l'Estat Autonòmic", in *Autonomia i Justícia*, vol. IV, Barcelona, Generalitat de Catalunya, 1998.

Lucas Murillo de la Cueva, P., "El Poder Judicial en Andalucía y las competencias autonómicas en materia de justicia", en Muñoz Machado, S., y Rebollo Puig, M., dirs. *Comentarios al Estatuto de Autonomía para Andalucía*, Thomson-Civitas, 2008.

Porras Ramírez, J.M., "El Poder Judicial en Cataluña, según el Estatuto y el Tribunal Constitucional. Limitaciones y posibilidades de desarrollo de un modelo", *Revista d'Estudis Autonòmics i Federals*, 12, 2011, pages 331–362

Reverón Palenzuela, B., *Poder Judicial, unidad jurisdiccional y Estado autonómico*, Comares, Granada, 1996.

Ruiz, G., *Federalismo judicial (el modelo americano)*, Civitas, Barcelona, 1994.

Sáiz Garitaonandia, A., *La Administración de Justicia en las Comunidades Autónomas. Situación actual y perspectivas de reforma*. Tirant lo Blanch / IVAP, Valencia, 2009.

Organic Laws of Transfer or Delegation (Article 150.2 SC): An Open Door to the Modification of the Constitutional Distribution of Competences

Juan María Bilbao Ubillos

In the Spanish legal system, which is based to a large extent on the affirmation of the dispositive principle, the Constitution is not the only legislation that regulates the distribution of competences. Other infraconstitutional norms complete this operation of demarcation or delineation. It is, in fact, the Statute of Autonomy, as a basic institutional law of each Autonomous Community, which determines "the competences assumed within the framework established in the Constitution" (147.1.d). However, the Statute is a rigid norm, which can only be reformed via a complex process involving the participation of the institutions of the Community itself. Constitutionally recognised autonomy is guaranteed precisely for that reason, because the State cannot unilaterally modify the Statute, without the consent of the institution that represents the citizens of the Community.

The Laws of Article 150 SC: The Extra-Statutory Attribution of Competences

The picture resulting from the assumption by the Statutes of Autonomy of the competences not exclusively reserved for State by Article 149.1 SC may be altered by an extrastatutory attribution of competences to the Autonomous Communities. The Constitution provides in Article 150 for the possibility of modifying in one sense or another, and by way of exception, the distribution agreed upon in the different Statutes, via the approval of three types of law that integrate the constitutional block. Implicit within this provision is an important concept: the distribution of competences between the State and the Autonomous Communities cannot be regarded as definitively closed, forever, when the Statutes reach the ceiling established in the Constitution. Thus is

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introduced an element of flexibility, of openness and dynamism, into the constitutional model, which facilitates its adaptation to new circumstances.[1]

In its first two paragraphs, Article 150 SC offers the possibility of extending the competences assumed in the Statutes, via two instruments that allow for the transfer to the Autonomous Communities of competences exclusively reserved for the State, which is somewhat contradictory or paradoxical. The door is left open for a development of the system in a centrifugal sense, of expansion of the competences of the Autonomous Communities, for a further turn of the screw in the process of decentralisation, an endless process that may be restarted or reactivated when deemed appropriate. However, it must be said, only following a unilateral decision by the State and under conditions that ensure the reversibility of that decision.

The fact is that these are two barely explored paths, which would partly explain the uncertainty surrounding everything related to this sort of escape hatch or valve provided for by the legislator. Everything is debated, no academic consensus has been reached with regard to the peculiar features of each of these concepts.

a) The first modality, little used to date, is the so-called framework law anticipated in section 1° of this provision: "Parliament, in questions of state competence, will be able to attribute to all or some of the Autonomous Communities the possibility of issuing for themselves legislation within the framework of the principles, basic laws and directives established by a state law."[2] In this case

[1] This possibility of making more flexible model of distribution of competences without modifying the Constitution, via transfer to the Autonomous Communities of competences belonging to the State (the inverse hypothesis is not contemplated) is not provided for in other systems. Certainly not in the United States (the Federation cannot transfer competences to the States), in Austria, in Belgium (it is only possible between regions and communities), or in Germany (the Federation may delegate competences to the States—the exercise of regulatory power, for example—in cases specifically provided for in the Constitution). It is possible in Switzerland, Mexico (via the agreements provided for in point VII of Art. 116 of the federal Constitution), in Brazil (a law may authorise States to legislate on matters whose regulation corresponds to the Federation). In Italy it is not possible to alter the constitutional distribution of legislative competences, but it is possible to delegate to the regions de regulatory power in matters reserved for State legislation; as in Canada (only administrative delegation). Australia allows the transfer of legislative powers under certain conditions, but only in the opposite direction (from States to the Commonwealth) and the same occurs in India (the Federation may pass laws on matters of State competence in situations of emergency or to protect the national interest). See Argullol and Velasco (2011), pp. 375–385.

[2] To date, no law has been passed with that name or label of Framework law, but various laws of cession of taxes to the Autonomous Communities (laws 25 to 36/1997 and 17 to 31/2002, passed with the aim of initiating two successive reforms of the system of autonomous financing the objective of which was increase financial co-responsibility), invoke Article 150.1 as a basis for the attribution to these Communities of regulatory capacity over those taxes made over (ownership of which continues to correspond to the State). And the content of these laws certainly fits into this category, because it is a revocable cession of regulatory powers that in principle correspond to the State (and which the Autonomous Communities have exercised above all to establish deductions). A different question is whether this cession fulfils the conditions required in the constitutional provision: on the one hand, the establishment of principles, bases and directives (of the "scope and conditions" of the cession) is achieved via a generic referral to Laws 14/1996, of December 20, of cession of State taxes to the Autonomous Communities and 21/2001, of December 27, which regulates the fiscal and administrative measures of the new system of financing of the Autonomous

the attribution is carried out via ordinary law, is revocable and Parliament retains control over this legislation (that is added to that which might eventually be exercised by the Constitutional Court), the scope of which is established in each case by the law itself. Something akin to a basic law (an instance of legislative delegation). However, as in the case of the laws of 150.2, there are competences that by their very nature cannot be delegated, because they form part of the hard core of powers exercise of which is inherent to the very existence of the State. Neither does this operation fall within questions reserved for organic law. Unlike the delegated legislation, which is exhausted by its exercise one single time, this delegation permits a continuous or successive exercise of legislative power, with no time limit, provided it is not revoked.[3] The autonomous law has to adapt to what is set out in state law. And violation of these principles established in the framework law would determine the nullity of the autonomous law. In any case, possession of the competence continues to correspond to the State, which can recover it at any time, via derogation or modification of the framework law.

b) Another possibility of extension of the repertoire of competences of the Autonomous Communities is that which is contemplated in paragraph 2: "the State will be able to transfer or delegate to the Autonomous Communities, via organic law, powers corresponding to areas of state ownership which are by nature liable to transfer or delegation." This would be, then, a unilateral decision by the State, revocable at any time by Parliament itself. Or more accurately, by the organic legislature, because it is a law that does not fall within ordinary legislature. The law "will provide in each case for the corresponding transfer of financial means, as well as the forms of control reserved for the State." Unlike the previous one, this paragraph has indeed been applied on various occasions, although not always in a correct or canonical manner. Because, as we shall soon see, has been used as an

Communities in the common system, respectively, laws that establish the general system of this cession, on the understanding that possession of regulatory competences and those regarding management of taxes made over corresponds to the State (Art. 37.1 of Law 21/2001). This latter norm has been derogated by the current Law 22/2009, of December 18, under which were passed Laws 16 to 30/2010, of July 16, which establish the scope and the conditions of the cession of State taxes to the 15 Communities in the common system. In Art. 2.2 of each of these Laws, there is a specific appeal to Art. 150.1 SC: "According to the provisión of article 150.1, the Constitution vonfers upon the Autonomous Communities the power to enact legislation for themselves within the framwerk of the principles, bases and guidelines provided for in Law 22/ 2009." Meanwhile, the formulae of parliamentary control that are implemented in all these laws are clearly insufficient (a political control of preventive character is established which consists in the obligation of referring to the Senate General Committee on the Autonomous Regions the draft laws elaborated in the exercise of ceded regulatory powers, prior to their definitive approval). See J.A. Montilla: "Art. 150. Ley marco. Ley orgánica de transferencia y delegación. Ley de armonización," in *Comentarios a la Constitution Española. XXX Aniversario*, directed by Casas and Rodríguez-Piñero (2008), pp. 2515–2516; and A. Carmona: entry "Ley marco," in *Temas Básicos de Derecho Constitucional*, directed by Aragón and Aguado (2011), p. 434.

[3] Logically, the attribution of legislative power involves the cession of the corresponding regulatory power to develop and define legal provisions (A. Carmona, op. cit., p. 433; and J.A. Montilla, op. cit., p. 2514).

expediente or previous step for the subsequent reform of the Statutes. And not to exceed or perforate the ceiling of Article 149, but to approach that limit.

The Organic Laws of Transfer or Delegation

Precedents

In search of a precedent for this concept we can go back to the Republican Constitution of 1931, Article 18 of which went as follows: *All areas not explicitly attributed by its Statute to the autonomous region, shall be deemed as pertaining to the competence of the State; but the latter will be able to distribute or transmit the powers by means of a law.*

Of more interest to us are the vicissitudes of the process of elaboration of the provision in question. The contents of Article 150.2 of the current Constitution were reflected, in not dissimilar terms, in the first paragraph of Article 139 of the Preliminary Draft:[4] *Se podrá autorizar por ley la asunción por parte del Territorio Autónomo de la gestión o ejecución de los servicios y funciones administrativas que se deriven de las competences que correspondan al State de acuerdo con la precedente relación.* The most significant element of this regulation is the specification with regard to the object of the delegation: it will only be possible to authorise the transfer of powers of management or execution, with the exclusion thereby of legislative powers.

Although some amendments presented were aimed at suppressing this section of the provision,[5] the fact is that the influence of the nationalist groups, which were well disposed towards a clause that opened the door to a redistribution of competences, beyond even the limit established in Article 149.1, and even "restauración foral," was apparent in the text that was finally approved, which in this aspect modified the initial, less ambitious, draft. Indeed, the report designed for the study of the amendments presented for the Preliminary Draft eliminated the reference to the administrative

[4] Published, along with the dissenting votes, in the BOC n° 44, of January 5, 1978.

[5] N° 35, p by Licinio de la Fuente (AP) proposed the suppression of point 1° of Article 139 on the grounds that it rendered virtually ineffective the provisions of the previous articles. In his intervention in the full Parliamentary session in defence of the amendment (BOC, Parliament, n° 115, July 20, 1978, p. 4510 and ss), this MP pointed out that it made no sense when the list of competences exclusive to the State had just been published immediately and unconditionally to declare that these functions Could be delegated to the Autonomous Communities. The constitutional reserve was thus rendered powerless, as it could be nullified by a specific electoral majority, leaving the State unprotected. To include this provision is "to keep alive a permanent state of demand. . . (. . .). Not to satisfy these demands, alter provoking them, would lead to a state of frustration. To satisfy them for all the Communities would lead to a disarming, a dismembering of the State . . ." And on the other hand, "delegating to some Communities but not to others, would lead to deep inequality between Spaniards" and would generate discrimination.

character of the functions that the State can delegate.[6] And the Ruling of the Senate Constitutional Commission includes the draft that would become definitive.[7]

Powers Which Can Be Transferred or Delegated

According to Article 150.2, "Powers corresponding to areas of State ownership" may be object of delegation or transfer. Therefore, it is possible to cede some or all powers over any area of State ownership to one or several Autonomous Communities, provided they are powers exclusively held by the State. (Art. 149.1 SC) or by virtue of the residual clause (Art. 149.3 SC), in other words, powers not yet assumed by the Autonomous Community via the Statute. For some authors it is not possible to transfer or delegate an area as a whole, integrally. Others, meanwhile, believe it is possible, because the limit lies not in the quantity of powers but in their nature.

And indeed, it is one of the most debated questions. Initially, what prevailed in the literature was the thesis that the legislator, who had provided for the assignment of legislative powers to the Autonomous Communities in the previous paragraph (duplication would make no sense), referred solely to the transfer of executive powers, an interpretation supported by the mention in the final clause of the transfer of financial means. However, this reading was not particularly convincing. Firstly, because the provision does not exclude the possibility of transferring regulatory powers. Secondly, because the delegation of executive powers be agreed by an organ that holds the ceded powers. Thirdly, because it does not seem logical that for the delegation of executive powers a more agravado procedure is provided for (organic law) than for the cession of legislative powers (ordinary law). And fourthly, because strictly speaking this is not a case of duplication between the first two paragraphs of Article 150: in 150.1 the transfer of Powers is not conceived as an instrument of redistribution of competences but as a technique of regulatory collaboration between two bodies, of the same type as the legislative delegation of Article 82 SC, with the peculiarity that the receiving body (the autonomous Parliament) is integrated into a different organisation.

And, in fact, the most restrictive interpretation was soon refuted by the very application of the provision, specifically with the approval of the organic laws 11 and 12/1982, of August 10 (LOTRACA and LOTRAVA), whilst the respective Statutes were approved via Article 143 SC. These laws would transfer legislative competences to the Canary Islands and Valencia, subject, certainly, to particular conditions and controls. With this precedent, it should surprise nobody that of the

[6] Article 143: "The State may delegate to the Autonomous Communities, via organic law and following request thereof, the execution of functions of State ownership." The modification was not a consequence of the specific acceptance of a particular amendment, although it could be influenced *in voce* by the one presented in the session of the Constitutional Commission of Congress held on June 20 by the PNV MP Arzallus, by virtue of which the State cold transfer or delegate *matters of its competence*. Neither does the report offer an explanation of the decision adopted.

[7] BOC, n° 157, October 6, 1978, p. 3443.

seven laws so far approved under Article 150.2, five have transferred legislative powers.[8]

The Transfer/Delegation Binomial

Article 150.2 SC makes express reference to both terms, but does not clarify what the difference is, if one exists, between these two modes or techniques of transfer of competences. There has been an extensive discussion on the scope and meaning of these two terms in this context. And of the legislature's freedom to choose one modality or the other. One sector of the literature circulated the theory that they are different notions or categories, with a different legal system too, understanding by transfer an attribution of ownership and exercise of the competence to another organ or body and by delegation, the cession of the exercise (not of the ownership), limited to executive powers and with broader controls. For others, transfer involves an operation of decentralisation, understood as competent to decide issues without submission to the la ***tutela*** or control of another superior subject, while delegation is a modality of deconcentration: the organ delegated to is competent to resolve definitively in its own name, but under the supervision and tutela of the delegating organ.

However, a no less qualified sector of the literature[9] disagrees with this focus and considers that in both cases what is transferred is only the exercise of the competence, not the ownership. Evidence of this would be the power reserved for the State to revoke. Although Montilla does not detect the existence of qualitative differences, he does admit differences of degree, nuances: control tends to be more intense, (even of suitability) in the laws of delegation, qualified only to cede executive powers.[10] And this is certainly the guideline observed, in general terms, in the laws passed so far. In any case, referred to in Article 150.2 SC is not comparable to the homonymous administrative figura, because the delegation is not agreed by the organ in possession of the executive powers and the relationship between transferor and transferee is not, as in the administrative sphere, of subordination or hierarchy.

Although in practice it is possible that the term *transfer* has been reserved for more significant and les conditioned cessions, there are no compelling reasons for affirming that there are areas that can only be delegated (those of Article 149.1) and others liable

[8] Nevertheless, in its Report on modifications to the Constitution (2006) and more specifically in the paragraph concerning the possible reform of Art. 150.2, the Council of State suggests, to avoid serious problems arising from abusive or excessive use of this potentially disruptive instrument, deliberately avoiding the possible transfer or delegation of executive or Management powers. But it is aware that such an option is not politically feasible (it would be interpreted as a step backwards, like a slap in the face).

[9] Montilla (1998) pp. 189–193 and 323 would be its principal exponent.

[10] Op. et loc. cit.

to delegation or transfer (those of 149.3).[11] In both cases, the Constitution enables the State to reserve for itself formulae of control over exercise and in both cases it is also possible to modify or revoke the cession. The Constitution authorises the organic legislature to classify each operation of transfer of competences in one way or another. It will be the specific circumstances of each case, such as the area involved in the transfer, the scope of the powers intended for transfer and the controls the State reserves for itself, which will incline the legislator towards one classification or another.[12]

Limits

The Constitution imposes a limit upon the organic legislator: it can only cede powers *that by their very nature are liable to transfer or delegation*, which appears to exclude the transfer of those related to areas (defence or foreign affairs, amongst others) where, as the Constitutional Court has stated, the Autonomous Communities cannot have their own policy.

The debate over non-transferable areas or powers dates from the constitution-making process. Since then, two possible interpretations have circulated:

a) The transfer of competences only applies to areas that correspond to the State by virtue of the residual clause of Article 149.3 SC.[13]
b) There are no material limits to the transfer in the list in 149.1, which, incidentally, in many cases already opens the possibility of participation of the Autonomous Communities (via legislation of development or competences of execution), but in the hard and indomitable core of sovereignty. During the constitution-making debate, the idea of a list of non-transferable areas was abandoned and there was inclusion of (amendment *in voce* by Pérez Llorca) the reference to the "nature" of powers, a limit that would operate only with regard to the areas reserved for the

[11] Thesis defended at the time by Aja y Tornos (1992), p. 191. Against, C. Viver Pi-Sunyer: entry "Transferencia y delegación de competencias del Estado a las Comunidades Autónomas," in Temas Básicos de Derecho *Constitucional*, directed by Aragón and Aguado (2011), p. 437.

[12] In the aforementioned report and in order to simplify the current text, which creates considerable confusion by referring to transfer and delegation as alternative options, the Council of State was in favour of abandoning this binomial and employing only the term "transfer," or that of "delegation," or perhaps that of "cession." With the majority of the opinion that there exist no qualitative differences justifying this disjunctive, there is not much sense in maintaining a duality the uncertain meaning of which is beyond comprehension. What would make sense, however, is to clarify, to dispel any doubts in this regard; that what is ceded via this procedure is only the exercise.

[13] This is a position defended by Ruiz-Rico (2001), pp. 211–212. For this author, it is necessary to respect the constitutional division of attributions between State and Autonomous Communities: "it would not be logical to hand over to the constituted power (unilateral organic legislature) the discretional power to subvert the autonomous model in questions of competences." Article 149.1 SC would be an unsurmountable limit. The State cannot abdicate its responsibilities.

State in Art. 149.1 SC, not with respect to those it possessed via application of Article 149.3 SC.

A majority of authors maintain that there are no areas that can be neither transferred nor delegated.[14] On careful examination, what is most relevant is not the area, but the degree of power that is transferred, the kind of powers and the controls provided for. Thus, in the field of defence, control of the Armed Forces is not the same as the measurement of conscripts prior to carrying out the now extinct military service, an administrative task that could quite easily be transferred. There are few areas so directly linked to state sovereignty that they do not allow for a cession of certain powers, at least on a level of mere execution. If, on the other hand, we establish a strict material limit on the transfer of powers, we are condemning this technique of extension of competences to ineffectiveness or sterility.

The limit established in Article 150.2, which is somewhat tautological (the very aptitude for cession), cannot be interpreted as a political limit, as a simple referral to the political judgement, of pure convenience or opportunity, of the legislature. It refers rather to competences inherent to the exercise of sovereignty and to the preservation of the unity and cohesion of the State, to the necessary degree for it comprehensively to fulfil the functions with which it is charged. A notion that admits various interpretations. In any case, this clause, which should always be interpreted in the context of the other constitutional provisions (systematic interpretation), cannot be used to cover up an emptying of competences of the central organs of State.

