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### The Hidden Counterpoint of Spanish Federalism: Recentralization and Resymmetrization in Spain (1978-2008)

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# The Hidden Counterpoint of Spanish Federalism: Recentralization and Resymmetrization in Spain (1978–2008)

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**ABSTRACT** The recent evolution of the Spanish ‘State of Autonomies’ has given rise to numerous political and academic criticisms, which argue that the initial federal logic of the system is giving way to a confederal logic that threatens the cohesion of the state. This article contradicts the negative diagnosis, outlining the main mechanisms that retain and in fact reinforce the powers of federalization in tandem with the fundamental political decentralization process that has taken place since 1978. This paper focuses on three critical areas: the distribution of legislative power, the fiscal system and the dynamics of the political process. In these three areas powerful mechanisms are at work reinforcing the power of federalization and weakening the power of the sub-federal entities.

**KEY WORDS:** Asymmetric federalism, centralization, Spain

## Introduction

Opinions differ, both in academia and among politicians, as to whether Spain is a federal state. We assume, following most recent comparative analysis (Agranoff and Ramos, 1997; Börzel, 2000; Burgess, 2006; Hueglin and Fenna, 2006; Rodden, 2006; Moreno, 2007; Watts, 2008) that it is, provided that: (1) Spain is a compound polity reuniting the main common structural characteristics typifying federal political systems—two orders of government, constitutional distribution of legislative and executive authority and allocation of revenue resources, a Constitutional Court to adjudicate disputes, processes and institutions to facilitate intergovernmental collaboration etc. (Watts, 2008); (2) there is no ideal type of federation, in fact federations

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institutionalize in an extensive variation of forms and federal political systems (McGarry and O’Leary, 2007). In addition, Spain is a federal state founded upon recognition of the internal plurality of nationalities and regions. So, under the pressures of a multinational society, “a compound nation of nations, the *Estado de las Autonomías* has to come to exhibit the basic structures and processes typical of federations” (Watts, 2009). It is through the relatively asymmetrical regulation of sub-federal self-government that this federal state has sought to accommodate the demands of its nationalities and regions. In other words, it has sought to establish a structure of shared and self-rule that might serve to maintain unity in the politico-cultural diversity of Spain.

If “federalisms occur when they are both sustainable and necessary” (Weingast and De Figueiredo, 1998: 7), the required sustainability poses two fundamental questions. First, how can central government be prevented from eroding federalism by making incursions into the administrative competence of the federated states? Secondly, how can the federated states be prevented from invading the administrative competence of central government, and from adopting unilateral rather than co-operative strategies? Our views on this latter issue in regard to Spanish federalism have been published elsewhere (Maiz and Beramendi, 2004; Maiz *et al.*, 2002). Here we analyse some aspects of the former, in relation to Spain.

We must first make clear the complexity of Spanish federalism, which derives from its history. Broadly, the federalization of the Spanish state was not the result of an agreement among pre-existing independent states, but of a pact that allowed the decentralization of an existing strongly centralized administration while preventing its total disintegration. The Spanish Constitution of 1978 was thus designed, not to bring the future members of a federation together, but to hold them together (Linz, 1997; Stepan, 2001, 2004) while recognizing their individual existence; and its circumstances led to the resulting polity exhibiting a set of asymmetries that constitute a fundamental feature of Spanish federalism.

Since the late nineteenth century, calls for self-government had come mainly, if not exclusively, from Catalonia, the Basque Country and, to a lesser extent, Galicia. This is why the Constitution acknowledges the existence of nationalities and regions within the Spanish nation, and provided a fast lane to self-government for these three territories—a lane later exploited by Andalusia as well, and which permitted the initial transfer of a larger share of administrative responsibilities from central government to these communities than was granted to others. But there are also other asymmetries (Moreno, 2001: 142; Maiz *et al.*, 2002: 387; Requejo, 2005: 81). Size-wise: the Autonomous Communities—that is, the federated units of the Spanish state—range from Andalusia, with its eight provinces, to the single-province Communities of Madrid, La Rioja, Cantabria, Murcia, Navarre and Asturias, not to mention the Autonomous Cities of Ceuta and Melilla. There are also fiscal asymmetries, exemplified in particular by the special fiscal régimes of Navarre, the Basque Country and the Canary Isles. Furthermore, provided that federations are complex systemic interactions between structures and actors—that is, federations are not only a set of specific institutions, but also imply decentralized and fragmented political party systems, which are both independent and dependent variables (Riker, 1964; Bednar *et al.*, 2001; Filippov *et al.*, 2004: 180)—there are significant differences among the political spectra of the various Communities (Nationalities and Regions). In some cases there are dominant

nationalist (secessionist) parties with a very long trajectory from the nineteenth century and/or parties that are confederated with, but formally independent of, the major parties of state-wide importance. Moreover, the presence of a violent terrorist organization (ETA), with a political branch (MLNV) claiming independence in the Basque Country, must be regarded as a key factor changing the parameters of the whole political process and altering the structure of federal bargaining in Spain (Máiz and Beramendi, 2004; Máiz and Ibarra, 2009).

In addition to the above-mentioned asymmetries among the federated units, there is asymmetry between these units and the state as regards the mechanism of the delimitation of responsibilities, an asymmetry that amounts to a pact between central and sub-federal parliaments (Aja, 1999). Art. 148.1 of the Constitution specifies a series of responsibilities that the Autonomous Communities were enabled to take on upon their constitution, Art. 149.1 lists a series of responsibilities that are reserved to the state, and Art. 149.3 establishes that any responsibilities not covered by either list could be taken on by the Autonomous Communities if they wished. The responsibilities actually assumed were specified in the Statutes of each Autonomous Community, which were drafted by the representatives of the Community and approved by the central state parliament and, only in four cases, in referendum by the inhabitants of the Community. Furthermore, the transfer of responsibilities was formally irreversible, since the Statutes can be modified only through the procedures established therein.

