

**ASYMMETRY IN THE SPANISH STATE'S MODEL OF
TERRITORIAL ORGANISATION**

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SUMMARY

I. INITIAL APPROACH TO THE SUBJECT FOR DEBATE

II. THE MODEL OF AUTONOMOUS COMMUNITIES: FROM HETEROGENEOUS POSSIBILISM TO A HOMOGENEOUS RESULT

A. THE CONSTITUTIONAL MODEL OF SPANISH TERRITORIAL ORGANISATION

A.1. A *sui generis* model of a decentralised state

A.2. The model of autonomous communities: open, initially flexible and
potentially asymmetrical

B. THE CURRENT SITUATION OF AUTONOMOUS COMMUNITIES WITHIN THE CONSTITUTIONAL FRAMEWORK THE ESSENTIAL DEFICITS OF THE SPANISH STATE OF AUTONOMOUS COMMUNITIES AS A FLEXIBLE, MULTINATIONAL STATE

B.1. The low quality of the autonomy of the Autonomous Communities,
in particular that of the so-called historic nationalities

B.2. The consequences of homogenisation for the final result: reforms of
the statutes of autonomy

III. SOME FINAL REFLECTIONS IN RELATION TO THE SUBJECT BEING DEBATED

ASYMMETRY IN THE SPANISH STATE'S MODEL OF TERRITORIAL ORGANISATION

I. INITIAL APPROACH TO THE SUBJECT FOR DEBATE

In the area of comparative law, two great historical forms or models of state can be distinguished, depending on the relationship between two of the elements constituting the state – power and territory – that is, depending on the territorial organisation of their power: unitary states and federal states¹.

On the one hand, at a theoretical level, the unitary state model tries to concentrate all State powers (legislative, executive and judicial) in a single institutional system (parliament, government, jurisdictional bodies), through which these powers act in the same way throughout the territory and from a single, central point. In this sense, we could highlight the example of the French State, which has the most symmetrical distribution of powers that exists. This system of distribution consists of not giving any power to the *départements*, except that of charging costs, and criminalising their cultures².

In the ideal model of a federal state, two instances of government are created: on the one hand, a general territorial government, made up of State institutions with State powers (legislative, executive and judicial); on the other, a government of limited territorial scope which also has State-type institutions and state powers (parliament, government, judicial bodies) according to a division previously established in the

¹ Like all academic divisions, this is a simplification that reduces the many forms of territorially organising political power that have existed and continue to exist. And, as in all doctrinal constructions, they are theoretical models which in fact take the form of a plurality of juridico-political structures with notable differences between them. Because of this, the federal state and unitary state have to be considered as two historical models of territorial organisation which, emerging at the end of the 18th century, evolved and gave rise to many variants, so today they no longer exist as such. See FOSSAS I ESPADALER; PÉREZ FRANCESCH. *Lliçons de dret constitucional*. Barcelona: Enciclopèdia Catalana, 1994, p. 173.

² So, the *départements* were created to wipe out certain cultures, for example Iparralde, which was integrated with Bearn into a *département* called "Pyrénées Atlantiques", with its capital at Pau; the same happened with "Rosselló", which was joint to part of the Occitan county of "Les Fenollèdes" to form the *département* of "Pyrénées Orientales".

federal or common constitution, which provides the supreme, founding regulations for this union.

The essential concepts of symmetry and/or asymmetry emerge with a consideration of the various ways in which each member state of the federal system can relate to the system as a whole, to the central authority and to each of the remaining member states³.

Symmetry consists of the relations between the federated units and the federation being of more or less the same type, regardless of the social, demographic or cultural characteristics of these units, which, in all cases, are usually very similar. In this way, each State or federated unit would fundamentally maintain the same relationship with the central authority⁴.

By contrast, asymmetry in the federal model means relations between the federated units and central power are not homogeneous. The federal constitution establishes different relationships for some of those units, reflected in different levels of powers, in the institutional framework, in representation outside the State, in tax policy, etc. The reasons leading to a regulation of legal asymmetries are diverse, but all are based on asymmetries in fact existing between the different federated units (cultural, geographical, historical differences, etc)⁵.

It is important to take into account that a high level of asymmetry does not necessarily involve a high level of self-government for the federated units (Malaysia). And, conversely, symmetry is compatible with sub-State bodies with a large capacity for decision-making and self-government. In this sense, as Prof. Tarr states in his article “Symmetry and asymmetry in American Federalism”⁶:

³ TARLTON, Charles D. “Simetría y asimetría como elementos del federalismo: una especulación teórica”, in *Asimetría Federal y Estado plurinacional. El debate sobre la acomodación de la diversidad en Canadá, Bélgica y España* (FOSSAS; REQUEJO). Madrid: Trotta, 1999, p. 21 and following.

⁴ The United States of America and Australia are examples of federations with a high level of formal symmetry.

⁵ Belgium, Malaysia and India form examples of asymmetrical federations.

⁶ See the article by TARR, G. Alan. “Symmetry and asymmetry in American Federalism” which can be found on the following Internet page: <http://www-camlaw.rutgers.edu/statecon/publications.html>.

“The United States is usually seen as a symmetrical federal system. The original thirteen states each exercised the same powers and enjoyed the same representation in the Senate, and the U.S Constitution guarantees that all states subsequently admitted to the Union join on an equal footing (...)