What criteria should be applied when determining whether the powers ceded are liable to transfer or delegation? Unlike the competences assumed in the Statutes, which are clearly limited by the list in Article 149.1, here the canon of validity is more general and imprecise. Reasonable parameters that may act as a reference when making this judgement are the model of State designed in our Constitution, which must be respected, and the very subsistence or continuity of the State. From the constitutional model of territorial organisation of power G. Ruiz-Rico[15] has drawn three general limits:

a) The principle of state unity, compatible with profound political decentralisation. This is not an invocation of national unity or sovereignty, in support o fan indivisible constituent power, because that is not a limit, but the prerequisite (prior political fact) for the existence of the State, but rather unity of action and direction of the State. What this principle seeks to highlight is that the State must be conceived of as principal (and not residual) organisation of power, in such a way that its powers or competences cannot be transferred in an unlimited manner to the Autonomous Communities. If central State authorities renounced the exercise of competences essential to the fulfilment of their obligations, the constitutional model would be distorted, which would seriously threaten the very survival of the State. The definition of Powers whose cession is compatible with the principle of unity of

[14] See, for all, Rodríguez de Santiago and Velasco (1999), p. 110.

[15] Op. cit., p. 221 and ss.

action and direction of the State's powers of control over can only be undertaken case by case. However, with this condition certain specific limits could be established, such as the non-transferable character of the State's powers of control (Articles 153 and 155 SC) over the exercise by the Autonomous Communities of their competences. Or the competences that in numerous paragraphs of Article 149.1 are attributed to the State to issue basic legislation, a competence to define the legislative common denominator that, logically, cannot be ceded to an Autonomous Community.

b) The principle of equality, as an element inherent also to constitutional order, both in its dimension of equality between territories, and in that of equality between citizens.[16]

c) The principle of economic unity, which implies the existence of one single economic order or space. As is stated in Article 139.2 SC, this is embodied in the guarantee of freedom of circulation of people and goods throughout national territory and in the state's competence over global direction of the economy (149.1.13: *bases and coordination of general planning of economic activity*). What would not be permissible, in constitutional terms, is a cession of state powers that could jeopardise that market unity.

On this question, attention should be paid to a recent declaration by the Constitutional Court that reveals a restrictive vision of the radius of action of this instrument. I refer to Ruling 32/2011, of March 17, which appraises the appeal of unconstitutionality lodged by the Government of Extremadura against Article 75.1 of the Statute of Castilla y León, reformed in 2007. The Plenary does not limit itself to a declaration of the nullity of the contested provision due to violation of Art. 149.1.22 SC, but goes further and rejects the possibility of a future assumption of competences vis-à-vis the

[16] The former is reflected in Articles 2 and 138.1 SC and should be understood not as a mandate of uniformity, but as a limit to diversity, with the objective of reducing disparities and guaranteeing all a minimum level. The formal equality of Spaniards is guaranteed in its specific territorial projection by Article 139.1 SC. In principle, we all enjoy the same rights (at least the rights recognised in Title I of the Constitution) and we have the same obligations anywhere in national territory. In the same way that the differences between the Statutes of the different Autonomous Communities may in no case imply economic or social privileges (Art. 138.2 SC) neither can the organic laws of Article 150.2 be the cause of discrimination between Spaniards. The fact of transferring or delegating powers to one Autonomous Community and not to others is not in itself discriminatory (the differences may be based upon reasonable motives). A different question is the cession of powers the State needs to guarantee that *minimum* or basic substratum of equality in the enjoyment of rights. Thus, the transfer of State legislative power to regulate the exercise of a fundamental right in its integrity would mean the loss of the capacity to ensure substantial equality in the enjoyment of the right. It is worth remembering that the power of the Autonomous Communities to regulate the exercise of constitutional rights with regard to matters of its competence, is limited by another enabling provision of the State, derived from Article 149.1.1 CE: to it corresponds "regulation of the basic conditions guaranteeing the equality of all Spaniards in the exercise of their rights and in the fulfilment of their constitutional duties."

water of the Duero Basin via their transfer through an organic law of the type provided for in Art. 150.2.[17]

Controls

This is a crucial aspect. Far from constituting a blank cheque, the cession provided for in Article 150.2 is subject to certain conditions. Unlike what occurs with competences assumed via the Statute by Autonomous Communities, exercise of which is not subject to a general power of correction on the part of the State (apart from the exceptional mechanism of Article 155 and the legal controls provided for in Article 153), in the case of powers ceded via Article 150.2, the State's powers of supervision are intensified. At the very least, the State reserves for itself the power to revoke a transfer or delegation via organic law (following the same procedure provided for in art. 81.2 CE, with no additional requirement).[18] Generally speaking, one Could regard as permissible all those forms of control directed towards guaranteeing that the will of the State be respected by the autonomous organ that exercises the ceded powers and that the central authorities have the possibility of reacting with the necessary force in the event of deviations or abuses. However, that control cannot reach the extreme of submitting the organ of the Autonomous Community that exercises the delegated powers to a regime of tutelage as if it were a hierarchically subordinate organ (STC 118/1996).

[17] The State Lawyer considered that the competences of legislative development and execution in matters of water resources and exploitation in certain areas of the in the Duero Basin could be acquired in the future via Art. 150.2 SC. But in LB 9° the Ruling rejected this allegation. Although it recognises that "this is not the moment at which to consider the scope of Art. 150.2 SC in general terms," warns that "to be coherent with the perceived unconstitutionality we have just explained, we must conclude with the impossibility of the aforementioned Autonomous Community assuming, by any means (including that of the said constitutional provision) the aforementioned competences with the scope and in the terms provided for in Art. 75.1 EACYL"). It is true that the State Lawyer leads to this, but I doubt that it were necessary to take sides and settle the question in this manner. However, the Court's position makes more sense in the Light of the provisions of R. Decree-law 12/2011, of August 26, which adds an Additional Provision 14 to the Water Law (recast text of 2001) according to which in the inter-community water basins "confers upon the Autonomous Communities whose Statutes of Autonomy provide for executive competence over powers of policy of public water works the exercise in its territorial ambit of the functions indicated in Art. 94.2 of that Law, as well as the processing of procedures arising from similar actions until the motion for a resolution." Would an organic law of transfer not be the most appropriate Vehicle for this cession? Montilla had already denounced the approval as an ordinary law and not an organic law of delegation, which was what was correct, of Law 62/1997, of December 26, of modification of Law 27/1992, of State Ports and of the Merchant Navy, which ceded to the Autonomous Communities certain management powers with regard to ports of general interest, a matter reserved for the State by Article 149.1.20 SC (op. cit., p. 335).

[18] There is no possibility of revocation or tacit derogation via a subsequent law contradicting the provisions therein (J.A. Montilla, *Art. 150. . .*, cit., p. 2508).

The Constitution does not provide a breakdown of the different types of control that may be established. We find only the reference that Article 153.b) makes to Government control, subject to Council of State ruling, over the activity of the institutions of the Autonomous Communities when it is a question of the exercise of powers delegated in accordance with the provisions of Article 150.2 SC. However, what it consists in is not specified.

The actual laws issued pursuant to this provision are what establish, in each case, the forms of control reserved for the State. And this is logical, because the pertinence or not of mechanisms of control or tutelage cannot be assessed in an abstract manner. It will depend upon the matter and above all upon the type of powers ceded. The experience of these years suggests to us that the control is more intense in the laws of delegation, with the possibility even of being extended to questions of opportunity.

Control does not have to be limited to an *ex post* fiscalisation of the activity of the Autonomous Community. It may also include the establishment of directives or criteria of action and the verification of fulfilment of these instructions. To render this supervision effective State employs two instruments: the duty of the institutions of the Autonomous Communities to facilitate information regarding the exercise of competences ceded and the power of inspection on the part of State Administration, which performs constant monitoring of this exercise. In the event of non-compliance by an Autonomous Community, the techniques or Powers of correction are activated, which may ultimately lead to the suspension or revocation of the actual cession.

Control is normally also linked to the maintenance of a certain level of efficiency of the services transferred or delegated: thus, in the transfer laws of 1992 and 1995 (and in draft laws presented during successive legislatures), it was specifically demanded that this level be, at least, equivalent to that of the services at the moment of transfer.

In practice, what are the controls that the legislator has established? The laws of transfer have provided for State control consisting in the power formally to accuse the Government of the Autonomous Community of non-fulfilment of its obligations in the exercise of transferred competences (for example, the obligation of reporting on its management). And in the case of persistent non-compliance, Central Government may suspend alter 3 months the transfer of powers and services, reporting this to Parliament, which will rule definitively on the Government's decision.[19]

[19] Organic Laws 11 and 12/1982 employ the following formula, the essence of which is reproduced in subsequent laws: "Without prejudice to the competence of the courts, or of the specific modalities of control that may be established over legislative powers by the State laws referred to in Article 150 of the Constitution , the AC will adjust the exercise of Powers transferred to the following principles and controls: a) the AC is obliged to furnish the State Administration with the information which the latter requests regarding the Management of the service; b) the Powers and services transferred must maintain, at least, the same level of efficiency as prior to the transfer; it cannot be the cause of financial imbalances in the Community or major destruction of natural and economic resources, nor may it introduce inequality between individuals or groups, nor act against the individual or collective solidarity of Spaniards; and c) in the event of non-compliance with the previous requirements, the State will formally advise the Community of this fact, and if the latter maintains its attitude, after three months Government may suspend after three months the transfer

Rather more complex is the question of control in the law of delegation passed in 1987: not only was the cession conditional upon the guarantee of certain standards of efficiency, but also observance of the rules of coordination that could be imposed by the Ministry of Transport (Article 16.2). This law established two types of control. Firstly, the possibility of revoking after 2 months the obligatory prior requirement (with Council of State Ruling), and secondly, the suspension of specific agreements and acts of the Autonomous Communities on the part of the Ministry of Transport (Article 20), a suspension that could only be lifted by the jurisdiction of the administrative courts after the submission of the appropriate appeal by the Autonomous Community affected. It is notable that the power of central Administration does not consist in challenging the supposedly illegal action of the autonomous Administration before the legal institutions, but directly in the suspension, established moreover by a minister, not by the full Government. CCR 118/1996, LB 6, declared the unconstitutionality of this provision, as contrary to what is set out in article 153.b) SC, which only provides for control by the Government of the Nation of the exercise of delegated functions. In this case, the suspension provided for in the contested provision is reserved for the Government, as collegiate organ (and subject to Council of State Ruling), and could not be conferred upon the Ministry of Transport.[20]

It is worthwhile reiterating that universal revocability is one of the essential characteristics of these laws. Whilst the competences assigned to the Autonomous Communities by the Statutes are not unilaterally conferred by the State, because the reform of the Statute does not depend solely upon the will of the State, the attribution of powers via these laws cannot be described as full or definitive: it can be unilaterally revoked via another organic law (another question is that this reversal is politically improbable). Precisely for this reason they cannot be incorporated into the statutory text as competences of the Autonomous Communities.[21]

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of powers and services, reporting this to Parliament, which will rule definitively on the Government's decision, lifting the suspension or agreeing to the revocation of the exercise of the transferred power." In any case, the Powers of control expire when the ceded competences are assumed by the Autonomous Community as its own via the corresponding reform of its Statute.

[20] At the time, the provisions of OL 5/1987 related to control were much criticised by García de Enterría (1988), p. 72: even in the event of their having been conferred upon the Government, this was a technique of tutelage which by then had disappeared from the ambit of local regime, precisely because of its incompatibility with the constitutional guarantee of local autonomy.

[21] On the relationship between the organic laws of Art. 150.2 SC and the Statutes of Autonomy, the Constitutional Court had the opportunity to make a declaration in its Ruling 56/1990, of March 23. In opposition to the thesis defended in its appeal by the Junta de Galicia, the Court argued very clearly that "the Statutes of Autonomy, despite their from of Organic Law, are neither useful nor constitutionally correct instruments, given their nature and mode of adoption, for performing transfers or delegations of powers of a matter of State ownership permitted by Art. 150.2 of the Constitution." Therefore, to use the Statute as an instrument of transfer or delegation "would imply attributing rigidity to a State decision in a manner not sought by the constitution-maker and that clashes with the greater flexibility which the instruments of Art. 150.2 should possess." In addition, "this last provision implies a formally unilateral decision on the part of the State, liable to withdrawal and introduction of instruments of control; the Statute, on the other hand, implies a double will."

Moreover, eventual revocation is a decision that Parliament can take with total liberty. The current legislature is not bound by the previous legislature. Therefore, I cannot share the thesis maintained by García de Enterría,[22] which admits the existence of a limit that could invalidate this operation: the banning of the arbitrariness of public powers (article 9.3 SC). In his opinion, the revocation *ad nutum* of the transfer or delegation, without objective and reasonable cause, would be an arbitrary action.

Real Performance of the Instrument Contemplated in Article 150.2

As I indicated at the beginning, the route opened by this provision has scarcely been travelled. If we bear in mind the expectation generated at the time, this under-use is striking. And not only that: when this dossier has been recurred to, it has not always been with the purpose anticipated by the constitution-maker. A brief chronological review will afford us more precise knowledge of what this constitutional provision has provided to date.

In 1982 two laws of this type were passed with the declared aim of completing the limited spectrum of competences that could then validly be assumed via the Statute s of Autonomy of the Canary Islands and Valencia, approved on the same dates[23] according to the procedure regulated in article 143 SC. By means of OL 11/1982 of complementary transfers for the Canary Islands and OL 12/1982, of transfer to the Community of Valencia de competences in matters of state ownership, both dated August 10, it was possible (in debatable fashion in legal-constitutional terms[24]) to

[22] Op. cit, pp. 74–78.

[23] In fact, the respective projects began to be processed at first (1980) according to the procedure provided for in Article 151 SC. Both in the Canary Islands and in Valencia the demands established by this provision had been amply satisfied. It was in July 1981 when the two major parties signed the Autonomous Pacts and agreed that all the pending Statutes should be approved via Article 143 CE. Given the political difficulties posed by the application of this criterion to the Canary Islands and Valencia, an exception was made, which took shape by means of a strange formula: in order not to frustrate the expectations created, the level of competences was maintained, comparable to that established in the Basque and Catalan Statutes, but the effective cession of competences which exceeded the provisional limit of Art. 148 was subject to the approval of the corresponding law of Article 150.2. The drafting of Art. 1.1 of the LOTRAVA leaves no room for doubt: "by this law the State, in accordance with Article 150.2 of the Constitution, transfers to the Autonomous Community of Valencia all those competences corresponding to matters of State ownership included in the Statute of the Valencian Community which exceed the competences configured in Article 148 of the Constitution."

[24] Nevertheless, the constitutionality of this formula has been endorsed in implicit manner by the Constitutional Court itself. See, with regard to the LOTRACA, CCR 17/1990, of February 7, issued in the appeal of unconstitutionality against the Canarian Water Law (10/1987), in response to one of the allegations by the appellants, who questioned the constitutional validity of the aforementioned organic law on account of the abusive use of the instrument provided for in Art. 150.2 SC.

overcome the limit imposed by article 148 SC, without waiting for the passing of the 5 years of compulsory "running in."

Both laws were repealed on the occasion of the adoption of the respective statutory reforms in 1994 and 1996. In any case, the most interesting aspect of this episode is that until the reform of the Statute and the subsequent assumption of its full ownership, the transferred competences corresponded to the Autonomous Community by virtue of the corresponding organic law issued under Article 150.2 SC, and not by virtue of the Statute. The competences are the same, but now their exercise is base on another title and therefore they are subject to another regime.

Ten years later, this path was chosen again to extend the competences of the Autonomous Communities with a common system, well after completion of the 5-year period following approval of the corresponding Statutes established in Article 148.3 SC. As is highlighted by the Statement of Purpose, OL 9/1992, of December 23, of transfer of competences to the Autonomous Communities that attained autonomy via Article 143 of the Constitution, has its origins in the Autonomous Pacts signed in February 1992 by the main parties, with the objective of satisfying, on the one hand, the aspirations of increased self-government expressed by these Communities and of avoiding, on the other hand, the disruptive heterogeneity of autonomous regimes, a perfectly possible situation under a Constitution that left to the initiative of the Autonomous Communities the revision of the distribution of competences. To order and rationalise the process and avoid dysfunctions in the functioning of the State, derived from the proliferation and dispersion of enabling provisions, which Could be articulated in each Statute with differing wording or formulation, Parliament approved the transfer of a homogenous set of competences, which set these Communities at the same level as those that followed the access procedure provided for in Article 151 SC.[25]

This technical dossier combines with successive reform of the Statutes (11 Communities in March 1994 and the Canary Islands in 1996) to consolidate and render irreversible the decision. It is not difficult to agree that the use of this concept is somewhat forced, because Parliament unilaterally anticipates the decision of the Autonomous Communities statutorily to assume these competences (with the subsequent breaking of the dispositive principle). The transferred powers are no Langer at the disposal of the central Powers of the State, rendering ineffective the modalities of control provided for in the corresponding law. The fact is that if all the Statutes passed at the founding moment were cut from the same cloth, in terms of both structure and content, the same can be said of the texts resulting from the reforms introduced in turn.

In all these cases, the 150.2 path is not employed to cede to the Autonomous Communities competences intrinsically belonging to the State (del 149.1 SC), but to transfer competences that these Communities could easily assume, but which the State

[25] Of the competences ceded, some are exclusive, whilst others are powers of legislative development and execution. Special mention should be made of the transfer of competences in legislative development and execution in educational matters, at all teaching levels.

still retained by virtue of Article 149.3 SC. This possibility was already contemplated in the Statutes as a route to the future assumption ("differed") of competences.[26]

In this brief historical recapitulation, the two sequences that follow have a common denominator: the AC of Galicia is the sole recipient of the transfer. Parliament approved, firstly, OL 16/1995, of December 27, of transfer of competences to the AC of Galicia, in diverse matters not included in 1981 in the initial text of the Statute. These are enabling provisions already transferred to Communities of common regime via OL 9/1992 and definitively assumed after the subsequent reform of their Statutes.[27] We are moving in any case between the limits established by Art. 149.1 SC (they are not exclusive competences of the State). To prevent this Community from being excluded again, OL 6/1999, of April 6 would subsequently be approved, of transfer of competences to Galicia. This time they are competences of legislative development and execution in matters of regulation of credit, Banks and insurance, another enabling provision already assumed by the Autonomous Communities (powers of execution) or only by the "historical" Communities (legislative development). As in the previous law, the objective sought is equity in the field of competences, correcting the imbalance that had been produced by the absence of that enabling provision in the Galician Statute and the effect of the residual clause of Art. 149.3 SC.

Under the provisions of Article 150.2 SC, OL 2/1996, of January 15 was also issued, complementary to that of regulation of the retail trade. This law transferred to the AC of the Balearic Islands competence in execution of state legislation in matters of internal trade, not assumed yet, unlike other Communities, in the corresponding Statute. This initiative, which attempts to rectify any involuntary error or omission, was motivated by the need to ensure the homogeneity of enabling provisions with regard to businesses opening hours.

A very different fate (not exactly equalising) awaited OL 6/1997, of December 15, of transfer of executive competences in matters of traffic and circulation of motor vehicles to the Autonomous Community of Catalonia, born of a Draft Law jointly presented by the Popular and Catalan Parliamentary (CIU). Following its approval, the Catalan Administration went on to exercise significant Powers of execution of State legislation in matters of issue, revision, revocation or suspension of permits sand licences to drive motor vehicles, including regulation of driving tests; vehicle registration and issue of driving licenses. The Law also contained a Transitory Provision by virtue of which traffic units of the Mossos d'Esquadra would gradually assume the exercise functions of traffic surveillance on inter-city roads, with the deployment completed in the territory of the Autonomous Community in 2000.

[26] Indeed, many Statutes included a clause by virtue of which se the Autonomous Community was also attributed all those competences transferred to it by the State via Organic Law. Many others also recognised the possibility of the Community having to request these transfers from the State, in accordance with Art. 150.2 SC.

[27] Prominent amongst the powers transferred is exclusive competence in matters of cooperatives and public entertainment and competence in the execution of State legislation in the matter of associations. This law, incidentally, does not provide for any type of control by the State. For Montilla (op. cit., pp. 334–335) it is unconstitutional.