This article concentrates exclusively on problems for self-government that may arise in the course of the relationship between the federation and its member Communities, a possibility that in Spain is linked to the heterogeneity of its Autonomous Communities both for historical reasons and, above all, because of the above-mentioned majority presence of nationalist parties in Catalonia and the Basque Country and, to lesser extent, in Galicia or the Canary Islands. Somewhat paradoxically, this issue is of acute current relevance in Spain as a result of the recent Statute reform processes pursued in Catalonia and other Autonomous Communities, which have led significant numbers of academics and members of the major Spanish political parties to the conclusion that it is the opposite kind of problem—erosion of the federal state by its members—that poses the immediate threat; that is, to the conclusion that the political decentralization of Spain has gone too far, and that this trend imperils the unity of Spain, the weight of the powers retained by the state (i.e. the federation), the equality of Spanish citizens, and/or cohesion and solidarity among the Autonomous Communities. We try here to show that this diagnosis is misconceived. We argue that within the structure defined by the Spanish Constitution of 1978, two opposing processes have always co-existed, the prevailing of one or the other at any given time depending upon circumstances. Specifically, the process of federalization that has led to the Autonomous Communities achieving significant levels of self-government has always been accompanied by a hidden process of *reactive de-federalization* that has continually eroded self-government through recentralization (i.e. reinforcement of the powers of the federation) and resymmetrization (i.e. placing all nationalities and regions on the same footing). We start by dividing Spanish history since 1978 into various critical junctures defined by changes in the balance between federalization and de-federalization.

(1) 1978–82. Following the promulgation of the Constitution of 1978, Autonomous Community status was attained almost immediately by two territories in which statutes of autonomy had already been approved prior to the Spanish Civil War: Catalonia and the Basque Country. Fearing both the possibility of administrative chaos if more territories rushed to obtain autonomy, and the associated possibility that the nascent democratic state might fall victim to a right-wing *coup*, the ruling centre-right Union de Centro Democrático (UCD) party then froze the initiatives of other territories. Strong opposition to this highly asymmetrical situation, led by Galicia (which had also approved a statute of autonomy before the Civil War) and by Andalusia, resulted in the agreements reached in mid-1981 between UCD and the other major Spanish political party of the time, the socialist Partido Socialista Obrero Español (PSOE), regarding the eventual generalization of a model of parliamentary Autonomous Community throughout Spain; these agreements led to the approval of the Statutes of Autonomy of Galicia, Andalusia, Asturias and Cantabria in 1981 and, in mid-1982, to the passage through parliament of the Ley Orgánica de Armonización del Proceso Autonómico (LOAPA), an act designed to ensure the harmonious co-ordination of the processes by which territories would attain Autonomous Community status. If it had ever entered into force, this act would probably have allowed the state, in the forthcoming years, to withhold the transfer of further powers to the existing Autonomous Communities while (a) endowing other ‘strong’ territories with a degree of autonomy similar to that of the existing Communities, and (b) provisionally ceding only less extensive powers to territories considered to be less prepared for the assumption of autonomy. Although the LOAPA was challenged successfully by Catalonia and the Basque Country governments in the Constitutional Court, which ruled large parts of it to be unconstitutional, the upshot was nevertheless that between the approval of the last of the seventeen Statutes of Autonomy in 1983 and the Statute reforms of 1994, a two-tier system existed in which seven Autonomous Communities (Catalonia, the Basque Country, Galicia, Andalusia, the Canary Islands, Navarre and Valencia) enjoyed broader powers than the other ten (Asturias, Cantabria, the Balearics, Castilla-La Mancha, Aragon, Castilla-León, Extremadura, Madrid, Murcia and La Rioja). Furthermore, apart from this asymmetry as regards administrative competence, the seventeen-community system that now covered the whole of Spain except the African cities of Ceuta and Melilla was also all too asymmetrical in other respects: asymmetry of size, in particular, constitutes a chronic structural problem that has persisted to this day, the tiny populations of some of the single-province Communities raising doubts as to whether they are really sufficient for the maintenance of significant autonomous government.

(2) 1982–93. In the 1980s the absolute majority government of the PSOE often postponed or resisted the transfer of powers to the Autonomous Communities and, indeed, introduced a number of recentralizing, resymmetrizing measures, for the sake of the much-needed modernization of economic and administrative structures. For example, piecemeal transfer of the social security information and management system would have significantly reduced its efficiency. On other occasions, the areas of competence of the Autonomous Communities were invaded by abuse of the general powers of co-ordination reserved to the state by the Constitution and other basic laws, or simply by the use of central spending power. This tendency persisted

after the 1989 elections, in which the socialists failed by just one seat to obtain an absolute majority, and was consolidated by the 1992 pacts between the PSOE and the right-wing Partido Popular (PP). One result was an increasing number of appeals to the Constitutional Court, making it a potentially key player in the organization of the federation. However, the Court has, in general, maintained the traditional role of such institutions, that of “negative legislator”: rather than establishing how a particular area of competence should be split between federal and sub-federal entities, it has limited itself to deciding whether the split proposed by central government is constitutional or not—a practice that has, in turn, led to central government using Tribunal doctrine to argue the impossibility of alternative solutions, more favourable to sub-federal autonomy, that might be equally constitutional. Finally, to the tendency to centralize in the name of administrative efficiency, Spain’s entry into the European Union added a tendency in the same direction as the result of its being the central state effectively responsible for negotiating and complying with EU requirements, even in areas that are assigned internally to the exclusive competence of the Autonomous Communities.

(3) *1993–2000*. Neither the socialist government of 1993–96 nor the first government of the PP (1996–2000) enjoyed absolute majorities. As a result of their consequent dependence on alliances with nationalist parties, their de-federalizing initiatives, which included several appeals to the Constitutional Tribunal regarding conflicts of competence and laws passed by Autonomous Communities, were offset by significant decentralizing activity: transfer of numerous areas of competence was accelerated; Art. 150.2 of the Constitution was invoked to delegate competence in other areas on the Autonomous Communities; a percentage of income tax was ceded; and the Senate was reformed to allow the non-voting participation of direct representatives of the Communities.