Article IV, section 3 of the Constitution, in empowering Congress to admit new states to the Union, does implicitly authorize it to establish the conditions under which they will be admitted. Acting under authority, Congress inserted conditions as to the substance of state constitutions in the enabling acts by which it empowered prospective states to devise constitutions and apply for statehood.”

Prof. Tarr goes on to explain certain aspects that could be considered asymmetrical, such as the "District of Columbia", the status of the Native American Tribes or the case of the Territories on the Road to Statehood, such as Alaska, Hawaii, etc.”.

As demonstrated in this paper, the case of the Spanish State is completely converse.

In Spain, the Constitution of 1978 does not contain a constitutional decision establishing a composite State. This relative lack of definition of the model of territorial organisation designed by the Constitution has served to strengthen an intense doctrinal debate about the constitutional model of the territorial organisation of the Spanish State. It is precisely the issue of asymmetry in the multinational context of the Spanish State that is at the heart of this controversy, although it should be noted that these brief pages make no attempt to carry out a detailed study, as there is excellent and abundant literature which has dealt with these matters in exhaustive detail, and we must refer to these⁷.

⁷ Without attempting to be exhaustive, we should highlight: Various authors: *Asimetría y cohesión en el Estado autonómico. Jornadas sobre el estado autonómico: integración y eficacia*. Madrid: INAP, 1997; AJA, Eliseo. *El Estado autonómico: federalismo y hechos diferenciales*. Madrid: Alianza Editorial, 1999; APARICIO, Miguel Ángel (Ed.). *La descentralización y el Federalismo. Nuevos modelos de autonomía política (España, Bélgica, Canadá, Italia y Reino Unido)*. Barcelona: Cedecs Editorial, 1999; *Autonomies: revista catalana de dret públic*, num. 20. Barcelona: EAPC, IEA, December 1995; CRUZ VILLALÓN, Pedro. “La estructura del Estado o la curiosidad del jurista persa”, *Journal of the Faculty of Law of the Complutense University*, num. 4, 1981; *Documentación administrativa*, num. 232-233, 1993; FERRANDO BADÍA, J. *El Estado Unitario, el Federal y el Estado autonómico*. Madrid: Tecnos, 1978; FOSSAS, Enric; REQUEJO, Ferran. *Asimetría Federal y Estado plurinacional. El debate sobre la acomodación de la diversidad en Canadá, Bélgica y España*. Madrid: Trotta, 1999; GARCÍA DE ENTERRÍA, Eduardo. *Estudios sobre autonomías territoriales*. Madrid: Civitas, 1985; GONZÁLEZ ENCINAR, José Juan. *El Estado unitario-federal: la autonomía como principio estructural del Estado*. Madrid: Tecnos, 1985; MONREAL, Antoni (ed.). *El Estado de las autonomías*. Madrid: Tecnos, 1991; MUÑOZ MACHADO, Santiago. *Derecho Público de las Comunidades Autónomas*, 2 vol. Madrid: Civitas, 1982; *Revista de Occidente*, num. 229. Madrid: José Ortega y Gasset Foundation, June 2000;

The following explanation is suggested by this context. During the constituent process, all political forces were aware that a formula accepted by everyone would have to be found, which conditioned the fact that the design of the model of territorial organisation should combine the unity of the Spanish State and, at the same time, should attempt to provide a response to the claims of the different historic nationalities through the territorial autonomous communities. This is the origin of its flexibility as a model.

The formation process of the model of autonomous communities has certainly been gradual and complex and is still not completed, to which must be added that it has not been possible to resolve the latent historical problem of fitting the historic nationalities into the Spanish State.

It seems appropriate to provide a concise reminder of the background to the issue of asymmetry and plurality in the organisation of the territorial power in order to find new points of analysis and, also, continue to help with reflection on this matter.

The controversy arising over the determination of an asymmetrical or symmetrical system or the powers the different nations or regions making up a composite State should have, cannot in any way be limited to the Spanish State. We could highlight the great controversy arising in the United States, citizen mobilisation and constitutional changes produced by the federalist campaigns.

These campaigns are considered by Bruce Ackerman as one of the three constitutional movements that has arisen in the history of the United States of America. In the federalist campaigns, people were affected by "abnormal" situations that directly affected their moods and psychological states as normal citizens, and their capacity for dialogue⁸.

SOLOZÁBAL ECHAVARRÍA, Juan José. *Las bases constitucionales del Estado autonómico*. Madrid: McGraw-Hill, 1998; TARLTON, Charles D. "Symmetry and Asymmetry as Elements of Federalism: A Theoretical Speculation", *Journal of Politics*, 1965, vol. 27/4, pp. 861-874; "Shared and Divergent Values" in Ronald L. Watts & Douglas M. Brown (eds.), *Options for a New Canada*, University of Toronto Press, Toronto, 1991, pp. 53-76; VIVER PI-SUNYER, Carlos. *Las autonomías políticas*. Madrid: Instituto de Estudios Económicos, 1994; WATTS, R. "Contemporary Views on Federalism", in B. de Villiers (ed.), *Evaluating Federal Systems*. Dordrecht-Boston-London, 1994.

⁸ See ACKERMAN, Bruce, *We the people Foundations*, the Belknap Press of Harvard University Press, Cambridge, Massachusetts, 1993. Also ACKERMAN, Bruce, *We the people Transformation*, The Belknap Press of Harvard University Press, Cambridge, Massachusetts, 1998. There are three constitutional moments analysed by Ackerman throughout the history of the United States: the initial moment of

constitution, the federalist campaigns and the New Deal, although, as we will see, other authors see the existence of more moments that can be considered constitutional ones.

