

Compromise or dislocation: federal alternatives to secessionist and centralizing temptations

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Introduction

In recent years, Spain has experienced a constitutional crisis that affects the territorial organization of power. In 2010, a ruling by the Constitutional Court on Catalonia's Statute of Autonomy shattered the "territorial constitution". The 1978 constitution established that for each of the "historical nationalities"¹ the Statute of autonomy is drafted on the basis of the pact between the central state and the community concerned. Based on this pact, a vote on a provisional statute is held in the regional legislature. Next, the Congress and Senate, which are authorized to amend the text, must validate it. Last, the citizens of the autonomous community must ratify the proposed statute in a regional referendum before it comes into force.² In 2006, the revision of Catalonia's Statute of Autonomy followed the prescribed path and came into force after being

¹ The "historical nationalities" are the three regions that approved a draft Statute of Autonomy under the 2nd Republic (1931–1939): Catalonia, the Basque Country and Galicia. Each of these political communities has a strong national identity that distinguishes it from the Spanish national identity.

² The specific procedure used to amend the Catalan Statute in 2005–2006 is found in articles 147.3 and 152.2 of the Constitution, and in article 56 of Organic Law 4/1979 (dated December 18th, 1979) concerning the Statute of Autonomy of Catalonia (Statute of 1979).

validated by the Catalan population.³ However, the *Partido Popular* (PP, the Popular Party) – which had refused to take part in the discussions about the reform of the Statute – appealed to the Constitutional Court on the grounds of unconstitutionality. In its decision 31/2010 dated 28 June 2010, the Constitutional Court made its ruling: a number of articles in the Statute were invalidated, while others had to be interpreted as dictated by the Court.⁴

The consequence of this decision was to break the territorial pact between Catalonia and the central state.⁵ Many Catalans saw the decision as an attack on the autonomy of their community, and increasingly began to support the holding of a referendum on independence. Under the “territorial constitution”, the referendum was the last step in the revision of the Statute of Autonomy but now, since the Constitutional Court had unilaterally changed the procedure, the referendum became the first step in a new process to redefine the relationship between Catalonia and the rest of Spain. At this point, the exercise of the “right to decide”⁶ began

³ Organic Law 6/2006 (dated July 19th, 2006) concerning the amendment of the Statute of Autonomy of Catalonia.

⁴ The most fiercely discussed subjects were the financial system and recognition of Catalonia as a nation, although only the preamble refers to this: “In reflection of the feelings and the wishes of the citizens of Catalonia, the Parliament of Catalonia has defined Catalonia as a nation by an ample majority. The Spanish Constitution, in its second Article, recognises the national reality of Catalonia as a nationality.” The provision is similar to that contained in the preamble to the Statute of Andalusia, amended by Organic Law 2/2007 (dated March 19th, 2007) concerning the reform of the Autonomous State of Andalusia: “The Andalusian Manifesto of Córdoba described Andalusia as a national reality in 1919, the spirit of which Andalusians fully channelled through the process of self-government reflected in our Magna Carta. In 1978, the Andalusians came out in strong support for the constitutional consensus. Today, in its Article 2, the Constitution acknowledges Andalusia as a nationality within the framework of the indissoluble unity of the Spanish nation.” Despite the similarities between the two texts, the *PP* has not submitted the Statute of Andalusia for review by the Constitutional Court, which has been described as “an action as incoherent as it is unfortunate” (Ferrerres, V., “El impacto de la Sentencia sobre otros estatutos”, *Revista Catalana de Dret Públic*, extra 1, 2010, p. 471).

⁵ Pérez-Royo, J., “La STC 31/2010 y la contribución de la jurisprudencia constitucional a la configuración de un Estado compuesto en España: elementos de continuidad y ruptura, e incidencias en las perspectivas de evolución del Estado autonómico”, *Revista Catalana de Dret Públic*, 2011, p. 121–149.

⁶ Catalonia’s claim for more autonomy is based on the “right to decide”. According to its supporters, the right to decide is different from the right to self-determination.

to appear inevitable for many Catalans, whether or not they supported independence.

The situation was so critical that, unless a new arrangement with respect to territorial autonomy was found, the constitution would immediately come under short-term or medium-term threat.⁷ Although Catalonia did not have the necessary power to implement secession, the Catalan conflict was sufficiently serious to make Spain totally ungovernable.

It is important to note that a legal approach to the problem could not break the deadlock.⁸ The crisis gripping Spain was *political*, and only a solution of the same nature could provide a remedy and a high-level resolution. During discussions about various ways to reduce tension and redefine a “territorial constitution” that would achieve a consensus in Spain, the federal solution was often suggested. This chapter will

It is an individual right to organize a referendum, founded on the principles of the rule of law and the Constitution, in which freedom of expression and the right to political participation are recognized, and on the Constitutional Court decision 42/2014 dated March 25th, 2014. In contrast, the right to self-determination is a collective right that allows unilateral secession, founded on international law. However, the distinction as presented here does not appear to be clear to all. See Barceló, Corretja, M., González, A., López, J., Vilajosana, J. M., *El derecho a decidir. Teoría y práctica de un nuevo derecho*, Barcelona, Atelier, 2015.