(4) *2000–04*. Under Aznar presidency, the second PP government took advantage of its absolute majority to reintroduce unabashed Spanish nationalism as a political criterion ruling the relationships among the Autonomous Communities and the state. Recentralization and resymmetrization prevailed in the treatment of the Communities as administrative units rather than as federated partners, in the playing-down of internal national and regional identities, in belligerence towards sub-federal nationalism and in a reinforcement of the administrative, political and economic power of central government.

(5) *2004 to the present*. The socialist government that came to power in 2004 was once again obliged, by its lack of an absolute majority, to seek the support of sub-federal nationalist parties. Whether from conviction or necessity, unlike its predecessors of either political wing it pursued the consolidation of a decentralized system, creating the Conference of Autonomous Community Presidents and favouring a reinforcement of the autonomy of several Communities by collaborating in the reform of their Statutes. Due in part to the intense Spanish nationalist campaign of the PP, and in part to the aggressive claims of sub-federal nationalists, this latter activity has been partially or provisionally frustrated by the Spanish Parliament’s rejection of the reformed Statutes proposed by the Basque Country (the *plan Ibarretxe*), and by the reformed Statute of Catalonia (which was passed by the Spanish Parliament) being challenged in the Constitutional Court. As a result, the 2004–08 government

did succeed in strengthening the self-government of the Autonomous Communities, but only in a relatively symmetrical fashion.

As the above brief survey of the history of the Spanish Autonomous Communities shows, the constitutionally endorsed decentralization and asymmetrization of the Spanish state have alternated or co-existed with de-federalizing processes and trends of recentralization and resymmetrization. The characteristics of contemporary Spanish federalism—the foreseen and unforeseen consequences of the Constitution and, beyond the institutions, the nature of its political processes—are thus the result of the interplay between these two tendencies in the actions and strategies of political parties, federal and sub-federal entities, the Constitutional Tribunal and other political agents.

In the remainder of this paper we focus on the problems caused *from above* by de-federalization in two critical areas: the distribution of legislative and regulatory power (who decides, about what matters and with what executive instruments); and finance (who gathers tax, who distributes it and with what criteria). Finally, we analyse certain aspects of political dynamics that tend to strengthen federal power at the expense of sub-federal power.

## The Distribution of Regulatory Power

### *Problem 1: The Concentration of Central Regulatory Power*

The method employed by the Spanish Constitution to split power between federal and sub-federal governments is apparently straightforward. It enumerates a number of areas of decision, such as defence, the monetary system, environmental protection, railways passing through more than one Autonomous Community, roads lying completely within a single Autonomous Community, etc., and either sanctions their assumption by Autonomous Communities or reserves them to the state; any areas not listed are susceptible of being taken over by Autonomous Communities, and all areas that an Autonomous Community could have taken over but did not are retained by the state. Nevertheless, three kinds of area of decision emerge by virtue of the level at which competence is transferred to the Autonomous Community: areas of *exclusive competence*, in which all power, both legislative and executive, pertains either to the state or to the Autonomous Community that has taken over the area in question; areas with *shared regulatory competence*, in which central government establishes a framework law for the whole of Spain but each Autonomous Community is free to flesh out and execute this framework through its own legislative and executive processes; and areas with *shared executive competence*, in which the state retains all legislative power and the Autonomous Community acts merely as executive. Although this situation has become widely accepted, it was not always so: in the years immediately following the promulgation of the Constitution, other readings were proposed that were more favourable to the Autonomous Communities, giving them greater freedom to design and implement more individualized policies.

Let us first consider shared regulatory competence. Here, federal legislation might in purity be supposed to limit itself to establishing the bare bones of legislative action, the basic principles that are to be expressed in concrete terms by sub-federal

legislation. In practice, however, federal legislators have employed an extremely inclusive concept of what is ‘basic’, ruling on material issues and even technical details. The references in Art. 149.1 of the Constitution to “bases and coordination” (item 13), “basic legislation” (item 17) and “basic norms” (item 27) have thus been exploited to establish a distribution of competence that is clearly biased in favour of the federation (Caamaño, 2002).

This result is exemplified by one of the first sentences of the Constitutional Court, STC 1/1982. The Basque Government claimed that certain technical banking regulations introduced by central government were unconstitutional, since a regulation of this rank could not be regarded as basic. The Court rejected the claim, ruling firstly that the basic minimum legislation to be shared by all need not be limited to the establishment of general principles, but could also be more concrete if it was necessary for the technical or organizational details in question to be applied throughout Spain; and, secondly, that although the common basic minimum legislation should preferably, in view of its intended stability, take the form of statute law, it might also exceptionally take the form of a governmental regulation. This early jurisprudence thus opened the field for central government to exercise broad regulatory powers that often came close to those of the former centralized state. “Basic legislation” has not infrequently consisted of a ministerial order expressing a political decision by the incumbent.

It must be admitted that this broad concept of basic legislation was passively encouraged by Autonomous Community Statutes that fail to defend or provide adequately for the concrete implementation of federal basic law by sub-federal legislation. For instance, Arts. 10 and 16 of the 1979 Statute of Catalonia establish that in certain affairs the *Generalitat* (the institutions of self-government) is competent to implement state framework legislation “in the terms that such legislation may establish”, an expression that the Constitutional Court has interpreted as an exercise of self-restraint by the *Generalitat* in favour of the Federation (STC 5/1982).

