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**Federalism and constitution: States' participation in  
constitutional reform as a guarantee of the**

*federalisation process.*

**(A study of Spain's unique model)**

by

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## Abstract

The aim of involving state members in reforming federal constitutions is to guarantee them the autonomy that they have been constitutionally granted. It also prevents reform from being carried out unilaterally by the central government and means the structure of competences can be modified as necessary. In this study, we will consider how federations manage, to a greater or lesser extent, regional intervention in constitutional reform. However, we will see how recently, in Spain, the anticipated routes for territorial participation in the constitutional text have proved to be clearly insufficient, and have developed into the recent crisis in this ‘State of Autonomies’, which is now facing the breakdown of national unity.

## Key-words

federalism, autonomy, constitutional reform, regional participation



## 1. Introduction: federalism and constitutional reform

If, according to Ackerman (1998: *passim*), the greatest constitutional changes often take place as a response to extraordinary situations or in deep crisis periods in which there is a great social movement to foster constitutional change, it can be said that in Spain, we are immersed in such a certain ‘constitutional moments’. The territorial issue, worsened by the economic crisis and the pro-independence challenge in Catalonia, is probably the central matter regarding the large amount of reform proposals to the Spanish Constitution and it justifies the analysis in depth on the constitutional reform in Spain. However, unlike it seems to be usual among Spanish academics<sup>1</sup>, we are not going to focus on the reform contents but on the subjects involved; specifically we are going to try to settle whether the Autonomous Communities’ participation in the reform is appropriately guaranteed or not in such a way that there are certain mechanisms that allow to update and improve the competences granted by the Constitution to these subnational entities.

This participation, as we will show in this section I, is a constituent element of Federal States and we, along with many other authors (for instance, Watts 2006: 92 and 129-131, Anderson 2008: 20, Elazar 1995: X), Agranoff 1996: 385-401, La Pergola 1979: 279, Aja 2014: 25, Solozábal Echevarría 2004: 10-13 and Alberti 1993: 229), think that Spain can be included within this model. Next, and in light of comparative law, we will classify and describe the various methods for involving the territorial entities in constitutional reform so as to find out which of them implies the greatest guarantee of federalisation (section II). Finally, we will focus on the Spain’s unique model. In this case, the formal channels for the Autonomous Communities involvement in constitutional reforms are clearly unsatisfactory, as we will see in section III.

The individual states’ involvement in constitutional reform is considered as one of the greatest contributions of the United States to the constitutional experience; this along with the fact the constitution is *rigid* and *written*, as well as the federal structure itself (La Pergola 2016: 188 and Blanco Valdés 2012: 107-112). What's more, if, as Loewenstein said, all the legitimate holders of power need to participate in constitutional reform because ‘the wider this involvement, the broader the consensus of constitutional reform and the greater its legitimacy’ (Loewenstein 1986: 172), this hypothesis is at its strongest in federal countries.



Here, the regional governments' contribution to constitutional reform has been described as one of the *defining* elements of this phenomenon by many authors<sup>II</sup>. Groppi has gone so far as to say that a federal constitution that only allowed itself to be revised through centralised procedures would be 'a contradiction in terms' (Groppi 2001: X).

It is with good reason that 'we have *federalism* only if a set of political communities coexist and interact as autonomous entities, united in a common order with an autonomy of its own' (Friedrich 1968b: 11). For this reason, a federal constitution must fulfil precisely the function of defining each of these singular identities and integrating them into State organisation, placing at their disposal areas of wider or narrower autonomy. Regardless of to whom sovereignty must be attributed in this State model, a matter on which there has much debate in the past<sup>III</sup>, and of the way it should be established, be it by aggregating pre-existing sovereign states (*integrative* or *aggregative* federalism) or by breaking down a unitary State (*devolved* or *disaggregative* federalism)<sup>IV</sup>, the basic structural principle of a federation is the existence of separate autonomous spaces of the common order. Here, the constitution attributes each of these regional governments (federative entities), their own sphere of competence. This is the only rule that governs the political existence of them all. This principle of autonomy, as shown by González Encinar, is defined as a compromise between centrifugal and centripetal trends in which a set of relations of coordination, participation, supraordination and subordination occur between the State organs (González Encinar 1985: 89 and 95). The form this takes is a type of collaboration and vertical division of power (Cámara Villar 2004: 211).

Beyond this structural principle of autonomy, the federation is an indefinable truth<sup>V</sup> (unless, like Wheare, we reduce it to the American federal model<sup>VI</sup>) because of the huge organisational differences between the different federal countries. The pitfalls of case selection can be particularly a problem in the comparative study of federalism. The number of federal states is not very large and it can diverge depending upon how one counts (for instance, 4 according Wheare<sup>VII</sup> or 25, in Watts' opinion – see Watts 2008: 24-28). With Abat and Gardner (2016: 382-383), we can agree that a rigorous working definition of federalism helps assure the similarity of states compared but can reduce the validity of inferences because of the small size of both the sample and the universe. A more inclusive definition allows more powerful and far-reaching inferences, but carries a risk of inaccuracy by sweeping in sample variation that the analysis may not take into account. In this work,



we have opted for a generous criterion. We expect that the limited objects we are comparing, only the rules relative to the amendment of federal constitutions, could minimise the risks. We are going, therefore, to include in our sample the *classic federal states* (United States, Switzerland, Austria, Australia, Canada or Mexico), the new democracies refounded on formal principles of federalism after the II World War (Germany and India) or emergent federations like Spain, Brazil, Argentina, Belgium, Russia, South Africa or Nigeria. We have consciously exclude Venezuela due to the authoritarian and centralist drift that the Bolivarian Constitution of 1999 implies. Even though Italy is classified as a Regional State, we have included it because of its similarities with the Spanish system in this issue<sup>VIII</sup>.

Before we continue, we must emphasise that autonomy must be enjoyed by the common entity as well as by the regional governments. But, precisely because of this common scope, in every federation, there must be a guarantee that the individual governments will be involved in forming the unitary will of that federation. This may be through ordinary (legislation or enforcement) or extraordinary (constitutional reform) procedure. To understand member states' involvement in constitutional reform, we need to discuss the legal relationships surrounding regional participation. The intention, as we know, is that the states are integrated into the federation and take a meaningful share of the federal power (as noted by García Pelayo 1993: 239-241).

The idea put forward by a large number of authors that the justification of this involvement could be attributed to the *contractual* origin of federal countries, and the fact they were formed by a confederation of independent sovereign states<sup>IX</sup>, no longer makes sense. Logically, this idea would only stand in *aggregation federalism*, where federative entities have replaced unanimity by majority rule (nearly always qualified) for any changes to be made to the constitutional pact. It cannot currently offer a satisfactory explanation to individual governments' requirements for involvement in constitutional reform.

A federation does not arise from a pact between previous communities, but from constituent power. That is, from the joint decision by the sovereign population to equip themselves with a federal organisation (González Encinar 1985: 84) that, as we have said, comprises their different identities and guarantees their autonomy. Participation in reform assures, therefore, that regional governments can express their own natures while incorporating part of their political life into the group as a whole; not as contrasting



components, but as part of a united front<sup>X</sup>. As we have emphasised, this is an important element in forming the State's unitary will, but also ensures the regional governments' very survival, as it prevents their constitutionally guaranteed sphere of autonomy from being modified unilaterally by the central authority (Ruipérez 1994: 99, Ventura 2002: 14 and Groppi 2001: 109).