⁷ The failure of the Spanish Constitution is the direct result of a failure to amend it. Although there are no explicit limits on amendments to the Constitution, only two minor amendments have been made (to articles 13 and 135), and only in response to constraints imposed by the European Union. Article 13 was amended in 1992 to provide for the implementation of the Maastricht Treaty. As a result, EU citizens gained the right to vote and stand as candidates in local elections in the state in which they resided. Article 135 was amended in 2011 to comply with the principle of budgetary stability established by the *Troika*. Under the new version, a public administration “may not incur a structural deficit that exceeds the limits established by the European Union”, namely 3 %. In addition, “Loans to meet payment on the interest and capital of the State’s Public Debt shall [...] have absolute priority”.

⁸ However, the legal approach remains relatively common among researchers looking at the Catalan situation. Many suggest that the Spanish Constitution can be entirely revised, since it contains no “perpetuity” clause. Because of this, Catalonia should target constitutional amendment via article 168 of the Constitution in order to exercise its “right to decide”. This position ignores – perhaps deliberately – the fact that article 168 was included in the final text of the Constitution to protect certain elements from any later amendment: the monarchy, the fundamental rights and freedoms, and the unity of the Spanish nation. See De Vega, P., *La reforma constitucional y la problemática del poder constituyente*, Madrid, Tecnos, 1985.

examine the various proposals made to revise the constitution, based on the adoption of a federal model. Each proposal will be analysed to determine if federalism would increase or decrease the incentive to secede and to vote for nationalist parties in peripheral regions, especially Catalonia.

1. Federalism in Spain

The term “federalism” refers to a form of territorial and legal organization in which political power is shared. It can be viewed in two different ways. First, *territorial federalism* can be understood as a way to organize political power within a single state or people (*demos*). Second, federalism can also be interpreted as a system to share political power among several states or peoples (*demoi*), commonly known as *pluralist federalism*.

It is clear that the federal idea is not seen as an attractive option in Spain, for several reasons. The first arises from Spanish constitutional history, which records only one federal experience: the First Republic of 1873 to 1874. In the Spanish national memory, this experience is associated with years of violence and political instability,⁹ and federalism is viewed negatively because of this unfortunate experience.¹⁰ Second, Francisco Pi i Margall was – and still is for many researchers¹¹ – the model proponent of pure federal theory in Spain.¹² This is why federalism

⁹ García-Escribano, J.-J., “Federalismo: el caso español”, *Daimon. Revista Internacional de Filosofía*, 27, 2002, p. 55–60.

¹⁰ Similarly, the republican idea is also criticized, and the two ideas are closely connected for most people in Spain. See Chust, M. (ed.), *Federalismo y cuestión federal en España*, Castelló de la Plana, Universitat Jaume I, 2004.

¹¹ See Trujillo, G., *Introducción al federalismo español*, Madrid, Cuadernos para el Diálogo, 1967; Jutglar, A., *Pi i Margall y el federalismo español*, 2 vol., Madrid, Taurus, 1975; Pérez-Tapias, J.-A., *Invitación al federalismo. España y las razones para un Estado plurinacional*, Madrid, Trotta, 2013.

¹² The book by Cagiao y Conde, J., *Tres maneras de entender el federalismo. Pi i Margall, Salmerón y Almirall. La teoría de la federación en la España del siglo XIX*, Madrid, Biblioteca Nueva, 2014, emphasizes that the theory of federation by Valentí Almirall is better and more strongly constructed than the theory of Pi i Margall. However, the history of federalism has consigned Almirall’s theory to oblivion. In Spain, he is considered more as a historian of confederation than of federation. According to dualist ideology, there is a difference between a federation and a confederation: a federal state is based on a constitution, and as a result the constitutional norm governs relations between the federations and its federated

is considered essentially in its *territorial* or monist version. However, since Spain is made up of a plurality of nations, their representatives have traditionally shown little faith in federal projects, finding more to support their interests in theories of nationhood.

However, the federal idea has re-emerged in the current context, as reflected in the November 2014 unofficial referendum on independence for Catalonia (9-N). Two questions were asked: “Do you want Catalonia to become a State?” and “Do you want this State to be independent?” The interpretation was that an elector who answered “Yes” to the first question and “No” to the second question would in fact have opted for a federal solution.¹³

In addition, intellectuals from various political horizons supported the federal option. Between 2012 and 2018, at least four manifestos were published in high-circulation newspapers.¹⁴ Last, several political parties in Spain and in the periphery proposed a revision of the constitution to move towards a federal state, seen as the best remedy against secessionism. This includes the projects presented by *Ciudadanos* (Cs, Citizens); *Partido Socialista Obrero Español* (PSOE, the Spanish Socialist Workers’ Party); *Partit dels Socialistes de Catalunya* (PSC, the Socialists’ Party of Catalonia); *Izquierda Unida* (IU, the United Left); *Iniciativa per Catalunya Verds* (ICV, Initiative for Catalonia Greens); and *Esquerra Unida i Alternativa* (EUiA, United and Alternative Left).

All these examples showed that the former hostility to federalism is gradually dissipating. However, it is reasonable to ask on what type of national conception the various federalist projects were based. As we will

states, while a confederation is an association of states under an international treaty; their relations are governed by international public law.

¹³ Colomer, J.-M., “Dos preguntas sin respuesta”, *El País*, Madrid, December 14th, 2013.

