

Sub-state entities and co-sovereignty within the EU: the Basque case in the current situation

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Estatu-azpiko erakundeek Europar Batasunean daukaten statusa aztertzen da, kide-subirautza edo burujabetza konpartitua teoriaren ikuspegitik. Orain arteko protagonistak Estatuak eta estatu-gainekotasuna duen Europar Batasuna izan dira, baina diseinatzen ari den eskenatoki berrian estatuazpiko izakiak ere azaldu dira, erregio-nazioak kasu. Euskal Autonomia Erkidegoaren kasua parametro hauen arabera aztertzen da burujabetza konpartituaren proposamena nolabait korapilatzen delarik, kidetza horretan Estatuaz gain, estaturgaineko eta aztatuazpiko mailak egonik. Kidetza hiru-koitza hau Europar Konstituzionalismo berrian, gobernantzaren diskurtso eta praktikan, edota Lisboa-ko bezalako agenda estrategikoetan nabarmentzen da.

Giltza-Hitzak: Kide-siburautza. Estaturgainekotasuna. Gobernantza. Estatuazpiko izakiak. Europar Konstituzio Tratatuak. Europar Batasuna. Euskal Autonomi Erkidegoa.

Se analiza el estatus de las instituciones infraestatales en la Unión Europea desde la perspectiva de la teoría de la co-soberanía o soberanía compartida. Hasta la actualidad, los protagonistas eran los estados y la Unión Europea, que posee un carácter supraestatal, pero en el nuevo escenario que se está diseñando aparecen también algunos entes infraestatales, como son las regiones-naciones. El caso de la Comunidad Autónoma Vasca se analiza según estos parámetros, presentando un caso de soberanía compartida un tanto complejo, en el cual se añan niveles supra e infraestatales, además del estado propiamente dicho. Esa triple asociación se manifiesta en el Nuevo Constitucionalismo Europeo y en el discurso y la práctica de la gobernanza, así como en agendas estratégicas como la de Lisboa.

Palabras Clave: Cosoberanía. Supraestatalidad. Gobernanza. Entes infraestatales. Tratado de la Constitución Europea. Unión Europea. Comunidad Autónoma Vasca.

Il s'agit d'une analyse du statut des institutions infra-étatiques de l'Union Européenne, considérée depuis la théorie de co-souveraineté et de souveraineté partagée. Jusqu'à aujourd'hui, les acteurs étaient les États et l'Union Européenne, à caractère supra-étatique; mais le panorama émergent laisse apparaître des sujets infra-étatiques comme les régions-nations. Le cas de la Communauté Autonome Basque est examiné à la lumière de ces paramètres. Il s'agit d'un cas de souveraineté partagée d'une certaine complexité, où l'on trouve des niveaux supra et infra-étatiques, outre l'État proprement dit. Cette triple association est présente dans le Nouveau Constitutionnalisme Européen, dans le discours et dans la pratique de la gouvernance et figure dans les agendas stratégiques comme celui de Lisboa.

Mots Clé : Co-souveraineté. Supra-étaticité. Gouvernance. Entités infra-étatiques. Traité établissant la Constitution Européenne. Union Européenne. Communauté Autonome Basque.

INTRODUCTION: CO-SOVEREIGNTY OF SUB-STATE ENTITIES WITHIN THE EU

Complex states or organizations (the EU) are made up not simply of citizens but, significantly, of citizens and the territorial sub-state entities of governance in which these citizens are constituted and which have different degrees of local, regional or national identities. The competencies and rights of these sub-state entities and their relations with the State of which they are a part and even with supra-state entities of which that State may be or become a member are set out in a “constitution”. Constitutions characteristically set out what, and to what degree, the different member regions, member nations or member states want to do together, and how, and to what extent, they want to do it, and what they want to do on their own. The current constitutional debates as regards the articulation of the Basque Country in Spain – the reform of the Statute of Autonomy – or as regards the articulation of Spain – the reform of the Constitution as regards the territorial distribution or the federal question, especially as regards the Senate – or as regards the articulation of the different Member States in the EU – the Constitutional Treaty and the Intergovernmental Conference – are expressions of a complex constitutional process. These processes may or may not lead to concrete constitutional changes but they are evidence of lively constitutional debates, of a growing constitutional culture or an intensifying constitutional process which is, in my opinion, as important as the concrete constitutional documents they deliver.

To give an overview of the Basque case as a sub-entity or even more a co-sovereign sub-entity within the EU, as the title of my intervention in this workshop suggests, is a difficult task which requires addressing the following tricky questions:

1. What are sub-state-entities in the EU?
2. What is co-sovereignty in the EU?
3. How do these ideas apply to the Basque case in the current situation?

And a sound reply to these questions requires in turn a theory of state and sub-state entities; a theory of sovereignty that could explain the possibility of co-sovereignty and finally also a vision of the EU. Ideally one single theory should manage to reply to the three questions. I would attempt a provisional response along the following lines:

1. Sub-state entities are *fragments of state* or fragments of governance below the state;¹ these would include local government (there are 100 000 municipalities in the new EU) but in this context we shall take it to mean “regions” (according to the Commission there are 250 regions). This term has EU currency but is often despised by sub-state nationalists who prefer *stateless nations*, or better *nations lacking their own state*... Sub-state

1. The term was coined and the concept was developed by G. Jellinek. See also Herrero de Miñón who introduced the notion into the Spanish political culture.

entities in the EU are regions of existing Member States whatever their degree of autonomy and whatever the degree of decentralization of the Member State where they belong. A more loaded concept of region requires, beyond the economic notion, a socio-political community which can be culturally identified as a people or even as a nation.

2. Co-sovereignty is a term that could be related to shared sovereignty; it assumes that sovereignty is not an absolute, all or nothing, concept but rather that it can actually be shared or held jointly by more than one entity. If this is applied to a nation-state it will find enormous theoretical and practical difficulties; if it is applied to a pluri- or multinational state or to a federal asymmetric state it will find fewer theoretical objections but still some practical difficulties (international law seems to reject this notion because it sticks to a formal conception of sovereignty as indivisible international personality). In the EU, co-sovereignty is probably the key to capturing its specific constitutional character: sovereignty is shared between the EU and its Member States; but where do sub-state entities fit in this already complex picture? By virtue of the principle of institutional autonomy the EU has, in principle, nothing to say as to how each Member State is organized from a territorial and constitutional point view.
3. The Basque Case: The Basque “region” of Spain is clearly a sub-state entity, the Basque Autonomous Community or, arguably two, if we add the Navarre *Foral* or Autonomous Community. The French *Pays Basque* is not a sub-state entity but a geographical name for a territory that is integrated in the wider French Department of the Atlantic Pyrenees, itself integrated in the *région* Aquitaine. This sub-state entity is part of a larger state which itself shares sovereignty with others in the EU.

The participation of the Basque Autonomous Community in the EU, which I take to be a good test-case for the co-sovereignty of sub-state entities in the EU, principally concerns the Spanish state, but it also concerns the EU: the few and weak available formulae for regional participation in EU affairs have not been explored to the full so far and an important opportunity was lost in the context of the Convention on the Future of Europe² and its proposal of a Constitutional Treaty to the Inter-Governmental Conference 2003-2004. This is cause for concern: there is a feeling that crucial decisions on the structure of Europe, and also on the respective role of Spain and its regions within this new Europe are, once again, being discussed and adopted with no real consultation of one of the main stakeholders concerned, the regions.