However, in order for these roles of integrating and defending autonomy to be fulfilled, various methods for involving the individual identities in constitutional reform have been foreseen in comparative law.

## 2. Methods for territorial involvement in constitutional reform in comparative law

From an overview of the different constitutional texts, we can conclude that in comparative law there are two main ways for regional governments to participate in constitutional reform<sup>XI</sup>: The first, which is clearly inspired by the US, is characterised by member governments participating in the reform procedure in a *direct* way (2.1). In the second (2.2), involvement takes place in an *indirect* way, when the said reform is approved by the federal parliament's second chamber. This is always defined as the House of territorial representation.

Before proceeding, we need to clarify several points. Firstly, outside of these methods, the involvement of territorial entities in constitutional reform does not always cover all the constitution's contents. Sometimes it is restricted to matters affecting relations between the centre and the periphery<sup>XII</sup>. Such is the case in Austria, where the Federal Council (*Bundesrat*) only becomes involved in constitutional reform if the amendment affects how the states' legislative and executive competences are distributed<sup>XIII</sup>. It is also the case in India, where State ratification is only needed for precepts regulating the State's essential nature as a federation, such as the distribution of competences, the election of the president, the states' representation in parliament, constitutional regulation of the judicial power and reform of the constitution itself<sup>XIV</sup>. Lastly, in South Africa, the constitution states that any amendment to the constitutional text must have the support of at least six provinces in the second chamber (*National Council of Provinces*) if it affects the bill of rights, the National Council of Provinces itself or any matter relating to the provinces<sup>XV</sup>.



Looking at federalism's origins, we can see that the direct involvement of states in constitutional reform is a common method in the initial federations, which arose when independent states merged (*integrative federalism*). Meanwhile, in federal countries that arose as a result of the decentralisation of a unitary State (*devolved federalism*); participation usually takes place through the second chamber<sup>xvi</sup>.

One last point that must be made, albeit a well-known one, is that *indirect participation* is generally included in all federal jurisdictions. Unsurprisingly, the second chamber is always defined as the chamber of territorial representation. For this reason, we shall limit ourselves to describing federal countries where this is federal entities' only mechanism for intervening in constitutional reform.

### 2.1. The direct involvement of sub-state entities

Returning to the different methods for participation, we have already said that systems featuring mechanisms for *territorial entities' direct involvement* in constitutional reform are inspired by the United States Constitution, whose article V contains two procedures for amendment<sup>xvii</sup>. The first, which is the only one to have been used since the approval of fundamental rule in 1787, puts Congress in charge of approving amendments to the Constitution. This requires a two-thirds majority in each chamber, and ratification by three-quarters of the states, either through their legislative assemblies or through Conventions created with this objective in each state. Congress also chooses the mode of ratification. Only one amendment – number 21 of the 33 that exist currently – has been ratified through state Conventions. The second procedure is a specific national Convention proposed by two-thirds of the states that approves constitutional amendments. These also must be ratified by three-quarters of the states in one of the ways we have seen previously. However, the greatest problem with this route for initiating reform is that it would require the proposal to be approved by a two-thirds majority in both Congress houses. This explains why this procedure – which, incidentally, was that used to ratify the Constitution in 1787 – remains unused.

As can be clearly deduced from our study of the American system, there are two instances during reform where the states may participate: either to propose a reform, where states call a national Convention; or, following a reform's approval by the national parliament, its ratification by the states. One of these methods for intervention from the



states can be found in the remaining systems that include this mode of direct participation in constitutional amendment.

#### 2.1.1. *During the initial reform phase*

The Constitutions of Canada, Mexico, Brazil, Russia and Italy state that federal entities can be involved in the *initiative phase* of reform by presenting a proposal to the federal parliament. There are, however, vast differences in the number of federal entities required for this.

The Canadian Constitution specifically states that it should be one provincial legislative assembly (article 46.1). However, in Russia, Mexico and Italy, a minimum number is not stated; meaning the rules of ordinary legislative procedure apply. It would suffice, therefore, for the proposal to come from a single territorial collectivity. For that reason, it would be enough for one regional council in Italy<sup>xviii</sup>, a single legislature of any Mexican state<sup>xix</sup> or a single legislative assembly of the different entities that form the Russian Federation to present a proposal for constitutional reform<sup>xx</sup>.

Lastly, in Brazil, any proposal must be endorsed by at least half of the federative units' legislatures, each of which must be expressed by a *relative majority* of its members (article 60)<sup>xxi</sup>.

#### 2.1.2. *Through approval of the final text*

*Direct* intervention by states during a reform's *ratification phase*, once it has been approved by the federal parliament, occurs either through the states' legislative organs or through their individual electorates, by means of a referendum. In the latter, the federation's own mechanisms for reform are thus interlaced with those of the democratic State (Groppi 2002: 124). The former case applies to Canada, Mexico, Russia, Nigeria and India and the latter to Australia, Switzerland and, in its own way, Italy.

The case of the Canadian Constitution (1867) is very unusual, because up until 1982 no procedure for constitutional reform had been established, because amendments were understood to be within the remit of the British Parliament, which had originally passed it. The *1982 Constitution Act* lays out two reform procedures that we will call *general* as they are intended for matters affecting the Federation and all the Provinces. Because of this, they require approval from both the federal Parliament and the Provinces. The first called '7/50



formula' would apply to all constitutional amendments for which there is no specific procedure, as well as to matters contained in article 42 of the Constitution<sup>XXII</sup>. It requires the approval of two-thirds of the provincial legislative assemblies (7 provinces) whose populations represent at least half (50 per cent) of that of them all (article 38). There is a second, *more aggravated*, general procedure that refers to matters affecting, among other things, the right of each province to have an equal number of House of Commons members to senators, the Constitution's bilingualism, the composition of Canada's Supreme Court and constitutional reform itself. In this procedure, any modification of the constitutional text requires unanimous approval by all the provinces' legislative assemblies (article 41). Along with these general procedures, there are three additional processes that we will call *unusual* for the following reasons: the first because it only applies to one or more provinces, in which case only approval by the legislative assemblies of the provinces concerned would be required (article 43); the second because it refers only to aspects affecting the parliament and executive itself – except for matters covered in articles 41 and 42 which, as we just saw, regulate general procedures – where approval by the federal parliament would suffice and concurrence from the provinces is not required (article 44); and the last because it refers to amendments to the of the provinces' constitutions, and specifically the parts that are considered to concern the federal constitution<sup>XXIII</sup>, whose reform would be a matter for the provincial assemblies through ordinary law (article 45).

Amendments to the Mexican Constitution can also not be finalised without approval from the territorial entities. In that regard, article 135 establishes that, following a vote by a two-thirds majority of the Congress of the Union members present, any addition to or amendment of the federal constitution must be approved by the majority of the legislatures of the states. The rule does not establish the majority by which local parliaments must support or reject the amendments and, for that reason, authors have stated that this should be determined in the constitutions of the states, and if it is not, a simple-majority approval should apply (Carbonell 2006: 229 and 233, and Carpizo 2011: 561-562).

