



CENTRO STUDI SUL FEDERALISMO

PERSPECTIVES ON FEDERALISM



ISSN: 2036-5438

# The new “Estatutos de autonomía” in Spain: a brief overview of the literature

by

Giuseppe Martinico

Perspectives on Federalism, Vol. 2, issue 1, 2010



## Abstract

In the latest years, the Spanish constitutional system has been characterized by a proliferation of sub-national fundamental charters (“*Estatutos de las Comunidades Autónomas*”, hereinafter CAs): in fact, many CAs are currently exploring the possibility to amend their basic charters.

This short review article aims at providing a brief overview of the recent developments in this field occurred in Spain

## Key-words:

Spain, Spanish regionalism, *Estatutos de las Comunidades Autónomas*



## 1. Preliminary remarks<sup>I</sup>

In the latest years, the Spanish constitutional system has been characterized by a proliferation of sub-national fundamental charters (“*Estatutos de las Comunidades Autónomas*”, hereinafter CAs): in fact, many CAs are currently exploring the possibility to amend their basic charters<sup>II</sup>.

This short review article aims at providing a brief overview of the recent developments in this field occurred in Spain.

When looking at this complex phenomenon, one could discern at least four main issues:

1. The reasons for this new process of *autonomía estatutaria*;
2. The content of the new proposals of *Estatutos*;
3. The nature of the principles and the provisions on local identities contained in the *Estatutos*;
4. The relationship between the new *Estatutos* and the Spanish Constitution.

I am going to deal with these four issues in this article, attempting to summarize (a part of) the massive literature appeared in these years.

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<sup>II</sup> The final version of this article was submitted and accepted in May 2009.

<sup>II</sup> For a general reflection on the subject, see G.J. Ruiz-Rico Ruiz *La reforma de los Estatutos de Autonomía : actas del IV Congreso de la Asociación de Constitucionalistas de España*, Tirant lo Blanch, 2006; L.Ortega Alvarez “Los nuevos estatutos de autonomía”, in *Cuadernos de derecho local*, n. 16, 2008, 102-113; I. Lasagabaster Herrarte, “La reforma de los estatutos de autonomía: una reflexión sobre su teoría y su práctica actuales”, *Revista catalana de dret públic*, n. 31, 2005, 15-56; M.A.García Herrera- J. M. Vidal Beltrán- J. Sevilla Segura (eds), *El estado autonómico: integración, solidaridad, diversidad*, Vol. I and II, Colex, Madrid, 2005; I. M. Delgado-L.Ortega Alvarez (eds), “La reforma del Estado Autonómico”, CEPC, Madrid, 2005; F.J.García Fernández, “La reforma de los Estatutos de Autonomía y la Constitución”, *Temas para el debate*, 126, 2005, 25-28; L. Martín Rebollo, Sobre los estatutos de autonomía y sus pretendidas reformas: algunos recordatorios y otras reflexiones, in *La reforma de los Estatutos de autonomía*, 2003, Junta de Castilla y León, 33-68; M.A. García Herrera- J. M. Vidal Beltrán- J. Sevilla Segura (ed.). *El estado autonómico : integración, solidaridad, diversidad*, Colex, Vol. 2, 2005.



## 2. The Constitutional background

Although the Spanish Constitution (“CE”) recognizes the State unity as a fundamental value, rt. 2 also “*guarantees the right to autonomy of the nationalities and regions which make it up, and the solidarity among all of them*”. This is the starting provision to understand the phenomenon of *autonomía*<sup>III</sup>. The competences of the CAs are not listed in the Constitution, but in the *Estatutos*; at the same time, there is not a list of CAs in the CE.

There are relatively few constitutional provisions devoted to the internal organization of the CAs (Articles 67, c.1; Art. 69, c.5; 87, c.2; 147, c.2, lett. C); Art. 148, c. 1, n. 1; 152, c. 1; 153; 155; 161, c. 2 and 162, c. 1, lett.a)<sup>IV</sup>.

Together with these provisions, there are many non-constitutional sources governing the process of *autonomía* (this phenomenon is called by scholars “de-constitutionalization”<sup>V</sup>). At the same time, the recalled constitutional provisions set a strong limit to the will of the subnational legislators to modify the *Estatutos*.

According to a reconstruction by Reyes<sup>VI</sup>, it is possible to identify three groups of relevant constitutional provisions:

1. provisions which ensure the existence of such institutions of self-government and acknowledge competences in terms of self-organization. Art. 147, c. 2, lett. C and Art. 148, c. 1 CE, belong to such a group. The former reads:

- 2.

*“The Statutes of autonomy must contain:*

- a) *The name of the Community which best corresponds to its historical identity.*
- b) *The delimitation of its territory.*
- c) *The name, organization, and seat of its own autonomous institutions.*
- d) *The competences assumed within the framework of the Constitution and the bases for the transfer of the corresponding services to them”.*

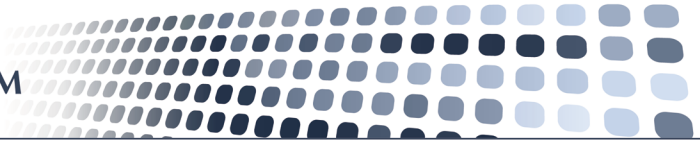
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<sup>III</sup> For a general overview on the CAs in Spain, see: A.Sánchez Navarro, “30 años de Comunidades Autónomas”, in *Diario La Ley*, 2008

<sup>IV</sup> M.Aragón Reyes, “L’organizzazione istituzionale delle Comunità autonome”, in *Diritto Pubblico Comparato ed Europeo*, n.3, 2007, 1156 – 1170, 1156.