Refraining now from any assessment of the political situation where it is passed (in the legislature initiated following the elections of 1996, with relative majority of the PP and an agreement of investiture and parliamentary collaboration with CIU), this law is a good example of application of the instrument provided for in Article 150.2 SC.[28] Because traffic and the circulation of motor vehicles is a matter whose competence corresponds exclusively to the State (149.1.21 SC) and the powers that are ceded, of an executive nature, are, without a doubt, liable to transfer. To justify the viability of this operation, the Statement of Intent underlines the connection with paragraph 29 of the same provision, which contemplates the possibility of the Autonomous Communities creating their own police forces. Under this entitlement, Article 13 of the Catalan Statute authorises the Generalitat to create an autonomous police force and indeed this was done via the law that created the Mossos d'Esquadra. The link between traffic and the security of citizens is based on the fact that the function of monitoring the traffic has traditionally been assigned to the law enforcement agencies. And this fact is crucial: Catalonia has an autonomous police force, which constitutes "the indispensable infrastructure" for the exercise of the transferred functions.

I have given an account of contents of the seven organic laws of transfer approved to date. All that remains to close this chapter is to refer to the only law issued under Article 150.2 in the form of an organic law of delegation of competences. This is OL 5/1987, of July 30, of delegation of State Powers in matters of road and cable transport. Via this law, the State delegated to the Autonomous Communities a series of management powers (processing and resolution of dossiers) over partial sections or fragments of regular lines of passenger transport crossing Community borders, which are integrally included within the territorial ambit of one single Community. And some others related, for example, with the acquisition, accreditation and control of the professional training necessary to undertake transport that crosses the territory of more than one AC, without prejudice to State competence with regard to the regulation of the basic conditions of the exercise of haulage, as well as, in general, of the conditions of obtaining and accrediting professional titles.[29]

[28] Montilla, who criticises the absence in this law of real instruments of control, beyond the obligation to inform, highlights the fact that for the first time this technique is employed not to equalise the level of competences of the different Communities, but to establish differences between them, a function with regard to which he expresses his reservations (op. cit., pp. 335–341).

[29] What this law sought was an equaling of competences, trying to homogenise the powers of all the Autonomous Communities in specific aspects related with transport. Thus, Article 18.2 provided for the suppression of the organs of specific management of overland transport that might exist within the regional State Administration. In this way, it could proceed with the necessary prudence towards one single Administration. But it has not served as a precedent.

Failed Initiatives

On various occasions, there have been unsuccessful appeals in parliament for the use of the path provided for in Article 150.2 SC. I should mention, firstly, initiatives related with the calling of popular consultation. It is common knowledge that the authorisation for the calling of popular consultation via referendum is a competence attributed exclusively to the State by Article 149.1.32 SC.[30] In the year 2001, J. Puigcercós, ERC MP integrated within the Mixed Group, presented a Draft Organic Law of transfer to the Generalitat of Catalonia of competences in matters of authorisation for calling a referendum, claiming the transfer of the powers of execution of State legislation in this matter, in order that the Generalitat might directly consult the citizens of Catalonia when it is a question of political decisions of particular significance. Proposals with similar content have subsequently been presented in Parliament. That same political Group presented two: one in June 2004, which was rejected by the full Parliamentary session in March 2007, and another in October 2006, which expired at the end of the legislature. And the Parliament of Catalonia presented another in February 2004 (at the end of the 7th legislature) its taking into consideration being rejected in February 2006.

Amongst the frustrated initiatives, the following should be highlighted: in the 3rd legislature, the Draft Organic Law on transfer of competences in matters of education to the Autonomous Community of Castilla y León, presented in June 1988 by the Parliament Castilla y León; in the 6th legislature, the Draft Law of transfer of competences to the Valencian Community, promoted by a Unió Valenciana M.P. in March 1999 and expired in February 2000[31]; in the 7th legislature (2000–2004), the Proposal related to the transfer of competences to the AC of Galicia in matters of airports and air traffic, presented in May 2000 and rejected in December 2001.

In the 8th legislature (2004–2008) processing continued of the Draft Organic Law of transfer of the meteorological services situated in Catalonia that are the responsibility of the State, presented in May 2003 and taken into consideration in December 2004,[32] and the law on competences in notarial matters, presented by the Parliament of Catalonia in July 2003, and five more proposals were presented, which met different fates. One was withdrawn: the Draft Organic Law on the transfer of competences to the AC of Aragon with regard to airports and air traffic, presented by J.A. Labordeta, of Chunta Aragonesista, in September 2004 and withdrawn a few months later. Another two were rejected by the full Parliamentary session: they did not pass the taking into consideration stage, neither did a new Draft Organic Law on the

[30] See to Art. 2 of OL 2/1980, regulating the different modalities of referendum, which clarifies that authorisation will be agreed by the Government, following proposal by the President, unless this is reserved for Parliament.

[31] Justification for the initiative is to be found in the delay in the reform of the Statute attributable to the political forces that signed the Autonomous Pact and the need to increase self-government.

[32] In spite of this, after requesting a ruling on this from the Constitutional Commission and opening the deadline for presenting amendments, it ended up expiring at the close of the 8th legislature.

transfer of competences to Galicia in matters of airports and air traffic (identical to that of the previous legislature), presented by two BNG MPs in September 2004 and rejected in June 2005, nor the Draft Organic Law of transfer to the Generalitat of Catalonia of competences of management of the State's maritime-terrestrial public domain corresponding to the coast, to promenades and to beach regeneration, of the territory of Catalonia, presented in July 2004 and rejected in December of the same year. And the last two, the Draft Organic Law of transfer of management, control of air space, regulation o fair traffic and transport at airports of general interest located in Catalonia and State-run, presented in March 2005 by the ERC Group and the Draft Organic Law on the transfer to the Generalitat of Catalonia of ownership of the airport of Barcelona-El Prat, presented by the same group in September 2006, expired at the end of the legislature.

In the last legislature, the 9th, not only has no new initiative been presented, but the only one that was still being processed since the 7th legislature, the Draft Organic Law of transfer to the Generalitat of Catalonia of competences in notarial matter, was withdrawn by its initiators. Perhaps the reluctance of the two major national parties use this route (none have been approved in the last 12 years) explains the increasing scepticism of the nationalist forces.

What Is the Role That May Be Placed in the Future by the Laws of Article 150.2 SC?

Our analysis must stem from an observation: however one looks at it, the margin that remains for increasing competences via reform of the Statutes is narrow. The Autonomous Communities have already assumed almost all the competences to which they can aspire without breaking the constitutional framework. There remains only one path to prolong in some way the process of decentralisation (advanced in an asymmetrical direction or not) and penetrate this ceiling or insurmountable limit established by the Statutes in Article 149.1: the laws of 150.2.

Is it good for the model of territorial organisation of power to be indefinitely open? Surely not. It may come as a surprise, to begin with, that it is possible to have what the Constitution has conferred upon the State on an exclusive basis. However, it is a decision of the Constitution-maker, who enshrined the dispositive principle and even included clause 150.2 to inject more elasticity into the system. To what end? It is true that the nationalists (the Catalans, above all) have on occasions suggested this instrument to raise levels of self-government and thus accentuate the asymmetry of the system. However, the fact is that there has been no genuine commitment towards following this path. The terrain where cession is more viable is that of Management powers, along the lines of what is known as federalism of execution (only one ordinary Administration: the single Administration). However, this operation can take two different directions: that of reinforcing the symmetry of the system or that of increasing the amount of asymmetry.

References

M. Aragón and C. Aguado, Tomo II (Organización general y territorial del Estado S), Civitas / Thomson-Reuters, 2ª edición, 2011, p. 434

E. Argullol and C.I. Velasco (dir.): *Instituciones y competencias en los Estados descentralizados. Institut d'Estudis Autonòmics*, 2011, pp. 375–385

M.E. Casas and M. Rodríguez-Piñero, Fundación Wolters Kluwer, 2008, pp. 2515–2516

E. García de Enterría *La revisión del sistema de autonomías territoriales: reforma de los Estatutos*, *leyes de transferencia y delegación*, *federalismo***,** Civitas, 1988, p. 72

J.A. Montilla *Las leyes orgánicas de transferencia y delegación*, Tecnos, 1998, pp. 189–193 y 323

J.M. Rodríguez de Santiago and F. Velasco, *Límites a la transferencia o delegación del artículo 150-2*° CE, REDC, n° 55, 1999, p. 110

G. Ruiz-Rico *Los límites constitucionales del Estado autonómico*, CEPC, 2001, p. 211–212)

E. Aja y J. Tornos *La Ley orgánica de transferencia o delegación del artículo 150.2 de la CE*, Documentacion Administrativa n° 232–233, 1992, p. 191

One Feature of the Spanish Territorial Model: The Distinction Between Laws Rules That Assign Competences and Rules That Merely Delimit Them

Tomás de la Quadra-Salcedo Janini

Introduction

It is well known that the model of Spanish political decentralisation is not set out in the Constitution but is left to a subsequent configuration through the approval of formally infra-constitutional laws. With regard to the model for territorial distribution of power, the Spanish Constitution is a twofold open norm.

On the one hand, it is open in the sense that it charges the Statutes of Autonomy with specifying the model, by assigning to them the task of laying down the competences taken on by the Autonomous Communities within the framework set out in the Constitution.[1] On the other hand, it is also open in that it allows the national parliament to delimit some of the competences assigned to the Autonomous Communities under the Statutes of Autonomy.

Assigning competences, which is outlined in the Constitution and amplified in the Statutes of Autonomy, does not therefore provide a definitive definition of what Autonomous Communities may or may not do at any given moment, as this will depend to a large extent on the way where the Central State has exercised its own constitutionally reserved competences at any particular time. This is a consequence of the fact that national regulation of such powers, for instance when the Central State exercises its competences on the basic laws set out and in application of the principle of competence, enables the scope of regional competences set out under the Statutes to be delimited at each point in time.

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[1] Fossas Espalder (2007).

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The scope of the Autonomous decision depends on how the Central State exercises its powers at any time. What results in the permanent uncertainity of the power distinction system.

Distinguishing Between Laws That Assign Competences and Those That Merely Delimit Them

Early on in its jurisprudence, the Constitutional Court drew a distinction between laws that assign competences and those that merely delimit them.[2]

The former, those that assign competences, were basically the Statutes of Autonomy and, in certain instances Organic Laws transferring powers or delegating power, since these are the laws that lay down so-called "competences assumed [by the Autonomous Communities] within the framework set forth in the Constitution," as laid down for the Statutes under Art. 147.2 d) of the Spanish Constitution (henceforth: SC).

The latter, those that merely delimit competences, were both the national laws to which the Constitution remits for specifying the scope of the competence taken on by the Autonomous Communities under the laws that assign such competences, as well as national laws to which the Statutes of Autonomy themselves would eventually be able to remit for specification and clarification.

In either case, re-submission, whether by the Constitution or by the respective Statute, would enable the national law to delimit either directly or indirectly the content of the regional competences that have, however, been assumed via the Statute of Autonomy.[3]

[2] For instance, in Constitutional Court Ruling 76/1983.

[3] This is the conclusion to be drawn from Constitutional Court Ruling 76/1983 when it states that "with regard to delimiting competences between State and Autonomous Communities, in accordance with the stipulations set out under Article 147.2, d) of the Constitution, the Statutes of Autonomy are the laws which lay down "the competences assumed within the framework set out under the Constitution," thereby establishing the system of competences through the Constitution and the Statutes, in which the latter are subordinate to the former. Nevertheless, this does not mean that all national laws which aim to delimit competences between State and Autonomous Communities are unconstitutional as a result of seeking to exercise a function which is reserved for the Statute. The reserve which the Constitution makes for the Statute on such a matter is neither total nor absolute. On occasions, national laws may fulfil the function of assigning competences—Organic Laws governing transfer or delegation of power—and on others delimit the content of such competences, as has been recognised by this Court on numerous occasions. Such is the case when the Constitution has remit to a national law for specifying the scope of a competence which may be assumed by an Autonomous Community, restricting the extent to which such competences may be assumed in statutory terms—as in the case envisaged under Article 149.1.29 of the Constitution—and as occurs when the Statutes conclude the process of delimiting competences, remitting to the requirements of a national law. In such instances, re-submission assigns delimitation of the content of regional competences to national law. In these cases, the task of delimiting competences, which is undertaken by national law, is not based on any general attribution set out under the Constitution, as occurs in the cases of the Statutes, but on a specific attribution."

With regard to the scope of the competence, the possibility exists, therefore, that statutory assignment of a competence may be finalised through a national law, as a result of this having been requested by the Constitution or by the Statute itself.

It initially appeared that the Constitutional Court had interpreted in a restrictive manner to which national laws the Constitution would remit for delimiting competences previously assigned under the Statutes, with Constitutional Court Ruling 76/1983 referring to the exceptional cases envisaged under Articles 149.1.29[4] or 150.3.[5]

The restrictive interpretation of those cases where the Constitution had remit to the national parliament to delimit, either directly or indirectly, competences assigned to the Autonomous Communities under the Statutes of Autonomy, seemed to lead to the idea that national parliament delimitation of competences was an exception, and that the general rule would be that such a delimitation would already have been carried out by the Constitution and Statutes of Autonomy themselves when assigning competences. At the same time, it also recognised the difficulties that such a direct delimitation by the laws that assign competences might entail in terms of interpretation.

When jurisprudence stated that "the national parliament may not in general terms intervene in the system of delimiting competences between State and Autonomous Communities without a specific constitutional or statutory provision" together with a list of the cases where such a provision might arise (Articles 149.1.29 or 150.3), the implicit assumption was that such specific provisions were considered exceptional.

However, a new case was soon added to the apparently exceptional instances of laws that merely delimited the competences set out by the Constitutional Court in the early jurisprudence referred to previously. This new case was none other than that of national laws that were issued when exercising the competences constitutionally reserved for the State, over the "bases" or "basic" legislation.

This seemed to be the assumption of the Constitutional Court when it claimed that the very act of establishing a "basic" law was equivalent to defining the limits of a competence.[6] Without entering into the justiciability thereof, such a definition of what is basic in effect delimits national and, by extension, regional competences.

Such doctrine seems to ignore the idea that delimiting competences in the case of basic laws has already been undertaken by the Constitution. For example, for Montilla, when competences are assigned through the technique of basic laws "it is the Constitution which sets out the areas of competence and, beyond the initial delimitation carried out by the national parliament, only the "supreme interpreter" thereof is able to

[4] This provision reserves for the State exclusive power over public safety, notwithstanding the possibility that Autonomous Communities may establish their own police forces in the manner set out under the respective Statutes in the framework laid down by an Organic Law.

[5] This assigns power to the State over laws that establish the necessary principles to harmonise the regulatory provisions of the Autonomous Communities when it is in the general interest.

[6] It is thus set out by the Court, for instance, in Constitutional Court Ruling 68/1984 since "when it is established what is meant by basic laws or when regulation over basic matters is being established, the content of national competence in a specific matter is also being delimited." Legal basis 3, and by extension the competence of the Autonomous Communities.

determine areas of competence. This may not be undertaken by the national parliament, as a constituted power, nor by the Statute, which is not the Constitution."[7]

However, this does not seem to be the interpretation that has been drawn in terms of jurisprudence and has affirmed the capacity of the national parliament to define, within certain limits, at each moment the scope of its own competence and by extension that of the Autonomous Communities, an interpretation from which it may be deduced that "if the basic laws may be changed then so, as an inevitable consequence, is the scope which is applicable under the pertinent legislation."[8]

What is to be understood by the Constitutional Court remitting to the State a delimitation of competences by reserving for it power over basic laws is that, as the Constitutional Court has admitted, "the system is left open in the sense that, although basic state laws lack the power to assign competences which may alter the constitutional and statutory system, in general terms they aim to delimit the regulatory framework within which the Autonomous Communities must confine themselves when exercising any of their own competences that may be related to the matter delimited by said basic laws."[9]

This opening up of the system of competences resulting from the State's capacity to delimit the scope of its own powers, and by extension those of the Autonomous Communities by determining what is a basic law, would not in itself distort the system of assigning competences set out by the laws under which competences are assigned, namely the Constitution and the Statutes, if the cases where the State were able to perform such a delimitation were interpreted in a restrictive manner. Indeed, given the importance of defining what is basic, it would fall to the Constitutional Court to oversee that such a definition "does not remain at the discretion of the State in order to ensure that regional competences are not left void of content or unconstitutionally cut back."[10] The State may not establish basic laws to such an extent that they leave the correlative competence of the Autonomous Communities void of content,[11] a situation that would come about, for instance, if regulation of such laws were to prove too

[7] For Montilla "only the Court may occupy the delimiting position which corresponds to the Constitution; neither basic legislation nor the Statute of Autonomy may replace it" on page 131 and 132. Montilla also points out that "the national parliament does not delimit what is basic, a task which is performed by the Constitutional Court. However, in the same manner as it puts forward the initial proposal it may also propose changes to the delimitation, for instance by restricting the scope thereof. Said changes may be accepted by the Constitutional Court, thereby altering the previous delimitation," page 133. Montilla Martos (2006). In the same vein, Rubio Llorente states that "basic laws do not normally delimit competences ... delimitation of competences is established in such cases by the Constitution and does not require any previous law," in Favoreau and Rubio Llorente (1991), p. 126 et seq.

[8] Constitutional Court Ruling 31/2010, Legal basis 60.

[9] Constitutional Court Ruling 69/1988, Legal basis 5.

[10] Constitutional Court Ruling 69/1988, Legal basis 5.

[11] Since Constitutional Court Ruling 1/1982, Legal basis 1, was first issued, the Constitutional Court has therefore been undertaking two successive operations in its jurisprudence; firstly, ascertaining whether the national law in question is or is not basic, and secondly, verifying to what extent regional law contradicts or otherwise national laws.

thorough and detailed.[12] It would therefore fall to the Constitutional Court to ensure that the State, through its capacity to delimit the scope of what has been assigned, does not turn this into a mere *flatus vocis*.

However, certain scholars have criticised the fact that "(Constitutional Court) disapproval of such detailing has only been applied to matters of a organizative nature[13] whilst failing to include fundamental aspects."[14]

In truth, the Constitutional Court had to a large extent left in the hands of the Central State the task of determining the scope of the latter's own competences and by extension those of the Autonomous Communities as well, devaluating to a certain extent the distribution of competences resulting from the laws that assign competences and transforming those that merely delimit competences into the true architects of the system for distribution of powers.

Such a consequence mainly came about when at the end of the 1980s the Constitutional Court began to link wide-ranging State power in the matter of the general organisation of the economy to the competence reserved for the State under Art. 149.1.13. of the Spanish Constitution regarding the basis and coordination of the general planning of the economy.[15]

[12] For instance, in Constitutional Court Ruling 147/1991.

[13] For instance, Constitutional Court Rulings 50/1999; 275/2000.

[14] Montilla Martos (2006), p. 117, *op. cit.*

[15] This was not always the case, since previously the Constitutional Court had seemed to distinguish between a competence reserved to the State under Art. 149.1.13 SC and a State competence concerning general planning of the economy, which seemed to be a national competence that had arisen out of the fact that it had not been assumed by the Autonomous Communities in their respective Statutes and therefore one which corresponded to the State by virtue of Art. 149.3 SC. Thus, for the Constitutional Court "the Autonomous Community has power over the competences assumed under its Statute, with the limits imposed by the Constitution (in particular, Art. 149.1.13 which reserves to the exclusive competence of the State the basis and coordination of the general planning of the economy), and (with the limits applicable) of the terms in which the competence has been assumed (in the Statute), a competence which is restricted by the general organization of the economy" (Constitutional Court Ruling 29/1986, Legal basis 4.).