¹⁴ “Llamamiento a la Catalunya federalista y de izquierdas”, *El Diario*, Madrid, October 17th, 2012: www.eldiario.es/catalunya/opiniones/Llamamiento-Catalunya-federalista-izquierdas_6_58854136.html; “Manifiesto federalista de los 300”, *El País*, Madrid, November 3rd, 2012: politica.elpais.com/politica/2012/11/03/actualidad/1351974095_330773.html; “Una España federal en una Europa federal”, *El Confidencial*, Madrid, July 16th, 2014: www.elconfidencial.com/espana/2014-07-16/50-intelectuales-lanzan-un-manifiesto-a-favor-de-la-reforma-federal-de-la-constitucion_162867/; “Renovar el pacto constitucional”, *El Diario*, Madrid, June 11th, 2018: www.eldiario.es/tribunaabierta/Renovar-pacto-constitucional_6_78181904.html

show, only a federal proposal based on a pluralist conception can hope to attract the support of nationalists in the peripheral regions. In the next two subsections, the proposals to reform the State of Autonomies along federalist lines will be examined one by one. They can be divided into two groups, based on the political arena in which the parties operate: the central state, or the regions.

1.1 The federal projects of political parties in the central state

The political parties in the central state that have presented federal proposals are the Cs, PSOE and IU.

The Cs is a liberal party, in both economic and social terms. It was founded in 2006 in Barcelona as a response to Catalan nationalism. The objective was to form a political party to represent the Catalan citizens who defined themselves as “non-nationalist”.¹⁵ Until the regional and local elections in 2015, its presence outside Catalonia was purely symbolic. Its electoral success coincided with the electoral collapse of the *Unión Progreso y Democracia* (UPyD, Union, Progress and Democracy), a party with a similar program focused on three main issues: Spanish, anti-periphery nationalism, the fight against corruption, and economic liberalism. One additional factor explains the rise of Cs: the discourse of *Podemos*, a new party on the left that denounced the existence of a political “caste”, had a strong impact on public opinion, and the establishment noticed a political party that could reflect its interests. The Cs was seen as a safe option.

In terms of national issues, the Cs remains faithful to a constitutional conception of Spain as a unitary nation-state.¹⁶ Its position in favour of a federal reform of the constitution is based on a monist national

¹⁵ Nationalism is a term with extremely negative connotations in Spain, where it is associated with theories that defend illiberal, non-democratic values, and an organic attachment to the political community with no regard for the rights of minorities. As a result, the hegemonic discourse uses the term “nationalism” pejoratively and only to refer to the ideology driving “nationalities” (the groups fighting for self-determination). On the other hand, the people who describe themselves as the defenders of the Spanish nation are referred to as “constitutionalists” or “patriots” rather than “nationalists”, even though the Spanish Constitution itself is nationalist, since it is based on the “indissoluble unity of the Spanish nation” (article 2).

¹⁶ Article 2 of the Spanish Constitution states that “The Constitution is based on the indissoluble unity of the Spanish Nation, the common and indivisible homeland of all Spaniards, it recognizes and guarantees the right to self-government of

vision of Spain. As presented by the Cs,¹⁷ federalism depends on two conditions: a decentralization of power based on the principle of autonomy, and integration, which results from the application of the principles of unity and solidarity. The decentralization process has been relatively successful in Spain. However, integration is still lacking. To work towards a true federalization of the Iberian peninsula similar to Germany, Austria or Switzerland,¹⁸ the Cs suggests a certain number of constitutional amendments: the inclusion in the constitution of a list mentioning the seventeen autonomous communities and two autonomous cities;¹⁹ the clarification of the sharing of powers between the central state and the autonomous communities to avoid duplication and dysfunction; a derogation from article 150.2;²⁰ the abolition of the Senate²¹ and the provincial councils; a reform of the tax system including

the nationalities and regions of which it is composed and the solidarity among them all.”

¹⁷ Ciudadanos, “Propuestas de regeneración democrática e institucional”: www.ciudadanos-cs.org/var/public/sections/page-nuestras.ideas.reformas-democraticas-institucionales/reformas-democraticas-institucionales.pdf?__v=136_0.

¹⁸ The US federal tradition is generally distinguished from the Swiss federal tradition. See: Gagnon, A.-G., “España y el federalismo”, *El País*, Madrid, October 9th, 2012. Germany and Austria are federal states that can be placed in the first category, and therefore differ markedly from the Helvetic Confederation. It seems slightly illogical for the Cs to bring these three examples together.

¹⁹ The Constitution recognizes the right to autonomy of nationalities and regions, but does not specify which territorial entities are considered to be nationalities or regions, or how many autonomous communities must be created. In general, researchers consider that political autonomy is an option rather than an obligation for the regions, because of the “dispositive principle”. This apparent freedom given to the provinces to create – or not create – an autonomous community is in reality limited by two control mechanisms. First, before the constitution was adopted, a pre-autonomy regime already existed in most territories. The map of autonomy followed the outline traced by the provisional system. Second, the Congress of Deputies is authorized to “take over the initiative of the local Corporations” to create autonomous communities in the “national interest” (article 144 c) of the Constitution). As a result, if some provinces refuse to exercise their right to autonomy, the Congress of Deputies can act in their stead.