The most unusual thing about constitutional reform in the Russian Federation is that approval by the Constitution's territorial entities is only required for one of the three amendment procedures. The first of the three applies to any change in the dogmatic part of the constitution when it affects the basis of the constitutional system, human and civil rights and freedoms or the procedure for reform (Chapters 1, 2 and 9 respectively). Article



135 specifically indicates that these provisions should be revised not by the Federal Assembly, but by a Constitutional Assembly. This is composed in accordance with the law, and will either approve the proposal by a majority of two-thirds of the total number of its members or refer the matter to a referendum. A referendum would require support from an absolute majority of its voters, under the condition that over half of the electorate participates in it. The second process, which applies to any change to the organic part of the constitution (Chapters 3 to 8), would follow the procedure of a federal constitutional law – which, as stated in article 108, requires approval by a majority of three-quarters of the Council of the Federation and two-thirds of the *State Duma*, and in addition approval by the legislative authorities of two-thirds of the subjects of the Russian Federation (article 136). Lastly, changes to the members of the Federation or to their status only requires approval through a federal constitutional law, without needing to be ratified by the Federation's subjects. What is surprising about this legislation is that changing the essential principles of the federal constitutional order does not require ratification from the territories. Also, although their approval is expected by referendum, this takes into account the Federation's entire electorate rather than the partial electorates of each of the Federation's subjects, which would have been the appropriate procedure had they wanted to introduce an element of federal legitimacy into the constitutional review process, rather than just democratic legitimacy through a referendum which, incidentally, is not even mandatory.

Finally, changes to the Constitutions of India – although, as we have seen, only in matters affecting relations between the centre and the periphery<sup>XXIV</sup> – and Nigeria also require approval from the states' legislative assemblies. However, for India, it suffices for an absolute majority of the states to pronounce themselves in favour, whereas in Nigeria<sup>XXV</sup> the support of two-thirds of them is needed.

In Switzerland and Australia, we have said that the mechanisms for federal reform are interlaced with those of *semi-direct* democracy, given that there is a direct appeal to the territorial entities' citizens to conform to constitutional modifications through referendums. In this sense, although the Swiss Constitution's procedure for reform changes significantly if its objective is the total or partial amendment of the said reform, in all cases, in order for the reform bill to take effect, it must be approved by the Swiss people and the people of the cantons that the country is made up of (article 195)<sup>XXVI</sup>.



The Australian Constitution states that, following a reform bill's parliamentary approval by an absolute majority, there is a period between two and six months for the citizens in each state to vote for the reform<sup>xxvii</sup>. For this to happen, it must be approved by the majority of the voters in the majority of the states, on the condition that they represent the majority of the voters in the federation as a whole. This means that in order for the reform to come into force, a double majority has to be reached: firstly, that of the states, and secondly, that of the whole of the federal country (article 128). Furthermore, if the reform aims to alter the representation of any state in the Houses or the limits of the state, a favourable vote is required from the majority of the voters of that state or the state affected by the reform.

The Italian Constitution assigns a very limited role to the regions for carrying out constitutional reform. They are not given the power to approve it; only to request a referendum for it to be approved by their citizens (article 138). Furthermore, such a referendum is not mandatory. It only takes place if, after the reform has been approved by an absolute majority, it is requested by either 500,000 citizens, a fifth of the members of one of the Houses or five Regional Councils. In addition, that option is declined and the referendum request not granted if the reform is approved by two-thirds of the Houses.

In the scenarios described up to this point (with the exception of Italy), the guarantee of federalisation of constitutional reform is clear in that it cannot be performed without the vote of a more or less qualified majority of each federation's constituent territorial entities – an absolute majority in Mexico, Australia, Switzerland and India; a two-thirds majority in Russia, Nigeria and Canada (generally speaking); a three-quarter majority in the United States; and unanimity in Canada (for certain matters). However, is there enough guarantee of sufficient intervention from regional governments when constitutional review occurs through the House of territorial representation?

## 2.2. Indirect participation through the House of territorial representation

In Germany, Austria, Belgium and South Africa, the Senate is the only route for participating in constitutional reform. But, in these cases, since members' State origin does not usually have much effect on the operation of the territorial chamber, the guarantee of federalisation is *quite weak*.



The reform procedure in the Basic Law for the Federal Republic of Germany is relatively simple; the only requirements specified are that reform be carried out expressly, and that both the Federal Council (*Bundesrat*) and the parliament (*Bundestag*) should support the reform text by a two-thirds majority (article 79 of the Basic Law for the Federal Republic of Germany)<sup>xxviii</sup>. The *Bundesrat's* unique model entails greater guarantees for federalisation, given that its members are designated by the *Länder* governments, who whip them into all voting a certain way. However, this does not mean that this model has avoided partisan logic. When the political orientation of the federal government is not in accord with that of the territorial governments, partisan interests have, at times, turned the *Bundesrat* into an *opposition chamber* through which *Länder* representatives, governed by minority parties from the opposition<sup>xxix</sup>, have prevented or delayed the approval of federal laws because of difficult negotiations in the two chambers' joint commission. To a large extent, the 2006 constitutional reform, which considerably reduced the number of laws requiring the *Bundesrat's* assent, was brought about by this partisan use of the second chamber which, in some ways, changed its constitutional function as a national parliament (Arroyo Gil 2009: 83).

In Austria, as we have seen, the participation of the *Länder* in constitutional reform through the Federal Council (*Bundesrat*) is very limited. This is because it only occurs when there is a change in relations between the centre and the periphery, which affects the executive or legislative powers of the *Länder* (article 44). For other proposals, agreement from the National Council (the *Nationalrat*) suffices. As for as the majorities needed, the presence of at least half of the members of the National Council is required (and, where necessary, the *Bundesrat*), as well as a two-thirds majority vote. In addition, when the change affects the composition of the *Bundesrat*, approval from the majority of the representatives from at least four *Länder* in that Federal Council is required (article 35).

Although their members are appointed by the legislative assemblies of the *Länder* in a number that is proportional to their composition, and renewed at each state election, research has shown how poorly territorial interests are represented in the Austrian *Bundesrat*. This is because of a relative social homogeneity and the almost entire dominance of the national parties, which leads to there being little difference between their activity and that of the National Council (de Cueto Noguerras 2001: 111 and 120, and Virgala Foruria 2011: 110). However, to compensate for the weak position of the *Länder* in the adoption of



common decisions, parallel instruments of *cooperative federalism* have been created. This has occurred particularly in the area of intergovernmental collaboration, through conferences that are either of a general nature, such as the Conference of Presidents, Ministers or Directors of Bureaux of the *Länder*, or on European subjects, such as the Integration Conference of the *Länder*, or sectorial, whose preparation and follow-up is dealt with by the Liaison Office for the *Länder* (*Verbindungsstelle der Bundesländer*). Other informal meetings, work groups and joint conferences have also taken place between several *Länder*<sup>xxx</sup>.

