The Ways of Federalism in Western Countries and the Horizons of Territorial Autonomy in Spain

Volume 2
The Ways of Federalism in Western Countries and the Horizons of Territorial Autonomy in Spain

Volume 2

Springer
Contents

Part I Intergovernmental Relations in Countries and in Spain

Intergovernmental Relations in The United States ............. Carol S. Weisert
Intergovernmental Relations in Benoît Pelletier
The Intergovernmental Relations of Germany ................. Rainer Arnold
The Intergovernmental Relations of Luzius Mader
The Participation of Autonomous Eduardo Virgala Foruria

Intergovernmental Relations in Ruling on the Statute of Maria Jesús García Morales
Intergovernmental Relations in In Search of a Model ........ César Colino

The Principle of Separation of Eleonora Ceccherini

Part II Intergovernmental Relations in Comparative Perspectives

Editors
Alberto López-Basaguren
Leire Escajedo San Epifanio
Fac. Social Sciences and Communication
University of the Basque Country
Leioa - Bizkaia
Spain

ISBN 978-3-642-27716-0 ISBN 978-3-642-27717-7 (eBook)
DOI 10.1007/978-3-642-27717-7
Springer Heidelberg New York Dordrecht London

Library of Congress Control Number: 2013938613

© Springer-Verlag Berlin Heidelberg 2013

This work is subject to copyright. All rights are reserved by the Publisher, whether the whole or part of the material is concerned, specifically the rights of translation, reprinting, reuse of illustrations, recitation, broadcasting, reproduction on microfilms or in any other physical way, and transmission or information storage and retrieval, electronic adaptation, computer software, or by similar or dissimilar methodology now known or hereafter developed. Exempted from this legal reservation are brief excerpts in connection with reviews or scholarly analysis or material supplied specifically for the purpose of being entered and executed on a computer system, for exclusive use by the purchaser of the work. Duplication of this publication or parts thereof is permitted only under the provisions of the Copyright Law of the Publisher’s location, in its current version, and permission for use must always be obtained from Springer. Permissions for use may be obtained through RightsLink at the Copyright Clearance Center. Violations are liable to prosecution under the respective Copyright Law.

The use of general descriptive names, registered names, trademarks, service marks, etc. in this publication does not imply, even in the absence of a specific statement, that such names are exempt from the relevant protective laws and regulations and therefore free for general use. While the advice and information in this book are believed to be true and accurate at the date of publication, neither the authors nor the editors nor the publisher can accept any legal responsibility for any errors or omissions that may be made. The publisher makes no warranty, express or implied, with respect to the material contained herein.

Printed on acid-free paper

Springer is part of Springer Science+Business Media (www.springer.com)
The Qualitative Development of the Spanish System of Autonomous Communities: Changes to the Statutes of Autonomy .......................... 575
Esteban Arlucea Ruiz

Statutory Rights and the Federal System ........................................... 587
M. Agudo Zamora and C. Milione

Multilevel Rights Protection in Canada ............................................. 597
Cecilia Rosado Villaverde

Difference, Dissent, and Community Identity: Striking the Balance in Rights Theory and Jurisprudence ........................................ 607
Ian Peach

Exploring the Social Origins of Elite Accommodation: Recognition and Civil Society Integration in Divided Societies ..................... 619
Alexander Pelletier and Michael Morden

Part III Territorial Autonomy in Spain: Other Issues

Openness, Complexity, and Asymmetry: A Comparative Perspective on the Challenges of the “Autonomic State” .......................... 639
María Salvador Martínez

Prevalence and Primacy: An Essay on Their Scope ................................ 657
Francisco J. Matia Portilla

The Primacy Clause in the Spanish Constitution: A Contribution to the Debate .......................................................... 669
José de Miguel Bárcena

Asymmetry as an Element of Federalism: A Theoretical Speculation
Fifty Years Later—Readdress the Spanish Case ................................ 679
Esther Seijas Villadangos

The Principle of Federal Loyalty and Trust in the Estado De Las Autonomías ................................................................. 691
Sebastian D. Baglioni

Brief Considerations Regarding the Structure of the Spanish Senate and the Boundary Between Federal Covenant and Autonomous State ........................................ 701
Elena García-Cuévas Roque

The Adhesion of the Spanish Autonomic State to the Disaggregative Model of Federalism: A Possible Way .......................... 711
Anna Mastromarino

Democratic Citizenship and Spanish Multinational (Dis)Order: Procedural Democracy Versus Secession Clause .......................... 731
José A. Sanz Moreno
Asymmetry as an Element of Federalism: A Theoretical Speculation Fifty Years Later—Readdress the Spanish Case

Esther Seijas Villadangos

Abstract Two essential and complementary parts are integrated in this article: a theoretical reflection about asymmetrical federalism and a pragmatic approach to the situation in Spain.

