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Xabier Arzoz

BA (Deusto), LL.M. (Saarbrücken), Ph.D. (University of the Basque Country). Associate Professor of Administrative and EU Law, University of the Basque Country (UPV/EHU). Legal Counsel at the Spanish Constitutional Court.
The views and opinions expressed in this article are those of the author and do not necessarily reflect the official policy or position of the institution for whom he currently works

Introduction

Spain may be defined as a "*multinational quasi federal unitary state*".[1] This characterization might appear contradictory, but it attempts to underline the unique Spanish model as it takes elements and characteristics from different state models in a rather convoluted way. The Spanish Constitution of 1978 attempted to combine the traditional ideology of the nation-state with a limited recognition of territorial and cultural autonomy. Certainly two fundamental provisions recognized collective identities: the right to autonomy of nationalities and regions (Art. 2) and the right to use the various regional languages (Art. 3). Nevertheless, at the same time, Art 2 stipulates that "*the Constitution is based on the indissoluble unity of the Spanish Nation, the common and indivisible homeland of all Spaniards*". Moreover, Spain has accorded territorial autonomy not only to the nationalities, but also to all 'ordinary' regions as well, giving rise to the establishment of 17 so-called 'autonomous communities' and two 'autonomous cities', Ceuta and Melilla.

1. See X. Arzoz, "Spanien: Die geschichtlichen Autonomien der Basken, Galizier und Katalanen als Beispiel eines multinationalen 'Quasi-Föderalismus' im Einheitsstaat," in, *Zur Entstehung des modernen Minderheitenschutzes in Europa* eds. Christoph Pan and Beate Sibyle Pfeil (Vienna: Springer 2006), 363-388.

At the surface, it is the territorial rationale what appears to prevail in the Spanish decentralization model. In contrast, the national character of a territorial autonomy results indirectly from the ethnic self-identification of the overwhelming majority of its inhabitants, as well as from the concrete exercise of autonomy through the various powers and functions of the Autonomous Community in education, language policy, media etc. Most nationalities have also used their powers to define their national symbols (anthem, flag, national festival days, etc.) and to emphasize their cultural specificity.

Therefore, Spanish federalism needs to be analysed from a triple perspective—the degree of decentralisation it has developed (the dilemma unitary state vs. autonomy), the degree of recognition and accommodation of ethnic and linguistic diversity it involves (the dilemma nation-state vs. multinational state) and the degree of asymmetry constitutionally entrenched and/or de facto implemented (the dilemma symmetrical vs. asymmetrical federalism).

The main development affecting Spanish federalism in the last few years consists of the elaboration, approval and review of the Statute of Autonomy of Catalonia, a process that has lasted seven years (2003-2010). The new Catalan Autonomy Statute has been a historical test for the whole structure of the Spanish 'State of Autonomous Communities'. A second most important development concerns the consecration of the principle of budget stability. In both issues, the Constitutional Court has ruled on their compatibility with the Constitution, and its rulings are expected to create enormous consequences.

The statute of autonomy of Catalonia of 2006 as a constitutional experiment[2]

Origins

The three historical nationalities—Basques, Catalans and Galicians—were vested with an extended autonomy in 1979-80, but two decades later their autonomy statutes were widely deemed to have exhausted their original goals. After 25 years, most Catalan political forces agreed on the need for comprehensive reform of Catalonia's Autonomy Statute of 1979 to meet new social and political challenges. These efforts to reform Catalan autonomy began with a diagnosis based on the degree of quality that Catalonia's self-government had enjoyed up to then. Some observers commented that after 25 years under the first Autonomy Statute, Catalonia only had a 'broad autonomy of low quality' because it was be-

2. See X. Arzoz, "Das Autonomiestatut für Katalonien von 2006 als erneuter Vorstoß für die Entwicklung des spanischen Autonomiestaates," in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 69:1 (2009): 155-193.

lieved that centrist tendencies in implementation and interpretation had increasingly eroded the scope of the autonomous self-government.