The concept of shared executive competence has suffered a fate similar to that of shared regulatory competence. Here the matter at issue is the scope of state legislation in those areas in which the state reserves to itself legislative powers while the Autonomous Community assumes executive power. Once again, an early sentence of the Constitutional Court exemplifies the problem. In response to a central government regulation ensuring the maintenance of public transport during a strike in Barcelona, the *Generalitat* claimed that regulations of this rank did not fall within the scope of Art. 149.1.7 of the Constitution, which reserved labour legislation to the state “without detriment to its execution by the organisms of the Autonomous Communities”; equating “legislation” with “law”, the claimant reasoned that since regulations were not laws, regulations affecting Catalonia were for the *Generalitat* to promulgate. However, the Tribunal ruled that the term “legislation” covered all kinds of regulatory measure, not just those with the formal rank of laws. Central government thus retained exclusive power as regards labour legislation at all levels, leaving sub-federal governments only the option of executing its laws and regulations. It was for the state to control strikes.



*Problem 2: Transverse Encroachment*

In the previous section we noted that in distributing competence in any particular area of decision between the federal and sub-federal governments, the Constitution distinguishes between regulatory and executive powers; depending on the area in question, it may be both regulatory and executive power, only executive power, or no power at all that can be transferred to an Autonomous Community. We saw that the interpretation of this distinction in practice has tended to favour the state. Here we argue that something rather similar has occurred with the various areas of decision themselves. Although the wordings of the Constitution and the Statutes of the Autonomous Communities treat the affairs to be managed by federal and sub-federal governments as neatly classifiable in distinct, mutually independent areas of decision, this convenient appearance of order naturally hides a much more complex reality, and it is here that the so-called transverse powers of the state have been interpreted in the state's favour. Particularly important in this respect is the state's power to establish the framework for, and co-ordinate, the general planning of economic activity (Art. 149.1.13 of the Constitution).

The paradigmatic example of the invasive use of this power concerns tourism. The regulation and control of this economic activity—a key Spanish industry—are not reserved to the state by the Constitution and, in the Statutes of most Autonomous Communities, are appropriated to the latter. In principle, all legislative, regulatory and executive activity concerning tourism should therefore be performed by the Autonomous Communities, without any kind of intervention by the state; but this is far from being what has actually occurred. In STC 75/1989 the Constitutional Court decided on whether the state could subsidize certain activities in the tourism industry in pursuit of its own policy in an area of decision in which the Autonomous Community of Catalonia had assumed exclusive competence. In ruling that the state could act in areas apparently outside its competence whenever the purpose of its actions was to guarantee “the achievement of the goals of national economic policy”, the Tribunal afforded recognition to the transverse nature of economic planning. What on paper was the exclusive competence of the sub-federal entity was thus encroached on by federal government through the interpretation of Art. 149.1.13 as a catch-all provision, similar to the “commerce clause” of the United States Constitution.

Another aspect of transverse encroachment concerns the so-called “organic” laws defined in Art. 81 of the Constitution, i.e. certain kinds of law passed by the federal parliament that require an absolute majority for their enactment, modification or repeal. Particularly striking are the cases of the Organic Law of Universities (2000) and the Organic Law of Educational Quality (2002), which illustrate both the recentralizing and resymmetrizing facets of this variety of de-federalization process (Maiz and Losada, 2005). The Organic Law of Educational Quality, for example, far from limiting itself to setting up general principles for the establishment of criteria of educational quality, both invaded the competence of the Autonomous Communities in educational matters, and implemented an educational policy with a traditional Spanish nationalist slant that clashed with the cultural and linguistic pluralism of Spain. The number of subjects that were obligatorily common to the syllabuses of all Autonomous Communities was increased; the possible educational paths of secondary school students were

subjected to state-wide regulation; the content of secondary school subjects was fixed state-wide; a concept of pre-school facilities as social assistance rather than education was imposed unilaterally; criteria were established for the evaluation of students and for when a student should repeat a year; the regulation of the objectives and methods of learning to read, and of oral expression, was centralized; and so on. Noteworthy among the resymmetrizing effects of this legislation were the result that the history syllabuses of all Autonomous Communities came to have 70% of their content in common; there was an increase in the number of subjects taught obligatorily in Castilian; and the student's performance in religion classes, i.e. classes of Roman Catholicism, was included in his or her academic record and incorporated in the overall mark employed as an entry qualification by higher-education establishments. The "organic", and hence federal, nature of the law was thus exploited to impose a conservative educational policy within a traditional Spanish nationalist perspective and, in so doing, to claw back regulatory competence in the field of education, in contradiction with the Statutes of the Autonomous Communities.

Finally, the state's exclusive power to regulate the basic conditions guaranteeing the equality of all Spanish citizens in exercising and fulfilling their constitutional rights and duties (Art. 149.1.1) has been a rich source of transverse encroachment, having been interpreted as establishing the competence of the state in all matters in any way touched on by the ample array of fundamental constitutional rights and duties. Even though the Constitutional Court struck down numerous articles of federal town planning laws of 1990, 1992 and 1998 (STC 61/1997 and STC 164/2001), this precedent has been ignored by the state and has not even been coherently taken into account by the Court itself.

*Problem 3: Which Entity is Competent in Matters not Mentioned Explicitly by the Constitution?*

The Spanish Constitution addresses, *inter alia*, a task that must be undertaken by any federal Constitution: delimitation of the scope of federal competence and of sub-federal competence. Its peculiarity is that while fixing the powers of the federation, it leaves sub-federal entities, i.e. Autonomous Communities, free to fix their own powers in their Statutes, so long as these powers do not overlap those that have been reserved to the state by the Constitution. Competences in any areas of decision that have been 'overlooked' are assigned to the state. These rules appear to take all possibilities into account and, to deal adequately with a problem that is typical of federal structures, the question of who is competent to legislate in matters that were unforeseen at the time the Constitution was passed. Nevertheless, the fragility of the Spanish solution was soon shown up by events. The basic failing was that the set of areas of decision that the Constitution reserved to the state in Art. 149 was outdated from the start, having been based essentially on a similar list in the Constitution of 1931. This set the scene for friction when the Autonomous Communities incorporated in their Statutes as broad a gamut of powers as possible so as to prevent areas of competence ignored by the Constitution from being occupied by the state. That the Communities' objective has been frustrated is due to two main reasons.

