

Spain's Multinational Constitution: a Lost Opportunity?

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Introduction

The Spanish Constitution of 1978 provided an opportunity for minority nationalities within Spain to achieve a degree of political autonomy not shared by others within the state. During the constituent process, the non-Spanish speaking national communities of Catalonia and the Basque Country were the only political entities demanding political autonomy to accommodate their national identities in the new Constitution. Today, after thirty years of democratic and constitutional development, we can see that the possibilities offered by the Spanish Constitution to recognize and accommodate the multinational character of the Spanish state have been lost. This article examines causes of this failure to take advantage of the possibilities provided by the Spanish Constitution to provide for asymmetrical political autonomy for minority nationalities.

The Spanish Constitution and the Model of Autonomous Communities

After forty years of fascist dictatorship, and at a delicate moment in the modern history of the Spanish state, the Spanish Constitution of 1978 (SC) emerged as the juridification of the transition to a new democracy in Spain. During the constituent process, divergent political forces were aware that for an acceptable constitutional formula to be found, any new model of territorial organization would have to balance

the need for unity in the Spanish state with the claims of different historic nationalities for political autonomy. The SC opted for an underdefined formula made up of two elements. First, the Spanish state would be founded on the basis of the unity and singularity of the Spanish nation, with a unitary Constitution and judicial system. Second, the Spanish Constitution would recognize and be able to accommodate a right to political autonomy for the nationalities and regions making up the Spanish state.¹ This open, flexible model designed by the SC emerged as the result of the need for political consensus, and as an essential means for the political and institutional recognition of historic nationalities in Spain.²

A deliberate vagueness in the constitutional text with respect to the organization of subunit governments within the state was another vehicle of consensus among the different political forces represented in the SC. Consequently, the Constitution did not establish a fixed model of federal or regional-territorial organization; it did not define the territorial map of the nationalities and regions; and it did not create autonomous communities, fix their organization, determine their powers, or provide them with specific jurisdiction. Rather, the creation of the Spanish state model emerged postconstitutionally as a gradual and complex — and as yet unfinished — process.

Although the Spanish Constitution does not formally establish or refer to “autonomous communities,” it does refer to territorial entities

that, in the Spanish constitutional order, are gifted with legislative autonomy and executive jurisdiction (including administration through their own representatives). In other words, the SC establishes some general rules concerning who can gain autonomy and how they can achieve it, but leaves these general rules without resolution or specification. Spain therefore does not have an official or constitutionalized name for its state model; nevertheless, doctrine referring to the Spanish state frequently uses terms such as: “autonomic” model, model “of autonomy,” or model of the “autonomous communities.”

Autonomous communities within the Spanish state include regions as well as nationalities.³ These communities are *preconstitutional* in that the processes through which they gain a degree of autonomy were developed before the Constitution came into force. They are also *subconstitutional*, in that the specification of the model of autonomous communities took place — and still continues — via a set of rules and decisions not found in the Constitution but rather below it, in the *constitutional block*.⁴

The SC specifies the procedure for drawing up the basic institutional rules for a future autonomous community; this procedure culminates in the passage of a statute of autonomy.⁵ It is this statute and not the SC that determines the powers of each autonomous community. The statutes of autonomy provide the rules by which the autonomous communities govern and legislate. That is, they provide the rules allowing the nationalities and the regions to access self-government and to legally constitute themselves as autonomous communities as conceived in the SC (article 2). These statutes specify the system of institutions and powers for the autonomous communities, within the scope of the openness and flexibility set out by the Constitution. Thus autonomous communities are permitted a margin of differentiation with respect to the various legal provisions addressing the content of autonomy. The result is potentially an element of both uniformity and heterogeneity in the system as a whole.⁶ A statute of autonomy, adopting the form of special organic state law, also becomes the basic institutional norm for each

autonomous community, and is thus integrated into the Spanish juridical system. As part of the *constitutional block*, a statute of autonomy thus forms the basic institutional regulations of the community, regulating its own institutions, and the powers it assumes in relation to the state.