<sup>V</sup> M. Aragón Reyes, “La construcción del Estado autonómico”, in *Revista general de derecho constitucional*, 2006, 1 ff.

<sup>VI</sup> M.Aragón Reyes, “L’organizzazione cit, 1156 – 1157.



The latter adds that the CAs may assume competences in, among other things, the organization of their own institutions of self-government. This provision means that only subnational norms (the norms of the CAs) may implement the provisions contained in the *Estatutos* regarding the institutional organization of the CA<sup>VII</sup>. This expressly implies a reserved jurisdiction for the subnational source in this field.

3. Provisions regarding the general organization of the CA, whichever its institutional structure. This is the case of Art. 1, c.1, according to which: “*Spain constitutes itself into a social and democratic state of law which advocates liberty, justice, equality, and political pluralism as the superior values of its legal order*”. This article forbids possible non-democratic evolutions for all the parts of the State, including the subnational entities, especially with regard to the pluralistic and democratic structure they must have.
4. Provisions concerning the form of government: we are referring to Articles 67, c.1<sup>VIII</sup>; 69, c. 5<sup>IX</sup>; 87, c. 2<sup>X</sup>; 152, c.1<sup>XI</sup>; 153<sup>XII</sup>; 155<sup>XIII</sup>; 162. c.1, lett. a)<sup>XIV</sup>. Among these, the

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<sup>VII</sup> M.Aragón Reyes, “L’organizzazione cit, 1156

<sup>VIII</sup> “(1) No one may be a member of the two Chambers simultaneously nor be a member of an Autonomous Community Assembly and a Deputy to the House of Representatives at the same time”.

<sup>IX</sup> “(5) The Autonomous Communities shall also designate one senator and one additional senator for each million inhabitants in their respective territories. The designation shall be made by the legislative assembly, or, in its absence, by the higher collective body of the Autonomous Community pursuant to the provisions of the Statutes, which in any case, shall insure adequate proportional representation”.

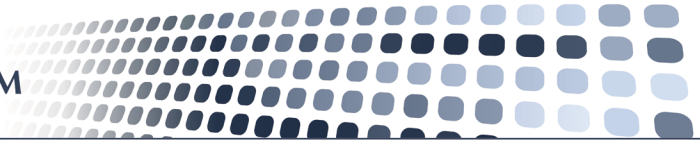
<sup>X</sup> “(2) The Assemblies of the Autonomous Communities may request the Government to adopt a bill or send to the Board of the House of Representatives a proposal of law, delegating a maximum of three members of their Assembly to that Chamber to defend it”.

<sup>XI</sup> “(1) In the Statutes passed by means of the procedure referred to in the foregoing article, the institutional autonomous organization shall be based on a legislative assembly elected by universal suffrage in accordance with a system of proportional representation which assures, moreover, the representation of the various areas of the territory; a Governing Council with executive and administrative functions, and a President elected by the Assembly from among its members and appointed by the King, to whom shall be responsible for directing the Governing Council, which constitutes the supreme representation of the respective Community as well as the State's ordinary representation in the latter. The President and the members of the Governing Council shall be politically responsible before the Assembly.

*A High Court of Justice, without prejudice to the jurisdiction exercised by the Supreme Court, shall be at the head of the Judiciary within the territorial area of the Autonomous Community. The statutes of the Autonomous Communities shall establish the circumstances and manner in which they will participate in the organization of the judicial demarcations of the territory. All of this must be in conformity with the provisions of the organic law on judicial power and compatible with its unity and independence. Without prejudice to the provisions of Article 123, successive appeals shall, where applicable, be lodged with judicial bodies located in the same territory of the Autonomous Community as that in which the competent court of the first instance is located”.*

<sup>XII</sup> “Control over the activity of the organs of the Autonomous Communities shall be exercised by

a) the Constitutional Court, in matters relative to the constitutionality of its normative provisions having the force of law; b) the Government, after the handing down by the Council of State of its opinion, regarding the exercise of the delegated



most relevant provision is represented by Art. 152, c.1, which requires the existence of a legislative Assembly to be elected by universal suffrage and “*in accordance with a system of proportional representation which assures, moreover, the representation of the various areas of the territory*”. Alongside this legislative Assembly, there should be a “*Governing Council with executive and administrative functions, and a President elected by the Assembly from among its members and appointed by the King*”; finally, “*A High Court of Justice, without prejudice to the jurisdiction exercised by the Supreme Court, shall be at the head of the Judiciary within the territorial area of the Autonomous Community*”. According to the Spanish Constitution, there are two ways to obtain the *autonomía*. Art. 152 requires a Parliamentary regime for those CAs aspiring to an immediate autonomy<sup>XV</sup>. The second way to get the *autonomía* is governed by Art. 143 CE<sup>XVI</sup>. Special

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*functions referred to in Article 150 (2); c) the jurisdiction in administrative litigation, with regard to autonomous administration and its regulatory norms;*

*d) the Court of Accounts, with regard to economic and budgetary matters”.*

XIII “(1) *If an Autonomous Community does not fulfill the obligations imposed upon it by the Constitution or other laws, or should act in a manner seriously prejudicing the general interest of Spain, the Government, after lodging a complaint with the President of the Autonomous Community and failing to receive satisfaction therefore, may, following approval granted by an absolute majority of the Senate, adopt the means necessary in order to oblige the latter forcibly to meet said obligations, or in order to protect the above-mentioned general interest.*

