



## INTERNATIONAL CONFERENCE ON: WATER MANAGEMENT IN FEDERAL AND FEDERAL-TYPE COUNTRIES SPAIN REPORT<sup>1</sup>

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**Abstract:** In Spain, the polemics about the distribution of competences over water and hydraulic works between the State and the Autonomous Communities begin with the promulgation of the Constitution in 1978 given its vague terms in section 149.1.22. Over time and with the intervention of the Constitutional Court, a solution has been reached consisting of attributing the management of river basins that cover the territory of more than one Autonomous Community (intercommunity basins) to the State and the management of the river basins that are situated entirely within the territory of an Autonomous Community (intracommunity basins), to that Community. However, this solution is subject to tensions and the latest reforms of some Statutes of Autonomy pose new political challenges in this regard. A particularly problematic question is usually that of the transfer of water resources between different territorial limits of river basin planning, which usually entail territorial conflicts (with political and social aspects), in some cases of considerable magnitude. Likewise other questions with a territorial impact are currently being discussed such as the Autonomous Communities reports in administrative procedures decided by the State, the existence, content and functionality of the so-called "right to water", etc....

**KEY WORDS:** Competences, Autonomous Communities, River Basin, Right to Water, Autonomous Community Reports, Basin Authorities, Transfers between different territorial limits of river basin planning.

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<sup>1</sup> The text, although initially prepared for the dates when the Conference was held, has been updated on 1 November 2008.



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## LIST OF ACRONYMS.

<b>AC</b>	Autonomous Communities
<b>SA</b>	Statute of Andalusia (2007)
<b>SAr</b>	Statute of Aragon (2007)
<b>SC</b>	Statute of Catalonia (2006)
<b>SCL</b>	Statute of Castile-Leon (2007)
<b>SCV</b>	Statute of the Community of Valencia (2006)
<b>SIB</b>	Statute of Illes Balears
<b>OL</b>	Organic Law
<b>SJCL</b>	Spanish Journal of Constitutional Law
<b>DCC</b>	Decision of the Constitutional Court
<b>DSC</b>	Decision of the Supreme Court
<b>TRLA</b>	<i>Texto Refundido de la Ley de Aguas</i> (Written Text of the Water Law) 2001



## I. GENERAL INTRODUCTION.

This Report is prepared at a time when there have been strong discussions in Spain for some time over the distribution of competences over water between the State and the Autonomous Communities, as well as over other water-related questions that the new reform phase of the Statutes of Autonomy has brought to light once again, that is, if it had ever disappeared from the limelight. In that discussion framework there are different controversies relate to the correctness or incorrectness of some of the formulas used in these Statutes, both constitutionally and technically speaking. With this brief introduction I only wish to highlight the deep political meaning of present-day discussions with respect to which the legal arguments necessarily go almost unnoticed, even when the solution of many of these controversies must, necessarily, have a legal vestment given the appeal that has been brought before the Supreme Court against some of these Statutes of Autonomy as I will later recall.

Indeed, that statutory reform process started in 2006 with the parliamentary processing of the SC and the SCV and continues today. We would be in the second phase of statutory reforms commenced after the initial drafting of the Statutes of Autonomy (1979-1983) and the reforms of the Statutes of Autonomy of the AC with limited initial autonomy that were carried out from 1994 until 2000. At that time and during that second phase the reforms which had been approved included those for the SCV (LO 1/2006, 10 April 2006), SC (LO 6/2006, 19 July 2006), SIB (LO 1/2007, 28 February 2007), SA (LO 2/2007, 19 March 2007), SAR (LO 5/2007, 20 April 2007) and SCL (LO 14/2007, 30 November 2007). Drafts were also formulated in connection with the Canary Islands and Castile-La Mancha, although these did not manage to conclude the approval process in the State legislature that ended in March 2008. On the date of conclusion of these pages (1 November 2008), the admission to processing of the draft Statute of Castile-La Mancha has taken place in the Congress of Deputies, which also contains important references to water, the most singular of all of these being the declaration of expiry of the Tagus-Segura transfer foreseen for 2015.



As I have mentioned, this reform process has brought about great controversy, with appeals to the Constitutional Court on grounds of unconstitutionality against several of the Statutes of Autonomy mentioned above<sup>2</sup>. Aragon formulated an unconstitutionality appeal against the SCV, namely against its article 17.1 that regulated the right of the citizens of Valencia to distribute excess water from surplus river basins. The DCC 247/2007 (12 December 2007), settled the appeal by stating that it was not possible for the Statutes of Autonomy to regulate rights relating to the competences of the respective AC. The aforementioned article was thus reduced to a guiding principle for the exercise of the public powers of Valencia, which, in any case, are subordinate to the State's directions in connection with the waters of the intercommunity basins<sup>3</sup>.

Likewise, the Autonomous Community of Extremadura has lodged constitutional appeals against articles of the Statutes of Autonomy of Andalusia and Castile-Leon, which foresee the cession of the Andalusian and Castilian-Leonese parts of the Guadalquivir and Duero River Basins, respectively.

La Rioja, on its part, has lodged an appeal of unconstitutionality against the Statutes of Autonomy of Catalonia and Aragon, in relation, also, to precepts that assume intervention of the AC on water. As one can see, only the Community of

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<sup>2</sup> This means that a decision of the CC, which appears at any time, can make any one or many of the arguments contained therein absolutely essential.

<sup>3</sup> The Decision mentioned, apart from what I sum up in the text, which is quite significant, is very important, too, based on some other statements made therein, which may even be predetermining other future Decisions of the CC in connection with the theory that is based on the role of the Statutes of Autonomy in respect of its delimiting nature over the distribution of competences between the State and the AC (in general, not only on water) and given the practical "deconstitutionalisation" of the majority of the legal framework of the State of the Autonomies. See critically FERNANDEZ FARRERES (2008) who disavows the entire Decision and the answer to that work in some of the statements of the constitutional magistrate M. ARAGON REYES (2008) pages 149-152. By way of criticism, but only for the theory established in this Decision in connection with the impossibility of the Statutes of Autonomy regulating the rights of citizens related to the competences of the AC, vid EMBID IRUJO (2008).



the Illes Balears has “kept out” of these appeals (that is, by not suing or being sued), which is very probably due in part to the fact that it is an insular Community and, therefore, all waters within its territory belong to the competence of the Community.

Really, these controversies are not new and have existed since the very moment the Spanish Constitution (1978) was drafted and from the first Statutes of Autonomy (1979-1983). As we will see in section II of this work, the Spanish Constitution sought a formula for distributing competences in its article 149.1.22 based, in principle, on hydrological criteria (reference to “waters” with certain characteristics). This formula has irremediably required interpretation due to its extremely indeterminate nature. This need for interpretation has subsequently extended to the formulas used by the Statutes of Autonomy of 1979-1983. These formulas followed, of course, the diffuse constitutional path and their interpretation was only solved, although seemingly only provisionally, by DCC 227/1988, given in the appeal of unconstitutionality against Water Law 29/1985 (2 August 1985). The decision established a certain method of interpreting the constitutional and statutory precepts, which the CC considered adapted to the Spanish Constitution. However, the CC did point out, in the aforementioned decision, that this was not the only possible formula.

Indeed, in a country with strong political decentralisation such as Spain, the reason for the controversy lies –apart from the obvious importance of the evanescent nature of the constitutional distribution criterion- in the difficulty of formulating principles of government that are derived from the political autonomy of the AC that is aimed to be exercised in their entire territory, which could be deduced from the fairly named “natural” concept of the river basin. Territorial political power and natural hydrographical division are not usually coinciding concepts and it is very difficult to articulate them with a certain degree of coherence in all the countries that share decentralised State territorial construction principles (section III).



All of this leads to continuous controversies which were also greatly aggravated when the State decided to carry out water transfers between territorial limits of different river basin plans. This implied movements of water between different AC, too (or within the same Community, as occurs, paradigmatically, with the case of Catalonia although there are also examples in Andalusia) which meant that conflicts flourished. For example, the National Hydrological Plan of 2001 supported the execution of a large water transfer from the Ebro River Basin to different basins of the Mediterranean Arc. This was abolished when there was a change in the governing party as a result of the general elections of 14 March 2004 (section IV).

The complex legal problem that is being narrated has developed, as a member state of the European Union, within the context of the application of EC Water Framework Directive (2000/60/EC, 23 October 2000), which establishes a community framework of action within the field of water policies. Its basic requirements in connection with organisational questions need to be examined (section V): The work finishes with some conclusions (section VI).

## **II. THE DISTRIBUTION OF COMPETENCES IN SPAIN OVER WATER AND HYDRAULIC WORKS BETWEEN THE STATE AND THE AUTONOMOUS COMMUNITIES: THE SITUATION DERIVED FROM THE STATUTORY REFORMS OF 2006-2008**

I shall begin, then, with the question of distribution of competences over water and hydraulic works in Spain, which has been briefly introduced in the previous section and which necessarily forms the main element of this work. I say this to insist that this remains an essential question subject to continual discussion and debate, both during the actual origin of our current legal system, the Spanish Constitution of



1978, and now<sup>4</sup>.

As substantial elements of this statement, I am going to successively analyse: the competences over waters (1) and hydraulic works (2); the question of the cession of the Andalusian part of the Guadalquivir and of the Castilian-Leonese part of the Duero to the Autonomous Communities of Andalusia and Castile-Leon respectively, which took place in the latest statutory reforms (3); and the issue of reports by the AC in administrative procedures where the State has the ultimate say (4).

#### 1. Competences over water: Concept and extension of the “exclusive” competences of the Autonomous Communities over waters of their own basins.

The controversial situation, as I have mentioned, was generated with the actual promulgation of the Spanish Constitution in 1978 and continued with the subsequent approval of the Statutes of Autonomy, a process that lasted from 1979 to 1983. Over those years, the formal origin of the discussion was the vague sentence of article 149.1.22 of the Spanish Constitution which described the competence of the State as being over "the waters flowing through more than one Autonomous Community". This was equivalent to leaving a "space" for the competences of the Autonomous Communities in connection with the waters that only flow through their territories. This was if, obviously, these AC could also

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<sup>4</sup> The entire issue of competence with reference to the new Statutes of Autonomy is analysed with slightly more detail in EMBID IRUJO (2007 a), page 13 and following and in EMBID IRUJO (2007 b), page 313 and following in the part “Competences of the State and of the Autonomous Communities”. Valid bibliographic references can be found there for the content of the Spanish Constitution (1978) and of the Statutes of Autonomy of the first phase (1979-1983). I omit these here for obvious reasons, but I must acknowledge the obvious worth of many of these doctrinal interventions (those of S. MARTINRETORTILLO BAQUER or A. MENENDEZ-REXACH, which are worth a special mention, for instance). A specific position must be granted, in any case, to the magnificent book by GALLEGOS ANABITARTE, MENEDEX REXACH AND DIAZ LEMA (1986) where the questions of competence also play a relevant role. See, too, the book of plural content by CARO-PATON and MACERA (2002).



choose these competences pursuant to the preparation procedure of their Statute of Autonomy (that is, for those Autonomous Communities with full initial or first degree autonomy as they were defined at the time). But what the constitutional article – and the statutory provisions that followed it – did not solve was the understanding of the expression “waters that flow” which could be equivalent to isolated rivers that flow out into the sea, to river tributaries or to an entire river basin.

It is obvious that the interpretation was not neutral; if the equivalent of the constitutional expression of article 149.1.22 CE were that of the river basin (a greater referenced surface area) the State would practically have the monopoly of competences over waters in Spain. Whilst it would be the AC that could aspire to have very substantial competences over waters if the legal interpretation were to choose the concept of river or tributary, which implied much less surface area and, therefore, increases the probability that this could be located within the territory of one single Autonomous Community.

