Revista catalana de dret públic #62

www.rcdp.cat

AN EGALITARIAN DEFENCE OF TERRITORIAL AUTONOMY. THE CASE OF SPAIN[*]

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Abstract

This article distinguishes several constitutional spheres of equality, since different conceptions and approaches to equality may emerge and prevail in each sphere. Instead of equality always opposing difference, this paper argues that its multinational sphere tends to require self-government, asymmetry and pluralism, for a multinational conception of equality seeks a deep, basic equality between majority and minority nations. Crucial issues concerning this multinational sphere will be examined, such as the allocation of powers, territorial asymmetries, bills of rights, and the question of sovereignty. The case of Spain is taken as an empirical and legal reference to study and reflect on the different constitutional spheres of equality. With regard to the territorial sphere, Spanish politics and jurisprudence commonly understand the principle of equality as a tenet of and a tool for centralization and unification. This traditional understanding will be challenged employing elements of political philosophy, constitutional theory and comparative law.

Key words: equality; autonomy; self-government; sovereignty; multinational; Spain.

UNA DEFENSA IGUALITÀRIA DE L'AUTONOMIA TERRITORIAL. EL CAS D'ESPANYA

Resum

Aquest article distingeix diverses esferes constitucionals de la igualtat, atès que poden sorgir i prevaldre diferents concepcions i enfocaments sobre la igualtat en cada esfera. En comptes d'una igualtat sempre contrària a la diferència, aquest article argumenta que la seva esfera multinacional tendeix a requerir autogovern, asimetria i pluralisme, ja que una concepció multinacional de la igualtat busca una igualtat bàsica i profunda entre les nacions majoritàries i minoritàries. S'analitzaran qüestions cabdals relacionades amb aquesta esfera multinacional, com ara l'assignació de competències, les asimetries territorials, les declaracions de drets i la qüestió de la sobirania. El cas d'Espanya es pren com una referència empírica i jurídica per estudiar i reflexionar sobre les diferents esferes constitucionals de la igualtat. Pel que fa a l'esfera territorial, la política i la jurisprudència espanyoles acostumen a entendre el principi d'igualtat com un dogma i una eina de centralització i unificació. Aquesta comprensió tradicional es qüestionarà emprant elements de filosofia política, teoria constitucional i dret comparat.

Paraules clau: igualtat; autonomia; autogovern; sobirania; multinacional; Espanya.

[*] I owe a debt of gratitude to Carles Viver, Víctor Ferreres, Gerard Martín, Marc Sanjaume, Andrew Hughes, and the editors and reviewers of the journal.

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Article received: 30.08.2020. Blind review: 21.09.2020, 25.09.2020 and 22.03.2021. Final version accepted: 13.04.2021.

Recommended citation: Bossacoma Busquets, Pau. (2021). An egalitarian defence of territorial autonomy. The case of Spain. *Revista Catalana de Dret Públic, 62*, 90-111. https://doi.org/10.2436/rcdp.i62.2021.3508.

Sumari

1 Introduction

The Constitution of Spain distinguishes some spheres of equality from others. With respect to the territorial sphere, Spanish jurisprudence understands the principle of equality as limiting territorial autonomy. The legal debate rests, therefore, on where to set those limits. With the aim of centralizing and unifying, Spanish politics often claims the obligation to treat all Spaniards equally while blurring any distinction between spheres of equality. By contrast, this article sustains that different spheres of equality need to be distinguished. As regards the multinational sphere, a harmonizing approach between equality and territorial autonomy is defended with the argument that, rather than necessarily being in conflict, the former may require the latter. To this end, the multinational sphere of equality is analyzed from many perspectives, including the recognition of minority nations, the allocation of powers, territorial asymmetries, bills of rights, the distribution of sovereignty, and the pluralization of constituent power.

The structure of this article is as follows. Section 2 makes some introductory remarks on the fundamental right to equality and its prohibition of discrimination. Section 3 distinguishes various constitutional spheres of equality, since they tend to involve different conceptions and approaches to equality. Section 4 explores the territorial spheres of equality in the Spanish Constitution. Section 5 addresses territorial equality in relation to Spanish politics, and Section 6 in relation to Spanish case law. After these more descriptive and contextual sections, Section 7 concentrates on developing an egalitarian defence of autonomy under a multinational sphere of equality. Section 8 presents some ideas on fundamental rights, judicial review and shared sovereignty under a multinational constitution. The final section concludes that, rather than equality ever opposing difference, its multinational sphere often requires constitutional autonomy, distinction and pluralism.

2 Discrimination as unreasonable differentiation

Article 14 of the Spanish Constitution reads "Spaniards are equal before the law, without any discrimination on grounds of birth, race, sex, religion, opinion or any other personal or social condition or circumstance".[1] This fundamental right to equality tends to be interpreted, in a juridical sense, as prohibiting unreasonable differential treatment in a similar fashion to Article 14 of the European Convention on Human Rights, which stipulates that "the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status".

Both the European Court of Human Rights and the Spanish Constitutional Court consider that a distinction is discriminatory only when it "has no objective and reasonable justification".[2] In the words of the Inter-American Court of Human Rights, "no discrimination exists if the difference in treatment has a legitimate purpose and if it does not lead to situations which are contrary to justice, to reason or to the nature of things".[3] It is common, therefore, to limit different treatment when it is arbitrary, capricious or contrary to human dignity.[4] What criteria of reasonableness are to be taken into account? In an early judgement, the Constitutional Court of Spain introduced a test based on a somewhat *communis opinio*, namely that the justification of difference ought to be "founded on and reasonable according to generally accepted criteria and value judgements".[5] The

1 The interpretation of this provision is primarily related to juridical equality, covering both equality in the application of the law and equality in the law itself. Two caveats are worthy of mention: first, the margin of appreciation when legislating is generally wider than when applying the law; second, the principle of equality specially forbids the same authority treating like cases differently. According to the Constitutional Court, Article 14 prohibits discrimination, but it does not include a fundamental right to be treated differently. See, *inter alia*, Judgements 49/1982, 103/1983, 86/1985, 241/2000, and 31/2018.

2 European Court of Human Rights, *Case relating to certain aspects of the laws on the use of languages in education in Belgium,* of 23 July 1968; *Case Bayev and Others v. Russia*, of 20 June 2017. Constitutional Court of Spain, Judgement 67/1982; Judgement 31/2018.

3 Advisory Opinion 4/84, 19 January 1984, on the Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica.

4 On the value of human dignity in contrast to the value of equal recognition, see Taylor (1992: 25-73). For Taylor, "the demand for equal recognition extends beyond an acknowledgment of the equal value of all humans potentially, and comes to include the equal value of what they have made of this potential in fact" (42-43).

5 Judgement 49/1982. See Otto (2010: 1439).

search for that consensus or common ground may certainly benefit from comparative law. Nevertheless, the test of reasonableness may not be solved by just applying *mechanical* or *purely formal* jurisprudential methods based, for instance, on treating like cases alike or on necessity and proportionality in a democratic society; it often needs far deeper legal accounts and philosophical approaches.[6] It is important to note that different accounts and approaches to equality may be defended in different spheres of equality.

3 Distinguishing constitutional spheres of equality

"The equality principle in most constitutions […] is plural rather than singular" (Sunstein, 2001: 156). This section distinguishes several constitutional spheres of equality, since they may, and are likely to, legitimate different conceptions and approaches to equality.[7]

Racial Sphere. This is the sphere of equality between people of different races – i.e. major groups of human beings divided according to their skin colours and other genetically inherited features.[8] It often has express reference in anti-discrimination constitutional clauses such as in the above-mentioned Article 14 of the Spanish Constitution, which forbids discrimination on several grounds including "race" and "birth".[9] The racial sphere of equality has been recurrently understood as requiring, ideally, a colour-blind constitution. Yet this ideal seems compatible with non-ideal affirmative action to remedy historical and present injustices.[10]

Religious Sphere. Equality between people and groups of different religions is a sphere commonly understood to be similar to the racial sphere. On many occasions, however, laws and public institutions are not able to be and ought not to be blind towards religion. Instead of pretending that religion does not exist, they should aim to treat the many religious doctrines and manifestations in neutral ways. Even though liberalism has praised neutrality towards religion at great length, such neutrality can sometimes be as difficult as national neutrality, since many cultural practices are closely linked to religious practices.[11]

Political Sphere. This sphere includes equality between people with different political approaches and between groups supporting different political programmes. This is an important sphere for liberal democracy which, instead of seeking to be blind to or neuter towards difference, needs to make sure that these differences are respected, granted voice in the public sphere, and taken into account. This not only aims to provide fair opportunities for current political minorities to become a political majority in the future, but also to deliberate and compromise with minorities to prevent democracy becoming a tyranny of the majority.