²⁰ Article 150.2 of the Constitution authorizes the state to “transfer or delegate to the Self-governing Communities, through an organic act, some of its powers which by their very nature can be transferred or delegated”.

²¹ Under the Constitution, “The Senate is the House of territorial representation” (article 69.1). However, it does not operate as a territorial chamber: the senators do not form parliamentary groups on the basis of their territorial origin but along partisan lines; they defend the interests of their party and not those of

a financial agreement for the Basque Country and Navarre to ensure fiscal uniformity; and greater cooperation between the various levels of government. It is clear that this federal project respects the spirit of the State of Autonomies in Spain.

In short, the Cs proposal does not challenge the current foundations of the constitution. If implemented, it would result in the recentralization of a certain number of powers, since in the view of the Cs the devolution process has been completed and it is now time to work towards greater centralization. In fact, this project would not necessarily earn a “federal” label in a comparative law study.

The PSOE, in turn, suggests that the principles of federalism are already present in the State of Autonomies, a model of territorial organization that it promotes. As a result, the conception of the nation enshrined in the constitution is perfectly acceptable to the socialists. However, forty years on, the State of Autonomies needs to be updated in several ways both to adapt it to the 21st century and to fight the twin temptations of independence and recentralization that are currently emerging. In a similar way to the Cs, the PSOE calls for the names of the autonomous communities to be written in black and white in the Constitution; for the sharing of powers between the state and the regions to be specified;²² and for federal mechanisms for institutional cooperation between the various levels of government to be developed. The socialists, too, consider that the tax system should be amended, without explicitly

their respective autonomous communities. In addition, the Senate has no specific function with respect to the territories. In fact, its vocation is to rule on the same issues as the Congress of Deputies. The only exclusive power held by the Senate is provided by article 155.1, which provides for compelling measures.

²² The PSOE has suggested that the Constitution should simply list the powers of the central state, making it possible for each Statute of Autonomy to list the powers of each autonomous community. The only constraint would be that the autonomous communities respect the powers of the central state as listed in the Constitution. The Cs suggests a change in the constitutional balance of powers, but with a dual list: a list of the powers exercised by the central state, and a second list of shared powers. Currently, the sharing of powers between the central state and the regions is particularly complex, since the Constitution contains two separate lists: one listing the powers of the autonomous communities (article 148) and the other the powers of the central state (article 149). In addition, legislative and executive powers over a given issue may be shared between the central state and an autonomous community, or reserved for one or the other. In such a nebulous system, numerous conflicts can arise. However, the proposal of the PSOE could clarify the distribution of powers, while the proposal of the Cs is practically identical to the current system.

mentioning economic agreements for the Basque Country and Navarre. Justice, fairness, legal security, stability and financial balance are the principles on which the constitutional reform would be based.²³

The PSOE proposes a reform of the Senate, to ensure the representation of the territories within the state and to allow the upper chamber to perform the role set out for it in the constitution. Unlike the Cs, the PSOE would constitutionalize various realities, facts and symbols that reflect Spain's pluralism. The constitution already mentions these differences, in article 2 on the existence of nationalities and regions; article 3.2 on regional languages; article 138.1 on the specific political and economic realities of different areas (article 141.4 and additional provision 3); and, last, recognition for historical rights (additional provision 1 and transitional provision 2), which are embodied in various mechanisms to reform the Statutes of Autonomy, and in fiscal systems for the Basque Country and Navarre. The PSOE mentions other differences in addition to those listed above. First, the accession of Andalusia to autonomy under article 151 would place the region at the same level as the historical nationalities. Second, article 5 of Catalonia's Statute of Autonomy would establish historical rights. Last, several Statutes of Autonomy would be applied according to circumstances in the area of civil law in the territories of the autonomous communities – Valence, Galicia, the Balearic Islands, Aragon, etc.

Another difference, compared to the Cs federal project, is the goal of integrating the autonomous communities into the decision-making process at the central state level, whenever a decision is likely to affect regional interests. In addition, the autonomous communities would be able to designate members of constitutional institutions and organs. Although the proposal does not mention the institutions explicitly, there can be no doubt that participation in the designation of the judges of the Constitutional Court would be considered a major step forward by the autonomous communities. The Constitutional Court is responsible

²³ PSOE, “Hacia una estructura federal del Estado”, July 6th, 2013: web.psoe.es/source-media/000000571000/000000571056.pdf; PSOE, “Un nuevo pacto territorial: la España de todos – Declaración de Granada”, July 6th, 2013: www.socialistes.cat/files/un_nuevo_pacto_territorial.pdf; PSOE, “La política autonómica del PSOE. Una reforma federal de nuestra Constitución frente al neocentralismo y la autodeterminación”, 2015: www.psoe.es/media-content/2015/09/68641-000000555807.pdf

for settling disputes between the central state and the regions and, as demonstrated on several occasions,²⁴ it is not in reality an impartial arbiter, but a highly politicized organ that places the interests of the central government at the heart of its priorities. Because “the Court has been most instrumental in defining the state of autonomies as one with federal arrangements”,²⁵ the territories should play a major role in designating its members, according to the PSOE.