The controversies on the question did not formally end until the 1988 decision of the Constitutional Court (DCC 227/1988, 29 November 1988), which considered the criterion of distribution of competences pursuant to Water Law 29/1985 (2 August 1985) to be adequate. The Court affirmed the interpretation of the constitutional expression in Law 29/1985, which equated "waters that flow" to "river basins". Therefore, river basins (as defined in Law 29/1985<sup>5</sup>) which extended through the territory of two or more Autonomous Communities were within the competence of the State and those included in the territory of a single Autonomous Community were subject to being the object of the competence of the Community if the latter was able, pursuant to the constitutional basis of the preparation process

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<sup>5</sup> Art. 14 indicated that “for the purpose of this Law, river basin is understood as the territory in which the waters flow to the sea through a network of secondary courses that converge in one single main course. The river basin, as a resource management unit is considered indivisible”.



for its Statute of Autonomy, to legitimately access this competence<sup>6</sup>. Paradoxically, in this specific case, one of the AC appealing before the Constitutional Court, the Community of the Balearic Islands (as they were then known in Spanish language), though insular, and therefore, with waters exclusively enclosed within its territorial limits, could not hold competences over its basins due to having prepared its Statute via the procedure marked in article 143 of the Spanish Constitution and, therefore, with competences that were limited to the list present in article 148 of the Spanish Constitution, which did not include waters<sup>7</sup>.

The decision endorsing the river basin interpretation of Water Law 29/1985 (2 August 1985), was not, obviously, the only possible way of understanding article 149.1.22 of the Spanish Constitution but, in the opinion of the Constitutional Court, the decision of the Legislator of 1985, was congruent with the Constitution based on technical, local and experience criteria (legal basis 15). But – and I insist on this because the question may have important consequences in the future – it was not the only possible way to correctly develop the Constitution<sup>8</sup>.

<sup>6</sup> Cf articles 15 and 16 of Water Law 29/1985. The “political” limitation mentioned in the text would not be overcome until Organic Law 9/1992 (23 December 1992) (result of the Autonomic Agreement of February that same year). From then on, the requirement to have water competences was only geographical: having territorial spaces within the limits of the Autonomous Community that respond to the concept of river basin used by Water Law 29/1985.

<sup>7</sup> Under this option of the Water Law 29/1985, the Basin Organisations (River Basin Authorities) were configured as autonomous State organisations. However, these could be joined by the Autonomous Communities whose territory fell within the specific limits of the respective Basin Organisation (cf articles 20 and following). All the AC exercised the specific options and joined the Basin Organisations that corresponded to them. On this issue, in general, see FANLO LORAS (1996).

<sup>8</sup> FANLO LORAS (2007) p. 293 and LOPEZ MENUDO (2008) p. 54; they consider the reservation that the Constitutional Court made regarding the possibility of there being other legal interpretations different to that which is considered to adapt to the Spanish Constitution (DCC 227/1988) to not be very important. However, I believe that we must not ignore any expression used by the Constitutional Court in its jurisprudence, especially when, in this specific case, if this expression were to be ignored, this would be the equivalent of considering the criterion of the river basin as decisive for the distribution of State-AC competences as constitutionally established; in other words for ever, until perhaps possible constitutional reform affects this interpretation. This, to my knowledge, would be the only case where a Constitution of a politically decentralised State uses this criterion (in the Spanish case this would not be expressly so, but pursuant to an interpretation of the Constitutional Court which, for these authors, would already be specified; I do not consider,



Finally, one could be tempted to say that all of this is history, but it is history that is worthwhile remembering because one necessarily must use what has already been established when carrying out a study and giving judgment about the regulatory novelties contained within the reformed Statutes of Autonomy. In any case, an exhaustive study – yet another – should not be undertaken of that jurisprudence or of the theory that preceded it or subsequently explained it, at least for the subject matter of this work, which has such a specific aim regarding the references to the current regulatory moment.

The truth is that although DCC 227/1988 represented a certain pacification in many of the issues discussed until that time, it did not put an end to the lack of satisfaction that certain AC expressed in connection with water management<sup>9</sup>. Proof of this is that the Constitutional Court had to again intervene<sup>10</sup>, always respecting those principles established in DCC 227/1988, which is obviously congruent with the maintenance of the validity of the legislation (Water Law 29/1985) which acted as the basis for its emanation<sup>11</sup>. Apart from the conflicts

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and I expressly insist in this regard, that this is the consequence that must be taken from the DCC 227/1988).

<sup>9</sup> The considerable increase, to date, in the number of AC not satisfied with the policy and distribution of competences on water (globally, or related to specific questions), with respect to the AC that came before the Constitutional Court in 1985, can be verified and would require a more in-depth study that obviously goes beyond the legal framework. These AC include Andalusia, Aragon, Castile la Mancha, Castile-Leon and Catalonia –at least- as shown by the many facts and data of legal and political content.

<sup>10</sup> I refer to the legislation of different AC on ecological or minimum flows that has been contested before Constitutional Court. The Court has at times, with decisions, which, with greater or lesser emphasis, disavowed the autonomic attempts to attribute competences exclusively based on the establishment of these flows. Cf. DCC 15/1998, (22 January 1998), DCC 110/1998 (21 May 1998), DCC 166/2000 (15 June 2000) and DCC 123/2003 (19 June 2003).

<sup>11</sup> Very representative of this type of reply is the content of the DCC 161/1996 (17 October 1996), issued in an appeal against a Catalan regulation on Hydraulic Administration. The Constitutional Court will affirm that “the most direct way that the Autonomous Community has to have an influence on the interests affected by the administration of the waters in the basins, which, like the Ebro or the Garonne River basins, extend beyond their territory, is via their participation in the governing bodies of the relative River Basin Authorities, in the terms foreseen by the state legislation, always respecting the constitutional framework that includes the collaboration principle between the State and the Autonomous Communities as the main principle. The actions that each one of the regional Administrations may directly carry out on the waters of the river basins that flow through several



formalised, many different political representatives, -and also in the doctrine, obviously-, continued to express opinions about the existing contradictions between the affirmation in the Statutes of Autonomy of certain exclusive competences of the AC (for example, on agriculture or industry) and the lack of direct intervention of those same AC on water, an essential auxiliary element to exercise these competences. This idea, by the way, can be fully shared, as it is the logical conclusion from an existing state of affairs with respect to which, objectively, one can only confirm.

It was not necessary, therefore, to be a prophet to realise that if a regulatory type procedure were again commenced in which the aim was to decide on the competences of the AC on water (statutory reform), opinions opposed to certain parts of the status quo would once more appear. These conflicts would at least have to be reflected in the regulation process, regardless of the final result of the statutory reform processes. In addition, there may also be a certain resentment that the bitter controversy surrounding the transfer from the Ebro River Basin to the Mediterranean Basins by Law 10/2001, (5 July 2001), of the National Hydrological Plan, and its subsequent abolition (by Royal Decree-Law 2/2004 appealed against as unconstitutional by the AC of Valencia and the Region of Murcia and a political group, later converted into Law 11/2005 of 22 June, which has also been appealed) has left in the different AC that are “parties” to this transfer, either as “grantor” territories or “receiver” territories. This adds still more elements to the “fire” or “catharsis” of the preparation of the statutory reform. Furthermore, and in the case of some Autonomous Communities such as Castile-La Mancha, the Tagus-Segura transfer is a current reality, not just a hypothetical reality in the future as occurred with Law 10/2001 (5 July 2001). This is considered by that region as a permanent territorial wound that is hoped will be cured on the occasion

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Autonomous Communities are only accessory to the actions that they develop by participating in the administration and management of the actual River Basin Authority and are only feasible insofar as its action does not interfere or disturb it”.



of the preparation of the new Statute of Autonomy in order, as from its promulgation, to progressively achieve the future use of the waters of the Tagus River Basin only in the territory of the actual basin. I will return to this later.

Now I would like to insist on the fact that the new Statutes of Autonomy are, in general, situated within the boundary of the current constitutional jurisprudence (with the important nuances that will be highlighted in this work), although there are some peculiarities such as the greater profusion in the use of the concept of "exclusive competences" of the AC over waters of their own basins<sup>12</sup>. This seems to collide with the competences that the State also maintains over these waters and which at times have an exclusive nature and, at others, establish basic legislation<sup>13</sup>. This would lead to believe that the new Statutes of Autonomy have exceeded their authority on this conceptual question.

Really, the question announced here (and as a relevant commentator has said about these problems of competence), is one of mere perspective, as if the concept of exclusivity is constructed in connection solely with some aspects of a power or with the whole of a specific power that an Autonomous Community enjoys in connection with a certain matter, it can be said that it has exclusive competence over it insofar as a specific exercise of power cannot be hindered by the State<sup>14</sup>.

Under those conditions and expressly recalling article 117.1 of the SC (which has acted as a model or inspiration for the others), the exclusive competence of Catalonia over the waters of its own basins<sup>15</sup> covers:

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<sup>12</sup> In that line, see article 117.1 SC , article 50.1 SA and article 72.1 SAr...

<sup>13</sup> Exclusivity was also part of some Statutes of Autonomy of the first period. See, for example, article 9.16 of the SC of 1980

<sup>14</sup> Cf FERNANDEZ FARRERES (2005), p. 305, note 16.

<sup>15</sup> The Statutes of Autonomy also refer to the existence of competences on intercommunity waters, those of State management. With respect to these and given the need to contain this work within limits of reasonable space, I refer to EMBID IRUJO (2007 a) and (2007 b).



- a) The administrative organisation, planning and management of surface waters and groundwater, of water uses, as well as hydraulic works.
- b) The planning and adoption of specific protection and management measures and instruments for water resources and the aquatic and land ecosystems linked to water.
- c) Extraordinary measures, if required, to guarantee the water supply.
- d) The organisation of the water administration of Catalonia, including the participation of users.
- e) The regulation and execution of actions related to the concentration of plots of land and irrigation works".

I believe that the entire precept adapts fully to the Constitution, even though the existence of some constitutional conditions, which qualify the dimension of that exclusive competence and offer their real profile, has not been expressly recalled therein. But the fact that the Constitution is not expressly recalled does not mean that it does not exist<sup>16</sup> and that, therefore, within the plane of legal interpretation, it does not have to be used to complete the legal regime of a partial regulation – as occurs in so many fields of the practical life of law. Thus, how can one not take into account, in this interpretative plane, the existence of article 149.1.18 of the Spanish Constitution regarding (basic) state competences over the administrative concessions or over the legal regime of the Public Administrations. This constitutional precept exists and the SC has not been able to avoid it. Its terms have simply not been repeated, thus following the tendency of the AC in the first period of reform, both in the field of water and other subject matters. This does not mean that the legal agents do not heed the constitutional diction in their respective work when applying the relevant statutory precepts.

<sup>16</sup> In some works I have spoken about a “fill of constitutional loyalty” with continuous mentions to the Constitution that follow appellations that clearly appear to be unconstitutional as is the case of article 17.1 of the SV and its regulation of the right to distribute excess waters from surplus basins. See EMBID IRUJO (2007 a), p. 33



The same occurs with respect to hydrological planning. The exclusive competence over this planning in connection with intra-community basins is affirmed in the Statute, but article 149.1.13 of the Constitution contains the role of the State with respect to the coordination of economic planning. It is that coordination activity that the Constitutional Court used in Decision 227/1988 to sustain the constitutionality of the attribution to the State of the approval of hydrological planning of intra-community basins in Water Law 29/1985. Therefore this planning operates, not as an expression of the administrative hierarchy – which would be impossible in the relationship between the State and AC based on their autonomy established in articles 2 and 137 of the Constitution – but as an element that operates with other expressions of the economic planning and the National Hydrological Plan (cf legal basis 20d in connection with article 38.6 of Water Law 29/1985).

In the case of the SA, it is article 50, section 1, that describes the competences over the “waters that integrally flow through Andalusia” with which it links up terminologically with what article 149.1.22 of the Constitution expresses, devoting section 2 to describe the competences over inter-community waters or basins (it is in this section where the expression “intercommunity water uses” appears). The text is slightly different to that of the SC but it contains the same idea of exclusive competence; as in the previous case, I believe that its content fully adapts to the Constitution, as the same interpretation of the expression “exclusive competence” that I have indicated above, can be made.

Thus, that Andalusian competence covers “water uses and resources, canals and irrigation, when the waters flow through Andalusia” and, from the standpoint of constitutionality, nothing can be said against this mention, as it corresponds perfectly to what, on the contrary, article 149.1.22 of the Constitution reserves to the State.