*Rigidity* is a characteristic of the Belgian Constitution (which, incidentally, is comparable to that of the Spanish Constitution's article 168). Its reform procedure is comprised of three stages. In the first, the House of Representatives and the Senate make a joint declaration on the need to revise the Constitution and the articles to be amended. Then comes the early dissolution of Parliament and the consequent announcement and holding of elections. Lastly, the newly elected reform legislator draws up the amendment, which cannot include laws other than those indicated in the initial declaration, and which in order to be passed requires a two-thirds majority vote in each House, as well as a *quorum* of two-thirds of the members of each House. As this brief description of the procedure suggests, the Senate and the Parliament participate in reform on equal terms (article 195)<sup>xxxI</sup>. However, despite the fact that the Belgian political system does not feature State-level political parties, since it is monopolised by Flemish and French ethnic-linguistic groups, territorial interests have never been well represented in the Belgian Senate. The selection of members therein has not ensured that all the sub-state entities have been able to express themselves fully. Up until the constitutional reform of 6 January 2014, the Senate was made up solely of representatives from the ethnic-linguistic communities (Flemish, French and German), and not of those from the regions (Flanders, Wallonia and Brussels). It therefore neglected its mission to give a voice to all territorial interests. With this reform, which accentuated the role of the regions, the aim has been to introduce mechanisms to mitigate the dualist and conflictual nature of Belgian federalism. More time is needed, however, to determine whether this has been effective<sup>xxxII</sup>.

Also in South Africa, the participation of territorial entities in constitutional reform occurs solely through the chamber of territorial representation – although, as we have seen, this is limited to certain matters. Specifically, article 74 of the South African Constitution establishes that, when amendments to the Constitution affect the Bill of Rights or relations



between the centre and the periphery, after being approved by the National Assembly, they must be accepted by the National Council of Provinces with a supporting vote of at least six of the provinces<sup>xxxiii</sup>. South Africa's National Council of Provinces consists of ten delegates from the government or parliament of each province. Notably, each province has one single vote for the adoption of most decisions, including any reforms to the constitution (article 65).

Lastly, Argentina is a special case, because while in order for an amendment to be passed a constitutional convention has to be formed, the decision to approve the reform requires a two-thirds majority from the Senate. This Senate is made up of three members from each province, who are elected by a system of limited majority, and operates following a logic that is more partisan than territorial (Carnota 2016: 53). We must ask, then, whether the constitutional convention is formed according to the federalising criteria of the Provinces having equal representation, as was the case in the 1787 United States Constitutional Convention – that is, whether or not there is an equal number of members for each province. Nothing is said in the Constitution of Argentina's article 30 about the convention's composition. However, the Argentine constitutional system has stated that it should be made up of representatives chosen in proportion to the population. The same population criterion is used for the formation of the lower house, the House of Deputies (Díaz Ricci 2004: 455). Hence, as Tania Groppi has indicated (2002: 111), the provinces only participate in constitutional reform through the Senate in the initiative phase.

From what has been said so far, it seems that the greater or smaller participation of regional governments in constitutional reform through the house of territorial representation is not distinguishable from that arising in the legislative procedure. In principle, greater guarantees of federalisation occur when the Senate is formed of representatives from State organs (governmental or parliamentary delegates) and when the provinces enjoy a joint position through equal representation in the chamber. However, *cleavages* or social fractures also have a significant impact and an effect on the party system, as we have seen in each case<sup>xxxiv</sup>. But it must not be forgotten that the second chambers' role of representing territorial interests is currently highly disputed because of political parties' prominence in the way they are operated (see Garrido López 2016 and Sáenz Royo 2014: 47-66).



What does not differ between them is the majority by which they must approve constitutional change; in all the cases we have studied, this is a qualified majority of two-thirds: Germany, Austria, Belgium (without forgetting that at least two-thirds of the members from each chamber must be present) and South Africa (six provinces out of a total of nine).

Whichever form it takes, be it *direct* or *indirect*, the truth is that when there are inadequate mechanisms for regional government to participate in constitutional reform, ordinary legislation is usually favoured, where meaningful ways of participating<sup>xxxv</sup> are planned or developed. Outside the Constitution, these may even alter spheres of autonomy that are constitutionally guaranteed. This may partially explain the limited success Spain's Autonomous Communities have had participating in constitutional reform.

### 3. Spain: shortfalls in the formal channels for the Autonomous Communities' involvement in constitutional reform

The Spanish Autonomous Communities' participation in constitutional reform is part of the general issue of constitutional reform in Spain, but has thus far played a minor role. In this sense, the shortage of reform experiences in Spain's constitutional text should be noted. Except for some very specific aspects which occurred, even more worryingly, not on Spain's own initiative, but were imposed from the outside because of the country's membership within the European Union, amending Spain's basic rule has been impossible. Some even speak of Spanish *differential fact* to describe the fact that it is impossible to turn to reform as a means of changing the constitutional text into a shifting reality (Rey Martínez 2014: 144)<sup>xxxvi</sup>. This demonstrates that Spain's parties are incapable of reaching fundamental political agreements, and perhaps even circumstantial ones; which could intensify with the new political situation. After the general election of 20 December 2015, they proved to be incapable of forming a government, which launched a new electoral process, and after the 26 June 2016 election had difficulties securing an investiture.

Without this essential basic consensus, the concept of constitutional reform is non-viable. This is not only because of the struggle to obtain the sufficient parliamentary and electoral majorities anticipated in the Spanish Constitution's articles 167 and 168 – both in the mid-elections and in optional or mandatory referendums – which, according to the



recent developments in our party system, the first two political parties are incapable of. It is also because of the lack of legitimacy that would come from imposing a reform that had been *cobbled together* in the context of *national integration crisis*<sup>xxxvii</sup>.

But, on the other hand, there are several risks associated with having a Constitution that fails to change in order to adapt to reality. Firstly, if the legislator has an exaggerated interpretation of the constitutional text, or constitutional case-law is too detached from it, this may lead to the constitutional rules losing normative power, and to also non-compliance, disaffection on the part of the people or, sometimes, the direct violation of constitutional rules.

In recent years, this has resulted in the rupture of the approval model for next-wave Autonomy Statutes, for whom the constitutional framework had become obsolete, and the STC (Constitutional Court ruling) 31/2010 on the Statute of Catalonia, as we will see. Attempts have been made, through statutory reforms, to constitutionally transform the distribution of power between the centre and the periphery so as to limit the authority of the central State<sup>xxxviii</sup>. This forgetting that the constitution remains the highest law and that an Autonomy Statute could end up being declared unconstitutional, even after having been approved in a referendum (Aja 2014: 78)<sup>xxxix</sup>.

At first glance, we might be surprised that the Autonomous Communities took this course of action since they could have carried this new layout to fundamental rule, and suggested constitutional reform directly. If we add to this the Autonomous Communities' lack of influence in the constitutional reform procedure through the Senate (or rather, in any decision made by the chamber), and this State of Autonomies' marked structural crisis, we have the full reasoning for the lack of participation. Let us now break this down.

### **3.1. Formal channels for the involvement of Spain's Autonomous Communities in constitutional reform**

The two mechanisms by which Spain's Autonomous Communities can participate in constitutional reform are, firstly, by presenting a constitutional reform proposal and, secondly, having the Senate act as a chamber for territorial representation.

In the Spanish Constitution, direct participation in the initiative phase of constitutional reform is not actually fixed directly, but through article 166, under the provisions of articles 87.1 and 87.2, which refer to the ordinary legislative procedure. This excludes popular



initiative from matters of constitutional reform and allows the Autonomous Communities' legislatures to directly present a proposal for constitutional reform to the *Cortes Generales* (the Spanish parliament).