First, the broad powers claimed in the Statutes are, in many cases, ill-defined, which has allowed and encouraged the state to appropriate matters to its competence whenever their inclusion among the exclusive powers of the Communities has been sufficiently unclear. Appeals to the Constitutional Court by the Federation on such matters have been both numerous and, in general, successful; and the activity of the state in these areas has hindered the development and execution of the Communities' own policies. This is the background to the Communities' demands for their Statutes to be reformed in a way that shall not only broaden their powers and bring them into line with their increasing administrative needs and capacities, but shall also effectively impede their being clawed back by the state; and it has been this desire to set up effective impediments to claw-back that has been responsible for the reformed Statutes of 2007 exhibiting such an obsessive excess of detail in defining the powers of the corresponding Communities—a defect that in recent times is not at all uncommon among the equivalent instruments of the sub-federal entities of other states.

The second cause of the Autonomous Communities having failed to realize the potential of their Statutes has, in fact, already been more than hinted at: the recentralizing tendency of the Constitutional Court, which has pushed its interpretations of the text of the Constitution to the limit in this direction. The following example is not untypical. In 1978, when the Constitution was approved, Spain had four small stock exchanges in Madrid, Valencia, Barcelona and Bilbao; they were independent of each other, and all four had quite low levels of activity. This historical situation partly explains why the Constitution does not explicitly reserve control of stock markets to the state. On the other hand, the Statutes of all the Autonomous Communities do explicitly claim regulatory power over the stock markets in their territories. When, in the 1980s, stock exchange activity began to increase dramatically due to foreign investment and the growth of the Spanish economy, which were favoured by the new constitutional situation of Spain and its entry into the EU, the state achieved, through legislation and otherwise, the adoption of an online trading system, the effective merger of the four stock exchanges and the establishment of market control bodies and mechanisms. In spite of the multiple arguments against its being empowered by the Constitution to do these things, the Constitutional Court ratified its competence in these matters; arguing on the basis of several areas of decision that *are* mentioned in Art. 149 (commerce, credit, economic planning, etc.), the Court effectively constructed a new area, the stock market, which it adjudicated by the state. In other words, in the face of economic reality, the Court interpreted the Constitution so as to invest in the state all competence in the newly emergent phenomenon (STC 133/1999).

#### *Problem 4: Federal Control over Sub-federal Law*

Just as important as the constitutional distribution of powers between federation and sub-federal units in a federal structure is the relationship between the federal and sub-federal legal systems. The Spanish Constitution adopts a classic approach to this issue: “in case of conflict, the laws of the State shall prevail over those of the Autonomous Communities in all matters not attributed to the exclusive competence of the latter” (Art. 149.3). Even so, the Federation has found a yet more efficient ‘solution’ to competence disputes: simply challenging sub-federal laws in the Constitutional

Court brings about their automatic suspension, without having to wait for a decision on competence. This suspension is explicitly imposed by the Constitution, at least for an initial period of five months, when the federal government challenges “measures and resolutions adopted by the organs of the Autonomous Communities” (Art. 161.2); but most constitutionalists have interpreted this wording as limiting the suspension (a) to orders and regulations issued by sub-federal governments, as opposed to laws passed by their parliaments; and (b) to “measures and resolutions” challenged because of their presumed violation of the distribution of competence established in the Constitution. However, the Organic Law of the Constitutional Court of 1979 extended the scope of this mechanism to the point of making it an extremely effective means of impeding sub-federal action: in spite of serious objections to its constitutionality, this Law declared automatic suspension to apply to sub-federal laws as well as legislation of lesser rank, and that the challenge motivating suspension could be based on any putative cause of unconstitutionality, not only on conflict of competence. Federal government thus has at its disposal an instrument allowing it to put the brakes on any kind of sub-federal legislation. And the efficacy of this instrument has furthermore been increased not only by the tendency of the Constitutional Court to ratify suspension upon five-month review, but above all by the backlog of cases in the Tribunal, which has led to it taking seven or eight years for a challenge to be ruled on.

## **Finance**

The Spanish Constitution establishes a number of different possible sources of income for sub-federal governments. The most important, specified in Art. 157, are taxes ceded by the state, surtax on state taxes, taxes imposed by the Autonomous Community itself, sums allotted from the Interterritorial Compensation Fund established to correct differences and implement solidarity among different Autonomous Communities and provinces (Art. 158), and “other allotments included in the State budget”. Although provision thus appears to have been made for Communities to enjoy financial autonomy on the basis of their own tax income, financial power is, in practice, concentrated in the state.

### *Problem 1: The Difficulty of Autonomous Taxation*

In principle, as noted above, Autonomous Communities can establish their own taxes. The only limits placed on this power by the Constitution are that the Communities cannot tax assets located outside their territory, and cannot impose taxes that hinder the free circulation of goods and services. Nevertheless, in 1980 the Organic Law of Autonomous Community Funding tightened these limits by stipulating that Autonomous Communities cannot tax assets or activities that are taxed by the state (Art. 6.2). This has been a very significant additional restriction. Today’s federal Spanish state having originated through the decentralization of a highly centralized predecessor, it was already taxing, right from its birth, practically everything taxable. Virtually nothing was left for the Autonomous Communities to tax, in spite of the efforts of the Constitutional Court to increase their powers in this area (as in STC 14/98, for example). Where sub-federal taxes have been imposed on assets or activities that

have escaped the state monopoly, such as nights spent in hotels, or under-exploited land, it has been more with extrafiscal intentions, to benefit the environment or economic structures, than for the sake of the scant earnings to be had from such taxes.