2. Surprisingly or perhaps not surprisingly at all, the Convention did not set up a group on regions and regional participation, although it did have a group on subsidiarity and one on national parliaments. Only one plenary session was devoted to the regional question. It is also important to remember that national parliaments had their representatives in the Convention and they could choose to have a representation of the federal chamber, but in the case of Spain, there was no representation of the regional parliaments. The Committee of the Regions only had an observer status at the Convention, although the initial intention of the Belgian presidency toward the Laeken declaration was to give them a full participatory status.

An illustration of the difficulties involved in accommodating for the sub-state entities claiming co-sovereignty is the so-called Ibarretxe Plan. The Basque Autonomous Government has submitted to the Basque Autonomous Parliament a proposal on a major reform of the Basque Statute of Autonomy, which devolved powers to the Basque Country in 1979. The current proposal launched in September 2003, popularly known as the *Ibarretxe Plan* after the current Basque President, advocates a new political “associate” status of co-sovereignty between the Basque Country and Spain. Reactions to this proposal have been varied, and heated; serious discussion and debate is yet to materialize, and might encounter serious political and legal obstacles.³ Even at the EU level, some key political figures have suggested that the Plan might be incompatible with the EU constitution! And this raises a new debate as to how far this is an internal Spanish issue and thus, according to the principle of institutional autonomy, immune to EU interference, or how far it can be said to alter the very structure of Member Statehood by claiming for a sort of third genus, or special status to be recognized to so-called “constitutional regions” within the EU. Fierce opposition to the Proposal has been expressed by the so-called “constitutionalist” front (especially by Jose Maria Aznar’s Partido Popular, but also by Jose Luis Rodriguez Zapatero’s PSOE of) on the grounds that it claims and establishes some degree of Basque sovereignty, and sovereignty is clearly indivisible. On the other end of the political spectrum political figures of the banned political party Batasuna, the political movement generally identified with ETA, have expressed reservations about the proposal since it ultimately amounts to accepting Spanish sovereignty and there is no such thing as a shared sovereignty. The three parties supporting the current Basque Government coalition PNV, EA and IU-EB support the proposal as does an important part of the population.⁴

3. The Spanish government, under the Partido Popular, brought an action for interim measures before the Spanish Constitutional Court in order to suspend the discussion of the proposal in the Basque Parliament. By an order of 20th April 2004, the Constitutional Court rejected the action on the ground that the possibility of discussing any amendment of the Autonomy Statute was essential to democracy.

4. A survey on a predecessor of this proposal launched by President Ibarretxe in September 2002 was conducted in October 2002 and it showed 73% of those interviewed holding that the Basque Country has its own identity amongst the “peoples” of Europe, 76% agreed with the claim that the Basque Country should have its own voice in Europe and 72% thought the Basque institutions were entitled to call for a referendum on the political status. Only 13% wanted the proposal to fail. The Basque Parliament adopted the Proposal for a new Statute in 30 December 2004, with a majority of two votes. It received three of the six votes of the parliamentary group formed by Batasuna, which argued that it was lending three of its votes to the proposal in order to allow it to go to the Spanish Cortes for debate. Batasuna had been banned as a party after the application of the new law on political parties but it still existed as a political grouping in the Basque Parliament because the Parliament Act did not contemplate the possibility of automatically dissolving one of its groupings, not even in execution of a judgment of the Supreme Court, which had no jurisdiction to rule on the parliamentary law. The President and two deputies of the Parliament had been prosecuted for contempt of court but they alleged they could not legally act otherwise since the majority of the Parliament had refused the dissolution of the parliamentary group, in spite of the Supreme Court judgment. This interesting Antigona case has received little attention in Europe, but it reflects the degradation of the Spanish democratic culture. The Higher Court of Justice of the Basque Autonomous Community, which is a territorial division of the unitary or single judiciary in Spain but which was the only competent jurisdiction to decide on Members of the Basque Parliament, finally found in 7 November 2005 in favor of the accused President and vice-presidents considering they ...

It might be interesting to analyse how the lively constitutional debate in the Basque Country has come to the current situation. Here is a brief historical overview. The Spanish Basque country, through most of its political parties, had the opportunity to participate in the constitutional process leading to the Spanish constitution of 1978. When the Spanish constitution was submitted to a referendum, the major Spanish parties (PSOE and the former UCD, not so clearly AP, the predecessor of the present PP) campaigned for a **favourable** vote whereas Basque parties supported abstention (PNV) or outright rejection (HB), and only one third of the Basques voted yes to the Spanish constitution. The reason for this, as we shall see in the next section, may have been the fact that Spain remained a unitary state formally and even more so, as regards its self-image. Whatever the case, a similar process to that which obtained in Bavaria, which had originally rejected the German federal constitution but later made a declaration of allegiance, may, arguably, have taken place with the approval of the Basque statute of autonomy (1979), the formal validity of which stems from the Spanish constitution and was approved by a majority of the Basques, who interpreted it as a form of covenant with the Spanish state.⁵

The accession of Spain into the European Communities (EC) had drastic consequences for the competencies which the Basque Autonomous Community (BAC) had assumed under the constitution and the autonomy statute and which were then pooled back into Brussels somehow pre-empting or dispossessing the BAC from its recently assumed powers. Other autonomous communities underwent a similar process. This process was carried out without compensations regarding the mechanisms by which the State government would involve the Autonomous Communities (AC) in the supranational decision-making processes affecting their competencies. The initial picture as regards the division of competencies, and which had come out of the Spanish constitution, was transformed into a somewhat different picture with the accession.

1. CO-SOVEREIGNTY WITHIN SPAIN: THE QUASI-FEDERAL NATURE OF SPAIN

According to its Article 2, the Spanish constitution is based on the indissoluble unity of the Spanish nation, the common and indivisible homeland of all Spaniards, and recognizes and guarantees the right to autonomy of the nationalities and regions that make it up and the solidarity among all of them. Following Kottman,⁶ Andrea Ross and Mayte Salvador have called Spain a regionalized unitary state,⁷ which, to my mind, is a fair categorization.

... benefited from the privilege of "inviolability" .i.e. a special type of immunity for the opinions and votes expressed in Parliament. The Proposal for a new Statute for Euskadi was finally debated at the Spanish lower Chamber on the 2nd February 2005 and widely rejected by the whole political spectrum. It only received the votes from the Basque national parties and the Catalan ERC.

5. The interpretation of historic rights and the Basque provinces as fragments of state is clearly set out in Miguel Herrero de Miñón, *Derechos Históricos y Constitución*, Madrid 1998.

6. "Europe and the regions" (2001) 24 *ELRev.* 483.

7. "Effect of Devolution on Implementation of EC law in Spain and the UK" (2003) 28 *ELRev.*: 210.

On top of the territorial division of the State into 50 provinces, the constitution provides for the possibility of setting up autonomous communities, which may be groups of provinces that share historical cultural links or single provinces with specific identity. Interestingly the territorial division in provinces seems to override the autonomous communities in the minds of many Spaniards, in the media and in some crucial territorial institutions like the constituencies to the two houses of Parliament, or in the administration of the State.

The Constitution did not mention how many ACs there would be, it does not mention any particular region except for Navarre and the Basque country, Ceuta and Melilla and the special nature of the Isles (Balearic and Canaries). The Basque country and Navarre are mentioned in the additional provisions. Indeed, there is a special recognition of the historic nature of these regions and of their special powers, the “fueros” which must be respected and may be updated according to the additional provision of both the constitution and the Basque statute of autonomy. There is a heated debate as to the legal nature of the “fueros”. For some they represent a sort of covenant between Spain and the Basque provinces and this is precisely the interpretation that would support the proposal for a new status currently at the Basque Parliament. For others they are no more than historical leftovers of private law peculiarities challenging the dogma of uniformity and equality between Spaniards. The fact is that the Basque provinces, including Navarre, have not only a distinct private law applicable in many territories – a feature they share with other territories like Catalonia – but also a special fiscal and financial regime, with full tax raising powers⁸ or tax sovereignty.

