

# The State of Autonomies in Troubled Times: The Pandemic Provides a Catalyst for Reinvigorating Inter-Governmental Relations

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**Abstract:** – The outburst of the pandemic occurred at a moment when the cooperation and the dialogue between territorial players had been reinforced in Spain. The implosion of the two-party system, the exhaustion of case law and the impact of the EU had already changed the dynamic of the ‘State of Autonomies’. The COVID-19 reinvigorated this trend moving from permanent conflict among tiers of government to growing cooperation. This growing cooperation has clear constitutional ramifications and could gradually rebuild the essential trust among tiers of government in Spain after years of conflict instigated by the Catalan and the Eurocrisis

**Keywords:** Pandemic and IGR; Bilateral and multilateral cooperation; Building trust.

## 1. Mistrust as the basic tenet of intergovernmental cooperation in Spain

One of the main features of the Spanish ‘State of Autonomies’ is the extremely high level of political controversy regarding the scope, asymmetry and even the need for political decentralization in Spain. The drafters of the 1978 Constitution were unable to come to agreement on the final structure of the State and so left the issue unresolved by postponing it.<sup>1</sup> Yet after all this time, we seem no closer to an end to the debate and political decentralization remains perhaps the most controversial aspect of the Spanish constitutional system.

Unsurprisingly, the relationship between the central government and the seventeen autonomous communities (hereinafter the ACs) has largely evolved in courts, since dialogue and cooperation among territorial political players have been particularly scarce. Mistrust among territorial players permeates the entire legal system. In fact, while the Spanish constitution contemplates several mechanisms to challenge before the Constitutional

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<sup>1</sup> P. Cruz Villalón *La curiosidad del jurista persa, y otros estudios sobre la Constitución*, Madrid, 2016, 388.

Court legal provisions enacted by either the central government<sup>2</sup> or by the regional governments, no mechanisms are contemplated to foster cooperation between the central and the regional governments or among the latter.<sup>3</sup> This feature of the Spanish Constitution is unsurprising, because we normally turn to law as the default system for conflict resolution when we do not trust the other party.<sup>4</sup>

As a consequence, pressure in the system tends to end up in the courts. In fact, between December 2011 and December 2015, 175 actions of unconstitutionality were brought before the Constitutional Court because of disputes between the central and regional governments. The two decisive factors behind this figure that corresponds to the 10th parliamentary term are the austerity measures implemented in the context of the Eurocrisis and the intensification of the conflict between the central and the Catalan governments. 82 out of the 175 actions of unconstitutionality targeted measures passed in response to the economic crisis. 49 out of the 175 actions were brought either by the central government challenging acts of the Catalan government or by the Catalan government against acts of the State. The magnitude of these numbers bears witness not only to the impact of both the Eurocrisis and the Catalan crisis upon the State of Autonomies but also to the shortcomings of the mechanisms for resolving conflicts between the State and the ACs.

However, this has begun to change since 2018 in a new political landscape where cooperation and dialogue among territorial players are encouraged. Specifically, the number of challenges before the Constitutional Court that did not first seek a negotiated agreement out of court has decreased. The change began in June 2018, when a no confidence vote led to the resignation of Spanish President Rajoy and the support of several nationalist parties was needed to form a new government. The fragmentation of the party system intensified after the 2019 general elections, when 22 parties obtained seats in the lower house of the Spanish parliament. Finally, in January 2020, a minority left-wing coalition government came to power.

From June 2018 onward the number of challenges before the Constitutional Court has clearly decreased because of successful negotiations

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<sup>2</sup> I use the terms “central government” instead of the term “national government” since the adjective national can be read in different ways in cases where there are several nationalist claims as in Spain. I also use the terms “regional governments” to refer to the governments of the autonomous communities, since Spain is generally considered a regional state. F. Palermo and K. Kössler, *Comparative Federalism. Constitutional Arrangements and Case Law*, Oxford, 2018, 9-10.

<sup>3</sup> Indeed, the only provision of the Spanish Constitution that addresses cooperation among regional governments reveals profound mistrust. Article 145.2 of the Spanish Constitution requires the authorization of the Spanish Parliament for any agreement among autonomous communities unless that agreement is limited to the management or performance of services.

<sup>4</sup> See, U. Frever, *Vertrauensfragen: Eine Obsession der Moderne*, München, 2013.

of disputes between the central and regional governments in bilateral meetings<sup>5</sup>. Intergovernmental relations (IGR) in Spain have been clearly improved since 2018, a trend facilitated by the implosion of the two-party system that dominated Spanish politics for decades.

The outburst of the pandemic thus occurred at a moment when the cooperation and the dialogue between territorial players had been reinforced. This article analyses the influence of the pandemic on the unexpected trend in the ‘State of Autonomies’ moving from permanent conflict among tiers of government to growing cooperation. Indeed, the pandemic has reinvigorated the dynamic of cooperation that both the Eurocrisis and the Catalan crisis instigated.