The former has sought to consolidate the key defining elements of asymmetry. Asymmetry for Constitutional Law is a form of state organization where territorial units with political autonomy enjoy a differentiated constitutional treatment, legitimized for the positive recognition of having different types of singularities (linguistic, juridical, fiscal) with respect to the other units of the State. Linked to asymmetry, we had proposed a neologism, *dissymmetry*, in an attempt to refine the concept. Dissymmetry will be applied to those situations where a proportional or symmetrical situation was broken in an anomalous or faulty way.

The latter has tried to cast some light on the Spanish situation through a series of dilemmas: We have paid attention to the transition from autonomism to federalism and the cohabitation between two types of federalism, a functional federalism and a nationalist federalism, that would result in an asymmetric federalism.

The tension between equality and asymmetry has put on the table the main problem of asymmetric federalism: not considering the differences as grievances. For that, our policies must distinguish what is really essential for citizens.

The last dilemma refers to the risk of emulating asymmetries by other territories, which united with a warning of avoiding a form of autistic federalism could illuminate our future—a future necessarily based on unity and solidarity.

This short essay is mainly speculative. It attempts to highlight a principal weakness in theoretical treatments of the concept of federalism, and to offer modifications of the federal concept. It is not in any sense a complete theoretical statement of federalism. Nor is it meant to survey writings on federalism, although it is generally based on a wide sampling from those writings (Tarlo 1965: 861).

---

E.S. Villadangos (Ed)
Facultad de Derecho, Departamento de Derecho Público, Universidad de León, Campus de Vegazana, 24071 León, Spain
email: mesiev@unileon.es

Asymmetry as an Element of Federalism: A Theoretical Speculation Fifty Years Later—Readdress the Spanish Case

Esther Seijas Villadangos

Abstract Two essential and complementary parts are integrated in this article: a theoretical reflection about asymmetrical federalism and a pragmatic approach to the situation in Spain.

The former has sought to consolidate the key defining elements of asymmetry. Asymmetry for Constitutional Law is a form of state organization where territorial units with political autonomy enjoy a differentiated constitutional treatment, legitimized for the positive recognition of having different types of singularities (linguistic, juridical, fiscal) with respect to the other units of the State. Linked to asymmetry, we had proposed a neologism, dissymmetry, in an attempt to refine the concept. Dissymmetry will be applied to those situations where a proportional or symmetrical situation was broken in an anomalous or faulty way.

The latter has tried to cast some light on the Spanish situation through a series of dilemmas: We have paid attention to the transition from autonomism to federalism and the cohabitation between two types of federalism, a functional federalism and a nationalist federalism, that would result in an asymmetric federalism.

The tension between equality and asymmetry has put on the table the main problem of asymmetric federalism: not considering the differences as grievances. For that, our policies must distinguish what is really essential for citizens.

The last dilemma refers to the risk of emulating asymmetries by other territories, which united with a warning of avoiding a form of autistic federalism could illuminate our future—a future necessarily based on unity and solidarity.

This short essay is mainly speculative. It attempts to highlight a principal weakness in theoretical treatments of the concept of federalism, and to offer modifications of the federal concept. It is not in any sense a complete theoretical statement of federalism. Nor is it meant to survey writings on federalism, although it is generally based on a wide sampling from those writings (Tarlton 1965: 861).

E.S. Villadangos (✉)
Facultad de Derecho, Departamento de Derecho Público, Universidad De León, Campus de Vegazana, 24071 León, Spain
e-mail: meseiv@unileon.es

A. López Basaguren and L. Escajedo San-Epifanio (eds.), The Ways of Federalism in Western Countries and the Horizons of Territorial Autonomy in Spain, Vol. 2,
DOI 10.1007/978-3-642-27717-7_44, © Springer-Verlag Berlin Heidelberg 2013
Approximately 50 years after Tarlton’s essay about symmetry and asymmetry, really focused on symmetry, we would try to make a reflection about asymmetry, which for Spain appears as more interesting one for the reasons than we will explain in the following pages.