II. THE MODEL OF AUTONOMOUS COMMUNITIES: FROM HETEROGENEOUS POSSIBILISM TO A HOMOGENEOUS RESULT

A. THE CONSTITUTIONAL MODEL OF SPANISH TERRITORIAL ORGANISATION

A.1. A *sui generis* model of a decentralised state

The Spanish Constitution of 1978 did not establish a completed or closed model for the territorial organisation of the State that can be subsumed into one of the two great types of State (federal or unitary). The constitutional text does not contain a particular model of territorial organisation because it does not expressly define one: it does not say whether the Spanish State is federal, integrated, unitary or regional; the Spanish State is not even defined as a "State of Autonomous Communities". We cannot fail to mention the fact that the State of Autonomous Communities appeared at a delicate moment of the modern history of the Spanish State and after 40 years of Fascist dictatorship.

The Constitution, therefore, designed an eclectic model which, whichever way it is looked at, is a model of a composite State and, therefore, is politically decentralised. So, although it is not a federal State it does theoretically show characteristics that are similar, in part, to federal political systems. For this reason, doctrine has frequently stemmed from preconceptions about the decentralisation system of the autonomous communities, putting it in line with a quasi-federal, federal-regional, unitary-federal, dualist federal or co-operative model and, for a large majority, as a heterogeneous combination of federal-regional and unitarist principles which attempt to establish it as a specific model⁹, where its limits would be found in the content of the statutes of autonomy and in the remaining rules of the so-called "constitutional block"¹⁰.

It can be seen, then, that the model of autonomous communities corresponds to some very specific characteristics which, in our opinion, would locate it in the group of

⁹ BARCELÓ I SERRAMALERA, Mercè. "Los conflictos de competencia entre el Estado y las Comunidades Autónomas en perspectiva" en *Derecho Constitucional para el siglo XXI* (Various Authors). Navarra: Thomson-Aranzadi, Volume II., 2006, pp. 4379 and 4380.

¹⁰ The "constitutional block" is the set of rules whose function is to distribute and organise the division of powers between the central State and the Autonomous Communities and it is the set of rules the Constitutional Court has to apply when it needs to resolve a conflict of powers between the various instances of government. It is made up of the Spanish Constitution, the Statutes of Autonomy, the laws granting powers and the non-statute laws amending powers (article 150 of the Constitution).

decentralised regional States¹¹, despite the fact that it shares a common element with federations - the fact that the decentralisation is designed for all the territorial sub-units and not for only some of them¹². Therefore, the sum of the territories provided with constitutionally guaranteed political autonomy (currently 17 Autonomous Communities plus two autonomous cities in North Africa: Ceuta and Melilla) is equivalent to the whole territory of the State¹³.

In this sense, it is necessary to look at some of the essential elements making the model of autonomous communities special, bringing it closer to the decentralised regional model and moving it away from the federal type.

a) The origin of the State of Autonomous Communities is not to be found in an agreement between previously sovereign entities but rather in the political decentralisation of a unitary State. The Spanish State is the result of an act of sovereignty of a single constituent subject: the Spanish nation or Spanish people which, as the sole holder of national sovereignty, creates the Spanish State, exercising constituent power through a Constitution. Consequently, only the Spanish nation and its representatives have so-called "constituted constituent power"; that is, the power to reform the Constitution. Therefore, according to the Spanish Constitution, the autonomous communities do not 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 reform¹⁴.

¹¹ In the regional States, the double level of government is established through a process of political decentralisation, guaranteed by the Constitution of the State itself. Unlike historic federations (United States, Switzerland, Germany, etc.), whose double level of government is linked to a centralisation process based on previously independent units, what previously existed here was a single political decision-making centre, which is decentralised at a particular moment. This "devolutionary" transfer of political powers obviously involves the existence of a previous centre and, in practice, has normally been established for only some regions of a State. Meanwhile, judicial and taxation powers usually remain with the institutions of the central authority while, in the process of constitutional reform, the role of the "regional" institutions is marginal, or even non-existent. Italy after the Second World War is a prototypical case of a regional State. See REQUEJO, Ferran. "La acomodación "federal" de la plurinacionalidad. Democracia liberal y federalismo plural en España", a *Asimetría Federal...*, cit., p. 315.

¹² 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 KINCAID, J. "The Devolution Tortoise and the Centralization Hare", in *New England Economy Review*, May/June, 1998, 13 s.

¹³ See REQUEJO, Ferran. "La acomodación...", cit., pp. 322 and 333.

¹⁴ By comparison, in the majority of cases, the federal State involves a pact between several sovereign states which, through a Constitution, decide to create a new entity – the federal State – which they all form part of and to which they delegate certain functions. Given that the Constitution is the expression of

b) Concerning the distribution of powers, in the State of Autonomous Communities, there is no constitutional guarantee of autonomy as such. In the model of autonomous communities, the distribution of powers is not directly made by the Constitution, but by the aforementioned constitutional block, which implies less of a guarantee of autonomy for the autonomous communities.