## 2. The ‘State of Autonomies’ reveals unexpected flexibility during the pandemic

In analysing the evolution of the framework of action at the federal and state levels, scholars have differentiated five consecutive stages of pandemic response:<sup>6</sup>

- a) The period of the appearance and spread of the virus prior to the first nationwide declaration of state of alarm (late January – 13 March 2020). During this short period of time, the ACs led the initiatives to contain the virus.
- b) The period from the time the first state of alarm went into force until it was deescalated (14 March – 21 June 2020).
- c) The first period of ‘new normality’ (22 June – 24 October 2020).
- d) The period of the second nationwide state of alarm (25 October 2020 – 9 May 2021).
- e) The second period of “new normality” (10 May 2021 – present).

Yet if we only focus on the pandemic’s effects on the functioning of the ‘State of Autonomies’, three periods might be distinguished: the first state of alarm, the “new normality” and the second state of alarm. During these periods, the allocation of powers showed unexpected flexibility, IGR increased, each and every regional president became a major leader before their constituencies and courts played a more active role in supporting IGR.

### 2.1. Pre-emption and the rise of cooperation: the first state of alarm

The first state of alarm conferred full responsibility on the central government to manage and implement measures to contain the Covid-19

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<sup>5</sup> From June 2008 until April 2022 there were 22 actions of unconstitutionality between the central and the regional governments, whereas from December 2011 until June 2018 there were 232

<sup>6</sup> M. Erkoreka, M. Grau and M. Kölling, *Decentralisation and Covid-19: Stress-testing the Spanish territorial system*, in N. Steyler (Ed.), *Comparative Federalism and COVID-19 Combating the Pandemic*, New York, 2022.

crisis. The President delegated authority to the ministers of health, defence, internal affairs, and transport, mobility, and urban affairs in their respective areas of responsibility, and any residual responsibility was assumed by the Minister of Health<sup>7</sup>. Thus, the first state of alarm initially implied clear centralization. This centralization called into question the theoretical lack of flexibility of the constitutional allocation of powers.

The Spanish allocation of powers may be characterized as an extremely detailed list of competences in a constitution whose amendment is in practice extremely onerous. The lack of space for political arrangements and mistrust among antagonist actors resulted in a theoretical separation of powers that relies on the legal fiction that courts are capable of apportioning powers in a clear, straightforward manner. This fiction derives from the presumption that the Constitution and the Statutes of Autonomy, in the first, could or even should foresee each and every detail of the separation of powers and, subsequently, that the meaning of those provisions would be so plain as to leave no room for divergent or evolving interpretations.

However, the exhaustive definition of the constitutional provisions squeezes out room for political arrangements,<sup>8</sup> while for practical purposes the allocation of powers must allow space so different political projects can coexist in the same territory and change over time. Similarly, room must also be left for the settlement of disputes involving political projects among the central and regional governments.

Competences are a basic and crucial element of the law. Perhaps it is because of their centrality that the notion of competences has become so well-known and established that it is now taken for granted. Importantly, however, the legal term *competence* encompasses several different specific meanings, all of which share one key feature: the restraint of power. In other words, whenever a competence is invoked, the actual concern relates to the limits on the power in question.<sup>9</sup> The allocation of powers among federal and regional authorities stems from arrangements made between the main political actors at both the foundation of the decentralized model and during its development. The notion that the separation of powers between the State and the ACs in Spain was fully complete represents an unconvincing fiction that has led to hundreds of challenges in courts.

It was in this context that the pandemic challenged one of the basic tenets of the Spanish allocation of powers, namely by triggering the preemption principle. In principle, if the powers are fully cabined to separate authorities, the preemption clause has no meaning.<sup>10</sup> Yet the central

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<sup>7</sup> Royal Decree 463/2020, 14<sup>th</sup> March

<sup>8</sup> R. Wahl, 'Der Vorrang der Verfassung' 20 *Der Staat* (1981) 507.

<sup>9</sup> F.C. Mayer, *Die drei Dimensionen der europäischen Kompetenzdebatte*, 61 *ZaöRV* (2001) 580.

<sup>10</sup> Article 149.3 of the Spanish Constitution establishes that the laws of the central state shall prevail, in case of conflict, over those of the Autonomous Communities regarding all matters over which exclusive jurisdiction has not been conferred upon the latter. However, it has

government action preempted the actions of the ACs through recourse to the constitutional provisions regarding the state of alarm. In fact, the powers of the ACs were overridden by the ones of the State whenever they conflicted during the first state of alarm. Although the preemptive effect ceased when the state of alarm was lifted, the occurrence attests to the actual flexibility that the allocation of powers can and must demonstrate. The need for significant flexibility in times of deep crisis should be explored and better articulated, since it could decrease the pressure on the Constitutional Court to play a decisive, authoritative role in defining the balance of power in the State of Autonomies.

Moreover, the curtailment of regional powers was compensated by increased AC participation in formulating the measures adopted by the central government during the first state of alarm. Enhancing participation in decision-making has largely been considered the best way to compensate for the unavoidable loss of exclusive powers in a global and interconnected world. Still, in the Spanish case no formal avenues exist for AC participation in areas allocated to the competency of the central government. This shortcoming became especially glaring during the first state of alarm when key decisions were adopted in fields where the ACs actually possessed most of the powers involved. Spain found its way out of this dilemma by relying on the existing mechanisms of cooperation, particularly the Conference of Presidents and the Interterritorial Council of the National Health Service.