*(2) With a view to implementing the measures provided for in the foregoing paragraph, the Government may give instructions to all the authorities of the Autonomous Communities”.*

XIV “(1) *The following are eligible to: a) lodge an appeal of unconstitutionality: the President of the Government, the Defender of the People, fifty Deputies, fifty Senators, the executive corporate bodies of the Self-Governing Communities and, when applicable, their Assemblies”;*

XV See Art. 151: “(1) *It shall not be necessary to wait for the five-year period referred to in Article 148 (2) to elapse when the initiative for the autonomous process is agreed upon within the time limit specified in Article 143 (2), not only by the corresponding Provincial Deputations or inter-island bodies, but also by three-quarters of the Municipalities of each province concerned, representing at least the majority of the electorate of each one, and said initiative is ratified by means of a referendum by the affirmative vote of the absolute majority of the electors in each province, under the terms to be established by an organic law.*

*(2) In the case provided for in the foregoing paragraph, the procedure for drafting the statute shall be as follows:*

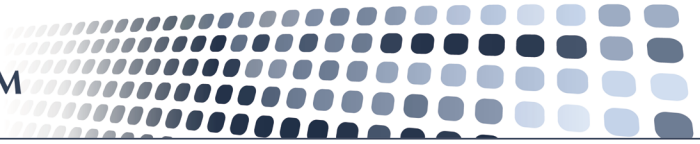
1) *The Government shall summon all the Deputies and Senators elected in the electoral districts within the territorial area seeking self-government in order to constitute themselves into an Assembly for the sole purpose of drawing up the corresponding draft statute for self-government, to be adopted by the absolute majority of its members.*

2) *Once the draft statute has been passed by the assembly, it shall be remitted to the Constitutional Commission of the House of Representatives which shall examine it within the time of two months with the concurrence and assistance of a delegation from the Assembly which has proposed it, in order to decide in common agreement upon its definitive formulation.*

3) *If such an agreement is reached, the resulting text shall be submitted in a referendum of the electoral corps of the provinces within the territorial area to be covered by the proposed statute.*

4) *If the draft statute is approved in each province by the majority of validly cast votes, it shall be referred to the Parliament. Both Chambers, in plenary assembly, shall decide upon the text by means of a vote of ratification. Once the statute has been approved, the King shall sanction it and shall promulgate it as law.*

5) *If the agreement referred to in Subparagraph 2) is not reached, the draft statute shall be treated like a draft law in the Parliament. The text approved by them shall be submitted in a referendum of the electoral corps of the provinces within the territorial area to be covered by the draft statute. In the event that it is passed by the majority of the validly cast votes in each province, it shall be promulgated under the terms outlined in the foregoing subparagraph.*



regimes aiming at simplifying the procedure of *autonomía* listed at Articles 143 and 151 are provided at Art. I and II of the Transitional Provisions<sup>XVII</sup>. Finally, Art. 144 provides that: “*The Parliament, by means of an organic law, may for reasons of national interest: a) authorize the establishment of an Autonomous Community when its territorial area does not exceed that of a province and does not have the conditions set forth in Article 143; b) authorize or accord, depending on the case, a statute of autonomy for territories which are not integrated into the provincial organization; and c) substitute the initiative of the local corporations to which Article 143 (2) refers*”.

### 3. The new *Estatutos* and the reasons for such a process

The new process of reforms started in 2004 after the election of the first Zapatero government<sup>XVIII</sup>.

The scholars identified at least four groups of factors pushing for the reform<sup>XIX</sup>:

1. the CAs' progressive loss of competences or, better, the progressive transformation of the Spanish system into a system of executive federalism: the *autonomía* of the CAs has just an administrative character, while the political responsibility of the biggest choices

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(3) *In the cases described in Subparagraphs 4) and 5) of the foregoing paragraph, failure to pass the draft statute by one or several of the provinces shall not impede the constitution of the remaining provinces into an Autonomous Community in the form as shall be established by the organic law envisaged in Paragraph (1)*”.

<sup>XVI</sup> “(1) *In the exercise of the right to autonomy recognized in Article 2, bordering provinces with common historical, cultural, and economic characteristics, the island territories, and the provinces with a historical regional unity may accede to self-government and constitute themselves into autonomous communities in accordance with the provisions of that Title and the respective statutes.*

(2) *The initiative for the autonomous process belongs to all the interested deputations or to the pertinent inter-island body and to two-thirds of the municipalities whose population represents at least the majority of the electorate of each province or island. These requirements must be fulfilled within a period of six months from the first agreement adopted on the subject by one of the interested local corporations.*

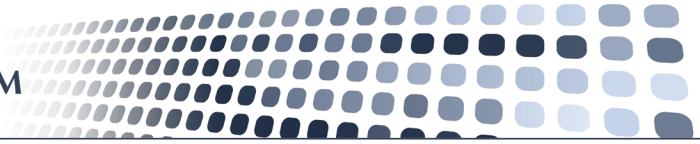
(3) *The initiative, in case it does not prosper, can only be repeated after the passage of five years*”.

<sup>XVII</sup> Art. 1 TP: “*In the territories with a provisional regime of Autonomy, their higher collegiate organs may, by means of an agreement adopted by an absolute majority of their members, substitute for the initiative which, in Article 143 (2) is attributed to the Provincial Councils or corresponding inter-island organs*”.