This difference is very far-reaching, as the power of the member states in federal States lies within the substantial protective nucleus of the Constitution¹⁵. By contrast, in the Autonomous Communities, their power has been provided by sub-constitutional regulations (Statutes of Autonomy and State laws distributing powers) handed down by the central State, and the procedure for reforming these is not as rigid as for reforming the SC.

c) Concerning the division of powers, the principle of autonomous communities is similar to the federal one¹⁶ because power is not solely concentrated in a few central instances but also resides in some territorial instances (legislative and executive powers), with the exception of the judicial power, which, in the Spanish case, is unique throughout State territory. So, although there is a vertical division of power in the State of Autonomous Communities, the distribution of this power does not affect the judicial power.

d) In federal States, the member states have the power to participate jointly in the formation of the will of the State. In the Spanish State, concerning mechanisms for the territorial entities to participate in the general institutions: the Spanish Senate, as designed by the Constitution, is not a chamber of territorial representation (representing the autonomous communities) as such, as it does not have precise, specific functions related to territorial representation; nor does it have a decisive weight in the legislative process, as it holds a clearly subordinate position with respect to the Congress: it does

the federal pact, the *review* of this federal Constitution requires an agreement of the parties that took part in it. The reform of the federal Constitution cannot therefore be carried out without the agreement of the Federation and its member states. This implies a constitutional guarantee of the independence of the latter.

¹⁵ In a federal State, the distribution of powers is made by the federal constitution itself and by the constitutions of the states, based on the fact that the federated states have original sovereignty.

¹⁶ In a federal State, by means of the Constitution, the regulation that creates the federal State, a distribution of powers between the Federation and the states is technically expressed, respectively attributing to them spheres of power - legislative, executive and judicial - within which they can freely act. There is, then, a horizontal and a vertical division of power: legislative, executive and judicial.

not have sufficient power to properly uphold territorial interests. Moreover, the Senate is not linked to the autonomous units, as the majority of senators are elected by the "provinces". The autonomous communities do not, therefore, play any kind of central role in the legislative power of the "federation".

e) Concerning taxation, the State of Autonomous Communities is very far from any model of fiscal federalism. Almost all taxes are established and collected by the central authority, with the exception of the Basque Country and Navarre, which have an asymmetrical taxation agreement with the central authority based on pre-constitutional "historical rights". It must be stated that the issue of finance is one of the deficits suffered by, for example, Catalonia, which has not had a finance system appropriate to its tax capacity and the level of powers assumed.

f) In the sphere of the European Union, the autonomous communities are not considered as political agents in relation to European Union institutions. In this respect, there are no mechanisms for the autonomous communities to participate in the area of relations with the European Union either - and this gap is particularly serious because the Union exercises many powers which are exclusive to the autonomous communities.

This is in contrast to the situation of other composite States of the European Union, such as the Federal Republic of Germany, where the different Länder have the power to act directly before European Union bodies when any matter over which they have exclusive powers is affected.

In the same sense, the Land can act on behalf of the whole State. This practice would seem incredible in the Spanish State, which has not even upheld the linguistic rights of Catalan or Basque firmly enough in European institutions or the State Parliament¹⁷.

¹⁷ However, concerning the use of the Catalan language before European institutions, some actions have been carried out: in December 2004, the central Government presented a memorandum to the European Union to obtain official recognition of the languages other than Spanish that 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 the members states could ask the institutions of the Union to allow the use of currently non-official languages; and, more recently, on 16 November 2005, an agreement has been signed allowing the use of the Catalan language in the Committee of the Regions.

A.2. The model of autonomous communities: open, initially flexible and potentially asymmetrical

The Constitution has not created the State of the Autonomous Communities as it neither defines the territorial map of the nationalities and regions nor creates the autonomous communities, nor fixes their organisation, nor determines their powers, nor provides them with competences¹⁸.

The Constitution, then, opted for an undefined formula made up of two elements: a) the Spanish State is unique and founded on the basis of the principle of the unity of the Spanish nation, with a single Constitution and a single judicial system; and b) the right to autonomy of *the nationalities and regions* making up the Spanish State is recognised so that, with the exercise of this right, the State is configured as having a structure based on political autonomy¹⁹. There is no doubt that this formula (the open, flexible model designed by the Constitution) is the result of the political consensus developed around the drafting of the Constitution in order to make possible, essentially, a means for the political and institutional recognition of the historic nationalities²⁰.

The Spanish Constitution does not define which are the nations and which are the regions and, when a Statute of Autonomy (a kind of internal constitution for the autonomous communities) defines the autonomous community as a nation it is not accepted by the State, despite the constitutional reference²¹.

All countries in the world know that the national issue is not an auxiliary or secondary issue but rather is the decision which will provide the frame of reference for all laws from the start and for any subsequent decision. Because of this, in the first article of all constitutions in the world, it can be seen which nation is speaking; which nation is exercising self-determination. Therefore, whether the nation speaking in the constitution is the Catalan, Spanish or European one, the Scottish or the British one, is not irrelevant

¹⁸ What the Spanish Constitution does do is to establish some general rules concerning who can gain autonomy and how they can achieve it, but it leaves these general rules without resolution or specification.

¹⁹ MOLAS, Isidre. *Derecho Constitucional*. Madrid: Tecnos, 2005, p. 176.

²⁰ This fact has even given rise to the situation where, according to M. A. APARICIO PÉREZ (“L’adequació de l’estructura de l’estat a la constitució (reforma constitucional vs. reforma dels estatuts)”, *Revista catalana de dret públic*, num. 31, 2005, p. 61), the State of Autonomous Communities finds that it has a hefty dose of constitutional instability.

²¹ In this sense we highlight the projects to reform the Basque (Ibarretxe Plan) and Catalan statutes.

but rather absolutely definitive, because this decides certain matters, such as the following: who are the nationals who have the right to vote, who do the rights and duties appearing in the constitution affect or whether - and how - the different national groups that there may be in the State are affected.