According to the Spanish constitution, each AC will have a name, its own symbols, and the list of competencies it assumes; and their Statute of Autonomy will be approved by the Congreso de los Diputados (Lower Chamber of the Spanish Parliament) and, in some cases, by referendum of the AC itself.⁹ The list of competencies which the State (i.e. the central parliament and government) reserves for itself such as immigration (now partly shared in Europe), defense (to be shared in Europe in the future), the monetary system (Spain is part of the Euro Zone), international relations (to be coordinated at a European level in the future), and those which may be assumed by the Autonomous Community is contained in the Constitution (Arts. 148 and 149). The ACs hold exclusive legislative and executive competence for matters like agriculture (now vested on the EC), urban planning, housing, forestry, the management of environmental protection, own language, sport and leisure, social welfare (but not pensions), health, harbors and ports, etc. The BAC has its own police alongside the Spanish police and its own exclusive fiscal regime. Those competencies that an AC does not assume in its Statute befall on the central State.

8. As a consequence, Spain does not have a single tax system but rather five, one for each of the Basque provinces and one for the rest of the Spanish territory.

9. Whereas the Basque Statute of Autonomy was approved by two thirds of the population, the Navarrese Statute was not submitted to a referendum.

In the present political map of Spain one finds 17 ACs. Initially it might have been thought that only the historic nationalities (i.e. the Basque Country, including Navarre, Galicia and Catalonia, as Article 2 of the constitution calls them) would create ACs followed, perhaps, by Andalucía, and the Isles. But in the end, a combination of two factors – the momentum created by the setting up of the historic nationalities and the reaction to extreme centralism under Franco in all the regions combined, perhaps, with the feeling amongst the ruling elite that the indivisible unity of Spain, a dogma stated in Article 2 of the Constitution, would be better preserved by a division of the whole of Spain into AC – led to the present political map. Even Madrid is an AC. A bill presented in the early 80s (LOA-PA) on the basis of Article 150(3) attempted to “harmonize” the process of autonomy and eliminate any possible asymmetry or variable geometry amongst the AC by imposing a sort of uniformity in the degree of devolution, but this bill was declared unconstitutional by the Spanish Constitutional Court, to the relief of those historic nationalities which had assumed a higher threshold of autonomy and feared uniformity by means of severe cuts (76/1983).

At the end of the day, the Constitutional Court is the final arbiter of conflicts on competence since it has the monopoly of interpretation of the constitutional compound (the Constitution and Statutes of Autonomy and its own statute). It has to strike a very difficult balance between the claims for autonomy in all autonomous communities, the existence of historic nationalities with a stronger claim, and the need to ensure cohesion at the state-national level. This constructive task takes place in a context where the Court is being closely supervised by the mass media and the political establishment to such a degree that it has been dragged into the position of an umpire of political disputes (the law concerning political parties for the banning of Batasuna, the action against the decision to include the Ibarretxe Plan in the agenda of the Basque Parliament). For a while, the Basque autonomous government has contested the legitimacy of the Court given that its judgments were considered to be systematically against Basque interests¹⁰ and that only candidates approved by the major Spanish parties are appointed as judges. However, a positive aspect of the system is that the Court is not bound by a doctrine of precedent, which might not contribute to uniformity of competencies but at least allows for the correction of decisions that may later be seen as excessively centripetal.

The devolution of powers to the AC was to be carried out by so-called processes of transfer of the financial, human and material resources of the central administration to the autonomous administration, and partly by regrouping some of the powers already vested in the provincial administrations. In the Basque Country these two processes of transfer of powers have been particularly important and quite slow. As regards the reorganization of competencies from the federal provinces that make up the Basque Country there was a debate as to what powers these should retain and exactly how much centralization in the

10. This criticism has increased in the light of the partisan statements of the former President of the Court who publicly questioned the status of “historic nationalities” and some of the Court’s decisions concerning the banning of the political party which refuses to condemn ETA violence and the closure of two Basque newspapers on the grounds that they are part of the wider ETA network.

Basque country was necessary – a heated debate on the Basque Law of the Historical Territories (1985), which organizes the distribution of competencies between the Basque central government and parliament and the provincial governments and parliaments, actually provoked the splitting up of the PNV and the creation of the more Basque centralist Eusko Alkartasuna. As regards devolution of powers from Madrid, both the Basque Autonomous Community and the State Government agree that the process of devolution – transfer of certain competencies and/or resources- is not complete yet, although there is an ongoing debate as to what and how much of it exactly is to be transferred.¹¹

Even if an AC has assumed certain competencies in its statute of autonomy, if it does not have the material means to pursue such competencies and if it does not have its own financial resources, it will hardly be able to operate. Since the BAC has the competence to adopt certain policies and the financial means to implement them by its tax raising powers, it has actually decided to do so in areas like employment policy, research, complementary pensions, etc. where the Statute of Autonomy recognizes Basque competence, and has not been waiting for an agreement on the transfer of the material, financial and human resources related to these competencies which are retained by the central government administration in the Basque Country. The result, if there is no co-ordination could be a duplication of implementation.

Another risk is of course that the central government does not act in the areas where it retains competencies (either because it has the competence according to the Constitution or because although the competence befalls on the BAC, no agreement on the transfer has been reached). In that case, the BAC might decide to act, especially in a situation of emergency.¹²

The “federal” nature of Spain is a subject of some debate and extensive literature. There is an understanding that the system is only quasi-federal (it is not fully federal since there is no chamber of the ACs as the US Senate or the German Bundesrat; the territorial units represented in the Senate and the constituencies of the Congress are the provinces, which as was explained above, is a pre-constitutional territorial division with important political functions and in the Basque Country are the internal federal components and important fragments of state with sovereign powers!). The presence of the central administration of the State in the AC is very

11. This debate is particularly acute as regards scientific research, employment policies and benefits and the management of the social security system, and also as regards the personal and material resources of the administration of justice which should have been transferred a long time ago. In 1995 all the political parties represented in the Basque Parliament adopted a rapport on the state of transfer of such competencies calling for the transfer of the 25% pending competencies. The situation has not really improved. The approval of the Catalan Statute of Autonomy in the spring of 2006 will not necessarily change the state of devolution.

12. Take the recent example of the fuel spilled on the Basque beaches by the Prestige oil tanker. In principle, the cleaning up of the residues at sea should be paid for by the Spanish Administration, but for different political and financial reasons it did not face up to its duties and those tasks, performed mostly by fishermen at sea to prevent the fuel from messing the coast, were paid for by the Basque Government, which is now claiming a right to offset the cost against the yearly contribution it negotiates with the Spanish Government.

strong and is represented by State delegations not always smoothly coordinated with local, provincial and regional administrations. While, there is an element of variable geometry or multiple speed in the process of autonomy and in the list of assumed competencies, this element is foreseen by the Constitution itself, which is aware of the different autonomous sensibilities and distinguishes between historic and ordinary ACs. One of the crucial features of the Spanish system is that regional governments do not participate in state decision-making processes, reserved to the Congress, the Senate – which is not genuinely federal – and the central government, and this unitary feature is very important when attempting to understand the attitude of the State government in relation to the participation of ACs in European Affairs.