Once a community has asserted the will to achieve political autonomy, it can do so via the appropriate access route. The SC establishes different routes for communities to achieve autonomy.⁷ If the statute of autonomy is drawn up by the general route (article 146), the autonomous community can assume only the powers listed in article 148, and must wait five years from the approval of the statute to extend them. By contrast, if the statute is drawn up using the procedure identified in article 151 (and in the Constitution’s transitional provisions), the autonomous community can immediately assume the powers it wants, except those reserved for the Spanish state (article 149.1). The result is a distinction between “slow” and “fast” track autonomous communities.

The SC therefore facilitates the creation of a flexible state model, structuring Spain as an autonomic, multinational state. The Constitution was designed to be an eclectic model that, from every angle, aims to establish a composite, politically decentralized state. Although not a federal state, it does theoretically have some characteristics similar to federal political systems. For this reason, Spanish constitutional doctrine has frequently evolved on the basis of preconceptions about the character of the decentralized model of the autonomous communities, placing that model in line with quasi-federal, federal-regional, unitary-federal, dualist federal, or cooperative models of federalism. For a large majority, the Spanish model of autonomous communities is conceived of as a heterogeneous combination of federal-regional and unitary principles.

Despite the fact that the SC shares a common element with federations — decentralization designed for all rather than some of the territorial subunits — the model of autonomous communities corresponds closest to a decentralized regional-state model.⁸ Indeed, the devolution principle, though an unwritten

principle of the SC, guides the whole process of community autonomy (together with the constitutional principles of unity and autonomy). Territorial communities seeking to achieve autonomy regulate all decisive issues concerning the territorial organization of the power of the state not regulated by the Constitution itself. Because of the devolution principle, the model of autonomous communities shows notable potential for asymmetry,⁹ allowing different solutions for very diverse territories and different degrees of political will.

The Current Status of Autonomous Communities Within the Constitutional Framework

Currently, there are nineteen statutes of autonomy in Spain, implementing political autonomy of varying degree for seventeen autonomous communities (Basque Country, Catalonia, Andalusia, Galicia, País Valencià, Navarra, Cantabria, Asturias, Murcia, La Rioja Aragón, Castilla la Mancha, Canary Islands, Extremadura, Balearic Islands, Madrid, Castilla León), and two autonomous cities in North Africa (Ceuta and Melilla).¹⁰ The sum of these territories, currently provided with constitutionally guaranteed political autonomy, is equivalent to the whole territory of Spain.¹¹

In the long run, it has not been possible to resolve the latent problem of fitting the historic nationalities into the Spanish state. The practical development of the model of autonomous communities has revealed limitations in achieving the SC's main objective: political accommodation of a multinational society, particularly with respect to the political recognition of the historic nationalities in a single Constitution.¹² These limitations stem from the political elaboration of the model of autonomous communities, which has made poor use of the possibilities offered by the SC for accommodating multinationality in the Spanish state.¹³ The *constitutional* recognition of this multinationality has not materialized, and the initial distinction made by the SC between nationalities and regions (a mechanism designed to recognize the different positions of Catalonia, the Basque Country, and

Galicia within the state of autonomous communities) has been diluted beyond recognition. Indeed the potential for asymmetry in the devolution of powers to the autonomous communities has been reduced, and the extent of communities' political autonomy is notably less than that which could have obtained under the SC.

In observing the development of the model of autonomous communities, it must be stated that the degree of autonomy of the historic autonomous communities is low. Leaving aside possible deficiencies in the Constitution and the statutes of autonomy, the reason for this limitation is found in the interpretation and practical application of this autonomy. In effect, political autonomy has been transformed into an essentially administrative autonomy, with a corresponding loss of capacity for political decision making by the autonomous communities.

Different mechanisms have been used by the central state to expand its own powers.