This is because, strictly speaking, a nation is not what is defined by the constitution but what defines the constitution. In fact, the constitution merely reflects the nation, previously constituted by an act of self-determination which is the origin of any subsequent act of sovereignty.

So, how can Catalans, Basques or Corsicans be asked for constitutional patriotism unless their nations are self-determined in the Constitution?

In fact, as the development of the Spanish Constitution, through the process of creating autonomous communities, has given rise to a non-multinational result, national claims do not fit into it except for those which are compatible with the national will of which the Constitution speaks. Of course, the majority of those who live in the State will, by goodwill or force, respect the State Constitution 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 Spanish Constitution, which has not given rise to a multinational system, as their own: that equates to asking them to renounce their national convictions and adopt the point of view of the Spanish nation; it equates to asking them, so to speak, to become national turncoats. Of course, they cannot be asked to do this in, particularly not in name of freedom, respect and democracy.

In this sense we would also like to highlight Prof. Tarr's statement in his article "Symmetry and asymmetry in American Federalism"²², on the right to self-determination of nations without a State.

Faced with this situation, the so-called "model of autonomous communities" has been a "materialisation" of the constitution provisions, as what the Constitution does do is to establish some principles (of unity and autonomy), some general rules²³ and procedures

²² See the article at <http://www-camlaw.rutgers.edu/statecon/publications.html>.

²³ The Spanish Constitution from 1978 establishes a flexible framework for the territorial organisation of the State based on the right to autonomy and on principles of devolutions. Consequently, within the same constitutional framework, the exercise of the right to autonomy and its definition and scope allow different specific forms.

for transforming the unitary, centralist Spanish State into a decentralised State which could adopt various forms (from 1 to 17 autonomous communities and two autonomous cities). The SC therefore "deconstitutionalises" the form of the State to establish some procedures under which the nationalities and regions can access autonomy.

It is precisely the specification of these principles and the initiation of the procedures established by the Constitution that have led to the creation of a "model of autonomous communities" which is *pre-constitutional* (as the "process of autonomy" under which the model was developed was begun before the Constitution) came into force, and *sub-constitutional* (as the specification of the model took place – and still continues – via a set of rules and decisions that are not found in the Constitution but rather below it; rules that are included in the *constitutional block*²⁴).

In this way, the *devolved powers or voluntary principle* must be mentioned as an unwritten principle of the Constitution, but one which guides the whole process of autonomy (together with the constitutional principles of unity and autonomy) and which means that the territories wanting to achieve autonomy regulate all decisive issues concerning the territorial organisation of the power of the State that are not regulated by the Constitution.

So, because of this "principle of devolved powers", the model of autonomous communities shows a notable degree of heterogeneity, at least potentially.²⁵ The model therefore allows different solutions for very heterogeneous territories and different degrees of political will.

The Spanish Constitution regulates certain minimum aspects, such as, the right of the nationalities and regions making it up to autonomy and solidarity between all of them (article 2); the subjects who can exercise the right to autonomy (article 143); the procedures for exercising it (articles 143 to 146 and article 151); and a minimum content which all statutes of autonomy must have (article 146); as well as a list of matters on which the autonomous communities can assume competences, with different levels of intensity (articles 148 and 149).

²⁴ FOSSAS, Enric. "Asimetría y plurinacionalidad en el Estado Autonómico" in *Asimetría Federal...*, p. 281 and following.

²⁵ This has been recognised in Constitutional Court Judgment 76/1983, 5 August, indicating that the "system of autonomous communities is characterised by a balance between homogeneity and diversity in the public legal statute of the territorial entities making it up".

In this sense, the statutes of autonomy are the agreed rules²⁶ by means of which the right to autonomy of the Autonomous Communities is provided with content; that is, they are the rules allowing the nationalities and the regions (article 2 SC) to access their self-government and to legally constitute themselves as autonomous communities, putting into practice the form of State sketched out in the Constitution; that is, with the extremely important constitutional function, given their position in the system of sources, of specifying the system of institutions and powers of the autonomous communities, within the notable degree of openness and flexibility set out by the Constitution, giving rise to a margin in the legal provisions over the content of the autonomy and, at the same time, a potential element of singularity and heterogeneity in the system as a whole²⁷.

Finally, it must be borne in mind that the Constitution established different procedures achieving autonomy²⁸. Having shown the will to achieve autonomy via the corresponding access route (although the possibility of opting not to be constituted as an Autonomous Community does exist) the Constitution indicates the procedure for drawing up the basic institutional rules for the future autonomous community (the statute of autonomy)²⁹ which determines the powers of each autonomous community, as the Constitution is not the regulation attributing powers to the autonomous communities.

²⁶ As established by the Constitution, the Statute forms the basic institutional regulations of the Community, where its task is to regulate its own institutions, the powers it assumes in relation to State ones and where other issues also have their place.

Concerning their nature, the Statutes have been considered as, at the same time, Autonomous Community and State law, in as far as they are organic State laws, with specific procedures for approval and reform. In this procedure, the most outstanding elements are its agreed nature and its submission to a referendum of the population. This means that the statutes are quite rigid and their content is protected from future amendments.

It should therefore be highlighted that the statute, then, is the instrument that specifies the right to autonomy and completes the constitutional remit (this is why it has that constitutional function).

²⁷ *Report on the reform of the Statute*. Barcelona: Government of Catalonia. Institute of Autonomous Community Studies, 2003, p. 43 and 44.