Indeed, the Covid-19 crisis brought unprecedented relevance to Spain's Conference of Presidents, which has held 15 meetings since March 2021, whereas from its inception in 2004 until the Covid-19 pandemic it had only convened on six occasions. In addition, the National Health Interterritorial Council became a key component in pandemic to allow the ACs to have a voice in decisions that, otherwise, would have been adopted unilaterally by the central government.<sup>11</sup> The few mechanisms for shared government were thus reinforced to moderate the loss of self-government during this period.

Nonetheless, as the pandemic slowed down, asymmetrical responses to the crisis increasingly arose. The pandemic affected territories in different ways that were not synchronous.<sup>12</sup> Furthermore, the Spanish constitutional system enshrined an asymmetric State that presupposed bilateral cooperation. Accordingly, the state of alarm was lifted through bilateral agreements between the central Spanish government and the AC

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rarely been applied. T. de la Quadra-Salcedo Janini, La reanimación de la prevalencia: ¿una grieta abierta en nuestro modelo centralizado de justicia constitucional?, 111 *REDC* (2017).

<sup>11</sup> T. De la Quadra-Salcedo Janini, 'Estado Autonómico y lucha contra la pandemia' in P. Biglino; F. Durán *Los Efectos Horizontales de la COVID sobre el sistema constitucional*, Zaragoza, 2020.

<sup>12</sup> <https://cor.europa.eu/18/en/our-work/EURegionalBarometerDocs/4370-Barometer%20optimized.pdf>

governments. The Royal Decree of 8 May 2020 that prorogated the state of alarm established that the measures for de-escalation were to be jointly adopted by the AC and the central government in order to adapt them to the particular circumstances in each and every AC. Upon reaching an agreement, the president of the AC was to implement it. In this sense, the first state of alarm implied a clear centralization of power that reinforced both the preemption clause and the coordinative power of the central government, both of which attest to the inherent flexibility of the allocation of powers.<sup>13</sup>

The centripetal effect of the pandemic, however, would soon end. On one side, it is the ACs themselves that have directly managed the public health system for the last 20 years. Abruptly switching management of a persistent health crisis to the central government would have been unsound. On another side, parliamentary support for the central government relies on a mix of regional parties particularly attentive to the centralization of power taking place. This led to a multilateral but also bilateral renaissance of the IGR. In fact, nationalist political parties with strong parliamentary support prefer bilateral cooperation in line with asymmetrical decentralization. Bilateral cooperation was extended to all the ACs, since all of them have competences on public health. Given the varied impact of the pandemic depending on the region, bilateral negotiation actually made sense.

Bilateral dialogue brought with it asymmetric de-escalation that allowed a degree of control over the pandemic while gradually reopening economic activity. However, the de-escalation was less smooth than expected as several ACs sought to lift restrictions too prematurely.<sup>14</sup> Furthermore, the Spanish government lacks effective legal (or administrative) capacity to monitor and assure proper implementation of the de-escalation.<sup>15</sup> On balance, the lesson that the governments drew from this period was that IGR represented the only viable avenue for containing the crisis.

## 2.2. An unprecedented role for the Presidents of the Regions during the second state of alarm

In mid-October 2020, infection rates spiked across the country. Faced with renewed trepidation, eleven ACs asked the central government to declare another general state of alarm. On 25 October 2020, the central government did just that, declaring a second nationwide state of alarm in Spain until 9 May 2021<sup>16</sup>. The measures taken under the second state of alarm, however, were less severe than those implemented during the first. They included

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<sup>13</sup> In a similar vein, F. Velasco and L. López de Castro, *Distribución territorial del poder durante la pandemia*, AFDUAM, 2021.

<sup>14</sup> [COVID-19 in Spain: a predictable storm? - The Lancet Public Health](#)

<sup>15</sup> A. Carmona, *El estado autonómico y la gestión jurídica de la pandemia*, Cuadernos Manuel Giménez Abad 21 (2021).

<sup>16</sup> Royal Decree 926/2020, 25th October

restrictions on social and religious gatherings and a curfew between 11:00 pm and 6:00 am, and similar regulations. These measures were designed to be scalable to the evolution and circumstances of the pandemic in the ACs by their respective presidents, allowing for asymmetrical, region-by-region management of the crisis.

The boost in the political relevance of the presidents of the ACs caused by the second state of alarm was unprecedented because it allocated them the power to take decisions to which the citizens were extremely sensitive. The second state of alarm reinforced the self-government of the ACs by empowering the regional leaders to handle the pandemic. In practice, the measures adopted by the ACs did not vary greatly, although some ACs, such as Castile and León or Valencia, chose to exercise caution, whereas others were quite reluctant to implement restrictive measures, President of Madrid being the prime example.