Socio-Economic Sphere. This sphere is related to socio-economic justice. Since this is a remarkably wide sphere, which varies substantially depending on different conceptions of justice and on each socio-economic context, it is difficult to include it in its broader sense as a fundamental right under strict judicial scrutiny. Instead, it tends to be split into several constitutional clauses and, in fact, is predominantly considered a matter of ordinary laws and policies.[12] While socio-economic, racial, religious and political spheres are usually based

6 See Fiss (1976: 175); Sunstein (2001: 164-165); Ferreres (2018: 229-247); Hart (2012: 162-163).

7 The term *spheres of equality* is inspired by Walzer's famous book *Spheres of Justice. A Defense of Pluralism and Equality* (1983) in the sense that a complex conception of equality claims different principles of distribution in distinct spheres of justice. According to Sunstein (2001: 156), "it would be obtuse to suggest that a simple conception of equality exhausts the term as it operates in legal and political discussion in the United States or elsewhere."

8 Even if race has no biological basis, it remains a deep-seated idea whose perverse social effects should not be ignored by the law. See Wade (2004) and Barragán González (2021).

9 In a similar vein, Article 21.1 of the EU Charter of Fundamental Rights prohibits discrimination based on grounds such as "race", "colour", "genetic features" and "birth". Although the equal protection clause of the US Constitution does not expressly refer to any particular sphere of equality, "history indicates that the Clause was extended to protect blacks" (Fiss, 1976: 172-173).

10 In the sphere of sex and gender, the principle of equality is also associated to a blindness that allows affirmative action. A conception of equality based on an "anticaste principle" (Sunstein, 2001: 155) could help to eliminate the tension between blindness and affirmative action.

11 Festivities could be a general example and Sunday a particular one, as the weekly day of rest in many states.

12 In broad terms, this sphere of equality is often endorsed by constitutional clauses establishing a welfare or social state, as is the case of Article 1.1 of the Spanish Constitution. In this case, this wide clause is complemented by other more specific constitutional provisions that attribute to public authorities the promotion of real and effective equality (Article 9.2), equal and progressive taxation (Article 31.1) and fairer distribution of wealth (Article 40.1).

on equal citizenship, the following spheres often include and accept some kind of differential citizenship.[13] All spheres nonetheless condemn inequalities that generate second-class citizens.

Polyethnic Sphere. This is the sphere of equality between people of different ethnic origins. This sphere is strongly linked to the cultural diversity that immigrant groups engender in the receiving country, including those descendants of immigrants who still perceive their identities as closely related to these groups. Rather than aspiring to obtain territorial and political autonomy, ethnic minorities often seek to enjoy the same civil rights as the autochthonous majority; equal opportunities in socio-economic terms; maintaining ascription to, and the character of, the group; and taking part in and influencing the common institutions. A main challenge of this sphere of equality is to adapt laws, institutions and practices in order to help immigrants feel (more) at home in the receiving country without requiring complete cultural assimilation.[14] This sphere tends to prefer integration to assimilation or separation.

Federal Sphere. The federal sphere includes both equality between people living in different self-governing units and equality between self-governing units as such. The self-rule dimension of federalism necessarily implies a certain degree of diversity and separation. The shared-rule dimension of federalism, by contrast, endorses union and aggregation.[15] Although some may claim equality between the federal government and the self-governing unit, this is usually refused by placing the central government in a position of hegemony or superiority. Taking into account the fact that the principle of equality rarely applies vertically, it may not necessarily apply horizontally between self-governing units. This may depend on the nature of the union. While symmetry is expected in unions conceived as compacts between equal parties (such as the USA, Germany and Austria), asymmetries should not raise many objections in other kinds of unions (such as the UK, Canada and Spain).

Multinational Sphere. Like the federal sphere, this is normally a type of territorial sphere.[16] Similarly to the federal sphere, it includes both equality between members of different nations and between national communities as such. Since states are not nationally neuter but often nationalizing, minority nations and their members tend to question equality understood as sameness or uniformity.[17] If holidays, for instance, were the same across the whole of a country, many of them would probably be related to the history or mythology of the majority nation. If there were a single official language, to put another example, it would likely be that of the majority nation. In these cases, minority nations and their members would not feel treated with equal concern and respect. Hence, a multinational constitution ought to be inclined to accept diversity, autonomy and asymmetry with the purpose of treating majority and minority nations equally.[18]

4 Territorial spheres of equality in the Constitution of Spain

Spain is a multi-tiered state with a codified and rigid constitution. The Spanish Constitution of 1978 is not, according to the Spanish Constitutional Court, the result of any federal pact between prior existing entities, but

13 With regard to first-generation immigrants, the polyethnic sphere applies without the need for sharing the same citizenship. The federal sphere often applies between citizens of the same federation, but admitting another citizenship in each federated unit. The multinational sphere can be understood as a type of equality that applies between two different national societies and, thus, based on distinct citizenship.

14 On the distinction between ethnic and national groups (hence between the ethnic and multinational spheres), see Kymlicka (1995: ch. 2); Kymlicka (2018); Patten (2014: ch. 8); Torbisco (2006: ch. 6).

15 On self-rule and shared rule, see Elazar (1987).

16 In theory more than in practice, both federal and multinational spheres can be non-territorial, for instance, in some proposals of Austro-Marxists Karl Renner and Otto Bauer spheres (regarding a principle of individual ascription to the nation as a cultural community and a federal state of the nationalities). Nevertheless, their proposals are often thought to be more non-territorial than they really were, as Klaus-Jürgen Nagel sustains in the introductory study of Bauer and Renner (2016: 9-51). In the real world, non-territorial federal and multinational arrangements tend to be a reasonable option for dispersed, small or weak cultural, linguistic or national communities.

17 I use *neutral* as a gradual concept, whereas *neuter* as a non-gradual one. Specifically, even if states are not nationally neuter, they can act in more or less nationally neutral ways. See Section 7 below.

18 In the sphere of disabilities, the principle of equality often requires treating disabled people differently.

a product of the will of the Spanish people as the exclusive holders of sovereignty.[19] Article 2 of the Spanish Constitution states that "The Constitution is based on the indissoluble unity of the Spanish Nation, the common and indivisible homeland of all Spaniards; and it recognizes and guarantees the right to autonomy of the nationalities and regions of which it is composed, and the solidarity among them all". Catalonia and the Basque Country are legally recognized, by the first article of their respective statutes of autonomy, as nationalities and they are organized as autonomous communities. There are fifteen other autonomous communities and two autonomous cities, most of which are not considered nationalities.

The principle of equality, if its many spheres are distinguished, should not always require uniformity, symmetry or centralization. Territorial spheres of equality provide different reasons for, degrees of, and limits to territorial autonomy. Under Spanish constitutional law, territorial spheres are not generally covered by the fundamental right to equality. In this respect, the Constitutional Court of Spain ruled that "not every constitutional provision concerning equality falls under the scope of Article 14 of the Spanish Constitution".[20] The Court distinguished the fundamental right to equality of Article 14 from the specific constitutional provisions on territorial equality (i.e. Articles 138.2, 139.1 and 149.1.1).[21] The non-application of Article 14 to territorial spheres, and the presence of specific constitutional clauses for these spheres, reinforces the distinction between spheres of equality.

The constitutional provisions that specifically address the territorial spheres of equality can be found in Title VIII "on the territorial organization of the State". Article 138.2 provides that "the differences between the Statutes of the different Autonomous Communities may in no case imply economic or social privileges".[22] "All Spaniards have the same rights and obligations in any part of the State territory", stipulates Article 139.1. The State, reads Article 149.1.1 referring to central legislative and executive authorities, holds exclusive competence over the "regulation of the basic conditions guaranteeing the equality of all Spaniards in the exercise of their constitutional rights and in the fulfilment of their constitutional duties".[23]

Although the Spanish Constitution is equipped with powerful legal tools to apply standardized versions of territorial equality, the right to (territorial) autonomy enshrined in Article 2 of the Constitution implicitly allows a significant degree of difference, pluralism and heterogeneity. This right to autonomy endorses an "inherent diversity" (in the terms of the Constitutional Court), since each statute of autonomy, as the basic law of each particular autonomous community, can attribute to its community distinct powers from other autonomous communities and may contain different clauses from other statutes of autonomy.