In the almost forty years of our Constitution being in effect, on only two occasions has anybody tried to put the above procedure into action. For the moment, neither has resulted in the text being altered. The first originated in a popular legislative initiative in 1990 in which the Basque parliament was urged to present a proposal of constitutional reform to the *Cortes Generales*, suggesting the right to self-determination be included in the Constitution's second additional provision. But that is where it stopped because the Autonomous Community's legislature did not even consent to the matter being discussed in the Basque parliament itself, deciding that it was a matter that popular legislative initiatives were not permitted to deal with.

The second occasion was much more recent, and consisted of a constitutional reform proposal made by the Asturias Parliament. This initiative originated in a proposal made by the *Izquierda Unida* (coalition formed by Communist Party and Republican Left Party) parliamentary group which had gathered requests from different social movements to stimulate mechanisms for direct democracy in Spain's constitutional system. However, the proposal has been pending consideration by the Congress of Deputies since February 2016.

By contrast, the mechanism through which the Autonomous Communities can be indirectly involved in constitutional reform through the Senate fits awkwardly into Spain's constitutional model. The Spanish Constitution only designates a tiny number of senators to the Autonomous Communities. Each of their legislatures is allocated one senator, plus another per million citizens, as laid out in the Statutes of Autonomy. This makes up a quarter of the chamber's members, with the other senators being chosen in provincial constituencies. Furthermore, the senators shall not be bound by any compulsory mandate since they just represent the Spanish people as a whole, not only their particular territories similarly to the way it happens in the Congress of Deputies. Finally, this chamber does not have a vital role in the legislative procedure when the interests of the territorial entities are at stake.

For all these reasons, the second chamber practically doubles congressional representation, but at the second reading and with a restricted role in the legislative



procedure (except in the case of the aggravated reform procedure described in article 168 of the Spanish Constitution, in which the powers of both chambers are equalled). For this reason, despite the literal wording of the Spanish Constitution's article 69.1, the Senate does not amount to a channel of expression for the territorial interests. Which, whether or not this initially made sense because of the compromise that was reached in the constituent process to not close the territorial model, it should have been corrected once the autonomous map was fixed at the beginning of the 1980s.

Lastly, it should be highlighted the fact that, the Spanish constitutional framework does not provide any other channels for intergovernmental collaboration relations that favour the participation of the different Autonomous Communities in the central State's decision-making process. It has been tried to make up for this absence of channels by means of several techniques and logics with a really uneven performance due to their lack of institutionalisation or even because of an uncertain legislative development thus, showing clearly the absence of any type of political interest in their implementation in some cases. Just only, the Conference for EU-Related Affairs (*Conferencia de Asuntos relativos a la Unión Europea, CARUE*) or the recently reactivated Presidents Conferences (*Conferencia de Presidentes*) provide some instances of collaborative practices attempts<sup>XI</sup>.

### **3.2. The uniqueness of the State of Autonomies: changing autonomous powers outside of constitutional reform**

We have seen that when territorial entities intervene in the constitutional reform process, one of the main problems associated with the organisation of compound states is resolved: the sphere of autonomy constitutionally guaranteed to the different bodies or levels of government (that is, the territorial and functional breakdown of powers) is ensured. At the same time, the structure of competences can be modified as required (La Pergola 2016: 16-24). It is a distinguishing feature of this State model, then, that the definition of its own sphere of interests cannot be made unilaterally by any of its parts, but requires consent from all the agencies involved.

However, as authors have emphasised<sup>XII</sup>, what distinguishes the Spanish Constitution from others is that it does not determine the State's territorial model. In fact, it does not establish the autonomous map, or require the State's territory to be fully decentralised, and nor does it establish the territorial breakdown of powers between the State and the



Autonomous Communities. The factors that led to this solution arise from the difficult political circumstances that surrounded the constituent process, and which led to a delicate balance being struck between the different forces. The development of this solution was deferred to a later stage through extra-constitutional rules. However, the unconstitutionality was not total, because in the Constitution there is a structural frame and basic principles on the subject that would have to be observed when determining the territorial structure (Aragón Reyes 2006: 75 and 78-79). Ultimately, as Bustos Gisbert rightly says, the territorial design conducted in the Spanish Constitution is of the *procedural* type; it is restricted to allowing the decentralisation process, indicating the access routes for autonomy, the limits of competence and the control and closing clauses that allow conflicts to be resolved and guarantees harmony in the system (Bustos Gisbert 2006: 73).

Nevertheless, although the Constitution does not establish the State's and the Autonomous Communities' spheres of powers, these cannot be identified unilaterally by any of the government bodies, because within the framework established by fundamental rule, agreement is needed between all parties. The most salient feature of the Spanish Constitution, which is also one of its essential characteristics, is that it has attributed to the territorial entities, which have a right to access autonomy (the 'nationalities and regions' in article 2), a decisive capacity in the set-up of the territorial structure. This has been made through the *dispositive principle*, which grants them at all times the powers of impetus and codecision in the *federalising process*<sup>XLI</sup>. This covers as much the initial part of the decentralisation process as its amendment.

At the initial stage, the dispositive principle grants representatives from the territorial entities the authority to decide whether they want to achieve autonomy (unless, for reasons of general interest, it is decided through an organic law that an autonomous initiative be taken over, as per article 144) and the authority to define, with the State, the territorial entity's power by functionally and materially determining its powers within the framework established by articles 148 and 149 of the Constitution. All of this must be contained in the Statutes of Autonomy as the basic institutional rule of each of the Autonomous Communities (article 147).

In the successive phases, the dispositive principle means that it is the Autonomous Communities who can propose and agree on changes to the defining elements of their autonomy through reform of the respective Statute of Autonomy, by means of a special



procedure. This begins with the Statute reform proposal being approved in the Autonomous Community's legislature, but also must have been approved by the *Cortes Generales* as an organic act.

The constitutional framework's second characteristic is *asymmetry*. The Spanish Constitution established a territorial structure featuring Autonomous Communities which, from the outset, could access the highest competences, taking on all those powers that were not reserved to the State by article 149.1 (using article 151, or the *fast track*) and others that, at least for an initial five-year period, had to conform to having just competences within the narrow scope of article 148 (the *ordinary route*). There was, however, nothing to prevent the degree of autonomy becoming equal after the period during the reform of its respective Statutes had passed (González Encinar 1985: 156).

Nevertheless, the seed of that which would later result in the main problems with Spain's autonomous system can be found in the Constitution's original framework. Firstly, although the dispositive principle ensures that the Autonomous Communities can intervene by defining the sphere of control, at the same time it establishes a system of bilateral relations between the centre and the periphery. This generates a high degree of competition between the Autonomous Communities and a complete lack of stability rather than contributing to integration<sup>XLIII</sup>. Secondly, the general nature and, in many cases, ambiguity of the constitutional rules means there is a high potential for unrest during the lengthy and complex development of the model. This has meant the Constitutional Court has become a referee for political conflict, litigating excessively and assuming a role that goes beyond that of a negative legislator<sup>XLIV</sup>. Lastly, by allowing changes to the territorial distribution of power through reform of the Statutes of Autonomy, without the need to trigger the procedure for Constitution review, the constituent process has left itself open indefinitely. Tomás y Valiente has warned of the risks of this (1993: 205): "The constituent process must be finalised. A State cannot stay indefinitely in the constitutional process without risking the unity of the underlying political society; the unity of the nation. If this break is not consciously sought, it is unwise to trigger forces that may lead to that result".