In his academic texts, Gómez-Ferrer, reporting judge on Constitutional Court Ruling 29/1986, maintains the statutory basis of State competence over the general organisation of the economy. For Gómez-Ferrer, the Statutes of Autonomy are not restricted to respecting the competences which the Constitution reserves for the State, under Art. 149.1.13, regarding the basis and coordination of the general planning of the economy, since by assigning competences to the respective Autonomous Communities, the Statutes do so "in accordance with the general organization of the economy," a wider concept than one set out under Art. 149.1.13 SC. For said author, the State's pre-constitutional competence in the general organisation of the economy would therefore impose restrictions on the competences assumed by the Autonomous Communities, as it has thus been established in the respective Statutes. Given the fact that the only competences which correspond to the Autonomous Communities are those which have been expressly assumed and that the Statutes explicitly respect State competence in the general organisation of the economy, Gómez Ferrer feels that State competence is fully justified by the express respect set out in the Statutes. Gómez-Ferrer Morant (1990), p. 125.

The link between the two concepts became clear in Constitutional Court Ruling 186/1988, Legal basis 2, where the Court highlighted that "the capacity to organize overall economic strategy (is) in general reserved to the State under Art. 149.1.13. SC. . ." and was maintained in subsequent jurisprudence.

National competence to undertake a "general organization of the economy"[16] was defined extensively in terms of jurisprudence, since it may cover both "national laws which lay down the guidelines and general criteria for organizing a specific area, as well as provisions for whatever action or specific measures may be necessary to achieve the goals set out within the organization of each area."[17]

Constitutional Court jurisprudence has indeed attempted to establish the existence of limits in national competence concerning the matter of the general organisation of the economy. The Constitutional Court has deemed that the competence referred to cannot "include any action of an economic nature that does not have a direct and significant impact on the overall economy."[18] If this were not the case, the Court claims that "a matter and a more specific competence (that of the Autonomous Community) would be stripped of all content,"[19] such a removal of all content being forbidden and leading to "a requirement that any national decisions which may be adopted based on Article 149.1.13 SC should confine themselves to those aspects deemed strictly necessary for attaining the economic goals which such decisions pursue."[20]

Yet, only on very few occasions has the Constitutional Court actually ruled that the State has substantially exceeded its powers when taking charge of making decisions in economic affairs.

The difference between the competence governing general organisation of the economy and the competence reserved for the State under Art. 149.1.13 SC seemed clear: State competence over general organisation of the economy would enable the latter to *plan the details*, whereas the competence reserved under Art. 149.1.13 SC would only *establish the bases and coordination measures*.

This is what is to be inferred from Constitutional Court jurisprudence when it claims that "in order to achieve objectives related to national economic policy, and when joint action is required throughout the whole of the country so as to ensure equal treatment regarding certain economic issues or due to the close interdependence of action carried out in various parts of the country, the State, when exercising its power to *organize general economic policy may conduct detailed planning*, only when the required cohesion of general economic policy demands that joint decisions be taken and only when such action can be implemented without jeopardising the economic unity of the nation *by undertaking to establish basic laws and coordination measures*" [our italics] (Constitutional Court Ruling 29/1986, Legal basis 4).

[16] Constitutional doctrine has also referred to the "organization of the economy as a whole," "management of general economic activity," "organization of economic activity as a whole" and other similar expressions.

[17] Many Constitutional Court Rulings, such as: 95/1986, Legal basis 4, 213/1994, Legal basis 4a) or 95/2001, Legal basis 3.

[18] Constitutional Court Rulings 186/1988 and 133/1997.

[19] Constitutional Court Ruling 112/1995, Legal basis 4, 21/1999, Legal basis 5, or 95/2001, Legal basis 3.

[20] Many Constitutional Court Rulings, such as: 152/1988, Legal basis 4, and 201/1988, Legal basis 2.

The Constitutional Court having virtually foregone any control over the State when the latter exercises its competence in the matter of organising the general economy has led to a curtailment in the regions' capacity to adopt their own policy in economic affairs.[21]

The Constitutional Court "has selected the competence based on fundamental laws and coordination of general planning of economic activity attributed to the State under Art. 149.1.13. SC as a kind of "catch-all" term to embrace all the faculties which the State is allowed to apply based on a particular interpretation of what might be deemed necessary towards maintaining economic unity in each specific case and given each specific circumstance."[22]

In this sense, constitutional jurisprudence has justified including the general organisation of the economy in Art. 149.1.13. SC due to the need to safeguard certain constitutional principles such as market unity or adopting a single economic policy. The Constitutional Court has thus stated that "in consonance with the concept of a single national economic policy and the subsequent existence of a single national market, such a State competence (149.1.13. SC) is extended to embrace an extremely wide range of matters, justifying State intervention provided that joint decisions need to be adopted in order to ensure the required coherence of general economic policy."[23]

Article 149.1.13 SC had become a kind of "commerce clause" allowing the State to regulate over a broad number of areas concerning any matters related to the economy. The basic consequence of such a wide-ranging interpretation of State competence over basic laws and the general planning of the economy is that national parliament delimitation of competences would cease to be an exception and become a general rule. As a result, cases where such delimitation had been performed by the Constitution and by the Statutes themselves when assigning competences thereby become an exception. As we shall now see, recent statutory reform has sought to offset this effect

[21] Such is the case, for instance, when constitutional jurisprudence, after declaring the Statute's having assigned a competence in the matter of business opening hours to be constitutional, then goes on to rule that Autonomous Communities must exercise their competence in said matter of business opening hours within the framework of the basic principles set out by the State by virtue of its competence governing the "bases and coordination of general planning of economic activities" described under Art. 149.1.13 SC. In application of constitutional jurisprudence, said national competence might lead to the State establishing freedom in the matter of opening hours, thereby completely dislodging regional competence, since the national law would neither allow nor require any action on the part of the Autonomous Community. This is one such instance in which the delimitation of powers arising from basic laws leads to regional competence being eliminated by making it irreconcilable. Jiménez Campo (1989), p. 67.

[22] Carrasco Durán (2005), p. 25. This is the view of Albertí when claiming that the Constitutional Court had proceeded to set out national competences in the matter of economic policy based on the principle of economic unity, a principle from which in turn the Court would have interpreted the need to ensure a single direction in economic policy, Albertí Rovira (1995), p. 231–232.

[23] Constitutional Court Ruling 225/1993, Legal basis 9. Azpitarte points out that "this desire to extend harmonisation of the laws quite clearly responds to a commonplace bias in the analysis of federal states: regulatory diversity leads to inequality" Azpitarte Sánchez (2009), p. 145.

by *shielding* regional competences, a process that has nevertheless been ruled unlawful by the Constitutional Court through Constitutional Court Ruling 31/2010.

The State's wide-ranging power to lay the basis for the system through laws that merely delimit competences called into question the role played in our territorial model by the so-called dispositive principle, according to which political decisions concerning the assumption of competences should be taken by the representatives of the Autonomous Communities in conjunction with institutions that represent the State. By contrast, the capacity to establish each territorial level's power to act is, to a large extent, in the hands of the national parliament, in other words deconstitutionalised without, however, the need for territorial bodies to be involved when establishing the specific scope of the competences assumed in statutory terms.[24]

Having analysed how, as a result of the wide-ranging interpretation of the scope of the competences on the basic laws, laws that merely delimit competences have become the general rule in our system rather than the exception, we now need to analyse firstly, the rules that govern the relationship between basic laws and regional laws, so as to then explore the rules governing the relationship between the Statute of Autonomy, a law that assigns competences, and basic laws, that merely delimit them.

Basic Laws, Laws That Merely Delimit Competences as a Parameter for Determining the Validity of Regional Laws

In this section, we will analyse the rules governing the relationship between basic legislation and regional legislation.

An important implication was to emerge for Constitutional Court doctrine as a result of its considering the basic laws dictated by the Central State as delimiting the scope of the competences assigned under the Constitution and the Statutes. For the Court, regional laws which contradicted basic national legislation, when the latter had been legitimately established in accordance with the corresponding competence that the Constitution had reserved for the State, infringed the constitutional system of distribution of competences either directly or indirectly and were unconstitutional.[25]

The Constitutional Court thus embraces the idea that by delimiting the corresponding regional competences which have been assigned under the Statutes, basic laws are, as a result, a valid basis for the pursuant regional provisions set out.[26]

[24] Autonomous Communities were, however, involved when competences were assigned through statutory reform although they were not involved when said competences were delimited when basic laws were adopted. On the matter of the dispositive principle and differences with the concept of deconstitutionalisation, see the excellent analysis by Fossas Espalder (2007) *op. cit.*

[25] One of many examples is Constitutional Court Ruling 60/1993, Legal basis 1, and in virtually identical terms, the legal bases of Constitutional Court Rulings 61/1993 and 62/1993.

[26] One author to embrace such an idea is Jiménez Campo (1989), p. 86 and 92. Whilst upholding the Constitutional Court's capacity to control the validity of the autonomous law through the conflict of competences and against the appeal of unconstitutionality, said author maintains the capacity of ordinary judges to apply the prevalence of basic laws over autonomous laws, which would be superseded or not applied (p. 84).

For the Court, insofar as they indirectly establish the exact scope of the area in which Autonomous Communities may legitimately exercise the competences assigned to them, basic laws act as a constitutional safeguard to control regional laws, such that if the latter infringe the former, they would be declared invalid due to their interference with the constitutional bloc or bloque de constitucionalidad.

Including basic laws in the constitutional bloc has been the subject of disagreement amongst scholars, since these are laws that would be imposed on regional parliaments but not on the national parliament, thereby curtailing the ability to bind all the ordinary legislators of the laws that make up said bloc. With regard to the national parliament, the basic laws would not have the inalterable nature that, in the opinion of certain scholars, it is felt that the laws which make up the constitutional bloc should have. However, such an inclusion is inevitable if the bloc is perceived as comprising those laws whose purpose is to delimit competences between the State and the Autonomous Communities.[27]

This seems to be the Constitutional Court's stance when it states that, "when a decision concerning constitutionality must be made through a comparison not only with the Constitution, but also with the so-called constitutional bloc, in accordance with the stipulations set out under Art. 28.1 of the Organic Law governing this Court when dealing with laws which, within the constitutional framework, had been passed to delimit the competences of the State and the various Autonomous Communities, it is clear that the Court should take into consideration the current and basic laws in place when formulating its judgement and issuing a ruling."[28]

However, contrary to the previously mentioned jurisprudential belief that autonomous laws which contradict basic national laws would be declared invalid due to their indirectly infringing the distribution of competences, certain scholars hold that the conflict which might arise between basic State laws and autonomous laws might be better resolved by not applying autonomous laws in whatever matters they may prove contrary to basic legislation.

For Rubio Llorente, the specific regulatory contradiction between autonomous legislation and basic legislation is not vitiated by a lack of competence but is brought about rather by "a defect of a very different nature (not a lack of competence) which disappears when, without any variation in the definition of competences, the area over which the national parliament has authority changes." Rubio seems to point to the result of the inefficacy of the law by discarding its inapplicability.[29] This would mean confirming the supremacy of national law over autonomous law and would offer the advantage of possibly applying autonomous law without the need for fresh enactment were the State to reconsider its definition of what is deemed basic.[30]

[27] Concerning the possibility of including the bases in the bloc, see Favoreau and Rubio Llorente (1991) *op. cit*; Jiménez Campo (1989) *op. cit*.

[28] Constitutional Court Ruling 137/1986 or 163/1995.

[29] Rubio Llorente (1991) *op. cit*, p. 128.

[30] Gómez Ferrer Morant (1987), p. 27 et seq.; Rubio Llorente (1991) *op. cit*, p. 31; Jimenez Campo (1989), p. 84 et seq.; Gómez Momtoro (1998), p. 392; and Solozábal Echevarría (1998), p. 167.

Yet, Constitutional Court jurisprudence seems to reject such an idea, declaring the invalidity of any autonomous law which opposes basic State law, even when the latter is subsequent, due to indirect infringement of constitutional distribution of competences.

The regulatory concurrence which leads the State to avail itself of Art. 149.1.13 in practice changes exclusive Autonomous Community competences in economic affairs into shared competences since the State, by using Art. 149.1.13., is delimiting what is basic. This means that any autonomous legislation (in principle laid down in application of competences assigned under the Statute) which opposes State legislation, laid down in application of competences founded on basic laws and coordination of the general planning of the economy, should be deemed null and void by the Constitutional Court that would have the monopoly of control in a system of concentrated judicial review for reasons of unconstitutionality since, in accordance with constitutional jurisprudence, by setting down what are basic laws, the State is delimiting competences. The wide-ranging interpretation given to the scope of the competence reserved to the State under Art. 149.1.13. SC, and the frequent use thereof by the national parliament, has meant that the Autonomous Communities now enjoy scant competence in the matter of the general planning of the economy, with the added consequence that any autonomous legislation which comes into conflict with State laws is deemed null and void as a result of having been laid down without the competence required to do so.[31]

In this regard, considering basic laws as a parameter to judge the validity of autonomous laws in certain cases was not a view shared by Constitutional Court judges Jiménez de Parga, Delgado Barrio and Rodríguez-Zapata who cast a dissenting vote in Constitutional Court Ruling 1/2003, wherein they held that "conflicts between autonomous laws and basic national laws that have undergone changes after the former have been approved, can and should be dealt with directly (by the ordinary judge) . . . applying basic national laws, since basic legislation should hold authority over autonomous laws that, despite having been correctly approved at the time, are not the result of Autonomous Communities exercising exclusive competences—in the strict sense—but rather competences that are a "legislative implementation" of basic national laws."

This leads them to conclude that "all courts of justice and not only the Constitutional Court have the power to directly resolve any conflicts which may arise – an increasingly commonplace occurrence – between autonomous laws, legitimately approved at the time, and the subsequent national laws which alter the basic laws governing a matter. Should the judge deem that the national law is not really a basic law, despite it having been declared as such, and that therefore the national law infringes Art. 149 SC, said judge should posit the issue of unconstitutionality (in accordance with Arts. 35 of the Constitutional Court Organic Law and 5 of the Law on the Judiciary). However, should the national law be deemed by the judge to be a basic law, both in material as well as formal terms, the judge should rule according to national law, and not apply the autonomous law which proves incompatible with it, as would be exactly the same if the autonomous law were to contravene provisions set out under EU law."

[31] Use of the competence reserved for the State under Art. 149.1.1. SC has been viewed as more reasonable than use of the competence set out under Art. 149.1.13. SC to legitimise, for example, adoption of certain national measures in the area of the economy and social affairs. The dissenting vote of Rubio Llorente with regard to Constitutional Court Ruling 152/1988 was cast along these lines. In literal terms, Art. 149.1.1. SC entails reserving wide-ranging competence for the State, a competence that enables it to set out the basic conditions to ensure equality when dealing with economic affairs, reflected in the State's capacity to establish a single common policy for economic affairs, as a result of having been assigned a guarantee of equality when exercising

Rules Governing the Relationship Between Laws That Assign Competences and Those That Merely Delimit Them

The present section explores the rules governing the relationship between the Statute of Autonomy and basic legislation.

Scholarly opinion has long debated the question of whether the relationship between basic laws and the Statutes of Autonomy should be governed by the principle of hierarchy or competence. The stance adopted by those who promoted reform of the Statute of Autonomy of Catalonia in 2006 is that the relationship between the two kinds of law should be one based on the principle of the hierarchical supremacy of statutory laws over national basic laws.

The purpose of statutory reform in Catalonia was to secure so-called *shielding* of regional competences, a *shielding* which reform sought to achieve, on the one hand, through a more detailed description in the Statute of Autonomy of the scope of the functions or faculties assigned to the Autonomous Community[32] and, on the other, by extending or detailing in the Statute the actual areas these would be assigned to.[33] It was more or less openly recognised that all of this was aimed at indirectly ascertaining the functional and material scope of the competences reserved to the Central State by virtue of Article 149.1 SC, which would include competences concerning basic laws. By using the two mechanisms referred to, namely the definition of the scope of the functions and the scope of autonomous power through a detailed breakdown thereof, the aim would be to bind the Central State and the Constitutional Court.[34]

When exercising the competences constitutionally reserved to it, the State would be conditioned by the indirect interpretation which, arising from the scope thereof, had

rights and when fulfilling constitutional obligations, rights that include for example the right to freedom of enterprise.

The use of the competence reserved to the State under Article 149.1.1 SC would place the terms of the issue in the sphere of concurrent laws (by redirecting State intervention in economic affairs towards exercising a non-shared transversal competence, as in the case of Art. 149.1.1. SC). Such a concurrence is dealt with by applying the principle of the supremacy of national laws and the non-application by ordinary judges of autonomous laws, as a result of there not having specifically been any excess use of competences on the part of the Autonomous Community in question that might lead to the autonomous laws being ruled invalid. The practical consequences concerning Autonomous Community capacity to act would be similar to those arising from the use of the competence on the general planning of the economy, since State legislation would displace autonomous legislation in economic affairs. However, this would be done without the need to declare the autonomous laws null and void. De La Quadra-Salcedo Janini (2008).

[32] Article 111 of the new Statute of Autonomy seeks to limit the scope of the basic laws established by the State by reducing them to principles or to the common regulatory minimum of each of the matters and by demanding that the basic laws be included in State legislation with the status of law.

[33] The new Statute of Autonomy details and itemises in sub-matters many of the areas thus far assigned to the Autonomous Community with the confessed purpose of shielding the region's own area of decision-making in light of the scope of some of the competences reserved for the State under Article 149.1.

[34] Abundant scholarly literature, which it is impossible to list in full here, is available addressing the matter. See Quadra-Salcedo Janini (2010).

been set out in the Statute of Autonomy. The indirect interpretation in the Statute of Autonomy of the scope of national competences, including those concerning basic laws, would then mean that the Statute of Autonomy would become a law that would act as a parameter to judge the validity not only of Autonomous Community action but also of State action when exercising its competences on basic laws.

The Statute of Autonomy's capacity to bind the State when exercising its competence over basic laws is founded on the position which, by applying this idea, the Statute of Autonomy would occupy in the system of legal sources. Its *quasi-constitutional* nature arises from its inclusion in the constitutional bloc, and the procedural particularities to emerge from reform thereof which endow it with a robustness that is characteristic of constitutional laws.

However, in Constitutional Court Ruling 31/2010, the Court rejected the idea that the relationship between the Statute and the basic laws is founded on any hierarchy when declaring, on the one hand, that it is inadmissible for the Statute to define the functional concept of basic laws since "the Statute of Autonomy's task excludes defining constitutional categories"[35] and, on the other, that in those cases in which the Statute assigns competences to the Autonomous Community on certain sub-matters "said assignation should be interpreted in a merely descriptive or indicative spirit, in the sense that said sub-matters form part of the material reality of the issue in question, yet without the exercise of national competences, both when they are concurrent as well as when shared with those of the Autonomous Community, being prevented or restricted by such a statutory assignation."[36]

However, the relationship between Statute of Autonomy and basic laws is not one which is based on the principle of competence either. Indeed, for Montilla, who upholds such an interpretation, any conflict between the content of the Statute and the basic laws will be resolved by the Constitutional Court, which "if it considers that basic legislation has been passed in the framework of the competences which the Constitution reserves for the State, the Statute shall yield to basic legislation. Likewise, should the Court deem that the State exceeds those competences and infringes upon those of the region, basic state legislation shall yield to the Statute or, where applicable, to the autonomous legislation which puts into practice said statutory competences." Under such a supposition, there can be no contradiction between what is set out in the Statute and in the basic laws since, should this be the case, it would fall to the Constitutional Court to determine which law infringes upon the area constitutionally reserved for the other.

Nevertheless, the conclusion to be drawn from constitutional jurisprudence is that Statute and basic legislation fulfil different functions. It falls to the Statute to assign competences to the Autonomous Community, whereas it falls to basic laws to indirectly delimit the competences assigned in the Statute.

[35] Constitutional Court Ruling 31/2010, Legal basis 57.

[36] Constitutional Court Ruling 31/2010, Legal basis 64. Constitutional Court doctrine in Constitutional Court Ruling 31/2010 does not mean that basic legislation constitutes a parameter for validating the Statute of Autonomy whose only guiding principle is the Constitution.