**Introduction**

Asymmetry has been introduced in the federal theory since the beginning of its existence, but it was in 1965 when Charles D. Tarlton rediscovered the importance of linking federalism to symmetry and asymmetry. The pragmatic implementation of federalism has required the creation of different ways of adapting flexible federal principles to the complex reality of several states.

This work has two targets: first, to develop a theory about the meaning of introducing asymmetrical elements into a federal system; second, to resolve the main problems that it could create, especially connected to the acceptance of the formula for a State, with special attention to the case of Spain.

The format of what follows can be outlined briefly at the outset. The first section is a general assessment of approaches to asymmetry through the answers to different capital questions: Why, what, how, and how many asymmetries? The second half is a brief discussion about the main issues of the Spanish decentralization, using the concept of asymmetry and the useful methodology of dilemmas or antithesis. A final reflection will conclude this study.

**Can a Federal System Be Asymmetrical? A Brief Theory About Asymmetry in a Federal Context**

Symmetry in federalism refers to sharing by component units, whereas asymmetry expresses the extent to which component units do not share in these common features. “Weakness” is the key concept, the reference for analyzing asymmetry, according to Tarlton’s speculation. This pathology should be treated or should be integrated in the State, in a way of cohabitation. Apart from studying the different types of asymmetries and their consequences, the main discussion must show how important it could be to design a compatible way of federalism that could include several degrees of asymmetry and their limits. Now, we will speculate.

**Justification: Why Asymmetry?**

The main reason for an asymmetrical performance of a decentralized State is to search for an instrument in order to accommodate the differences for achieving a stable State. States with a variety of cultures, languages and religions could find in
Asymmetry a *modus operandi* for managing them. Nonetheless, asymmetry can neither be regarded a priori as useless nor a panacea. With that considered, we will try to justify the asymmetrical resource in these first paragraphs: Why develop a theory about asymmetry? Why asymmetry?

Why make a dissertation about asymmetry? In 1965, Charles Dudley Tarlton wrote a brief essay about symmetry and asymmetry, which is the core of our article. Tarlton wrote three interesting studies about federalism and asymmetry: “Symmetry and asymmetry as elements of federalism: a theoretical speculation” (1965); “Federalism, political energy and entropy: implications of an analogy” (1967) and “The study of federalism: a skeptical note” (1971). The Voting Rights Act, a law that consolidated an only-citizenship-in-North-America provision, was his main reference. From this academic point of view, we could differentiate three main stages in the study of asymmetry: the first one, the beginning of the concept, in Tarlton’s works; the second one, the consolidation of asymmetry in the theory about federalism, Agranoff’s (1999) volume; and the last one, with two capital references for any comparative study about asymmetrical federalism, with Watts and Burgess’s works.

Why asymmetry? We will try to solve the beginning and the end of asymmetry, legitimacy and challenges of asymmetry. Looking back to history, we could find special differences in political organizations, maybe the ancestors of asymmetry: *foedera aequa–foedera iniqua*, German hegemony federalism (Seijas 2003: 222–251). These types of differences were justified by the Latin expression *exceptio firmat regulam*, which we adapt to a theory about asymmetry in exceptions to help fulfill rules. We link the legitimacy of asymmetry with the need of searching for an instrument to link the different parts of a State. A pragmatic approach in order to join the different units in a State legitimizes asymmetry. This is very close to the main challenge of asymmetry. The aim of asymmetry is to integrate the different units in search of stability.

**Definition: What Is Asymmetry?**

The notion of asymmetry refers to the situation where some territorial units should be allowed some scope for reflecting on their specific characteristics and needs.

In an etymological approach to asymmetry, we must refer to the Greek word *asymmetria*, which means disproportion. In other words, asymmetry is a lack of symmetry that implies another element for making a comparison. This is an aseptic meaning. A situation where a heterogeneous element is introduced, breaking the proportionality of the parts, between them and in relation to the whole. A second meaning, in a pejorative sense, what we call dissymmetry—the prefix dis-expresses negation or completeness or intensification of an unpleasant or unattractive action—will be applied to those situations where a proportional or symmetrical situation was broken in an anomalous or faulty way (i.e., for political pressures, the threat of secession or self-determination, the confusion between powers—if you
have differences in culture, religion, language ... you could reach more powers in economy, social services, or foreign policy or more representatives in state institutions). When a territorial organization is based on dysymmetries, we have to speak about the pathology of federations, meaning the failure of them (Watts 1999: 109–115).