The precept mentioned also grants competences to Andalusia over “groundwater when its use does not affect another territory”. The expression seems, initially, to be at odds with the interpretation that the Constitutional Court offered in its Decision 227/1988 (legal basis. 16), on the question of distribution of competences over groundwater. In that case and in connection with “renewable” groundwater, the Court affirmed that these were included in the respective basin and, therefore, competence over this groundwater belonged to the entity that had competence over the basin. The criterion of “use” that does not affect “another territory”<sup>17</sup> is not, therefore, the determining factor of the distribution of competences for the Constitutional Court. The determining factor for the Court is the respect for the principles of the hydrological cycle and, therefore, the inclusion of the controversial renewable groundwater in the basin it belongs to, where a certain relationship of continuity is established with surface waters.

It cannot be ignored that the definition of river basin has varied as a result of the transposition in 2003 of EC Water Framework Directive of 2000. Article 16 of the TRLA, which defines the river basins, refers only to a “surface of land whose surface runoff flows entirely through a series of currents, rivers...”; therefore there is no mention, not even the possibility, of including groundwater in the definition -which did occur in the old definition of basin of Law 29/1985-.

But groundwater is now taken into account in the definition of the new concept of river basin district contained in article 16a of the TRLA whereby “river basin district is understood as the “land and marine area comprised of one or several neighbouring river basins and the transition waters, *groundwater* and coastal waters associated with these basins”. Groundwater arises, then, in the context of the definition of river basin district and as a material reality “associated” with a

<sup>17</sup> Indeed, the word “territory” is quite ambiguous in this context and also requires interpretation. It can only refer to the fact that it does not affect any other territory than the Andalusian territory, namely any other “Autonomous Community”.



basin (which initially and exclusively includes surface waters). This logically entails its incorporation into the broader river basin district territory, which is where groundwater is taken into account. Thus, a change has occurred in the general configuration of groundwater, although I do not think that this change is so important as to lead to substantial variations on the current situation, which should be considered in more depth.

The current regulation regarding aquifers (or hydrogeological units) distributed among different river basins and how they are managed must not be ignored. The general principle is formulated by article 16, section 3 of the TRLA<sup>18</sup> (this precept was added on the transposition of the EC Water Framework Directive in 2003), which expands the previous principles in articles 7 and 8 of Appendix I of Law 10/2001 (5 July 2001) of the National Hydrological Plan. Law 10/2001 defines shared aquifers as those that are situated “in territorial areas of two or more River Basin Plans” (article 7.1) prescribing both a delimitation system and the allocation of the water of each shared aquifer among the different basins (article 7.2)<sup>19</sup>. This determines the way in which each basin organisation manages the volumes allocated, but under the principle of cooperation and with the possibility of assignments between organisations (article 8).

It seems that the mention of groundwater in article 50 of the SA is the only appropriate way of interpreting the Constitution. Andalusia, through the basin organisations of its own intra-community basins, would exercise competences over

<sup>18</sup> The precept indicates that “the aquifers, which do not fully correspond to any particular district, will be included in the nearest or most appropriate district, and that the part of an aquifer corresponding to its respective territorial limit may be attributed to each one of the districts; and in this case, a coordinated management must be guaranteed via the appropriate notifications between districts affected”.

<sup>19</sup> In the case of river basins situated in Andalusian territory, Appendix I, mentioned above, allocates resources between the basins of the Guadiana I and of the Guadalquivir (Hydrogeological Unit of Campo de Montiel), Guadiana II and Guadalquivir (Hydrogeological Unit of Almonte-Marismas), and Guadalquivir and Sur – this basin is transferred now to Andalusia – (Hydrogeological Units of Sierra de Líbar, Sierra de Cañete, Sierra Gorda-Polje de Zafaraya and Tejera-Almijara-Las Guájaras) in certain quantities that are immaterial in this work.



the groundwater associated with these basins or, in any case, over the resources assigned to it by the State legislation or planning on aquifers shared between several basins (or more correctly, between territorial limits of different River Basin Plans), which would be the case whereby groundwater would not affect other territories.

The SA also grants exclusive competence over mineral and thermal waters, which is logically coherent with article 148.1.10 of the Constitution.

Finally, the SA provides for exclusive competence of the Autonomous Community over the participation of users, the guarantee of water supply, land plot regulation and works to transform, modernise and consolidate irrigation and for the efficient saving and use of water. These concepts are each very different, with different underlying legal realities, so they require a much more in-depth study.

First, there is nothing decisively opposed to the allocation of exclusive competence over the participation of the users, even though today the existence of an article in the TRLA (article 18.1.b) must not be forgotten, which requires the AC to provide that no less than one third of the members that constitute the Water Administration are users' representatives. The basic nature of this rule was accepted as such by the Constitutional Court<sup>20</sup>. Therefore and if this mention of the state legislation does not disappear, it is binding the Autonomous Community of Andalusia, thus underscoring –in the current state of affairs, I insist- the exclusive nature of that competence which would, rather, be shared in practice. To argue that the Statute attempted to prevent the application of principles such as article 18.1.b of the TRLA in Andalusia would – once again – go against the reality of State competences derived from article 149.1.18 of the Constitution on the legal regime of Public Administrations, since determining the presence of users in different

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<sup>20</sup> Cf. DCC 227/1988, legal basis 21 e, which refers to the “natural” origin of this basic rule.



administrative bodies unmistakeably shows this basic regime of the hydraulic Administration, regardless of the percentage that might be established<sup>21</sup> or any other specific way of referring to this presence.

The guarantee of water supply is a concept that is not relevant to the present discussion because, in a strict sense, it refers to aspects of the local services of urban supply or, in any case, to concessionally granted flows, whatever their destination. This would, therefore, be a reference that should fall within the concessional regime and its relative principles, over which the State may establish basic legislation (article 149.1.18 of the Constitution).

Finally, the last concepts reflected in the precept examined are more related to actions that must be understood as included within agricultural issues (where the AC have exclusive competences according to their Statutes of Autonomy), knowing, however, the difficulties that exist when considering the distribution of competence in the field of irrigated agriculture. In any event, the competences over water and agriculture, which have been discussed, operate within Andalusian intra-community basins only and are therefore unlikely to present any interpretation and management difficulties in the future<sup>22</sup>.

## 2. Competences on hydraulic works.

I refer now to the competences on hydraulic works; thus, we must necessarily refer to the concept of "hydraulic works of general interest" which are State

<sup>21</sup> It could always be disputed, however, if the establishment of a "fixed" percentage as, in this case, of a third, could not be improved from the perspective of the basic legislation and development legislation relationship (and the constitutional position of the AC), with references in the basic regulation to a "framework", to a more flexible system than that of a fixed percentage.

<sup>22</sup> In any case, it should be recalled here that the only article of the Statute of Autonomy appealed before the Constitutional Court (by the Autonomous Community of Extremadura) is article 51, relating to the exclusive competence of Andalusia over the part of the Andalusian basin of the Guadalquivir. Article 50, which the discursive process contained within the text deals with, has not been appealed.



competences<sup>23</sup>. The State traditionally assumes this competence by means of a declaration of the general interest of a work<sup>24</sup>, even when there is a legal specification of what is understood by hydraulic works of general interest since the reform of Water Law 29/1985, operated by article 46 of Law 46/1999 (13 December 1999). Also, according to the Constitution (article 149.1.24) public works – and therefore hydraulic works too – that affect two or more Autonomous Communities are within State competence.

The independence of the competence over hydraulic works from the competences over waters has been well established for a long time. It is possible for the State to exercise competence over hydraulic works (those declared of general interest) within the territory of an intra-community basin (which falls within the competence in relation to water of the Autonomous Community where the basin is located) and, in turn, for an Autonomous Community to also exercise competence over hydraulic works (of autonomic interest) within the territory of an inter-community basin (of State competence). Everything, I insist, depends on the work being considered of “general interest” for the State (according to the criteria in article 46 of the TRLA)<sup>25</sup> and, therefore, of the formal assumption, or not, of competence by the State. And if it has not been declared of general State interest, it will be of regional interest and with the possibility of execution and exploitation by the respective Autonomous

<sup>23</sup> The Constitution refers, generically, to State competence over public works in article 149.1.24.

<sup>24</sup> Cf. EMBID IRUJO (1995); see also subsequently MARTIN-RETORTILLO BAQUER (2000) and then EZQUERRA HUERVA (2007).

<sup>25</sup> Given the obvious relativity of the distinction of competences over hydraulic works, in my work “Hydraulic Works” (1995) I considered the last “criterion” that could be used to differentiate or separate the works of State competence from the works whose competence belongs to the AC. In the absence of any defining legal rule (as article 46 of the TRLA has later been), I answered that the criterion could only be the size or importance of the hydraulic work associated with a certain financing that could not be assumed by the Autonomous Community (cf. EMBID IRUJO, 1995, page 94 and following and 115 and following). That is the reason why, until now, there have not been any State-Community conflicts in this field, but rather there has been considerable interest by all the AC in achieving from the State the declaration of works to be of general interest, or, more recently, of locating a work as one within the definition in article 46 of the TRLA (which, in any event, usually always includes works of important economic cost).



Community regardless of where this work is located.

Several articles of the recently reformed Statutes of Autonomy have a bearing on this briefly described reality and which aim to divert “executive” competence over works of general interest towards the respective Autonomous Community, but “in the terms established in the State legislation”. This is affirmed by article 117.2 of the SC which provides that the Community may “participate in the planning and programming of the works of general interest which correspond to it [under State law]”.

In the case of Andalusia, article 50.2 of its Statute acknowledges executive competence of the Autonomous Community over the execution and exploitation of works of State ownership by prior agreement. Article 72.3 of the SAr moves along the same line, expressing that it corresponds to the Autonomous Community “to execute and exploit the works of State ownership, if this is established by agreement...”

All the precepts mentioned, therefore, adapt perfectly to the Constitution insofar as they do not attribute competences directly to the AC mentioned over the execution and exploitation of the hydraulic works that fall within State competence, but within the framework of agreements (Andalusia and Aragon) or in the terms established in the State legislation (Catalonia). This referral to the State legislation also represents, among other things, a way of naming the agreements, between the State and the Communities, given the generic prevision of these in article 6 of Law 30/1992 (26 November 1992), on the legal system of Public Administrations and on the common administrative procedure, and apart from specific mentions that which may exist in specific pieces of water regulation. There are many agreements that have taken place until now between the State and the AC<sup>26</sup> on this matter, and

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<sup>26</sup> To the extent where I even suggested the existence of a “tertium genius” of hydraulic works alongside the works of general interest and of regional interest: those agreed between State and Autonomous Communities. On this issue see EMBID IRUJO (1995), page 116 and following.



these, I believe, on the basis of current signs, will increase in the future.

In any case, the fact that a Statute of Autonomy can attribute to the Community management competence over works of general interest for the State would not, in any case, be a novelty in the current statutory reform process. Recall article 11.8 of the SC of 1980 (among other Statutes of Autonomy) that attributed executive competence to the Generalitat (regional government of Catalonia) on “ports and airports qualified as of general interest, when the State does not reserve its direct management”. The reformed Statutes of Autonomy recognise management competences over hydraulic works within the framework of agreements or subject to State legislation, but they are more cautious – although they lead to the same result – than the example provided by article 11.8 of the 1980 Catalonian Statute.

### 3. The cession of the Andalusian part of the Guadalquivir River Basin to Andalusia and of the Castilian-Leonese part of the Duero River Basin to Castile-Leon

#### A) The case of the cession of the Andalusian part of the Guadalquivir River Basin to Andalusia

One of the most outstanding provisions of the SA is its article 51, which deals with the “exclusive” competence of the Autonomous Community of Andalusia over waters of the Guadalquivir River Basin that flow through its territory and do not affect any other Autonomous Community. Undoubtedly it is the fact that the majority of the Guadalquivir Basin is Andalusian (due to territorial extension, importance of exploitations and the number of people affected compared with the total number of people living in the basin) which is in the origin of the text. However, it does not, in principle, seem entirely consistent with the Constitution, understanding as such the interpretation of the phrase of article 149.1.22 of the Spanish Constitution ("waters flowing through more than one Autonomous Community") according to the concept of basin that was first decided by Water Law



29/1985 (2 August 1985) and which the Constitutional Court in its Decision 227/1998, legal basis 15, later considered to adapt to the Constitution due to "logical, technical and experience" criteria as I have mentioned above and bearing in mind that the Constitutional Court did not, under any circumstances, express that its theory were the only possible way of interpreting art. 149.1.22 of the Constitution.