Furthermore, it is hard to imagine how this situation might change. Even the Basque Country and Navarre, which for historical reasons are exceptional in enjoying, in principle, almost complete autonomy to impose taxes, have seen their taxation powers restricted in practice, in this case due to the demands of the Single European Market. The most notorious example of this occurred when the Basque Government took the initiative of providing tax exemptions for firms domiciled in the Basque Country. To prevent discrimination on the grounds of nationality, the European Commission reacted by demanding of Spain that these exemptions also be granted to all non-Spanish EU-domiciled firms trading in the Basque Country; but when the Spanish state obliged by passing the required exemption law, it was struck down by the Constitutional Court on the grounds that it discriminated against Spanish companies domiciled outside the Basque Country, which were not made eligible for the exemptions. Since the Court has also ruled against the legality of the exemptions to companies domiciled in the Basque Country, the fiscal powers of the Basque Country have, in effect, been curtailed by the EU.

But what about the first of the sources of sub-federal income specified in Art. 157, taxes ceded in whole or in part by the state? The key word here is “cede”, for it is left to the state to decide whether it cedes any taxes or not, and the form that any cession takes. Consider, for example, two of the most important: income tax and company tax. The state has not ceded a single cent of company tax, which it treats as a fundamental element of its tax structure. It *has* ceded up to one-third of income tax, and regulatory powers over proportional and non-proportional deductions from that third, but it has retained control of its economic structure; Autonomous Communities can lighten their citizens’ final tax burden, but they cannot alter rate schedules. Thus the Communities have some room to use their share of state taxes as an instrument of social policy (as in the case of their own taxes, as we saw above), but no control over where that income comes from.

The only significant source of income that an Autonomous Community can exert control over is the surtax it may place on state taxes. But placing such a surtax has a grievous political cost; politically, it is more profitable to wait for the state to become unpopular by raising taxes, and then pocket whatever extra state funding those rises may make available. Besides which, if state tax rates are calculated to optimize overall prosperity, there cannot be much room for an Autonomous Community to raise them without perturbing its own economy.

### *Problem 2: Who Decides How State Funds are Allotted?*

Because of the scant taxation capacity of the Autonomous Communities, their income derives largely from “allotments included in the State budget”. In principle, the distribution of state income among the Autonomous Communities is not arbitrary, but governed by certain objective criteria that are established by law and are adjusted about once every five years following multilateral negotiation in the Tax and Finance Policy Council. Currently it depends largely on population (the larger the population

of the Community, the larger the share it gets) and “interterritorial solidarity” (the Communities with the worst economic indicators are subsidized). The crucial point here is the dependence of changes in the distributive criteria on the passage of a law, which means that the bargaining power of the various parties in the preceding negotiations depends to a large extent on the balance of power in the central Parliament. For example, in 2001 a number of Autonomous Communities refused to agree to adjustments proposed by central government, but these adjustments were nevertheless introduced by the absolute majority government of the time through a change in the law-fixing criteria. This situation has furthermore received the support of the Constitutional Court in STC 13/2007: when Andalusia claimed that the law imposing the 2001 criteria, 21/2001, was unconstitutional because these criteria had not been agreed to by Andalusia, the Tribunal ruled that although agreement was desirable, in its absence the state should prevail, without the Autonomous Communities having any right of veto. This, of course, does not mean that a law must necessarily force the state’s wishes on a discrepant Community: under the previous system, Communities not agreeing to adjustments in funding continued to be funded in accordance with the pre-existing schedules; but 21/2001 made no such provision.

*Problem 3: The Geographical Distribution of State Funds Not Transferred to the Autonomous Communities*

The above considerations clearly show how financial power is concentrated in the state: the sub-federal Autonomous Communities are not truly free to finance themselves through taxes that they control, and neither can they veto criteria proposed by the state for the distribution of state funds. Worse still, although the funds included in the state budget explicitly for transfer to the Autonomous Communities are distributed using criteria which the Communities may or may not agree with but which are at least objective, there is no such limitation to the way in which the state distributes spending in fulfilment of responsibilities of its own exclusive competence. The geographical distribution of state spending is a powerful political instrument for various reasons, not least because state spending in a particular area of decision can determine the Autonomous Communities’ spending requirements in related areas of their own competence. An example of evident importance is state spending in roads and railways; it is for the state to decide where it builds or modernizes main roads linking two or more Autonomous Communities, but its actions in this area certainly affect the economy and road-related spending requirements of the Communities. As in the case of the criteria for the distribution of funds to the Autonomous Communities, the policy of central government in this respect will ultimately depend on whether it needs support in the central parliament and, if so, on where the required support can be obtained.

*Problem 4: Budget Control*

Following the example of the USA, and in accordance with EU policy, successive Spanish governments have made a balanced budget not just an administrative principle but also a legal requirement. Neither central government nor sub-federal governments

can pursue policies leading to deficit. One consequence of this is an effective strengthening of the powers of the state in relation to those of the Autonomous Communities. It works like this. Every year, the central government estimates the change in gross domestic product (GDP) over the next three years, and the central parliament approves the corresponding spending limit. Given that the Autonomous Communities are responsible for more than one-third of all public spending in Spain (as against about one-fifth for central government, excluding social security), limits must also be set on sub-federal spending. But they are not fixed by the parliaments of the corresponding Autonomous Communities, as the limits on central government spending are, but by the Tax and Finance Policy Council (which includes representatives of both the central and sub-federal governments), and the growth forecast that serves as a reference is the central government's estimate of forthcoming GDP. Furthermore, if central government issues a sub-federal government with an official warning about its budgetary control, the sub-federal government must submit a corrective financial plan to the approval of the Tax and Finance Policy Council; and, if sub-federal overspending constitutes a breach of the EU Stability and Growth Pact, it is the Autonomous Community that is fined, not the state. With all these trammels, it is very difficult for any Autonomous Community to pursue an expansive public spending policy.

## Politics

So far, we have seen how power has been concentrated in the state, rather than in sub-federal entities, by legislation and by the interpretations of the Constitutional Tribunal. However, we should not forget the directly socio-political factors that also contribute to de-federalization.