Autonomous competences are therefore assigned statutorily, not legislatively, and yet are delimited by the Central State indirectly through a determination of what is basic. When passing laws, the State does not in theory alter the constitutional and statutory code concerning the distribution of competences although it does delimit it.

Viver criticises Constitutional Court Ruling 31/2010 for "entailing express recognition of almost total freedom for central State bodies when determining the content and scope of national competences and, indirectly, autonomous competences, to the detriment of the Statutes of Autonomy."[37] The role of the Statutes of Autonomy, the laws assigning competences, is therefore undermined, their function being reduced to that of making a nominal statutory declaration of autonomous competences which is void of content.

Maintaining the freedom of central State bodies to set out the content of their own competences was one of the central aspects of the political debate throughout the process of statutory reform and, as Viver states, the ruling settled the debate in favour of this freedom.[38]

However, this is not the result of the Constitutional Court's having rejected the Statute of Catalonia's interpretation which viewed the latter as a valid framework for basic State legislation,[39] but rather as a result of the wide-ranging interpretation given of the national competences on basic laws.

Conclusion

In Spain, as in other politically decentralised systems, one of the risks inherent in relativising the decision-making capacity of regional bodies resulting from the impact which exercising central competences might have on said autonomous competences is that this may lead to regional legislation being stripped of its decision-making capacity. Such a risk could be averted by the Constitutional Court carrying out a restrictive interpretation of the State's capacity to delimit the scope of competences assigned through the Statutes.[40]

[37] Viver Pi i Sunyer (2011).

[38] Viver Pi i Sunyer (2011) *op. cit.*

[39] We do not consider the definition given in the Statute to be acceptable, since the reason why it must be the national parliament and not, for instance, the Statute that determines the scope of what is basic, is to ensure the two functions fulfilled by the basic laws in our legal code according to the Constitutional Court: firstly, to establish a minimum common legislation throughout the whole of the country, and secondly to enable certain variation in the scope of national competences and by extension those of the Autonomous Communities depending on the political circumstances of each moment. This would not prove possible if the scope of the basic laws were determined in statutory terms. Quadra-Salcedo Janini (2004).

[40] We concur with the view expressed by Montilla concerning the appropriateness of re-establishing formal guarantees vis-à-vis regulatory provision of basic laws, since beyond their legal specification they need to be applied by the Constitutional Court. Montilla Martos (2003).

Whilst assuming the need to maintain the State's ability to delimit the scope of the competences assigned in order to endow it with the capacity to ensure unity, the solution to this risk of impairing regional decision-making power must be sought through the possible involvement of Autonomous Community representatives in the national bodies that are charged with exercising such a delimitation of competences. Autonomous Community loss of decision-making authority would be relativised were there a Senate (Upper House) which acted as a true Chamber for territorial representation whose mission were to channel the interests of the Autonomous Communities through their involvement in drawing up national laws.[41]

Representing the interests of territorial bodies in national institutions also guarantees said bodies' autonomy and decision-making capacity. Whilst not providing a legal safeguard, it would, nonetheless, provide Autonomous Communities with the political safeguard of being able to take their own decisions. Such political safeguards are by no means alternatives, nor do they exclude the possibility of legal safeguards, but are complementary. However, the former prove more effective than the latter in the current composite States, in which central power has been endowed with wide-ranging decision-making capacity aimed at ensuring equality and unity as a means of further guaranteeing the existence of a territorial decision-making framework which would be deemed sufficient by the actual territorial bodies themselves.

References

Aja Fernández, E. and Arbós i Marín, X., "El Senado, cámara posible de las autonomías". Revista de Estudios Políticos issue 17, 1980

Albertí Rovira, E., *Autonomía política y unidad económica,* Cívitas, Madrid, 1995. pages 231-232

Azpitarte Sánchez, M., "El Estado autonómico unitario y el informe del Consejo de Estado sobre la inserción del derecho europeo en el ordenamiento español" REAF, issue 9, October 2009, page 145

Carrasco Durán, M., *El reparto de competencias entre el Estado y las comunidades autónomas sobre la actividad económica,* Tirant Lo Blanch, Valencia, 2005, page 25

Cruz Villalón, P., "La estructura del Estado, o la curiosidad del jurista persa". Revista de la Facultad de Derecho de la Universidad Complutense, special issue 4 (1981), page 61

De La Quadra-Salcedo Janini, T., *Mercado nacional único y Constitución*, Centre for Political and Constitutional Studies (CEPC), 2008

Favoreau, L. and Rubio Llorente, F., *El bloque de la constitucionalidad*. Civitas. 1991, page 126 et seq.

Fossas Espalder, E., *El principio dispositivo en el Estado Autonómico*, Marcial Pons-IVAP, Madrid-Barcelona- Buenos Aires, 2007

Gómez Ferrer Morant, R., "Relaciones entre leyes: competencia, jerarquía y función constitucional". RAP, no. 113, CEPC, 1987, page 27 et seq

Gómez Momtoro, A. J. and Caamaño Dominguez, F., "De nuevo sobre quién debe resolverlos conflictos territoriales de competencia", REDA, issue 99, 1998, page 392

[41] Aja Fernández and Arbós i Marín (1980). In a similar vein of enabling Autonomous Community involvement in the matter of exercising national competences, an early opinion was expressed by Cruz Villalón (1981), p. 61.

Gómez-Ferrer Morant, R., "Bases y ordenación general de la economía", in Pérez Calvo, A. (Coord.): *Normativa básica en el ordenamiento español,* Ministerio de Administración Pública, Madrid, 1990, page 125

Jiménez Campo, J., "¿Qué es lo básico? Legislación compartida en el Estado Autonómico". Revista Española de Derecho Constitucional issue 27, 1989, page 67

Montilla Martos, J.A., "La legislación básica tras las reformas estatutarias", Revista Española de Derecho Constitucional issue 78, 2006

Montilla Martos, J. A., "Los elementos formales en el proceso de producción normativa de lo básico". Revista Española de Derecho Constitucional issue 68, 2003

Quadra-Salcedo Janini, T., "El Tribunal Constitucional en defensa de la Constitución. El mantenimiento del modelo competencial en la STC 31/2010 sobre el Estatuto de Autonomía de Cataluña". Revista Española de Derecho Constitucional, issue 90. 2010.

Quadra-Salcedo Janini, T. de la, "¿Es el Estatuto una norma capaz de modular el alcance de la legislación básica del Estado?", Revista Española de Derecho Constitucional, issue 72, 2004

Solozábal Echevarría, J.J., *Las Bases constitucionales del Estado autonómico* McGraw-Hill, 1998, page 167

Viver Pi i Sunyer, C., "El Tribunal Constitucional, ¿ «siempre, solo... e indiscutible» ? La función constitucional de los Estatutos en el ámbito de la distribución de competencias según la STC 31/2010". Revista Española de Derecho Constitucional issue 91, 2011

The Authority Over the Administration of Justice in Spain: Current and Future Distribution Between the State and the Self-governing Communities

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Abstract Even though the Spanish Constitution of 1978 established the jurisdictional unity and reserved the authority over the Administration of Justice to the State institutions, the self-governing communities play an important role in this area. The paper will summarize how the functions related to Administration of Justice are currently distributed between the State and the Autonomous Communities. Additionally, the possibilities to extend the powers of the territories in this arena will be reviewed, respecting the limits set by the Spanish Constitution of 1978.

After the Spanish Constitution of 1978 was enacted, the territorial distribution of power between the State and the Autonomous Communities allowed the regions to have their own governments and parliaments. In this sense, the step taken in the political decentralization in both the executive and the legislative branches cannot be denied. Nevertheless, the same conclusion cannot be reached in the case of Judiciary. In fact, section 117.5 of the Spanish Constitution (S.C.) establishes jurisdictional unity as one of the principles of the State. In addition, s. 149.1,5 S.C. provides that "the Administration of Justice" is one of the exclusive competences of the State, which seemed to distance the autonomies from taking part in the field of Justice.

However, even though the self-governing Spanish territories may not have their own judicial branches, this does not mean that they cannot participate in any way in the functioning and organization of the Judiciary. Moreover, this very Constitution gave way to this participation in some of its sections, and anticipated that these territories should be born in mind when organizing the courts to be implemented state-wide.

The following will summarize how the functions related to Administration of Justice are currently distributed between the State and the Autonomous

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Communities. Additionally, the possibilities to expand the powers of the territories in this area will be reviewed, respecting the limits set by the Spanish Constitution of 1978. In both cases, the Spanish Constitutional Court's jurisprudence will be considered, focusing mainly on the latest Ruling 31/2010, but not forgetting others, such as Rulings 56/1990 and 62/1990, which previously analyzed and gave response to some of the issues. For a better understanding of the topic, we will focus on the main approaches to the matter and each one's implications in the power distribution between the self-governing communities and the State: the governing of the Judiciary, the jurisdictional or court organizational approach, and the competence over the non-judicial manpower and equipment supporting the judicial staff.

The Government of the Judicial Power in the Spanish Autonomic State

S. 122.2 S.C. provides that the General Council of Judicial Power is the governing body of the Judiciary, adding that an Organic Law shall lay down its status and all the points regarding its members. In addition, it states that the General Council consists of a President, who at the same time presides over the Spanish Supreme Court, and of 20 members appointed for a 5-year term. Each State chamber, the Senate and the Congress, nominates ten of them, six among judges and magistrates of all judicial categories, and four amongst lawyers and other jurists of acknowledged competence with more than 15 years of professional practice (s. 122.3 S.C.).

The General Council of the Judicial Power created by the Constitution was thus a centralized institution with no participation by the autonomies on its members' designation. This idea of centralization was increased when in 1985 the Organic Law of the Judicial Power was passed. The Organic Law, which regulated not only the government body of the Judiciary but also the main topics of the Judicial Power as a whole (courts, their organization and powers, ways of becoming judge and magistrate, judicial independence and impartiality. . .), provided no more than symbolic participation of the autonomous regions in the field of governing the Judicial branch. In fact, despite creating lower judicial-governing bodies linked to the General Council, the regions could not nominate members or take part in any of them. This feature was especially remarkable in the Governing Chamber of the High Court of Justice, since the Organic Law implemented this Court in every region and therefore this Governing Chamber was the reference institution related with the issue in the autonomous territories. Regardless of this fact, no territorial participation was provided. Contrary to what mentioned in the case of the members of the General Council, who were all appointed by the Spanish Parliament, the Governing Chambers of the High Courts of Justice consisted of only judges and magistrates, ex-officio or among-them elected members, without any kind of intervention of the regional legislative or executive in the selection process.

Some regions, mainly those with a strong historical nationalist tradition and more self-governing spirit on their territory, such as Catalonia and the Basque Country, have vigorously demanded to take part in this arena. As a response, and also in part because of the need of political support the ruling Socialist Party had from the Catalan nationalist group due to its weak majority in the Spanish Congress, the Socialist Spanish Government presented in the early 2006 a draft bill proposing the implementation of a Justice Council in every self-governing region. In parallel, a draft of a new Statute for Catalonia was also approved by the regional Parliament, containing an explicit reference about the Justice Council for the territory. Both drafts' regulation of the Justice Council established ambitious functions to be assumed by the new institution and, additionally, a diverse participation of the autonomous legislators in the designation of its members: whereas only a third of the whole members were selected by the regional Parliament in the draft bill, all but the President was appointed by the Catalan Chamber in the new Statute Project.

Subsequent to several proceedings and considerations by both the Senate and the Congress, the end of the legislature and the new Spanish general elections in 2008 did not allow passing into law the 2006 draft bill. Nevertheless, after serious amendments promoted by the Socialist Party in the Spanish Parliament (among them section 99, related to the composition of the Justice Council, which now generically provides that the Parliament of Catalonia will appoint the Council members established by the Organic Law of the Judicial Power) this new Catalan Statute was enacted in July 2006. It was the first time a current law provided a Justice Council with the participation of the regional Parliament in their composition—although not yet defined, since it should be developed by a future modification of the Organic Law of the Judicial Power.

This does not mean that the Justice Council had an easy way for its implementation. After the enactment of the new Statute of Catalonia, the rightist and traditionally centralizing Popular Party appealed to the Constitutional Court on the grounds that an important amount of the articles of the Statute—including the core of the Justice Council's regulation—was against the Spanish Constitution.

It took 4 years and a heated internal debate to the Constitutional Court to release its opinion—Ruling 31/2010. This Ruling invalidated some of the articles of the Statute and established a specific interpretation for some others.

The main articles related with the Justice Council could be found in the first group and therefore were declared unconstitutional. In a confused sentence (LG 47), the Court says that: *no institution but the General Council of the Judicial Power may assume governing functions over the State Judicial Power integrated jurisdictional Courts, and no law but the Organic Law of the Judicial Power may set the structure and functions of such* –Justice- *Councils, which could create possible deconcentrated models, not constitutionally essentials, whose very existence and configuration must remain in the Organic Legislator area of decision, with the aforementioned constitutional boundaries.*

Thus, there are two reasons offered by the Constitutional Court to refuse the Catalan Judicial Council. Firstly, the General Council of the Judicial Power is the only possible governing institution in the judiciary. Secondly, the regulation regarded the government of the judicial power must be provided by the Organic Law of the Judicial Power.

The first approach would imply that the General Council remains the one and only constitutionally possible judiciary governing institution; this argument is senseless, since it forgets the existence of other inferior governing bodies created by the Organic Law, such as the region-based Governing Chambers of the High Courts of Justice. The second approach lays aside the "validity without effectiveness" theory. According to this viewpoint, accepted by the Constitutional Court in other rulings, the articles would be valid—and therefore constitutional—but would not be effective until the Organic Law of the Judicial Power was modified to create and regulate the Judicial Councils, in the sense already provided by the Statute of Autonomy.

Nevertheless, The Constitutional Court Ruling does not say that the Judicial Council is unconstitutional by itself. It is the inaccuracy of the Statute of Autonomy to contain its regulation that is against the Constitution, and not the institution itself. Thus if the 2006 draft bill had been passed modifying the Organic Law of the Judicial Power, the Judicial Council would now be a current governing body of the Judiciary where the self-governing territories could take part in selecting some members of it in the way provided by the Organic Law. Therefore, despite the Constitutional Court Ruling, this possibility gives hope to the Autonomies of having an area of influence in the government of the Judiciary in their own territories.

The Jurisdictional or Court-Organizational Approach

The jurisdictional unity as a principle of the Spanish State established by the s. 117.5 S.C. seemed to totally exclude the Autonomic Communities from the organization of the Courts to be implemented in this country. However, a glimpse to the rest of the text shows that this first perception is not totally valid; in fact, the s. 152.1 S.C., originally established only for the historical regions, set that their Statutes of Autonomy had to provide the participation of the self-governing territories in this field through three different ways:

1. Firstly, through the existence of *a High Court of Justice, without prejudice to the jurisdiction of the Supreme Court*, which *shall be the head of Judicial Power in the territory* of the Autonomous Community.
2. Secondly, through the participation of the Community *in the setting-up of the judicial districts of the territory*.
3. Thirdly, establishing that *without prejudice to the provisions* of the Supreme Court, *successive proceedings, if any, shall be held before Courts located in the same territory of the Autonomous Community where the Court having jurisdiction in the first instance is located.*

The Constitution also set that all the previous provisions of the Statutes of Autonomy must be conformed *to the provisions of the Organic Law of the Judicial Power and to the principles of unity and independence of the Judicial Power*. This point outlined the superior position of the Organic Law and limited the options the regions had to develop their self-governing field in the area. However, at the same time, despite the aforementioned jurisdictional unity and the state exclusive competence in the

Administration of Justice, it forced the future Organic Law—it was passed in 1985, whereas the Constitution is dated in 1978—to give entrance to the Autonomous Communities in some parts of the regulation of the Judiciary.

They were the historical Basque Country and Catalonia the first approving their Statutes in 1979 and, of course, they took advantage of the possibilities given by s. 152.1 S.C. to increase their self-governing. Afterwards, even though they had been firstly established in the Constitution for the historical territories, most of the other Autonomies' Statutes also received these provisions about a High Court of Justice, the participation in the setting-up of the judicial districts and the finalization of proceedings inside the territory where the first instanced was located. The Constitutional Court upheld the validity of these provisions on the grounds that the obligation for the historical territories given by s. 152.1 S.C. didn't mean that the rest of the regions were not allowed to do so: it was compulsory for the firsts, and optional for the seconds—Rulings 56/1990 and 62/1990.

Consequently, when in 1985 the Organic Law of the Judicial Power was to be passed most of the autonomies had reflected in their basic laws the possibilities given by the Constitution originally to the historical regions in the area of Justice. In this context, the Organic Law generalized the regulation even for these territories that did not do so, in the way shown in the next paragraphs.

High Court of Justice of the Self-governing Autonomies

S. 70 of the Organic Law of the Judicial Power (O.L.J.P.) established that "the High Court of Justice of the Self-Governing autonomy will be the head of the judicial organization in the autonomic territory, without prejudice to the jurisdiction of the Supreme Court." This expanded the High Court to the whole autonomies—even for La Rioja, the only region that didn't receive it in its Statute—, and made uniform the existence of the different Courts in all the regions, regardless of the historical condition of some of them.

As far as the jurisdiction of the High Court of Justice is concerned, the Organic Law distanced it from the cassation appeal—the extraordinary appeal on points of law provided by most of the regulations in the European continental countries—reserved to the Spanish Supreme Court, and only gave to the High Court a very small participation in the criminal and civil fields.

Participation in the Setting-Up of the Judicial Districts of Their Territories

Even though the authority to establish the judicial districts is in the core of the Administration of Justice, and therefore it would be an exclusive competence of the State *ex* s. 149.1,5 S.C., the constitutional mention about the participation of the

autonomies in the setting-up of the judicial districts in their territories made by s. 152.1 S.C. obliged the O.L.J.P. to receive it in any way.

Nevertheless, this reception was made by the Organic Law more in a formal than in a real level: the participation was limited to a proposition to be prepared by the self-governing autonomies to be sent to the Spanish Ministry of Justice; according to s. 35 O.L.J.P., the Ministry had to "bear in mind" the autonomic proposition when defining the judicial districts, but any kind of binding effect was established for it. On the other hand, s. 35.6 O.L.J.P. was more generous with the territories about the capital of the judicial districts inside the autonomic territories, since it set that these capitals had to be determined by an autonomic law.

Considering that the proposition is made by the organizations that know best their own territories—the self-governing autonomies—a modification in the Organic Law to increase its binding effect would not be surprising. The Ministry of Justice could release some criteria related to the minimum and maximum population or territorial length per judicial district, and let every autonomy define their own districts, always respecting the general criteria previously established from the Ministry. This would not only mean a qualitatively more important participation of the autonomies in this specific point, but would also bring the decision-making closer to the citizens affected by it.

Ending of the Successive Proceedings in the Territory of the Autonomy Where the Court Having Jurisdiction in the First Instance Was Located

This approach, related with the organization of the Judiciary but maybe more with the regulation of the procedural laws in the whole jurisdictions, implied that if a first instance was tried in a Court located in one specific self-governing territory, the possible successive appeals related with the case had to be judged in courts situated in the same autonomy.

Nonetheless, as mentioned above, the cassation appeal is conceived as an extraordinary appeal, and it remains reserved to the Spanish Supreme Court; thus this is an excluded area for the High Courts. Additionally, the Organic Law of the Judicial Power created the National Court, which has jurisdiction in all the State, with particularly remarkable authority in the criminal field. The creation of this court took away some important areas from the jurisdiction of the autonomies-based High Courts of Justice, since it plays the first instance role in some influential cases outside the autonomy-based courts, and therefore the possible appeal is normally judged by the Supreme Court.