Another difference with the Cs project would have helped to avoid the constitutional crisis that followed the decision by the Constitutional Court (31/2010). Given that the Statutes of Autonomy are organic laws – with some specific features given that they stem from agreements between the central state and the autonomous communities – the procedure for reviewing their constitutionality should be different from the procedure to assess the constitutionality of other organic laws. Under this reform, no referendum could be held until challenges to Statute has been settled by the Constitutional Court.²⁶

In short, although the PSOE presents its federal proposal as a remedy for recentralization and secessionism, it bears a strong resemblance to the system of devolution currently in place. For this reason, it is difficult to consider it as a federal model from a legal standpoint.²⁷ The Spanish State of Autonomies is neither a federation in the formal sense – the

²⁴ Bengoetxea, J., “Seven thesis on Spanish justice to understand the prosecution of Judge Garzón”, *Oñati Socio-Legal Series*, 2011, p. 1–18; Buchanan, A., “Prólogo a la edición española”, in *Secesión. Causas y consecuencias del divorcio político*, Barcelona, Ariel, 2013; Cagiao y Conde, J., “El federalismo ante la consulta catalana. Una lectura federal del derecho a decidir”, in Cagiao y Conde, J., Martín, V. (eds.) *Federalismo, autonomía y secesión en el debate territorial español. El caso catalán*, Paris, Le Manuscrit, 2015, p. 77–128.

²⁵ Agranoff, R., Ramos-Gallarín, J.-A., “Toward federal democracy in Spain: An examination of intergovernmental relations”, *Publius*, vol. 27, n°4, 1997, p. 1–38.

²⁶ Under the federal project of the PSOE, once the Statute had passed the *Cortes Generales*, a three-month period would begin during which the question of unconstitutionality could be raised. The Constitutional Court would then have six months to render a decision, and a referendum would be held only once the decision had been released and the necessary amendments made.

²⁷ Gagnon, A.-G., Sanjaume, M., “Cataluña: federalismo y derecho a decidir”, *Anuario del Conflicte Societari*, 2013, p. 432–456.

constitution makes no mention of federalism – nor in material terms since the key principles that govern federations are strikingly absent.²⁸

The IU also proposed a federal reform of the constitution in 2013, in association with the Catalan parties ICV and EUiA. The project is analysed in the next subsection.

1.2 The federal projects of political parties at the regional level

At the regional level, the political parties that have made federal proposals are all from Catalonia. The PSC and EUiA, respectively the Catalan branches of the PSOE and the IU, and the ICV, a party allied with the EUiA during Catalan elections, are the political parties whose federal projects will be examined here.

Unlike the PSOE, the PSC considers Spain to be a multi-nation state.²⁹ Since “federalism provides a suitable institutional structure for states made up of several nations”³⁰ – such as Spain – the constitution should incorporate federalism as one of its structuring principles, starting with article 1. The PSC believes that there is no difference between the terms “nation” and de “nationality”.³¹ In everyday language, “nation

²⁸ Payero, L., Gustafarro, B., “Devolution and secession in comparative perspective: The case of Spain and Italy”, in Schütze, R., Tierney, S. (eds.), *The United Kingdom and the Federal Idea*, Oxford, Hart, 2018, p. 123–152.

²⁹ Fundació Rafael Campalans, “Por una reforma constitucional federal”, *Papers de la Fundació*, 164, 2013: www.fcampalans.cat/uploads/publicacions/pdf/164_papersdelafundacio_def.pdf.

³⁰ *Ibid.*, 5.

³¹ During the constitutive debates, the difference between “nation” and “nationality” was one of the most difficult issues. For the *Alianza Popular* (AP, the conservative party), the *Euskadiko Ezkerra* (EE, the Basque party on the left) and the *Esquerra Republicana de Catalunya* (ERC, the republican Catalan party on the left), nation and nationality were significantly different. As a result, and depending on their respective positions, the AP suggested striking out the term “nationalities” from the constitutional text and leaving only “Spanish Nation”, while the EE and ERC wanted to use the term “nation” for all the political communities within the state, and not only for Spain. A majority of members supporting the consensus – the *Unión de Centro Democrático* (UCD, the union of the democratic centre), the PSOE, the *Partido Comunista de España* (PCE, the communist party of Spain) and the Catalan minority – wanted to combine plurality and diversity within the same political entity. Ortega’s national theory was used to resolve this difficulty. Ortega’s national conception is strongly influenced by the Hegelian distinction between

refers to the society of a state that has been recognized by international law, while nationality is associated with a federated state, *Land* or region; in any case, it is a conventional distinction”.³² The suggested constitutional reform would make it possible to recognize Catalonia and the Basque Country as nations with their own symbols, institutions and powers. As a result, in the federal democratic state proposed by the PSC, all the constituent parties – whether nations or nationalities – would be considered equal.³³

The PSC also proposes a reform of the upper chamber, not only because its operations are redundant and unproductive, but also and above all to respect the principle of participation by federated entities in central institutions, whatever their name – Senate, Council of Autonomous Communities, etc. The federal Senate would be able to take part in the legislative process when a bill was likely to affect the interests of the autonomous communities,³⁴ and would take the lead in intergovernmental

“nation” and “people”. According to Hegel, the nation embodies the national character (*Volkgeist*) through the state, while the people is an agglomeration of individuals bound by objective ties stemming from their shared culture, whose collective consciousness is not anchored strongly enough for them to constitute a sovereign political entity. The nation has a political essence, while the people have only a cultural essence: this is the secret of and condition for their coexistence. In place of nation and people, the Spanish Constitution identifies a (Spanish) nation and nationalities, but the theoretical construction remains the same. A well-documented study of the influence of Ortega’s theory on the constitutional concept of nation is found in Bastida, X., *La nación española y el nacionalismo constitucional*, Barcelona, Ariel, 1998.

