

teoría & derecho

REVISTA DE PENSAMIENTO JURÍDICO

La crisis del Estado de las autonomías

Sumario

DEBATE

La crisis del Estado de las autonomías

Artículos:

Javier García Roca

Joaquín Tornos Mas

Alberto López Basaguren

Francisco Caamaño

Santiago Muñoz Machado

Héctor López Bofill

Marc Carrillo

ESTUDIOS

El reflejo de la *poena naturalis* en la *poena forenses*. Posibilidades en derecho penal español

Miguel Bustos Rubio

Concepciones de la acción

Jesús Padilla Gálvez

La protección penal del derecho a la intimidad

Javier Zaldívar Robles

VARIA

Sociedad y estado ante la tesis institucionalista. A propósito del libro *Why nations fail. The origins of power, prosperity, and poverty*. *Crítica bibliográfica*

Pedro Brufao Curiel

Derecho y verdad II. Genealogía(s), Germán Sucar y Jorge Cerdio Herrán (eds.). *Crítica bibliográfica*

Claudio Martyniuk

Tratado lógico-filosófico. Ludwig Wittgenstein. *Crítica bibliográfica*

Margit Gaffal

REVISTA SEMESTRAL. JUNIO nº 19/2016



tirant
lo blanch

SUMMARY

DISCUSSION

The crisis of the autonomous state

Dirigido por Marc Carrillo

Presentation	11
<i>Marc Carrillo</i>	
A Federal Reform of the Constitution: A Path between Secession and the Fear of Moving Forward	16
<i>Javier García Roca</i>	
The Reform of the Autonomous State. Diversity of Problems and Solutions... ..	32
<i>Joaquín Tornos Mas</i>	
Crisis of the Territorial Autonomy and Secessionist Demands: Is The Federal System «the» Alternative?.....	46
<i>Alberto López Basaguren</i>	
From Autonomus State to the Federal State? The Illusion to Fly with Clipped Wings.....	62
<i>Francisco Caamaño</i>	
A Return to the Constitutionality.....	78
<i>Santiago Muñoz Machado</i>	
Catalonia and the Possibility of Secession	90
<i>Héctor López Bofil</i>	
The Reform of the Autonomous State and Catalonia.....	104
<i>Marc Carrillo</i>	

STUDIES

The Reflection of Poena Naturalis in Poena Forensis. Possibilities in the Spanish Criminal Law.....	118
<i>Miguel Bustos Rubio</i>	
Conceptions of Action	146
<i>Jesús Padilla Gálvez</i>	
The Criminal Law Protection of the Right to Privacy	162
<i>Javier Zaldívar Robles</i>	

VARIA

Society and State before the Institutional thesis. About <i>Why nations fail. The origins of power, prosperity, and poverty. Note Book</i>	189
<i>Pedro Brufao Curiel</i>	
<i>Derecho y verdad II. Genealogía(s), Germán Sucar y Jorge Cerdio Herrán (eds.). Note Book</i>	195
<i>Claudio Martyniuk</i>	
<i>Tratado lógico-filosófico. Ludwig Wittgenstein. Note Book</i>	203
<i>Margit Gaffal</i>	
Author Guidelines	209
Ethical Guidelines	219

A FEDERAL REFORM OF THE CONSTITUTION: A PATH BETWEEN SECESSION AND THE FEAR OF MOVING FORWARD

Javier García Roca

*Catedrático de Derecho constitucional
Universidad Complutense de Madrid*

ABSTRACT

There is a clear need to promptly reform the Constitution in a federal sense, both for technical and democratic reasons. But this task must be carried out slowly, following a regular constitutional procedure inspired by the principles of transparency, deliberation, the participation of minorities and independent experts' expertise. We must close the Constitution inside the Constitution and not in a broad constitutionality block, learning from our experiences and seeking to repair the defects. We need to clarify our division of territorial jurisdiction, to better relations of cooperation, to introduce financial norms, to build an Autonomous Communities Council, to reach covenants in the use of languages and on the Spanish nation complexity. It will not be easy, but could be enough if we walk part of the way. There is no other path. Catalonia's secession would be an expensive adventure and a long trip to no man's land. Not to move, would be like committing a suicide, a serious irresponsibility.