²⁸ The Constitution establishes two procedures for achieving autonomy for the whole territory: a general one (art. 143.2, with the variant of the first transitional provision): *all the ACs except Andalusia*; and a special one (art. 151.1), which requires a broader manifestation of the wish for autonomy: *Andalusia*.

Besides these procedures, specific means are established intended to be used by particular territories: the Second Transitional Provision: for *Catalonia, the Basque Country and Galicia*; the First Additional Provision and the Fourth Transitional Provision: territories with traditional rights, especially *Navarre*; and article 144.b. and the Fifth Additional Provision: *Ceuta and Melilla*.

²⁹ The Constitution provides two broad procedures for drawing up the 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 Transitional Provision 2,

So, achieving autonomy has legal consequences involving powers in the following sense: if the Statute was drawn up by the general route (according to article 146 of the Constitution), the autonomous community could only assume the powers appearing in the list in article 148 SC and had to wait five years from the approval of the Statute if it wanted to extend them. By contrast, the autonomous communities that had drawn up their Statute using the procedure in article 151 (and transitional provisions) could immediately assume the powers they wanted, except those reserved for the State (article 149.1 of the Constitution). This fact gave rise to the distinction being made between the "slow track" autonomous communities and the "fast track" ones³⁰.

B. THE CURRENT SITUATION OF AUTONOMOUS COMMUNITIES WITHIN THE CONSTITUTIONAL FRAMEWORK THE ESSENTIAL DEFICITS OF THE SPANISH STATE OF AUTONOMOUS COMMUNITIES AS A FLEXIBLE, MULTINATIONAL STATE

Initially, it must be forgotten that the Spanish Constitution of 1978 and the statutes of autonomy have involved a positive, radical change compared to the traditional centralist organisation of State power in Spain.

On this point, the historical constant of Spanish constitutional law must be highlighted; each period of liberty in the Spanish State has led to the consecration of a decentralised

³⁰ Concerning the constitutional distinction established in article 2 of the Constitution between the "nationalities" and the "regions", there is a majority Spanish doctrine indicating that no legal conclusion must be drawn differentiating the nationalities from the regions. Therefore, according to this dominant opinion, it is irrelevant that the Constitution, should establish a different between nationalities and regions; nor is it relevant that it should establish different routes for achieving autonomy which, at the same time, imply a different ceiling on powers, nor that there should be varied symbolism and elements or identity, nor possible institutional diversity nor that different systems of finance should have been established.

In opposition to this position, we understand that a constitutionally established asymmetry must be upheld. That is, a nationality is not the same thing as a region – otherwise the differentiation established by the Constitution itself would not make sense.

Despite this, the wording of the constitution is ambiguous (very probably deliberately so on the part of the constitutional legislators), as the constitutional text attempted to combine two opposing traditions: that upholding a single Spanish nation, governed in a centralist way, and that claiming the existence of different nationalities with the right to self-government. And, so as not to break the constitutional consensus, the solution consisted of including the two concepts in a single precept (art. 2 SC), making it tremendously difficult to find a coherent explanation to understand the constitutional text.

Ultimately, it can be concluded that the Constitution uses the term nationality, which has the essential meaning of 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.

framework of powers and self-government for the different nations and regions as well as an increase in individual freedoms; this happened with the Constitution of the Spanish Republic of 1931. By contrast, each period with a retreat of public freedoms has eliminated or considerably restricted self-government capacities alongside the restrictions on all rights and freedoms of citizens. As an example, we would highlight the Jury Act and, in particular, the indications in its Explanation of Reasons, Jury Trial Act 5/1995, 22 May.

On this point we would like to highlight the article by Prof. Tarr, "For The People: Direct Democracy in The State Constitutional Tradition"³¹, which analyses the codification in the different constitutions of the North American states over the last three centuries, the instruments regulating direct democracy and the reasons why the American founding fathers did not include this possibility in the American Constitution.

This article makes an excellent analysis of the institution of the jury in the United States and the differences from the institution of the jury in England.

The development of the "model of autonomous communities" has shown its limitations for achieving the main objective sought by the Constitution: the political accommodation of a multinational situation, particularly concerning the historic nationalities and their political recognition in a common constitutional area³².

These limitations stem from the constitutional development laid down in the "model of autonomous communities" which has made poor use of the possibilities offered by the Constitution for developing multinationality in Spain³³. Not only has the constitutional recognition of this multinationality been eliminated, incomprehensibly diluting the initial distinction between "nationalities" and "regions" (according to article 2 of the Constitution, as a mechanism designed to recognise the difference position of Catalonia, the Basque Country and Galicia within the State of Autonomous Communities) and reducing the asymmetrical potential contained in the devolution principle, but it has granted these communities a level of autonomy notably inferior to that they could have

³¹ This article by TARR, G. Alan. "For The People: Direct Democracy in The State Constitutional Tradition" can be found on the following Internet page: <http://www-camlaw.rutgers.edu/statecon/publications.html>.

³² FOSSAS, E.: "Asimetría...", cit., p. 291.

³³ FOSSAS, E.: "Asimetría...", cit., p. 292.

obtained with the Constitution itself.

B.1. The low quality of the autonomy of the Autonomous Communities, in particular that of the so-called historic nationalities

Political autonomy and self-government mean the capacity to make regulations to govern the matters for which powers are recognised in the statutes of autonomy and involve the possibility of implementing differentiated public policies.