³² Fundació Rafael Campalans, *op. cit.*, p. 14. In addition, the ambiguity between nation and nationality stems from the principle of nationalities, which involves considering that “every nation/nationality must have an independent state, and all states must form a single nation”.

³³ However, the term “nation of nations” is acceptable for the PSC. Without appearing explicitly in the Constitution, the formula was materially included in 1978 (see above, note 31). In Spain, the term “nation of nations” means that Spain is a political nation made up of cultural nations, or a nation of nationalities. For all these reasons, a “state of nations” would be a less ambiguous term, and would express the essence of a federation more effectively.

³⁴ The Senate acts as an upper chamber, since it rules on the same issues as the Congress of Deputies. However, the Senate has no right of veto. Once the Congress of Deputies has voted for a bill, if the Senate on an overall majority vote decides not to ratify it, the Congress can overcome its opposition “by overall majority or by single majority if two months have elapsed since its introduction” (article 90 of the Constitution). Jorge Cagiao y Conde and Alain-G. Gagnon - 9782807617124

relations both vertically – between the governments of the autonomous communities and the central government – and horizontally – between the governments of the autonomous communities – thereby facilitating participation by the autonomous communities in the institutions of the European Union. The Senate would be made up of members of the regional governments, adopting a model close to that of the *Bundesrat*.

With respect to the distribution of powers, the PSC proposes the inclusion of a list defining the powers assigned to the central government in the constitution, along with a residual powers clause, establishing that all other powers would fall under the authority of the autonomous communities.³⁵ As a result, the Statutes of Autonomy would lose one of their reasons for existing: to delimit the powers exercised by each community.

Although the autonomous communities have legislative and executive powers, judicial powers are not devolved. The PSC proposes to extend the federal principle to cover judicial powers, giving more scope to the high court of justice (*Tribunal Superior de Justicia*), changing the composition of the general council for judicial power (*Consejo General del Poder Judicial*), and creating an authority to coordinate the functions and powers exercised by the central state and the autonomous communities in the area of justice (a consultative commission on judicial powers).³⁶

The PSC explicitly mentions the need to take the federal formula into account in the membership of the Constitutional Court. For this purpose, the autonomous communities should help elect judges to the court via the federal senate, which could designate half of the members,

³⁵ A major amendment would affect the power to organize a referendum, which under article 92 is currently held by the central state. The PSC proposes that the autonomous communities should be able to exercise this power. This would make it possible to find a solution to the current situation in Catalonia. It is important to remember that the parliament of Catalonia asked the Congress of Deputies to delegate to it the power to organize a referendum in January 2014, pursuant to article 150.2. Congress rejected the request from Catalonia by a majority vote, and the referendum held on November 9th, 2014 could not be considered official. With the reform proposed by the PSC, this situation would not have occurred.

³⁶ The proposal for constitutional reform made by the Cs, on the contrary, would tend to reduce the powers of the autonomous communities in the field of justice by removing their power to appoint judges to the high court of justice, currently entrusted to the regional legislatures (article 330.4 of Organic Law 6/1985, dated July 1st, 1985, concerning judicial power). In addition, the Cs proposes the abolition of the General Council of Judicial Power.

with the six remaining members being designated by the Congress of Deputies.

The Catalan socialists also suggest reforming the two mechanisms for constitutional amendment (articles 167 and 168). First, article 167 should include protections to guarantee the holding of a genuine public debate in the event of a constitutional reform, to avoid the scenario of 2011, when article 135 was amended on the basis of a simple agreement between the PSOE and the PP in less than a month. Second, the autonomous communities should take part in the constitutional reform process via the federal senate and a final referendum, for which the PSC suggests that a majority of the votes cast in a certain number of regions would be enough to endorse a reform project, instead of the national consultation currently provided for.³⁷

The tax system would also be reformed under the PSC proposal. The principles of solidarity and adequate resources would be given precedence, to guarantee inter-territorial balance. More specifically, because of the financial crisis, social development is under threat. The Constitution would guarantee social services for all citizens (health, education, retirement, etc.) and the central state, as well as the autonomous communities, would be responsible for creating an additional fund to fight poverty. The federal senate would participate in the implementation of financial legislation, since most powers in the area of health, education and social services are under the jurisdiction of the autonomous communities. With respect to the tax collection systems in the Basque Country and Navarre, the PSC suggests that the dysfunctions introduced by the specific economic agreements need to be corrected. For this purpose, the PSC considers that these territories should show more solidarity with the other federated units to compensate for the surpluses generated by their specific regime.