Asymmetry for Constitutional Law is a form of state organization where territorial units with political autonomy enjoy a differentiated constitutional treatment, legitimized for the positive recognition of having different types of singularities (linguistic, juridical, fiscal) with respect to the other units of the State.

The main aftermath of asymmetry is the qualitative intensification of powers of one unit without reducing the powers of the others, ad intra, and the reflection of these singularities in the state institutions and intergovernmental relations, ad extra. A proper asymmetrical Constitution must include limits to the positive asymmetries regulated by it. Because asymmetry is not less essential to federalism than symmetry, it is basic to strengthen the stability of the system from the periphery. The main limits of asymmetries are equality and solidarity.

Description: How Is Asymmetry?

We wish to emphasize four features of asymmetry: first, singularity. The root of any asymmetry has to be a differential fact that must not be shared with the rest of the territorial units. Second, identity, a difference is not enough to speak about asymmetry. It is considered that an asymmetrical element is the channel to express the demands of citizens and its bond of union; Third is gradual implementation and flexibility. We could use asymmetrical arrangements according to the variety of situations that we could face. In other words, it could simply create more problems than solutions, and it could be disastrous. In the development of policies or legislation according to an asymmetrical pattern, it is important to have some degree of flexibility within the constitutional system. Last feature is the instrumental nature reflected in the Constitution. Linked to the essence of asymmetry, we stress its subsidiary feature, subordinated to fill other values and principles regulated in the Constitution and the reasons it was adopted basically—unity and stability.

The implementation of asymmetrical arrangements implies different measures concerning legislative powers, functions, distinct administrative status, Civil Law, Fiscal powers, representation in national parliament, reservations of posts in the national executive, language, distinct party system, religion, or symbolism (Keating 1998: 196).

Typology: How Many Asymmetries?

“Among the several states in a federal union, cultural, economic, social, and political factors combine to produce variations in the symbiotic connection between
those states and the system” (Tarlton 1965: 861). Those types of factors would be described as preconditions to asymmetry. We could simplify those types of preconditions of asymmetry in socio-economic and cultural-ideological aspects. If we consider them separately, they only constitute a test of the differences that exist in a plural political organization, especially “federal systems”. We need to add the features that characterize asymmetry (singularity, identity, gradual implementation, flexibility and instrumental nature reflected in the Constitution) in order to consider them as asymmetrical.

Focusing only on asymmetries, we could distinguish different types from a conceptual distinction that could be useful for a practical analysis:

The first type is de iure and de facto asymmetries. The former refers to those asymmetries formally entrenched in constitutional level and in other types of laws, i.e., in the Spanish case, Statutes of Autonomy, so that territorial units are treated differently by the lawmaker. De facto asymmetries refer mainly to political practice or intergovernmental relations where asymmetrical preconditions are reflected. One of the most important de facto asymmetry is the existence of different territorial units, according to the size or the population of each unit. Those preconditions produce a diversity of factors of power in every State and reflect, in the perception that everyone has of the others, supremacy and, on the other side, fear and distrust of the less powerful units.

Very close to the former category, Watts has distinguished political and constitutional asymmetries. Political symmetry, which is a common feature in all federal systems, refers to relative influence of the various constituent units within a federation that arises from the impact of cultural, economic, social, and political conditions. Constitutional asymmetry implies the constitutional assignment of different powers to different constitutional units, which is not such a common feature in many federal systems (Watts 1999: 63).

Structural and relational asymmetries are the result of considering the scope where they are implemented. Structural asymmetries are the result of a static analysis of a plural State and refer to the differentiated position of the territorial units due to different factors like population, race, culture, religion... From those conditions it has determined a singular position of those territorial units in the State that affects decisively the general policy, i.e., elections, fiscal policy... Relational asymmetries are the consequence of projecting those structural asymmetries ad extra. They determine the special status of a territorial unit, i.e., the bilateralism in the relations between the center and those States or Regions.