In the development of the model of autonomous communities, it must be stated that the level of autonomy of the historic autonomous communities is low in terms of quality. Leaving aside the possible deficiencies of the constitutional and statutory texts, the reason for this statement has to be sought in the interpretation and practical application – what has been done with this autonomy, which has been transformed from a theoretical politically autonomy to an essentially administrative autonomy, with the corresponding loss of capacity for political decision-making by the autonomous communities³⁴.

a) One of the main indicators of this low quality of autonomy concerns the low capacity of autonomous community bodies to adopt their own policies in complete, coherent areas³⁵. There is no matter, not even those reserved for the exclusive competence of the autonomous community, where the State has not fixed the policy directives to be followed, often with an extraordinary degree of detail; nor is there any matter of autonomous community competence which, from the point of view of social reality, has not been legally fragmented to permit State intervention³⁶.

³⁴ It is said that the autonomy has become "administrativised".

³⁵ CORRETJA I TORRENS, M.; VIVER PI-SUNYER, C.; "La reforma de l'Estatut d'Autonomia i les competències de la Generalitat", *Revista Activitat Parlamentària*, num. 7, January 2005.

³⁶ For example, although the current Statute of Autonomy attributes to the Catalan government – and to the other autonomous communities – exclusive powers over *housing*, this area has been touched by up to seven subsidiary areas where the State has some powers (civil legislation, commercial legislation, basis of health, transport and communications, telecommunications, basis of environmental matters, legislation on compulsory purchase); based on this, the State has adopted specific measures concerning housing, it has approved action plans and programmes, it has dictated laws and, finally, it has created a ministry. This means the Catalan government's capacity for self-government 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

It can be seen, then, that State intervention has prevented the Autonomous Communities from developing their own policies in their areas of competence, even in areas where the autonomous community has exclusive powers, something which has not prevented the central State from maintaining *de facto* rights of intervention in certain areas.

Different types of mechanisms have been used by the central State to expand its own powers:

Firstly, the system for the distribution of powers designed by the Constitution and the Statutes and essentially based on the determination by the State of some *bases* or lowest common denominators that are binding for all, and their development through autonomous community law, has left the autonomous community parliaments very little room for manoeuvre in order to pass substantial legislation. In this sense, the indeterminate nature of the notion of basic standards or "bases" in the constitutional text has made it easy for the State to classify any legislative, regulatory and even executive activity it considers relevant as basic, very considerably limiting the scope of the powers of the autonomous communities³⁷.

This effect of expanding State powers has also been produced via the so-called *horizontal State rights*, which are particularly important in the economic sphere³⁸ or fixing the basic conditions for the exercise of public rights.

A third State title that has been used erratically and expansively is that in *article 149.1.1* of the SC, attributing to the State the power to regulate the basic conditions guaranteeing the equality of all Spaniards in exercising their constitutional rights and duties. Its normal interpretation includes all public activities necessary to ensure uniform treatment of citizens' rights and duties.

Together with these three mechanisms, the State recovery of powers that the statutes of autonomy had initially attributed to the Autonomous Communities has also been

practice, and doing this in interstitial and often residual areas. The effects of this phenomenon can be seen in all spheres, although, of course, it is not as strong in all of them.

³⁷ And, as the Constitutional Court initially accepted this definition of "bases" it has been impotent to exercise effective control over their extension.

³⁸ For example, use of the bases and co-ordination of general planning of economic activities, a right referred to in the Statute of Autonomy of Catalonia, to condition or override powers of the Catalan government in the economic sphere.

achieved by more subtle means, like the central State's claim *of the extra-territorial scope of phenomena which are the subject of its powers, strengthened by criteria of general interest*.

As soon as a phenomenon coming within the powers of an autonomous community goes beyond that community's boundaries, the State invokes the recovery of the power, claiming the supra-community nature of the subject being regulated and the effect on general interests, rather than establishing formulas for joint action between the autonomous communities affected.

Ultimately, if an analysis is made of the laws handed down by the autonomous communities, the result is that the majority are laws with subsidiary, organisational and procedural content; only a minority have significant content and an important part of the development of these laws is mere reproduction, which may be more or less literal, of higher-ranking State laws.

b) Another factor showing the low quality of the autonomy of the autonomous communities refers to the fact that in the Spanish case there is no constitutional guarantee of self-government, which is one of the distinctive characteristics of political autonomy.

While in general the constitutional guarantee of self-government means that the content of the powers attributed to the politically decentralised bodies is consecrated in constitutions, so that their scope is removed from the game of circumstantial parliamentary majorities, in the Spanish case this constitutional guarantee is diluted by the fact that the criteria for the distribution of powers between the State and the autonomous communities, based on the Constitution and the statutes of autonomy (which have not taken on the role delimiting the powers and closing the system which correspond to them), are generic and indeterminate, and gaps have been left in relation to the distribution of powers. This means the model for the distribution of powers (remember this is deconstitutionalised) remains at the mercy of the State legislators, who have, de facto, gone about occupying these gaps (especially by means of *basic standards*).

c) A third indicator of the low quality of the self-government achieved by the autonomous communities concerns the lack, up to now, of will to make two non-exclusive models compatible with one another while developing corresponding policies.

The first model, refers to the need to seek suitable mechanisms for participation, co-ordination and co-operation in order to be able to put into practice common policies that must be treated global and which have to be defined jointly between the different political entities (central State and autonomous communities).

The second model, concerning the power of the historic Autonomous Communities to develop their own policies in their own way, individually and with full liberty in areas where they have exclusive competences and where will enjoy full freedom of political choice.