Like the PSOE, the PSC highlights the need to include the specific features of the autonomous communities in the Constitution, and to

³⁷ The PSC ignores a crucial aspect that requires amendment: the procedure under article 168 of the Constitution. This is a striking omission, given that its document recognizes the need to use article 168 to implement the reform. However, the conditions it sets are so exorbitant that the procedure has never been applied, and this situation will not change. As pointed out by many partisans, article 168 is, rather than a mechanism for reform, a way to prevent any amendment of the Constitution (De Vega and Payero-López).

introduce a degree of asymmetry in the sharing of powers. The Catalan socialists also emphasize that the Statute of Autonomy cannot be under the control of the Constitutional Court after the holding of a referendum, whose constitutionality should be determined before the population of the autonomous community concerned votes on the text. In addition, the Spanish parliament should not take part in the reform process and should not play a role in the promulgation of the statutes of autonomy, which would be assigned to the regional legislature. On this point, the positions of the PSC and PSOE diverge.

Although the federal proposal made by the PSC in May 2013 is substantially different from the path laid out by the PSOE in the rest of Spain,³⁸ in July of the same year the Catalan branch also signed the declaration of Granada,³⁹ apparently aligning with the Spanish socialists.

The IU, its Catalan branch the EUiA, and the ICV see Spain as a *de facto* multinational and multilingual state. In accordance with federal principles, interpreted from a leftist standpoint, they have traditionally defended the right of peoples to self-determination.⁴⁰ They consider that Spain is suffering from a severe constitutional crisis with many causes. First, the economic crisis and the undermining of social and workers' rights have eroded the social contract on which democracy was founded. Second, the political model initiated by the *transition to democracy* has lost its impetus. Last, decision 31/2010 by the Constitutional Court and the recentralization process launched by the central government have shown that the demands for more autonomy from the periphery cannot be heard within the framework set by the Constitution, which leaves no room for interpretation in a federative direction. As a result, "a majority of citizens in Catalonia do not accept the current Statute of Autonomy or constitutional framework, and to resolve this situation, they claim the right to decide."⁴¹ Since the power to organize a referendum has

³⁸ In the view of Alain-G. Gagnon and Marc Sanjaume, the PSC proposal was federal in nature and its goal was not to achieve standardization. As a result, it was clearly different from the PSOE proposal (Gagnon, A.-G., Sanjaume, M., *op. cit.*).

³⁹ Gutiérrez-Calvo, V., Ríos, P., "PSOE y PSC sellan su pacto federal sin resolver el conflicto por la consulta", *El País*, Madrid, July 6th, 2013.

⁴⁰ IU, ICV and EUiA, "Declaración sobre el derecho a decidir y el modelo de Estado", May 25th, 2013: www.izquierda-unida.es/sites/default/files/doc/Declaracion_IU_ICV_EUiA_DerechoDecidir_ModeloEstado.pdf.

⁴¹ *Ibid.*, p. 2. Jorge Cagiao y Conde and Alain-G. Gagnon - 9782807617124

been assigned to the central state, the government must negotiate the conditions for holding a referendum with the parliament of Catalonia to allow the Catalan population to express its will. This obligation stems from the democratic principle, which requires government by consent.⁴² Once the result of the referendum is known, and if it is not favourable to the current constitutional framework, the state must draw the necessary conclusions and implement the demands made democratically.

In short, the Constitution should recognize both the pluralistic nature of Spain and the right to decide of its member nations, with that right being considered synonymous with the right to self-determination. For that purpose, a constituting process should be launched in Catalonia and in the rest of Spain.

2. Federalism and the right to self-determination

Self-determination is a polysemic term whose meaning varies depending on the intention behind its use. In some cases, self-determination is seen as being synonymous with a type of territorial or non-territorial autonomy; in other cases, liberal democracy is understood to be a sufficient condition for an assumption that the various components of a composite state enjoy self-determination; in yet other cases, self-determination leads to a range of scenarios freely chosen by the members of the political entity holding the recognized right, including the ability to secede. In the Spanish context, the demands made by the peripheral nations fall mainly into the last category. As a result, secession should be an option open to discussion and a free vote, but the electors could also decide to target another outcome, such as the adoption of a federal model.

In the wake of decision 31/2010 of the Constitutional Court, secession made a forceful appearance in the Spanish debate. A significant number of Catalans voted for political parties that made the foundation of an

⁴² According to the IU, ICV and EUiA, “when a significant number of citizens in a specific territory question the existing institutional framework and call for sovereignty, legal means must be implemented to determine the wishes of all the citizens living in that territory” (*ibid.*, p. 3). Although the document does not cite the Supreme Court of Canada in connection with the legality of Québec’s secession, the group’s reasoning has a strong resemblance to that of the Reference (*Reference re Secession of Québec, op. cit.*, par. 88).

independent republic one of their priorities.⁴³ An even greater number of electors support the exercise of the right to self-determination.⁴⁴ Given the context, several political parties, both in the centre and at the periphery, made proposals in support of a reform of the Spanish constitution.

It seems fair to ask if federalism could provide a remedy for secessionism in Spain. The answer to this question must take into account the fact that the Spanish national context is characterized by pluralism. Any new territorial arrangement would have to recognize this internal diversity, and this would be a condition *sine qua non* for successfully exiting the crisis.