Interestingly, the preference for more or less restrictive measures did not correspond to the political party in power. The lack of horizontal cooperation, however, made it easy to transform discrepancy among ACs into a struggle between the Socialist Party and the People's Party. In this regard, the cases in which the AC government of Madrid voted against the measures of the Interterritorial Council of the Spanish National Health Service were framed as votes against the central Socialist Party-led government. The position of the other ACs where the People's Party was also in control, in contrast, went largely unnoted. This dynamic suggests that vertical cooperation between the AC and central government is highly susceptible to political antagonism.

Horizontal cooperation, however, seems to minimise the risk of misuse of the mechanism for IGR because any Autonomous Community that wants to antagonise the central government needs the support of a significant number of its peers. Such support can be difficult to rally when the decision of one AC can deeply compromise the policies of another, the risk of which is particularly acute in the management of a pandemic. Each territory may require different measures but those measures must be coordinated at the very least with the neighbouring regions. All in all, during this period the State of Autonomies was reinforced and grew in strength.

The increased involvement of the regions in the management of the pandemic is unsurprising. On one side, two decades of leaving health service provision to regional authorities have deprived the central government of the necessary experience and know-how to coordinate effectively.<sup>17</sup> On another side, increased cooperation fomented trust among territorial leaders that opened up new avenues for political dialogue. In a nutshell, the pandemic triggered a centralized state of alarm that moved towards a shared and

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<sup>17</sup> M. Erkoreka, M. Grau and M. Kölling, *Decentralisation and Covid-19*, cit., 39.

asymmetric de-escalation that ended up in regional implementation of the state of alarm.

### 2.3. The “new normality”: Are courts back in the picture?

During the ‘new normality’, ACs widely exercised their powers to tackle the crisis. In this regard, ACs imposed restrictions on mobility and selective confinement. Significant variance among the measures adopted was feared but the ACs all ended up applying similar measures and restrictions. The coordination of the measures was maintained by virtue of the Interterritorial Council of the National Health Service. In fact, the vaccination strategy was designed by the Vaccine Advisory Committee comprised of experts from all the ACs and the central government.

It should be noted, however, that courts struck down some of the restrictions adopted by regional governments<sup>18</sup>. According to the judges’ own interpretation of the powers of the ACs to determine the measures adopted to tackle the pandemic throughout the territory, the resulting policy needed greater coordination. In turn, the annulment of measures or their extension by courts caused noticeable unease among several regional governments.

This occurred in the framework of two amendments that were made to the Administrative Jurisdiction Act. First, in September 2020, an amendment was passed to require ratification by Regional Higher Courts for measures that restricted fundamental rights with the goal of combating the pandemic. Subsequently, another amendment was added to make the Regional Higher Courts’ decisions regarding the pandemic challengeable before the Supreme Court in order to concentrate the courts’ interpretation of the regional powers to tackle a pandemic.

Unsurprisingly, the Constitutional Court played a pivotal role, especially after declaring the second state of alarm unconstitutional in Judgment 183/2021. From the perspective of the ACs, the main finding behind the Court’s decision was that stricter control over the state of alarm by the central government was needed before its implementation could be delegated to the ACs. In other words, the government needed to establish clear criteria and guidelines for not only the implementation of the state of alarm but also for follow up mechanisms and final review.

The central government, however, had simply listed the outer limits on restrictions of fundamental rights that the ACs were to respect, allowing them full discretion to implement less severe restrictions or even to suspend them. Furthermore, the declaration of the second state of alarm also established that the Conference of the Presidents could ask the central

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<sup>18</sup> Particularly the High Courts of the Basque Country and Aragon [Ratificación casacional de medidas autonómicas anti-covid, conforme al nuevo Real Decreto-Ley 8/2021 – Blog de Francisco Velasco \(wordpress.com\)](https://www.francoisvelasco.com/2021/09/08/ratificacion-casacional-de-medidas-autonomicas-anti-covid-conforme-al-nuevo-real-decreto-ley-8-2021/).

government to lift the state of alarm once it had been in effect for four months if the Interterritorial Council of the National Health Service agreed. This provision was also declared unconstitutional.

Summarizing, the Constitutional Court held the central government, along with the Lower Chamber of Parliament, as solely responsible for the state of alarm. Delegating implementation to the ACs was permitted, but only under tight control by the central government. The state of alarm had ended by the time the Court's judgment was handed down, yet the decision is nonetheless extremely relevant. Such judgments serve as precedents, creating path dependencies that reinforce structural dynamics in a federal or regional system.<sup>19</sup>

The crucial role played by the Spanish Constitutional Court in the State of Autonomies makes sense in light of the scarcity of dialogue among the central government and ACs. Generally, “the more inter-institutional and the inter-governmental coordination is lacking, the more radical is the role played by the judiciary finding rational ways to determine the division of work among the inevitably numerous players.”<sup>20</sup> Given these circumstances, it is surprising that the Constitutional Court chose not to support an interpretation of the provisions of the state of alarm coherent with the growth of IGR that occurred during the pandemic and the already established powers of ACs in the area of public health (although the dissenting opinions did). An interpretation aligning the rules for the state of alarm with the development of the State of Autonomies represented the wisest strategy, since stability, effectiveness, and legitimacy can only be maintained through continuous flexibility and adaptation in federal and regional states.<sup>21</sup> Such a strict interpretation of the State of Alarm Act is surprising, at the very least because it was enacted in 1981 when there were only three ACs in Spain and the transfer of services and human resources to them was only beginning.