The Andalusian Statute submits the conferral of "exclusive" competence over the Andalusian part of the Guadalquivir Basin to a series of "precautions". Thus, the competence is exclusive only: where the waters do not affect another Autonomous Community; and without prejudice to the general planning of the hydrological cycle, of the basic rules on environmental protection, public hydraulic works of general interest or "that foreseen in article 149.1.22 of the Constitution". The caveats in the article are very important and some of them are worthy of specific comment.

The SA placed special emphasis on the fact that the ceded waters are only those which do not affect another Autonomous Community<sup>27</sup>. Thus, one may think, the constitutional article (article 149.1.22) that simply attributes to the State competence over the waters that "flow" through the territory of more than one Autonomous Community is respected. The State would continue to manage the waters of the Guadalquivir Basin that flow through more than one Autonomous Community and that affect other Autonomous Communities different to Andalusia, whilst the Andalusian Autonomous Community would manage the waters which, although belonging to a basin that extends through the territory of more than one Autonomous Community, do not affect other Communities of the Basin. Having

<sup>27</sup> The intellectual origin of this concept "affects" another Autonomous Community and referring to waters could be in article 149.1.24 of the Constitution which, in connection with public works, attributes to the State competence over those of general interest and also over those "whose execution affects more than one Autonomous Community". The Statute of Andalusia has, then, mixed constitutional concepts related to water and to hydraulic works in the search for a new criterion for the distribution of competences that adapts to the Constitution.



said this, it is understandable that we are faced with an almost scholastic type digression where the reader is firstly asked to believe in the existence of this type of waters and secondly, that this existence can, in practice, be clearly delineated. Thus, the personal and material means corresponding to the competence assumed by the Statute can thus be transferred, as occurs with all the other statutory attributions on different matters.

As I indicated in a work originally published in 2007, these assumptions may be correct from a technical viewpoint, although in my opinion they may be quite difficult to demonstrate. Such demonstration is above all quite difficult to carry out within a combined Commission on Transfers comprised of the State and the Autonomous Community of Andalusia, which would be a logical consequence of article 51 of the SA. However, the agreement on transfers was signed on 20 September 2008, having been approved by the Council of Ministers at its meeting of 17 October 2008 and valid as from 1 January 2009. In any case – and linking this idea up with another of the parts of article 51 – a perfect, unanswerable delimitation could only be done on the basis of a new hydrological planning method that indicates -one of its primary objectives– which waters of the Guadalquivir River Basin are not affecting other Communities and are therefore subject to cession to the Andalusian Community without constitutional concerns<sup>28</sup>. In this case, the efficiency of the article would really have to be postponed until this hydrological planning has been approved (in other words, if the requirements and timelines in the TRLA are satisfied, within a period of time concluding 31 December 2009).

An obvious temporal question also needs to be resolved: does the “non-impact” referred to in article 51 refer to the current state of affairs only or is it projectable into the future, too? I mean that it is perfectly possible for waters to be theoretically granted to the Autonomous Community of Andalusia because they do not currently affect any other Community, due, for example, to the absence of hydraulic

<sup>28</sup> This must occur in a participative and transparent way, with contributions from everyone, as is the formal legal requirements of hydrological planning.



infrastructures that would permit their diversion towards any other Autonomous Community<sup>29</sup>. But, however, this possibility cannot be rejected unequivocally, in the future, as we must not forget that we are talking about all its capacities and possibilities.

All of this consolidates the ideas expressed above about the difficulty of the topic that concerns us and if it is appropriate or not for it to be the Constitutional Court that must finally give judgement over the constitutionality of the statutory provision.<sup>30</sup>

In any case, one more comment should be made on the last caveat or precaution of the precept I am mentioning, the reference to article 149.1.22 of the Spanish Constitution, constituted as the end of the conditions of the exercise of the exclusive competence of the Autonomous Community of Andalusia. That sentence – in the context of current State legislation and the jurisprudence of the Constitutional Court, and I place emphasis on the word “current” – may mean practically the denial of the competence that the beginning of the article seems to affirm. It would not be possible to have competence over part of a river basin

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<sup>29</sup> It is clearly noticeable here how a criterion of “affected” in the SA, which, as I have mentioned above, seems to be inspired by article 149.1.24 of the Constitution related to the competence over works, may not be readily transferable to an essentially flowing element – water – and whose use in one Autonomous Community or another may depend, precisely, on the execution of hydraulic works. In any case, we must remember that the impact of a hydraulic work must always refer to the impact of the resource that such a work regulates or channels. It is finally clear that even with the transfer to the Autonomous Community of Andalusia, this does not mean that a hydraulic work may be carried out in the future that will permit redirecting the water currently attributed to Andalusia, to another Autonomous Community of the basin. All of this basically depends on the hydrological planning and on the respect for the administrative procedures foreseen to approve and execute the hydraulic work.

<sup>30</sup> It is advisable to point out that even though the constitutional adaptation is decided within the framework of the relative conditions that art. 51 of the SA already contains in a abridged manner, the adaptation of the TRLA will depend on the new legal situation, as the TRLA adapts entirely to another regulatory framework which DCC 227/1988 considered was in agreement with the Spanish Constitution as I have already mentioned earlier in this work.



subject to the provisions of article 149.1.22 of the Constitution, if this same constitutional precept, pursuant to the Constitutional Court's interpretation in Decision 227/1988, precisely, denies the possibility of Autonomous Communities having this competence, by exclusively reserving it for the State because the waters –basins-are intercommunity waters regardless of whether they affect another Autonomous Community or not. All of this must, I insist, be considered with the clear understanding that the Constitutional Court has only said that the interpretation of the Water Law 29/1985 (2 August 1985) adapts to the Constitution, and not that other interpretations of the law could be adopted by State legislation that might also be constitutional; the Constitutional Court has explicitly stated that the Water Law is not the only possible way of interpreting the terms of article 149.1.22<sup>31</sup>.

The above discussion demonstrates that article 51 of the SA is clearly confusing and has internal contradictions, which, when appropriate, would finally end up in the Autonomous Community being denied the competences, which, paradoxically, the same article seems to confer. In this case, the fact that the waters affect another Autonomous Community or not should not be taken into account, therefore, as a first condition<sup>32</sup>. As I have already indicated above, an appeal has

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<sup>31</sup> I have already mentioned above that the hypothetical decision of the Constitutional Court that the only possible interpretation of the constitutional expression of "waters flowing" of article 149.1.22 of the Constitution were a river basin, would be the only case –as far as I know, and one never knows the extent of one's own ignorance- of world constitutionalism –relating to politically decentralised states, obviously- where the criterion of river basin were the only way of interpreting or understanding the Constitution with respect to the subsequent distribution of competences that must exist in any politically decentralised state between the "Federation" or central State, and the federate states or entities. In any case, the underlying aspect of this entire problem is the understanding of the expression "river basin" which is, in no way, the same in all the States. There is, of course, a specific concept in the 2000 Water Framework Directive (applicable today, therefore, to 27 European countries), but the concepts of river basin vary in theory and in practice in countries outside these 27 European countries.

<sup>32</sup> This sentence of article 51 of the EA should be analysed with the "logical, technical and experience" criteria that the Constitutional Court refers to, which would take us quite a lot further than what can be undertaken here. In any case, the word "impact" is an indefinite legal concept



been brought before the Constitutional Court against the article by the Autonomous Community of Extremadura which will, therefore have the opportunity to resolve the serious doubts that I have just put forward.

The truth is, however, that there are more than sufficient objective reasons for Andalusia to be able to effectively manage the Andalusian part of the Guadalquivir Basin provided its management does not endanger – either now or in the future – the positions of other Autonomous Communities or the powers of the State and, that this be the guiding element for the decisions to be adopted on it.<sup>33</sup> But this cannot be achieved by the formula in article 51 of the Statute of Andalusia, unless the Constitutional Court substantially qualifies its indication in DCC 227/1988 using, as an initial base, what it has already indicated about Water Law 29/1985 not being the only possible interpretation of the Constitution<sup>34</sup>. It must be achieved

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that would necessarily require legal interpretation tasks (what is impact?), which are reserved for the State legislator. It is not impossible, either, that this same State legislation may be considered to be contrary to article 149.1.22 of the Constitution due to its mere existence (note, in this regard, DCC 5/1983 referring to the LOAPA [Organic Law on the Harmonisation of the Autonomy Process], and where the Constitutional Court denied the State legislator interpretative powers, although a considerable jurisprudential change has occurred in this topic. DCC 247/2007 has even affirmed the interpretative capacity of the Constitution of the Statutes of Autonomy, understanding, obviously, that this interpretation may be judged from a material viewpoint as adapting to the Constitution).

<sup>33</sup> There are other issues that underlie the problem examined here and which I must mention for completeness: the complete reserve to the State, as occurs today, of the decision possibilities about water extremely narrows other decision possibilities of the exclusive competences of the Autonomous Communities where the water element is decisive for its exercise: consider, above all, agriculture, but industry would also fit in here, as these are both fields where all the Statutes of Autonomy affirm the existence of exclusive competences of the Autonomous Communities. On the issue of distribution of competences between State and Autonomous Communities on water, there is still a lot to be said, and it is an unavoidable requirement to go deeper into the material and organisation criteria of our constitutional system, without partial visions and bearing in mind, also, the general directive of efficiency which, as a valid constitutional principle, for all the Public Administrations, is contained with article 103.1 of the Spanish Constitution.

<sup>34</sup> And the reference to the hydrological planning should play a key role in clarifying the issue, as an instrument of the State to bring up to date the extension of the waters which, because they do not affect any other Autonomous Community, are subject to exclusive management by the Autonomous Community of Andalusia.



using other constitutional possibilities. This will have to be looked into with more attention and at greater length at another time.

#### B) The cession of the Castile-Leon part of the Duero Basin to Castile-Leon

The SCL also provides for the cession to the Community of and exclusive competence over (article 75.1) the waters of the Duero Basin “which have their source in Castile-Leon and divert to Portugal without crossing any other Autonomous Community” and “given the relevance that the Duero Basin has as a configuring element of the Castile-Leon territory”.

Though using different terminology, the criterion used in the Statute of Castile-Leon is similar to the criterion we have just contemplated in the case of the assumption of competences of the Guadalquivir by Andalusia. In this case, the key was that the waters whose competence was assumed did “not affect” any other Autonomous Community. Here the question is whether “they divert to Portugal without crossing any other Autonomous Community”. If the basic criterion is the same, the same should also be said in connection with this competence; its presumed incompatibility with the interpretation by the Constitutional Court of article 149.1.22 of the Constitution in DCC 227/1988 unless the Constitutional Court were to change its views. And, of course, the need for there to be a preliminary regulatory and/or planning process that explains without any doubt whatsoever which waters fall within the Community’s exclusive competence.



In any case, I do believe it is necessary to reject the fact that the “international” nature (better still community nature) of the Duero Basin is an obstacle to its possible partial cession to the Autonomous Community of Castile-Leon. An outright rejection is not required by the current legal system. The Spanish State must continue to satisfy a series of obligations (towards Portugal and towards the European institutions) derived from the nature of the basin, but the relevant international law (I am thinking about the so-called Albufeira Agreement of 1998 signed between the Kingdom of Spain and Portugal and the previous agreements that are still valid) or the community law (the existence of a supranational limit<sup>35</sup> in the sense of the 2000 EC Water Framework Directive) do not have the slightest interest in which State organisation within the national frontiers exercises particular competences over the basin.