Leaving apart the jurisdiction and the very existence of the National Court, we consider that a modification to give the authority over the cassation appeal to the High Courts should not *a priori* be excluded. We are aware that the Spanish Constitution outlines the highest position of the Supreme Court in all branches of Justice (s. 123.1 S.C.). However, we should wonder if the authority over the cassation appeal is the only

way to preserve this highest position—and even if it is the best one, considering the Supreme Court enormous backlog. This position could be covered by giving to the Supreme Court the ability of revising the opinions released by the High Courts of Justice when judging the cassation appeals. The new "last appeal" would guarantee the uniformity of their interpretations and, in order to avoid the backload, it could take the U.S. "writ of certiorari" form, whereas the High Courts in the self-governing communities would deal with the standard cassation appeals.

The Functions of the Self-governing Communities in the Non-judicial Equipment and Manpower Supporting the Judicial Staff

A first approach to this point requires an analysis to section 122.1 of the Spanish Constitution; it provides that "the Organic Law of the Judicial Power shall make provision for the setting up, operation and internal administration of courts and tribunals as well as for the legal status of professional judges and magistrates, who shall form a single body, and of the staff serving in the administration of justice."

According to the article, the Organic Law of the Judicial Power would once again be the defining rule in the field of Justice: it had to make provision for the overall administration of courts and the staff serving on it, both the jurisdictional—judges and magistrates—and non-jurisdictional one. There was an only constitutional limitation for the Organic Law: the jurisdictional staff should form a single body in all the State. It was an important, constitutional-level boundary for the autonomies, since it prevented them from creating their own bodies of judges, and therefore all the judicial staff is dependent on the State institutions—mainly on the General Council of Judicial Power, the governing body of the Judiciary (s. 122.2 S.C.).

As mentioned, before the Organic Law of the Judicial Power was enacted in 1985, the regions passed their Statutes of Autonomy, becoming self-governing communities. Fourteen of them explored a possibility of acquiring functions in the area by adding to their fundamental texts a special clause, the so-called "subrogation clause." Through this clause, the Autonomies assumed the powers the Organic Law of the Judicial Power recognized as the Government's or reserve or attribute to it. Once again, the Organic Law that was going to be passed in 1985 would define the distribution of functions in the field of the Administration of Justice.

When the Organic Law was finally enacted, autonomies' expectations of assuming an important level of authority in this field were not fulfilled. Although the function related to equipment and building serving the Judiciary was attributed to the Government (s. 37 O.L.J.P.), and thus through the subrogation clause to the Communities, all the different bodies of public employees working in the Administration of Justice were considered state bodies (s. 464 O.L.J.P.). This meant that the regulation over the Law Clerks and lower civil servants taking part in the Judiciary should be delivered by the Ministry of Justice; moreover, due to its special character of state bodies, and despite

the subrogation clause, the Ministry—not the autonomies—conserved the jurisdiction over these public employees.

Some self-governing communities appealed to the Constitutional Court against the alleged unconstitutionality of the Organic Law, on the grounds that *de facto* it limited the potential of the subrogation clauses. In Ruling 56/1990, the Constitutional Court established that the core of the Administration of Justice, the functions directly related with the jurisdiction, could never be assumed by the Communities, and thus should always be responsibility of the State. However, according to the Ruling, the supporting staff and equipment of the judges and magistrates was out of this core and could therefore be assumed by the autonomies; but this assumption should be done following what is provided by the Organic Law of the Judicial Power. In this sense, even though the Constitutional Court underlined that *it was not the only constitutional option*, the State nature of the bodies decided by the Organic Law was constitutional. As a direct consequence, a common regulation for these bodies was needed, and it had to be provided by the state institutions, not by the autonomies.

The autonomization of Law Clerks and the rest of the supporting staff, leaving the authority over these bodies in the self-governing institutions' hands, would be clearly constitutional. In this sense, it would give each autonomic government the responsibility of managing them to find the best way to maximize both human and material resources in order to provide the best Administration of Justice possible in their own territories.

Conclusion: Finding Ways to Bring Justice Closer to the Self-governing Autonomies

After analyzing the main issues regarded the Administration of Justice and the Spanish self-governing communities, some conclusions may be drawn. These conclusions may consider the jurisdictional unity the Spanish Constitution designs for the whole State; however, we also have to bear in mind that this unity may not exclude the autonomic participation in some important areas of the Judicial Power, nowadays accepted or constitutionally acceptable in the future legislation.

Firstly, despite Constitutional Court ruling 31/2010, outlawing the core regulation of the Judicial Council established by the Catalan Statute, the grounds used in the opinion show that the unconstitutionality stemmed from the inaccuracy of the Statute to regulate it, thus it was not originated in the nature of the judicial governing institution. According to this, a modification of the Organic Law of the Judicial Power creating the autonomic Judicial Councils would be constitutional. This new regulation should allow the autonomic participation in the appointing process of the members of this judicial body, as the Spanish Constitution provides for the members of the General Council of the Judicial Power and their designation by the Senate and the Congress.

Secondly, the jurisdiction of the autonomy-based High Courts of Justice might be opened to assume more responsibilities, especially as far as the cassation appeal is

concerned. The highest position of the Spanish Supreme Court would be guaranteed by a new appeal, which would let the Supreme Court revise the High Courts' judgments in order to unify the interpretations released by them.

Finally, leaving apart judges and magistrates—who *ex constitutione* must form a single body state-wide—, the authority over the different bodies of law clerks and other public employees might be given to the autonomies. Alongside with the authority over the equipment and buildings the self-governing communities nowadays already have, the authority over the non-jurisdictional staff could be used to implement new systems maximizing the resources and therefore improving the Administration of Justice in their territories.

References

Borrell Mestre, J. (2002). Estado Autonómico y Poder Judicial. Atelier, Barcelona, Spain.

Gerpe Landín, M., Cabellós Espiérrez, M.A. (2011). La regulación estatutaria del Poder Judicial y su tratamiento en la STC 31/2010. Revista d'Estudis Autonòmics i Federals 12: 302–330.

Porras Ramírez, J.M. (2011). El Poder Judicial en Cataluña, según el Estatut y el Tribunal Constitucional. Limitaciones y posibilidades de desarrollo de un modelo. Revista d'Estudis Autonòmics i Federals 12: 331–362.

Saiz Garitaonandia, A. (2009). La Administración de Justicia en las Comunidades Autónomas. Situación actual y perspectivas de reforma. Tirant lo Blanch, Valencia, Spain.

The Power-Distribution Nature of the Reserves of Organic Law in the Constitutional Case Law: The Case of the Organic Law of the Judiciary

M. del Mar Navas Sánchez

Introduction

It is widely common to refer to the open nature of the State's territorial model designed by the Spanish Constitution (SC), as well as to the relevant role that the Constitutional Court (CC) has performed from the beginning in that model building. One of the aspects where the intervention, and therefore, the contribution of the constitutional case law have been expressed with a greater intensity has been the one related to the territorial distribution of the power between the State and the Autonomous Communities (AC). A proof of this is the collection of judgments of the Constitutional Court (hereafter, STC) whereby all the appeals of unconstitutionality set out against the new Statutes of Autonomy (SA), approved by some AC (also called second-generation Statutes), are solved.[1]

Besides, these judgments, particularly, STC 31/2010, give us the opportunity to analyse again a matter that, with occasion of the first SA, attracted the attention of doctrine and jurisprudence. We refer to the legal nature of the reserves of Organic Law provided for in the SC, as far as the distribution of powers between the State and the AC are concerned. That is to say, what is the relationship between these constitutional norms (Article 81.1 SC, Article 122 SC, etc.) and the other norms referring specifically to the distribution of powers. When the SC reserves certain subject to the Organic Law, the questions to be posed are: is it just establishing a provision related to the system of law sources? Alternatively, on the contrary, is it also conferring an additional

[1] We refer to the judgments STC 247/2007 (Valencia's Statute of Autonomy, 2006), STC 31/2010 (Catalonia's Statute of Autonomy, 2006), STC 30/2011 (Statute for Andalusia, 2007), STC 32/2011 (Statute for Castilla y Léon, 2007) and STC 110/2011 (Statute for Aragón, 2007). Besides, new Statutes of Autonomies have been approved, namely: Balearic (2007) and Extremadura (2011).

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power upon the State, although in an implicit way, apart from what provided for in Article 149 SC?

The purpose of our contribution is to analyse the role that constitutional case law has conferred upon the reserves of Organic Law with regard to the organization of state and regional powers. Therefore, we will carry out an essentially jurisprudential analysis so as to make our humble contribution to the doctrinal debate about the State of the Autonomies. We are mainly concerned about underlining the way whereby the CC is using the reserve of Organic Law as a power-distribution technique. Particularly, we will focus on the case of the Judiciary, which is used to complement CC's case law by means of which the latter limited the scope of the specific title of competence, that is, Article 149.1.5th, to the core of that Power, excluding everything not included in that core.

A Brief Approach of the Reserves of Law and the Constitutional Norms About the Distribution of State and Regional Powers

The basic framework (or ordinary system) of distribution of powers between the State and the AC, whose respective powers are fixed by the SA, is provided for in Articles 148 and 149 SC.

However, the SC also contains some other rules that may have an influence upon this power-distribution system. Therefore, we must take these rules into account so as to determine the role (if any) that they perform with regard to the distribution of powers between the State and the AC. Among these rules, and as far as the boundaries (which ones and which scope) of the state powers are concerned, we underline the constitutional provisions that establish different reserves of law, especially when affecting an Organic Law. According to this, the question to be posed is the following: what is the relationship between the constitutional norms and all those norms that specifically refer to the political-power distribution between the State and the AC?

Nevertheless, and as we are analyzing a reserve of Organic Law, the matter brings certain problems, due to this Law's peculiar feature: being a norm that only can come from the State. In accordance with Article 81.2 SC, only the *Cortes Generales* (that is, the bicameral parliament composed of the Congress of Deputies, or the lower house, and the Senate, or the upper house)—and, therefore, the State—can draw up these laws, and will have to follow, besides, a specific procedure for this. Thereby, the *form* of the law will pre-determine the unique body authorized for its production, namely: the State, excluding the AC. Therefore, and unlike the ordinary laws, it is not a *form* that is available for both of them (State and AC).

Due to the fact that it is unquestionable that only the State—by means of the General Courts—can draw up an Organic Law, the matter related to its power-distribution scope arises almost naturally. When the Constitution reserves a subject to the Organic Law, is it also conferring upon the State the power of regulating that subject in the same terms and scope set forth in the constitutional norm containing it? Is it possible, then, considering it as a title of competence of the State and, in short, as a norm conferring state powers? Alternatively, on the contrary, do we have to consider it

as a simple reserve of law, a rule about a concrete *form* of legal production, whose content is provided for in the specific rules for distribution of powers (Article 149 SC)?

The CC, apart from the doctrine, has tried to give an answer to all the questions mentioned before in a case law that, with occasion of the reserve provided for in Article 81.1 SC ('development of fundamental rights and public liberties'), the CC itself has called as 'non-rectilinear'. This case law has not given a homogeneous treatment to this question, as the CC has considered each reserve of Organic Law independently, despite there have been some attempts of drawing up general-scope statements. That is why it is convenient to analyse them separately. Nevertheless, we will just analyse two of them, namely, Article 122 SC and the reserve of the Organic Law of the Judiciary (OLJ). Besides, we will also analyse the one related to the development of the fundamental rights and public liberties (Article 81.1 SC) that will serve us as a counterpoint for the conclusions reached with regard to Article 122 SC. We will start with the reserve of Organic Law of Article 81.1 SC, which is the one that has aroused a greater interest in the doctrine and in the constitutional case law.

The Influence of the Reserve of Organic Law for the Development of Fundamental Rights and Public Liberties (Article 81.1 SC) in the Power-Distribution System, in Accordance with the Constitutional Case Law

With regard to this reserve of Organic Law, most of the doctrine has set forth its position about the matter we are concerned in this work. Some authors (Baño León 1988: p. 208; Pemán Gavín 1992: pp. 213–214) are in favor of considering that the reserve of Organic Law confers simultaneously upon the State an exclusive power about the reserved subject. On the contrary, other authors are against that, and their positions can be grouped into two. On the one hand, there are authors who consider that it has not a power-distribution nature because the reserve of Organic Law and norms of territorial distribution of powers take place in two different levels (Lucas Murillo de la Cueva 1999; Villaverde Menéndez 2007a: p. 213 *et seq* and 2007b: p. 328 *et seq*). On the other hand, other authors consider that the reserve of Organic Law can only be conceived as a rule related to the system of law sources, that is to say, a rule about the form whose content has to be determined by the titles of competence with influence upon the reserved subject (Barceló i Serramalera 1991: p. 88 *et seq* and 2004: p. 50 *et seq*; Cabellos Espiérrez 2001: p. 232 *et seq* and 2007: p. 234 *et seq*; De Otto 1984: pp. 66–67; Tudela Aranda 1994: p. 253 *et seq*).

CC's definitive doctrine about this matter is contained in the judgment STC 173/1998, related to the law of association. Nevertheless, with the aim of reaching this definitive doctrine the constitutional case law has undergone a hesitant evolution ('non rectilinear') whose main milestones have been set forth in the judgments STC 5/1981 and STC 137/1986, both referred to the right to education. In the first judgment, the CC does not actually differentiate between the scope of the Organic Law of Article 81.1 SC and the titles of competence of Articles

149.1.1 SC and 149.1.30 SC. On the contrary, in the judgment STC 137/1986, the CC defines which ones of the provisions of the Organic Law are not available for the AC, since basic rules for the development of the right are contained, and which ones, on the contrary, can be modified by means of their own regional laws, since they constitute supplementary state law. However, none of these judgments would provide a solution, neither definitive nor satisfactory, to the matter we are concerned, as it has been proven by the critics expressed by Chofre Sirvent (1994) and Lasagabaster Herrarte (1987), among others. It is in the judgment STC 173/1998 whereby the CC sets forth its definitive case law, at least so far, about this matter.

Moreover, this case law is placed between two parameters that are apparently opposed. On the one hand, that 'the reserve of Organic Law of Article 81.1 SC does not contain, in all honesty, any authorizing titles of competence in favor of the State' [judgment STC 173/1998, legal basis or *fundamento jurídico* (f.j.) 7]. On the other hand, apart from what it has been previously mentioned, that 'by virtue of Article 81.1 SC, only the State can enact this form of laws for the development of the fundamental rights and public liberties and that the AC, when exercising their powers, must respect their content under penalty of committing a vice of unconstitutionality by violation of Article 81.1 SC' (STC 173/1998, f.j. 7).

The CC solves this contradiction establishing a distinction between the 'direct development' of the fundamental right and the regulation of its legal regime. While the first one is constitutionally reserved to the Organic Law and, therefore, it can only be incumbent upon the State, the second one is subject to the rules regarding distribution of powers (Articles 148 and 149 SC). The CC defines the scope of the reserve of Organic Law: the regulation of certain essential aspects for the definition of the right, the definition of its scope and the determination of its boundaries with regard to other liberties constitutionally protected. As far as the other possible rules are concerned, namely, the regulation of the 'subject' whereby the right is focused on, this is incumbent upon the ordinary law-maker (either state or regional) with sectorial powers to act upon it (STC 173/1998, f.j. 7).

Despite all the attempts of the CC so as to differentiate the wide nature and scope of the reserve of Organic Law and of the rules related to the distribution of powers, and despite its statement that the first one confers no powers upon the State, it still seems that this reserve of Organic Law also has a power-distribution scope. This has happened since the CC conferred upon the State a faculty (the direct development of the right) directly provided for in Article 81.1 SC, and not in any of the titles of competence included in Article 149 SC.

In this sense, there have been several proposals and opinions expressed in the doctrine to save the contradiction where the judgment STC 173/1998 seems to commit. Among them, we underline the opinion expressed by Villaverde Menéndez (2007a: p. 213 *et seq* and 2007b: p. 328 *et seq*), although the author starts from an opposite view, that is: from the identification, by the CC, of the object of this reserve of Law with the scope of state power provided for in Article 149.1.1 SC. The main idea is that fundamental rights are not competence subject since they are part of the Constitution of the State as a whole (*Gesamtverfassung*) and are not, therefore, available for both state and regional law-makers. Thereby, when the organic law-maker develops

the content of a fundamental right he does not act as a law-maker of the central State, but of the *Gesamtverfassung*. According to Fernández Farreres (2005: pp. 70–72), on the contrary, the doctrine contained in this judgment is accurate, provided that it is assumed that the organic law cannot go beyond the state powers so as to establish basic rules. In other words, the Organic Law can only include rules that, from the point of view of the distribution of powers, have a basic nature. Other authors, for instance, Barceló i Serramalera (2004: p. 57) and Cabellos Espiérrez (2007: 102–106 and 2001: pp. 238–260) are, however, openly critical with this constitutional case law, since they consider that the CC ends up assigning a power content to this reserve of Organic Law that, on the other hand, should not have.

In any case, we would like to stress, not this case law and its contradictions, but all the efforts made by the CC so as to reject the consideration of the reserve of Organic Law of Article 81.1 SC as a norm conferring powers upon State. Therefore, the CC rejects the fact that this norm supposes an alteration of the power-distribution norms between the State and the AC. These efforts are also completed with the conception that the CC holds up applies here about the Organic Law as an exceptional norm requiring a restrictive interpretation. And this restrictive interpretation is focused on the reserved 'subject' ('fundamental rights and public liberties') as well as on the object of the reserve, that is, the regulation that by its virtue is incumbent upon the organic law-maker and, therefore, State's law-maker (*direct* 'development' of the right).

It could also be understood that, more deeply, this case law does not really suppose an extension of the powers that are incumbent upon the State with regard to the fundamental rights. Although the judgment STC 173/1998 does not do that and, therefore, it is object of doctrinal criticism (Cabellos Espiérrez 2001), it could be possible, at least in theory, to refer the content of Article 81.1 SC to Article 149.1.1 SC. That is to say, to redirect that regulatory scope (direct development) set forth by the CC in the orbit from Article 81.1 SC to Article 149.1.1 SC as a part of the content that the judgment STC 61/1997 conferred upon the 'regulation of the basic conditions guaranteeing the equality of all the Spanish citizens in the exercise of the rights'. Thereby, the State is authorized to regulate the primary content of the right, the fundamental legal positions (elementary faculties, essential limits, fundamental duties, basic benefits, certain premises or previous assumptions) (STC 61/1997, f.j. 8). As a consequence, we would face a faulty comprehension of the reserve of Law, in this case Organic. However, the situation is very different when it is the case of the reserve of OLJ, not only because in this latter all the efforts, the cautions and the restrictive interpretation, made by the CC in the case of Article 81.1. SC, disappear, but, mainly, because the CC does not hesitate to consider it as a genuine norm assigning powers, and able to alter the distribution regime that, otherwise, would be deducted from Article 149.1.5th SC.

The Reserve of Organic Law of the Judiciary in the Constitutional Case Law: Its Consideration as a Norm Conferring Powers Upon the State

The perspective is completely different when we analyse the reserve of Organic Law with regard to the Judiciary and to its governing body, namely, the General Council of the Judiciary (GCJ). The exceptional nature of this type of rule is not noticed here, and there is no reference to the necessary restrictive interpretation that should lead the delimitation of its scope. Besides, and unlike in the previous assumptions, the CC does not hesitate to assign the power-distribution nature either to Article 122 SC or to the OLJ itself.

However, before continuing with our analysis, it is necessary to distinguish the two different scopes of the reserve of the OLJ (Article 122 SC). On the one hand, the setting up, operation and control of the Courts and Tribunals; the legal status of professional Judges and Magistrates (Article 122.1 SC); and the statutes and functions of the GCJ as well as the system of incompatibilities applicable to its members (Article 122.2 SC). On the other hand, the legal status of the staff serving in the Administration of Justice (Article 122.1 SC). Even though the OLJ is considered in the frame of the Constitution as a single text, its treatment is not considered like the latter, since they do not share the same scopes. That is to say, in the first case, the reserve is referred to a collection of subjects that, in accordance with the constitutional case law, are part of the exclusive power that Article 149.1.5th SC confers upon the State. On the contrary, the second case refers to the scope whereby the AC could, in principle, assume their own powers.