Federal and regional states must be flexible to endure. As Jenna Bednar argues, “even if a constitutional designer did know what the people wanted and could anticipate future changes, she would still have to acknowledge the imprecision of social science understanding of how to calibrate the distribution of authority to meet these goals.” In other words, only flexibility brings stability.<sup>22</sup> Furthermore, because conflict and mistrust among territorial players are undeniable characteristics of the State of Autonomies, the system finds itself in dire need of tools that will allow it to lighten the workload of the courts.

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<sup>19</sup> P. Popelier, *Dynamic Federalism*, New York, 2021, 303.

<sup>20</sup> F. Palermo and K. Kössler, *Comparative Federalism*, cit., 451.

<sup>21</sup> A. Benz, *Dimensions and dynamics of federal regimes*, in A. Benz & J. Broschek (Ed.) *Federal Dynamics: Continuity, Change, and the Varieties of Federalism*, Oxford, (2013), 74.

<sup>22</sup> J. Bednar, *The Robust Federation: Principles of Design*, Cambridge, 2009, 219.

In the absence of effective policy, law was introduced to govern IGR, which inflated the prominence of the Constitutional Court, a development that, in turn, has undermined the legitimacy of the Constitutional Court itself.<sup>23</sup> This is the main reason that the Court's failure to grab the opportunity to acknowledge an interpretation based on broad intergovernmental consensus is so surprising.

### 3. Inter-governmental cooperation: a rising trend aligned with deep, ongoing changes in the Spanish political system

In recent years, IGR has clearly been on the rise in Spain. As already mentioned, the pandemic reinvigorated the Conference of Presidents and transformed the Interterritorial Council of the Spanish National Health Service into an essential player for the adoption and coordination of pandemic measures. Building on or expanding this trend in other fields can also be envisaged.

In fact, setting aside the meetings of the Interterritorial Council of the National Health Service, there were 121 meetings of the Sectorial Conferences in 2021. Before the pandemic, the Sectorial Conferences had never met more than 77 times in one year. Not only is the number of meetings relevant, so are the decisions taken in them and the number of ACs participating in them. In this regard, both the pandemic and the Recovery and Resilience Facility (RRF) were taken up in the Sectorial Conferences. Currently all the ACs tend to participate in these meetings whereas, in the past, the ACs with a special tax and fiscal system generally abstained because the Sectorial Conferences typically required collaboration agreements that demanded additional funding from the regions that lacked the tax system for them.

Most importantly, the collaboration has opened an avenue to tackle the conflict between the Catalan and the Spanish governments. Traditionally, Catalonia has been actively involved in the collaborative network between the central government and the ACs, playing a leading role in fields such as the participation of the ACs in the EU.<sup>24</sup> However, in 2018 and 2019 Catalonia chose not to send a representative to the meetings of the Council as part of the Spanish delegation. Although it resumed its participation in 2021, it had also stopped taking part in the Council on Fiscal and Financial Policies, a key conference for the tax system coordination.

It is also remarkable that both bilateral and multilateral cooperation are flourishing. Bilateral cooperation, an inherently crucial element in the asymmetrical State of Autonomies, has markedly intensified on all fronts

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<sup>23</sup> M. González Pascual, *Methods of Interpreting Competence Norms: Judicial Allocation of Powers in a Comparative Perspective*, 14 *GLJ* (2013).

<sup>24</sup> M. González Pascual, *Las Comunidades Autónomas en la UE. Condicionantes, evolución y perspectivas de futuro*, Barcelona, 2013.

since 2018. An immediate first effect of the increase in bilateral negotiations among the ACs and the central government can be seen in the drop off in challenges before the Constitutional Court. The legal basis for bilateral negotiation is Article 33.2 of the Constitutional Court Organic Act. It contemplates a simple and rather informal procedure that relies on the will of the parties. The provision was added in 2020 and has catalysed the establishment of bilateral commissions. While in 2020 there were only seven bilateral commissions, presently there is a bilateral commission between each and every AC.

Secondly, the role of the bilateral Mixed Commissions on Transfers of Services has also been strengthened. The Spanish Constitution devolved the task of developing the ‘State of Autonomies’ to the Statutes of Autonomies, which had the consequence of increasing the asymmetry of power among the ACs. In fact, some Statutes of Autonomy have undergone profound amendment over the years, whereas others remain untouched. The heterogeneity stems not only from the bilateral design that permits asymmetry, but also from gradations in the desire of each AC for self-governance. The original purpose of the Mixed Commissions on Transfers of Services was to coordinate the transfer of personnel and resources to the ACs when they came into being, but some still actively continue.