Two issues arise from this description which I consider worth mentioning at this point: (i) the attitude and self-conception of the state is very important; a State may well be decentralized and federal, it may even be multicultural and multinational but if official authorities – judges, diplomats, government officers, the military and the police – the media, the financial and economic establishment and the intelligentsia see it as a unitary state then there is little the constitutional provisions can do, and if this state has a powerful capital it will even become centralist. The conception of the Spanish State which has prevailed over the last years has been that of a unitary, centralist Spain (it may actually change in a more pluralistic and federalist sense with the political change and the strength of the Catalan catalyst)¹³. The second issue (ii) is the proliferation of layers of governance and administration – from the local, through the provincial, regional, national or state administration and finally the supranational or European level – which poses not only the financial burden of a very large civil service – but also an immense co-ordination challenge and a need to provide a coherent service to the citizen. In principle, the distribution and division of competencies caters for this need but when there are so many administrations to distribute competencies and so many spheres of action that imply an overlapping of competencies, competence “anomalies” result: two extreme situations can

13. In a catalyzed reaction the catalyst generally enters into chemical combination with the reactants but is ultimately regenerated so that the amount of catalyst remains unchanged. Since the catalyst is not consumed, each catalyst molecule may induce the transformation of many molecules of reactant. Likewise, the pro-independence Esquerra Republicana de Catalunya seems to be provoking a catalyst reaction on Catalan politics generally and this may expand unto Spanish politics: the formation of a coalition government between the PSC (Catalan branch of the PSOE), ERC and the IC (Iniciativa per Catalunya- Els Verts) can be seen as the first reaction in this sense, the victory of the PSOE in the Spanish election could be the second, but these reactions will take time in the Basque Country where the PSOE subsidiary is very different from its Catalan section. In any case the catalyzed reaction is not permanent. The Statute of Autonomy approved by the Catalan Parliament on 30-09-2005 was considerably watered down by an agreement reached between the Spanish Prime Minister and the leader of the Catalan opposition representing CiU. This new text was passed by the Spanish Cortes and approved in referendum by a clear majority of the Catalans in the spring of 2006. The turnout in the referendum of 18-06-2006 was 48,85%, of which 73,90% were yes votes advocated by the majority of the Parties and 20,76% were no votes advocated by the Catalan ERC and the Spanish PP. The catalyst effect of the approved text will start a new reaction: new Statutes of Autonomy are being debated in other Autonomous Parliaments. It remains to be seen whether this process will lead to any reform of the Spanish Constitution. The paradox is that the Spanish Constitution may in the end only be amended in order to accommodate for the fact that the first born child of the next heir to the throne, Prince Felipe of Bourbon, will be Leonor of Bourbon.

then obtain: a service is not properly provided by any of the administrations (research) or the same service is provided simultaneously in the same territory by more than one administration with little coordination (proactive employment policy or culture are two good examples).

2. CO-SOVEREIGNTY IN THE EU: THE SPANISH CONSTITUTION AND THE EUROPEAN COMMUNITIES

The Spanish constitution does not contain a single reference to Europe or to the process of European integration. It only generally provides that, by means of an organic law, authorization may be established for the conclusion of treaties which attribute powers to an international or supranational organization or institution (and for the possibility of holding a referendum). Although the competencies of the AC are directly affected by the transfer of powers to the European Communities, the authorization foreseen by the Constitution rules out the involvement of the ACs except for their limited presence in the Senate.

Foreign affairs are the exclusive competence of the central government and parliament (Arts. 93 and 149-1-3) and it has been generally understood that "European Community matters are foreign affairs". The initial doctrine of the Constitutional Court confirmed this extreme view, which was harshly criticized by the literature as pre-empting AC of any competence they might have assumed in their statutes of autonomy and which might then have been pooled to the EC.

The Basque statute of autonomy provides in Art. 20.3 that the BAC shall enforce treaties and agreements that affect its competencies and that no international treaty or agreement may affect the distribution of competencies unless a revision of this distribution is carried out according to the constitution. With hindsight this really seems wishful thinking.

The Spanish constitution was amended, its only real amendment ever, in order to conform to the Maastricht provisions on citizenship and the right of EU citizens to vote and stand in local elections. The Maastricht principle of subsidiarity has had no impact on the constitution, and the general understanding of the major Spanish political parties is that the constitution should not be changed or amended, if possible, which has led to a sort of sacralization of the text. One may wonder why the Spanish Constitution should make no reference to Europe, considering that most of the powers are being vested into the EU and that, soon, most decisions will be adopted by a majority system.

The distribution of competencies foreseen in the Spanish constitution and the Basque autonomy statute was operative by the beginning of the 80s. Six years later Spain acceded to the European Communities, transferring upwards or pooling into the EC important areas of sovereignty which had been previously devolved to the AC, only five years earlier. Many of the powers vested in the EC by the MSs fell fully or partly under regional competence and Spain was no exception. This has had enormous consequences: the central government co-decides in Brussels on areas where the central State had devolved competen-

cies to the regions, thus pre-empting the transfer of powers to the AC or recovering devolved powers with the excuse of exercising them in Brussels through a single voice and that it would be very difficult to coordinate 17 ACs. The acceptability of the system will depend on the involvement of these sub-state entities in the higher sphere where sovereignty is being shared.

The success and acceptability of the system and the respect for the distribution of competencies foreseen in the constitution and the autonomy statutes (the so-called constitutionality compound) would depend on the attitude of the central government as regards the possibility for the ACs to participate in that process of decision-making and the mechanisms for the defense of devolved competencies by the AC, which is a mixed matter of European Community law, constitutional law and European, state and regional politics.

On the other hand, from the point of view of EC law, there is no specific impact or requirement imposed on the Member State as regards its regions: EC law respects the institutional and constitutional autonomy of the Member State to organize internally as it wishes; it is respectful of, and even *blind* to the internal organization of the MS. On the other hand a MS cannot plead its own complex internal distribution of powers as a defense for belated, wrongful or non-implementation or any other possible breach of any EC obligation (it is *blind* in this sense as well) and Member State liability will follow from an infringement originated in any infra-state public entity.¹⁴ It is a matter of dispute to what extent this regional or sub-state blindness of the EU is a necessary consequence of supranational integration or rather the imposition of (some of) the sovereign Member States, worried with their possible inward erosion, to rule out any temptation sub-state entities might have to gain protagonism and share sovereignty in Europe.

On the one hand it would seem that accommodating for “constitutional regions” – i.e. regions with legislative competencies in areas shared with the EU – will complicate the institutional and organizational arrangements of the EU given that only a few of the 250 regions of the EU could be considered ‘constitutional’; on the other hand, efficient application of EU law and effectiveness of European policy cannot be attained if the regions feel alienated from the decision-making process; take the issue of implementing or transposing a directive by a federal or devolved Member State: how can efficiency of transposition be secured if there is little communication between Brussels and the regions concerned, or even between Brussels, the Member State capital and the capital of the region concerned. This is probably why the White Paper on Governance launched the formula of the tripartite contracts that are supposed to ensure a fruitful collaboration between the three levels of governance. Indeed, the Commission has adopted a communication on the systematic dialogue with territorial associations taking the Committee of the Regions as the main forum for interlocution in order to identify the relevant associations.¹⁵

14. See cases 103/88, Fratelli Costanzo SpA v. Comune di Milano [1989] ECR 1839 or C-431/92 Commission/Germany (Grosskrotzenburg power station) [1995] I-2189.