Distribution of Powers

The system for distributing legislative and executive powers — identified in the Constitution and the statutes of autonomy — is based on the Spanish state determining basic standards or “bases” binding for all. Statutes of autonomy are the means through which these common bases have been developed by the central state, with the result being that autonomous communities law has been used to constrain the autonomy of the parliaments of the autonomous communities. Indeed, the indeterminate nature of the notion of basic standards in the Constitution has made it easy for the state to classify *any* legislative, regulatory, or executive activity it considers relevant as “basic,” considerably limiting the scope of the autonomous powers of the autonomous communities.¹⁴

Expanded state powers have also developed by so-called *horizontal state rights*, which are particularly important in the economic sphere,¹⁵ or by the fixing of basic conditions for the exercise of public rights. Third, article 149.1.1 of the SC, which attributes to the Spanish state the power to regulate basic conditions guaranteeing the equality of all Spaniards, has been used er-

ratically and expansively. Its normal interpretation includes all public activities necessary to ensure uniform treatment of citizens' rights and duties.

In addition, the state's recovery of powers that were initially assigned to the autonomous communities has been achieved through more subtle means. For instance, the central state has laid claim to jurisdiction over autonomous community law or policy with extraterritorial scope. As soon as a matter coming within the powers of an autonomous community reaches beyond that community's territorial boundaries, the state takes over the matter, claiming the supracommunity nature of the subject being regulated. Rather than establish a formula for joint action among affected autonomous communities, the state simply assumes a general interest in the matter and takes it over.

Ultimately, the majority of the laws made by the autonomous communities has subsidiary, organizational, or procedural content; only a minority has significant policy content. The development of these laws often amounts to a more-or-less literal reproduction of higher-ranking state laws.

Political Capacity and Reform

Another important indicator of the inadequacy of community autonomy under the Spanish Constitution is the limited capacity of autonomous community bodies to adopt their own policies in discrete, coherent areas.¹⁶ Central state intervention has prevented the autonomous communities from developing policies in their own areas of jurisdiction. But even in areas where an autonomous community has *exclusive* powers, the central state maintains *de facto* rights of intervention in certain cases. There are no matters, not even those reserved for the exclusive jurisdiction of an autonomous community, where the state has not fixed policy directives to be followed, often with an extraordinary degree of detail. Likewise, there is no matter of jurisdiction within an autonomous community that, from the point of view of social reality, has not been legally fragmented to permit state intervention.

For example, although the current statute of autonomy in Catalonia attributes to the Catalan government exclusive powers over housing — and the same is true of other autonomous communities — this area has been affected by up to seven subsidiary areas over which the Spanish state has power (civil legislation, commercial legislation, bases of health, transport and communications, telecommunications, bases of environmental matters, legislation on compulsory purchase). On this basis, the state has adopted specific measures concerning housing; approved action plans and programs; dictated laws; and, finally, created a ministry. This means the Catalan government's capacity to create policy on a matter of great social importance is, as a general rule, reduced to the rather unglamorous and less far-reaching role of putting state policies into practice, frequently in interstitial and often residual areas.

Furthermore, because the Spanish state is the result of an act of sovereignty of a single constituent subject — the Spanish nation — which is the sole holder of national sovereignty, only the state and its representatives have “constituted constituent power” to reform the Constitution. Therefore, the autonomous communities cannot take part in the process of constitutional reform, and their only chance to participate is reduced to the phase of the legislative initiation of the reform.

State Participation and Representation

It must be stressed that in the current Spanish state there are no effective and stable procedures — whether bilateral or multilateral — for participation or collaboration among the different levels of government (the autonomous communities and central state institutions) to determine joint policies. The autonomous communities do not take part in appointments to state institutions such as the Constitutional Court (which has among its functions the resolution of conflicts of jurisdiction between state and autonomous community authorities), or the general judicial authority. There is no legislative chamber within the system of state institutions in which the autonomous communities are represented or permitted to codetermine law and policy. Indeed, the auton-

omous communities hold a clearly subordinate position with respect to the Congress, and they do not have sufficient power to properly defend their territorial interests. Moreover, Senate representation is not linked to the autonomous communities, as the majority of senators are elected by provinces. Nor does the Senate function as a mechanism to decentralize jurisdiction, or facilitate autonomous community participation in state decision making.¹⁷

Until recently, there has been a lack of political will to devise suitable intergovernmental mechanisms for participation, coordination, and cooperation between the central state and autonomous communities to put into practice common policies which must be jointly defined (particularly those with extraterritorial effect). There has been a similar lack of political will to defend the power of the historic autonomous communities to develop their own policies in their own way in areas where they have exclusive jurisdiction, and where they should enjoy full political decision-making autonomy.

