

CONSTITUTION OF SPAIN AND FEDERALISM – A REVIEW

Introduction: the context and the federalist basics

The Autonomous Community of Catalonia seeks to obtain independence from the Kingdom of Spain. The Catalanian autonomy, created in 1978-79 through the new Spanish Constitution and enhanced in 2006, seems to frustrate many Catalonians. The regional demonstration in 2012, the human chain in 2013 – the so called '*Via Catalana*' (the Catalan Way), the plebiscite in 2014 and the parliament resolution in 2015 show a strong desire to live in another institutional environment. Even the suspension of the resolution, by the Constitutional Court in Madrid, does not stop this process. Once more, the central Government of Spain is opposed to this movement among the Catalan people and institutions. It tries to block this and previous official and other attempts in Catalunya to follow a democratic way to full independence.

Still, one appeals to the resolution for an independent Catalonia in 2017. Therefore, the regional Government is determined to organise a citizens referendum on October 1st, 2017, with only one question: "*Do you want Catalonia to become an independent State?*". No other.

This political antagonism in Spain stimulates me to write this paper. Why? Besides 1° a centralist system, completely ruled '*top down*' from one power centre, 2° a decentralised or regionalised state like Spain today, and 3° a secession from such states, yet other institutional systems are available. I am convinced that the old organisation system called 'federalism' is a model able to solve many tensions in and between cultural and socio-economic dissimilar societies. That is why I try to test the present Constitution of Spain by the federalist principles. This text is not an analysis in depth of the Spanish Constitution considering federalism, it is a short review of this subject.

What is federalism? The federalist principles are 1° the sharing of sovereignty among at least two government layers, i.e. each layer safeguarded by a constitution, in democracies emanating from the citizens free will, and 2° the limited assignment of federal powers and institutions through the federal constitution, as the federation is created '*bottom up*' by the federating units. Bottom up means democracy built on the citizens will, like Aristotle taught us.

Phrased otherwise, federalism means a layered sovereignty and a vertical distribution of sovereign powers, without hierarchy. It is a vertical version of Montesquieu's horizontal distribution of power, i.e. the three state branches, the legislature, the executive and the judiciary. Therefore, federalism gives an extra dimension to democracy.

Whether federalism is acceptable for the citizens concerned, depends from at least the following preconditions. First, they should experience a layered identity, in their mind set and their attitude, being an individual, a family member, but also a local citizen, a regional one, a federal one etc. These preconditions are universal to start a federalising process anywhere. Moreover, to be really successful, a federation shall be a political objective in itself, not a mere instrument to achieve other purposes, like accommodating partial and/or external interests, nor an externally imposed system. For more remarks about any political system *as such*, see the epilogue and my paper '*Federalism, the concept, and Federations, the practice*' at www.tombeurcounsel.eu. For my review of some failed, weak and strong federations, see the papers nos. 18, 19 and 20, at www.europeanfederalistpapers.eu.

Now, let us review the Spanish Constitution. I hope you enjoy. Observations are welcome.

Constitutional Preamble and Preliminary Part

The Preamble and this Part shall stipulate that all Spanish citizens, i.e. those residents with political rights, are the source of Spanish sovereignty. Therefore, the citizens shall ratify any federal constitutional draft text by referendum. The drafting by an elected constitutional convention is recommendable. The same goes for the constitution of each federating unit (below: region/-s).

Part I – Fundamental Rights & Liberties

Most of these stipulations shall be tested when the power distribution between the federal level and the federated units is on the federalisation agenda. The same goes for Chapter 3 of Part III.

Part II – The Crown

One observation: the amending of article 62 (Functions of the King) shall be considered, esp. the dissolution of the Cortes Generales (art. 62, litt. b). For the justification, see Parts III-VI.

Part III – Houses of Parliament

The federal parliament shall consist of two equivalent Houses, one House representing all Spanish citizens, the other representing the regions. This shows the double level sovereignty in the federation. The House representing the regions shall hold an equal number of delegates from each region, as there is equality in sovereignty between all regions. This means also: no difference between them regarding the legal status (see also Part VIII). All conflicting stipulations in the present Constitution, esp. in this Part, should be abrogated.

Parts IV, V and VI – Government, Administration, Cortes Generales & Judicial

One observation: whether the Houses could still be dissolved by the (federal) Government, shall be considered, as this is incompatible with the constitutional rule that the members of the federal Houses shall be directly elected by the citizens. That is their inalienable legitimation, towards the Government too. See articles 115 & 116, 5°, Part V. See also Part II and art. 69, Part III.

Part VII – Economy & Finance

All stipulations shall be tested when the distribution of powers between the federal level and the regions is on the federalisation agenda, often taking into account the EU competences. A particular attention should be paid to the budgetary stability and its audit (articles 135 & 136).

Part VIII – Territorial Organisation of the State

All stipulations regarding the internal organisation of the municipalities, provinces and autonomous Communities shall be abrogated (articles 137, 140-142). They shall be substituted by a stipulation indicating the sovereign units constituting the Spanish Federation.

All federating units shall be equal in sovereign powers (see also Part III above). The federal rules and the EU rules shall be implemented in the same way, all over the Spanish territory. Therefore, articles 138 and 139 shall be amended accordingly.

The regions being the safeguarded source of federal sovereignty, all stipulations shall be abrogated regarding the creation and organisation of autonomous Communities or other regional

and local authorities (articles 143-147). The same goes for the *cooperation* between regions (art. 145), that is no fusion nor transfer of powers, because all are equally constituting the Spanish Federation through the federal Constitution (see previous sentences of this paragraph).