Art. 2 TP: “*The territories which in the past have, by plebiscite, approved draft Statutes of Autonomy, and which, at the time of the promulgation of this Constitution, have provisional regimes of autonomy, may proceed immediately in the manner provided in Article 148 (2), when agreement thereon is reached by an absolute majority of their pre-autonomous higher collegiate organs, and the Government is duly informed. The draft statutes shall be drawn up in accordance with the provisions of Article 151 (2) when so requested by the pre-autonomous collegiate organ*”.

<sup>XVIII</sup> For a chronicle of the process, see the special issue of the *Revista general de derecho constitucional*, n 1, 2006.

<sup>XIX</sup> C.Viver Pi-Sunyer, “La riforma dello Statuto della Comunità autonoma di Catalogna: principali novità e problemi di costituzionalità”, in *Diritto e società*, 2008, 315 – 349, 317.



belongs to the State. This phenomenon may be explained in several ways: the actual progressive loss of exclusivity of the regional formally-exclusive competences; the hidden expansion of the basic competences of the State, thanks to general clauses like the one included in Art. 149.1.13 regarding the general principles of the economic order<sup>xx</sup>; the use of the State spending power also in the ambits of CA's jurisdiction; the exclusive implementation of the EC norms through State laws;

- 2 The big issues of the means of regional funding and of the system of territorial equalization: this reason applies above all to *Catalunya*, which contributes tax money to the State more than what it receives from the State in terms of State investments or available resources<sup>xxi</sup>.
- 3 The lack or the non-functioning of the mechanisms of cooperation and participation at both the horizontal and the vertical levels;
- 4 The so-called “identity questions”, related to the acknowledgment of national realities different from that of the Spanish nation.

In order to deal with these questions, there were three possible options: a new interpretation of the constitutional provisions regarding the *autonomía* of the CAs (the same applied to the *Estatutos* of the CAs); a constitutional reform; the preparation of a new text to be discussed and approved by the State Parliament, which is the way the CAs chose.

Currently, six CAs approved new *Estatutos*: Comunidad Valenciana (*ley orgánica*, April 10, 2006, n. 1), Catalunya (*ley orgánica*, July 19, 2006, n. 6)<sup>xxii</sup>, Baleares (*ley orgánica*,

<sup>xx</sup> “1) *The State holds exclusive competence over the following matters: ...13) bases and coordination of general planning and economic activity?*”.

<sup>xxi</sup> M. Medina Guerrero, “Algunas consideraciones sobre la eventual reforma del sistema de financiación”, in M.J. Terol Becerra (eds.), *El Estado autonómico in fieri, cit.*, 197 ff.; J. Ramos Prieto, “La distribución de las competencias de gestión, recaudación, inspección y revisión en materia tributaria y la reforma de los Estatutos de Autonomía”, *Revista de estudios regionales*, n. 78, 2007, 365-386

<sup>xxii</sup> On this *Estatuto*, see R.L. Blanco Valdès, “Lo Statuto catalano: testo e pre-testi”, in *Quaderni costituzionali*, 2006, 677 ff.; I. Ruggiu, “Il nuovo Statuto catalano”, in *Le Regioni*, 2007, 81 ff.; G. Duranti, “Asimmetria e modernizzazione del federalismo in Europa: il caso della riforma dello Statuto catalano”, *Rassegna parlamentare*, 2008, 249 – 279; E.Aja, “La riforma dello Statuto catalano del 2006”, *Diritto Pubblico Comparato ed Europeo*, 2007, 1133 – 1154; M. Carrillo, “Il nuovo statuto di autonomia della Catalogna”, *Giurisprudenza costituzionale*, 2007, 3297 – 3321; C. Viver Pi-Sunyer, “La riforma cit”; G. Poggeschi, “La definitiva approvazione del nuovo Statuto di autonomia della Catalogna. Un passo in avanti verso una maggiore asimmetria dell'Estado autonómico”, *Diritto Pubblico Comparato ed Europeo*, 006 fasc. 3, 1340 – 1352; J.A. González Casanova “Reforma del estatuto de Cataluña y Estado federal”, *Revista de fomento social*, n. 241, 2006, 57-75





February 28, 2007, n. 1)<sup>xxiii</sup>, Andalucía (*ley orgánica*, March 19, 2007, n. 2)<sup>xxiv</sup>, Aragón (*ley orgánica*, April 20, 2007, n. 5), Castilla y León (*ley orgánica*, November 30, 2007, n. 14); other CAs, such as Castilla-La Mancha, are attempting to revise their *Estatutos*<sup>xxv</sup>. There was also a failed attempt to approve a new *Estatuto* in the País Vasco<sup>xxvi</sup>.

All the *Estatutos* present important novelties, both substantially and formally: they are longer than in the past; they present a long list of “regional rights” (above all social ones); they re-write the list of competences of the *Estatutos*; sometimes new legal sources are provided for (it is the case of the legislative decrees); they enlarge the fiscal and financial autonomy; they contain provisions regarding the judiciary power; they revise the discipline governing the cooperative relations with the State and the EU; they contain some provisions devoted to the issue of identity.

#### 4. The nature of the principles and provisions on identity

As we saw, all the *Estatutos* (except for the draft *Estatuto* of Castilla la Mancha, which, on the contrary, presents itself as averse to the identity language) contain provisions on rights and principles. Scholars began to reflect on the nature of such provisions, reaching conclusions similar to those present in the Italian debate<sup>xxvii</sup>. It is a relatively new question, since the old texts were silent on these points<sup>xxviii</sup>.