In addition, some constitutional clauses directly establish asymmetries between territories in terms of languages (Article 3.2), civil law (Article 149.1.8), processes of devolution (Article 151 and Transitory provision 2), the institutions of self-government (Article 152), and historical rights (Additional provision 1). Beyond the autonomy granted by each statute of autonomy, Article 150.2 of the Constitution allows the transfer or delegation, as accorded via organic statute, of state powers to particular autonomous communities. Territorial asymmetries are and should be characteristic of the so-called "State of autonomies". This could be implicitly related to the distinction that Article 2 makes between "nationalities" and "regions". Both nationalities and regions are holders of the right to autonomy, but they may hold, desire and enjoy this right to different extents and with different degrees of intensity.[24]

Plurality and diversity are intrinsic in all federal and decentralized states. The inherent diversity of the Spanish state of autonomies is recognized in the first words of Article 138.2 in referring to "the differences

19 See Judgements 76/1988, 247/2007, 31/2010, 42/2014.

20 Judgements 155/1998 and 45/2007.

21 "Divergences between laws passed by distinct legislatures do not fall under a claim of equality (of Article 14)", reads Judgement 319/1993.

22 The "Statutes" referred to in Article 138.2 seem to be the statutes of autonomy, which are the basic laws of each autonomous community.

23 This translation is meant to refer to both constitutional rights and duties, since this is the approach taken by jurisprudence and most academics. *Inter alia*, Constitutional Court Judgements 61/1997, 31/2010, 151/2014; Otto (2010: 781); Alonso de Antonio (1999); Pemán Gavín (2018).

24 See Bossacoma and Sanjaume-Calvet (2019).

between the Statutes of the different Autonomous Communities". This article accepts "differences" but forbids "privileges". Etymologically, privilege comes from *privata lex*, as a law for a particular individual or group of people. Privilege, however, carries a more negative, pejorative meaning in this constitutional clause.[25] Privilege is, thus, an irrational or unfair difference. If understood in a similar way to "discrimination", Article 138.2 may endorse a prohibition of differences with no objective and reasonable justification.[26] All this allows for the interpretation of equality as permitting difference in territorial spheres. For example, when taking into account the multinational sphere, differences in language laws and policies should rarely be regarded as unconstitutional privileges.

At first glance, Article 139.1 has a surprisingly broad standardizing potential as it reads "all Spaniards have the same rights and obligations in any part of the State territory". A textual interpretation, however, should not trump a contextual, systematic and teleological interpretation of the constitutional right to territorial autonomy.[27] As the rights and obligations referred to in Article 139.1 cannot be *all* rights and obligations, this provision can be interpreted in light of Article 149.1.1, according to which not all rights and duties shall be equal but only the constitutional rights and duties. In this vein, under Article 81.1, the fundamental rights enshrined in the Constitution shall be developed through organic statutes passed by the Spanish Parliament.[28]

In addition to the recognition of fundamental rights by the Constitution and their development by organic statutes, the interpretation of fundamental rights by central courts or a centralized judiciary often paves the way to equality as standardization across all nationalities and regions.[29] Fundamental rights, many believe, ought not to be affected by the territorial distribution of powers.[30] Although equality as uniformity in fundamental rights and equality as diversity in ordinary rights can be a harmonic and systematic interpretation, in Section 8 we will question this rather simplistic interpretation since fundamental rights play a decisive unifying and centralizing role.

Independently or complementarily to the previous interpretation, Articles 138.2 and 139.1 can also be interpreted in a federal manner, understanding that equality essentially operates within every self-governing unit and does not allow discrimination among citizens of other self-governing units of the union. This federalist interpretation would comprehend these Spanish provisions similarly to Article IV Section 2 of the US Constitution (the privileges and immunities clause), Section 117 of the Australian Constitution, Article 37.2 of the Swiss Constitution, and Article 33 of the German Constitution. Even the principle of non-discrimination of EU citizens has a similar function (Article 21.2 of the Charter of Fundamental Rights of the European Union).[31]

25 The word "privileges" does not seem to have a negative meaning in other provisions of the Spanish Constitution (see Article 67.3) nor in the US Constitution (see Article IV Section 2 and the 14th Amendment).

26 Albertí (2018a). Likewise, it might endorse a prohibition of unjust enrichment of one autonomous community over another. Lucas Verdú and Lucas Murillo de la Cueva (1998a).

27 From the very beginning, the Spanish Constitutional Court has maintained that Article 139.1 does not require absolute uniformity of rights across all Spanish territory (Judgements 37/1981 and 247/2007, amongst others). Otto (2010: 767).

28 On the connection of these three constitutional provisions, see Cabellos (2006: 102-106).

29 This happens in many decentralized polities. As José Woehrling (in Argullol and Velasco, 2011: 188) argues, "every time a legislation of a province is declared unconstitutional, the same automatically applies to the other provinces and territories. This amounts to negative standardization. Standardization can also be more invasive. It is well known that Supreme and Constitutional Courts often hand down 'constructive' decisions in which they set out in great detail how the legislature should amend legislation to make it consistent with the Constitution. Sometimes courts go so far as to write new legislation themselves by judicially rephrasing the impugned legislative provision (adding to it or deleting part of it). In such cases, the courts impose positive uniform standards, sometimes down to minute details, on all the federated states". Likewise, see Woehrling (2009).

30 See Otto (2010: 766-784).

31 The federalist interpretation just presented is compatible with making some rights dependent on residence. Granting certain political and social rights only to the people with a domicile in the region may well be rational or reasonable, such as voting rights or welfare payments. In the end, the federal interpretation does not aim to target uniformity or standardization but rather unjustified different treatment of members of the same political union. The privileges and immunities clause, for instance, allows a State to discriminate against citizens of other States of the Union if there is a "substantial reason" for the difference in treatment and "substantial relationship to the State's objective" (Chemerinsky, 2011: § 5.5).

Such federalist interpretation of Article 139.1 is connected to the fundamental right of Spaniards to freedom of movement and residence across all Spanish territories (Article 19 of the Constitution). In this direction, Article 139.2 stipulates that "no authority may adopt measures which directly or indirectly obstruct freedom of movement and establishment of persons and free movement of goods throughout the whole of the Spanish territory". Thus, a holistic approach to Article 139, interpreting sections 1 and 2 as containing akin and related norms, also makes clear that differences between self-governing units are allowed provided that they do not discriminate between Spanish citizens.[32]

In addition, a historical approach could help this interpretive stance as Article 17 of the 1931 Spanish Constitution (a key precedent of the current 1978 Constitution) banned autonomous regions from treating their citizens differently from other Spaniards.[33] Civil law deserves a brief mention as well. While public law was more or less centralized and uniform depending on the type of political regime in power, civil law maintained different principles and rules across distinct parts of Spain. Many provisions of the Spanish Civil Code are not applicable, for instance, in Catalonia, where Catalan civil law has been preserved even in periods of dictatorship, and these differences have been added to in the 21st century with the enactment of the Civil Code of Catalonia. Article 149.1.8 of the Spanish Constitution of 1978 allows self-governing units with historically distinct civil law to maintain, modify and develop it.

It could be argued that stricter textual interpretations of Article 139.1 were nevertheless conceivable, even though they would have severely limited the development of the "State of autonomies". The broad compromise on the approval of the 1978 Constitution directly after the fall of the dictatorship had considerable costs, among which are a substantial degree of imprecision and ambiguity with respect to the territorial constitution. Hence, the territorial structure of Spain was to be designed by the constituted powers rather than the constituent power. Both Articles 138.2 and 139.1 are good examples of this ambiguity between a unitary and a decentralized constitution.[34] In the end, this constitution could, and still can, be developed in different decentralized ways and degrees.