Moreover, after a moderately nationalist party held power in Barcelona for 20 years, in 2003 three new parties gained a majority in regional elections for Catalonia's Assembly. The new left-nationalist coalition set a clear goal of amending the Autonomy Statute of 2005. 90 percent of the members of the Catalan parliament approved the new draft statute, which was opposed only by the *Partido Popular*, the Spanish Conservative Party. Subsequently, negotiations to have the statute approved by Madrid, as required by the Constitution, were held between a Catalan delegation and the constitutional commission of the Spanish Parliament. Finally, after two thirds of the original version were amended, a new version of the Statute was accepted. The significant curtailment of the initial text approved by the Catalan political forces led *Esquerra Republicana*, a Catalan nationalist party that was a member of the government coalition in Barcelona, to reject the new statute, along with the Spanish Conservative Party, which opposed it for completely different reasons. On 30 March 2006, the Spanish Parliament approved the new Autonomy Statute with 189 to 154 votes. The Catalan people immediately accepted the new statute in a popular referendum, but the turn-out of 49.41 percent was relatively low. 73.23 percent voted in favour of the new Autonomy Statute, while in 1979, 88.1 percent had voted for the previous Autonomy Statute. The new Autonomy Statute came into force on 20 July 2006 after a three year long amendment process, supported by widespread public attention. Catalonia's new statute[3] was completely reshaped in form and content, embracing 223 articles instead of 57.

The core of Catalan autonomy

The most important innovations concerned the introduction of new rights and duties for Catalan citizens and of new principles orienting the public policies of Catalan institutions. These included, firstly, the establishment of new competences and the controversial introduction of legal techniques to precisely define and to protect Catalonia's competences from erosion and centralisation by the state legislative and executive; new, hotly debated finance regulations; secondly, new instruments for cooperation with the State and for participation in State organs and in State decision processes that deal with European matters or affect Catalan interests; thirdly, the regulation of the official status of the Catalan language and of the language rights and duties of Catalan citizens; and last but not

3. The full text of the new statute approved on 19 July 2006 is available in the languages that are official in Catalonia (Spanish, Catalan and Occitan) or in other parts of Spain (Basque and Galician) and in five major international languages (English, French, German, Italian and Russian) at: <http://www.gencat.cat/generalitat/eng/estatut/index.htm >

least, some new provisions dealing with symbolic aspects concerning the identity of Catalonia as a sub-state nation. Below, we will comment briefly about what can be considered as the core of Catalan autonomy, territorial and linguistic autonomy.

Catalonia's autonomy, as enshrined in the new Statute of 2006, endows its institutions with legislative and executive powers in the regulation of its institutions, public infrastructure, transport and public mobility, agriculture and husbandry, fishery and forestry, crafts, environmental protection, regional incentives for the regional economy, museums and libraries, protection of its national heritage, tourism and sports, leisure activities, health and social services, education, cultural and language policy.

Based on the respective Autonomy Statute, Spanish Autonomous Communities are allowed to assume all powers not explicitly attributed to the State by the Constitution (Art. 149 (3)). The two lists of powers, pertaining to the Autonomous Communities and to the State respectively, did not set a clearly defined pattern of power sharing, but sometimes overlapped. Often the individual powers were of a concurrent type. This brought about major conflicts, as the real regulatory power of the Autonomous Communities depended on how far the State exerted its own framework of legislative power. Moreover, the Constitutional Court was often called upon to solve such conflicts, and in most cases decided in favour of the State's institutions.

As a result, Catalonia's new Autonomy Statute tried a different approach by defining with extreme precision every single section and subsection of the autonomous powers. 58 articles punctiliously demarcate and attribute every single power, regarding not only primary fields of public activity, but also secondary and tertiary fields. This system should prevent possible conflicts between government levels in the future and ensure maximum legal security in the division of powers between Barcelona and Madrid. For instance, agricultural powers are split into eleven single sub-activities, nine of which are under the exclusive legislation of Catalonia while the rest are shared with the State.