And I conclude by affirming the same for Castile-Leon as what I have indicated for Andalusia, but, in this case, with even greater emphasis, if possible: due to its territorial extension, the importance of the uses and the population affected, the Duero River Basin should belong almost entirely to Castile-Leon and there should be an action method for the Autonomous Community to have the ultimate jurisdiction over all the waters that may be considered as “belonging” to the Community. With the expectation that has arisen about what the Constitutional Court may say about this Statute in the future, there are other constitutional procedures that place decisive importance on the management of the “Castilian-Leonese” Duero basin by the Community of Castile-Leon, and, further, certain regulatory modifications have been made to the organisation of the state river basin organisations to be able to achieve this aim. The rigidity of the Constitutional Court’s interpretations should never lead to lack of effectiveness in the life of the organisations and institutions; the role of the jurists, apart from the –

<sup>35</sup> That is why the RD 125/2007, (2 February 2007), which establishes the territorial limit of the river basin districts, has referred to the “Spanish part of the river basin districts corresponding to river basins shared with other countries” (article 3).



often – easy affirmation of unconstitutionality, is to find pathways to ensure law and effectiveness become terms that can be combined together.

4. The issue of reports by the AC on administrative procedures where the State has the ultimate say.

In the general terms with which I am dealing with these questions, I must now refer to another characteristic, a general one, too, of the current statutory reform. This characteristic is the different ways in which the Autonomous Communities participate in processes whose final decision belongs to the State. Thus, the issue of reports by the Communities or their participation in the State processes to adopt decisions on hydraulic works of general interest, transfers or others, are regulated in the new statutory texts.

It has been alleged that the regulation of these reports would represent an interference or disturbance in State competences and that, therefore, its presence in the reformed Statutes of Autonomy would be unconstitutional<sup>36</sup>. My opinion, however, is contrary to this and I also believe that the intervention of AC in processes where the resolution competence falls upon the State is a symptom of good constitutional health. Neither the content of the State's decision nor its competence is disputed, as the only aim is for the State to have another opinion and for this to be expressly formalised: that is, the opinion of the Autonomous Community on its obvious "interest", territorially speaking, that a final State decision may affect.

It is possible – I do not know – that when the State of Autonomies in Spain was founded, the position that I now openly propose could have been expressed more emphatically and with greater conviction. But I believe that almost 30 years after

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<sup>36</sup> For example, in the appeal formulated by the members of the popular parliamentary group against the SC. But there are also doctrinal documents with that content.



the approval of the first Statute of Autonomy (of the Basque Country in 1979), with the real experience of the working of the State and the existing Constitutional Court jurisprudence, rejecting (on the basis of constitutionality), the provision in the reformed Statutes of Autonomy for non-binding reports by the AC, or the mere participation in decision processes by the State, represents an incorrect understanding of what the Constitution and the State of Autonomies mean. I say so for the following reasons:

a) As the Constitutional Court has said many times, the collaboration between public entities is a constitutional principle that is not expressly written but which is essential for the working of the State of Autonomies<sup>37</sup>. The fact that typical formulas for collaboration like those I am considering could be argued to be unconstitutional due to their presence in the relevant standard of the constitutionality block seems aberrant to me<sup>38</sup> or, from another viewpoint, it could also be interpreted as a confession by those expressing views of regret at the loss of the centralist State (although this may not be the direct opinion of these commentators)<sup>39</sup>.

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<sup>37</sup> DCC 34/1993 (30 July 1993), mentions the collaboration obligation as an “elementary principle of relationship” and DCC 18/1982 (4 May 1982), says that it is a “general obligation that need not be justified in specific articles ... is implicit in the actual essence of the territorial organisation method of the State that is implemented in the Constitution”.

<sup>38</sup> It is commonplace in the discipline – which is why no specific quotes are necessary – to express the regret for the express lack of collaboration mechanisms between State and AC in the Constitution. The collaboration agreements between the AC are only regulated in article 145.2 of the Spanish Constitution. Therefore, the incorporation of the reports mentioned in the text as a relevant element of the constitutionality block is reason for satisfaction.

<sup>39</sup> On the other hand, the Constitutional Court in DCC 227/1988, has previously referred to the need for State and AC to collaborate with the following words, which, although pronounced in a general fashion, will be applied later in the paper to the specific field of water: “The projection over one same physical medium or natural resource of different areas of competence in favour of the State or of the AC requires collaboration between both Administrations. This collaboration ‘is essential for the good working of the State of the Autonomies’ as this Court has indicated, due to a generic relationship with cases such as the one set out now, in DCC 76/1983, (5 August 1983). Furthermore, this overlapping of competences, as mentioned, leads to the coordination between the Administrations involved, as that decision also declares; a coordination that corresponds to the State insofar as the objectives of economic planning are affected. After establishing this, it must be stated, too, that neither the competence on coordination nor the competence on the planning basis authorise the State to attract any competence of the Autonomous Communities towards its sphere



b) Ordinary laws have been gradually including collaboration processes like those included now in the Statutes of Autonomy that I am discussing, and the Constitutional Court jurisprudence has indicated these laws are perfectly constitutional providing they are not non-binding (cf. DCC 40/1998). One might say that these facts that I am commenting have been developed in State laws that, of course, the State can freely modify. But they have also appeared in Community laws not – regularly – appealed by the State<sup>40</sup>. All of these regulatory presences are merely the recognition of that implied constitutional principle – and I insist on this idea – of collaboration.

c) Following DCC 247/2007 /2 (12 December 2007), it seems undeniable that these collaboration formulas that I am referring to can perfectly well form part of the content of the Statutes of the Autonomies. And, in addition, that this insertion would, in some way or another, oppose the Constitution, the only possible parameter of constitutionality of the Statutes of Autonomy. We can see how, in legal basis 12 of the Decision mentioned, following an in-depth study into the constitutional function of the Statutes of Autonomy present in art. 147.2 of the Constitution, the possibility of the Statutes of Autonomy containing provisions that go beyond that strictly foreseen in article 147.2 of the Constitutions is categorically stated. These provisions, for example, will refer to relationships between the community powers and the state powers, a relationship that would include –I believe there can be no doubts about this, at least based on a legal reasoning

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of activity, due to the mere fact that its exercise may have an influence on the development of the State competences on certain matters”.

<sup>40</sup> Different Territorial Organisation Laws of AC acknowledge the existence of compulsory reports of the AC on State planning processes. See, for example, the Territorial Organisation Law of Andalusia of 1994 that foresees reports from Andalusian bodies on the hydrological planning prepared by the State. Likewise, Law 1/2001, of Aragon (which has been appealed by the Government of the Nation, before the Constitutional Court due to the inclusion of the requirement for reports from an autonomous body – the Territory Organisation Council – on the State hydrological planning, although the Constitutional Court later raised the suspension of the Aragonese Law and the Government of the Nation finally withdrew the appeal) goes in the same direction.



process- everything related to the principle of collaboration:

“All of this derives in the fact, finally, that the Statutes of Autonomy may normally contain, not only the determinations expressly foreseen in the constitutional text we have referred to, *but also other questions, derived from the provisions of article 147 of the Constitution, relating to the functions of the community powers and institutions, both in their material and organisational dimensions, and relating to the relationships of these powers and institutions with the remaining state and community public powers, on the one hand, and with the citizens, on the other*”. (the italics are mine).

And slightly further on this initial decisive statement is complemented with the following, also very important, words:

“The indications given justify the fact that we have to consider that the legitimate content of the Statutes is not limited to the literal stipulations of articles 147.2 and 3 of the Constitutions and other expression constitutions provisions, but that this content is linked to the dispositive principle in the terms set forth. However, this content cannot be understood diffusely, based, among other reasons, on its especially rigid nature. *In short, the constitutionally legal content of the Statutes of Autonomy include both the content that the Constitution expressly foresees (and which, in turn, is comprised of the minimum or necessary content foreseen in article 147.2 of the Constitution and the additional content that the remaining express referrals that the Constitution makes to the Statutes refer to), as well as the content that, although not expressly indicated by the Constitution, is an adequate complement due to its connection with the aforementioned constitutional provisions. This adequacy must be understood as referring to the function that, in a strict sense, the Constitution entrusts to the Statutes, as regards a basic institutional standard that must carry out the functional, institutional and competence regulation of each Autonomous Community*”. (the italics are mine)

d) Finally, and in another order of affairs, the presence of reporting or participatory requirements in certain procedures of State competence must not be



considered, in any way, as a kind of “imposition” of the Autonomous Community on the State. On the contrary, I believe that the Autonomous Community is just as interested in issuing a formal opinion on the exercise of State competences, as the State is in achieving that opinion to be more certain of the appropriateness of its final decision. In this regard, the origin of the rules I am dealing with could lie both in the initiative of statutory reform exercised by the AC and in the parliamentary procedures of the General Courts that process these statutory initiatives. This does not matter because, I insist, the mechanism that we are dealing with is essential for an efficient working of the State of Autonomies and therefore its presence in such relevant rules of the constitutionality block should never be considered unconstitutional, but as a representative example of the practical vigour and efficiency of the State of the Autonomies.

I will return to the matter of reports later when I deal with the question of water transfers between territorial areas of different River Basin Plans. The possibility of the issue of reports by the affected AC is also expressly foreseen in the different Statutes of the Autonomies.

### III. THE CONCEPT OF RIVER BASIN AND ITS ROLE IN SPAIN

In view of the above and given the multiple references to the role of river basins in the above discussion, it seems essential to reflect here on the regulative concept of river basin to know more precisely what it aims at transmitting with all the above words. I reproduce what the Spanish legislation states in this regard, in article 16 of the TRLA, approved by Royal Legislative Decree 1/2001 (20 July 2001):



“For the purpose of this law, river basin is understood to be the surface of land whose surface run-off flows in its entirety through a series of streams, rivers and possibly lakes towards the sea by only one outlet, estuary or delta. The river basin, as a management unit of the resource is considered indivisible<sup>41</sup>.”

This is not the only possible concept of a river basin although, in my opinion, it is the one which best corresponds to the “natural” characteristics of hydrographical division to which I refer and in which the outlet to the sea of the different water currents that form the basin is highlighted. This definition of the basin as a unit of management is a rare thing, when compared with other countries. On the contrary, it is possible to find the use of other definitions – which for the aforementioned example would be simply sub-basins– that are used, rather as a management reference in many countries. The specific characteristics of each country determine the content of these definitions<sup>42</sup>.

On some occasions it is the very size of a basin (when this is enormous) that makes unitary management very difficult when various or a large number of countries are involved and it is difficult to coordinate organisations – necessarily international in character – capable of carrying out the integrated management of the waters of the entire basin, even though international rights over rivers are powerfully advancing in this direction<sup>43</sup>.

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<sup>41</sup> This definition comes from article 2 of the EC Water Framework Directive, of the European Parliament and of the Council (23 October 2000), which establishes a community action framework in the area of water policy. In section V, I make a brief comment on this Directive in questions related to river basin management.

<sup>42</sup> Imagine –not a very complicated exercise- countries with no outlet to the sea or which are cut off by mountain chains where watercourses arise that are soon integrated into other countries. It is obvious that in these cases, the Spanish (and European) definition is not of use to that specific country because the outlet to the sea either does not exist or takes place beyond its frontiers, unless there are international treaties that determine something in connection with the joint management with other countries for which, from the internal law viewpoint, they would be sub-basins.

<sup>43</sup> Considering the integrated management of the Amazon river basin (with 6,144,727 km<sup>2</sup>) or of the Congo river basin (3,730,474 km<sup>2</sup>) or the Nile river basin (3,254,555 km<sup>2</sup>) is nothing but a utopian approach (now and also in a distant future) although, apart from the same internal



In some federal countries, the powers of the constituent States (or of the autonomous political units no matter what name they go by) over water are such that, when rivers or basins exist that exceed the limits of the States only a pact between these political units will permit a “distribution” of water and shared water management, which goes beyond the pure local territorial interest. This is the case, for example, in the United States and the Republic of Argentina whose States and Provinces, respectively, have been granted substantial constitutional competence over water and which, therefore, have to resort to signing agreements between States (in the USA, where such inter-State agreements are called “compacts”) and Provinces (in Argentina) for the management of the supra-State or inter-jurisdictional rivers. In the USA, the most well-known and also controversial pact is the “compact” of the Colorado River of 1921 (revised by another of 2007) which is effectively a mere distribution of water between seven States, which might have been acceptable in 1921 but nowadays the absence of references to quality or forms of management in it causes multiple problems (GETCHES)<sup>44</sup>. In Argentina there are also several treaties of this nature between Provinces<sup>45</sup>. Over the last few years there has been an attempt by the central government to re-establish its competence over waters by determining legislatively (through so-called “minimum assumptions” that are similar to the Spanish basic legislation) the competences of the Provinces. There is a relevant body of work critical of the constitutionality of these measures (MATHUS), and the matter is awaiting the Supreme Court to solve the problem.