The Spanish Constitution visibly displays a state-nationalist approach to equality, at least in a discursive dimension. The fundamental right to equality enshrined in Article 14 refers only to Spaniards instead of expressions such as *every person*. Likewise, Article 139.1 reads "all *Spaniards* have the same rights and obligations in any part of the State territory". Article 149.1.1 establishes the central power on the "regulation of basic conditions guaranteeing the equality of all *Spaniards* in the exercise of their constitutional rights and in the fulfilment of their constitutional duties".[35] These excessive references to Spaniards are signs of a nationalistic constitution in discourse. Yet again, systematic, teleological and contextual interpretations should trump textual interpretations of the equality clauses of the Spanish Constitution.

Why did the framers not refer to everyone, every individual or use some other less nationalistic formulation? One explanation of this discursive approach may be another consequence of the search for the above-mentioned constitutional compromise. Given that the dictatorial establishment supported strong forms of national and state unity, and traditionally opposed decentralization and diversity, many provisions referring to the equality of Spaniards eased the acceptance of territorial autonomy and, arguably, the fundamental right to equality. Although the principle of equality may reasonably have a function of counteracting certain forms of sub-state nationalism, the truth is that it can sometimes favour state nationalism more than liberal egalitarianism.

32 By reading Article 139.1 in a different order ("the same rights and obligations all Spaniards shall have in any part of the state territory"), the federal interpretation may be easier.

33 See Otto (2010: 771); Lucas Verdú and Lucas Murillo de la Cueva (1998b); Albertí (2018b).

34 See Cruz Villalón (2006: 377-389).

35 This nationalistic approach has, in some cases, important legal effects. For instance, since Article 149.1.1 refers to *Spaniards*, the Constitutional Court several times refused state powers over immigration under this provision (Judgements 227/2012 and 33/2014). Conversely, the Court has extended to non-Spaniards the fundamental right to equality of Article 14 by means of a systematic interpretation which takes into consideration Article 13 (Judgement 107/1984). See Ferreres (2013: 251-252).

5 Territorial equality in Spanish politics

The principle of equality can indeed favour certain forms of state nationalism. During the parliamentary debates on the 2006 Statute of Autonomy of Catalonia, the conservative People's Party (*Partido Popular*) led by Rajoy blamed Zapatero's socialist Government for breaking the equality of rights and duties of Spaniards.[36] The parliamentary group of this party introduced a proposal to guarantee "the equality of all Spaniards" and "the equality of all nationalities and regions" that was passed also with the votes of the socialist group.[37] The strategy of the People's Party, shared by significant factions of the Socialist Party, consisted of two roads both aiming to hinder the granting of more autonomy to Catalonia: insisting on the equality of all Spanish citizens and the equality of all Spanish autonomous communities.

Equality among autonomous communities was a secondary road with a similar direction to the main one heading towards equality of all Spaniards as members of the same nation. For instance, the 2006 Statute of Autonomy of the Valencian Community, then governed by the People's Party, incorporated an additional provision intending to grant to the Valencian Community any increase in the competences held by other autonomous communities and requiring the Valencian authorities to ensure that the degree of self-government of the Valencian Community is updated on "equal terms" as the rest of the autonomous communities. As another example, we can observe that the 2007 Statute of Autonomy of Andalusia, then governed by the Socialist Party, reproduced many provisions of the 2006 Statute of Autonomy of Catalonia.[38] Claiming symmetry of competences ("coffee for everyone" in Spanish political jargon) in countries with numerous self-governing units tends to be an effective strategy to counteract demands for more autonomy for minority nations.[39]

The primary road was to push for equality of all Spanish citizens. In early 2006, while the proposal for a new statute of autonomy for Catalonia was being debated in the Spanish Parliament, the People's Party started collecting signatures across Spain against this proposal and calling for it to be submitted to all Spaniards through referendum. Under the slogan "We all have the right to express our opinion" and claiming to be backed by four million signatures, the People's Party introduced an initiative in Parliament, in which the question of the proposed referendum was "Do you agree that Spain should remain a single nation in which all its citizens are equal in rights and obligations, as well as in the access to public benefits?" The People's Party defended the initiative as both "exquisitely democratic" and "a requirement of democracy".[40] Interestingly, this campaign resembles the later demands in Catalonia for a referendum on independence but with the roles reversed.

The legal course of passing this type of statute of autonomy had a constitutionally compulsory and binding referendum to be submitted to the citizens of Catalonia at the end of a constitutional procedure with the function of ratifying a written agreement between democratic representatives. Yet the People's Party had no problem in demanding a different referendum from the one that was constitutionally required. Conversely, this political party, together with the Socialist Party, asserts that a referendum on secession is unconstitutional, since this matter must be addressed, according to the jurisprudence of the Constitutional Court, through the proper constitutional revision procedure, which requires a referendum to be put to all Spaniards after the

36 See, among others, the speeches of Fernández Díaz (180/000925) and Rajoy (180/001216) in the Spanish lower chamber on 19 October 2005 and 15 March 2006, respectively.

37 "Proposición no de Ley del Grupo Parlamentario Popular en el Congreso, para garantizar la igualdad de todos los españoles en el ejercicio de los derechos y en cumplimiento de los deberes constitucionales, así como la igualdad de todas las nacionalidades y regiones" (162/000032).

38 The People's Party brought to the Constitutional Court many provisions of the Statute of Autonomy of Catalonia that were identical, or very similar, to the provisions of other statutes of autonomy. Since the latter were not challenged, this entailed a discriminatory political treatment towards Catalonia.

39 Generalized asymmetry can make it very difficult to rule a country with numerous self-governing units. Asymmetries raise problems of who is, what and how to decide. On the other hand, in order to avoid powerlessness and insignificance, central authorities are likely to resist granting extensive symmetric autonomy. In general, increasing the number of self-governing units can be part of a central strategy of *divide et impera*.

40 See Ferreres (2013: 167). On the website of the Congreso de los Diputados, "Cronología constitucional: Año 2006". In the press, "Rajoy presenta en el Congreso cuatro millones de firmas por un referéndum sobre el Estatuto," *El País*, April 25, 2006; "Rajoy afirma que tiene derecho a recoger firmas donde le dé 'la gana' para apoyar un referendum," *El Mundo*, January 31, 2006.

wording of the amendment is agreed by qualified majorities in both chambers of the Spanish Parliament.[41] The contradiction is salient: To oppose territorial autonomy, the referendum was considered a requirement of democracy without regard to the letter of the law. To demand secession, any referendum must follow strictly the legal procedures without regard to other sources of legitimacy such as democracy and self-determination.

Ever since these debates took place, the principle of equality of all Spaniards has been present in the controversy regarding both autonomy and secession. One of the main arguments of Premier Rajoy and his cabinet while refusing, first, the so-called Fiscal Pact for Catalonia and, later, the secession of Catalonia and specifically the referendum on independence was the "equality of all Spaniards" together with the unity of Spain and the national sovereignty.[42] This approach also prevailed in the Spanish Parliament.[43] The argument of equality, however, should no longer remain monopolized by the unionist narrative.[44]

6 Territorial equality in Spanish jurisprudence

The debate on territorial equality in the legal arena basically revolves around the question of where to place the limits of the state power, under Article 149.1.1, to regulate basic conditions. In contrast to Spanish politics, in Spanish case law, the territorial distribution of powers is more relevant than the constitutional provisions on substantive territorial equality. The legal role of the controversial Articles 138.2 and 139.1 is thus discreet.[45] This could be so because the Constitutional Court was cautious from the very beginning in applying the principle of equality in relation to territorial spheres. Unity, autonomy and solidarity are, unlike equality, the three main principles of the territorial constitution of Spain (enshrined together in Article 2). Compared to equality as uniformity, the principles of unity and solidarity seem quite compatible with autonomy. Conversely, unity and solidarity may be compelling legal rivals to secession and to full fiscal autonomy. Economic justice regarding territorial spheres is more related to the principle of solidarity than that of equality, at least under the Spanish Constitution.