A Mixed Commission on Transfers of Services is convened when and only if an AC requests for one, thereby opening negotiation with the central government that could eventually lead to an agreement. Sometimes these transfers are quite significant, such as that adopted in May 2021 to make effective the competence of the Basque Country to administer the penal institutions in it,<sup>25</sup> but they are often much smaller in scale, for example to transfer a single facility from central government to AC management. Although the Mixed Commissions on Transfers of Services are capable of ensuring the effectiveness of the regional powers, their success depends on the will of the AC and the dialogue with the central government. So they too represent a source of asymmetry.

Thirdly, more general bilateral commissions have been initiated and their reach has been expanded. In fact, six of the Statutes of Autonomy reformed since 2006 have created bilateral commissions in which the State and the Autonomous Community are theoretically on equal footing and can negotiate in any field. Since 2018, five bilateral commissions have been convened, including the Catalonia-Central Government Bilateral Commission.

Finally, and relatedly, the bilateral dialogue represents the most promising instrument to tackle the deep tensions between the central and the Catalan governments. A new bilateral “dialogue roundtable” forum has been established for the long-standing territorial conflict. In it members of

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<sup>25</sup> [Disposición 11239 del BOE núm. 161 de 2021.](#)

both governments participate, including on occasion their respective presidents, and its agenda is thorough and thought through.<sup>26</sup>

The bilateral and multilateral cooperation has thus grown not only in terms of the number of meetings but also in the relevance of their deliberations and possible outcomes. IGR is becoming a determinant variable in the formula for successful AC participation in central government decision-making, and now represents much more than forums for the technical coordination of the minutiae of specific policies and collaboration. The executive-based institutions are proving to be the most effective guarantee for AC interests in the State's decision-making.<sup>27</sup> Their reach and relevance should not be underestimated, as they have opened an avenue to solve fundamental conflicts in and over the constitutional system. This development is crucial because the Constitutional Court has traditionally been the only forum for solving the differences between the ACs and the central government. This imposed an enormous workload on the Court, to the point of hampering its very legitimacy, and the system has proven unable to adapt to either the Catalan crisis or the Eurocrisis.

Balancing bilateral and multilateral cooperation is extremely relevant as well as novel. Cooperation in key areas tends to be bilateral or, at the very least, regional authorities particularly stress bilateral cooperation in such matters. Even when multilateral negotiations or cooperation have been undertaken, as a matter of fact, autonomous communities have often framed them as bilateral – as a sort of “pretend bilateral negotiation”<sup>28</sup> – which reveals the relative distaste for multilateral cooperation, however essential it is for the proper functioning of the ‘State of Autonomies’.

Bilateral cooperation is one of the more salient paths for intergovernmental cooperation in Spain, however it hampers multilateral efforts to reach consensus when it addresses matters that affect several ACs in similar fashion. Bilateral cooperation can also hinder resolution of disputes when it is considered a privilege by any of the parties involved. Furthermore, bilateral cooperation tends to stimulate compartmentalization and to favour stronger ACs, encouraging them to push for even greater advantage through more asymmetry. Where the central government loses control, federalism through bilateral negotiations risks accelerating centrifugal dynamics.<sup>29</sup>

Bilateral cooperation is thus a fundamental trait of the State of Autonomies that should be balanced with the multilateral cooperation.

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<sup>26</sup> [060220-AgendaParaElReencuentro.pdf \(lamoncloa.gob.es\)](https://www.lamoncloa.gob.es/060220-AgendaParaElReencuentro.pdf).

<sup>27</sup> F. Palermo, *Beyond Second Chambers: Alternative Representation of Territorial Interests and their Reasons*, 10 *Perspectives on Federalism* (2018).

<sup>28</sup> In fact, the central government often reaches the same agreement with several regional governments but instead of drafting and signing a single agreement, each regional government signs a separate one in which no mention whatsoever is made of the multilateral agreement. E. Albertí, *Relaciones de colaboración con las Comunidades Autónomas*, in E. Aja (Eds.) *Informe Comunidades Autónomas 1998*, Barcelona, 1999, 67.

<sup>29</sup> P. Popelier, *Dynamic Federalism*, cit., 319.

Regarding this balance, the pandemic, along with the RRF, have served as a catalyst accelerating the ongoing trends. Notably, IGR in Spain has aligned with the pandemic management in other federal and regional states. Allowing space for local diversity in pandemic response offers potential advantages by enabling “constituent units to respond to local conditions, to experiment with new approaches, and to strengthen accountability.”<sup>30</sup>

While this seems inarguable, the actual drivers of the growth of IGR in Spain are the implosion of the two-party system, the exhaustion of case-law and the impact of the EU upon the ‘State of Autonomies’.

### 3.1. The implosion of the two-party system

The euro crisis turned the traditional Spanish two-party system into a multi-party system. The transformation followed a long process of loss of support for the two main parties<sup>31</sup> that eventually yielded a Lower Chamber in which 22 political parties held seats. The current central government is a left-wing coalition that needs the support of at least other five political parties in the Lower Chamber.<sup>32</sup> The situation is quite similar at the regional level, where 11 regional governments out of 17 are ruled by coalitions that in most cases depend on support by minority political parties. A fully new dynamic is emerging that changes the relations among tiers of governments.