The different degree of asymmetrical outcomes has generated quantitative types of asymmetry. For instance, a Constitution could provide an asymmetric assignment of powers to the various territorial units to increase provincial or regional autonomy. On the other hand, a Constitution, a subconstitutional law, or a political decision could establish an increase in national or federal powers over specific territorial units for some specific functions, i.e., very expensive powers like health care or education. This was a claim of several Spanish Autonomous Communities (i.e., Valencia, Madrid, and Murcia), sustained from summer of 2011. The consideration of Autonomous Communities as responsible for the crisis, and not as...
victims, has forced that situation. Nonetheless, this is not new because in 2009, Canary Island proposed to give back to the State the autonomous power over immigrant children. Times of crisis and economic difficulties are times for rolling back to the State.

Finally, the existence of asymmetries, which could be described as transitory or permanent, is explained according to the circumstances of acceptance or refusal that generate the integration of differentiated elements inside the State. Time is the key question in these types of asymmetries. The different ways of reaching autonomy in Spain is an excellent example.

The permanent asymmetries are entrenched in the Constitution or at a subconstitutional level, and its aftermath is to define the system qualitatively.

Asymmetric Federalization in Spain: Main Challenges

According to the brief theory assessments about asymmetry that we have done in the first chapter of this article with a dogmatic presentation, we will try to change the perspective, adopting a practical point of view and paying attention to the situation of Spanish decentralization. To complete that objective, we have chosen a dynamic method consisting of expressing the main issues through a series of dilemmas, according to a dialectic way of thinking. The result of this proposal is reflected in the last chapter.

Autonomism Versus Federalism: Spanish Virtual Federalism

The first dilemma that we propose reflects the tension between status quo and the future: preserve the success of the existing autonomous system (more or less workability) versus the desire to adopt a federal system.

The long shadow of federalism has been projected over our State with different degrees of intensity from the same moment of the creation of the Spanish Autonomoust System. However, we must recognize that the unique substantive reference to federation in the Spanish Constitution of 1978 is negative—sec. 145.1: “Under no circumstances shall a federation of Autonomous Communities be allowed”. Nevertheless, it is very common that Spain, especially for foreign academics, was considered federal (Elazar, Watts 1999, Gagnon). According to Elazar’s description of federalism, “self-rule and shared rule”, Spain could be considered a federation or a “federation-in-the making” (Palermo et al. 2010: 12) or a protagonist of an “unfulfilled federalism” (Beramendi and Maíz 2004).

Different substantive features of our system sustain that consideration: (1) We have a system of shared powers (secs. 148 and 149). (2) The process of preparing Statutes of Autonomy followed a covenant pattern with a keenly felt federal nature, especially according to section 151.2. (3) This federal nature is strengthened when...
we pay attention to LORAFNA, a Statute of Autonomy especially endorsed for Navarra Foral Autonomous Community. (4) The first final clause for closing the system of shared powers is very close to a federal proposal (sec. 149.3): “Matters not expressly assigned to the State by this Constitution may fall under the jurisdiction of the Autonomous Communities by virtue their Statutes of Autonomy”. (5) The prevalence clause (sec. 149.3) “State, whose laws shall prevail”. (6) The system for controlling Autonomous Communities established by the Constitution is based on legal principles of jurisdiction, sec. 153—“Control over the bodies of Autonomous Communities shall be exercised by: (a) The Constitutional Court, in matters pertaining to the constitutionality of their regulatory provisions having the force of law. (b) The Government, after the handing down by the Council of State of its opinion, regarding the exercise of delegated functions referred to in section 150, subsection 2. (c) Jurisdictional bodies of administrative litigation with regard to autonomic administration and its regulations. (d) The Auditing Court, with regard to financial and budgetary matters”. (7) Final substantive feature is the Autonomous Communities’ participation in State decisions through the Senate (sec. 69) and through legislative process (secs. 87.2 and 109) or in the planning of general economic activity (sec. 131.2).

Readdressing these characteristics, we can sustain that Spain is a “virtual federal State”, according to the meaning of virtual, “almost or nearly as described, but not completely or according to strict definition”. So we could dissert about “the federal appearance of the Spanish Autonomous system”. The hitherto backward-looking review of Spanish decentralization leads us to the next step. We will try to draw the main steps to become a fulfilled federation, the federal transition in Spain.