An early ruling of the Constitutional Court determined that the principle of equality neither imposes the same competences for all autonomous communities nor similar methods and results in the implementation of those powers. Territorial autonomy implies the capacity of each nationality and region to decide when and how to exercise its own competences, under the framework of the Constitution and its respective statute of autonomy. Therefore, inequalities in the legal position of citizens living in different communities do not necessarily infringe the principle of equality, since this principle does not require uniform treatment of all citizens' rights and duties in every matter and in the entire territory of the state but, in sum, "equality in fundamental legal positions".[46]

The approach to equality as uniformity in fundamental rights and equality as diversity in ordinary rights brings the debate to the vertical division of powers and, in particular, to Article 149.1.1, which grants central authorities the competence to regulate the basic conditions to ensure the equality of all Spaniards in their constitutional rights and duties. According to the Constitutional Court, this is a central power to regulate "the basic conditions to guarantee equality with regard to constitutional rights and duties as such" ("constitutional

41 See Bossacoma and López Bofill (2016: 111-113); Ferreres (2013: 191).

42 See, for instance, the extended interview with Rajoy, *Cadena Ser*, October 28, 2015; or his interview on *Onda Cero*, January 26, 2017. Beyond the prime minister, the minister of culture and spokesman of the Spanish Executive assured that the Government would act firmly against the referendum on the independence of Catalonia to defend the "sovereignty and equality" of all Spaniards. See "El Gobierno tiene estudiadas todas las vías legales para frenar el 1-O", *La Vanguardia*, August 17, 2017.

43 For example, in March 2016, a Resolution on the "defence of democracy, equality and union of all Spaniards" was passed which expressed, first, the commitment to the unity and integrity of Spain and the protection of the constitutional order and, second, the determination of opposing every intention to call a self-determination referendum in any territory of Spain.

44 Under a multinational view of equality, a remedial right to secede can be defended when members of a minority nation are not recognized as such and are not allowed an appropriate accommodation and self-government within the larger state (see Patten, 2014: ch. 7). A moral defence of a primary right to secede can be based on the equality and freedom of nations for self-determination, using the theoretical artefact of a hypothetical multinational contract. This contractual approach, which I call justice as multinational fairness, is grounded in a particularly deep sense of equality (see Bossacoma, 2020: ch. 2).

45 This might be slightly different, however, when reviewing reforms of statutes of autonomy.

46 Judgement 37/1987.

rights, in the strict sense, as well as basic duties" and "conditions with a close, direct and immediate relation to the rights recognized in the Constitution"). These basic conditions, the Court holds, may be related to the primary content of rights, elemental capacities, essential limits, fundamental duties, basic benefits, some preconditions, etcetera. This broad and open-ended list has a vague limit set by the Court: the regulation of the basic conditions cannot entail "a final and complete legal regime" of the affected constitutional rights and duties.[47] Precisely because this central power to regulate the basic conditions potentially has such vast scope, broad and expansive interpretations ought to be rejected. In fact, the Constitutional Court admits that Article 149.1.1 should be used prudently to avoid altering the constitutional system of allocation of powers (Judgements 37/1981 and 18/2017).

Yet when put in practice, this jurisprudential construct gives (too) much leeway to central legislation.[48] As a paradigmatic case, in 2017 the Constitutional Court upheld, under the unifying power of Article 149.1.1, a Spanish decree "on the regulation of the basic conditions to issue and use the parking card for disabled people".[49] This case conveys many teachings. First, the regulation mentioned in article 149.1.1 does not need to be statutory legislation, but can be secondary legislation issued by the central executive.[50] Second, the constitutional rights referred to in Article 149.1.1 include guiding principles such as those on health, environment and protection of the disabled and the elderly.[51] Third, the alleged constitutional right guaranteed can sometimes have no more than a marginal connection, as is the right to freedom of movement in this case. Fourth, although Article 149.1.1 often works complementarily to other state competences or constitutional provisions, it also operates as an independent power.[52] Fifth, under Article 149.1.1 central authorities can regulate substantive, procedural, institutional and organizational aspects related to constitutional rights and duties.[53] Sixth, the Constitutional Court understands Article 149.1.1 as a central power with standardizing purposes to substitute diverse regulation for uniform regulation even in fields of exclusive sub-state competences. Seventh, the Court admits very comprehensive regulation, despite its prohibition of "final and complete" regulation.[54]

7 Equality in need of autonomy

The present article proposes an approach that is uncommon in Spanish politics and jurisprudence, namely that some spheres of equality are in need of territorial, political or group autonomy. Rather than being necessarily conflicting, the principle of equality may call for and benefit from self-government, asymmetry and legal pluralism. The principle of equality, understood as equal concern and respect, often requires treating distinct peoples differently. In many day-to-day plurinational democracies, problems do not only arise from differential treatment but rather from identical treatment (Kymlicka, 1995: 113).[55]

When understood in a unifying way, the many facets of equality (i.e. equality of rights, of opportunities and of results) tend to favour the idea of the nation-state or, more precisely, of a nationalizing state.[56] If a state handles these facets of equality uniformly across all its territory, it acts as if it were a single nation with its members-citizens having common sympathies, desires and interests to govern themselves as a community of shared destiny. This is likely to provoke controversy and resentment in states that are sociologically multinational. In particular, many Catalans and Basques do not feel represented by the Spanish Government

47 Judgements 61/1997, 151/2014 and 18/2017.

48 In similar vein, Cabellos (2006).

49 Judgement 18/2017.

50 Also in Judgements 32/1983 and 64/1989.

51 Also in Judgements 32/1983, 149/1991, 13/1992 and 33/2014.

52 Also in Judgements 61/1997, 184/2012 and 18/2016.

53 Also in Judgements 61/1997, 290/2000 and 18/2016.

54 See the dissenting opinion of Justice Asua in Judgement 18/2017.

55 Similarly, Kymlicka (2001a: ch. 5); Taylor (1992: 37-44, 61-64).

56 See Kymlicka (2001a: ch. 15).

in the same way as other Spaniards do. Their national identity is more tied to their autonomous communities and, consequently, they are more inclined to regard their sub-state government as being national.[57]

Equality of what is no less important than *equality of whom* (Kukathas, 2003: 215). Generally, equality applies within those territorial societies recognized as states.[58] Hence, it should come as no surprise if equality operates within sub-state units in certain fields, as the choice is not just whether to treat the world population equally but also which portions of humanity ought to be treated equally. Being aware of the territorial boundaries of equality should avoid exaggerated unifying objections to equality as difference. This work focuses on equality between groups because identity, membership and context matter for treating individuals equally. Equal concern and respect for persons as *contextual*, rather than *atomistic*, individuals requires taking into consideration our social context and sense of identity, and nationhood is a significant source of both sociality and identity.[59] The multinational sphere of equality becomes even more relevant since states, instead of being nationally neuter, tend to be nationalizing entities.[60]

In a more jurisprudential approach, the "feeling of inferiority" test of the seminal US Supreme Court case *Brown v. Board of Education* can be reappraised by distinguishing spheres of equality, and it may justify differential treatment as a genuine concern for equality.[61] While exclusionary practices may consist of treating people differently on grounds of race, they might also consist of treating people identically without due concern for their nationality. Although segregation had for *Brown*'s case a "sense of inferiority", distinction, separation, autonomy and asymmetry are likely to have other meanings in other spheres of equality.[62] In recent decades, American society has been reshaped by several movements often calling for full integration regarding issues of race, gender, sexuality, disability and immigration. By contrast, cultural, national and linguistic movements claiming the right to remain different, to have group autonomy, to be separate or independent have had no such capacity to reshape the USA.[63]

Both autonomy and asymmetry can work as devices for equal recognition and reasonable accommodation of majority and minority nations. Autonomy and asymmetry may foster equal recognition by acknowledging, internally and externally, some minority nations and distinguishing them from the territorial units into which the majority nation is divided. Autonomy and asymmetry may ease reasonable accommodation, for instance by granting linguistic powers to the minority nations with a distinct language. While in some spheres there can be a reasonable debate as to whether or not the constitution should be blind, the multinational sphere tends to require a culturally-sighted constitution. Yet, when the racial sphere welcomes or requires preferential treatment, it gets closer to the multinational one.[64]

For Bruce Ackerman (2014: 13), the case law arising from *Brown* is the beginning of a genuinely "sociological jurisprudence" with the aim of eliminating the institutionalized humiliation of Black people. A sociological jurisprudence, we can contend, should take the potential differences between spheres of equality seriously.

57 See Bossacoma and Sanjaume-Calvet (2019: 435-437).

58 See Kymlicka (2001b: 249-250).

59 MacCormick (1999: 162-163, 182).

60 See Bossacoma (2020: Part I).

61 Justice Warren expressed the opinion of the Supreme Court in these words: "To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."