In the past, the most important changes in the State of Autonomies’ were decided by the two main political parties, since the only two ACs, if any, with which the central government had to negotiate were the Basque Country and Catalonia. An agreement between the leadership of the Socialist Party and the People’s Party therefore generally sufficed. Subsequently, the agreement would be drafted as a proposal to amend or enact new Statutes of Autonomy, which the regional parliaments usually pass without question. Hence, no need (or advantage) was seen in opening negotiations with the regional governments.

The dynamic changes when coalitions govern in different tiers of government. Coalition rule increases the need for negotiation and diminishes the potential loss of power, since sharing or distributing power is already part of daily decision-making. Power-sharing governments tend to bolster IGR, whereas power-concentrating governments undermine it.<sup>33</sup> Hence, if Spain remains a multi-party system, IGR should keep growing.

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<sup>30</sup> Ch. Saunders, *Grappling with the pandemic Rich insights into intergovernmental relations*, in N. Steyler, *Comparative Federalism and COVID-19*, cit., 383.

<sup>31</sup> The PP and PSOE garnered 73.35% of votes in 2011, but votes for the two main parties were below 50% in 2014.

<sup>32</sup> The number of political parties needed to pass a measure in the Lower Chamber depends on the majority required for the measure and on the number of abstentions. Abstentions sometimes, however, also help the government pass legislation.

<sup>33</sup> N. Bolleyer, *Intergovernmental Cooperation: Rational Choices in Federal Systems and Beyond*, Oxford, 2009, 6.

### 3.2. The erosion of constitutional case-law

Traditionally, the lack of trust among the territorial players in Spain led them to resolve their disagreements by challenging the adversary's position in court. The constant involvement of the courts, however, has corrosive effects on the allocation of powers. In fact, court decisions tend to be overly rigid in that they cannot be reversed by the territorial players themselves. Furthermore, once courts pronounce their reading of a legal provision, they enshrine their interpretation of the specific competence underlying the controversy, thereby framing the terms of the debate for future controversies.<sup>34</sup> Courts play a crucial role in the allocation of powers when a referee is needed to resolve disputes over competence. Yet the task before courts is particularly difficult when they are asked to interpret the norms regulating competence. It is the political strength of political actors that determines the allocation of powers reflected in the constitutional framework. The competences of all the players must be equally evaluated. Hence, the Constitutional Court must not only preserve the constitutional space of the State but also the constitutional space of the autonomous communities.<sup>35</sup>

Since a system as highly decentralised as Spain is intrinsically dynamic, the balance between continuity and change varies over time in order to provide a proper response to new problems while keeping the balance of power intact. Nevertheless, different organs produce different outcomes, and institutional path dependency is particularly entrenched in the judiciary. Substantial changes that courts are reticent or unable to effect may be needed precisely to maintain the initially envisaged balance. Currently the political parties are undertaking such changes by fostering a new narrative that praises IGR. This trend is not surprising given the judicial deadlock reached in the conflicts over Catalan autonomy and the Eurocrisis.

Even though a profoundly divided Constitutional Court tends to protect the powers of the central government, in this case it has opened the door to readjusting its case-law. Dissenting opinions calling for more AC participation have become a constant in the decisions of the Court. Such dissenting opinions compel the Court to refine and back up its reasoning in subsequent cases, which quite often augurs the emergence of new case-law.<sup>36</sup>

In addition, the Constitutional Court has played a crucial role in the withdrawal of several pending challenges that the central government had filed against regional acts. While the Constitutional Court may refuse to

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<sup>34</sup> L. López Guerra, *El Tribunal Constitucional y la resolución de los conflictos competenciales*, 10 *RVAP* (1984) 368.

<sup>35</sup> H. D. Jarass, *Allgemeine Probleme der Gesetzgebungskompetenz des Bundes*, 19 *NZfVwR*, (2009)1092.

<sup>36</sup> L Fisher, *Constitutional Dialogues. Interpretation as Political Process*, New Jersey, 1988, 188.

grant withdrawal if a constitutional interest is at stake,<sup>37</sup> it has accepted each and every withdrawal when the action of unconstitutionality derived from a controversy between the central and a regional government.<sup>38</sup> Generally speaking, withdrawals are technical and unproblematic because they usually occur after the dispute is rendered moot by an intervening court decision, the repeal of legislation or the enactment of new law. Yet from 2018 on, most withdrawals reflected shifts in the new central government's stance on important policy fields. In this regard, we might highlight a certain change in the case law granting more discretion to the regions on social entitlements in cases similar to those under debate in bilateral commissions.<sup>39</sup> The new case law made such arrangements easier for the central government. Furthermore, the Constitutional Court accepted each and every request by the central government to withdraw their constitutionality actions. In sum, it appears the Constitutional Court has also come to believe that the allocation of powers had been misappropriated by the main players and that bilateral commissions have facilitated political negotiation.