KEY WORDS

Federal amendment of Constitution, State of the Autonomous Communities, Distribution of jurisdiction, Relations of cooperation, Resources of Autonomous Communities, Senate, Linguistic pluralism, Right to decide?

THE REFORM OF THE AUTONOMOUS STATE. DIVERSITY OF PROBLEMS AND SOLUTIONS

Joaquín Tornos Mas
Catedrático de Derecho administrativo
Universidad de Barcelona

ABSTRACT

The Spanish State of autonomies needs to address two different crises. The first one is caused by the Catalan claims for secession. The second one, by a general exhaustion of a model of territorial organization that was very vaguely designed in the 1978 Constitution and that, despite its remarkable success, shows clear signs of disfunctionality. The answers to both crises need to be different too. Regarding the Catalan situation, the proposed political and legal response is a constitutional reform that recognizes the plurinationality of Spain and, within this, the singularity of Catalonia. The possibility of holding a referendum in Catalonia prior to the constitutional reform in order to ask about the possible separation of Catalonia from Spain should not be dismissed. The response to the functional crisis of the State of autonomies requires a reform of the Constitution that adopts a federal approach and includes in the legal text the distribution of powers amongst the State and the autonomous communities, the reform of the Senate and the basic principles of the financing system.

KEY WORDS

Federalism, Referendum, Constitutional reform, Secessionism, Sovereignty

CRISIS OF THE TERRITORIAL AUTONOMY AND SECESSIONIST DEMANDS:
IS THE FEDERAL SYSTEM «THE» ALTERNATIVE?

Alberto López Basaguren

*Catedrático de Derecho constitucional
Universidad del País Vasco*

ABSTRACT

This paper considers the crisis affecting the system of territorial autonomy in Spain. And it argues that the only possible way to overcome this is evolution via the route taken by the most reliable and established federal systems in the world. The author believes that the secessionist crisis is not the cause but the effect of the crisis of our system of territorial autonomy. In this sense, it would be impossible to understand the outbreak of the secessionist crisis without taking into account the inability to resolve, in a satisfactory manner, the problems that had been increasingly apparent during recent years; in particular, the financial question. Comparative experience shows that only a strong and coherent federal system has the capacity to contain and overcome the crisis. But without forgetting that Spain needs to respond appropriately to the country's particular circumstances.

KEY WORDS

Territorial autonomy (Devolution), Federal System, Secession

FROM AUTONOMOUS STATE TO THE FEDERAL STATE?
THE ILLUSION TO FLY WITH CLIPPED WINGS

Francisco Caamaño

*Catedrático de Derecho constitucional
Universidad de Valencia*

ABSTRACT

The author considers that the democratic constitutions of Spain (1931, 1978) have not been successful in the matter of territorial distribution of power, because they have denied the reality of a state in which there are different national feelings. Only an emotional federalism, that is, to work for unity on the idea of federal loyalty can set an alternative link. To achieve this, more important than introducing typical institutions of a federal state is to recognize diversity and generate a true federal culture in which equality is the result of good management of the difference.)

KEYWORDS

Autonomous state, Federalism, National feelings, Territorial distribution

A RETURN TO THE CONSTITUTIONALITY

Santiago Muñoz Machado

*Catedrático de Derecho administrativo
Universidad Complutense de Madrid*

ABSTRACT

The article stresses that the Catalan independence proposal and its rejection of the Constitution of 1978, remember a historic constitutional conflict in Spain since 1812: the question of sovereignty. In this regard, the sharing of sovereignty originally unconditional and single, to give birth a new state, is only conceivable operation in extreme cases do not arise in the European advanced democracies.

The author rejects the model of political decentralization in Spain is a form of incomplete or weakened federal state. On the other hand, it argues that a future reform of the Constitution could provide intangibility clause referring to the territorial organization of the State, and in relation to the possibility of a self-determination referendum held in Catalonia, is held to be constitutionally possible, but limited to their territory, so that citizens ratify a new statute. If other type of referendum, regardless of the powers of the citizens of a single territory, the territorial referendum should be simultaneous with other statewide.