62 See Kymlicka (1989: ch. 7).

63 Patten (2014: Preface).

64 In the US Supreme Court case of 1896 *Plessy v. Fergusson*, the later celebrated dissenting opinion of Justice Harlan reads: "Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. (…). The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved." Nonetheless, such a blind and individualist vision of the constitution can be criticized from the very same racial sphere of equality regarding, in particular, affirmative action. In this vein, Owen Fiss (1976: 171-172) proposed an interesting way to interpret the equal protection clause: "The antidiscrimination principle, with its individualistic, means-focused, and symmetrical character, would tend toward prohibiting such preferential treatment; the group-disadvantaging principle, on the other hand, would tend toward permitting it (and indeed might even provide the foundation for the fourth-order claim that may lie around the corner – that of requiring the preferential treatment)".

If the jurisprudence is to be sociological, it should take into consideration, together with the feeling of inferiority, the feelings of belonging as well as the shared desires for autonomy and recognition.[65] Thus, sociological jurisprudence ought to be well aware that cultural membership matters to people. And because cultural membership matters, institutionalizing difference through political autonomy arrangements may help to prevent members of minority nations feeling inferior and even humiliated. "After all, liberal equality is meant to be able to accommodate the fact that different groups value different things, including, presumably, different cultural memberships" (Kymlicka, 1989: 182).[66]

Beyond purely theoretical discourse, distinguishing constitutional spheres of equality may have an impact on legislation, implementation and adjudication. With respect to the racial sphere, laws can be passed, interpreted and applied in a rather uniform, standardized or centralized way. By contrast, the multinational sphere can be seriously harmed if uniformity, standardization and centralization are imposed by a single, central government. Thus, when approaching the topic of the allocation of powers, it is wise to endorse a culturally-sighted rather than a blind constitution. Likewise, central courts and a centralized judiciary can do harm to the multinational sphere of equality, since its rulings and case law may also work as powerful centralizing and unifying mechanisms.[67]

Judicial review of fundamental rights can cause centralization and standardization, whereas the adjudication on territorial organization and division of powers is less controversial with regard to the spheres of territorial equality. There are theoretical and practical reasons to defend that courts are well suited to adjudicate on territorial disputes.[68] Theoretical reasoning could emphasize the important role of both constitutionalism and the judiciary in protecting minorities, including minority nations. The judicial branch is thus envisioned to have a counter-majoritarian function. In some contexts, practical reasoning could highlight the advantage of this branch being less accountable than the political branches to the entire electorate of the state and being more independent from party politics. Although courts are not isolated from public and partisan approval and disapproval, their rulings are not generally the results of electoral cost-benefit analyses. Despite their lack of neutrality towards certain territorial disputes, the judiciary tends to value and seek impartiality of judgement as well as be more committed to reason-giving and to abiding by precedents than political branches.[69]

The Canadian context offers a good laboratory to study the role of courts, the recognition of distinctiveness and the importance of certain allocations of powers. In the 1998 *Quebec Secession Reference*, the Supreme Court not only managed to accommodate secession in a reasonable and reasoned way, but also to recognize Quebec's "distinct culture".[70] While doing so, the Court implicitly conceived Canada as a multinational federation:

> "The principle of federalism facilitates the pursuit of collective goals by cultural and linguistic minorities which form the majority within a particular province. This is the case in Quebec, where the majority of the population is French-speaking, and which possesses a distinct culture. This is not merely the result of chance. The social and demographic reality of Quebec explains the existence of the province of Quebec as a political unit and, indeed, was one of the essential reasons for establishing a federal structure for the Canadian union in 1867. [...]. The federal structure adopted at Confederation enabled French-speaking Canadians to form a

65 See Tierney (2008).

66 See Torbisco (2006: ch. 5).

67 In this vein, Kelsen (2008: 19-23) recommended an international judiciary (i.e. an international court with compulsory jurisdiction) as a mechanism to centralize power at the international level.

68 We would perhaps be more convinced of this suitability if minority nations and sub-state units had a significant role in the appointment of the judges who make up the highest courts, if these judges reflected the national and territorial diversity of the country, and if the constitutional or supreme courts were geographically decentralized. However, according to the Venice Commission report on the composition of constitutional courts of 1997, "the representation of minority groups on the bench seems not to be a common goal". See also Abat Ninet (2020).

69 See Tierney (2004: 247-253). Arguably, the doctrine of precedent generates a veil-of-ignorance effect that favours the protection of minorities.

70 In a motion tabled by Prime Minister Jean Chrétien on 28 November 1995, the House of Commons had already recognized that "Quebec is a distinct society within Canada"; see "Jean Chrétien on Recognition of Quebec As A Distinct Society", November 29, 1995.

> numerical majority in the province of Quebec, and so exercise the considerable provincial powers conferred by the *Constitution Act, 1867* in such a way as to promote their language and culture".[71]

In addition to secession, Quebec's distinctiveness may also justify granting more competences to *la belle province* as well as other asymmetrical arrangements.[72] A significant example is the greater powers that Quebec has over immigration than the other provinces.[73] Minority nations are afraid that immigrants from third states, seeking greater opportunities and mobility, tend to learn the language and culture of power first, which often coincides with that of the national majority. Since states tend to control immigration and integrate newcomers into the national (majority) culture, a multinational constitution should grant minority nations considerable powers over immigration and the terms of integration (i.e. education and language).[74] Although culture and language do not necessarily imply a distinct national identity, it is no accident that they often go together. Culture and language are products of socialization processes that nourish feelings of belonging while these feelings, in turn, promote identification with a particular culture and language as well as reinforce the processes of socialization (Patten, 2014: 60).

Asymmetrical powers and arrangements are nevertheless considered by many people in English Canada to be contrary to the principle of equality of all provinces and of all Canadian citizens (Woehrling, in Argullol and Velasco, 2011: 140-141). This is when the federal sphere of equality may diverge from the multinational sphere. While the former is often grounded in equality between units of the same tier, the latter tends to focus on equality between different layers of government – especially in cases where the majority nation is in control of the central level and minority nations are (or could be) in control of (some) sub-state levels. The multinational sphere of equality seeks a deeper sense of equality between *demoi* (peoples) rather than a surface sense of equality between citizens of one *demos* (people).

This leads us once again to the debate on the conception of the union. Is it a compact between equal provinces or a compact between nations? The former leads to uninational regional federalism, the latter to multinational federalism. Whilst a compact between equal regions does not tend to treat nations and their members with equal concern and respect, multinational federalism is willing to do so. In many cases, multinational federalism should welcome asymmetries between different units of the same level of government. Behind and beyond particular arrangements in the allocation of constituted powers, multinational federalism seeks recognition of national pluralism, shared sovereignty and diverse constituent powers.[75]

These different visions of the principle of equality (differential versus identical treatment) explain, in part, the failed attempts at constitutional reform in Canada in the late 20th century. In the words of Woehrling (in Argullol and Velasco, 2011, 140-141), "equality does not require the same treatment for people or communities in different situations. The province of Quebec embodies the desire of its French-speaking majority to remain culturally distinct and politically self-governing, while the other provinces serve as regional divisions of a single national community. Thus, some form of differential treatment would be justified by the differences existing in the two situations. Actually, the refusal of English Canada to accept that point of view seems to be explained by the denial, by most English-speaking Canadians, of the fact that Quebeckers form a separate national community within Canada, and that Canada is a multinational federation."

The principle of the rule of law incorporates a principle of juridical equality that requires treating like cases alike and unlike cases differently.[76] If this is so, are *nationalities* and *regions* to be treated equally? Are the *state*

71 *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, paragraph 59.

72 It may also justify opting out from federal schemes such as the Canada Pension Plan (see section 94A of the 1867 Constitution Act) and even opting out from certain constitutional amendments (see section 38 of the 1982 Constitution Act). On asymmetrical federalism in Canada, see Gagnon (2009 and 2019).

73 See Canada-Québec Accord relating to Immigration and Temporary Admission of Aliens, 5 February 1991. Section 12.c. runs: "Canada shall not admit any immigrant into Québec who does not meet Québec's selection criteria".

74 Kymlicka (2001a: ch. 15).

75 See Tierney (2017); Taylor (1992); Requejo (2012). Requejo (2017) emphasizes the importance of recognition but notes that very few multinational federations establish an explicit constitutional recognition of their internal national pluralism.