In addition, although when Tomás y Valiente wrote those words at the beginning of the 1990s there was virtually a general consensus that the State of Autonomies had succeeded, the new millennium was to bring with it a process of statutory reforms that supported its failure (Valencia, Catalonia, Balearic Islands, Andalusia, Aragon and Castilla



and León). These statutory reforms did not address the need to widen the Autonomous Communities' scope of power, because they had already reached the limits of competence described in article 149.1 (that is, responsibilities reserved to the central State by the Constitution). What they did respond to was the need to restrict the scope of State competences, through identifying transverse State responsibilities such as coordinating general economic planning (article 149.1.13), or basic equality in the exercising of rights (149.1.1<sup>a</sup>) and the scope of basic State regulation<sup>XLV</sup>.

While all the statutory reforms up to that point had a shared focus that of Catalonia began with a principle that, as we will see in the next section, had already been alluded to in the Basque Statute's proposal, which encroached on the foundations of Spain's territorial model: the unilateral nature of reform. This left the Cortes with no other option than to accept the autonomous proposal without discussion<sup>XLVI</sup>. And although that was not to be the case finally, because some changes agreed on by the PSOE (the central Socialist party) and the CiU (the Catalan Convergence and Union party) were introduced during their parliamentary process as organic law, it was more a last concession of nationalism than a negation of basic principle, so an *Estatut* being declared unconstitutional would not have been accepted by the people.

Needless to say, the STCs (Constitutional Court rulings) on the *Estatut* had a significant effect on the statutory reforms' content<sup>XLVII</sup>. And although except in very exceptional circumstances this did not result in the texts being declared unconstitutional, through *interpretation*, the Autonomous Communities' attempts to define the allocation of competences reserved to the State by article 149.1 were disabled, which would result in only one thing: constitutional reform.

### 3.3. The road to constitutional breakdown in the Basque Country and Catalonia

Until this point, we have focused on attempts made by the Autonomous Communities to make informal changes to the constitutional system based on interpretations by political stakeholders, the legislator and constitutional case-law. But we are currently experiencing a drift, driven by Basque and Catalan nationalism, for which the constitutional framework is no longer sufficient. These movements are not interested, however, in constitutional reform, because they have chosen the secessionist route, therefore manifesting a clear determination for the unilateral breakdown of the constitutional order.



The first attempt at constitutional breakdown arose after the failure of the so-called *Plan Ibarretxe*. This was a Statute of Autonomy proposal that was based on premises that were completely contrary to the Constitution, such as the national character of the Basque people, the original legitimacy of their power and the right to unilaterally establish a new relationship with the Spanish State that would grant the Basque Country ‘commonwealth’ status<sup>XLVIII</sup>. The autonomous proposal was rejected, so the Basque authorities tried to consult the Basque people on their relationship with Spain. This process was halted by the Constitutional Court, which declared that the Basque country did not have any power on the matter of referendums (STC 108/2003, Fjts. 2º and 3º).

The process in Catalonia is following a different course. As Aja reminds us, the climate generated in Catalonia by the economic crisis, autonomous financing and the long delay of the ruling on the *Estatut* generated an atmosphere that was favourable to independence. This drove the autonomous powers to a secessionist process in which the first step would have to be a sustained consultation on the Catalan people's right to decide.

The Constitutional Court denied that the ‘right to decide’, understood as a right to self-determination or the right to consult on Catalonia’s relationship with Spain, conformed with the Spanish Constitution. However, it did not reject the possibility of reaching independence, provided that was carried out within the framework of constitutional reform procedures, given the fact there are no intangibility clauses within Spanish basic rule. It even indicated the route that must be used for this and which, as we have seen in this study, is for the Autonomous Community’s legislature to present a constitutional reform proposal<sup>XLIX</sup>. The Constitutional Court bears no relation to the informed opinion of Pedro de Vega, the strongest advocate in this field that there are implicit limits to constitutional reform, and for whom the power to revise must be exercised without breaking legal continuity, given that bringing out a revolution, which would be an act of constituent power in itself, is not permitted (de Vega 1985: 68-69). In his words, if ‘all constitutions are identified by a certain political regime and a political formula that materially defines, and socially legitimises, the legal framework, it is clear that any attempt to change the basic values making up the political formula, through the mechanism of reform, would not simply imply the substitution of articles by others, but the creation of a different political regime and the establishment of a new constitutional system’ (de Vega 1985: 285-286)<sup>L</sup>.



However, the *Generalitat de Catalunya* completely bypassed these decisions from the Constitutional Court and, following the *illegal* and unguaranteed referendum held on 1 October 2017, chose to take the route of a Unilateral declaration of independence. This declaration, to try to force the Spanish State into a negotiated exit, which was made by Carles Puigdemont, the Generalitat's President, was suspended in the first instance (although later approved by the Catalan Parliament on 27 October). Before which, the national government's response was to activate proceedings laid out in the Spanish Constitution's article 155 for state intervention in an Autonomous Community to force Catalonia to fulfil its obligations. Some of the measures authorised by the Senate on 27 October were: the removal of Carles Puigdemont as Catalonian president, the dissolution of the Catalan Parliament and the calling of autonomous elections on 21 December 2017. This situation has still not been resolved.

#### 4. Conclusion

Involving regional governments in constitutional reform has the aim of guaranteeing the autonomy that has been granted to them constitutionally. It prevents reform from being carried out unilaterally by central governments and, at the same time, allows the structure of competences to be modified as necessary.

At the comparative level, two routes of intervention are envisaged: a) *direct*, the initiation of reform through a proposal that originates at the territorial assembly, or through a reform being approved by the assemblies or electoral bodies of the sub-state entities; or b) *indirect*, through the house of territorial representation. In our view, only direct participation is a sufficient guarantee of federalisation, because in reality the lower chambers are unable to function without being affected by partisan interests.

In Spain, the only way the Autonomous Communities can participate in constitutional reform is if their legislative assemblies present a constitutional reform procedure; this is especially true given that despite what is stated in article 69.1 of the Constitution, the Senate cannot be considered a genuine house of territorial representation. The Autonomous Communities have hardly ever gone down this direct route. Throughout the almost forty years the Constitution has been in vigour, there has been just one attempt to initiate reform in this way, through a popular legislative initiative in the Basque Country



that was not processed by its parliament. A proposal by the Asturian Parliament is currently pending processing in the Congress of Deputies.

However, that does not mean that the Autonomous Communities have not had the opportunity to participate, along with the State, in defining their autonomous scope. Spain's unique constituent process has meant that the distribution of the spheres of power for each of the government levels has been deferred to a later point in time and made using extra-constitutional rules. These have, nonetheless, had to respect the procedures and the limits of competence laid out in the Constitution. Because of that, the Autonomous Communities' route for defining the State's territorial structure has not been constitutional reform; but instead approving and reforming its Statutes of Autonomy through the *dispositive principle*. This principle grants to them a decisive capacity in the *federalising process* through the faculties of impetus and codecision.

Once the highest level of competence in article 149.1 had been reached, reforms by the so-called new-wave Statutes tried to jump the constitutionally established hurdles, creating a constitutional mutation in order to limit the intervention of the State in the sphere of competences, through the use of cross-sectional titles (149.1.1 and 149.1.13) as well as the scope of basic State rule. The mechanism they should have used is constitutional reform. In addition, attempts have been made in the Basque Country and Catalonia to break down the constitutional regime unilaterally, outside the procedures laid out in the Constitution.