The phenomenon of re-writing the *Estatutos* has been carried out mainly through two main means: the Preambles and the “self- definition” contained in the *Estatutos*.

xxiii On this *Estatuto*, see: J. Oliver Araujo, V.J. Calafell Ferrà, *Las Islas baleares: una comunidad autónoma in fieri*, in *El Estado autonómico in fieri*, cit., 215 ff.

xxiv G. Ruiz -Rico Ruiz, “Una primera diagnosis del documento de bases para la reforma del Estatuto de Andalucía, in M.J. Terol Becerra (eds.), *El Estado autonómico in fieri. La reforma de los Estatutos de Autonomía*, Sevilla, 2005, 323 ff.

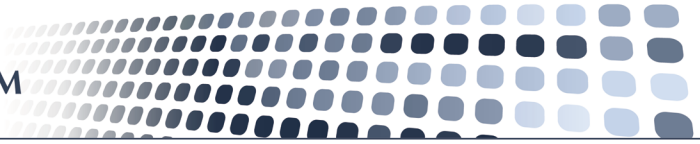
xxv For an overview, see <http://www.aelpa.org/observatorio.htm>

xxvi E. Vergala Foruria, “La reforma Ibarretxe: un auténtica ruptura estatutaria”, in M.J. Terol Becerra (ed.), *El Estado autonómico in fieri*, cit., 401 ff.. See the text available at: [www.nuevoestatutodeeuskadi.net](http://www.nuevoestatutodeeuskadi.net)

xxvii For a comparison, see: A.Mastromarino-J.M. Castella' Andreu (eds.), *Esperienze di regionalismo differenziato*, Giuffrè, Milano, 2009..

xxviii R. Maluenda Verdù, “La reforma del Estatut d'autonomia: una necesidad identitaria”, in V. Garrido Mayol (ed), *Instituciones políticas de la Comunidad valenciana*, Valencia, 1999, 245 ff.; I. Ruggiu, “Testi giuridici e identità.

Il caso dei nuovi Statuti spagnoli”, 2/2007, 133 ff; A.Mastromarino, “A margine della proposta per la revisione dello statuto catalano in tema di nazione e nazionalità spagnole”, in *Diritto Pubblico Comparato ed Europeo*, 2005, 1577 - 1584.



With regard to the former, they contain many references to the old-time Reigns which were established in their territories before the Spanish unification or before the latest constituent phase<sup>xxxix</sup>; at the same time, many “*derechos forales*”<sup>xxx</sup> and traditions<sup>xxxi</sup> are recalled and one of the aims of these *Estatutos* consists in the attempt to give them new life in the current age<sup>xxxii</sup>.

With regard to the latter, formulas like nation<sup>xxxiii</sup>, nationality, historical nationality, national identity, historical community<sup>xxxiv</sup> abound, and many provisions are devoted to linguistic idioms<sup>xxxv</sup>.

There is another element characterizing such a phenomenon: the diffuse reference to folklore elements or local personalities, images, idioms, dances (*flamenco*)<sup>xxxvi</sup>, and to all

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xxxix See the Estatuto of the Catalunya: [http://www.pedrojherando.com/aelpa2007/informacion/eac\\_es\\_20061116.pdf](http://www.pedrojherando.com/aelpa2007/informacion/eac_es_20061116.pdf). From the Preamble: “*El pueblo de Cataluña ha mantenido a lo largo de los siglos una vocación constante de autogobierno, encarnada en instituciones propias como la Generalitat –que fue creada en 1359 en las Cortes de Cervera– y en un ordenamiento jurídico específico recogido, entre otras recopilaciones de normas, en las Constituciones i altres drets de Catalunya. Después de 1714, han sido varios los intentos de recuperación de las instituciones de autogobierno. En este itinerario histórico constituyen hitos destacados, entre otros, la Mancomunidad de 1914, la recuperación de la Generalitat con el Estatuto de 1932, su restablecimiento en 1977 y el Estatuto de 1979, nacido con la democracia, la Constitución de 1978 y el Estado de las autonomías*”.

See also the Estatuto de Andalucía [http://www.pedrojherando.com/aelpa2007/informacion/eac\\_es\\_20061116.pdf](http://www.pedrojherando.com/aelpa2007/informacion/eac_es_20061116.pdf): “*El primer texto que plasma la voluntad política de que Andalucía se constituya como entidad política con capacidad de autogobierno es la Constitución Federal Andaluza, redactada en Antequera en 1883. En la Asamblea de Ronda de 1918 fueron aprobados la bandera y el escudo andaluces*”.

xxx See Art. 4, c. 4, Estatuto of Comunidad Valenciana (<http://www.pedrojherando.com/aelpa2007/informacion/ESTATUTOCV.pdf>).

xxxi Art. 5 Estatuto of Catalunya: “*El autogobierno de Cataluña se fundamenta también en los derechos históricos del pueblo catalán, en sus instituciones seculares y en la tradición jurídica catalana*”.

xxxii F. Rey Martínez, “Sentido y alcance del concepto de “derechos históricos” en la constitución y en los estatutos de autonomía”, in *La reforma de los Estatutos de autonomía. Revista jurídica de Castilla y León*, 2005, 181 ff.

xxxiii See, again, the Preamble of Catalunya.