### *Problem 1: Symmetrization*

We noted in the introductory section of this paper that by 1983 Autonomous Community status had been achieved by 17 areas that covered the whole of Spain except Ceuta and Melilla, and which constituted a two-tier system in which seven Communities enjoyed broader powers than the other ten. Although the establishment of such a large number of Communities, with their wide differences in size and economic standing, has created many problems, it also avoided the instability that is characteristic of federations with very few members, which often tend to be dominated by just one (Colomer, 1998). However, the two-tier structure, and the momentum of the process that led to the upper tier having seven members instead of just two (Catalonia and the Basque Country), fed the aspirations of lower-tier members to be upgraded to the upper tier; and, in turn, the effective satisfaction of these aspirations in the mid-1990s fuelled the ambition of upper-tier members (particularly those with historical episodes of autonomy) to gain even fuller powers so as to maintain superior status.

The climate in favour of symmetrization that was generated by the lower-tier Communities helped create a notion of state—the “State of Autonomous Communities”—that purported to differ both from the centralized state and the federal state; a notion in which sub-federal entities subsist as equals within the indissoluble unity of the Spanish nation proclaimed in Art. 2 of the Constitution. This climate was amply exploited by

central government to commit (and by numerous Autonomous Communities to overlook) what the Constitutional Court has only recently regarded as abuse of the supplementary nature of State law, and to invoke a number of broad constitutional concepts (the principle of equality, the general interest of the economy, the single market, interterritorial solidarity, etc.) in ignoring the possibility that the same constitutional ends might be achieved in different ways by different Communities—this in spite of the Court's ruling that the principle of equality does not mean that all Autonomous Communities should necessarily have the same powers or exercise their powers with identical or similar results (STC 37/1987). Furthermore, however, it has led the Communities to develop as inward-looking entities that lack channels for mutual communication and negotiation other than via central government—a role that the Spanish Senate, though constitutionally a “chamber of territorial representation” (Art. 69.1), has never, in fact, fulfilled; and this compartmentalization—this flip-side of the symmetrical state of Autonomous Communities—has, in turn, strengthened nationalist parties and conflict between Spanish and local nationalism.

*Problem 2: The Politics of Finance ('Don't Bite the Hand that Feeds You')*

We saw earlier that a central government with a sufficient parliamentary majority can control the distribution of funds to the Autonomous Communities by fixing the criteria of distribution. It cannot directly control the way the Autonomous Communities spend the money they are allotted. Nevertheless, an example will suffice to indicate the extent to which it can exercise indirect control.

In principle, the state can only legislate a broad framework for the provision of housing subsidies by Autonomous Communities; it is for the latter to enact detailed legislation in this area, and to manage the payment of subsidies. In practice, however, the state exercises much tighter control by means of agreements accompanying the transfer of the necessary funds to each Autonomous Community. These agreements stipulate in considerable detail not only how housing subsidy schemes are to be managed, but also the powers of the sub-federal entity. Strictly, this exercise of *de facto* power by the state is not unconstitutional, since it takes the form of an agreement between the state and the Autonomous Community, which thereby agrees to re-empower the state in return for material reward; but the inferior bargaining position of the Community is evident, since the loss of funds resulting from refusal to sign would have a dire political cost. And, of course, the generalization of this scheme to all Autonomous Communities leads not only to the concentration of power in central government, but also, as a consequence, to the symmetrical application of the same housing subsidy policy to all the Communities, which are thus unable to experiment with innovative policies designed specifically for the particular housing problems of each.

*Problem 3: The Political Cost of Challenging Popular State Legislation*

It is not only the political cost of losing out on state funding that is feared by sub-federal governments; opposition to possibly unconstitutional state legislation that is nevertheless popular might also have a political cost. This is well illustrated by the



recent example of the ambitious plans of central government to implant, over a period of eight years, a general scheme of aid and assistance for incapacitated persons of all kinds, for the legislation drawn up to implement the plan is based on a novel interpretation of the constitutional powers of central government that has been publicly questioned by two sub-federal governments. However, neither of these sub-federal governments has actually challenged the legislation in the Constitutional Court, because both not only acknowledge its social importance, but also fear the political cost of opposing it. There are numerous other examples, on a smaller scale, of the state thus paying scant heed to its constitutional limitations in the application of policies that it knows it would be political suicide for sub-federal governments to oppose.

#### *Problem 4: Unforeseen Effects of EU Membership*

As we saw in Problem 1 of the 'Finance' section, Spain's membership of the EU has had significant consequences for the constitutional relationship between its federal and sub-federal entities, partly because the EU claims for itself an increasing share of competence, and partly because it is largely central government that acts on Spain's behalf in the EU. It would be simplistic to ignore that EU membership has in many ways reduced the autonomy of the state; monetary policy, for example, is no longer under state control. But it is also true that membership has shifted the balance of power between federal and sub-federal entities in favour of the former, because it is currently the state, not the Autonomous Communities, that is almost exclusively responsible for incorporating EU legislation into Spanish law. The consequences of this situation are well illustrated by the case of agricultural legislation. In consonance with the Spanish Constitution, all the Autonomous Communities have assumed exclusive responsibility for agricultural affairs; but agricultural policy has also always been one of the pillars of EU action and, in the Lisbon Treaty, is included among the areas in which competence is shared between the Union and the member states. As a result, and given the immaturity of the mechanisms by which the Communities can theoretically participate in the formation of Spain's EU bargaining position, the Communities have effectively lost power in favour of both the Union and the state (in spite of efforts to enable them to defend their own positions in the Council; see Börzel, 2000). But the drainage of power from the Autonomous Communities does not stop there: even more relevant is the organization of EU agricultural commerce as a single market, which in practice means that the role of the Communities is limited to the administrative distribution of their share of EU production quotas among their farmers.