From a formal point of view, we have two options: a constitutional reform or a constitutional implementation in a federal sense, federal reform versus federal mutation (according Constitutional Law classic term). The former option will lead us to follow the ruled process fixed in Title X of Spanish Constitution, “too easy” if we pay attention to the last reform of sec. 135 against what scholars have sustained for a long time. It is important to introduce the reform of this title, including the Autonomous Communities participation in future constitutional changes. The latter option would consist of interpreting the Constitution and the States of Autonomy in a federal way (deconstitutionalization). This option has been reinforced in the VIII and IX Legislatures (2004-2008/2008-2011) with the reforms of seven Statutes of Autonomy (Valencia, Aragon, Illes Balears, Catalonia, Andalucía, Castilla and León, and finally, Extremadura) and by the absence of a consensus between the major political forces in Spain.

In a material perspective, the first proposal is to achieve a global consensus, with the same degree of support that the Constitution of 1978 has got. That substantial change would have to include, at least, the following topics: identifying the federal States and reforming the Senate in a symmetrical (USA pattern) or an asymmetrical way but never dissymmetrically. This means to give a qualitative reception of differential facts, but never in a quantitative way. The essence of democracy is to change quantitative items, number of votes into qualitative decisions or policies.
A transparent and stable system of intergovernmental relations and the inclusion of plural symbols in the State (plurinationalism) should be key elements in this reform. Three basics steps in that transition would be:

First, to create a federal culture. The main target is to prepare civil society to assume the values of federalism connected to stability and unity. Political forces must communicate these ideas to the citizens in order to build a leadership culture linked to federal ideas. It would be basic that federal proposal, federal culture would be able to gain the same support that, currently, nationalist culture enjoys;

Second, to specify the main characters and the main sceneries of the federal evolution in Spain. An advanced Spanish federal map would be focused on asymmetry, the union of a functional federalism, and a nationalist federalism, in a redefinition of the current autonomous system where the differences would be minimized and linked only to real differential facts. With the slogan of “rolling back the States”, we would try to underline the advantages of recovering the common features of the central autonomous communities with a protagonist of national territories. We are at the moment when welfare of citizens must prevail. It would have to fight with the strong desires of self-determination that we find in some autonomous communities and the lack of confidence in federalism from the central autonomous communities. The main challenge is making asymmetry workable and fair, so we have to know the limits of asymmetry;

Third, to translate that proposal to a legal challenge, especially at the constitutional level. The last point in this journey towards a Federal Spain is to consolidate it at constitutional level and, from the point of view of its legitimacy, with the same high degree of support that the present Constitution has enjoyed since its approval in 1978.

To federalize Spain does not mean to weaken it, neither does it mean to open the door to disintegration or secession. Federalism means to stress union in a noncentralized way. The resource of asymmetry is a tool for achieving harmonization, for managing the conflict; asymmetry is not an end in itself. The following dilemmas should illustrate more details of our proposal. First, the map of federal implementation could be a mixture of two types of federalism (functional federalism and nationalist federalism); the result would be an asymmetrical federalism. Second, the major problem in Spanish decentralization is the combination between equality and asymmetry. Third, here is a warning about the main risk of the process: the proliferation of elements of divergence.

National Federalism Versus Functional Federalism

In an attempt of sketching the map of a future scene of a federal Spain, with the only purpose of stimulating a debate on this issue, we will not advocate a particular model. Our line of reasoning is to propose a global idea that reflects our aim of searching for a workable proposal. The limit is not to perpetuate and exacerbate old problems and, at the same time, not create new ones.
The fundamental issue is to link those parts of Spain with a strong nationalist feeling with the rest of Spain (ROS) that lacks this feeling, but at the same time they do not want to lose the advantages of living in a decentralized system in terms of democracy and social rights.

With the aim of accommodating linguistic, civil law, and fiscal powers, we could demand a federal pattern for the peripheries that support demands for autonomy, a nationalist federalism.

The rest of Spain could enjoy a functional federalism whose core elements were an efficient policymaking. They look for a basic equal status for citizens. These introduce the topic of equality and asymmetry. A functional federalism, especially in times of crisis, means a reduction of bureaucracy and institutions. At the same time, the cooperation between territories must increase in order to avoid superfluous duplication. Of course, intermediate administrative levels between citizens and states must be reduced or disappear.

Asymmetry Versus Equality

Diversity is inherent to each process of decentralization, and it is not necessarily negative, but it can cause the risk of unequal treatments among Spanish citizens. The risk of inequality can be easily understood by testing different policies, i.e., health policy, education, or civil servants’ salaries.