The new Autonomy Statute of 2006 further strengthened the legal position of the Catalan language. In the long run, Catalonia purports to make use of its autonomy to establish an asymmetric system of official languages that benefits Catalan. The main principles of the Catalan language legislation have now been entrenched in the Autonomy Statute, which is a piece of legislation with a constitutional character. Catalan now is Catalonia's 'own language'; it is to be used preferably and prevailingly by all public institutions and public media and also as the regular medium for instruction in the educational system. Furthermore, Catalan is the official language of Catalonia as Castilian is the official language of the State. Everyone has the right to use both official languages, and Catalonia's

citizens, according to the new Statute, have the right and the duty to know both languages. This duty is a considerable innovation for Spain as a whole, as the Constitution prescribes that all citizens have the duty to know the state's official language, Castilian. Thus, all public authorities of Catalonia are called to take all necessary provisions to guarantee compliance with that duty.

The new Autonomy Statute puts special emphasis on the linguistic rights of the Catalan speaking citizens when interacting with the judiciary and other authorities of the State. All judicial public officials and employees must demonstrate sufficient command of both official languages to handle their specific responsibilities. Furthermore, the state administration based in Catalonia must ensure that its employees are sufficiently fluent in both languages. All Catalan citizens are also entitled to address many relevant organs of the state such as the Parliament, the Constitutional Court and the High Court in Catalan in writing.

A further step in upgrading the status of the Catalan language requires addressing its position on the international level. Catalonia and the Spanish State are required to perform all necessary steps to have Catalan officially recognized within the European Union and to ensure the usage of Catalan in international organisations and covenants referring to language and culture. In addition, Catalonia is called to foster contacts and collaboration with communities using Catalan within and outside of Spain.

End of the constitutional experiment: Judgement 31/2010 of the Constitutional Court

The accommodation of Catalonia within Spain, from a Catalonian point of view, had not yet been resolved in a satisfactory manner with the old autonomy statute of 1979. The new statute of 2006 set the goal of putting Catalonia within Spain and Europe in a better position. It certainly gave a new push toward the further development of the whole system of Spain's regional autonomies. Initially disputed institutions and provisions have been incorporated into the reformed autonomy statutes of other Autonomous Communities, such as, the recognition of civil rights and civil duties, the proclamation of programmatic principles, references to historical rights, the enlargement of rights of the Autonomous Communities to participate in state-wide decisions on State institutions whenever regional interests were concerned, the extension of the scope of autonomous powers, stricter financial obligations of the State *vis-à-vis* the Autonomous Communities and the decentralization of the judiciary. All such provisions contributed to enhance constitutional progress for the regional autonomies.

Nevertheless, Catalonia's new Autonomy Statute was contested by the second largest political force in Spain. Although approved by 90 percent of the Catalan parliament and by 73 percent of Catalonia's electorate in a subsequent referen-

dum, the approval of Spain's Conservative Party had not yet been ensured. Immediately after the proclamation of Catalonia's new Autonomy Statute, the Conservative Party lodged an appeal, on the grounds of unconstitutionality, against more than half of the text with over one hundred provisions. It was the first time in Spain's constitutional history that an autonomy statute was so massively appealed, and there was no precedent for squashing a single autonomy statute's provision. The conservatives even appealed articles of Catalonia's Statute that they had previously approved in the statutes of other Communities. More worryingly, in the following years, the Constitutional Court was the target of unprecedented manoeuvres to dominate the composition of the Court and to influence an eventual ruling on the constitutionality of the Catalan Statute.

When the five hundred page long Judgement 31/2010 of the Constitutional Court on the constitutionality of the Catalan Autonomy Statute was finally delivered on 28 June 2010 [4]—four years after the challenge had been brought—it disappointed many sectors, although for opposite reasons. Certainly, it only annulled 15 provisions, in most cases not completely but with regard to specific aspects. The majority of the contested provisions were declared to be compatible with the Constitution, but under two big caveats.

The first one is that the declaration that the powers included in the Statute, part of which were intended to be exclusive powers, does not prevent action that even on the same subjects could be implemented by the state according to its own constitutional powers. The statutory attempts to define and systematise regional competences in three big categories (exclusive, shared and executive competences) were rejected. A statute of autonomy is inadequate to make those definitions because this is a function reserved for the Constitution and to the interpretation of the Constitutional Court. The definitions of the different categories of powers must be regarded as a description of case-law only, without any legal value by themselves. One of the few provisions that have been annulled is Art. 111, which purported to entrench a legal concept of shared competence that was restrictive on behalf of state action.