#### *Problem 5: Federalization and Globalization*

The wave of privatization that swept Europe in the 1990s, when central governments balanced their budgets by selling off state-owned companies, did not leave Spain untouched, and it has resulted in the recentralization of decision making in some of the most dynamic areas of the economy. The electric power industry provides a good example. In the 1980s, the Spanish electric power industry was characterized by two features: a geographically compartmentalized monopolistic market in which, in each Autonomous Community, electric power was supplied and distributed by a

single power company; and the fact that, though ostensibly in private hands, most of these companies were, in fact, state-owned. The first step towards the liberalization of this system was the merger of the state-owned companies to form a single national power company, and the second step was the privatization of this national company. However, what this process created was not a competitive market, but a set of privately owned monopolies, some of them under the control of multinational corporations. Since these large firms pay little heed to local preferences in pursuing their activity, the result has again been to drain effective power away from the Autonomous Communities, whereas central government, as the representative of a larger market, retains at least some influence.

### *Problem 6: Inertia*

We spoke above of the immaturity of the mechanisms by which Autonomous Communities can participate in the formation of Spain's EU bargaining position. That these mechanisms have not been developed more fully is just one example of the way in which, as the result of the inherited hypercentralism of central bureaucracy, certain responsibilities have been zealously retained by the state even when there is no legal impediment to their allocation to the Autonomous Communities. In the case in point, although international relations are assigned by Art. 149.1.3 of the Constitution to the exclusive competence of the state, the Autonomous Communities' promotion of their economic interests has, in practice, required that they become increasingly active outside Spain, especially since Spain's entry into the EU, which harbours multinational intercourse at multiple levels of government; and the Constitutional Court has long since ratified the legitimacy of such action (STC 165/1994). For many years, the Ministry for Foreign Affairs nevertheless continued to hamper Autonomous Community initiatives, such as the establishment of delegations in Brussels, and to deny the Communities the chance to participate in the negotiation of international agreements or in Spanish delegations to international organizations. As a result, the foreign activity of the Communities, their involvement in the formation of Spain's foreign policy, and the institutional infrastructure required for these tasks, are all markedly unconsolidated in comparison with other aspects of Community activity and structure.

### **Conclusion: the Dual Philosophy of the State of Autonomous Communities**

In the foregoing we have analysed the chief mechanisms by which, in partial denial of the federalist philosophy inherent in the Constitution and the Statutes of the Autonomous Communities, the Spanish state has tended to promote both the resymmetrization of the federal structure (by placing all the Autonomous Communities on an equal footing) and the recentralization of powers that had been ceded to or otherwise enjoyed by the Communities in one way or another.

The current situation may be summarized as follows. Roughly, the state is responsible for core legislation (the codes of civil, labour, commercial, penal, administrative and process law); for economic and fiscal policy; for internal and external security (although some Autonomous Communities already have their own police forces, and the possibility of their creation is included in almost all the Statute reforms currently

in progress); for communication structures involving more than one Autonomous Community; for social security; for the guiding principles of education and health policy; and for support and reinforcement of the basic rights of the citizen.

Within the framework designed by the state, the Autonomous Communities play an executive role and, to a lesser extent, exert political control in an area that is fundamental to any social state—social services, including education and health. They have thus taken on responsibilities that are highly exposed to public opinion. Citizens in need of social services are almost invariably attended by their Autonomous Community.

In some respects the above situation is close to executive federalism, and was even more so during the second Aznar government (2000–04), when the erosion of the Communities' powers of autonomous decision reduced them to the status of mere executors (Aznar, 2004: 238). But the fact that responsibility, albeit of a limited nature, is exercised by the Communities in the areas that are closest to the public, has strengthened their governments in their demands not only for more and better self-government, but also more and better recognition of cultural differences and distinct identity. It is these demands that have prompted numerous political and academic figures to call for a recovery of power by the state (health, education ...) and the revival of a unitary concept of the Spanish nation in opposition to the distinct nationalities recognized by the Constitution and by the Statutes of various Autonomous Communities. In our opinion, these proposals reflect both an erroneous diagnosis of the situation, and an erroneous prognosis. Is the state's loss of integrative efficacy due to a lack of power? Hardly, since its powers are in fact far from negligible, as we have seen throughout this paper. If its integrative efficacy has diminished, it is because, in the current international environment of Spain, the functions required of the central authorities of a federation are no longer what they used to be.

Classically, federal states emerged in order to increase the joint power of their sub-federal units, which thereby came to enjoy the advantages proper to both small and large states. The federation was not created in order to limit the power of its members, but to provide their governments with more resources and more power in the fulfilment of their functions. Its integrative efficacy derived from its satisfying sub-federal requirements that it protect civil rights, construct a single market and defend against attack from without. Are these the functions that the sub-federal units of contemporary Spain ask the state to fulfil? Defence is now unthinkable outside the context of the North Atlantic Treaty Organization and the European Security and Defence Policy. Similarly, the relevant single market is that of the EU. And the civil rights issue has undergone a curious transformation in that the possibility of their being threatened by sub-federal entities is no longer entertained; what is nowadays at issue is whether the Statutes of Autonomous Communities can guarantee more civil rights than the state. Accordingly, we believe that the present situation of Spanish federalism poses a question that is much more profound than whether the state has sufficient power: namely, what is the role of a federation in Spain's current circumstances? How can it integrate self-government and shared government, unity and diversity, in a world of post-modern democracies?

We believe that the integrative function of the Spanish federal state must take into account a fact that is common to all culturally and politically complex plural (multi-national) states: that there is no viable policies of co-operation and equality without

appropriate handling of differences. The powers of the federation must focus on two themes: the promotion of civil solidarity and the resolution of conflict between sub-federal units and between these units and the federation itself. And this will require that the implicit philosophy of de-federalization, the realization of which we have sketched in this paper, gives way to an explicit philosophy of *plurinational federalism* in which by trial and error—federalism being “a continuing seminar in governance” (Elazar, 1987: 85)—self-government is reconciled with shared government and unity with diversity.

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