Anyway, it must be recognised that the Autonomous Communities' involvement in constitutional reform is not sufficiently guaranteed. As we have seen, their role in reform consists of merely submitting a proposal that will later be processed by the *Cortes Generales*, and in which they will have no involvement. For this reason, we believe it's imperative that this power of initiative be supplemented by other additional channels for the Autonomous Communities' participation.

According to what we have stated in this paper, we think it is essential to involve the Autonomous Communities at least in the parliamentary procedure in constitutional reform<sup>11</sup>. For that purpose, a *consultations phase* could be established in the parliamentary proceedings so as to facilitate a greater degree of agreement in the inclusion of the territorial interests in the *Cortes Generales*. It could be carried out by means of intervention of the Autonomous Communities Presidents or several Autonomous Deputies appointed by territorial Parliaments in the Senate's General Committee on Autonomous Communities



(*Comisión General de Comunidades Autónomas*). It is also possible to send the Autonomous Executive or their parliaments' opinions regarding their position about constitutional reform. Another possibility is to summon an intergovernmental forum such as the Presidents' Conference.

The greatest federalisation guarantee would be achieved if, once passed the constitutional reform by the *Cortes Generales*, it was passed by at least the majority of the Autonomous Parliaments or, another possibility would be a referendum approved by a double majority: the majority of the Spanish people and the majority of the Autonomous Communities' voters. But the establishment of a second *ratification phase* requires a constitutional reform in any case.

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<sup>I</sup> See Castellà Andreu (2018a: 11), about the main contributions to the Spanish Constitutional amendment.

<sup>II</sup> Please see, among many others, Bryce (1988: 72 and 119-120), Mouskheli, (1931: 301); Carré de Malberg, (1948: 121-122), Livingston (1956: 281 et seq.), Durand (1965: 204-205), Wheare (1997: 120-127), Friedrich (1968a: 637), Burdeau, (1967: 492) and, to highlight some within our field, García Pelayo (1993: 240), Ruipérez (1994: 79-80) and Blanco Valdés (2012: 27).

<sup>III</sup> Manuel García Pelayo (1993: 220-231) recognises the different viewpoints.

<sup>IV</sup> For more detail on the evolution of federalism, from the initial unifying federalism (e.g. the United States, Switzerland, Canada, Germany and Australia) to the most recent cases of decentralised federalism (Austria, India, Belgium, Spain, Russia or South Africa) please see Biglino Campos (2010) and Mastromarino (2010: 79-156).

<sup>V</sup> In our field, it is emphasised that the federation cannot be boiled down to one concept that describes the full range of organisational structures that are defined as federations, since each case is a response to specific historical or social circumstances. It is, as such, only possible to establish a series of *common* or *minimum* structural criteria González Encinar (1985: 86-89), Aja (1999: 25-33), Ruipérez (2012: 7-32) or Blanco Valdés (2012: 21).

<sup>VI</sup> On this matter, see Wheare (1997: 81).

<sup>VII</sup> *Ibidem*. He describes as federations those nations whose systems mimic the characteristics of American federalism (Switzerland, Canada and Australia). The rest he has labelled *quasi-federal* (not even Germany falls within his definition of a federation).

<sup>VIII</sup> However, Gianfrancesco 2017's study on the need to develop reform in the federal sense to improve the regions' routes for participation in decisions taken by the state (see Gianfrancesco 2017)

<sup>IX</sup> See Schmitt (1982: 118), La Pergola (2016: 313) and Wheare (1997: 40-41) or more recently, Groppi (2001: 83).

<sup>X</sup> As demonstrated convincingly by Smend, and his concept of the constitution's integrating role. The quote is taken from Smend (1985: 178).

<sup>XI</sup> Authors, however, usually resort to Durand's classification, which distinguishes between models featuring a) parliamentary approval and state ratification, b) just parliamentary approval and c) parliamentary approval plus ratification by the states and the electoral body. See Virgala Foruria (2011: 111-112) and Ruipérez (1994: 104-115).

<sup>XII</sup> The Constitution of the Russian Federation is an interesting case; it states that intervention by *subjects of the Federation* is not merely for relations between the centre and the periphery, but all the organic parts of the Constitution, as we will see.

<sup>XIII</sup> Article 44.2 of the Austrian Constitution: 'Constitutional laws or constitutional provisions contained in



simple laws *restricting the competence of the provinces in legislation or execution* require furthermore the consent of the Federal Council which must be imparted in the presence of at least half the members and by a majority of two-thirds of the votes cast<sup>9</sup>, consulted on the Austrian Parliament's website [http://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Erw&Dokumentnummer=ERV\\_1930\\_1](http://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Erw&Dokumentnummer=ERV_1930_1) (1/11/2017), (italics ours).

<sup>XIV</sup> Specifically, in the second paragraph of article 368 of the Indian Constitution – consulted on the Ministry of Justice webpage, <http://ltowmin.nic.in/olwing/coi/coi-english/coi-4March2016.pdf> (1/08/2017) – it states that any amendment to the following articles must be ratified by the legislative assemblies of at least half of the States: articles 54 and 55, on the election of the President of India by the electoral college (which also comprises the states' members of parliament as well as the members of both houses); articles 73 and 162 (in which it is expressed that the executive power of the Union and the states must extend to matters on which they have legislative powers); article 241 (the States' High Courts); Chapter IV of Part V (judicial power); Chapter I of Part XI (legislative powers of the Union and the States); any of the Lists of the Seventh Schedule (where the exclusive and concurrent competences of the Union and the states are detailed); as well as the representation of states in Parliament or any amendments of the article itself.

<sup>XV</sup> Indeed, the South African Constitution states that reforms to the constitution need only be approved by the National Council of Provinces, with the support of at least six of them, if they relate to article 1, which describes the values on which the Republic is based (article 74.1) or Chapter 2, the Bill of Rights (article 74.2); or if the amendment relates to a matter affecting the National Council of Provinces, alters provincial boundaries, powers, functions or institutions or amends a provision that deals specifically with a provincial matter (article 74.3). It should be borne in mind that in this second chamber, which is formed by provincial delegates, each province has one vote (article 65). The Constitution was viewed on the Constitutional Court of South Africa website, <http://www.constitutionalcourt.org.za/site/constitution/english-web> (1/08/2017).

<sup>XVI</sup> Similarly, Groppi (2002: 120-122).

<sup>XVII</sup> Article V of the US Constitution: 'The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments, which, in either case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate'. The US Constitution text was consulted at <https://www.usconstitution.net/const.pdf> (7/2/2018).

<sup>XVIII</sup> Article 138 of the Italian Constitution does not state who can make constitutional reform proposals, so article 121 (which establishes the regions' institutional organisation) along with article 71 (which governs legislative action) need to be referred to in order for the regional councils to submit bills to the chambers. The Constitution was consulted on the Italian Senate of the Republic's website <https://www.senato.it/1024> (4/8/2017).

<sup>XIX</sup> Although the Mexican Constitution's short article 135 does not address constitutional reform proposals made by the states' legislative assemblies, this right can be found in article 71, which regulates legislative initiative. On this matter, please see Jorge Carpizo (2011: 543 and 560). The following version of the Constitution was consulted: <http://www.diputados.gob.mx/LeyesBiblio/htm/1.htm> (5/8/2017).