One of the most important issues in a federal State is to clarify what equality means. Can we talk about the same equality in a unitary State or in a federal State? What happens with equality in asymmetric federations?

There are two references for comparing, constituent units and citizens, and two conceptualizations of equality, arithmetic equality and geometric equality.

On the one hand, arithmetic equality postulates absolutely equal treatment under the law. On the other hand, geometric equality requires differentiation of treatment according to real differences. This was Plato’s main theory. If we apply this theory to constituent units, under an arithmetic equality all these units would be considered absolutely equal under the law. If we differentiate the legal status between them according to real differences, such as territorial size, population, tradition, language, religion, we should apply a geometric concept of equality. The justice of this application depends on the reality of these differences and on the limits to the consequences of the assignment of that singular status.

In the case of individuals, we have to reinforce the jurisprudential concept of “fundamental juridical positions” (STC 37/1987, FJ.10). That cryptic expression refers to the heart of equality, its essence. This is the only way for making that concept compatible with asymmetry. In that case, there is enough room for differences but not for discriminations among citizens.

Connected to the study of equality, we have to take a look at the interesting question of its perception. First of all, asymmetry can cause grievances among citizens. A demand for symmetry would be necessary for counterbalancing the
situation. It is quite common that a phenomenon of policy contagion happens. It means that policy choices made in one territorial unit may be copied in the rest. This could lead to a surrealistic situation, like we will see in the next paragraph, when the goal of copying other Autonomous Communities is only *per se* an asymmetric element (if you have a proper language, me too).

Another very important issue linked to equality and asymmetry is that there is a dilemma with respect to the distribution of resources and the way the territorial units are financed. The richest units perceive that they subsidized decentralization. This is the case of Catalonia that has been clearly reflected in the amendments to section 135 of the Constitution in its recent reform. Amendment 12 signed by the Catalan Group: “The State will ensure that under no circumstances will alter previous positions per capita contribution to gross domestic product by each Autonomous Community over the final positions in disposable income per capita adjusted for prices” (Official Bulletin of the Congress of Deputies, 05/09/2011).

Catalonia, Western Australia, and a long list of federal States feel exploited as a cash cow. Their usual answer is to propose to secede from Spain, Australia... because of the high burden they had carried in financing poorer units. In Spain, we have on the table for the new Legislature the proposal of “Catalan Fiscal Covenant”, similar to “Basque Country Concierto” and “Navarra Convenio”. This is a proposal that can be included in a type of federalism that Watts called “fend-for-yourself” (Watts 1999: 45); this is a clear root of a pathology of federalism. We have to remember again the two clear limits to asymmetric federalism: unity and solidarity.

Asymmetry for Every One Versus Designed Asymmetries

The formula of “Coffee for everyone” has been one of the most democratic elements of Spanish decentralization, also one of the most criticized. Current preoccupation is the adaptation of this famous slogan to an asymmetrical context, “asymmetries for everyone.”

If someone checks one of the recent reformed Statutes of Autonomy, i.e., Castilla and León, LO 14/2007, 30th November, it will be evident that there are plenty of asymmetrical references, even in the traditional center of Spain. So we could find singular historical reasons of the Autonomous Community; different proper languages, “leonés”, “gallego” (sec. 5); a Charter of Rights for the Castilian and León citizens (Title I); new territorial organizations inside the Autonomous Community, with a differential fact (El Bierzo sec. 46.3); and the legal recognition of internal plurality that determines the need for phasing out economic and demographic imbalances between the provinces and territories of the Autonomous Community (D.A. 2.º).

This is not the proper way to get to federalism but an option for a failed formula. A federation is not a mechanism for manufacturing asymmetries; this path will lead to a disaster; it will start to crumble.
Nevertheless, what can we do when political forces, especially those from periphery, are tightening rope and when the rest of Spain (ROS), in an effort not to be outdone, triggers further demands (i.e., Camps clause)? The strengthening of the integrative function of the state and horizontal cooperation are the main solutions.

We have to add another challenge, the dilemma between an executive federalism and a participatory federalism. The recent Statutory reform process and the constitutional reform have shown the absence of popular participation, e.g., referendum on the Catalan Statute of Autonomy held on 18th June 2006, with a 49 % participation. Federalism without the counterbalance of the people would be an autistic federalism.