Concerning the competences of the federal and federating authorities, the federalist principle is that the federal competences are assigned. This is a consequence of the federalist concept that the federation is built *bottom up*, by the federating authorities. They transfer some competences to the whole, the federation. Not the way around, i.e. top down, from the centre. So, these federal competences shall be listed in the federal Constitution, approved by a majority of the citizens of each region and also by them all together as Spaniards. This means that the other, non assigned competences, often called the residual competences, shall remain at the federated level of government. Accordingly, article 148 shall be abrogated and article 149 amended.

Following the federalist principle of a sound division of powers, the federal level shall not interfere in the legislative working and procedure of the federated level, and vice versa. Federalism does completely exclude federal supervision on the regions too. Therefore, the articles 150 (Legislative Coordination), 151 (Writing of State in special regime), 152 (Bodies of autonomous Communities) and 153 (Control of their Bodies) shall be abrogated. Of course, equal multilevel cooperation is allowed, that is voluntary, although sometimes recommendable or inevitable.

When conflicts arise between the federal authorities and a region, they shall be settled through negotiations between the bodies concerned and ultimately by specific judicial Courts. Articles 154 and 155 shall be amended, resp. substituted accordingly. See also next Part.

Again, according to the federalist logic (see above), the regions enjoy their own resources. So, the federal Constitution shall stipulate the federal resources, also assigned like the field competences. Yet, the federalist approach does not exclude inter-level solidarity. The content of the articles 156-158 shall be substituted with such stipulations.

Part IX – Constitutional Court

The articles in this Part shall exclude the Spanish Government from appointing members of this Court (articles 159-165). When federalising Spain, only the directly elected members of the federal Houses shall do so, after the compulsory consultation of the highest councils of the judiciary. The creation of a few constitutional Courts of first instance, located in several cities, should be considered. Their sentences shall be disputable before the highest constitutional Court in Madrid.

Concerning the grounds of appeals against unconstitutionality, the citizens and all legal persons too shall have a right to launch an appeal. The federal Houses shall have the last say in such a legislation. Article 162 shall be amended accordingly.

Part X – Constitutional Amendment

Along with the power of the federal Houses and the competent institutions of the regions, any amendment shall be debatable in all these institutions which is introduced by a representative and significant number of citizens. Once the amendment passed by the elected institutions, it shall be ratified by a representative majority of the citizens at the two levels of government. The articles 166-169 shall be amended accordingly; the same for the related articles 87 (P. III) and 116 (P. V).

Additional Provisions, Interim Provisions and Repeals

The still relevant stipulations shall be adapted to, or integrated into the federal system.

Epilogue

Most of the non mentioned stipulations in the present Constitution stay valuable. Everyone should appreciate the remarkable shift of the Spanish state organisation through this Constitution in 1978. Therefore, a new shift, towards federalism, looks realistic at the end of this decade. And promising too, when one looks at the success of many federations, e.g. Australia, Brazil, Canada, Germany, India, the USA and Switzerland. Less realistic and promising is a *unilateral* secession, anywhere in the political world order, due to its international implications, like the diplomatic recognition by other independent states and admission into international organisations, including the EU. A recent precedent showing the huge effect of leaving, is the 'Brexit'. Although the EU Treaties do stipulate withdrawals. Its final date is very uncertain. Very.

Evaluating my federalist review of the present Constitution of Spain, I advise to write a new Constitution for a federal Spain. In addition, I recommend a constitutional stipulation about the procedure for a periodical evaluation of the federal Constitution, also to be ratified by the citizens. World nature and history learn that all systems do evolve over the years, often 'degenerating'. I refer to my quote below, esp. Rossiter's words "*no constitutionality without morality*", morality meaning here loyalty towards the legal rules. If these rules do not suit anymore, change them.

This paper sets only forth the federalist principles and preconditions. Building and sustaining any federation requires more, of course. Besides the multilevel sovereign ruling, true federalism can only be practiced with the following indispensable features: 1° an inherently valuable and sound distribution of powers, both power levels having an added value, and 2° an effective and reliable system for the accommodation or solution of inter-level disputes and conflicts.

The power distribution is a political sensitive stage in constituting a federation. It is about ruling, indeed. But one should realise that democratic ruling holds responsibility and accountability too.

Now, which guiding landmarks shall border the federal powers and, by doing so, bordering the residual powers of the federated units in Spain? I suggest: Spain's history, its geopolitical position, its natural resources and its socio-economic size. Furthermore, its social and political development, its different languages and ways of living. Last but not least, its political position and ambition in this multipolar world, dominated by a handful of states equalling subcontinents. This power issue shall be a chapter in a case study of Spain's Federation.

Another chapter shall deal with the issue what kind of features the Spanish Federation should have. It is useful to start from a number of criteria. Like an institutional or functional structure, an exclusive or competitive power distribution, a structural allocation of resources and an organisation mode of multilevel cooperation. See my presentation of such four types of federations, in Paper no. 5 on www.europeanfederalistpapers.eu. Yet, any type of Spanish Federation shall respect the same federalist principles.

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*"And the message of The Federalist reads: no happiness without liberty,
no liberty without self-government, no self-government without constitutionalism,
no constitutionalism without morality – and none of these great goods without stability and order."*

Clinton Rossiter in his Introduction of 'The (American) Federalist Papers ', edition 1961