Self-Government

Another factor constraining the political autonomy of autonomous communities is the lack of a constitutional guarantee of self-government in the Spanish Constitution. A guarantee of self-government generally ensures that the powers attributed to politically decentralized bodies is consecrated in a constitution. In Spain, this constitutional guarantee is diluted by the fact that the criteria for the distribution of powers between the state and the autonomous communities — as defined by the Constitution and the statutes of autonomy — are generic, indeterminate, and have significant gaps. The distribution of powers remains at the mercy of state legislators who have occupied those gaps, especially by means of setting basic standards.

When an autonomous community accepts a statute of autonomy, the SC provides no mechanism to facilitate the constitutional recognition of that community as a nation.¹⁸ This omission deprives those autonomous communities with boundaries potentially corresponding to the historical nationalities of the capacity to speak as a nation, which is definitive in the

international and domestic sphere. As a result, there are no mechanisms to provide for autonomous community participation in the field of relations with the European Union (EU). In the sphere of the EU, the autonomous communities are therefore not considered political agents of the Spanish state. This gap is particularly serious because the EU exercises many powers that are under the exclusive jurisdiction of the autonomous communities. In direct contrast, the *Länder* of the Federal Republic of Germany have the power to act directly before EU bodies if a matter over which they have exclusive power is affected. The Spanish state has not even firmly upheld the linguistic rights of Catalan or Basque in European institutions or the state Parliament.¹⁹

Taxation

Almost all taxes are established and collected by the central state, with the exception of the Basque Country and Navarre, which have asymmetrical taxation agreements with the central authority based on preconstitutional “historical rights.” It must be stated that the issue of finance is a site of contestation for Catalonia, for example, which has not had a finance system to match its tax capacity and political autonomy. As a result of this taxation system, some autonomous communities lack the financial capacity to carry out their own policies.

Ultimately, these features of the development of the autonomous communities under the SC reveal that the process has not led to the establishment of a viable multinational state. In practice, only national claims that are compatible with the national will as expressed in the Constitution are acted upon. Of course, the majority of those who live in the Spanish state — whether by goodwill or force — respect the SC because it is the basic legal regulation that controls everyone’s lives. However, Catalan, Basque, or Galician nationalists, for example, cannot be asked to consider the SC as their own, because it has not given rise to a multinational system. To expect as much would be like asking these nationalists to renounce their national convictions and adopt the point of view of the Spanish nation; it is equivalent to asking them to become national turncoats, so to speak. Of

course, they cannot be asked to do this, particularly not in name of freedom, respect, and democracy.

The Consequences of Homogenization: Reforms to the Statutes of Autonomy

After the SC's thirty-odd years in force, it is undeniable that the initial conception of constitutional flexibility underlying the right to community political autonomy and the devolution principle, has not resulted in self-government for autonomous communities; rather, the law and policy made by one autonomous community is generally indistinguishable from that made by the others. The state of autonomous communities began with an initially open-ended and "differentiated" interpretation, consecrating unique autonomous communities for Catalonia, Galicia, and the Basque country. This interpretation, however, has given way to a homogenization of the model. Indeed, homogenization started with the first Autonomous Community Agreements (1981), and continued with the second Autonomous Community Agreements (1992) (the aim of which was to reduce the scope of the devolution principle).²⁰

In effect, the opportunity provided by the Spanish Constitution of 1978 to turn the Spanish state into an asymmetrically decentralized state has been missed. The materialization of the model of autonomous communities has been the result of the specification of constitutional principles relating to territorial organization, through the so-called process of autonomy. But this specification has resulted in the loss of the constitutional objective of flexibility and asymmetry, which seemed able to give rise to the development of a model of autonomous communities adequate to the multinational character of the Spanish state. According to the thesis of some Spanish constitutional specialists, the major defect of the current constitutional design is that an attempt has been made to resolve two different issues at the same time, and with the same techniques of territorial organization: the decentralization of a state *and* the articulation of its multinational nature.