KEY WORDS

Constitution, Sovereignty, State Federal, Referendum, Constitutional Reform, Constitutional Court

CATALONIA AND THE POSSIBILITY OF SECESSION

Héctor López Bofill

*Profesor agregado de Derecho constitucional
Universitat Pompeu Fabra (Barcelona)*

ABSTRACT

The article analyses the secessionist demand raised by the Catalan institutions in recent years within the Spanish Constitutional framework. The author describes the Spanish constitutional barriers to the secessionist challenge and offers a comparative insight on the secessionist procedures that have took place in liberal democracies. The article concludes outlining a theory on the secession in a scenario of democracy and constitutional rigidity with the background of the recent transformations in International Public Law regarding the creation of new States. In the end, a proposal on a constitutional amendment concerning the multinational accommodation in Spain is suggested.

KEY WORDS

Constitution, Secession, Catalonia, Spain, Democracy, Constitutional amendment, International Public Law

THE REFORM OF THE AUTONOMOUS STATE AND CATALONIA

Marc Carrillo

*Catedrático de Derecho constitucional
Universidad Pompeu Fabra (Barcelona)*

ABSTRACT

This article argues that the system of political decentralization espanyol is exhausted, especially with regard to the aspirations of political autonomy in Catalonia, the main reason lies in the shortcomings of the rules of distribution of powers between the State and the Autonomous Communities. In this context the very restrictive effects of the judgment of the Constitutional Court (STC 31/2010) on the Statute of Catalonia 2006. To overcome such a situation, the paper proposes a comprehensive reform of the Constitution by including a particular solution for Catalonia as well.

KEY WORDS

Constitution, Political autonomy, Constitutional Court, Catalonia, Constitutional reform, Additional provision.

THE REFLECTION OF *POENA NATURALIS* IN *POENA FORENSIS*
POSSIBILITIES IN THE SPANISH CRIMINAL LAW

Miguel Bustos Rubio

*Profesor Asociado de Derecho penal
Universidad de Salamanca*

ABSTRACT

Natural punishment (*poena naturalis*) cases constitute an undeniable social reality. Physical or psychic ills that may suffer the perpetrator of a crime as a direct result of his criminal activity, can make the *poena forensis* disproportionate and inhumane. To avoid this situation, in this paper we study the different possibilities existing in our substantive criminal law in order to reflect the effects of *poena naturalis* in *poena forensis*. In this paper we studied similar laws in other jurisdictions, and we carry out reform proposals (*lege ferenda*) to resolve the tensions that can occur with different principles of criminal law.

KEY WORDS

Poena forensis, Poena naturalis, Proportionality, Insignificance, Punishment, Mitigating

CONCEPTIONS OF ACTION

Jesús Padilla Gálvez

*Profesor contratado doctor de Filosofía
Universidad de Castilla-La Mancha*

ABSTRACT

The aim of this paper is to discuss the meaning of «action» and to analyze its standard definition in the form of a nominal structure. We start from the view that «to act» refers to any human action or its omission, which are guided by certain reasons and directed to certain ends. Taking into account the deficiencies of the nominal structure we aim to develop a predicative structure of action. We argue that the meaning of action is inseparably linked with two elements: first, the speaker verbalizes action in the form of language games that contain predicative components; and second, these components become manifest in a particular form of life. As such, the essential features of the content of an action become apparent by the explicit structure in which the speaker verbalizes actions. The order according to which every action is performed allows us to gain a perspicuous representation of it. An analysis of the grammar that accompanies action reveals the holistic program and established institution by which such action was taught, trained and acquired.

KEYWORDS

Action, Meaning, Language games, Forms of life

THE CRIMINAL LAW PROTECTION OF THE RIGHT TO PRIVACY

Javier Zaldívar Robles

*Profesor Asociado de Derecho penal
Universitat Jaume I de Castelló*

ABSTRACT

The fast development of new technologies and particularly, social networks, are setting up a society who lives addicted to their mobile devices daily. In a globalized world, any image or comment posted on a social network reaches an uncontrollable number of recipients in just a few seconds, which leads to virtual world devirtualize. Also, one of the major risks which this society is facing is convert privacy in a public setting or an open gateway permanently opened to the public, losing control over the privacy. The purpose of this article is to address different areas of legal protection of the right of privacy, but focusing exhaustively in criminal matters.

KEYWORDS

New technologies, Social networks, Right to privacy, Image, Criminal law, privacy