Proposals and Final Reflection

Following this reasoning and applying it to a brief discussion of the quality of asymmetrical federalism in Spain, certain interesting conclusions are reached:

Firstly, we could develop the asymmetrical federalism theory, adding the category of dissymmetry. Dissymmetry will be applied to those situations where a proportional or symmetrical situation was broken in an anomalous or faulty way (i.e., for political pressures, the threat of secession or self-determination, the confusion between powers—because you have different culture, religion, language ... you could reach more powers in economy, social services, or foreign policy or more representatives in State institutions). The risk of falling into a pathological federalism, founded in dissymmetries, is too high. All deceived federations could corroborate this premise.

Secondly, we could suggest a list of stages for what we have called “the Spanish transition to federalism”: First is to create a federal culture. The main target is to prepare civil society to assume the values of federalism connected to stability and unity. Political forces must communicate these ideas to the citizen in order to build a leadership culture linked to federal ideas. It would be basic for that federal proposal that a federal culture would be able to gain the same support that, currently, nationalist culture enjoys. It is crucial to emphasize the importance of limits. The essence of federalism—unity and self-government—is not compatible with secession.

Second is to specify the main characteristics and the main sceneries of the federal evolution in Spain. An advanced Spanish federal map would be focused on asymmetry, union of a functional federalism, and nationalist federalism, in a redefinition of the current autonomous system where the differences would be minimized and linked only to real differential facts. With a slogan of “rolling back the States”, we would try to underline the advantages of recovering the common features of the central autonomous communities without forgetting the importance of national territories. We are in the moment when welfare of citizens must prevail. It would have to fight with the strong desires of self-determination that
we find in some autonomous communities and the lack of confidence in federalism from the central autonomous communities. The main challenge is making asymmetry workable and fair, so we have to know the limits of asymmetry.

Third is to translate that proposal in a legal challenge, especially at the constitutional level. The last point in this journey towards a Federal Spain is to consolidate it at a constitutional level. It must have the same high degree of support that our present Constitution has enjoyed since its approval in 1978.

Our last reflection refers to how difficult it is to find comprehensive answers to the questions raised by asymmetrical federalism. We cannot stop trying to get them. Our dilemmas have tried to contribute to this effort.

“The concept of federalism has been a major panacea in Western political thought for an incredible range of problems... Whenever events have seemed to demand cooperation and coordination, while interests and anxieties have held out for the preservation of difference and diversity, the answer has almost unfailingly been some form of federalism” (Tarlton 1965: 874). In the future, it is possible for Spain to become federal, and this federalism could be an asymmetrical federalism.

References

Baden-Baden.
Baltimore and London.
<table>
<thead>
<tr>
<th>Query Refs.</th>
<th>Details Required</th>
<th>Author’s response</th>
</tr>
</thead>
<tbody>
<tr>
<td>AU1</td>
<td>This was originally a fragment and was therefore merged with the prior sentence. Please check if appropriate.</td>
<td></td>
</tr>
<tr>
<td>AU2</td>
<td>The two questions were modified to turn them into complete sentences. Please check if acceptable.</td>
<td></td>
</tr>
<tr>
<td>AU3</td>
<td>Please check if the change made here is correct.</td>
<td></td>
</tr>
<tr>
<td>AU4</td>
<td>Please check if the modification done here does not alter the meaning intended by the sentence.</td>
<td></td>
</tr>
<tr>
<td>AU5</td>
<td>Kindly check if the alterations done here did not change the meaning of the sentence.</td>
<td></td>
</tr>
<tr>
<td>AU6</td>
<td>Please check if the insertion of the word ‘aspect’ here is appropriate.</td>
<td></td>
</tr>
<tr>
<td>AU7</td>
<td>Please check if the change made in this sentence did not deviate from the true meaning of the sentence.</td>
<td></td>
</tr>
<tr>
<td>AU8</td>
<td>Elazar and Gagnon are cited in text but not present in list. Please check.</td>
<td></td>
</tr>
<tr>
<td>AU9</td>
<td>The citation “Palermo 2010” (original) has been changed to “Palermo et al. 2010”. Please check if appropriate.</td>
<td></td>
</tr>
<tr>
<td>AU10</td>
<td>Please check if the merging of this phrase to the previous clause is acceptable.</td>
<td></td>
</tr>
<tr>
<td>AU11</td>
<td>Burgess (2006) is not cited in text. Please cite it or delete it from the list.</td>
<td></td>
</tr>
</tbody>
</table>