The second caveat is the imposition of a consistent interpretation on 24 of the contested provisions: "[T]*his provision is compatible with the constitutional text as long as it is interpreted in the following precise sense*". This has made Judgement 31/2010 into a huge repertoire of binding interpretative criteria on the scope of many statutory provisions dealing with competences, procedures and institutions.

The consistent interpretation approach has been applied to almost all innovations of the statute reform of 2006, including linguistic and socioeconomic rights. The Judgement upholds the constitutionality of all articles of the Statute

4. Published in *Boletín Oficial del Estado [Oficial Journal of the State]*, Nr. 172 of 16 July 2010.

concerning language, except for the 'preferential' reference in Art 6 (1), which was annulled. However, almost without exception, language provisions have been the object of consistent interpretation. Similarly, the legitimacy of the inclusion and regulation of social rights as subjective rights in autonomy statutes, has been resolved negatively. Statutory rights have been downgraded to mere programmatic or guiding principles. Last but not least, the references included in the preamble to "*Catalonia as a nation*" and to "*the national condition of Catalonia*" were explicitly declared to lack "*interpretative legal force*", paradoxically the provision establishing the "*national symbols of Catalonia*" was declared to be consistent with the Constitution assuming that "*the Spanish Constitution does not recognise other nations than the Spanish Nation*".

The imposed consistent interpretations eliminate a good part of the constitutional innovation purported by the Statute. The imposition of a consistent interpretation on many statute provisions may prove to be problematic if too many provisions are given a meaning that does not coincide with the one that was considered when political parties approved the statute reform in parliament and later the people accepted it in a referendum. For that reason, the consistent interpretation approach may also turn out to be more detrimental for the political aspirations of the electorate than the mere annulation of the relevant provisions.

It should be emphasized that the reinterpretation of the characteristics of the Spanish allocation of powers proposed by the Statute of Autonomy of Catalonia was rejected unanimously by all judges of the Constitutional Court. Nevertheless, four of them held in four dissenting opinions that the Court should have declared void more provisions than it did—mainly because they rejected the consistent interpretation approach.

The constitutional consecration of the principle of budget stability

Another important Judgement for the development of the Spanish state model was adopted by the Constitutional Court in July 2011. Judgement 134/2011[5] gives an answer to the constitutional challenge brought by the Parliament of Catalonia against various provisions on the two pieces of legislation on budgetary stability adopted in 2001[6] by the State legislature to comply with the European Union's Stability and Growth Pact. It may be recalled that this Pact encourages Member States to apply sound budgetary policies from the time they enter the third stage of the Economic and Monetary Union (EMU). The abovementioned Judgement of the Constitutional Court ruled that the establishment of the sta-

5. Judgement 134/2011 of 20 July 2011; published in *Boletín Oficial del Estado [Oficial Journal of the State]*, Nr. 197 of 17 August 2010.

6. General Budgetary Stability Act (Ordinary Law 5/2001) and Complementary Budgetary Stability Act (Organic Law 5/2001), of 12 and 13 December 2001.

bility principle for the public sector and the definition of measures to guarantee it with regard to the regional budgetary laws do not violate the political and financial autonomy of the Autonomous Communities. The Judgement accepted the constitutionality of the establishment of a State control on regional budgets, based on a broad interpretation of the State competence recognized by Art 149 (1) (13) concerning the general management of the economy.

Subsequently, on 27 September 2011 the Spanish Constitution was amended, for the second time in its life, in order to constitutionally entrench the principle of budgetary stability.[7] This constitutional reform was agreed upon by the leaders of the two Spanish hegemonic national parties and carried out within a record period of two weeks.[8] According to the new Art 135 (1) of the Constitution, "All *Public Administrations shall adapt their actions to the principle of budgetary stability*".

The new constitutional provision does not define the precise scope to be given to the principle of budgetary stability—a principle that should not necessarily be interpreted, for example, as requiring a total balance or zero deficit. It simply stipulates that "T*he State and the Autonomous Communities shall not incur any structural deficit exceeding the margins set, if any, by the European Union on its Members States*" (Art. 135 (2)). Beyond that point, it is up to the state legislator to establish the precise scope of the principle. Art 135 (5) reads: "*An organic law will establish the maximum structural deficit allowed for the State and for the Autonomous Communities, according to their gross domestic product*". That organic law will also regulate, among others, the distribution of the deficit and debt thresholds between public administrations and the responsibility of each public administration in case of noncompliance of budgetary stability goals. That organic law is expected to pass before 30 June 2012 and its provisions concerning the maximum structural deficit allowed for the State and the Autonomous Communities shall enter into force by 2020.