By way of example of the restrictiveness of the symmetrical reading of the SC of 1978, and its effect on Spanish state policy, one might point to the nonacceptance of the term "nation" in the Basque and Catalan draft statutes of autonomy (approved by the parliaments of these nations but not accepted by the Parliament of the Spanish state), and the rejection of the possibility of a federation between the Basque Autonomous Community and the Autonomous Community of Navarre (explicitly recognized in the Spanish constitution in its fourth transitional provision).

The avenues available to improve or overcome this situation are diverse. Changes should address in particular the autonomous communities' lack of capacity to establish and develop their own policies; the lack of capacity for self-organization in a broad sense (institutional development, territorial organization, and legal instruments to carry it out); and the lack of financial capacity to carry out policies appropriately.

In order to seek solutions to the deficits noted above, several different possibilities could be explored, including: reinterpreting the Constitution and the statutes of autonomy (which has been suggested and attempted throughout this period without any positive result); constitutional reform (which has not yet firmly appeared on the agenda of the various political parties); and statutory reform within the existing constitutional framework (which is, in fact, being carried out).

Whatever else happens, statutory reforms for the different autonomous communities are now being tackled. Catalonia has carried out its own statutory reforms to overcome the Constitution's gaps and deficits related to its capacity for self-government, finance, and the organization of the Catalan government. These reforms also address new political requirements such as the recognition of new rights and duties; principles guiding public policies; and the definition of a new system of relations with the EU, the Spanish state, and the other autonomous communities. The degree to which the state is prepared to accept political heterogeneity across the autonomous communities (and within the

framework of the Constitution) can be seen in these reforms.

Future reforms must emphasize that proposals for statutory reform cannot attempt to amend the Constitution, but must scrupulously respect its constraints and principles. However, reforms can attempt to take maximum advantage of the possibilities offered by the statutes of autonomy to facilitate and preserve the political autonomy of the autonomous communities, and should encourage, as far as possible, the constitutionalization of the division of powers between the state and autonomous communities. While, ultimately, political pacts will largely determine the level of autonomy each autonomous community can achieve, as well as its relations with the state, the devolution principle, and the potential for asymmetry in the possible agreements between the state and autonomous communities, are sufficient bases for believing that there is a very broad legal margin for deepening the political autonomy of the autonomous communities. At the very least, it can be said that the Spanish constitution of 1978 can indeed accommodate the evolution of Spain as a multinational state; that the SC has not been so used is a lost opportunity, but one that could be regained.

Notes

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- 1 Isidre Molas, *Derecho Constitucional* (Madrid: Tecnos, 2005) at 176.
 - 2 This situation has resulted in the autonomous communities facing significant constitutional instability. M.A. Aparicio Pérez, “L’adequació de l’estructura de l’estat a la constitució (reforma constitucional vs. reforma dels estatuts)” (2005) 31 *Revista Catalana de Dret Públic* 61.
 - 3 The dominant Spanish constitutional doctrine draws no legally relevant conclusion from the distinction made in article 2 between “nationality” and “region.” In contrast to this position, we understand that there is, indeed, a legally relevant constitutional distinction between

nationality and region, otherwise the differentiation established in the Constitution itself would not make sense. Nevertheless, the wording of the Constitution is ambiguous as the constitutional text attempted to combine two opposing traditions: one upholding a single Spanish nation, governed from the centre; the other claiming the existence of different nationalities with the right to self-government. So as not to break the political consensus on the wording of the Constitution, it eventually included the two concepts in a single precept (article 2 SC), making it tremendously difficult to locate a coherent understanding of the constitutional text. Ultimately, it can be concluded that the Constitution uses the term nationality, which has the essential meaning of a nation without a state. In this way, “nationality” implies (as does the term “nation”) a higher level of consciousness of collective identity than “region,” which describes mere historic and cultural roots or common economic links.