<sup>XX</sup> Article 134 of the Russian Constitution permits the legislatures of the Federation's subjects (republics, *oblasts*, *krais*, *autonomous oblasts*, autonomous districts or federal cities) to initiate constitutional reforms. The version on Russia's Constitutional Court website was consulted <http://www.ksrf.ru/en/INFO/LEGALBASES/CONSTITUTIONRE/Pages/default.aspx> (5/8/2017).

<sup>XXI</sup> However, this confirms that the federative units' great difficulty in launching the constitutional reform procedure is balanced out with the need to ratify them, as is the case in the United States. This, as authors have demonstrated, would give the Brazilian federal system greater legitimacy. Please see Almagro Castro (2015: 225, 263-264). The version on the Senate website was referred to [http://www.senado.gov.br/atividade/const/con1988/con1988\\_18.02.2016/ind.asp](http://www.senado.gov.br/atividade/const/con1988/con1988_18.02.2016/ind.asp) (5/8/2017).

<sup>XXII</sup> These are: the principle of proportionate representation in the House of Commons; the number of senators for each province, their election procedure and the powers of the Senate; the Supreme Court of Canada and, lastly, the creation of the provinces and their current limits. The version on the Ministry of



Justice website was consulted [http://laws.justice.gc.ca/PDF/CONST\\_F.pdf\(5/8/2017\)](http://laws.justice.gc.ca/PDF/CONST_F.pdf(5/8/2017)).

XXIII We must bear in mind that there is no formal concept for a provincial Constitution in Canada. Rather, there is a material concept (a Constitution that has not been compiled into one fixed document), from which the laws relating to the organisation and operation of a province's governing bodies, as well as the powers, prerogatives and mandate period of its legislative assembly, are formed. These laws can be found, in part, in the federal Constitution itself. Castellà provides an extensive study of this matter; please see Castellà Andreu (2014: 287-298).

XXIV On matters requiring State approval, see endnote XIV.

XXV The Nigerian Constitution also stipulates two procedures for constitutional reform. The first is general, and requires approval from two-thirds of each House of the National Assembly. The second is more aggravated and refers to changes to section 8 of the Constitution (which regulates the creation of new States and boundary adjustment) and fundamental rights (Chapter IV), and would need a four-fifths majority in each House. However, ratification by the territories in all cases requires approval from two-thirds of the territories (Chapter 1, Part 2, Section 9). The fundamental law text can be consulted here, on the National Assembly website: [http://nass.gov.ng/document/download/5820\(7/8/2017\)](http://nass.gov.ng/document/download/5820(7/8/2017))

XXVI Please see the Constitution on the Swiss Government website <https://www.admin.ch/opc/fr/classified-compilation/19995395/index.html> (6/8/2017). The subject of Swiss constitutional reform is dealt with in more depth by Lopez Castillo (2014: 372-375).

XXVII The Constitution can be found on the Australian Parliament's website [http://www.aph.gov.au/About\\_Parliament/Senate/Powers\\_practice\\_n\\_procedures/Constitution](http://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Constitution) (7/8/2017).

XXVIII The Constitution was consulted on the *Bundestag* website <https://www.btg-bestellservice.de/pdf/80201000.pdf> (7/08/2017).

XXIX We must, however, consider the insights of Aja, who plays down the *Bundesrat's* partisan orientation. He considers that, in Germany, the Federal Council's opposition stance is not systematic and is only apparent during periods where *Länder* elections indicate a future political change in the federal government, and that harmony is restored after the federal elections. See Aja (2006: 728-729).

XXX For more in-depth study on this, see Vidal Prado (2014: 277-278).

XXXI The text available on the House of Representatives website was consulted: [https://www.lachambre.be/kvvcr/pdf\\_sections/publications/constitution/GrondwetFR.pdf](https://www.lachambre.be/kvvcr/pdf_sections/publications/constitution/GrondwetFR.pdf) (8/08/2017).

XXXII For more in-depth study on this matter, see Mastromarino (2015: 80-82).

XXXIII Please see endnote XV.

XXXIV On the different factors having a greater or lesser effect on how representative the second chambers are of the territories, please see Alberti (2004: 296-314).

XXXV As we have seen, this is the case in Austria where legislation has created several formulae for intergovernmental collaboration as a driving force for territorial interests when shaping and implementing decisions taken by the Federation. Also in Belgium, through the so-called special laws for institutional reforms (*lois spéciales*) that, in order to be approved, require majority votes from the linguistic groups that are present in each chamber. See Groppi (2002: 125) and, particularly for Belgium, Verdussen (1998: 62, 66-67).

XXXVI Similarly, Pérez Royo (2003: 215 and 217 and, more recently, 2015: 28).

XXXVII Terminology taken from Tudela Aranda (2016: 209).

XXXVIII Similarly, see Tajadura Tejada (2005: 70-72).

XXXIX To avoid tensions between the decision made by the electoral body and that of the constitutional judge, the Organic Law 12/2015, of 22 September, reintroduced into the constitutional court's Organic Law a prior appeal of constitutionality for the Autonomy Statutes.

XI See Expósito (2017), a detailed analysis of this matter.

XLI In this sense, the expression coined by Pedro Cruz Villalón (1981: 53 and 59) 'unconstitutionalisation of the state form' has been hugely successful.

XLII On this principle, Enric Fossas' consultation must be considered. See Fossas Espadaler 2008: 151-173.

XLIII See the reflections of Javier Ruipérez (2012: 83-84), on the need to end the dispositive principle and to close the Constitution's territorial model of the distribution powers between the State and the Autonomous Communities.

XLIV Similarly, see García Fernández (2012: 301 and 313). If to this we add politicians' tendency to unload their responsibilities onto the Constitutional Court, we can understand in even more depth the current level



of political unrest and delegitimation reached by the institution.

<sup>XLV</sup> See for more information on this Jaúregui (2009: 120-138).

<sup>XLVI</sup> Similarly, see Blanco Valdés (2005: 60).

<sup>XLVII</sup> See STCs 31/2010, Fjs. (fundamentos jurídicos, or Grounds) 16°, 17°, 57, 58, 111, 115 and 135; 137/2010, Fjs. 5°, 8° and 9° and 138/2010, Fjs. 5° and 6°.

<sup>XLVIII</sup> For more information on this, see Virgala Foruria 2005: 403-440.

<sup>XLIX</sup> Among other many Constitutional Court decisions, STC 103/2008, Fj 4°; 42/2014, Fj. 4.c; 31/2015, Fj. 6.B.a); 138/2015, Fj. 3°; 259/2015, Fj. 7°; 90/2017, Fjs. 6-9; 114/2017, Fj. 5°; 120/2017, the only Fj. and 124/2017, Fjs. 7° and AATC 141/2016, Fj. 5°; 170/2106, Fj. 6°; 24/2017, Fj. 8°; 126-2017, Fjs. 5-10 and 127/2017, Fjs. 5-8. An in-depth analysis of constitutional case-law on the Catalan process of secession can be found in Castellà Andreu (2016: 561-592).

<sup>L</sup> This theory is applied to the Catalan and Basque cases by Javier Tajadura Tejada (2009: 363 and 381), Javier Ruipérez (2013, 126-135) and Jordi Jaría i Manzano (2015: 192-197).

<sup>L<sup>1</sup></sup> See also Castellà Andreu (2018b: 52).

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