xxxiv On this phenomenon, see: E. Sejas Villadangos, “Estado, soberanía, nación y nacionalidades, demasiados factores para una sola ecuación. Revisión de estas categorías a la luz de las reformas constitucional y estatutarias en España”, in “La reforma de los Estatutos de Autonomía”, special issue *Revista jurídica de Castilla y León*, Valladolid, 2003, 211 ff.; R. Blanco Valdés, *Nacionalidades históricas y regiones sin historia: a propósito de la obsesión rutinaria*, Madrid, 2005.

xxxv Art. 6 from the Estatuto of Catalunya, where both Catalan and Castilian are conceived of as official languages of the CA: “*1. La lengua propia de Cataluña es el catalán. Como tal, el catalán es la lengua de uso normal y preferente de las Administraciones públicas y de los medios de comunicación públicos de Cataluña, y es también la lengua normalmente utilizada como vehicular y de aprendizaje en la enseñanza.*

*2. El catalán es la lengua oficial de Cataluña. También lo es el castellano, que es la lengua oficial del Estado español*”. See also the Estatuto of Comunidad Valenciana at the Preamble with regard to the “*lengua valenciana*”.

xxxvi See Art. 68 of the Estatuto of Andalucía: “*Corresponde asimismo a la Comunidad Autónoma la competencia exclusiva en materia de conocimiento, conservación, investigación, formación, promoción y difusión del flamenco como elemento singular del patrimonio cultural andaluz*”.



those elements which the literature has brought back under the umbrella of *hechos diferenciales* (“differential or distinguishing facts”)<sup>XXXVII</sup>.

Other two categories of tools devised by the CAs in this process need to be mentioned: new collective rights are claimed, and new competences for the CAs, conceived as functional to their protection, are requested<sup>XXXVIII</sup>.

Going on in analyzing the means used by the CAs to promote their peculiarities, one could point out the provisions devoted to the symbols<sup>XXXIX</sup> of the CAs: regional feasts, flags, monuments, anthems.

Scholars have profusely analyzed such provisions, emphasizing their ambiguity, their dangerousness but, above all, their rhetorical nature. Other scholars pointed out the reasons behind the language of identity: the necessity to gain new competences<sup>XI</sup> (as we saw, alongside the recognition of new collective rights there is the request of new competences to protect them) and, as a consequence, the claim of new funds, according to the logic “no money, no competences”.

The linguistic<sup>XLI</sup>, cultural and local peculiarities are thus the grounds to claim new funds<sup>XLII</sup>.

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XXXVII See the Estatuto of the Balears about the insularity of the Region as a peculiar fact of the Community: Art. 3- “1. *El Estatuto ampara la insularidad del territorio de la Comunidad Autónoma como hecho diferencial y merecedor de protección especial*”. ([http://www.pedrojhernando.com/aelpa2007/informacion/EstatutAutonomiaIB\\_cas.pdf](http://www.pedrojhernando.com/aelpa2007/informacion/EstatutAutonomiaIB_cas.pdf)).

XXXVIII See the Estatuto of the Balears, Art. 18: “1. *Todas las personas tienen derecho a acceder en condiciones de igualdad a la cultura, a la protección y la defensa de la creatividad artística, científica y técnica, tanto individual como colectiva. Los poderes públicos procurarán la protección y defensa de la creatividad en la forma que determinen las leyes.*

2. *Todas las personas tienen derecho a que los poderes públicos promuevan su integración cultural.*

3. *Los poderes públicos de las Illes Balears velarán por la protección y la defensa de la identidad y los valores e intereses del pueblo de las Illes Balears y el respeto a la diversidad cultural de la Comunidad Autónoma y a su patrimonio histórico*”.

XXXIX See Art. 5, Estatuto of Estatuto of Comunidad Valenciana.

XI On the system of competences, see: F. Balaguer Callejón (ed), *Reformas estatutarias y distribución de competencias, Instituto andaluz de administración pública*, Sevilla, 2007; J. Tornos Mas, “Balance de la distribución de competencias tras la reforma de los Estatutos de Autonomía”, *Informe comunidades autónomas*, 2006, 879-89; “M. Paloma Biglino Campos, Reforma de la Constitución, reforma de los Estatutos de Autonomía y configuración constitucional del Orden de Competencias”, in *Revista de las Cortes Generales*, n. 65, 2005, 7-30; E. Guichot Reina, “El reparto de competencias sobre protección de datos tras los nuevos Estatutos de Autonomía”, in *Justicia administrativa: Revista de derecho administrativo*, n. 39, 2008, 5-18;

XLI M. Barceló i Serramalera, “Els drets lingüístics com a drets públics estatutaris”, *Revista de llengua i dret*, n. 47, 2007, 265-286

XLII On the financial system in the new *Estatutos*, see A. de la Fuente- M.Guidín “La financiación autonómica en los nuevos estatutos regionales”, in *Hacienda pública española*, n.182,, 2007, 165-200; E. Emilia Girón Reguera, “La incidencia de la reforma de los Estatutos de Autonomía en la financiación autonómica”, *Revista española de derecho constitucional*, n. 27, N° 80, 2007, 75-111



## 5. The relationship between the new Estatutos and the Spanish Constitution

Soon after the approval of the first *Estatutos*, the literature split over the constitutionality of many new provisions included in those texts<sup>XLIII</sup>.

Suffice it here to recall two exactly opposite positions appeared on the *Revista d'estudis autonòmics i federals*: those by Pedro Cruz Villalón<sup>XLIV</sup> and Eduard Roig Molés<sup>XLV</sup>.