15. See http://europa.eu.int/comm/regional_policy/consultation/territorial_en.htm.

One of the virtues of the EU experiment, and one its major differences with the USA system, is the absence of a specific European federal administration on the territories of the Member States. The result is that a very large amount of legislative instruments are adopted at Member State level which have their origin in EU initiatives but are implemented by the different layers of administration within the state. The judicial application of EU law is also the responsibility of domestic courts. Take the case of public contracts. There is a basic set of EU directives which regulate the field as regards procedures and conditions. These are then transposed into state and regional laws and regulate public action. Private litigants can control the conduct of public administrations and will have access to the courts. If there is any doubt as to the extent of the procedural and material rights, the Court of Justice in Luxembourg will provide an authoritative interpretation of the requirements of the directives and these will ensure uniform application throughout the EU. With very few administrators and judges a whole system of public adjudication of contracts has been set in place in the whole of the EU, and this will control not only the dishing out of Community funds but all adjudications above a certain threshold decided by all the public bodies in the EU. According to the Communication of the Commission COM(2004) 101, the payments at EU level to support all its policies – sustainable development (growth, cohesion and employment), citizens' interests and the EU as an international player – will be 143 100 Meuros in 2013, which will amount to only 1,15% of the gross national income across the EU.¹⁶ What the “federal” administration does in Brussels is to supervise and control and co-ordinate the work of the “national” administrations in the areas of EU competence. An interesting question that arises is why should the state administration not assume a similar role in federal systems and rely entirely on regional administrations like the Brussels bureaucracy does.

3. THE AUTONOMOUS COMMUNITIES AND THE EC

3.1. Participation in EU law- and policy making

The State government has consistently refused active participation of the AC in the EC. Only consultation was foreseeable under the PP government, and this at the discretion of the State government, but even when it came to informing the regions on EU affairs, only piecemeal information on non-confidential documents was spread out. This situation changed quite rapidly with the PSOE government. Some regional ministers have participated in Council meetings alongside the State ministers in areas like education, social affairs, health, agriculture and fisheries or environment. Consultation goes on and the Sector Conferences of Autonomous Communities and the plenary Conferences of AC presidents and the Spanish Government President have been reconvened. The Senate has not been reformed yet but there is a more active participation of both Chambers in European affairs. President Rodríguez Zapatero has also adopted a more EU oriented foreign affairs policy in comparison to the more “atlantist” orientation of his predecessor, Aznar.

16. http://europa.eu.int/comm/budget/pdf/financialfrwk/enlarg/COM_2004_101_en.pdf.

Committee of the Regions

This organ, which has purely advisory functions in some areas of EU law and policy and which includes also representatives of local authorities, was created by the Maastricht Treaty, largely to appease the increasing demands from infra-state entities to participate in the process of European integration, given that they felt alienated from it by the Member State governments and the slight mutation of the Community system towards inter-governmentalism. The ACs have a representative each in the Committee. In the Basque case it is the Basque President's high commissioner who normally attends the meetings. But the Committee, surprisingly is organized by groupings of political parties and of States, which is quite contradictory with the reason for its creation. ACs have an opportunity to suggest amendments to the reports of the Committee, but those reports are not binding, and for the moment the institutions do not even have to motivate their decisions not to follow the advisory opinion.

The Economic and Social Committee also has a representative from the BC, it is a representative of the Basque Trade Unions (ELA): Basque national unions represent more that 60% of the Basque workforce. Spanish Unions only have 35% of the union representatives in the Basque country.

European Parliament

The constituency to elect MEPs in Spain is a single State constituency, which means that regional parties have to stand and compete at the state level, where they seek coalitions with other regionalist parties. Spain has so far resisted calls for a regional reorganization of its constituency. The loss of 14 seats (temporarily 10 until Bulgaria and Romania join in) might have an influence on the relative weight of regional parties such as those currently grouped in the European Free Alliance (and others).

3.2. Participation in policy making

The participation of the regions in the making of EC law should not blind us to the fact that a great deal of European governance is carried out in another, soft, less formal but nevertheless institutionalized context, i.e. policy-making. In areas like the employment strategy, the concrete future objectives of the systems of training and education, the European area of lifelong learning, the social policy agenda, the European research area, the restructuring of regional policy, the coordination of immigration policies, etc. European policy is often designed by the Commission and approved and amended by the Council with consultation of the Parliament, the Economic and Social Committee and the Committee of the Regions. It normally is adopted in soft law instruments and uses the so-called Open Method of Coordination (OMC). But this 'open' coordination is only of Member States.

The consultation process by the Members of the Council as required by a new culture of governance implies that relevant stakeholders are consulted. It is not always the case that the State governments represented at the Council con-

sult regions, and in Spain, consultation of the regions is at the discretion of the central government through sector conferences or specially convened conferences. The Commission often proceeds to open consultation, also following a new culture of governance, and regions then have an opportunity to participate through direct interviews with the Commission just like any other stakeholder. The Commission can go even further and suggest the adoption of tripartite contracts between the Commission, the Member State and the region in areas like regional policy or the environment. Spain has not accepted this formula so far. As regards the policy making issues, the only formal means of participation by the regions, so far, is through the Committee of the Regions which is consulted on policy issues by the Commission.

This aspect of participation has been neglected by the regions when putting forward their claims. The fact that only soft instruments are being produced should not be undervalued. They have an important normative, though not legal impact; they are politically very influential and have a potential for being integrated into the political agenda at all levels: regions, states and EC. They can bring forward an implicit erosion of regional competencies. Take the example of quality as an objective of the education systems. In most federal or quasi-federal arrangements education is a regional competence; the central government however may be tempted to invoke the need to ensure uniformity of quality standards in order to allow for coordination at the European level, and preempt important competencies through framework laws setting minimum quality standards throughout the regions or creating central agencies for Educational quality in order to control the regions. The issue has dimensions that transcend the EC. Thus, the OECD has important policy-making functions in the field of education and lifelong learning. In some countries like Germany where education is a competence of the regions, it is a regional delegate appointed by the Bundesrat (the chamber with representation of the Länder) who represents the whole of the German state. Nothing of the sort takes place in Spain: the ACs are not even informed of the discussions taking place at the OECD ministerial working groups on education. This is not a matter of law but rather of administrative or governance culture: the central government believes the State means the central government only, and as a result, the rest of the policy makers are left in the blue. Another example: the Commission has an Agency for health and safety at work which has its seat in Bilbao (other similar agencies exist throughout the EU: Copenhagen, Thessaloniki, Alicante, Parma, London, etc.). This agency cooperates with the local and regional authorities, but only state-level representatives participate formally in the Board, which advises on EU policy in this very important area.

3.3. Application of Community Law: downward participation of the regions

According to Article 93 of the Spanish Constitution, the Spanish state adapts international law into the Spanish legal order. The statutes of autonomy provide for the ACs to execute and enforce international treaties and the question was raised whether this could also mean implement and legally transpose.