Therefore, this distinction is coherent with the case law of the CC about the way the distribution of powers is organized between the State and the AC with regard to the Administration of Justice (please see the judgments STC 56/1990, STC 62/1990, STC 158/1992, STC 105/2000, STC 253/2005, and STC 31/2010). A key aspect in this doctrine has been the distinction set up by the CC between a wide sense and a strict sense of this notion ('Administration of Justice'). *Strictu sensu*, the Administration of Justice just covers the exercise of the jurisdictional function by Judges and Magistrates, the setting up of those elements that become essential to the judicial independence, that is, the governing power conferred upon the GCJ, and the design of the judicial structure of the State (organization of the judicial demarcations). Nevertheless, there is still a set of material means and non-judicial staff that, without exercising jurisdictional functions, are at its service, performing some auxiliary or assistant-functions. These material means and non-judicial staff compose the Administration of Justice in a wide sense, which is also called 'administration of Administration of Justice'.

Taking this distinction into consideration, the CC concludes that the State holds an exclusive power, as referred to in Article 149.1.5[a] ('Administration of Justice'), over the Administration of Justice in a strict sense. On the other hand, with regard to the management of the material means and non-judicial staff, the AC can assume powers over them, provided that it had been set forth in their respective SA.

Even though this case law has been the focus of different criticisms in the doctrine (Balaguer Callejón 2000; García Herrera and López Basaguren 2006, among others), the truth is that, as a last record, it made it possible that the AC could assume certain powers related to Justice, beyond the explicit constitutional provisions to this respect (Article 152.1 2nd paragraph SC). Besides, the distinction mentioned before served the CC to declare as constitutional the 'subrogation clauses' contained in the first SA. The reason why they have acquired that name is because they set forth that the AC would be subrogated in the position of the Central Government with regard to those powers conferred upon the latter by the OLJ. The CC considers that they are perfectly valid and compatible with the SC since they refer to the scope whereby the AC can assume powers with regard to the Administration of Justice. However, this does not prevent the CC from specifying their scope, establishing certain restrictions to their possible actions.

Nevertheless, it is important to distinguish two types of restrictions. On the one hand, some restrictions (please see the judgments STC 56/1990, f.j. 8; STC 62/1990, f.j. 5) are, from our point of view, perfectly logic and reasonable and are generally referred to the conditions that must concur so that those clauses could act. Among them we can underline the fact that it is impossible that the AC can assume supra-community powers, or the fact that those clauses could not act with regard to those powers framed in the strict notion of Administration of Justice, and with regard to those powers that, despite their wide conception, have not been conferred upon the Central Government by the OLJ. Moreover, and because of the fact that they refer to the powers of the Government, the only powers that could be assumed by the AC shall be statutory and executive, but never legislative.

On the other hand, as far as the second type of restrictions is concerned, they are set forth by the CC with regard to non-judicial staff that, as we have mentioned before, are part of the scope that, as it is not included in the main core of Article 149.1.5th SC, is incumbent upon the AC, if it has been provided for thereby in their SA.

In this sense, the CC applies not only the previous restrictions, but also another additional restrictions deriving directly from the reserve of Organic Law of Article 122.1 SC ['The organic law of the judiciary shall determine (. . .) the legal status (. . .) of the staff serving in the Administration of Justice'].

In accordance with the CC, this reserve implies that the State is reserved, by means of the organic law-maker, the determination of the basic or common elements of that status, and that every regional legislative power is excluded. Besides, even though it considers that it is not the only possible option available for the law-maker to guarantee that homogeneous regulation, the CC also considers as perfectly constitutional the configuration of this non-judicial staff as a National Body, with the subsequent additional restrictions to the possible regional actions. Thereby, the AC are even deprived of the powers that are typically governmental if it is considered that their exercise can question the nature of National Body (please see sentences STC 56/1990, f.j. 10; STC 105/2000, f.j. 5).

Thereby, the CC confers upon the reserve of Organic Law a power-distribution nature that, in principle, is not incumbent upon it, above all if we take into account that the CC, elsewhere and with regard to a different reserve, but with a clear vocation of generality, has set forth that the reserve of Organic Law contains no titles of competence in favor of the State (STC 173/1998).

Even in the case that it would be estimated that (as it seems logic in accordance with Article 122.1 SC) only the State holds the power to regulate the legal status of non-judicial staff, the CC would be required to make an adequate interpretation. That is to say, not only to account for the reasons why it is imposed as a unique possible interpretation, but also to define the restrictive criterion to be followed when delimiting the scope of the reserve of OLJ to this respect. This restrictive interpretation would be imposed not only by the extraordinary nature that the CC confers upon this type of norm, that is, the Organic Law, but also because it would be a case of special or exceptional distribution of powers (Viver Pi-Sunyer 1989). In other words, a case by means of which the State would be conferred an additional power that, in accordance with the jurisprudential interpretation, cannot be framed in Article 149.1.5th SC and, therefore, by means of a rule not related to the ones assigned specifically to the distribution of powers. A rule that could also alter the power distribution as provided for in those specific provisions rendering practically without content a scope that, otherwise, would be incumbent upon the AC.

Nevertheless, the previous aspects are not provided for in the constitutional case law, which laconically states that the configuration of this non-judicial staff as a National Body has been the option chosen by the law-maker so as to 'guarantee homogeneously, in every AC, the rights of the citizens in their relationships with the Administration of Justice'. (STC 56/1990, f.j. 10).

Another aspect worthy of mention is the statement set forth by the CC according to which the OLJ is free to confer certain powers, beyond the strict scope of government of the Judiciary, namely, the one focused on Judges and Magistrates with the aim of guaranteeing their independence, upon the GCJ instead upon the Government, preventing the subsequent subrogation clauses [please see the judgments STC 56/1990, f.j. 8. b); STC 105/2000, f.j. 2 and 4]. We consider, on the contrary, that the freedom of the law-maker is not absolute in this context, since it would only be justified the distribution of those powers that, despite the fact that they are not included in the hard core of the Judiciary, as they are not a necessary part for the strict governing function, are considered absolutely essential to guarantee the judicial independence. Thereby, the removal of powers of AC's power scope could be justified, even though in the case that the GCJ is considered as a body not related to the territorial distribution since it is not a part, not of the set of central organs of the State, but of the constitutional order. And this would be coherent with the consideration by the unique Judiciary as a Power included in the State as a whole (Balaguer Callejón 2010). However, it would not release from this restrictive interpretation, closely related to its function of judicial independence guarantee that is, in short, what justifies the existence of this organ.

The prominent role that the constitutional case law confers upon the OLJ has been confirmed again in the judgment STC 31/2010.[2] For example, the CC has declared as unconstitutional the new Catalonia's Statute of Autonomy with regard to the creation of the 'Council of Justice of Catalonia' since it considered as incompetent the statutory rule so as to create this body, conceived as a governing body of the Judiciary in Catalonia. That body can only be created by the OLJ, which is an Organic Law that, on the other hand, is apparently assigned an absolute power by the CC in order to perform this 'deconcentration' of the GCJ (f.j. 47). Furthermore, it has reiterated the decisive role performed by the OLJ as extreme and determining of the validity of the statutory provisions, even in scopes not included in the core of the Administration of Justice, such as the one related to non-judicial staff (f.j. 52). That is to say, statutory provisions that, in not few occasions, are not declared as unconstitutional, but at the price of being moved by the OLJ itself (Torres Muro and Álvarez Rodríguez 2011).

In short, in accordance with this constitutional case law, it is relevant to conclude that the CC has been using the reserve of OLJ as a power-distribution technique (Balaguer Callejón 1997). Or, in other words, as a rule conferring powers that the CC also uses to complement its own case law about the scope of the constitutional and power-distribution norm (Article 149.1.5th SC) that the CC itself restricted to the jurisdictional function, to the governing function that is incumbent upon the GCJ, and to the design of the judicial structure of the State. That is to say, a doctrine that, although it served to save the constitutionality of the SA to this respect (subrogation clauses), has turned out to be tinged by the CC itself by means of the use made with regard to the reserve of Organic Law as an additional technique of distribution of powers. The CC does not hesitate to confer a power-distribution nature upon Article 122 SC and, by extension, upon the law itself where the constitutional provision is set forth, namely, the OLJ. Thereby, and as far as this subject is concerned, the CC bases the distribution of the power on different bodies and entities: as far as possible in Article 149.1.5th SC; and when not, in Article 122 SC, altering the power-distribution system that, otherwise, would be deducted from Article 149.1.5th SC.

References

Balaguer Callejón, F. (1997). La constitucionalización del Estado autonómico. Anuario de Derecho Constitucional y Parlamentario 9: 129–160

Balaguer Callejón, F. (2000). Poder Judicial y Comunidades Autónomas. Revista de Derecho Político 47: 53–68

Balaguer Callejón, F. (2010). Las cuestiones institucionales en la STC 31/2010, de 28 de junio. El Cronista del Estado Social y Democrático de Derecho 15: 62–69

Baño León, J.M. (1988). Las autonomías territoriales y el principio de uniformidad de las condiciones de vida. Instituto Nacional de Administración Pública, Madrid, 360 pp

[2] The literature regarding this judgment is abundant. However, we will underline some of them related to the conception of the Judiciary in the new SA and/or in the STC 31/2010: Balaguer Callejón (2010), Cabellos Espiérrez (2011), Cámara Villar (2011), and Porras Ramírez (2009).

Barceló i Serramalera, M. (1991). Derechos y deberes constitucionales en el Estado autonómico. Civitas, Madrid, 141 pp
Barceló i Serramalera, M. (2004). La ley orgánica. Ámbito material y posición en el sistema de fuentes. Atelier, Barcelona, 173 pp
Cabellos Espiérrez, M.A. (2001). Distribución competencial, derechos de los ciudadanos e incidencia del derecho comunitario. Centro de Estudios Políticos y Constitucionales, Madrid, 471 pp
Cabellos Espiérrez, M.A. (2007). La regulación de los derechos: el papel del Estado y de las Comunidades Autónomas a partir del artículo 149.1.1 CE. In: Hofmann, R., Bifulco, R., Ortega Álvarez, L., Cabellos Espiérrez, M.A., and Nieva Fenoll, J. Estado compuesto y derechos de los ciudadanos. Generalitat de Catalunya. Institut d´Estudis Autonòmics, Barcelona, 83–111
Cabellos Espiérrez, M.A. (2011). Los Consejos de Justicia en el actual proceso de reformas estatutarias y sus perspectivas de futuro. Revista de Derecho Político 80: 89–116
Cámara Villar, G. (2011). Reformas estatutarias y Consejos de Justicia autonómicos a la luz de la doctrina del Tribunal Constitucional. Teoría y Realidad Constitucional 27: 197–220
Chofre Sirvent, J.F. (1994). Significado y función de las leyes orgánicas. Tecnos, Madrid, 335 pp
De Otto, I. (1984). Los derechos fundamentales y la potestad normativa de las Comunidades Autónomas en la jurisprudencia del Tribunal Constitucional. Revista Vasca de Administración Pública 10: 53–72
Fernández Farreres, G. (2005). La contribución del Tribunal Constitucional al Estado autonómico. Iustel, Madrid, 470 pp
García Herrera, M.A. and López Basaguren, A. (2006). Constitución y Poder Judicial: la incompleta realización del Poder Judicial. Estudios de derecho judicial 90: 127–207
Lasagabaster Herrarte, I. (1987). Sobre las leyes orgánicas. Revista Vasca de Administración Pública 17: 51–69
Lucas Murillo de la Cueva, E. (1999). Igualdad y autonomía. Las competencias sobre asociaciones en la jurisprudencia constitucional. Civitas, Madrid, 173 pp
Pemán Gavín, J. (1992). Igualdad de los ciudadanos y autonomías territoriales. Universidad de Zaragoza-Civitas, Zaragoza-Madrid, 331 pp
Porras Ramírez, (2009). La Justicia en los Estatutos de Autonomía de segunda generación. Teoría y Realidad Constitucional 24: 265–292
Torres Muro, I. and Álvarez Rodríguez, I. (2011). El Poder Judicial en Cataluña en la STC 31/2010, de 28 de junio. Teoría y Realidad Constitucional 27: 345–376
Tudela Aranda, J. (1994). Derechos constitucionales y autonomía política. Civitas, Madrid, 471 pp
Villaverde Menéndez, I. (2007a). La función de los derechos fundamentales en el marco del Estado de las autonomías. Revista d'Estudis Autonòmics i Federals 5: 203–239
Villaverde Menéndez, I. (2007b). La intangibilidad competencial de los derechos fundamentales: forma de Estado y derechos fundamentales. Teoría y Realidad Constitucional 20: 321–357
Viver i Pi-Sunyer, C. (1989). Materias competenciales y Tribunal Constitucional. Ariel, Barcelona, 251 pp

The Role of the State in the Realisation of the Right to Housing

Special Reference to Subsidised Housing

Pilar Garrido Gutiérrez

Projection of the social state onto a decentralised territorial model entails a degree of homogenisation, insofar as real equality cannot be achieved without some territorial equivalence in levels of assistance. The diversity of actions that Autonomous Communities (ACs) can undertake in this area must therefore be reconciled with the uniformity arising out of the reality of the state where they participate.[1]

The right to housing is enshrined in Article 47 of the Spanish Constitution, which states that:

> All Spaniards are entitled to enjoy decent and adequate housing. The public authorities shall promote the necessary conditions and shall establish appropriate standards in order to make this right effective, regulating land use in accordance with the general interest in order to prevent speculation.
>
> The community shall participate in the benefits accruing from the urban policies of the public bodies.

From a jurisdictional perspective, the ACs have assumed housing as an exclusive power through their statutes of autonomy. However, this distribution of powers is upset by the importance of the housing industry for economic development or, to put it another way, for creating the conditions of social reproduction. As a result, the influence of the housing subsector on the market and on the economy has allowed the state to take a predominant role in defining actions to be taken in the field of housing policy. Housing plays an important economic role, and the state may therefore act in this field even though it is the exclusive power of the ACs.[2]

[1] Ruiz-Rico (2002), p. 29.

[2] Garrido (2004), pp. 369 et seq.

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Spain is currently in the midst of a serious economic and financial crisis associated with a property crisis arising from the bursting of the property bubble.[3] In this situation, it is important to revisit some of the basic elements where housing policies have been developed in the country. One of these elements—although not the only one—entails the need for a change in the role the state has played over the years with regard to the constitutional right to decent and adequate housing.

In the *autonomic* (or regional) state of Spain, power over housing has been assumed by all regional statutes of autonomy as being exclusive to the ACs. The role of the state in this area is considered from two perspectives: one arising out of an economic interpretation of the issue and the other where housing is viewed as a constituent part of a basic social right, which must be guaranteed under certain basic conditions throughout the state. Clearly, it is the first of these roles that the state has played over the last 30 years. However, we believe it should begin to act as the guarantor of the basic conditions for enjoyment of the right to housing throughout the Spanish state.

Over the following pages, we shall try to set out a number of ideas related to this line of argument.

Actions of the State in Housing Policy: The Economic Nature of the Measures Adopted

Throughout the second half of the twentieth century, the most tangible manifestation of housing policy in Spain at any given time was the various forms of subsidised housing adopted.[4]

From the passing of the constitution in 1978, the main thrust of public housing policies has been to incentivise private development of subsidised housing for sale; in contrast, direct assistance and public housing development targeted at individuals with limited resources or problems of social exclusion have been given a much more secondary and isolated position.[5] These actions were regulated in successive state housing plans.

The grounds for the state's actions and intervention in the area of housing, through approval of the State Housing Plans, was given as being the economic nature of the measures taken. They all involve some measure of support to the building industry.[6] The jurisprudence of the Constitutional Court (CC) itself[7] supports state intervention in the jurisdictional area of housing through state powers on planning and coordination of economic activity (Art. 149.1.13) and the bases of credit management (Art. 149.1.11). The Court stresses the close association between housing development and general economic policy, given the impact of encouraging construction as a factor

[3] See Naredo and Montiel Márque (2010).

[4] Trilla (2010), pp. 134 et seq.

[5] Muñoz Castillo (2000), p. 360.

[6] Betrán Abadia (2005), p. 5 et seq.

[7] SSTC 152/1988, of 20 July 59/1995.

of economic development and especially in creating jobs. These categories are the only categories under which intervention in matters of housing is permitted. The state is not entitled to promote any activity in the area of housing, through direct regulation, but only if the promotional measures are justified on the grounds of its powers on establishing the bases for planning and coordination of economic activity and credit management.[8]

Housing policy in Spain has been implemented through promotion centring on the provision of state funds. This has essentially consisted of qualified financing[9] aimed at supporting private development and the acquisition of subsidised housing for sale.[10]

The qualified financing thus covers a series of promotional measures with which the state seeks to achieve two goals: to support the building of subsidised housing, mainly by private developers, thus increasing the supply of homes at a limited price; and to provide economic assistance to people looking for housing to allow them to afford ownership.

These state housing plans contain a series of financing instruments that have remained unchanged from the time the Spanish Constitution was passed. These are qualified loans, personal grants, and subsidies for qualified loans.[11]

Over recent years, the relationship between the state and the autonomous communities in the area of housing has evolved. The initial, more confrontational, position of the 1980s, where the state assumed nearly all powers, has given way to greater collaboration and more decision-making powers for the autonomous communities. This process was motivated by a need to simplify and systemise the legislation on subsidised housing through greater collaboration and a call for a greater share of decision-making in this area, more in line with the distribution of powers established in the constitution and in the statutes of autonomy.

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[8] STC 152, 1988, of 20 July (FJ 2).

[9] See the study on qualified financing by Muñoz Castillo (2000), pp. 181 et seq, ob. cit.

[10] The years leading up to the passing of the Constitution saw an important shift in the system of financing housing policy. The compulsory investment coefficient was excluded—in other words, savings banks and other financial institutions were no longer obliged to devote a given part of their funds to housing loans. The new system, which has survived to the present, is based on agreements between the state government and the financial institutions.

[11] Royal Decree—Law 31/1978, of 31 October opened the door to personalised economic assistance (assistance under previous promotional legislation had traditionally gone to the construction rather than the buyer). The Plan for 1981–1983 included these personalised subsidies that were further developed in the 1984–1987 plan, which now referred to qualified loans, subsidies on interest of these loans and personal subsidies. Following Decrees 1.494/1987, of 4 December 1987 on financing and Decree 224/1989, of 3 March 1989 on financing which established open-ended measures, the 1992–1995 Housing Plan, in keeping with the guidelines of the two previous state plans, established a system that was to form the framework where subsequent housing plans would operate. The system of qualified financing was maintained from that moment on, although with some significant technical and substantive modifications. The following forms of financing were established:

- Qualified loans. Awarded by financial institutions under the aegis of agreements signed with the Ministry of Public Works and Transport.
- Direct economic assistance. Subsidies for qualified loans and personal grants.

In the early years, during the 1980s, the state regulated all areas covered by the Plan through its housing plans, leaving the autonomous communities little room for manoeuvre.[12]

In the area of housing, the system was founded on the use of the "Sectoral Conferences"[13] (also known as Autonomous Community Conferences), which are multilateral organs of cooperation, where the central government and the different regional administrations sign agreements that will subsequently form the basis of the *convenios* or pacts[14] signed between the state and each individual autonomous community, once the state housing plan has been approved. Thus, coordination of the objectives of housing policy was facilitated by both the sectoral conferences—as a medium for channelling regional demands—and the *convenios*, in terms of the execution of the state plan.

This situation changed at the beginning of the 1990s. Since the launch of this instrument of collaboration, the *convenio*, the distribution of roles between state and regions has gradually changed. This instrument is more directly covered in Royal Decree 1668/ 1991, of 15 November 1991. This decree eliminates one of the indirect effects of the previous legislation, under which the state administration selected actions eligible for finance from amongst those that the autonomous community had already classed as eligible for protection, meaning that it was the state that actually executed housing policy.[15]

The autonomous communities have taken on a more important role, and can now to some extent condition the objectives and purposes of the state plan and the criteria for distribution of the budgetary funds, since actions eligible for protection are determined through information submitted by the ACs based on their needs. In practice, this information is accepted without question by the state.[16] This represents a removal of powers from the state and a greater role for the ACs.