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management problems in each member country of those basins, in all the cases indicated and depending on the potentiality that many international declarations and conferences have given to the concept of river basin, there have been considerable progresses over the last few years on the way to achieving coordination elements, at least.

<sup>44</sup> On the other hand, the Federation may always influence the management over the waters of the States, using standards based on environmental powers of the Federation. I recall, in this regard, the decisive role of the federal Laws on clean water or on scenic rivers.

<sup>45</sup> The last one I know about, between the provinces of Mendoza and La Pampa and also signed by the State through two Ministries, is dated 7 August 2008, and deal with the Atuel River, thus happily solving a long legal and political conflict between the two provinces.



Taking into account the aforementioned, we can reflect upon the role of the river basin in Spain.

The first thing I must highlight, then, is the age of the concept and role of river basins in Spain. This age is even more outstanding if we take into account its late arrival to the majority of other countries, if it has arrived at all. The basin as a basis for the preparation of a coordinated plan of hydraulic works appeared in Royal Decree-Law of 15 March 1926 with respect to the creation of River Basin Union Authorities (as they were known then). These bodies, that initially only had competence over hydraulic works and which were unique in that, apart from taking on the basin as an element for the planning and execution of works, they included the users' participation in these processes (that is, the agricultural owners of the basin). These Authorities evolved to assume competence over water management, an area where the participative element was very tenuous, and the management corresponded exclusively to the purely "administrative" part of the Authorities. (through the Commissariat and the President in the final instance).

Nowadays the basin, in Spanish law, is:

a) *The basis of the State water administration:* The TRLA thus regulates the existence of basin organisations with the name of River Basin Authorities<sup>46</sup> which those AC whose territory lies within the basin managed by the State, can be incorporated into<sup>47</sup>. Today and by virtue of the new concept of River Basin District that originates from the EC Water Framework Directive<sup>48</sup>, the basin organisations extend their competence to the whole of the River Basin District, having to coordinate their competences with those of other Administrations in the so-called

<sup>46</sup> They are legally Autonomous Organisations which make administrative decisions subject only to contentious-administrative appeals. The willingness of the State to achieve the greatest administrative autonomy possible for the basin organisation is thus clear.

<sup>47</sup> All the Autonomous Communities are incorporated into the relative Basin Organisations.

<sup>48</sup> The River Basin Districts add the transition waters and the coastal waters to the traditional basin territory with the definitions that article 17 of the TRLA offers for them.



Committee of Competent Authorities (only with coordination and consultative functions, not decision functions). Furthermore, the Autonomous Communities with their own basins to manage, construct their water administration based on the river basin unit, promoting the idea of “autonomy” for such organisations<sup>49</sup>.

b) *The territorial limit of hydrological planning (of basins)*: One of the most important achievements of Water Law 29/1985 (2 August 1985) was legally structuring hydrological planning and regulating it<sup>50</sup>. The hydrological plans of the State management basins were passed in 1998 and autonomous management basin plans have also been approved. Hydrological planning, with some different orientations, has also been set out by the EC Water Framework Directive (2000) and now the hydrological plans of the basin as a district are being prepared in Spain, which adapt to the prescriptions of this Directive and which should be passed before 31 December 2009.

c) *The decisive element regarding water management*: If the hydrological planning is of a basin (with the existence of a National Hydrological Plan that was passed by Law 10/2001 (5 July 2001)) and the administrative organisation is also at this level, it can be concluded that the “ordinary” water management is that which is carried out in the river basin. “Going beyond” a single basin’s limits by regulating a water transfer from one basin to other (better still, from one territorial limit of river basin planning to another), requires, as a general rule, its insertion into the National Hydrological Plan. This is passed by Law and is not a “free” regulation but one where the “conditions” of said transfer must appear (cf. article 45.1.c TRLA).

<sup>49</sup> The “Agencies” formula (for example, Catalana del Agua, Andaluza del Agua, Vasca del Agua) is being generalised as an organisation peculiarity and name for these organisations of the AC. But their legal nature is usually as entities of public law that function in agreement with private law. We thus find something similar to the function of the State Agencies to improve the public services contained in Law 28/2006 (18 July 2006), and which are characterised by a great organic, contractual, budgetary, financial and personnel management autonomy, etc.

<sup>50</sup> EMBID IRUJO (1991) on this subject and unanimously the subsequent theory.



The territorial limits of the basin organisations – and therefore of the river basins – were established in 1987 and have remained practically untouched until now. Recently, legislation creating a new State basin organisation – the Minho-Limia, which arises from the segregation of a territory of the basin (incorrectly called so) of the North – has been passed and the decision of the Supreme Court of 20 October awaits execution. This decision annulled certain articles of the Jucar River Basin Plan because they extended their validity to territories that were themselves river basins and were wholly within the Autonomous Community of Valencia and consequently should be managed by the Community, given the terms of its Statute of Autonomy.  
<sup>51</sup>

#### **IV. THE PROBLEMS OF TRANSFERS OF WATER RESOURCES BETWEEN DIFFERENT TERRITORIAL LIMITS OF RIVER BASIN PLANNING. THEIR PRESENCE IN THE REFORMED STATUTES OF AUTONOMY**

Water transfers are perhaps the area, at least in Spain, where tensions underlying the water-territory relationship are shown most clearly<sup>52</sup>. The conflictive element that water transfers between river basins has always represented in Spain (in both the political and social environment) has already been mentioned. In the present section I am going to deal with the transfers and their problems in general (1) and later their presence in the recently reformed Statutes of Autonomy (2).

1) Transfers of water resources between the territorial limits of different River Basin Plans

The phrase “water transfers between the territorial limits of different River Basin Plans” corresponds to the terms of article 43.1.c of Water Law 29/1985 (2 August

<sup>51</sup> On the important (and difficult) question of the way this decision was executed see the study in EMBID IRUJO (2006 a). in the final bibliographic sources which include references to another theory that need not be mentioned here.

<sup>52</sup> On the last theory, see the excellent work by MENÉNDEZ REXACH (2007)



1985), which entrusted the regulation of transfers thus defined, including their “conditions”, to the Law approving the National Hydrological Plan (note, today the text is article 45.1.c of the TRLA of 2001)<sup>53</sup>. But prior to this, specific regulations had already taken place<sup>54</sup> and even attempts to produce one big transfer based, simply, on the granting of an administrative concession had occurred. These attempts had led, in many cases, to political and social controversy.

We must then commence by mentioning the years 1973-1974, when a draft project was formulated by the Administration for a diversion of a yearly volume of 1,400<sup>3</sup> Hm<sup>3</sup> from the Ebro Basin to that of the Eastern Pyrenees. The transfer was not carried out. It was attempted to base the transfer on the granting of a mere concession, initiating the procedures by publishing an Announcement-note in the official Bulletin of the Province of Tarragona where the catchment would take place. Finally, faced with the political and social resistance, the initiative was dropped<sup>55</sup>.

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<sup>53</sup> On this question see EMBID IRUJO (1991) p. 211 and following.

<sup>54</sup> I must warn that many of the existing transfers (some not at all relevant from the viewpoint of water volumes entailed) do not have their own regulation as they started way back when giving an administrative concession was the element that legitimised the action, but at times not even this exists.

<sup>55</sup> On this issue, the book by S. MARTIN-RETORILLO BAQUER, L. MARTIN-RETORTILLO BAQUER, J. BERMEJO VERA and L. MARTIN REBOLLO (1975) is essential.



In 1981 a vulgarly called “mini-transfer” (due to its relatively small volume, 125 Hm<sup>3</sup> yearly transfer, in relation to the aforementioned) was regulated by Law 18/1981 from the Ebro Basin to the Province of Tarragona, which was carried out. It is interesting to observe the limited territorial definition, as it was not just destined to another river basin, that of the Eastern Pyrenees, as it was then called, but to an administrative division –a province- partly located within another river basin, that of the Eastern Pyrenees..

The most important diversion is the one known as Tagus-Segura, regulated by Laws of 1971 and 1980 that were not essentially polemical in their time, but which today raise constant conflict when decisions need to be made on the volume of water that has to be periodically diverted. The diversion was designed to move 1,000 Hm<sup>3</sup> of water each year, but it was immediately and legally limited to 600 Hm<sup>3</sup> which has only rarely been able to be diverted because of the lack of water in the head reservoirs. This leads to the consideration that there as an obvious technical imperfection in its design, undoubtedly constituting one of the causes of many of the criticisms it receives today. The Community of Castile-La Mancha is seeking to declare the expiry of this diversion through a specific provision to its Draft Statute of Autonomy (which I will examine further on).

The major controversies since the regulation of the National Hydrological Plan by Law 10/2001 (5 July 2001), have been in relation to the transfer from the Ebro Basin to those of the Mediterranean Arc (internal basins of Catalonia, Júcar, Segura and the Province of Almeria). Apart from the social disruption (with several demonstrations in different towns), the Aragon Autonomous Community formulated appeals of unconstitutionality to the Constitutional Court, made reports before the European Commission due to infringement of community directives, and has made multiple contentious-administrative appeals against different administrative actions carried out to execute the transfer, until such transfer was abolished by Royal Decree-Law 2/2004 (18 June 2004), converted to Law 11/2005,



on 22 June 2005.<sup>56</sup>

Tensions have recently arisen again by virtue of the passing of the Royal Decree-Law 3/2008 (21 April 2008), on exceptional and urgent measures to guarantee the water supply to towns affected by the drought in the province of Barcelona (BOE num. 97, 22 April 2008). The Law provides a temporary authorisation to transfer the unused water originating from the water authorised to be transferred by Law 18/1981 (the law regulating the mini-transfer to the province of Tarragona that foresaw a transfer volume of up to 4 m<sup>3</sup>/s, but which is not using more than 2.8m<sup>3</sup>/s at present in the Province of Tarragona ), to the Province of Barcelona (that could, therefore, use up to 1.2m<sup>3</sup>/s, as Royal Decree-Law 3/2008 orders respect for the current limits on utilisations)<sup>57</sup>. This was a regulation based on an extraordinary drought situation that, precisely, began to change with abundant rainfall as soon as the Royal Decree-Law 3/2008 reached the BOE. The text had a curious final provision three that ordered the cessation of the validity of the Royal Decree-Law when the cause of the extraordinary situation ceased or, in any case, 30 days after the commissioning of a desalination plant that is being constructed in Barcelona and which is foreseen to be operative in June 2009. The Council of Ministers held on 6 June 2008 reached an agreement to the extent that the extraordinary drought situation had ceased and, therefore, the Decree-Law would no longer be in force.<sup>58</sup>

<sup>56</sup> The reasons for the opposition to this transfer appear in the book of the GOVERNMENT OF ARAGON, Allegations (2001)

<sup>57</sup> Article 3 of the Royal Decree-Law foresaw that the volumes to be transferred could be obtained via the formulation of water use rights concession contracts with irrigators of the Ebro River, and therefore, outside the system of Law 18/1981. On the meaning of this technique in connection with the forecasts of the Statute of Aragon, on preliminary reports to be issued by this Community relating to water resources transfer (cf. articles 19.3 and 72.3 of the Statute of Aragon.), see Judgement 81/2008 (12 May 2008) of the Legal Advisory Commission of the Government of Aragon.