In that article by Cruz Villalón, after recalling what he considers the main aspects of the Spanish territorial model, the author identifies those features that have never been challenged since 1978. Then Cruz Villalón moves on to analyse what he calls the re-foundation period of the new *Estatutos de autonomía*; in his opinion, these new *Estatutos* imply a re-definition of the State by the CAs, especially looking at the draft of the *Estatuto de Catalunya*.

A very different position is expressed by Eduard Roig Molés. According to him, the new institutional equilibrium coming from the *Estatuto de Catalunya* should be considered as a fundamental step in the development of Spain's original territorial model, since it would ensure a clearer definition of the distribution of powers and a more transparent financing system. At the same time, it would imply the solution to new institutional needs (the example given by the author refers to the participation of the Autonomous Communities in the decision-making processes concerning state-wide issues).

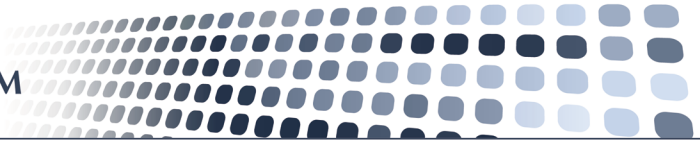
The first opportunity for the *Tribunal Constitucional* (TC) to rule on the constitutionality of the *Estatutos* was given in the *sentencia* n. 247 of January 12, 2007, focused on Art. 20 of the *Estatuto* of the Comunidad Valenciana<sup>XLVI</sup>.

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<sup>XLIII</sup> On the relationship between the reforms of the Estatutos and that of the Spanish Constitution, see: T. Ramón Fernández Rodríguez, “De la reforma de los Estatutos a la reforma de la Constitución”, *Foro: Revista de ciencias jurídicas y sociales*, n. 5, 2007, 13-28; M.A. Aparicio Perez, “La adecuación de la estructura del Estado a la Constitución (reforma constitucional vs. reforma de los estatutos)”, in *Revista catalana de dret públic*, n. 31, 2005, 57-86; Ferret i Jacas, “Estatutos de autonomía: función constitucional y límites materiales”, in *Revista catalana de dret públic*, n. 31, 2005, 87-108

<sup>XLIV</sup> P. Cruz Villalón, “La reforma del Estado de las autonomías”, in *Revista d'Estudis autonòmics i federals*, n. 2, 2006, 77 ff.

<sup>XLV</sup> E. Roig Molés, “La reforma del Estado de las Autonomías: ¿ruptura o consolidación del modelo constitucional de 1978?”, in *Revista d'estudis autonòmics i federals*, n. 3, 2006, 149-186; see also: J. Pèrez Royo, “Consideraciones sobre la reforma de la estructura del Estado”, in *Reforma del Estatuto de autonomía para Andalucía*, vol. II, Parlamento de Andalucía, Sevilla, 2005, 37 ff.



The TC rescued the contested provision, by acknowledging the right to high quality water, as provided for in subnational *Estatutos*. The decision is important since it clarifies that an *Estatuto* is an act that cannot be disposed of by the sole will of the State or of the CA. It is an act emanating from the wills of both entities.

There are two main positions in the literature in this respect: according to some scholars, this act is the expression of a sort of constituent power (“*una cierta potestad constituyente*”) having a constitutional meaning<sup>XLVI</sup>.

According to other scholars, it is a mere “*norma de organización*” of the CA.

Moreover, the TC recognized a broad interpretive function to the *Estatuto* with regard to the constitutional provisions devoted to the competences of a CA.

The TC specified also that the content of the *Estatutos* shall not be limited to what Art. 147, c. 2, recognizes, but they are free to add other contents, except provisions in contrast with the CE: in this sense, Art. 147, c.2, provides for the minimal content of the *Estatutos*.

Having said this, the TC moves on to deal with the provisions devoted to rights in the *Estatutos*. In this respect, there are two main positions in the literature<sup>XLVII</sup>: according to

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XLVI On this decision, see: M.Iacometti, “La ‘prima volta’ di un nuovo Statuto (quello valenciano) di fronte al Tribunale costituzionale”, *Diritto Pubblico Comparato ed Europeo*, 2008, 702 &f.; see also Francisco M. Caamaño Domínguez,

“Sí, pueden: (declaraciones de derechos y Estatutos de Autonomía)”, *Revista española de derecho constitucional*, n. 79, 2007, 33-46

XLVII On this debate, see J. Tornos Mas, “La reforma estatutaria: un debate marcado por la posición constitucional de los Estatutos de Autonomía”, in *Revista General de Derecho Administrativo*, n. 12, 2006; J.J. Solozábal Echavarría, “El Estado social como Estado autonómico” in *Teoría y realidad constitucional*, n.3, 1999, 61-78; G. Trujillo Fernández, *Leciones De Derecho Constitucional Autonómico*, Tirant Lo Blanch, Valencia, 2004, 122 ff.