Initially it was thought, and the Constitutional Court confirmed this view by an awkward interpretation of the doctrine of supplementary powers (“*supletoriedad de la ley estatal*”), that only the State – meaning the central government or state parliament – could implement directives. This absurd line, contradicting the very spirit of the EC Treaty, was later corrected following sharp criticism by the literature. But the practice has prevailed and is still encouraged by the State government which keeps adopting framework or harmonizing laws for the implementation of directives: ACs often wait for the State government to produce a sort of internal framework legislation “*ley de bases*” and then adopt the relevant laws in their autonomous parliaments or governments.¹⁷ The process of European integration implies a strengthening of the central executive because it is precisely the central government that participates in the elaboration of the very law and policies it then has to implement, and this in turn implies a weakening of the political decision-making power of other state institutions – parliament and ACs. This has not been compensated by efficient mechanisms for the participation of these disempowered institutions in the elaboration of EU law.¹⁸

From the point of view of EC law it is clear that only the Member State as a legal person will be responsible for any infringement of EC law, including that arising from lack of implementation or breach of EC law by an AC or even by a local council. If the AC is competent internally to legislate in a given matter, there is no justification for the State government or legislator to usurp the competence with the excuse that a framework law is necessary to ensure implementation. This only complicates matters, slows the transposition process and creates unease at the state level, besides disempowering the AC. It must not be forgotten that the binding nature of directives is a consequence of the principles of Community law and not of the act of implementation by a framework law. The AC is thus free to transpose a directive if it has the competence, but it may run the risk of having to change its own implementing legislation which might perfectly be correct from the standpoint of Community law, if the State government or parliament comes up with a framework law with higher minimal standards or with centralizing or coordinating functions or institutions.

This practice, which has been adopted by ACs themselves, clearly goes against the interests of both AC and EU and diminishes their autonomy, but the regions probably see this as a means to exert pressure on the State to become more cooperative in the upwards process of consultation: if it was the State government that voted for the directive at the Council with no participation of the ACs, let it then feel the pressure of implementing the directive on its own. However, if the AC has not adopted the necessary implementing measures and the deadline for implementation has expired, the state government might be justified in adopting implementing measures via substitutive legislation (*supletoriedad*). There is as yet, no internal mechanism for imposing penalties to defaulting

17. Art 24.3 of Ley 50/1997 provides that the Ministry of Public Administration will elaborate a report when implementation of a Community instrument may involve the ACs.

18. See Rafael Bustos Gisbert, “La ejecución de derecho comunitario por el gobierno central” in 67 *RVAP (Revista Vasca de Administración Pública)*, 2003, p. 163-186.

AC who are in breach of implementation obligations and if the central government insists on the adoption of framework laws, then only it will be responsible for belated implementation (penalties following infringement proceedings or liability for damage caused to individuals by non-implementation).

The Court of Justice

The lack of privileged status as regards defense of its own interests or judicial review by the regions is accompanied by an extensive passive legitimacy: the acts and laws of regions can be the source of breaches of EC law and this may lead to declarations of infringement, of incompatibility of their law with the Treaty and even to declarations of liability and duties of compensation. Formally it is the Member State which is concerned, but in situations where the political climate between the MS government and the AC government is terse, this can be a cause for serious concern. The saga concerning the fiscal sovereignty of the Basque territories is worth mentioning in this respect. As is well known, the three provinces that make up the BAC and the AC of Navarre have full powers in the field of direct taxation. Company tax laws of the Basque Juntas Generales and the Navarrese Parliament have normally provided for a slightly more favorable rate of taxation than that applied by the Spanish Parliament laws that apply in the rest of Spain. By a peculiarity of the Staute of Historic Territories which is like the "federal constitution" of the BAC, the laws of the Basque provinces have the formal status of by-laws and they can be attacked in the regional courts whereas the tax laws of the Navarrese Parliament have the status of laws and can only be attacked in the Constitutional Court of Spain. As a result of this peculiarity, the company tax laws adopted by the Normas Forales of the provincial parliaments, the Juntas Generales, of Araba, Bizkaia and Gipuzkoa have been systematically attacked before the Higher Court of Justice of the BAC on grounds, amongst others, that the lower tax rate or the other special benefits recognized by these Normas for the companies established in the territories of the provinces amount to state aid contrary. The case was brought by the border AC which felt grieved by the Basque tax regime, the ACs of Cantabria, La Rioja and Castilla-Leon. The Abogacía del Estado has often intervened in support of those neighboring ACs. On one occasion, this Court decided to refer the case to the Court of Justice in Luxembourg. The EC Court never had the chance to rule on the issue because the reference was withdrawn. But it was very strange to see that the parties to the case were on the one hand the neighboring ACs, backed by the Abogado del Estado in the main proceedings, and the Basque territories on the other. The Government of Spain intervened presenting observations to the Court. It was the Abogacía del Estado, again, but this time defending the particularities of the Basque regimes. The same body entrusted with the legal defense of the interests of the state was acting as prosecution in the main proceedings and defense in the preliminary proceedings. The issue is now settled by the Court in its judgment of 11-09-2008, in cases C-428/06-434/06, UGT La Rioja et al. in spite of the Commission's far fetched interpretation that leads to practical elimination of the power of regions to adopt tax laws that differ from the laws applied in the rest of the Member State because the Commission will consider them as state aids contrary to Article 87(1) of the EC Treaty, in the light of its 1998 Communication on State Aids of a regional nature. The Court of Justice first clarified the issue in a judgment of 6-09-2006 in the case C-88/03 Portugal v. Commission. The Court has practi-

cally corrected the Commission interpretation in order to allow for the possibility of regional tax laws establishing differential rates, as long as the regions or infra-state entities have a clear constitutional political, legislative and economic autonomy and as long as the amounts that are not levied by virtue of the lower rates are not offset in any way against financial inputs having their origin in the State finances; in other words, the tax system must be consistent and self-contained. This important judgment has been celebrated by the Basque provinces who are now asking the Spanish judiciary to drop or reform their jurisprudence in the issue, especially the Tribunal Supremo which had adopted a line of interpretation which ignored important principles of Community law. The judgment of 11-09-2008, on a preliminary reference from the Court of Justice on the BC, has finally decided the issue against the line advocated by the Commission.

It must also be pointed out that, so far, Spain has never adopted a policy of balanced representation of its different legal systems or of the historic nationalities in its appointment of members of the Court of Justice (including CFI judges and Advocates General) or of the Spanish Constitutional Court or Tribunal Supremo for that matter. No regional sensibility has been shown in the appointment of any of its posts in the Union institutions either.

But the requirements of EC law may go even further. Thus, the Court of Justice in *Fratelli Costanzo*, cited above, not only declared that the local (and regional) authorities are bound by Community law, but they must also “dis-apply” internal law, including laws adopted by the State legislature, if they run counter to EC law, which may place the local and regional authorities in a very difficult position vis-à-vis the state legislative and judicial organs: they could even be accused of disobedience or breach of the duty of obedience toward the state and the constitution. The Court was probably not aware of potentially how far its *ratio* could go.

Implementation of EU policy

One must also examine application of EU policy and soft law, because this is an area which often escapes legal control. It is often a matter of resources, and political discourse has not so far made it an issue. Specific research would need to be carried out in order to find out how far Commission and Council policy recommendations and guidelines are being followed by regional governments. As regards the BAC, five examples of the impact of EU policy guidelines can be mentioned in this regard: thus, following the European employment strategy,¹⁹ the Basque Government elaborated an inter-institutional employment plan inspired with involvement of the social actors; likewise, as regards the EU policy on lifelong learning, a White Book has been elaborated based on the Commission memorandum and communication; in the field of research, the last research plan of the Basque Government closely follows the guidelines of the VI frame-

19. The elaboration of national employment plans in the context of the European Employment Strategy becomes a challenge for the coordination of all the existing employment policy measures which are dispersed through the many levels of public administration: not only the INEM (Spanish employment institute) but each AC has its own employment policy, so do many provincial councils and even many municipalities adopt measures for the promotion of employment.

work program of the Commission; in the field of sustainable development, the Basque government is one of the few governments in Spain to have adopted such a strategy, and finally in the field of the information society the Basque government has adopted an inter-institutional plan which was closely inspired in the Commission Europe.²⁰ Direct consultation is sought with the Commission on policy issues, and this method of working and networking is proving very useful. The Basque government would now need to learn from the most recent experience of cooperation and adopt benchmarks for making the most of the open method of coordination at all levels, but it has not yet devised a strategy in this sense. Sharing good practice with the Commission and using the Committee of the Regions in order to lobby the EU institutions in this regard would be useful strategies worth pursuing.