It must be stressed that, in the Spanish State, there are no effective and stable mechanisms or procedures (whether bilateral or multilateral) for participation and/or collaboration between the different levels of government: the autonomous communities and State institutions, in order to determine joint policies if necessary. Neither does the Senate function as a mechanism for decentralisation and autonomous community participation³⁹, nor do the autonomous communities take part in the appointment of members of the central State institutions, such as, the Constitutional Court (which has among its functions that of resolving conflicts of competence between the central and autonomous community authorities) and the General Judicial Authority; nor are there mechanisms for autonomous community participation in the field of relations with the European Union.

d) Other deficiencies that might be listed refer to problems emerging through the absence of the decentralisation of the judicial power and the lack of capacity of some autonomous communities to carry out their own policies through insufficient finance.

Ultimately, the deficits and lack of autonomy of the autonomous communities are clear.

³⁹ The reform of the Spanish Senate is a major issue, which has created a great debate for many years.

B.2. The consequences of homogenisation for the final result: reforms of the statutes of autonomy

After the Spanish Constitution's 29 years in force since 1978, and in the flexible context of the territorial organisation of the State, based on the right to autonomy and the devolution principle, it is undeniable that this initial flexibility has not been reflected in the result, in as far as autonomous communities have been generally established with a rather homogeneous content concerning their level of self-government.

The State of Autonomous Communities has developed from an initially "differentiating" interpretation that consecrated for Catalonia, Galicia and the Basque Country (Second Transitional Provision in relation to art. 152 SC) – a system different from the other Autonomous Communities – towards a homogenising interpretation, starting with the first Autonomous Community Agreements (1981) and reaching the second Autonomous Community Agreements (1992), the aim of which was to reduce the scope of the "devolution principle"⁴⁰.

In effect, an opportunity to turn the Spanish State into an asymmetrically decentralised State has been missed.

The following, as we have already mentioned, are among the issues with the greatest negative effects in the sphere of autonomy: the lack of capacity for self-government for the autonomous communities to establish and develop their own policies; the lack of full capacity for self-organisation in a broad sense (institutional development, territorial organisation and legal instruments to carry it out), and insufficient finance to carry out policies appropriately.

The routes to follow to improve or overcome this situation were very diverse. In this sense, in order to seek solutions to the deficits noted, several different possibilities could be considered: a) the rereading of the constitution and statutes which has been suggested and attempted throughout this period, without any positive results being obtained; b) constitutional reform, which does not yet firmly appear on the agenda of the various political parties; and c) statutory reform within the constitutional framework, which is, in fact, being carried out.

⁴⁰ As FOSSAS, E. says: "Asimetría...", cit., p. 286.

Whatever happens, statutory reforms for the different autonomous communities are now being tackled (Catalonia is one of those that has carried out its own statutory reform) in order to overcome the gaps and deficits we have mentioned involving capacity for self-government, finance and the organisation of the Catalan government and in order to deal with new political requirements, such as the recognition of new rights and duties, principles guiding public policies and the definition of a new specific system of relations both with the European Union and with the State and the other autonomous communities.

Broadly, these would be some of the keys to reforming the system of competences that have been proposed (Catalonia) and are proposed by some autonomous community parliaments.

In this sense, emphasis must be placed on the fact that a proposal for statutory reform cannot attempt to amend the constitution but must scrupulously respect its limits and principles. However, it can attempt to take maximum advantage of the possibilities offered by the statutes of autonomy and their specific position in the system of sources to guarantee and complete autonomous community powers, avoiding, as far as possible, the "deconstitutionalisation" of the system of division of powers.

In summary, the legal nature of the Statute, the devolution principle we have mentioned, the nature of the act of parliament agreed between the State and the Autonomous Community which also has the principle of heterogeneity, are sufficient elements for thinking that there is a very broad legal margin for deepening the autonomy of the autonomous communities.

However, ultimately, political pacts are what in the end determine the level of autonomy each Autonomous Community can achieve and its relations with the State and which, in some way, is in play. The level of political heterogeneity the State is prepared to accept within the framework of the Constitution can be seen in these reforms.

III. SOME FINAL REFLECTIONS IN RELATION TO THE SUBJECT OF THE DEBATE

The model of autonomous communities constructed based on the Constitution of 1978 progressively consecrates a decentralised State showing similarities federal states but which, because of its characteristics, is absolutely singular and difficult to compare with any other. It is not federal, then, because the SC does not say so, nor does it meet all the characteristics of a federal state.

This model of autonomous communities has been the result of specifying constitutional principles relating to territorial organisation through the so-called process of autonomy. But this specification has meant losing sight of the objective of flexibility and asymmetry, which seemed as if it was going to give rise to the development of the model of autonomous communities.

According to the thesis of some specialists, the major defect of current constitutional design is that an attempt has been made to resolve two different issues at the same time with the same techniques of territorial organisation: the decentralisation of a State and the articulation of its multinational nature.

By way of an example of Spanish State policy in relation to its restrictive and *symmetrising* reading of the Spanish Constitution of 1978, we have the non-acceptance of the term "Nation" in the Basque and Catalan draft statutes of autonomy (approved by the parliaments of these nations and 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 recognised in the Spanish Constitution in its Fourth Transitional Provision.

Ultimately, it cannot be ignored that "the accommodation of difference is the essence of the true equality"⁴¹.

⁴¹ Judgment of the Canadian Supreme Court, *Andrew vs. Law Society of British Columbia* (CHRR D/5719).