76 According to Rawls (1999: 208), "the rule of law also implies the precept that similar cases be treated similarly. Men could not regulate their actions by means of rules if this precept were not followed".

and the *autonomous communities* to be treated equally? Are the *Spanish nation* and *nationalities* to be treated equally? The Constitutional Court of Spain maintains that sovereignty cannot be confused with autonomy, so the relation between the state (as a legal organization of the Spanish Nation) and each autonomous community (whether a legal organization of a nationality or region) is not one among equals. The former has a position of superiority over the latter (Judgement 31/2010).

A multinational constitution should refuse state hegemony in favour of some form of shared sovereignty. At a surface level, this type of constitution requires diversity in legislation, application and adjudication, as well as rethinking the allocation of typical central powers such as immigration. At a deeper level, it involves an understanding of the union, the compact and constituent powers according to the plurinational phenomenon. *Pouvoirs constituants* not vested in one nation and its citizens but in its nations and citizens. Instead of We the People, it could be We the Peoples and Citizens. Beyond the importance in terms of recognition of such expressions, practical means of sharing constituent power(s) between peoples can be through the recognition of rights to initiate, participate and ratify constitutional amendments,[77] as well as rights of veto, nullification and secession.[78]

On the question as to whether nationalities and regions should be treated equally, the Spanish Constitutional Court considered that "Articles 9.2, 14, 139.1 and 149.1.1 of the Spanish Constitution safeguard the equality of individuals and social groups but not the equality of the autonomous communities." Autonomous communities are equal, argued the Court, under some constitutional provisions; but they can be unequal following the provisions of their statutes of autonomy.[79] The Court has nonetheless developed doctrines and precedents to challenge differences among autonomous communities, such as (1) devaluating the normative force and scope of statutes of autonomy, (2) allowing the central political branches an expansive use of its powers, even displacing or overriding the supposedly "exclusive" competences of the autonomous communities, (3) interpreting all statutes of autonomy similarly despite their different provisions, and (4) diluting any distinction between "nationalities" and "regions" to foster equality as uniformity.[80]

8 Fundamental rights in multinational contexts

Different spheres of equality may mingle and conflict. If, for example, the Catalan Parliament were to pass a statute on places of worship, this would involve religious, federal and multinational spheres of justice – possibly even racial and ethnic spheres. It is doubtful as to whether a magic formula could be designed to sagely handle the many points that would overlap or intersect with one another. If one sphere is not more salient than others, harmonizing and middle-ground interpretations can offer ways to deal with it. Although limiting the standardization effects of equality to the fundamental rights and so admitting diversity in ordinary rights has been referred to in previous sections, in this section the need for uniformity in fundamental rights will be put into question.

Minorities within minorities often prefer the protection of more distant authorities. Sometimes this is so because a minority within a minority is a portion of the majority. But this is not the only case, since a farther power may simply be perceived as offering better protection for minorities within minorities than a nearby one. If the majority has a more direct and concerning conflict with middle minorities, it may be keen to engage in some alliance with the minority of the minority. The majority may pursue the old strategy of *divide and rule* or apply the ancient proverb *the enemy of my enemy is my friend*. According to traditional federalist lessons, factional equilibrium is more likely in larger societies (through the presence of multiple factions which counterbalance their powers and interests).[81]

77 See Pérez Alberdi (2018).

78 See Bossacoma (2020: Part III).

79 Judgement 20/2013.

80 See Judgement 31/2010. In this and other judgements, the Court considered that the Spanish nation is the only nation under the Constitution and that sovereignty only belongs to the Spanish people as a whole. See Viver (2011 and 2012) as well as Viver in Argullol and Velasco (2011: 132-132, 729-730).

81 See Publius (2001: No. 9-10).

Minorities within minorities should be able to turn to the central authorities when the middle minority is ruled by illiberal institutions, laws and practices. In other words, when a minority exercises self-government in ways that are not compatible with liberal democracy, the liberal-democratic state has a strong claim to refuse substantial degrees of autonomy and to position itself, through legislation and adjudication, as the final protector of the minorities within minorities. In the end, equality as autonomy should be seen as giving minority nations or self-governing units "external protections" (against the majority nation or the state) rather than "internal restrictions" (against their own minorities), since the intolerant character of the self-governing community undermines the *prima facie* reasons for autonomy.[82]

Although it is widely believed that central legislation and adjudication should play a strong role in fundamental rights, it is more deferential to self-government to make sure each level of government has adequate structures to protect fundamental rights, such as democratic elections and representation, separation of powers and judicial review. One advantage of this approach is to promote respect and protection of human rights within the self-governing unit instead of imposing a uniform doctrine on fundamental rights. The former is an autonomous approach (protection from within), whereas the latter is heteronomous (protection from outside). The framers of the US constitution took an autonomous approach in Article IV Section 4: "The United States shall guarantee to every State in this Union a Republican Form of Government".[83]

By guaranteeing a republican form of government, translated today as a liberal-democratic form of government, rights in general and equality in particular can be protected without detriment to autonomy.[84] Yet this may work better in theory than in practice, as Article 7 of the Treaty on European Union illustrates. This provision creates a mechanism to detect and punish serious and persistent breaches by a Member State of the founding values such as democracy, equality, rule of law and respect for human rights. The hazardous procedure of Article 7 makes it exceptionally difficult to end up imposing any actual sanction and is, thus, a weak threat for Member States. Two caveats are nevertheless worthy of mention. First, Article 7 can still work as a warning device of such a serious risk.[85] Second, other more jurisdictional and less political mechanisms and procedures can be developed in order to check Member States' systematic violations of the founding values.[86]

The field of application of fundamental rights is sometimes confined to the specific competences of a particular polity. In other words, some (quasi-)constitutional bills of rights are applied in relation to the scope of powers of the respective tier of government. In particular, Article 51.1 of the Charter of Fundamental Rights of the European Union stipulates that its provisions "are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties."

Although this limited scope of application of fundamental rights might hinder legal certainty due to distinct articulations, interpretations and levels of protection, it enhances the legal certainty in the allocation of powers, since the recognition of fundamental rights in one tier of government will not affect the competences of another tier. In this way, the distribution of competences is legally secured from legislation and judicial review of other tiers, and so is territorial autonomy in general. In this vein, Article 51.2 reads "The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties."

82 While "external protections" protect the group from the decisions and acts of the majority, "internal restrictions" restrict dissent and internal pluralism (Kymlicka, 1995: 35-44). It is not always easy, however, to distinguish the former from the latter. The same instrument of protection can be both used externally and misused internally.

83 On this provision, Madison wrote: "The more intimate the nature of such an union may be, the greater interest have the members in the political institutions of each other; and the greater right to insist, that the forms of government under which the compact was entered into, should be substantially maintained" (Publius, 2001: No. 43).

84 See Article 152.1 of the Spanish Constitution.

85 See the first paragraph of Article 7 and the triggering of it by the European Commission against Poland in 20 December 2017.

86 See Bogdandy (2020) and Bogdandy et al. (2012).

It is legally conceivable, therefore, to recognize fundamental rights circumscribed to the respective ambit of competences. In such legal contexts, legislators, judges, scholars and lawyers should engage in a permanent dialogue in order to seek a consensus, notwithstanding the lack of binding legislation and case law. For instance, some fundamental rights of the EU Charter shall be interpreted in harmony with "the constitutional traditions common to the Member States".[87] There is actually no obstacle to other layers of government adopting or internalizing other tiers' rights, jurisprudence, doctrines, levels of protection, and so forth.[88] In fact, in order to promote dialogue, it can be wise to stipulate an obligation to interpret fundamental rights in accordance with other declarations of rights.[89]

From sub-state tiers of government, bills of rights usually limit their scope to their own tier avoiding interference with upper tiers. For instance, Article 37 of the Statute of Autonomy of Catalonia provides that its bill of rights shall only bind Catalan public authorities.[90] In a similar fashion to the EU Charter, this article also establishes that the rights and principles enshrined in the Statute of Autonomy shall not alter the allocation of powers nor limit the fundamental rights recognized in the Spanish Constitution and the international treaties ratified by Spain. It is worth mentioning that the inclusion of a bill of rights in the 2006 Statute of Autonomy of Catalonia generated a controversy about whether statutes of autonomy, as basic laws of each nationality or region passed by the Spanish Parliament, could enshrine higher rights. The Spanish Constitutional Court rejected that those rights were fundamental rights and understood them more as guiding principles, whose binding force depends on ordinary legislation.[91]

As observed, basic laws of both supra-state and sub-state levels of government often intend to circumscribe their bills of rights to the territorial distribution of powers. With those phenomena coming from above and below the sovereign state, would a similar doctrine applied in the central tier not be reasonable? When both supra and infra layers of government are liberal-democratic, central authorities do not need to safeguard fundamental rights beyond their fields of competence by means of legislation and judicial review. Likewise, fundamental rights recognized by the state are not directly applicable to supra-state tiers, with one caveat, the doctrine of *counter-limits*. Under this jurisprudential doctrine, the highest courts of some Member States are vigilant that fundamental rights are duly protected at the European Union level.[92] Why is the state, as a middle layer of government, the main and last guardian of fundamental rights? The answer may lie in the vision of sovereignty, constituent power and the nature of the union.