### 3.3. The growing influence of the EU

IGR in Spain has always been much more fruitful in the setting of EU bodies. The meetings and agreements among regional governments and among them and the central government have always been much more successful when the matter to be settled involved the participation of the ACs at the EU level.<sup>40</sup> In other words, IGR with respect to European integration has been quite solid, multilateral and even horizontal when necessary. Similarly, the Next Generation EU recovery plan will undeniably drive further growth in IGR in Spain. In fact, the Sectorial Conferences are convened regularly to deal with the implementation of the Recovery and Resilience Facility and, more importantly, Spain's Recovery and Resilience Plan specifically includes new measures to improve its IGR. The Country Specific Recommendations addressed to Spain repeatedly insisted on the need for improved coordination and cooperation among the various tiers of government.<sup>41</sup> Since the RRF is intrinsically linked to the Country Specific Recommendations,<sup>42</sup> Spain's Recovery and Resilience Plan includes a corresponding proposal.<sup>43</sup>

The central government has not yet tabled a bill to improve IGR but one is in the pipeline. Furthermore, a new Ruling of the Conference of

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<sup>37</sup> Order 155/1996.

<sup>38</sup> J. A. Montilla, *La solución política a las controversias competenciales*, 12-13, ADCP, (2001) 133.

<sup>39</sup> Judgments 16/2018, 80/2018, 8/2019 and 31/2019.

<sup>40</sup> M. González Pascual, *Methods of Interpreting*, cit.

<sup>41</sup> See the Recommendation for a Council Recommendation on the 2019 National Reform Programme of Spain and the Recommendation for a Council Recommendation on the 2020 National Reform Programme of Spain.

<sup>42</sup> Article 17 Regulation (EU) 2021/241.

<sup>43</sup> [16062021-Componente11.pdf \(lamoncloa.gob.es\)](https://www.lamoncloa.gob.es/16062021-Componente11.pdf)

Presidents has been approved by the Conference of Presidents itself.<sup>44</sup> The amendment has turned the Conference of the Presidents into the key organ of IGR, one disposing of a Secretary and charged with specific tasks. This should institutionalise the role of the Conference of Presidents to allow it to play a relevant role in IGR on a regular basis rather than only during critical junctures. Furthermore, Spain's Recovery and Resilience Plan also includes a proposal to improve the Sectorial Conferences by amending the Public Sector Legal Framework Act, which requires more concrete wording to reach its potential. Similarly, new rules are being discussed to improve IGR beyond the specific context of the pandemic. In this sense, the European framework might be seen as having triggered necessary reform that would not have otherwise taken place.

#### 4. Concluding remarks

Political power in Spain has oscillated between centralization and decentralization, the latter particularly when the central government needed the support of the Catalan and/or Basque nationalist parties with seats in the Lower Chamber. These periods brought not only greater decentralization, but also deepened power asymmetries among the ACs. Although such shifts are primarily political,<sup>45</sup> they also have constitutional ramifications in a framework that gives wide leeway for the asymmetrical development of self-government among the ACs. The implosion of the two party-system, the persistent questioning of standing case-law and the influence of the EU, however, seem to have heralded a new trend of solid and sincere cooperation among the distinct tiers of government in the State of Autonomies. Such cooperation is necessarily both bilateral and multilateral. The pandemic and its ensuing socioeconomic crisis, provided a strong catalyst that drastically accelerated dynamics favouring IGR that had already started to emerge.<sup>46</sup> Nonetheless, it is hard to know whether the new dynamic will endure or not. The pendulum may swing back. On one side, the radical right wing political party VOX appears to be gaining popular support, and scaling back the self-governing powers of the ACs is a central pillar of its political platform. However unconstitutional in current circumstances, a shift towards strong centralization were this party to come to power could change the paradigm. At the same time, all the ACs have gained influence because of increased IGR. No matter their political orientation, which varies widely, regional governments will not easily relinquish the visibility and political strength that they enjoy at the moment.

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<sup>44</sup> [Reglamento-Conferencia-de-Presidentes-13-03-2022.pdf \(mptfp.gob.es\)](https://www.mptfp.gob.es/Reglamento-Conferencia-de-Presidentes-13-03-2022.pdf)

<sup>45</sup> In this regard the Spanish case is close to the Italian one, See F. Palermo 'Asymmetries in the Italian regional system' in E. Arban, G. Martinico and F. Palermo (Eds), *The Italian contribution to comparative regionalism*, New York, 2021.

<sup>46</sup> P. Popelier, *Dynamic Federalism*, cit., 281.

The institutional reforms currently being elaborated, on the other side, are passed, they would have an undeniable effect in favour of IGR. Even if finally abrogated, they would still affect institutional policy and culture. Attempts at reform become embedded in ongoing institutional evolution, as Arthur Benz argues, to the extent that “reforms never succeed or fail in total. Each reform builds on earlier discussions, proposals or partial changes.”<sup>47</sup> The future of the State of Autonomies remains an open question, but the impact of the pandemic upon the balance of power between the ACs and the central government and the emphasis on IGR will not fade easily.

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<sup>47</sup> A. Benz, *Dimensions and dynamics*, cit. 87.