3.4. The claims of the major Autonomous Communities

Having seen the major aspect of the present *status quo* of regional presence and representation in the EU, it may be interesting to note that calls for change are made not just by those AC, which like the BAC could be accused of going too far, but by the majority of the ACs. The major changes claimed by the regions in Spain are the following:

- constitutional reform of the Senate to make it a true chamber of the regions, of the ACs,
- allowing participation of the ACs in the Council through an agreed mechanism of coordination (and in some cases like taxation, depending directly on competencies),
- allowing direct access to the European Court of Justice in defense of their own competencies; this claim would require changes into the present regulation of *locus standi* at the Court,
- regional constituencies for the elections to the EP instead of a single constituency,
- increasing the powers of Committee of the Regions including access to the ECJ in defense of subsidiarity and its prerogatives and duty of the relevant institution to motivate why the Committee of the Regions' opinion is not followed.

This overall review of the present situation shows that co-sovereignty of the regions or sub-state entities within the EU is not so much a reality or an expression of governance as a desideratum and a political claim. The response from the political elite from established nation-states will probably be to see nothing wrong with this situation: only the Central Government is supposed to get invol-

20. I do not want to give the impression that the Basque Government is doing everything well, what is really meant is that these are examples where it is directly pursuing European policy guidelines, sometimes regardless of what is being accomplished at the state level.

ved in the sharing of sovereignty, and it will do so reluctantly. If this is the general view, and if this is the orthodoxy, the claims of sub-state entities to get more directly involved in the running of the EU will depend on the will of the state and if there is no will in this sense the ensuing frustration may lead to a claim for full secession from the state and for the creation of a sort of member statehood. On the other hand regionalism is a reality within the EU – regional policy with its three pillars on convergence, competitiveness and cooperation or the Committee of the Regions being but two of its expressions – and some politicians have called for a more imaginative and innovative approach to these regions so that they become a sort of third genus.²¹ This is the regional predicament; and the challenge. How can an initiative like Interreg in the context of transfrontier cooperation take off at all if regions are not supposed to cooperate across frontiers without an authorization of their Member State.

4. THE PARTICULARITIES OF THE BASQUE CASE

The specificity of Basque autonomy is the so-called economic covenant based on so-called historic rights.²² It is often said that the Basque Country enjoys one of the highest levels of autonomy in Europe. This is only true as regards powers of taxation where sovereignty lies with the provincial parliaments. In other matters, going from the serious issues to the pure anecdotal ones,²³ the level of autonomy is actually lower than that achieved in other regions. Justice is a good example. Nations like Scotland have their own system of law: substantive and procedural, and their own administration of justice; the BAC has almost no powers in this area, the only decentralized power is that of providing for the material resources for the administration of justice. Even the issue of ensuring that, in the Basque territory, the administration of justice can properly operate in the Basque language is denied by the very restrictive interpretation of the central government backed by the Constitutional Court.

The political parties

This is clearly not the place to give an overview of Basque politics, which are complicated and in constant flux. But it may be interesting to note that the claims for a more direct participation of the Basque Country in European affairs is, or at least has been, one of the cleavages of Basque politics. The Basque parties claim the participation of the regions or ACs in the process of the formation

21. Rapport Lamassoure. Very timid echoes of this can be seen in the Napolitano report, but the Mendez de Vigo report on subsidiarity shies away from any regionalist inclination.

22. For the specific issue of the Basque tax regime and its compatibility with EC law, see Xabier Ezeizabarrena, “*Los Derechos Históricos de Euskadi y Navarra ante el Derecho Comunitario*”, in 19 Azpilcueta, Cuadernos de Derecho de la Sociedad de Estudios Vascos, Donostia 2003.

23. The UK army garrisons in Scotland display the Scottish flag; nothing of the sort is conceivable in Euskadi. National sport teams are the obvious example, but seemingly irrelevant questions like numberplates of motor vehicles are often illustrative. German vehicle numberplates display the symbol of the Land where they are registered and the initials of their cities, in Spain they have been centralized and reflect no origin at all. The list can go on and on.

of the will of the Spanish State before the Council of the EU, and the direct coordinated participation of the Basque Country and Navarre, together with the State government in taxation matters where these entities are co-sovereign. The Spanish Popular Party was reluctant to accept the participation of Autonomous Communities in the Council. The Socialist Party shared this view until 2004. Now, it is in favor not only of participation but also of the reform of the Senate to make it a territorial chamber. Given that participation of the AC in Council meetings is a fact now, the only issue would be whether the BAC could achieve a special status in view of its specificity in areas like direct taxation. But the traditional grievances aired by the Basque nationalist parties have lost some of their impact now.

The proposal of the Basque President²⁴

The failure of regional formulae at the EU level, frustration with the watering down of the Autonomy Statute and with centralist attitudes of the political elites in Spain which have literally redefined the distribution of competencies were factors contributing to a belief, in many circles, that the Basque Country should claim full member-statehood. This claim is shared by other European regions.²⁵ As explained in the opening of this article, the Basque president has (27-09-2002) tabled a proposal that falls short of independence, it is a proposal for an association agreement between the Spanish State and the Basque Country.²⁶ As regards Europe, this proposal calls for direct participation in the Council. This proposal was followed one year later by an official proposal from the Basque government to reform the Autonomy Statute. The proposal was passed by the Basque Parliament on 30-12-2004 but subsequently turned down by the Congreso de los Diputados in Madrid in 2-2-2005.

The will to have a direct presence in Europe is justified on the basis of the defense of exclusive competencies and national identity. It is important to note that the claim to an associate status with the Spanish state -i.e. co-sovereignty within Spain – has an implication on the EU in the claim to become an associate nation which echoes some of the proposals which were made at the Convention to create a third genus between the Member State and the “region” (Alain Lamassoure and Sir Neil MacCormick both tabled proposals to the Convention in this direction), this would imply a sort of co-sovereignty at the EU level as well, acknowledging the fact that sovereignty is actually held by the citizens and expressed through their parliamentary representatives at the regional, state-national and supranational or European level. The claim seems to be that the new European Constitution should recognize the special status of stateless nations and constitutional regions. Needless to say, the Convention did none of

24. The proposal and relevant documents can be consulted at this website: <http://www.nuevo-estatutodeuskadi.net/>.

25. See the European Free Alliance program for the European Parliament elections of June 2004. See also Mikel Irujo Amezcaga, *Euskal Herria en la Unión Europea*, Pamplona 2002.

26. This proposal has stirred the political debate in the whole of Spain. Even the general elections of 2004 will be largely fought between the Popular Party and the Socialist Party on this issue.

that. As a sign of good will the new Spanish prime minister has committed to defending the institutional recognition by the EU of the languages that are official in Spain but not in the EU (Basque, Catalan and Galician). Progress is being made in this area, in spite of occasional opposition from some Member States who resist recognition of internal languages other than the official state language, most notably France.