- 4 E. Fossas i Espadaler & J.Ll. Pérez Francesca, *Lliçons de dret constitucional* (Barcelona: Enciclopèdia Catalana, 1994) at 281 and following. The *constitutional block* is the set of rules whose function is to distribute and organize the division of powers between the central state and the autonomous communities; it is the set of rules the Constitutional Court has to apply when it resolves conflicts of power among the various instances of government. It is made up of the Spanish Constitution, the statutes of autonomy, laws granting powers, and the non-statutory laws amending powers (See article 150 of the SC).
- 5 The SC provides two broad procedures for drawing up a statute of autonomy: a general one (article 146) for those gaining access via article 143; and a special one (article 151.2) for those gaining access via 151.1 and the second transitional provision.
- 6 Institute of Autonomous Community Studies, *Report on the Reform of the Statute* (Barcelona: Government of Catalonia. Institute of Autonomous Community Studies, 2003) at 43-44.
- 7 The SC establishes two procedures for achieving autonomy for the whole territory: a general one (article 143.2, with the variant of the first transitional provision), which was followed by all the autonomous communities except Andalusia; and a special one (article 151.1), which requires a broader manifestation of the wish for autonomy, as in the case of Andalusia. Besides these procedures, specific means are to be used by particular territories, including: The second transitional provision for Catalonia, the Basque Country and

Galícia; the first additional provision and the fourth transitional provision for territories with traditional rights, especially Navarre; and article 144.b and the fifth additional provision, for Ceuta and Melilla.

- 8 In the regional states, a dual level of government is established through a process of political decentralization, guaranteed by the constitution of the state. The “devolutionary” transfer of political powers involves the existence of a previous centre and, in practice, has normally been established for only some regions of a state. The autonomous communities follow the idea of devolution much more closely than they do that of federation. Concerning the distinction between these two concepts see J. Kincaid, “The Devolution Tortoise and the Centralization Hare” (May-June 1998) *New England Economic Review* 13-40.
- 9 This has been recognized in Constitutional Court Judgment 76/1983, 5 August, indicating that the “system of autonomous communities is characterized by a balance between homogeneity and diversity in the public legal statute of the territorial entities making it up.”
- 10 An “autonomous city” is a special administrative division. Only the cities of Ceuta and Melilla have had this status since 1995. The main difference between autonomous communities and cities is that the latter do not have legislative capacity.
- 11 *Supra* note 4 at 322, 333.
- 12 *Ibid.* at 291.
- 13 *Ibid.* at 292.
- 14 Because the Constitutional Court initially accepted this view of the scope of “bases,” it has been unable to exercise effective control over their extension.
- 15 Examples include general planning of economic activities (a right referred to in the Statute of Autonomy of Catalonia), to conditional or override powers of the Catalan government in the economic sphere.
- 16 M. Corretja i Torrens and C. Viver Pi-Sunyer, “La reforma de l’Estatut d’Autonomia i les competències de la Generalitat” (2005) 7 *Revista Activitat Parlamentària* 1 at 17-23.
- 17 The reform to the Spanish Senate has created a significant debate for many years.
- 18 In this context we highlight the projects to reform the Basque (Ibarretxe Plan) and Catalan statutes.
- 19 Some efforts have been made concerning the use of the Catalan language before European institutions: in December 2004, the central

government presented a memorandum to the European Union to obtain official recognition of the languages other than Spanish which have been declared official by the statutes of autonomy; on 13 June 2005, the Council of Ministers of General Affairs and Foreign Relations agreed that members states could ask the institutions of the EU to allow the use of currently non-official languages; and, more recently, on 16 November 2005, an agreement was signed allowing the use of the Catalan language in the Committee of the Regions.

- 20 *Supra* note 4 at 286.