The sovereign state is generally believed to be the central and final protector of equal fundamental rights. Constituent power, often (mis)conceived as highly unified, is considered the primary decision maker on fundamental rights. If a union is made up of sovereign states that have retained their main sovereign powers, this union might not be the presupposed final guarantor of fundamental rights whereas the self-proclaimed "High Contracting Parties" may well be.[93] This seems to be the current case of the European Union as it might once have been the case of the United States of America.[94] Sovereignty and constituent powers in the USA have experienced a long process of centralization and unification.[95]

87 See Article 52.4 of the Charter.

88 Article 4 of the Statute of Autonomy of Catalonia attempts this through a weak formula of an obligation to "promote".

89 Article 10.2 of the Constitution of Spain establishes an obligation to interpret fundamental rights in accordance with international treaties on human rights. See Saiz Arnaiz (1999).

90 With a marginal exception regarding linguistic rights.

91 Constitutional Court Judgement 31/2010. Such a uniform approach to fundamental rights could nevertheless be compatible with a diverse approach in relation to "super-rights" incorporated in special statutes at sub-state level. See Bossacoma (2015: 34-53).

92 See Italian Constitutional Court judgement *Frontini* (no. 183 of 1973) and German Federal Constitutional Court judgements *Solange* (of 29 May 1974 and of 22 October 1986) and followers.

93 See Article 1 of the Treaty on European Union and the decision of the Federal Constitutional Court of Germany on the Treaty of Lisbon (2 BvE 2/08), among other rulings. Bossacoma (2018).

94 See Calhoun (2003: 318). In the judgement of 1869 *Texas v. White*, the Supreme Court distinguished the Confederation from the Federation: "Under the Articles of Confederation, each State retained its sovereignty, freedom, and independence".

95 See Ackerman (2014: 28-29).

At present, the USA is conceived essentially as being a uninational federation with the multinational sphere being found beyond the federal structure, as is the case of the Indian territories. Interestingly, some American Indian tribes have not been fully subject to equal protection guaranteed by the US Constitution and have been allowed to reject certain constitutional rights.[96] This was often defended, as it was in the US Supreme Court, with the argument that Indian tribes in the United States "were not, strictly speaking, foreign states, but they were alien nations, distinct political communities".[97] In a multinational constitution, sovereignty and constituent power should be understood in more qualified, shared, diffused, interactive, functional, malleable and dynamic ways.[98]

The case of the USA shows that the multinational constitution and the federal constitution do not always coincide and, as a result, the federal and the multinational spheres of equality can have different territorial boundaries. By contrast, as seen earlier, the Canadian Federation was initially designed to accommodate a French majority in one province but this was not the end of the story. Provincial borders were later redesigned to house Indian majorities as well. In these ways, multinational federalism inspired the design and redesign of the internal borders of Canada. "Federalism was a legal response to the underlying political and cultural realities that existed at Confederation and continue to exist today", confirms the Canadian Supreme Court.[99]

In Canada we can also find constitutional tools to foster equality as autonomy in fundamental rights such as the *notwithstanding clause* provided in Section 33 of the Canadian Charter of Rights and Freedoms. The Charter, as part of the 1982 Constitution Act, is superior to ordinary legislation and binding for both federal and provincial tiers of government. Accordingly, courts, and ultimately the Supreme Court of Canada, can review ordinary legislation under the scope of the Charter. Yet Section 33 grants to both the federal parliament and provincial legislatures the power to override certain rights of the Charter in order to shield a piece of legislation from judicial review. The notwithstanding clause automatically expires after five years but can be re-enacted.[100]

Some provinces demanded the notwithstanding clause because the Charter and the judicial review it endorsed was believed to be an instrument of nation-building. The notwithstanding clause granted authority to legislate in derogation of the fundamental freedoms, legal rights and equality rights. Democratic rights, mobility rights and linguistic rights were excepted. Some consider that these exceptions pursued the goal of nation-building by "strengthening in people a sentiment of belonging to Canada as a whole, as opposed to the sentiment of belonging to a particular province".[101] In protest against the Charter, the Quebec legislature passed a law including a *clause nonobstant* to all Quebec legislation in force and for some time automatically included a notwithstanding clause in all new statutes. Other provinces, by contrast, rarely used the power of legislative override (Hogg, 2013: 39.3 and 39.4).

Ultimately, fundamental rights recognized by the central level of government need not be legally binding for all self-governing units regardless of the allocation of competences, nor need these rights be controlled by a central court or a centralized judiciary. There are theoretical reasons to reject this necessity and practical ways to do otherwise. The principle of equality does not necessarily require centralization and uniformity with respect to fundamental rights in contexts where minority nations are sufficiently liberal and have reliable liberal-democratic institutions that are capable of ensuring the rule of law through proper checks and balances. A multinational constitution should look upon standardizing mechanisms, including legislation and adjudication on fundamental rights, warily since equality is often in need of territorial autonomy.

96 See Kymlicka (1989: 195-196). Nevertheless, the Indian Civil Rights Act of 1968 established that no Indian tribe in exercising powers of self-government shall deny to any person within its jurisdiction the equal protection of its laws. In general, this federal law extends some fundamental rights of the US Constitution to Indian tribes.

97 Opinion of Justice Gray in judgement of 1884 *Elk v. Wilkins*.

98 See MacCormick (1999: ch. 8-9); Keating (2012); Torbisco (2014); Bossacoma (2018: §§ 1, 6).

99 *Reference re Secession of Quebec*, paragraph 43.

100 See Hogg (2013: ch. 36, 39).

101 Woehrling (in Argullol and Velasco, 2011: 187). On the nation-building, centralizing and standardizing effects of the Canadian Charter, see Woehrling (2009).

9 Conclusion

Every political tradition and movement tends to shape its own legitimizing ideas, values and doctrines. In the historical struggle against the *ancien régime*, liberal forces have favoured equal citizenship and equal rights while opposing many traditional forms of differential treatment. Influenced by these liberal conceptions of equality, some federal theories and practices have opposed distinct forms of recognition and accommodation, asymmetries between self-governing units and different fundamental rights in different parts of the country. Against the sovereignty of the few, democratic liberalism fought for the sovereignty of the nation, the people and the constitution. However, liberalism too often thought in monistic terms about the nation, the people and the constitution. Once again following these liberal flows, some federal traditions endorsed these monistic patterns.[102]

While "the politics of universal dignity fought for forms of nondiscrimination that were quite 'blind' to the ways in which citizens differ", the politics of recognition often requires that we make some distinctions the basis of differential treatment, contended Charles Taylor (1992: 39). The idea and principle of equality should no longer be exclusively associated with racial blindness, religious neutrality and socio-economic justice, but also with recognition and accommodation of cultural, linguistic and national diversity. Self-government, asymmetry and legal pluralism can and should be defended under a multinational conception of equality, which assumes a deep, basic equality between majority and minority nations.

The present article has therefore argued that a multinational constitution ought to:

1. Conceive and handle equality as a complex principle and thus distinguish some spheres of equality, and their underlying tenets, from others.

2. Accept and protect self-government to recognize the existence of distinct societies and accommodate them within the multinational state.

3. Acknowledge and safeguard asymmetries to treat minority nations differently from the territorial units into which the majority nation is divided.

4. Allow and respect diverse legislation and adjudication on fundamental rights in order to treat some units as distinct societies entitled to significant constitutional autonomy.

5. Embrace shared forms of sovereignty between majority and minority nations while granting some constituent powers to the latter.

To conclude, instead of equality always opposing difference, its multinational sphere may well require constitutional autonomy, distinction and pluralism.

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102 See Requejo (2011); Tierney (2017).

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