Another significant change came with Royal Decree 1186/1998, which significantly increased the powers of the ACs. Actions eligible for protection included in the Housing Plan are only applicable in the absence of regional regulation.[17] Homes that are declared to be protected by the specific legislation of each AC are eligible for state financing. This was confirmed in the new State Housing Plan for 2002–2005. Royal Decree 1/2002, of 11 January 2002, on measures for financing protected actions in matters of housing and land, establishes a single type of subsidised housing, for which it sets out certain general requirements such as price and size. These may be adapted by the ACs in the designation of eligible homes contained in their own plans. The targets

[12] Beltrán De Felipe (2000), p. 49. Iglesias Gonzalez (2000), pp. 98 et seq.

[13] Corcuera Atienza (1997), pp. 49 et seq. Tornos Mas (1994), pp. 71 et seq.

[14] The Basque Country and Navarre, with their own special system of financing, are not party to this system.

[15] Jiménez De Cisneros Cid (1994), p. 242.

[16] Jiménez De Cisneros Cid (1994), p. 238, op cit.

[17] Beltrán De Felipe (2000), p. 55, op. cit.

for the number of protected actions to be carried out are established in the *convenios* signed between the state and the respective autonomous community.[18]

This development had important consequences. The ACs acquired a more central role in defining housing policies. As a result, policies were better adapted to regional circumstances. However, at the same time, it led to the absence of a general basic legal system for the entire territory of the state establishing the conditions and requirements to be met by any subsidised housing and its purchasers, in order to ensure that they meet the required social function, which is clearer in this type of home. This situation has led to the emergence of different regional regimes of subsidised housing.

It should be noted that the differences in the promotion of subsidised housing are not restricted to the regime; there are also important quantitative differences[19]; some autonomous communities have passed standards that tie the land to the construction of these homes, whereas in other autonomous communities, this is not the case or it happens to a lesser extent.

Towards a New Role of the State in Relationship to the Right to Decent Housing

Over the years, Spanish public housing policies have been driven by other requirements mainly associated with the development of the economy and the fight against unemployment.[20] This perspective has sometimes ignored or made it impossible to regulate sufficiently the conditions or requirements necessary for subsidised housing to meet its social function.

A change in the state's role with regard to the constitutional right to housing could result in this right's being better guaranteed throughout the territory. The state must take it on itself to establish certain minimum conditions that would, on the one hand, guarantee the social function of the protected homes, regulating the bases of their legal system and on the other hand enable all citizens to enjoy a proper urban environment, i.e. a habitat that would allow equal opportunities in the city.

With regard to state intervention in matters of subsidised housing, Article 149.1. 1 of the Constitution may be of particular interest.

Article 149.1.1[21] is a constitutional precept that has been treated with some caution, given that it was viewed as an instrument for enabling expansive intervention of the state in matters corresponding to the ACs. The Constitutional Court set out its interpretation of Article 149.1.1 in STC 61/1997, of 20 March 1997. In this development, it has been seen first as a precept interpreting state powers, later as a

[18] RD 1/2002, Article 43.

[19] Roca (2010), pp. 219 et seq.

[20] This has been the case for many years: one example is the so-called Salmón Act of 1935. See Muñoz and Sambricio (2008), p. 29 et seq.

[21] Inter alia, see the following studies on Article 149.1.1 of the Constitution: Pemán Gavín (1992). Baño Leon (1988). Tudela Aranda (1994). Barnes Vazquez (2004). Aja (1992).

mechanism for restricting the powers of the autonomous communities[22] and finally as an autonomous jurisdictional header that can justify state intervention.

In Ruling 152/1988, of 20 July 1988, Justice Rubio Llorente accepted in his personal vote the possibility of basing state intervention in housing on Article 149.1.1. He accepted that there were difficulties in legal dogma in considering all rights arising out of state actions adapted to the principles of social and economic policy listed in Heading I, Chap. 3 of the Constitution to be "constitutional rights." However, he did not believe that these problems were insurmountable if "constitutional right" is understood to be a generic concept. In any case, he considered such difficulties to be much serious than those resulting from use of another generic title (Art. 149.1.13), unsuitable not only in itself, but particularly because—by its very nature—it leads to a complete ablation of the autonomic powers.

The senior judge did not believe that state housing plans came under the aegis of Article 149.1.13, even recognising the impact of the housing subsector on the economy. Firstly, he argued, a complete action plan, developed to its final procedural ends and financed with state funds does not fit the concept of bases as described in the enabling header. Secondly, because the sense of the state action should be based not on the association between housing and economic development but on achieving the goal of realising the right to decent housing established in Article 47 of the Constitution and the state could consequently act using Article 149.1.1 as "an effort (by the state) to ensure an equal minimum in the exercise (strictly in the enjoyment) of a constitutional right." Therefore, this construction is more respectful of the powers of the ACs and could more effectively serve future action on the part of the public powers.

The State Land Act, approved by Royal Legislative Decree 2/2008, of 20 June 2008, is a good example of the issue under discussion here. It is not a law on urban planning, spatial planning or housing law, in consistency with the jurisdictional regime established under the constitution, the statutes of autonomy and the jurisprudence of the Constitutional Court (STC 61/1997, of 20 March 1997). Rather, it is a law that establishes the basic conditions for the exercise of the rights affected by the land use regime.

The preamble establishes that:

> This is not an urban planning law, but a law referring to the regime of land use and equality in the exercise of the constitutional rights associated therewith in matters concerning the interests whose management is constitutionally entrusted to the state. It is, therefore, a law conceived from the demarcation of powers established in these matters by the body of constitutional law [bloque de la constitucionalidad], and which can and must be applied respecting the exclusive powers attributed to the Autonomous Communities in matters of spatial planning, urban planning and housing and, in particular, on public land ownership.

In establishing a catalogue of rights and obligations of citizens with regard to housing, urban planning and the rural and urban environment, the law seeks to regulate the basic conditions for the exercise of certain rights, all by virtue of the ownership of powers provided for in Art. 149.1.1 of the Constitution.

[22] Among other rulings, see: STC 87/1985 (FJ8ª), STC 38/1988 (FJ25ª), STC 136/1991 (FJ1ª), etc.

Article 1 of the state Land Act uses similar terms in referring to its purpose: "This Law regulates the basic conditions that guarantee equality in the exercise of constitutional rights and in the fulfilment of constitutional duties relating to land throughout state territory. It also establishes the economic and environmental foundations of its legal system, its assessment and the patrimonial responsibility of the public authorities in these matters."

Article 2.3 of the Act likewise establishes that, "The public powers shall promote the conditions for the rights and duties of citizens established in the following articles to be real and effective, adopting any measures of spatial and urban planning necessary to ensure a balanced result, favouring or containing, as necessary, the processes of land occupation. Land associated with a residential use under spatial and urban planning shall serve the effectiveness of the right to enjoy decent and adequate housing under the terms provided for in the legislation on the matter."

Referring to the rights associated with the land use regime, with regard to which the law must regulate the exercise of the basic conditions that guarantee the equality of all Spaniards in the exercise thereof, the law expressly addresses the right to housing.[23]

Title II (on the bases of the land regime), Article 10 establishes the criteria to be used by the competent public authorities in making effective the principles and rights and duties set out in the law. It requires them to reserve part of the land devoted to residential use for the construction of subsidised housing.

The Preamble to the Act states that:

> A separate mention should be given to the reservation of residential land for subsidised housing; as already stated, it is the Constitution itself that associates land use planning with the effectiveness of the right to housing. Given the unusually long and intense period of expansion in Spanish property markets, and especially in the residential property market, it seems reasonable today to place the guarantee of a minimum supply of land for affordable housing within the material concept of the bases of planning of economic activity, because of its direct impact on these markets and its relevance for land and housing policies; however, this does not prevent its being adapted by the legislation of the autonomous communities to their own urban planning model and their specific requirements.

The law again establishes a reserve of residential land for public housing, based on Article 149.1.13 of the Constitution related to the bases of general planning of economic activity.[24] While it recognises the association made by Article 47 of the

[23] The right to housing is again referred to in Article 4 a) of the State Land Act.

[24] Article 98.3 of the codifying legislation of the 1992 Land Act states that, "Should the general planning classify land intended for the construction of subsidised housing or any other regime of public protection, it shall consider this classification as a specific use, and shall apply to it the weighting coefficient which, with justification and in coordination with the property valuation criteria, expresses its value in relation to the characteristic of the area of distribution in which it is included" Ruling 61/1997 declared this article (FJ 24.d.) to be unconstitutional, arguing that its purpose was "to regulate one of the elements of typical usage, despite the fact that the clear connection with the indirect and related promotion of subsidised housing does not have the virtue of drawing basic regulation in this matter towards Art. 149.1.13 of the Constitution, especially when the autonomous communities have assumed powers on spatial planning, urban planning and housing, a more directly involved ownership which, in this case, must take precedence."

Constitution between the right to housing and the uses of the land as grounds, it ends up classifying this measure among "the bases of planning of economic activity."

Article 10.1b) of the Land Act regulates it saying that the public authorities must:

> Assign suitable and sufficient land for productive uses and residential use, reserving in all cases a proportional part for housing subject to a regime of public protection that, at minimum, must allow for the establishment of a maximum price for sale, rental or any other form of access to housing, such as a building right or administrative concession.

This reserve shall at minimum cover the land necessary to make 30 % of the residential building allowance set out in the urban plan to be included in urban planning actions.

As we can see, this Act establishes a list of rights that are affected by land planning. They include the right to enjoy decent housing, provided in Article 47 of the Constitution. To this end, part of the land assigned for residential use shall be devoted to protected homes, the characteristic of which shall be the restriction on price.[25]

The Land Act, although establishing this obligation upon the autonomous communities, allows a flexible application, enabling a smaller reserve to be assigned for certain municipalities or actions. However, application of exceptions to the land reserve cannot lead to a concentration of protected homes in a specific area of the territory, given that state legislation requires the provision of a "distribution of their location that respects the principle of social cohesion."[26] The aim of this measure is to prevent the possible emergence of ghettos.[27] There are already numerous regional urban planning regulations referring to this concept.[28]

If the purpose of this regulation is to realise the constitutional right to housing, exercise of this right—in this specific case through access to subsidised housing at an affordable price for people most in need—should involve certain general requirements that will ensure the basic conditions of its exercise throughout the territory of the state and fulfilment of its social function.

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[25] Article 19.2 establishes that the following text must be stated in land disposal deeds:

"a) The planning classification of the land, when it is not subject to private use or building; includes buildings outside planning regulations [*fuera de ordenación*] or is zoned for the construction of homes subject to some regime of public protection that makes it possible to fix the maximum price of sale, rental or other form of access to housing."

As for the classification of this land, Article 39.2. establishes that:

"Land acquired by an administration by virtue of the duty referred to in Article 16, Section 1 b), that is assigned to the construction of homes subject to some regime of public protection that makes it possible to fix the maximum price of sale, rental or other form of access to the housing, which cannot be allocated, either in this conveyance or in successive ones, for a price greater than that of the maximum passing-on value [*valor máximo de repercusión*] of the land on the type of dwelling in question, in accordance with its regulatory legislation. This limitation shall be stated in the administrative record and in the deed or contract of disposal.

[26] Temporary Provision I of the Land Act.

[27] F. Iglesias González: "El nuevo plan de vivienda 2009–2012 y sus efectos sobre el urbanismo; en especial, las reservas de suelo para vivienda protegida" en . . .p. 63 et seq.

[28] Ponce (2006).

These requirements are already regulated in the State Housing Plan 2009–2012.[29] The difference with regard to this situation is that they would constitute the general and basic regime of subsidised housing and their application would not depend on who provides the economic resources for financing them. The purpose would not be to establish a complete and uniform regime of subsidised housing, but only those aspects linked to ensuring the social function of the subsidised housing, i.e. the basic conditions of the exercise of the right to housing.

The issues to be regulated would be[30]: the minimum duration of the protected regime; the need for a personal grading of the allottees in the first and subsequent conveyances (obligation to create a register of housing applicants); designation of the housing and the limits of use and transfer; the registrary protection of the subsidised housing; maximum price; minimum and maximum floor area of the housing and need for control and inspection. In addition, in order to ensure social cohesion within our cities, a certain diversity of types is required, i.e., different residential resources and different formulas of access to protected homes erected in the same zone.[31]

The minimum content of the constitutional right to housing raises certain requirements. We therefore need to speak of the right to a suitable habitat or right to the city,[32] which involves the fulfilment of certain conditions where *mixtification*[33] and social cohesion are important elements.

The characteristics of our property market are widely known. We have seen the social consequences of a market dominated by home ownership, in both unregulated and protected housing. This characteristic has been closely linked to intensive residential construction. Far from solving the problem of affordability of housing, this trend has actually made it worse as the property boom led to a scandalous increase in house prices and the consumption of large tracts of land, with disastrous environmental consequences. The provision of housing in Spain has little to do with the housing needs of Spanish citizens; it therefore seems equally necessary to bring greater pressure to bear on the competent public authorities to effectively match the housing supply to social needs, by creating certain obligations based on the social function of the land and by making a relationship (as already highlighted in the last state land act) between land use and the constitutional right to decent housing.

Finally, it is worth citing the case of Italy where there has been a *volte-face* in the state's position on the design of housing policy. After such a broad decentralisation towards the regions and the local government entities under Legislative Decree

[29] Title I of Royal Decree 2066/2008, of 12 December 2008, governing the State Housing and Rehabilitation Plan 2009–2012 regulates the general conditions (especially in Articles 3 to 10 of the Decree).

[30] This regulation must be established by law and not by a regulatory order, since, *inter alia*, it will affect the property regime of these homes.

[31] In terms of the formula of ownership (property, rental, building rights) and the beneficiaries, they must be targeted at different groups: elderly people, young people, immigrants, etc.

[32] Pisarello (2001), pp. 29–51.

[33] This concept has been developed and given a certain legal status in France. See Brouant (2006), p. 145 et seq.

No. 112 of 1998, the Italian state is once more going to assume a predominant role in the design of the housing policy at state level.[34]

The Constitutional Court has accepted this position, on the grounds of the general clause on the determination of the essential levels of assistance relating to civil and social rights set out in Art. 117.2 m) of the Italian constitution[35]; elsewhere it relates the legitimation of state intervention to the issue of "governance of the territory," thus placing this intervention within the concurrent legislation established in Art. 117 of the Italian constitution.[36]

As established in Sentence Nº 166 of 2008 "The regulatory areas that are assigned to the legislative authority of the state are on the one hand: the determination of the minimum levels of housing need that are strictly inherent to the unrenounceable core of human dignity and on the other hand, the establishment of general principles, within which the regions can validly exercise their power to schedule and execute specific public housing settlement programmes either by means of the construction of new housing or by means of the recovery and re-conditioning of existing properties. The two powers (the first is the exclusive authority of the state and the second is shared) integrate and complement one another, since determination of the minimum levels of housing provision for specific categories of underprivileged subjects cannot be separated from the establishment at a national scale of interventions, in order to avoid imbalances and differences in the enjoyment of the right to housing by underprivileged social categories."

Whereas Article 149.1.11 and 13 of the Spanish Constitution have been used as grounds for accepting state intervention in the area of housing, one should not lose sight of the possibilities provided by Article 149.1.1, which might sanction state action that is more in keeping with the protection of the constitutional right to housing, an intervention that is now more necessary that ever before given the emergency housing situation now faced in the country.

References

AJA, E.: "El artículo 149.1.1ª de la Constitución como cláusula de cierre del principio desigualdad social" in VVAA, *La función del artículo 149.1.1ª de la CE en el sistema de distribución de competencias. Institut d´Estudis Autonomics, Barcelona, 1992*.

BAÑO LEON, J. M.: *Las autonomías territoriales y el principio de unificación de las condiciones de vida*, INAP, Madrid, 1988

BARNES VAZQUEZ, J.: *Problemas y perspectivas del artículo 149.1.1ª CE*, IEA, Barcelona, 2004

BELTRÁN DE FELIPE, M.: *La intervención administrativa en la vivienda. Aspectos competenciales, de policía y de financiación de las viviendas de protección oficial*, Ed. Lex Nova, 2000, p. 49

[34] Civitarese (2010), p. 106.

[35] Ruling No. 94 of 2007.

[36] Ruling No. 451 of 2006.

BETRÁN ABADIA, R.: "Sobre vivienda, urbanismo y ciudad", in *Acciones e investigaciones sociales*, No. 21, 2005, p. 5 et seq

J. P. BROUANT: "La cohesión social y el derecho urbanístico: ¿Hay espacio para la regulación legal en Francia?, in *Derecho urbanístico, vivienda y cohesión social y territorial* J. Ponce (Coord.), Marcial Pons, Madrid 2006. p. 145 et seq.

CIVITARESE, S.: "La política de vivienda en Italia" in *Construyendo el derecho a la vivienda*, F. LOPEZ RAMON (Coord.), Marcial Pons, Madrid, 2010, p. 106.

CORCUERA ATIENZA, J.: "La participación intergubernamental sectorial en el sistema autonómico español: Las Conferencias Sectoriales", in *La participación de las CCAA en las decisiones del Estado*. A. PEREZ GALDOS (Coord.), Tecnos-Inst. Navarro de Administración Pública, Madrid, 1997, pp. 49 et seq

GARRIDO, P.: "El derecho a una vivienda digna y adecuada" en *Los principios rectores de la política social y económica*, J. TAJADURA (Coord.), Biblioteca Nueva, Madrid, 2004, pp. 369 et seq.

IGLESIAS GONZALEZ, F: *Administración Pública y Vivienda* Ed. Montecorvo, Madrid, 2000. pp. 98 et seq

JIMÉNEZ DE CISNEROS CID, F. J.: "La cooperación para la formulación y ejecución de planes de vivienda*", Documentación Administrativa*, n. 240. 1994, p. 242

R. MUÑOZ, S. SAMBRICIO: "La Ley Salmón de 1935 y el Madrid de la Segunda República", Ilustración de Madrid, No. 9. 2008, p. 29 et seq

MUÑOZ CASTILLO, J. M.: "*El derecho a una vivienda digan y adecuada. Eficacia y ordención administrativa*, Colex, Madrid, 2000, p. 360

NAREDO, J. M. and MONTIEL MÁRQUE, A.: *El modelo inmobiliario español y su culminación en el caso valenciano*, Icaria Editorial, Barcelona, 2010.

PEMÁN GAVÍN, J.M.: *Igualdad de los ciudadanos y autonomías territoriales,* Madrid: Prensas Universitarias, 1992

PISARELLO, G.: "Del derecho a la vivienda al derecho a la ciudad: avatares de una historia" in *El Derecho a la ciudad, Serie Derechos Humanos Emergentes 7*, Instituts de Drets Humans de Caytalunya, Barcelona, 2001, pp.29–51

J. PONCE (Coord.): *Derecho Urbanístico, Vivienda y Cohesión Social y Territorial*. Marcial Pons, Madrid, 2006

ROCA, J.: "El marco urbanístico de la política de vivienda" in *La política de vivienda en España*, J: LEAL (Coord.), Ed. Pablo Iglesias, Madrid, 2010, pp. 219 et seq.

RUIZ-RICO, G.: "El Estado social autonómico: Eficacia y alcance de las normas programatico-sociales de los Estatutos de Autonomía", *Revista española de Derecho Constitucional*, n. 65–2002, p. 29.

TORNOS MAS, J.: "Las Conferencias Sectoriales" in *Documentación Administrativa*, n. 240, 1994 pp. 71 et seq.

TRILLA, C.:" Una reflexión sobre el modelo español de política de vivienda" in *La política de vivienda en España,* Ed. Pablo Iglesias, Madrid, 2010, pp. 134 et seq.

TUDELA ARANDA, J.: *Derechos Constitucionales y Autonomía Política,* Civitas-IVAP, Madrid, 1994