Networks of regional cooperation

In the meantime, and awaiting the evolution of the regional question in Europe, the Basque Country has followed a sort of associationist strategy by grouping together with other European regions and creating the Conference of Regions with Legislative Competencies, REGLEG,²⁷ with other regions of federal or semi-federal states who have similar claims for participation in the European institutions. Likewise, the Parliamentary assemblies of these regions also have created a network. In their meeting in Florence in 2002, they formulated common claims to the European Convention seeking the recognition of the regions' right to defend their competence, to participate in the Council, to have access to the ECJ, to reinforce the Committee of the Regions, etc. These REGLEGs have called for a distinct status within the EU, a status which could be reflected in the Committee of the Regions, in the creation of specific constituencies before the European Parliament and in the recognition of a special standing before the Court of Justice. This idea of shared sovereignty acquires new shades when embraced by these important regions, but it adds complexity to an already complex institutional architecture, and especially runs into difficulties as regards the majority of regions of the EU which are not, in that sense constitutional. The entry of new Member States of smaller size and population will inevitably raise new questions concerning the need to have a means of representing constitutional regions.

The Basque Country is also very active in the Conference des Régions Périphériques et Maritimes (CRPM)²⁸ currently presided by Tuscany. The CRPM acts as a voice for the regions before the European Institutions. Three other networks are noteworthy: the European Association of Regions and Local Authorities for Lifelong Learning (EARLALL),²⁹ the Network of Regions for the Information Society and the Network of Regional Governments for Sustainable Development (nrg4SD),³⁰ which is a world-wide organisation. On a more specific sector, there are numerous groupings and we could simply mention the Network of European Wine Producing Regions, and the seat is in Bilbao.

The idea behind these "sector by sector" networks, which are ad hoc and piecemeal, is twofold: regions thus seek to gain a voice before the supranational

27. <http://www.regleg.org/>.

28. <http://www.crpm.org/>.

29. <http://www.earlall.org/>.

30. <http://www.nrg4sd.net/>.

and international institutions, especially with a view to consultation and defense of regional interests, and they have a platform for cooperation, sharing of best practices and partnerships. These experiences are contributing to the establishment of important cooperation frameworks and are attracting the attention of new regions. However, an overall strategy for participation in Europe through the different areas of competence is lacking, and as a result, many projects and actions which could have a European dimension and create synergies with other levels of government and other regions are sadly missed out.

Curiously enough the Basque Country has been rather moderate in its claims for participation, which have been centered on the EU. Thus participation in organizations like the OECD, or the UNESCO, WHO, FAO, ILO, should also involve, at least consultation and information, and ideally participation in the formation of the will or even direct representation, as in the case mentioned above regarding the education committees of the OECD. New policy documents of the UNO are now making an important distinction between federal states and national states given that many of the UN policies (e.g. sustainable development) are carried out by sub-state entities and an adequate account of action can only be made if this factor is taken into consideration.

CONCLUSION

One of the important theoretical implications of the dispute regarding the participation of ACs in European institutions is the conception of the State. It is clear that the EU brings together Member States, and that the MSs are the interlocutors of the EU. But the question is whether this necessarily means the central government or whether other institutions can also represent the State. A predominant conception of Spanish governments so far has been that only the central State government can represent the State. This is true as regards the formation of the will of the State, the unwillingness to be subject to any form of scrutiny and control of that position by Parliament and by the Senate, and even the unwillingness to include regional ministers in the State representation at the Council. It is even more so as regards participation in international fora where the state does not even inform the AC on the issues of their competence. It would seem almost as if the Spanish government had warned the European institutions, especially the Commission that it should not proceed to a direct consultation of the regions without its prior consent. The tripartite contracts proposed by the Commission in the White Paper on Governance³¹ in fields like structural funds or the environment are doomed to fail in Spain precisely because of this idea that only the central government can act on European affairs. The result is, of course, a risk of diminishing the efficiency of European law and policies to the detriment of the region, the state and Europe, and ultimately to the detriment of the citizen.

This limited conception of the State also eschews asymmetric formulae. It is clear that ACs have different competence thresholds and that this fact necessa-

31. http://www.europa.eu.int/comm/governance/index_en.htm.

rily has a consequence when it comes to the defense of competencies in issues like subsidiarity, yet the Spanish governments have adopted uniformity formulae. The distribution of competencies seems to be a purely internal issue. When it comes to the representation of the state before the EU, the state government recaptures all the competencies alleging the principle of unity or uniformity of the state representation. But the Spanish government made it public, in the light of its position in the Convention for the Future of Europe, that it opposes a formula whereby the new 'Constitution' would provide for the respect of local and regional identities, considering that this is an interference with internal MS matters.

The recent moves to defend the interests of so-called "constitutional regions" (REGLEGS) also raise interesting issues concerning the question of co-sovereignty. How can one define a constitutional region? What specific level of competencies are they supposed to have? What legal instruments are they supposed to enact? Are they supposed to have an elected parliament and government? They are difficult notions and any attempt to integrate them into institutional representation formulae at the EU will have to face the fact that only some Member States have such constitutional regions, and the principle of equality between the MSs may be compromised. According to MacCormick³² the constitutional regions differ from administrative regions which have no identification as nations and because their functions are policy-coordinating rather than legislative. However he lists German Länder as constitutional regions since their construction as legal entities with full legislative competencies directly or indirectly flows from the constitutional order of the MS of which they are a part, although these do not, or at least do not all, claim a national identity. The distinction would then be between purely administrative regions, constitutional regions and stateless nations which claim sovereignty. But how can the principle of equality be ensured if constitutional regions and stateless nations are given an institutional status with allegedly some rights and obligations in the EU context? The exploratory search for a third genus capturing the regions is indeed a challenge.

The REGLEGS have called for a clear distribution of competencies. The claim is understandable in the sense that they want to make sure that the regional competencies are not watered down or outright preempted with the excuse of the process of integration, but the claim does seem to have other unfelicitous tones. One can doubt whether a strict division and distribution of competencies is at all possible. On the other hand, *l'air du temps*, the new culture of governance enhances the participation of public authorities in the fulfillment of shared missions and the line favors cooperation between administrations rather than strict distribution and separation of competencies. The very principle of subsidiarity seems to carry an implicit recognition that such strict distribution of powers is very difficult, especially where shared or concurrent competencies are at stake. The areas of policy where no laws as such are adopted can be exercised by different administrations, since their exercise and implementation will not so much be a matter of title or actual competence as one of resources: the question is

32. Contribution 220 to the Convention 31-01-2003: Stateless Nations and the Convention's debate on regions" See N. MacCormick, *Questioning Sovereignty*, Oxford 1999.

‘does the administration have the necessary means to act successfully’ rather than ‘does the constitution explicitly recognize a competence to act’

We are witnessing the birth of a new international player, the EU, with a shared view of the person, the citizen and society through the Charter of fundamental rights. It is important that, in a post-sovereign and post-national world, this new player also provides vision for those nations in Europe which fall short of statehood but wish to have a direct say in the common project of Europe. In a sense the new conceptions of shared sovereignty should start from a completely different outlook: they should start and end with the citizen: citizens are the source of sovereignty, and the different layers of administration should be seen as the different levels in which citizens decide to act to defend their interests. As the opening paragraph of this contribution reminds us complex states or organizations (the EU) are made up not simply of citizens but, significantly, of citizens and the territorial sub-state entities of governance in which these citizens are constituted and which have different degrees of local, regional or national identities. On the other hand, if this new player fails to offer any interesting “constitutional” status to the regions it may be sending the message that the only way to fit in the EU institutional system is to become a Member State. Recent experiences like that lived in Montenegro in the spring of 2006 by Kosovo in the winter of 2008 add interesting tones to this monochrome palette.