<sup>58</sup> The question that could be posed at a speculative level is when the validity of Royal Decree-Law has really ceased, as the final provision three does not require, at all, the agreement of the Council of Ministers for the abolition to take place. Most probably, and definitely prior to 6 June 2008, the situation of extraordinary and urgent need no longer exist and in the literal terms of the final provision three, the validity of the Royal Decree-Law 3/2008 had already ceased. This is a peculiar



## 2. The transfers of water resources in the new Statutes of Autonomy

This part will discuss how the new Statutes of Autonomy deal with water resource transfers, most especially the Statute of Aragon, which is the statute that has more references in this regard.

a) Thus, this Autonomous Community must “watch” to avoid transfers, as Article 19.3 of the Statute of Aragon provides:<sup>59</sup>

“It corresponds to the Aragonese public powers, in the terms established by this Statute and according to the principle of basin unit, the Constitution, the State legislation and the applicable community regulations, to especially watch to avoid water transfers from the river basins that form part of the Autonomous Community, which affect sustainability interests, in agreement with the rights of present and future generations.”

This precept could be understood within what could be called “principles” of the actions of public powers (the one that the Constitution regulates in Chapter III of Title I). The reformed Statutes of Autonomy – those of the initial stage of reform too in some cases, namely, the period immediately following the promulgation of the Constitution – have chosen to configure principles of action of their public powers, regularly alongside the establishment of citizens’ rights. It can be observed, in the

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way of terminating the validity, which, in other circumstances, could have had certain legal consequences (consider the legal legitimisation or not of contracts or expropriations in agreement with a regulatory text that had, necessarily, to be considered as abolished in the terms of the Royal Decree-Law). On the general characteristics from the legal viewpoint of this regulatory curiosity, I believe it is useful to refer to the judgment of the Legal Advisory Commission of the Government of Aragon 81/2008, (12 May 2008), which foresaw the way of abolishing the text which would take about one month to be officially confirmed.

<sup>59</sup> A legal interpretation of all the precepts of the SAr on transfers can be followed in the Judgment of the Legal Advisory Commission of the Government of Aragon 81/2008 (1 May 2008), issued in response to the consultation formulated by the Government of Aragon on Royal Decree-Law 3/2008.



case that concerns us and in view of the final wording of the text, that the Aragonese public powers<sup>60</sup> are not responsible for watching over any type of water resource transfer, but only over those that affect sustainability interests. However, in practical terms, it may seem that the public powers are being entrusted to observe the legal system, as it would be difficult to consider a water transfer that does not affect sustainability interests – at least not after article 45.2 of the Constitution with its principle of “rational utilisation of natural resources” and, above all, after the EC Water Framework Directive (2000) and its mandate to obtain a good ecological status of the waters to be achieved by the year 2015 (cf article 4.1.a) with its clear objective that the status of surface waters and groundwater must not worsen after the entry into force of this text.<sup>61</sup>

b) Likewise, in some of the new Statutes of Autonomy the formulation of reports by the AC is foreseen before the State approves water transfers. This is the case in the Statutes of Catalonia and Aragon. Article 117.4 of the SC indicates that: “The Generalitat (Government of Catalonia) must issue a mandatory report for any basin transfer proposal that entails the modification of the water resources of its territorial area”. The SAR in its article 72.4 associates the report with “the defence of the rights related to water contemplated in article 19” and therefore “the Autonomous Community will issue a mandatory report for any proposal of hydraulic works or water transfer that may affect its territory” adding that “the Government of Spain should effectively foster the agreement between all the Autonomous Communities that might be affected”.

Finally, article 75.5.2 of the SCL also regulates the report we are referring to and

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<sup>60</sup> The Statute of Aragon would operate here, from the viewpoint of its leader text nature of the Aragonese legal system, with specific assignments aimed at the Aragonese public powers, such as DCC 247/2007 (12 December 2007), has categorically described to talk about the dual capacity of the Statutes of Autonomy: as state regulations and leaders of community legal systems. Cf. legal basis 10-12.

<sup>61</sup> And on what legally “watching over” can mean, I refer once again to the Judgment of the Legal Advisory Commission 81/2008, which contains an ample explanation of the legal meaning of this word.



which now appears linked to the governing principle of political action to guarantee a quality water supply. It does so with the following words: "In application of this principle and within the framework of the State legislation, the Junta of Castile-Leon will issue a mandatory report on any State decision that may involve water transfer outside the territory of the Community."

Therefore, on the general trend indicated it can be said that the regulation of these reports fully adapts to the Constitution, as I have referred to above (in section II of the work) when I deal with these reports in a general manner, although this is being argued before the CC. And I insist now, on my general starting point: it is not possible to conclude that, in a State such as that of the Autonomies, with the characteristics with which the Constitution regulates it, the existence of a non-binding report, which has the dual capacity of enabling the Autonomous Communities to express their opinions on State projects with an undeniable territorial incidence may be unconstitutional. And it may also be unconstitutional for the State to be able to formally receive the opinion of the AC in order to better orientate its final decision. It is obvious that if the constitutional system of a State such as ours should lead to this, it should be changed immediately to formally foster the existence of procedures via which a minimum principle of communication can be achieved and not a radical confrontation, which is what the expulsion from the constitutional system of such reasonable – and limited – procedures would inexorably lead to<sup>62</sup>.

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<sup>62</sup> It is advisable to repeat, once again, that apart from everything that has already been said in the text, with DCC 247/2007 (12 December 2007) and its paragraphs mentioned above, all the statutory articles that have appeared on this type of reports are perfectly justified.



c) On the other hand and although it does not deal directly with transfers, the foresight of the SAr, in its additional provision number five should be seen as a regulation related to these<sup>63</sup>, and according to which:

"The hydrological planning will specify the allocations, investments and reserves for the compliance with the principle of priority in the exploitation of water resources of the Ebro basin and of the rights set out in article 19 of the present Statute, considering that the resolution of the Regional Assembly of Aragon of 30 June 1992 establishes a water reserve (6,550 Hm<sup>3</sup>) for exclusive use of the people of Aragon".

Even when there have been discussions on this article given that the Ebro basin is managed by the State (inter-community) and the La Rioja Autonomous Community has included this in its unconstitutionality appeal against the SAr., the contents of the provision appear to me to fully adapt to the Constitution, as the only thing it does is to entrust to the state hydrological planning –responding to the same legal functionality of said planning according to TRLA, articles 38 and following- the specification of allocations, investments and reserves<sup>64</sup>. The figure of 6,550 Hm<sup>3</sup> in no way appears as binding, as it is simply a reminder that it proceeds from a Resolution of a territorial Parliament and that it must be taken into account or considered by the state hydrological planning.

d) I refer, finally, to the expiry order of the Tagus-Segura transfer which is

<sup>63</sup> The parliamentary resolution that is read in the text mentioned originates from the organisation of a line of defence by the Autonomous Community of Aragon against the undesirable consequences that might be derived from the water transfers foreseen in the National Hydrological Plan prepared by the Administration between the years 1992 and 1993 and which went no further than a Preliminary Draft Law as it was not even passed by the Council of Ministers as a Draft Law.

<sup>64</sup> And, in connection with the mention of the "rights" included in article 19 of the EAr, we know since DCC 247/2007, (12 December 2007), that the Statutes of Autonomy cannot regulate rights of the citizens related to Community competences, so in article 19 the only thing to be considered is a governing principle that will be aimed at the public powers of Aragon insofar as these have competences over water management, and, of course, it does not bind the public state powers at all.



found in the Draft Statute of Autonomy of the Castile-La Mancha Autonomous Community and which could not be passed in the past Legislature (2004-2008) and whose parliamentary proceedings in the current legislation have begun. It is being taken into consideration by the Congress of Deputies (14 October 2008). Without a doubt the text to which I refer (the first transitory provision of this Draft Statute) is the most "radical" regulation, which, regarding the transfers, are contained in the Statutes of Autonomy examined because it simply provides for the extinguishment of this transfer in 2015. I believe that this is a sign of clear unconstitutionality, as the regulation of the transfers between territorial limits of different River Basin Plans belongs to the competence of the State ex article 149.1.22 of the Constitution and must, therefore, be freely decided by its legislation and with the conditions that the actual State establishes therein (cf. article 45.1.c TRLA). Indeed, a Statute of Autonomy, I believe, cannot express itself in this unilateral way, in agreement, among other arguments, with the loss of free availability over the content of the Statutes of Autonomy that the State possesses, pursuant to the reform of the Statutes of Autonomy. Such a statutory possibility is not included, either, in the broad area that DCC 247/2007 (12 December 2007) -in the text that I have reproduced in section II of this work- has granted to the capacity of the Statutes of Autonomy. I believe that this is something that even the regulatory initiative<sup>65</sup> ignores as what it does is to simply offer an "alternative" political philosophy to the realisation and execution of this transfer, which, I deduce, would include the following outstanding elements:

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<sup>65</sup> It must not be forgotten that the additional provision number one of Law 11/2005 (22 June 2005), amending Law 10/2001, (5 July 2001), of the National Hydrological Plan, already contained some precepts devoted to the reduction of transferable flows in the context of other measures destined to the most important use by the Castile-La Mancha Community of the waters of the Tagus river. In the theory, see DELGADO PIQUERAS (2007) for an explanation of the reasons for foreseeing the expiry contained in the draft Statute and FANLO LORAS (2008) for a heated defence of the regulation of the existing Tagus-Segura transfer.



-The binding nature of the extinguishment of the transfer to the basic time period established by the Water framework directive of 2000 (and its transposition to Spanish Law), 2015, namely, the moment when a good ecological status of the surface waters and groundwater must be achieved –if not before- as we have already considered in this paper (and with the possibility of extending the achievement of these environmental objectives to 2027, in extreme cases). What is transmitted with a draft regulation such as the first transitory provision mentioned is that the existence of this transfer prevents obtaining this good ecological status<sup>66</sup> in the Tagus basin, where the extinguishment of the transfer would be the expression of an essentially environmental measure and of compliance with the community law, too.

-The environmental approach is reinforced, once the Statute enters into force, by ordering the execution of “the management and re-organisation of the water uses, especially irrigation, according to the available water supply in the Segura river basin”. The same second transitory provision, in which this text in inverted commas can be found, provides that any new water resource generated in the Segura river basin, should be destined to replace the resources transferred through the infrastructure of the Tagus-Segura.

-The savings that this policy would offer for the Tagus basin require the new Hydrological Plan of the Tagus basin to include the rate of the reduction of transferable resources and, consistent with this, the utilisation of these resources within the Tagus basin and to attend to “the needs of the river basin itself”. The broadness of this expression leads to the clear deduction that it is not just considering environmental needs but also the utilisation of non-transferred waters for multiple ends, including the possibility of environmental purposes, of course.

In addition, the provision foresees the issue of a report on multiple actions

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<sup>66</sup> So, the last sub-section of section one of the first transitory provision indicates that: "It must be guaranteed that the Tagus river and the environmental spaces associated with its exploitation have sufficient quality and quantity of water to reach the objectives referred to".



regarding water transfers between basins<sup>67</sup>, providing, too, for the presence of the representatives of the Communities Board, who will be able to take part and vote, in the management bodies of the transfer until this is extinguished.

## V) THE WATER FRAMEWORK DIRECTIVE 2000 AND THE PRINCIPLES DERIVED FROM IT OVER THE ADMINISTRATION OF RIVER BASINS

The fact that Spain is a European Union country leads us, finally, to make a brief foray into the contents of the 2000 Water Framework Directive from the perspective of the questions analysed in this paper. This is necessary in order to observe if its decisions agree or not with the content of the different Statutes of Autonomy examined in this paper, especially in connection with the relationship between the Guadalquivir basin and Andalusia and the Duero basin and Castile and Leon in their respective Statutes of Autonomy.

A few prior comments must be made: the first is obvious and it is that the community regulations do not take the internal constitutional structure of a country into account and, in agreement with now quite old principles that interpret the community law, there is a certain internal organic indifference in the community regulations on the internal organic structure of the States. What matters for community law is that its mandates be complied with by each State, regardless of the state organisation that satisfies it. This question will be determined by the respective constitutional structure.