Thus, the legal framework of the principle of budgetary stability is laid down in Art 135 (2) of the Constitution. On the one hand, it consists of a constitutional ban on the State and the Autonomous Communities to incur any structural deficit exceeding the margins eventually set by the European Union. On the other hand, the Spanish Parliament is commissioned to set the maximum structural deficit available to both the State and the Autonomous Communities, and to develop the legal framework of the budgetary stability applying to both. Local authorities are also bound by the budgetary stability principle.

7. "Reform of Article 135 of the Spanish Constitution, of 27 September 2011". Published in *Boletín Oficial del Estado [Official Journal of the State]*, Nr. 233 of 27 September 2011.

8. On 13 January 2012, the Constitutional Court did not admit the individual complaints brought by two Members of the Parliament against the constitutional reform, which were based on the infringement of the legislative procedure (Interlocutory Injunction 9/2012). Three dissenting opinions by three judges argued for the admission of the complaints and for an examination of their merits.

In addition, Art 135 (3) establishes that the amount of public debt of all the public administrations with regard to the State's gross domestic product shall not exceed the benchmark set forth in the Treaty on the Functioning of the European Union. The abovementioned organic law shall also provide all necessary means to guarantee compliance with the limitation of public debt. In order to calm the financial markets, the same article and paragraph stipulates that the payment on the interest and capital of the Administrations' public debt "*will be an absolute priority*", a rather bizarre constitutional obligation imposed on future generations.

Conclusion

In all federal or decentralized states, the judicial institution responsible for the allocation of powers plays a key role in shaping the system of powers, since a degree of vagueness and imprecision with regard to the scope of powers reserved to the central level is inherent to constitutional provisions that deal with the distribution of powers. Spain is not an exception in this regard. Certainly, the Constitutional Court's Judgement 31/2010 does not give a solution to the question put forward by the Catalan statute reform, the ever narrower capacity of Autonomous Communities to conceive and implement their own distinct policies. The solutions to prevent the further narrowing of autonomous communities' political autonomy appear to be two: a more restrictive approach by the Constitutional Court to the State's capacity to redefine the scope of regional powers assigned to Autonomous Communities and a constitutional reform. Both seem politically unlikely.

Judgement 31/2010 and 134/2011 of the Constitutional Court, together with the recent reform of Art 135 of the Constitution, confirm the consolidation of a homogenous view of the Spanish decentralisation model. Judgement 31/2010 declares the development of autonomy as being closed to the contribution from Autonomous Communities, as autonomy statutes were denied a constitutional role in the process of developing the decentralisation model. The lesson from the constitutional experiment involved in the elaboration, approval and review of the Statute of Autonomy of Catalonia of 2006 is that constitutional reform is inevitable in Spain both for the enhancement of political decentralisation and for the further accommodation of the two differentiated Autonomous Communities, Catalonia and the Basque Country.

Abstract

The main development affecting Spanish federalism in the last few years consist of the elaboration, approval and review of the Statute of Autonomy of Catalonia, a process that has lasted seven years (2003-2010). The new Catalan Autonomy Statute has been a historical test to the structure of the Spanish 'State of Autonomous Communities'. Another development concerns the constitutional consecration of the prin-

ciple of budget stability. In both issues, a homogenous view of the Spanish decentralisation model has prevailed.

Résumé

Les principales évolutions du fédéralisme espagnol ces dernières années tiennent à l'élaboration, l'approbation et la révision du Statut d'autonomie de la Catalogne, un processus qui a duré sept ans (2003-2010). Le nouveau Statut d'autonomie catalan a constitué un test historique de la structure de « l'État des communautés autonomes ». Une autre évolution concerne la consécration constitutionnelle du principe de stabilité budgétaire. Dans les deux cas, une vision homogène de la décentralisation espagnole a prévalu.