As explained previously, there are two conceptions of federalism, and as a result two significantly different federal options available to Spain: one is monist, the other pluralist. While the first presupposes a mechanism for national construction leading to the birth of a nation-state,⁴⁵ the second explicitly recognizes national pluralism. It is broadly accepted that, in a heterogeneous context, territorial federalism creates more problems than it solves. According to Máiz, the formula provides ammunition for both the supporters of centralization (state nationalism) and for secessionists (non-state nationalism).⁴⁶ Where several nations co-exist, asymmetrical multinational federalism – including the possibility of dislocation – appears to be the only acceptable option, and this is the case for Spain.

The construction of a federation by aggregation⁴⁷ requires the ratification by sovereign states of a fully-consented federative pact. By

⁴³ During the election held on December 21st, 2017, the *Partido Demócrata Europeo Catalán* (PDeCAT, the Catalan democratic and European party), ERC and the *Candidatura d'Unitat Popular* (CUP, the popular unity candidacy) obtained 70 seats (out of 135) in the Catalan parliament, with a total of over two million votes. According to the public opinion barometer (April 2018) of the *Centre d'Estudis d'Opinió*, 48 % of Catalans wanted Catalonia to become an independent state, with 43.7 % against: upceo.ceo.gencat.cat/wsceop/6668/.

⁴⁴ 71.4 % of Catalans support the holding of a referendum on independence, with 23.4 % against. Data from the public opinion barometer published in July 2017: upceo.ceo.gencat.cat/wsceop/6288/Abstract%2520in%2520English%2520-857.pdf.

⁴⁵ Maiz, R., "Federalismo plurinacional: una teoría política normativa", *Revista d'Estudis Autònoms i Federals*, 3, 2006, p. 43–85.

⁴⁶ *Ibid.*

⁴⁷ Beaud, O., *Théorie de la Fédération*, Paris, Presses universitaires de France, 2007.

acting in this way, the parties recognize for the future that they remain free to decide their individual and joint political futures. This is what is commonly known as the “right to self-determination”. Because of this right, the parties can choose not to join the federation – this is one of the risks of freedom.

Our analysis of the proposals for constitutional reform based on a federal model, presented in the previous section, leads to three possibilities. First, the models based on a unitary conception of the state are of no help in solving the territorial crisis. The projects of the Cs and PSOE do not require a change to the current foundations of the Constitution – the indivisible and indissoluble nature of the Spanish nation – and as a result their respective “federal” projects are closer to a unitary state that has decentralized some of its powers than to a true federation.⁴⁸ Further, their conception of the nation is close to that of the PP since they state – in accordance with article 2 of the Constitution – that there is only one nation in Spain: the Spanish nation.⁴⁹ Second, the proposals based on a pluralist conception of federalism can be useful in recognizing minority states within the Spanish State. The federal project of the PSC recognizes Spain’s internal pluralism. However, it does not admit the possibility of national self-determination, since the constituent parties are not authorized to refuse to sign the constitutive federal pact.⁵⁰ For the IU, EUiA and ICV, federalism is one possible option in the exercise of the right to self-determination. As a result, a new constitution with entirely new foundations would be necessary.

In short, constitutional recognition of national pluralism and the right of nations to self-determination is compatible with a pluralist model of federalism. Only the proposals made by the IU, ICV and EUiA meet both conditions. It would be possible for the parties that support independence in Catalonia – and their electors – to agree to a federal

⁴⁸ Olivier Beaud describes this system of devolution as “federalism by disaggregation” (*ibid.*). However, also according to Beaud’s theory, a federation is a union of states, which means that a regional state (created by decentralization from a unitary state) is an intermediate category between a unitary state and a federal state.

⁴⁹ For example, the Cs and PSOE supported the PP government in its use of article 155 of the Constitution (federal coercion) when the Catalan parliament declared independence (*Senate Debates Journal*, n° 45, October 27th, 2017).

⁵⁰ According to the PSC, “nationalist parties can adopt the federal formula provided they do not consider independence, which would make federalism meaningless” (Fundació Rafael Campalans, *Op. cit.*, p. 17).

reform of the central state along these lines. However, the political parties of Spain, which retain a unitary vision of the country, would probably be unlikely to accept it, including the parties that have proposed federal projects. Their vision is rooted in a monist national conception of the state, while the pluralist federalists and Catalan nationalists share a multinational conception of Spain.

The national question will, however, remain unresolved for as long as the unitary vision persists. Two main arguments support this fact: first, democracy in Spain is historically linked to recognition for its internal national pluralism; and second, federalism is based on a pact (*foedus*) between states. Freedom to join or not to join the federation is a prior condition for any discussion about a federal project, and an exploration of this pathway requires being open to dialogue and negotiation. Unfortunately, these two notions are largely absent from the Spanish political tradition.

Conclusion

This chapter examines the projects for constitutional reform recently advanced by several political parties in Spain, all targeting a federal model. In these proposals, federalism is seen as an alternative to secession, or as a way to resolve the historical problems caused by the territorial form of the Spanish State. As stated in this chapter, a federal reorganization of the Spanish State can make a substantial contribution to solving the national question if, and only if, it is established on the basis of pluralist logic. If national diversity is not recognized and if federalism is founded on a pact between territories, freedom to join the federation is a necessary condition for the adoption of the federal pact. However, this freedom must have, as a corollary, freedom to withdraw from the constitutional pact. As a result, a federal reorganization of the Spanish State would inevitably involve granting a right of self-determination to its constituent nations.