In second place, it is obvious that whatever results are reached in the analysis now

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<sup>67</sup> This is the text: "The Board of Communities will use a mandatory and decisive report on any proposal of transfer, cession, transaction or exchange of water within one same river basin or between river basins that use infrastructures or that affect courses that flow totally or partially within the territory of Castile La Mancha, reserving the right to exercise the allocation and preferential use of these resources to attend to the needs of the actual region".



started, none of what has been mentioned here is applicable to the constitutionality lawsuit pending upon different Statutes of Autonomy before the CC. Community law may be (is) a parameter of the legality of Spanish regulations, but its articles (including those of the original law) do not, in any way, operate, with respect to the Spanish regulations, in the constitutionality plane, not even as an auxiliary element to interpretatively support certain lawsuits that they wish to establish in connection with different questions pending before the Constitutional Court and which have been mentioned throughout the study.

And finally, we can say that community law is not, precisely, a prodigy of technical regulations and clarity of which, of course, the actual community organisations are very aware, continuously expressing the idea that it is advisable to make community law simple and clear<sup>68</sup>. This is more than noticeable in the very deficient, speaking solely from the technical viewpoint, Water framework directive of 2000. This deficiency will surely be the cause (it is already) of different interpretation problems in the future in connection with not too trivial questions. In this case we will have opportunity to notice one of them, as it is impossible to safely deduce from the text of the Directive such a simple question as whether there is one single competent authority in each river basin district or whether there can be more than one; although, in my opinion and weighing up the different possible arguments, all of which are based on what is expressly said in the Directive, the legal interpretation of the different texts to be considered would tend more towards this last option. Let us look at it more slowly<sup>69</sup>

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<sup>68</sup>The quotes in this place could be very varied, but due to their importance I recall the “inter-institutional agreement related to the common guidelines on the quality of the drafting of the community legislation of 22 December 1998” (DOCE no.C 73, 17 March 1999).

<sup>69</sup>Cf. a general vision of this Directive in the monograph of C. TIRADO ROBLES (2004), page 57 and following especially. Likewise, see CARO-PATON (2006) and DELGADO PIQUERAS (2001).



We must begin by pointing out that for the Water framework directive there are two basic concepts from the perspective that interests us now: basin and river basin district, which are defined in article 2<sup>70</sup>. These concepts are essential to regulate the environmental

objectives to be satisfied, the legal framework of the hydrological planning of a basin with a district scenario and the form of management of the basins in the same Directive. And in this context it is important to highlight that the Directive wants the water management to be based on river basins and on its grouping into districts as foreseen in article 3; but it is doubtful that it will require one single “competent authority” (in the terms of this Directive) for each one of them. Thus, there is a precept from which this principle of single authority could be derived (article 3.2)<sup>71</sup>, but it is refuted in another set of precepts constructed under the principle that the community authorities must be informed of “the” competent authorities in each national river basin district. This is the aim of article 3.8, with Appendix I specifying something more in this regard, from which it can be deduced that there can be more than one competent authority in each river basin district<sup>72</sup>, which, based on the broadness with which the river basin district is defined in the

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<sup>70</sup> Thus, river basin is the land surface whose surface run-off flows entirely through a series of streams, rivers and possibly, lakes, towards the sea through one single mouth, estuary or delta; and river basin district is the marine and land area comprised of one or several neighbouring river basins and the associated groundwater and coastal waters, named in agreement with section 1 of article 3 as the main unit for the management of the river basins.

<sup>71</sup> The article indicates that “The member states will adopt the appropriate administrative provisions, *including the appointment of the adequate competence authority*, for the application of the standards of this Directive in each river basin district situated in their territory”. Section 7 of the same article indicates that “Member states *will appoint the competent authority* at the latest on the date mentioned in article 24”. Art. 24 refers to 22 December 2003.

<sup>72</sup> Thus, in this Appendix I, the plural is used to refer to the list of competent authorities that must be sent: “In application of section 8 of article 3, the Member states will provide the following information *on all the competent authorities in each national river basin district....* And the plural continues when they are also asked to send “a description of the legal and administrative responsibilities of *each* competent authority and their function within the river basin district”; and related to the composition it is said that “when the competent authority assumes responsibility for the *coordination of other competent authorities*, a list of these authorities must be provided together with a summary of the institutional relations established to guarantee the coordination”.



Directive, is more than cautious and not only from the specific perspective of such as complex territorial government situation as the Spanish one. Anyway, combining all the previous precepts may be decisive in the interpretation that is followed, the definition of competent authority contained in article 2.16 according to which one must understand “*the authority or authorities* named in agreement with sections 2 and 3 of article 3”.

These statements of the Water framework directive of 2000 must be taken into account in connection with the competences of Andalusia and Castile-León over the “Andalusia” and “Castile León” parts of the Guadalquivir and Duero rivers, already examined. More specifically, different kinds of reproaches can be made of these legal texts—like those contained in this paper—but not from the perspective of failure to comply with that foreseen in the Water framework directive of 2000, even with the interpretative doubts that have been formulated. This occurs because the Water framework directive is not very clear in this question<sup>73</sup> –as in others– and the possibility of there being different

competent authorities in each river basin district<sup>74</sup> can perfectly be deduced, which is what I have done, so the situation that reflects that the Statutes of Autonomy of

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<sup>73</sup> <sup>72</sup> That may be the cause of the Decision of the Court of Justice of the European Communities of 30 November 2006, passed on subject C-32/05, Commission vs. Luxemburg. The Decision is compulsory reading, above all with respect to the general principles on the application of community law and on the consideration of the Water Framework Directive which “does not seek total harmonisation of the regulation of the Member States on water issues” (section 42 of the Decision). In the questions that concern us now, the Decision deduces the obligation of Luxemburg to include the definition of the concept of basin and river basin district in its internal legislation, although not too many consequences must be drawn from this since, as Luxemburg adduces, there are no national river basin districts in its territory, but instead national parts of international river basin districts regulated by international agreements. Thus, it is within the framework of these agreements and of the bodies regulated by them where the environmental objectives established by the Directive for river basin districts must be enforced, as specifically established by the Decision.

<sup>74</sup> Introducing evaluations here with respect to the “efficiency” of the precepts mentioned or to the genuine “spirit” of the Water framework directive would be a different question. It is perfectly possible to do this and in a study with a different objective and methodology to this, it would even be advisable to do so. But here I must exclusively adhere to what the community legislator has written textually on this matter.



Andalusia and Castile-León fully adapts to the community text. Naturally what the Framework Directive would demand, assuming the perfect possibility of different competent authorities, is an effective coordination in the action between all of them, a coordination whose first assumption would be the hydrological planning of a basin with a district scenario, as here there is not the slightest doubt about the existence of a single plan demanded by this Framework Directive. This question is not discussed, in any way, in the two statutory texts examined.

## VI. CONCLUSIONS

The moment has finally arrived to formulate some specific conclusions drawn from all that examined above. And the first thing that has to be done in this regard is to highlight the apparent paradox that the advance in the political decentralisation in Spain (advance constituted by the latest reforms of the Statutes of Autonomy) creates some problems in connection with water government. From my point of view, however, that paradox is only “apparent”, as I have already said, as what any observation of compared law in federal States or federal-types States (politically decentralised States, in any case) shows, is the tension that is established between the government policy of the territory and the “natural” water management principles by basins, always so difficult to carry out.

These problems, which I notice in the Spanish statutory situation, have a singular rooting in the questioning of the role of the river basin as an indivisible management unit carried out by the Statutes of Andalusia and Castile-León. There is no doubt that the possibility of “fractioning” river basins and the cession of part of them to these AC (the part that does not affect other AC) is a different management mechanism to that put forward by Water Law 29/1985, (2 August 1985) -and prolonged in TRLA of 2001-. Beyond the question of its constitutionality and even the same compatibility with that established in the Water framework directive of 2000, as fully examined on previous pages, there should also be a “functionality”, “efficiency” approach over the good water management, which does



not seem to have been carried out at all in these regulation processes. But, it is hoped that this will take place in the new regulatory documents that appear<sup>75</sup> In any case, our attention

is drawn to how the pioneer country in constructing a water administration based on the criteria of the river basin as an indivisible management unit, can be orientated to dismantling –not even partially<sup>76</sup>- this form of administration if and in the last instance, only one hydrological planning per basin and in the hands of the State would serve to coordinate the actions of the different existing management bodies if, obviously, the CC were to approve the formula of the Statutes of Autonomy examined. This would considerably enhance the role of hydrological planning, a field where Spain, too, is a pioneer in that it considered it as a regulation<sup>77</sup> and in the discovery of its multiple capacities. A new one appears now derived from the fractioning of the river basins and of the role of this planning in the coordination of their management.

On the other hand and although I have only made very limited reference to the question that follows, the presence in the reformed Statutes of Autonomy of a “right to water” must also be highlighted, which is translated into the affirmation of specific positions of citizens of the AC in connection with the supply and sanitation even to carry out “economical activities”. There is no doubt of the attractiveness of the expression “right to water”<sup>78</sup>, but this, in normal international approaches, only refers to the supply for drinking water and to sanitation. Nothing to do with a

<sup>75</sup> In this regard, the publication of the RD on transfer of functions and services to Andalusia, passed by the Council of Ministers at its meeting of 17 October (still not published on the date when this paper is written) must be awaited. Above all, it is necessary to refer to the future Hydrological Plan of the Guadalquivir River Basin District, a unique plan, obviously, in connection with any administrative management area that exist in this basin.

<sup>76</sup> Even when it pronounced the “partial” reference with precaution, as when a first exception is accepted to a principle, it can never be suspected how many will appear later, based on the same reasonings that gave rise to the original exception. I believe that one must be clear here, easily predicting a future depending on everything that has been occurring in the past.

<sup>77</sup> Cf. EMBID IRUGO (1991) in totum.

<sup>78</sup> Cf. EMBID IRUJO (2006, b) page 15 and following



supposed “right” to carry out economic activities, which, furthermore, would be contradictory to the constitutional bases of public domain in our country<sup>79</sup>. However, the DCC 247/2007 (12 December 2007), affirming the impossibility of the Statutes of Autonomy regulating subjective rights related to the competences of the Autonomous Communities, has depreciated any possibility of deducing consequences from this supposed right to water.

Finally, I indicate my trust that these political and legal controversies will finally achieve a constitutionally correct and technically appropriate chicanery, which will permit a continuation of the essential parts of the management formulas that have a certain age and obvious prestige among us. But this must be done without having to carry out a servile adoration towards a past, which must be examined closely and never with an acritical and Utopian vision. Each generation must search, without too many prior conditions and not only in the field of the water, for the legal-organisational formulas that it believes most appropriate to solve the problems that each generation also faces in a singular way. In this regard, the recent calls to realism of LÓPEZ MENUDO<sup>80</sup> are very adequate and are clearly situated in this line, connecting perfectly with what I have defended herein and in different previous papers about the need to adapt organisational formulas founded under very different circumstances, both regarding the territorial configuration of

<sup>79</sup> Cf. article 132 CE and DCC 227/1988. Nobody has a “right” to be granted a use of waters. This would be contradictory with the constitutionally guaranteed position of the owner of the public hydraulic domain, the State.

<sup>80</sup> I copy textually: “The third starting point consists in admitting in the most realistic way that the important factor to be retained by the State are the great decisions, understanding as such the legislation, the hydrological planning with its series of measures required to make the inter-territorial solidarity principle established in article 2 of the Constitution effective, complemented by the set of compensatory measures for the fair distribution of wealth. Although probably the loss of the state monopoly in the management of administrative “current subjects” can be considered as the loss of an estimable value, this should not be lamented in excess if the essential pillars of the system are properly controlled. It does not seem that the system must be closed to the de-concentration of executive competences, to the intercommunity collaboration formulas, to state coordination, leaving the State, in any case, in a subsidiary role for when those management formulas are shown as being insufficient” (LOPEZ MENUDO, 2008, p. 82).



the State and its very same liberal-democratic substance, to the very demands of a State of Autonomies. But this, obviously, does not mean rejecting or leaving behind the most notable and useful aspects of what our ancestors have handed down to us. The 1978 Constitution undoubtedly permits and encourages the consecution of appropriate organisational formulas for water management based on the best of our traditions that are backed up by a spirit of collaboration and territorial cooperation that in no way must be rejected.



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