XLVIII For a general overview: G. Càmara Villar, “Reflexiones sobre tres aspectos de la reforma del Estatuto de autonomía para Andalucía: principios, derechos y deberes, y administración de la justicia”, in *Reforma del Estatuto de autonomía para Andalucía*, cit, vol. II, 157 ff; see also P.L. Murillo De La Cueva, “Sobre la reforma del Estatuto de autonomía para Andalucía. Los principios y los derechos”, in *Reforma del Estatuto de autonomía para Andalucía*, cit., vol. II, 85 ff.; A. H. Catalá i Bas, “La inclusión de una carta de derechos en los Estatutos de Autonomía”, *Revista española de la función consultiva*, n. 4, 2005, 181-204; G. J. Ruiz-Rico Ruiz “Derechos sociales y reforma de los estatutos de autonomía: el derecho a la vivienda”, *Nuevas Políticas Públicas: Anuario multidisciplinar para la modernización de las Administraciones Públicas*, n. 2, 2006, 74-95; R.Canosa Usera, “La declaración de derechos en los nuevos Estatutos de Autonomía”, *Teoría y realidad constitucional*, n.20, 2007, 59-115; M. Aparicio Wilhelmi- G. Pisarello “El reconocimiento de derechos, deberes y principios en los estatutos de autonomía: ¿hacia una comprensión multinivel o en red de la protección de los derechos?”, *El Clip*, n. 42, 2007, <http://www.gencat.cat/drep/iea/pdfs/c42.pdf>; M. Carrillo López, “Los derechos, un contenido constitucional de los Estatutos de Autonomía”, *Revista española de derecho constitucional*, n. 80, 2007, 49-73; E Expósito, “La regulación de los derechos en los nuevos Estatutos de Autonomía”, *Revista d'estudis autonòmics i federals*, 2007, 147-202.



Castellà Andreu<sup>XLIX</sup> and Ferreres Comella<sup>L</sup>, for example, there is not a necessary and a *priori* contrast between the constitutional provisions and the new norms contained in the *Estatutos*; according to other scholars, there would be the risk to create asymmetries in terms of rights' protection, and a reserved jurisdiction for the Constitution in the field of rights should be acknowledged<sup>LI</sup>.

Finally, the TC rescued the provisions of Art. 17, c. 1, of the *Estatuto* of the Comunidad Valenciana, understanding it as a precept addressed to the legislator and not breaching the State competence in the ambit of water planning. In order to rescue the provision, the TC distinguished between the fundamental rights and freedoms, and the *principios rectores*<sup>LII</sup> of social and economic policies, that would be sort of non-directly-applicable principles, aimed instead at orienting the activity of legislators and giving them goals to be achieved. They do not lack legal nature (in this sense the conclusion reached by the TC differs from that of the Italian *Corte Costituzionale*<sup>LIII</sup>); at the same time, thanks to this distinction, those provisions do not jeopardize the principle of equality contained in the CE.

Alongside this subnational provision embodying *principios rectores*, there might be some clauses devoted to rights that are already included in constitutional provisions: these would not be inconsistent with the CE, but they would be just reproducing a constitutional precept.

In case of norms which go beyond the constitutional precepts, it will be necessary to consider their link to the local needs: if they embody local aspirations, they might not be considered as unconstitutional<sup>LIV</sup>.

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XLIX J. Castellà Andreu, "Lo estatuto de autonomia del 2006 come (discutibile) strumento per la realizzazione dell'autogoverno della Catalogna", in S.Gambino (ed.), *Regionalismi e statuti*, Giuffrè, Milano, 2008, 216 ff.

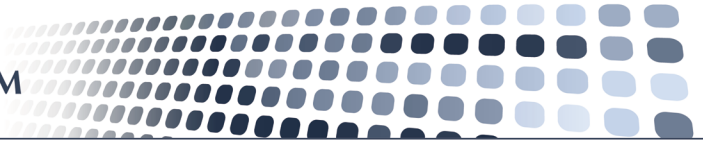
L V. Ferreres Comella, "Derechos, deberes y principios en el nuevo Estatuto de Autonomía de Cataluña" in V.Ferreres Comella-M. Paloma Biglino Campos- M. Carrillo López (eds.), *Derechos, deberes y principios en el nuevo Estatuto de Autonomía de Cataluña*, CEPC, Madrid, 2006, 38 ff.

LI L.M. Díez-Picazo, "¿Pueden los Estatutos de Autonomía declarar derechos, deberes y principios?", in *Revista Española de Derecho Constitucional*, n. 78, 2006, 63-75.

LII M. A. Aparicio Pérez- J. M. Castellà Andreu- E. Expósito (eds), *Derechos y principios rectores en los estatutos de autonomía*, Atelier, Barcelona, 2008.

LIII Corte Costituzionale, Judgments 372-378-379/2004, available at [www.cortecostituzionale.it](http://www.cortecostituzionale.it)

LIV M.Iacometti, "La 'prima volta' cit 716.



The decision of the TC was characterized by a deep division among its components, and opened a new phase of uncertainty, in the wait for the upcoming decision on one of the most commented upon *Estatutos*: that of Catalunya<sup>LV</sup> . .

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<sup>LV</sup> Against the Estatuto de Catalunya many objections were addressed: on the 31<sup>st</sup> of July 2006, some members of the People's Party presented a *recurso de inconstitucionalidad* before the Constitutional Court; in 2006, 112 articles and four additional provisions of the Estatuto de Catalunya were contested before the Court by the *Defensor del Pueblo*, on the following grounds: the mention of Catalunya as a Nation, the provisions concerning the language, the competences, the jurisdictional system, the discipline of bilateral relationships. Other claims were presented by the Government of Murcia and that of the Balearic Islands. See R.Tur Ausina, "SPAGNA – Lo Statuto della Comunità di Catalogna e di Valencia impugnati dinanzi al Tribunale costituzionale", on [http://www.unisi.it/dipec/palomar/027\\_2006.html#spagna1](http://www.unisi.it/dipec/palomar/027_2006.html#spagna1). Another element to be taken into account for understanding the political importance of this decision is given by the request of objection to the judge Prof. Pablo Perez Tremps, which was accepted by the plenum of the Court on the 5<sup>th</sup> of February 2007.